

SHORTFALLS OF THE 1996 IMMIGRATION REFORM LEGISLATION

HEARING

BEFORE THE
SUBCOMMITTEE ON IMMIGRATION,
CITIZENSHIP, REFUGEES, BORDER SECURITY,
AND INTERNATIONAL LAW
OF THE
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FRIDAY, APRIL 20, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP,
REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:06 a.m., in Room 2141, Rayburn House Office Building, the Honorable Zoe Lofgren (Chairwoman of the Subcommittee) presiding.

Present: Representatives Lofgren, Gutierrez, Berman, Jackson Lee, Delahunt, Sánchez, King, and Forbes.

Staff present: Ur Mendoza Jaddou, Majority Chief Counsel; R. Blake Chisam, Majority Counsel; George Fishman, Minority Counsel; and Benjamin Staub, Professional Staff Member.

Ms. LOFGREN. This hearing of the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law will come to order.

Vigorous enforcement of the immigration laws is not only necessary, it is our responsibility. We must demand respect for the rules and also secure our borders.

In 1996, Congress put forward a plan to enhance the enforcement of our immigration laws. A package of 1996 immigration reform laws further increased the number of Border Patrol agents and technology for border enforcement, required the Border Patrol to build fencing along the border, expanded the grounds of removal, and streamlined the removal process. Those laws created electronic employment verification systems and eliminated eligibility for welfare benefits.

Those who wrote the bill, I am sure, meant to positively impact the situation of illegal immigration. Ending illegal immigration is an important goal. But, as we now know, the 1996 Act did not put an end to illegal immigration, not even close to it.

The estimated numbers of illegal immigrants living in the United States has risen dramatically since 1996, growing from between 5 million to 6 million people to an estimated 11 million to 12 million today.

Until last year, the probability of an illegal border crosser getting caught dropped precipitously since 1996, even as more money and resources were committed to border enforcement. Those crossing the border simply shifted to more remote locations, making apprehension less likely, while also making it more likely that migrants will hire *coyotes* or die in the desert.

Congressional attempts to manage the borders have, by most any measure, failed to accomplish the goal of stopping the flow of illegal immigration. The law of unintended consequences has reared its ugly head. We still have work to do and things to fix.

The Illegal Immigration and Immigration Responsibility Act of 1996, referred to as IIRIRA, created traps for those here illegally. It not only increased the cost of coming to America, but it also increased the cost of leaving. This has had the unintended effect of making people stay in America even when they would otherwise have returned home.

For decades before the 1986 Immigration Reform and Control Act, illegal immigrants from Mexico came to America much as they do today. The difference between then and now is that most of them, some 80 percent, left within a couple of years. We learned in our fourth hearing that IRCA disrupted those historic patterns. The 1996 law not only continued to disrupt those patterns, they made things worse.

Let me cite just one example. The 1996 Act created what are known as the 3-and 10-year bars to entry. Because these bars can only be triggered when someone departs the United States, the bars provide an incentive for undocumented immigrants to stay here, and stay they do.

Instead of staying for 2 to 3 years, Mexican immigrants now tend to stay for 6 or 7 years or more. They have to. The cost to get in has gotten too high. It takes longer to pay off the coyote who has to be hired for each crossing, and because of the 3-and 10-year bars, the cost of leaving are higher still. And it has become even more dangerous and costly to reenter.

The road to ruin is paved with good intentions. We must always be mindful of the law of unintended consequences. It is easy to say, we simply need to enforce the laws we have. But instead we need to work toward a comprehensive solution. We must reform our immigration laws not only to secure our borders but to provide for the safe, orderly and controlled future flow of immigrants. We must make certain that we protect American workers and safeguard the sanctity of family, and we must ensure that we do not create a permanent underclass of immigrant workers in this country.

I look forward to hearing from our distinguished panelists today as we explore the unintended consequences and shortfalls of the 1996 immigration reforms.

I would now recognize our distinguished Ranking minority Member, Mr. Steve King, for his opening statement.

[The prepared statement of Ms. Lofgren follows:]

PREPARED STATEMENT OF THE HONORABLE ZOE LOFGREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRWOMAN, SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW

Vigorous enforcement of the immigration laws is not only necessary, it is our responsibility. We must demand respect for the rules and also secure our borders.

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Those who wrote the bill, I'm sure, meant to positively impact the situation of illegal immigration. Ending illegal immigration is an important goal.

But, as we now know, the 1996 acts did not put an end to illegal immigration. Not even close to it.

The estimated number of illegal immigrants living in the U.S. has risen dramatically since 1996, going from between 5 to 6 million people to an estimated 11 to 12 million today. Until last year, the probability of an illegal border crosser getting caught dropped precipitously since 1996, even as more money and resources were committed to border enforcement. Those crossing the border simply shifted to more remote locations, making apprehension less likely, while also making it more likely that migrants will hire coyotes or die in the desert.

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For decades before the 1986 Immigration Reform and Control Act, illegal immigrants from Mexico came to America, much as they do today. The difference between then and now is that most of them—some 80%—left within a couple of years. We learned in our 4th hearing that the IRCA disrupted those historic patterns.

The 1996 laws not only continued to disrupt those patterns, they made things worse.

Let me cite just one example. The IIRIRA created what are known as the 3 and 10 year bars to reentry. Because these bars can only be triggered when someone departs the United States, the bars provide an incentive for undocumented immigrants to stay here.

And stay they do. Instead of staying for 2 to 3 years, Mexican immigrants now tend to stay 6 or 7 or more years. They have to. The costs to get in have gotten too high. It takes longer to pay off the coyote who has to be hired for each crossing. Because of the 3 and 10 year bars, the costs of leaving are higher still. And it has become even more dangerous and costly to reenter.

The road to ruin is paved with good intentions. We must always be mindful of the laws of unintended consequences. It's easy to say we simply need to enforce the laws we have.

Instead, we work toward a comprehensive solution. We must reform our immigration laws not only to secure our borders but to provide for a safe, orderly and controlled future flow of immigrants.

We must make certain that we protect American workers and safeguard the sanctity of family. And, we must ensure that we do not create a permanent underclass of immigrant workers in this country.

I look forward to hearing from our distinguished panelists today as we explore the unintended consequences of the 1996 immigration reforms.

Mr. KING. Thank you, Madam Chair. I appreciate you holding this hearing today and appreciate the witnesses coming forward to testify.

In the mid-1990's, there was a sea change in our strategy to control the southern border. In 1994, the total complement of Border Patrol agents was 4,226. The Border Patrol let illegal immigrants cross the border and then tried to apprehend them in border communities.

Now, numbers and the strategy were deficient. The southwest border was in a state of crisis. The transit routes most heavily used for illegal immigrants were in the San Diego corridor, which had become an open sieve.

Then things changed. First, in El Paso, Texas, Border Patrol Chief Silvestre Reyes, now Congressman of Texas's 16th District, conceived and launched the most successful border initiative in recent memory. Pursuant to Operation Hold the Line, he placed his agents directly on the border and had them stop attempted border

crossings. This visual deterrent had the effect of dramatically reducing illegal crossings, cutting crime in border communities and winning the praise of the public.

When top INS officials, resentful of Reyes' success, put roadblocks in his path and resisted applying his doctrine in other areas, it got more difficult. But Immigration Subcommittee Chairman, Lamar Smith, brought Chief Reyes to testify before Congress. Subsequently, INS adopted the Reyes strategy in San Diego and dubbed it "Operation Gatekeeper." It has been remarkably successful. Apprehensions have plummeted, and the INS touted the operation as one of its most successful border control initiatives ever.

Next, Congressman Lamar Smith and Senator Alan Simpson wrote, and saw through to enactment, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The act authorized a yearly net increase in Border Patrol strength of a then unheard 1,000 a year. A decade later, the Border Patrol has a strength of over 13,000 agents.

The act also called for the construction of a second and third row of border fencing along the southern border for 14 miles inland from the Pacific Ocean. The fence, combined with "Operation Hold the Line," which was facilitated by the increasing Border Patrol strength, led to the San Diego border being secured and crime in San Diego dropping by half.

As a result of these actions, it has become significantly more difficult for illegal aliens and drug smugglers to cross the southwest border. Illegal immigrants must now resort to difficult routes across rugged terrain in California and in Arizona. As long as Congress continues increasing Border Patrol strength in the future, we can look forward to the day when the entire border is brought under control.

Now, some make the argument that the increased border security since the mid-1990's has actually made our illegal immigration problem worse. The argument is that when illegal immigrants could cross the border at will, they practiced circular migration and went back and forth across the border. Some did.

But once border security increased, many aliens who had made it across the border stayed permanently in the U.S. for fear of not being able to get back across the border after returning home. That is the argument.

Now, this argument is flawed for two reasons. First, it makes little difference as to the effect of illegal immigration on the American economy and society whether illegal immigrants stayed permanently or whether they go home for Christmas vacation or any other time.

Second, the very data that Mr. Massey utilizes purports to show that the percentage of illegal immigrants who return to Mexico within a year of illegal entry declined between the mid-1980's and the mid-1990's ever since then and has stayed relatively stable.

Given that the major efforts to control the southwest border did not begin until the mid-1990's, it makes no sense to argue that increased border enforcements have resulted in more permanence.

But even if we accept the circulatory premise for the sake of this argument, it does not argue that we should abandon a chance to

further secure our borders. It has always been the case that we can never control illegal immigration through border security alone.

First, an estimated 40 percent of illegal immigrants have come to the U.S. legally on temporary visas and have simply illegally procured jobs and never left. Second, we will never be able to totally seal our thousands of miles of land and water borders. Some people will inevitably get through.

For both these reasons, border security must be combined with robust interior enforcement, especially through the enforcement of employer sanctions. Unfortunately, while we made the border progressively tighter since the mid-1990's, Administrations past and present have practically abandoned worksite enforcement. That is why we have 20 million illegal immigrants today, not because we have more Border Patrol agents.

I am heartened by the steps taken by Julie Myers in the past to reinvigorate enforcement. It is making a difference. But the issue has been raised about how many die in the desert, and I would say some of that is unmitigated by a reduced number that are hit by cars because of illegal crossings in the San Diego area.

And the point that I would make is that there are a significant number of Americans who die at the hands of some of those who are criminals who do get across that desert, and that number is far, far greater in number, and we need to be protecting and defending the American people. That is what this policy is about.

I look forward to the testimony.

Thank you, Madam Chair, and I yield back.

Ms. LOFGREN. Thank you.

And in the interest of proceeding to our witnesses and mindful that we will be having a series of votes in the near future, I would ask that other Members submit their statements for the record within 5 legislative days.

Without objection, all opening statements will be placed within the record.

And, without objection, the Chair will be authorized to declare a recess of the hearing at any point.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, COMMITTEE ON THE
JUDICIARY

Today we continue our examination of the earlier immigration reform efforts. As we have done with the 1986 Act, we are looking to the 1996 example to inform us as we work to get it right this time.

Congress passed the IIRAIRA in 1996 as a "get tough" approach to immigration management. But rather than ending illegal immigration, there are more illegal immigrants ten years later than at any other time in history. Why did this "get tough" law fail? Perhaps it failed because it substituted an enforcement-only approach instead of an approach that was balanced and pragmatic. Like IRCA, the 1996 law turned out to lack options to meet the real-world needs of immigrants and employers.

The IIRAIRA was outwardly very tough. It doubled the number of Border Patrol agents and started the spate of fence building on the Southern border. It sped removal and reduced the ability of courts and the immigration service to weigh humanitarian factors. It made refugee and asylum laws much more strict.

There were some things about that law that are positive, if implemented fully. Such aspects of IIRAIRA as pilot programs to test employment eligibility verification, visa waivers for certain countries, and enhanced sentences for those who enslaved or abused immigrants seemed to be positive steps at the time.

But by and large, IIRAIRA was a restrictive law in which responsibility and enforcement fell on the powerless aliens, such as through the statutory bars to re-entry for people who had to leave the country even if there were pressing humanitarian reasons. Attempts to address these problems through follow-up technical modifications were derided and dismissed as “amnesty” programs. And so, once again, here we are seeking a solution.

None of the 1996 law’s get-tough provisions addressed the root of the immigration issue. Indeed, they may have made it worse by cutting off the circular migration that has always existed in the Americas.

Today we will hear from nationally recognized experts, including a witness who labored mightily to try to implement IIRAIRA while he was with the government. We hope to take away valuable lessons that will help guide our work over the coming months to develop a controlled, orderly, and fair immigration system.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW

This hearing will examine the shortfalls of 1996 Immigration Reform Legislation. The most significant bills from that period are the Antiterrorism and Effective Death Penalty Act of (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).

AEDPA was intended to deter terrorism, to provide justice for victims, and to provide an effective death penalty. It was passed by a Republican-controlled Congress following the Oklahoma City bombing and signed into law by Democratic President Bill Clinton. It also has provisions which have an impact on immigration law.

Among other things, AEDPA requires mandatory detention of non-citizens who have been convicted of a wide range of criminal offenses, including minor drug offenses. IIRIRA expanded this list to include more offenses.

One of the troublesome aspects of these mandatory detention provisions is that they are not restricted to serious criminal offenses. Under these provisions, mandatory detention may apply to aliens who were convicted of a crime for which no time in prison was actually served because the crime was so insignificant.

Mandatory detention also is required in expedited removal proceedings. My Save America Comprehensive Immigration Act of 2007, H.R. 750, would eliminate mandatory detention for aliens in expedited removal proceedings. This applies even if the alien has never been convicted of any criminal offense and does not pose a flight risk. This is particularly troublesome in view of the fact that many of the aliens in expedited removal proceedings are women and children or members of some other vulnerable population.

Mandatory detention is wrong and it wastes resources. It requires the detention of people who do not need to be detained despite the shortage of detention space for aliens who really do need to be detained. It makes more sense to provide discretion for releasing people in detention if they are not a danger to the community or a flight risk, which is the standard for aliens who in removal proceedings but are not subject to mandatory detention.

AEDPA authorized state and local police to arrest and detain aliens who are unlawfully present in the United States, which is a violation of civil immigration law, but only in the case of aliens who have been convicted of a felony in the United States. AEDPA required a nexus between civil immigration law violations and the criminal behavior before local police could detain individuals with civil violations.

IIRIRA went further and authorized state and local police to enforce civil immigration laws when there is a “mass influx” of foreign nationals, the situation requires an immediate response from the federal government, and federal officials obtain the consent of the state or local supervising department.

IIRIRA also established a mechanism which can be used to delegate immigration law enforcement authorities to state and local police provided the officers have undergone adequate training and have entered into a formal agreement with the Department of Justice. This is known as the MOU process, for “memorandum of understanding.”

In addition, IIRIRA provides that public employees cannot be barred from reporting immigration-related information about a particular individual to the immigration service. This was done in response to state and local laws or executive orders that had been enacted around the country to prohibit such disclosures. My Save America Comprehensive Immigration Act would strike this provision.

IIRIRA includes a wide variety of changes which made it far easier to deport or exclude non-citizens for minor criminal violations which occurred many years ago. Among other things, IIRIRA lowered the sentence and monetary amount thresholds for many of the crimes on the list of aggravated felonies and other excludable or deportable offenses and did so on a retroactive basis—meaning that offenses that were not previously deportable became deportable retroactively in 1996, even if they occurred in earlier years.

My Save America Comprehensive Immigration Act would provide Immigration Judges and the Board of Immigration Appeals with the discretion to avoid removal on the basis of nonserious offenses. It provides that a conviction which did not result in incarceration for a year or more may be disregarded for immigration purposes as a matter of discretion. This permits the adjudicator to base the removal decision on whether the specific offense involved warrants removal.

Ms. LOFGREN. We have four distinguished witnesses here today to help us consider the important issues before us.

First, I am pleased to welcome Dr. Douglas Massey, a professor of Sociology and Public Affairs at Princeton University. Professor Massey currently serves as the Director of Graduate Studies at Princeton's Woodrow Wilson School, and his research has focused on topics ranging from international migration to urban poverty. Professor Massey currently serves as President of the American Academy of Political and Social Science and co-edits the *Annual Review of Sociology*. He reviewed both his master's and doctorate degrees from Princeton.

We will next hear testimony from Paul Virtue, a former general counsel to the United States Immigration and Naturalization Service. During his tenure at INS, Mr. Virtue supervised over 600 attorneys on the nationwide litigation team and advised the INS Commissioner, the Commissioner of the White House and several other Federal agencies on immigration matters. Mr. Virtue currently practices law as a partner at Hogan & Hartson here in Washington and holds his law degree from the West Virginia University College of Law.

I would like next to welcome Hiroshi Motomura, a professor from the University of North Carolina's School of Law. Professor Motomura co-authored the widely used law school case book, *Immigration and Citizenship: Process and Policy*. He has served as co-counsel in several recent immigration cases before the Supreme Court and is a member of the American Bar Association's Commission on Immigration. Professor Motomura is a graduate of Yale College and the University of California-Berkeley's Boalt Hall School of Law.

Finally, I would like to welcome Mark Krikorian, the Executive Director of the Center for Immigration Studies, a research organization here in Washington, DC, that examines the impact of immigration on the United States. Mr. Krikorian has published articles in *The Washington Post*, the *New York Times* and the *National Review*, among other publications. Mr. Krikorian holds a masters degree from the Fletcher School of Law and Diplomacy and a bachelor's degree from Georgetown University.

Now, as you can tell, there are bells ringing and lights flashing, and what that tells us is that we have a series of votes on the floor of the House. We have nine votes, the first one of which will be 15 minutes and the remainder of which will be 5 minutes apiece. And that is the last of the day.

I apologize that your testimony has been interrupted. We should reconvene—when would be a good time—an hour, really, it will be an hour. If you can come back at, let's say, 11:15. Is that possible for the witnesses to do? There is a cafeteria in the basement where there is coffee and doughnuts.

We will recess and be back here at 11:15 to hear your testimony. Thank you very much.

[Recess.]

Ms. LOFGREN. We are back in session, and I would like to, first, apologize to the witnesses. The voting took forever. But we are here now to hear your testimony. The entirety of your written testimony will be made part of the record.

I would ask that each of you summarize your testimony in 5 minutes or less, and we will remain within that time limit on questions.

And, Dr. Massey, if you would begin.

TESTIMONY OF DOUGLAS S. MASSEY, Ph.D., PROFESSOR OF SOCIOLOGY AND PUBLIC AFFAIRS, PRINCETON UNIVERSITY

Mr. MASSEY. Chairman Lofgren, Ranking Member King, since 1986, the United States has pursued a politics of contradiction with respect to Mexico.

On the one hand, we have joined with Mexico and Canada to create an integrated North American market and made arrangements for the free movement of goods, capital, information, resources and services across our borders.

On the other hand, within this otherwise integrated market, we have acted unilaterally in a vain attempt to block the movement of labor. This contradictory policy has not only failed, it has backfired, producing outcomes that are categorically worse than if we had done nothing at all.

Under pressure from U.S. Treasury in 1986, Mexico joined the general agreement on tariffs and trade and looked northward to join Canada and the United States in a new free trade agreement, which was enacted on January 1, 1994. Since that date, Mexico and the U.S. have formally been committed to unifying markets within North America.

As shown in figure one, total trade between the two countries—it is not advancing—total trade between the two countries has skyrocketed, increasing eight times between 1986 and 2000. Since 1986, the number of exchange visitors from Mexico has tripled, the number of business visitors has quadrupled, and the number of intercompany transferees has grown five times. Within this rapidly integrating economy, however, U.S. policymakers have somehow sought to prevent the cross-border movement of workers, in essence, seeking to integrate all markets except for one, that for labor.

To finance this fundamental contradiction, beginning in 1986 we adopted an increasingly restrictive set of immigration and border enforcement policies. Let's just do it without the slides.

To connect this fundamental contradiction, beginning in 1986, we adopted an increasingly restrictive set of immigration and border policies. First, the Immigration Reform and Control Act granted \$400 million to expand the Border Patrol, the 1990 Immigration

Act authorized hiring of another 1,000 officers, and in 1993, these new personnel were deployed in Operation Blockade as part of an all-out effort to stop unauthorized border crossing in El Paso, a strategy that was extended to San Diego in 1994 as Operation Gatekeeper.

Finally, the 1996 Illegal Immigration and Immigrant Responsibility Act provided funds to hire another 1,000 border officers per year through 2001.

From 1986 to 2002, the Border Patrol's budget increased by a factor of 10, the number of hours spent patrolling border grew eight times, and the number of Border Patrol officers tripled. In essence, the U.S. militarized the border with its closest neighbor, its second largest trading partner and a nation which was committed by treaty to an ongoing process of economic integration.

Rather than slowing the flow of immigrants into the United States, however, this policy of insisting on separation while promoting integration yielded an array of unintended and very negative consequences. The most immediate effect was to transform the geography of border crossing.

Whereas, undocumented border crossing during the 1980's focused on San Diego and El Paso, the selective hardening of these borders after 1993 diverted flows to new and more remote locations. And as late as 1989, only one-third of undocumented migrants crossed outside of San Diego or El Paso, but by 2002, two-thirds were crossing somewhere else.

And once they had been deflected away from traditional migration points, migrants kept on going. Before 1993, no more than 20 percent of all undocumented migrants went to States other than the three traditional destinations of California, Texas and Illinois, but by 2002, 55 percent were proceeding to some new State of destination. Undocumented migration was thus nationalized.

In addition to transforming the geography of immigration, U.S. border policies had two additional unplanned effects. First, by pushing immigrants into more remote and less hospitable sectors of the border, the enforcement in San Diego and El Paso dramatically increased the number of migrant deaths. The rate of death during undocumented border crossing tripled from 1992 to 2002.

In addition, although remote sectors were more dangerous, they were also less patrolled and contained fewer enforcement resources. By pushing migrants into desolate sectors of the border, U.S. policies, therefore, actually lowered the likelihood that illegal migrants would be apprehended.

At first, the migrants unwittingly walked into the new wall of enforcement resources in these two built-up sectors and the probability of apprehension temporarily went up. Quickly, however, migrants got wise and went around the built-up sectors and crossed through empty deserts, sparsely populated ranch land and wild sections of the Rio Grande. And as a result, the probability of apprehension plummeted to record low levels.

The financial costs of border crossing to migrants were nonetheless driven upward. The average cost of hiring a border smuggler tripled from \$400 to \$1,200 in real terms. Unfortunately, Mexicans did not respond to the new costs and new risks of border crossing

by deciding not to migrate; rather, they decided to stay longer once they were here.

As shown in the figure, the probability that a Mexican male or female would decide to undertake a first trip to the U.S. did not change from 1980 to the present. For men, the probabilities fluctuated between 1 and 2 percent per year, and for females, it has never exceeded a fraction of 1 percent. Rather than responding to the increased costs and risks of border crossing by staying home, Mexicans hunkered down and stayed once they had achieved entry. Rather than returning home, possibly to face——

Ms. LOFGREN. Dr. Massey, I forgot to announce that when the red light goes on, the 5 minutes are up. I turned it off, but if you could summarize, that would be great.

Mr. MASSEY. Basically, what I would like to say is that the attempt to close off a border with our largest trading partner has backfired, and the rate of in-migration into the United States has not changed in 20 years. What changed was the rate of out-migration, and that doubled the rate of undocumented population growth in the U.S., and that was a complete function of our border policy.

[The prepared statement of Mr. Massey follows:]

PREPARED STATEMENT OF DOUGLAS S. MASSEY

“When Less is More: Border Enforcement and Undocumented Migration”
Testimony of Douglas S. Massey

before the

Subcommittee on Immigration, Citizenship, Refugees,
Border Security, and International Law

Committee on the Judiciary
U.S. House of Representatives

April 20, 2007

Since 1986 the United States has pursued a politics of contradiction with respect to Mexico. On the one hand, we have joined with Mexico and Canada to create an integrated North American market and have made arrangements for relatively free cross-border movements of goods, capital, information, resources, and services. On the other hand, within this otherwise integrated market we have acted unilaterally and with increasing militancy in a vain effort to block the movement of labor. This contradictory policy has not only failed, it has backfired, producing outcomes that are categorically worse than if we had left our immigration and border policies unchanged.

Under pressure from the U.S. Treasury and international lenders, in 1986 Mexico joined the General Agreement on Tariffs and Trade and looked northward to join Canada and the United States in a new free trade agreement, which was enacted on January 1, 1994. Since that date, Mexico and the United States have formally been committed to unifying markets within North America, and as shown in Figure 1, total trade between the two countries has skyrocketed, increasing eight times between 1986 and 2000. This rising cross-border movement of goods and services was accompanied by migration by all sorts of people. As shown in the figure, since 1986 the number of exchange visitors from Mexico has tripled, the number of business visitors

has quadrupled, and the number of intra-company transferees has grown 5.5 times. As envisioned under NAFTA, the two economies are integrating.

Within this rapidly integrating economy, however, U.S. policy makers have somehow sought to prevent the cross-border movement of workers—in essence seeking to integrate all markets except one—that for labor. To finesse this fundamental contradiction beginning in 1986 we adopted an increasingly restrictive set of immigration and border enforcement policies. First the Immigration Reform and Control Act granted \$400 million to expand the size of the Border Patrol. Then the 1990 Immigration Act authorized hiring another 1,000 officers and in 1993 these new personnel were deployed in Operation Blockade as part of an all-out effort to stop unauthorized border crossing in El Paso, a strategy that was extended to San Diego in 1994 through Operation Gatekeeper. Finally, the 1996 Illegal Immigration Reform and Immigrant Responsibility Act provided funds to higher and additional 1,000 Border Patrol officers *per year* through 2001.

As shown in Figure 2, from 1986 to 2002 the Border Patrol's budget increased by a factor of ten, the number of hours spent patrolling the border grew eight times, and the number of border patrol officers tripled. In essence, the United States militarized the border with its closest neighbor, its second largest trading partner, and a nation to which it was committed by treaty to an ongoing process of economic integration. Rather than slowing the flow of immigrants into the United States, however, this policy of promoting integration while insisting on separation yielded an array of unintended and very negative consequences.

The most immediate effect was to transform the geography of border crossing. Whereas undocumented border crossing during the 1980s focused on San Diego and El Paso, the selective hardening of these sectors after 1993 diverted the flows to new and remote locations. As shown

in Figure 3, as late as 1989 only one third of undocumented migrants crossed outside of San Diego or El Paso, but by 2002 around two thirds were crossing somewhere else; and once they had been deflected away from traditional crossing points, the migrants kept on going. Before 1993, no more than 20% of all undocumented migrants went to states other than the three traditional destinations—California, Texas, and Illinois—but by 2002 some 55% were proceeding to a new state of destination. Undocumented Mexican migration was thus nationalized.

In addition to transforming the geography of immigration, U.S. border policies had two additional unplanned effects. First, by pushing immigrants into more remote and less hospitable sectors of the border, the border build-up in San Diego and El Paso dramatically increased the number of migrant deaths. As Figure 4 shows, the rate of death during undocumented border crossing tripled from 1992 to 2002. Second, although remote border sectors were more dangerous, they were also less patrolled and contained fewer enforcement resources. By pushing migrants into desolate sectors of the border, U.S. policies therefore lowered the likelihood that illegal migrants would be apprehended.

As shown in the Figure 5, at first the migrants unwittingly walked into the new wall of enforcement resources erected the most popular border-crossing locations and the probability of apprehension temporarily went up. Quickly, however, the migrants got wise and simply went around built-up sectors and crossed through empty deserts, sparsely populated ranch land, and wild sections of the Rio Grande. As a result, the probability of apprehension plummeted to reach record low levels. American taxpayers were spending billions more to catch fewer migrants. Thus, greater risks of death and injury were offset by lower rates of apprehension at the new crossing sites.

The financial costs of border-crossing were nonetheless driven upward. As shown in Figure 6, the average cost of hiring a coyote or border smuggler tripled, going from \$400 to around \$1200 dollars in real terms. Unfortunately, however, Mexicans did not respond to the new costs and risks of border crossing by deciding not to migrate. As the bottom lines in Figure 7 show, the probability that a Mexican male or female would decide to undertake a first undocumented trip to the U.S. changed little from 1980 to the present. For men the probability has fluctuated between 1% and 2% while for females it has never exceeded a fraction of 1%.

Rather than responding to the increased costs and risks of border crossing by staying home, Mexicans without documents instead hunkered down and stayed once they had successfully achieved entry. Rather than returning home possibly to face the gauntlet at the border once again, they postponed their return to remain longer in the United States and as they did so rates of return migration steadily fell. As indicated by the upper line in Figure 7, the likelihood of returning to Mexico within 12 months of an undocumented entry fell from around 45% in 1982 to just 25% in 2001.

If the rate of in-migration remains constant while the rate of out-migration falls, only one outcome is possible: net undocumented migration will increase, and this is precisely what happened. Figure 8 draws on U.S. census data to show how the rate of Mexican population growth in the United States accelerated during the 1990s compared with the 1980s and earlier. The ultimate effect of restrictive border policies was to double the net rate of undocumented population growth, making Hispanics the nation's largest minority years before Census Bureau demographers had projected—not because more Mexicans were coming but because fewer were going home.

One final consequence of U.S. efforts at restriction stems from the employer sanctions enacted by the 1986 Immigration Reform and Control Act. The act's criminalization of undocumented hiring did not eliminate the magnet of U.S. jobs so much as provide incentives for employers to shift from direct hiring to labor subcontracting. Rather than hiring immigrant workers directly, employers in sectors such as agriculture, construction, custodial services, and non-durable manufacturing shifted to the use of labor subcontractors, who for a fee absorbed the risk of legal sanction under IRCA. If federal authorities raided a work site and discovered undocumented workers, employers simply blamed the subcontractor and escaped prosecution.

Although this strategy protected employers, it harmed workers because it meant that they increasingly had to work through a middleman who pocketed a portion of their wages; and subcontracting was imposed on all workers regardless of legal status. It became the routine mechanism for hiring in labor markets where immigrants worked. As a result, the net effect of IRCA's employer sanctions was not to eliminate undocumented hiring, but to depress the wages earned all immigrants, whether legal or illegal. As shown in Figure 9, in the wake of IRCA wages for all workers fell in real terms, at least until the employment boom of the late 1990s; but the wages of legal resident aliens and, by implication, U.S. citizens, fell even faster than those of undocumented workers.

In sum, the imposition of repressive border and immigration policies in a context of ongoing economic integration with Mexico has backfired. The desire of the United States to have its cake and eat it too—to integrate all North American markets except one—has reduced the odds of border apprehension to a forty-year low, doubled the net rate of undocumented population growth in the United States, and transformed what had been a circular flow of male workers going to three states into a settled population of families scattered over 50 states, while

driving down wages and undermining the working conditions for citizens and legal resident aliens. It is hard to imagine a more dysfunctional set of policies or outcomes.

At this point, pouring more money into border enforcement will not help the situation and in my opinion constitutes waste of taxpayer money. The border is not now and never has been out of control—the rate of undocumented in-migration has been virtually constant for more than 20 years. I understand, of course, that tougher border enforcement may be the political price one has to pay for broader immigration reform. But we must realize that the solution to the current crisis does not lie in further militarizing the border with a friendly trading nation that poses no conceivable threat, but in implementing policies that will achieve four fundamental outcomes:

- (1) regularizing the status of the 12 million undocumented migrants currently present in the United States through earned legalization programs;
- (2) accommodating future immigration from Mexico by increasing the legal quota for people admitted to permanent residence from that country and establishing a temporary worker program that protects native workers by guaranteeing labor rights for those with temporary visas;
- (3) shifting from border to internal enforcement by creating a secure, machine-readable identification card that workers can present to employers to prove their right to work in the United States; and
- (4) devoting more resources to the internal bureaucracy of immigration administration to reduce visa backlogs, increase efficiency, and dramatically improve government oversight of entries and exits;

I believe that, if implemented, these reforms would substantially eliminate undocumented migration as a problematic social and economic while protecting the interests of American

citizens, our neighbors in Mexico, and the migrants themselves. In various of my writings I have laid out specific proposals how to achieve these ends. I would be delighted to elaborate on them in greater detail in response to questions from the committee, but for now I would simply like to thank you for the opportunity to share the results of my 30 years of research into the social science of undocumented migration.

Figure 1. Indicators of Cross-Border Economic Integration

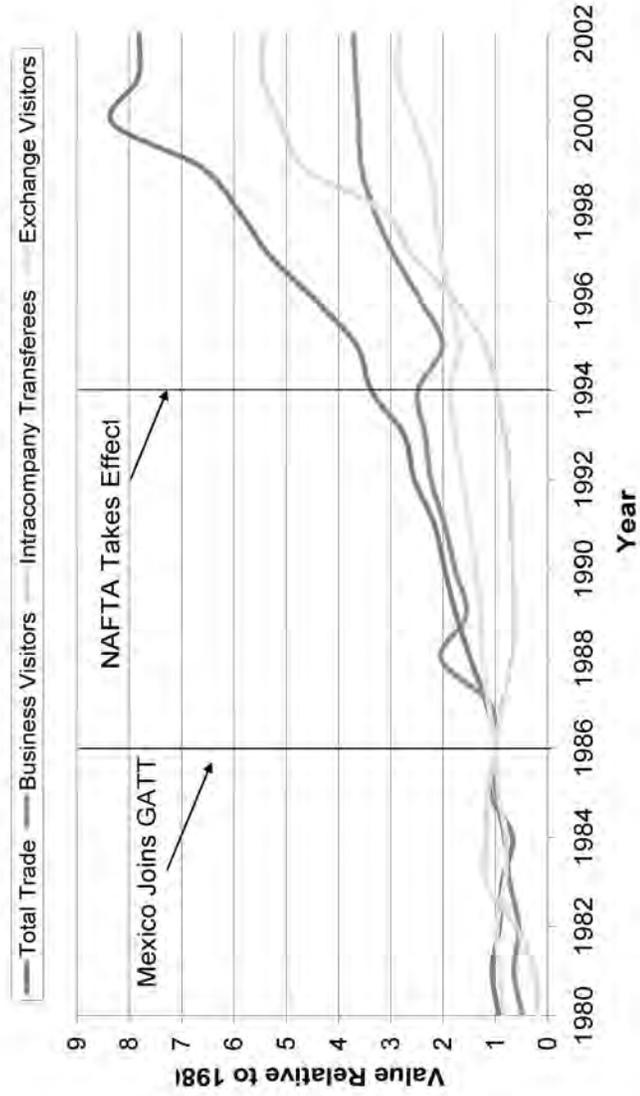


Figure 2. Indicators of Border Enforcement 1980-2002

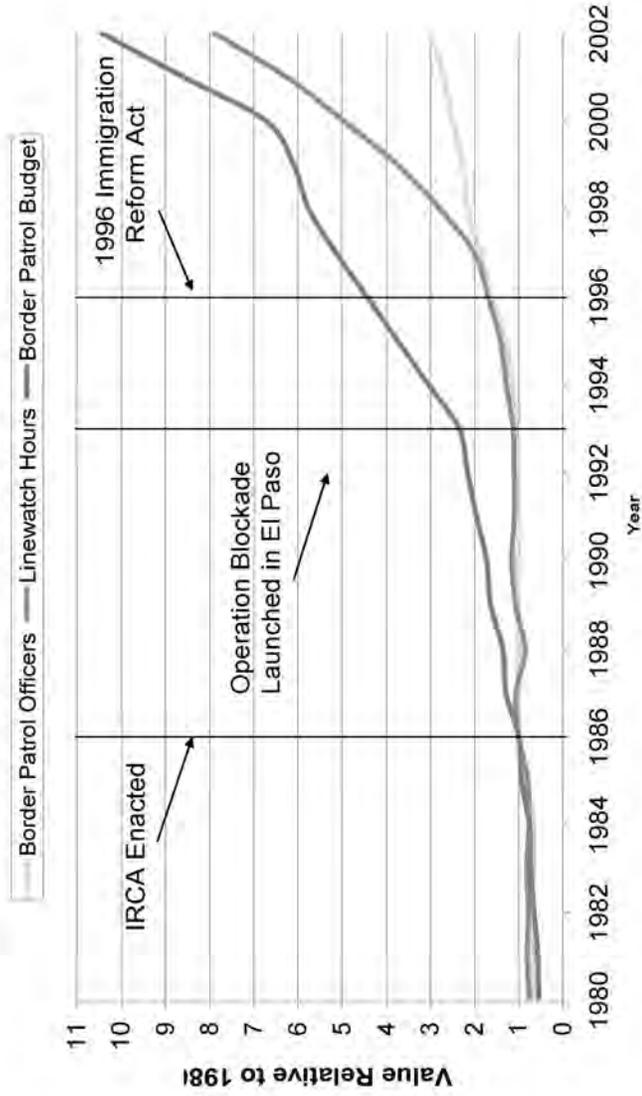


Figure 3. Proportion Going to New Crossing Points (Not San Diego or El Paso) and New Destinations (Not California, Texas or Illinois)

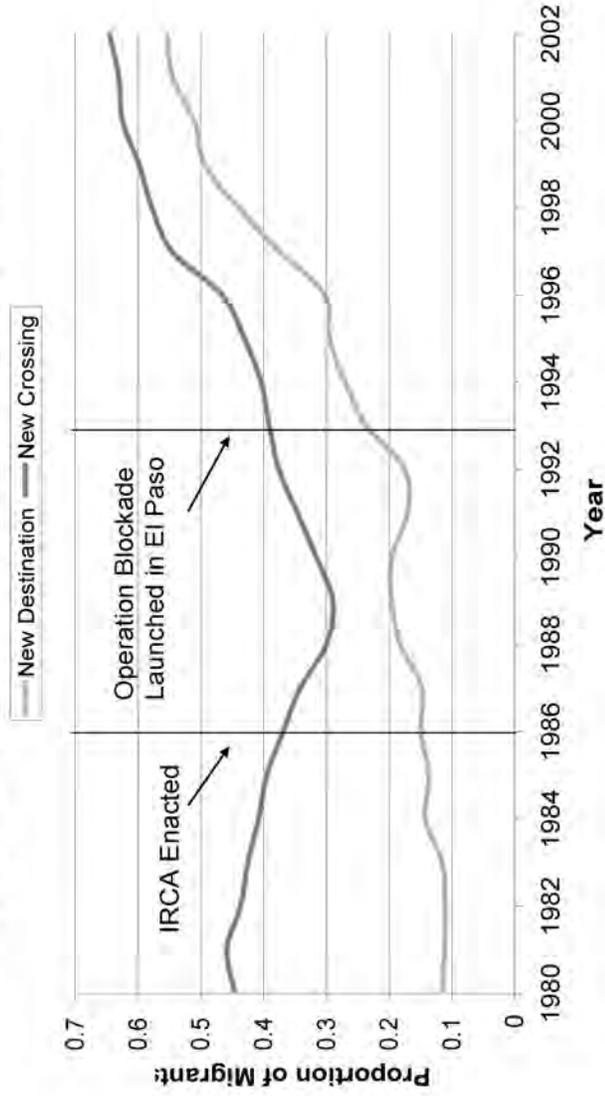


Figure 4. Death rate from suffocation, drowning, heat exhaustion, exposure, and unknown causes along border 1986-98

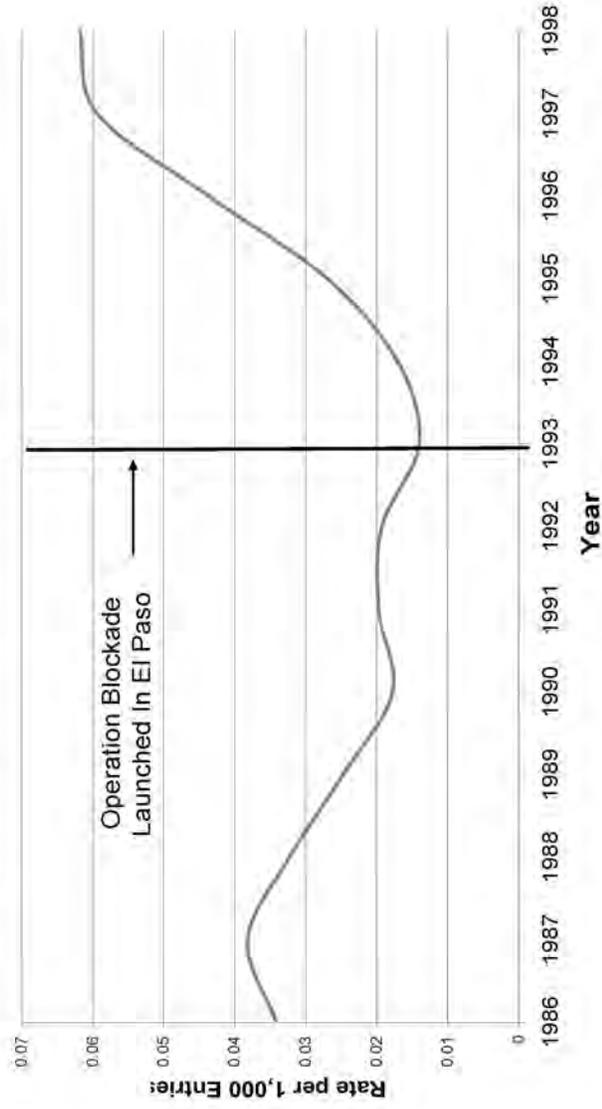


Figure 5. Probability of Apprehension 1980-2001

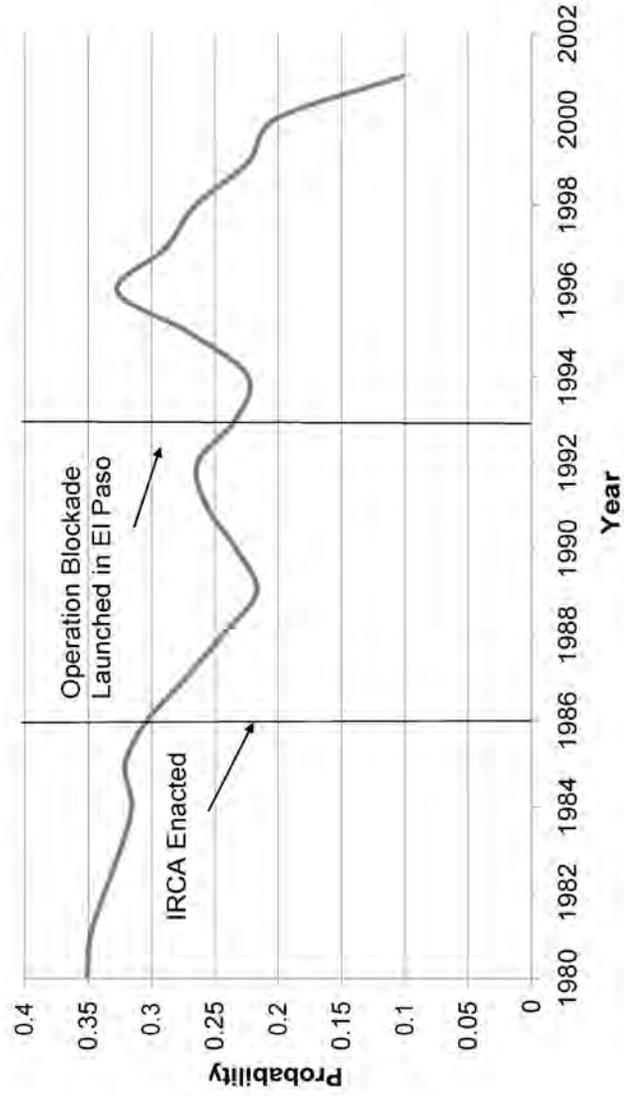


Figure 6. Average Cost of Hiring a Coyote

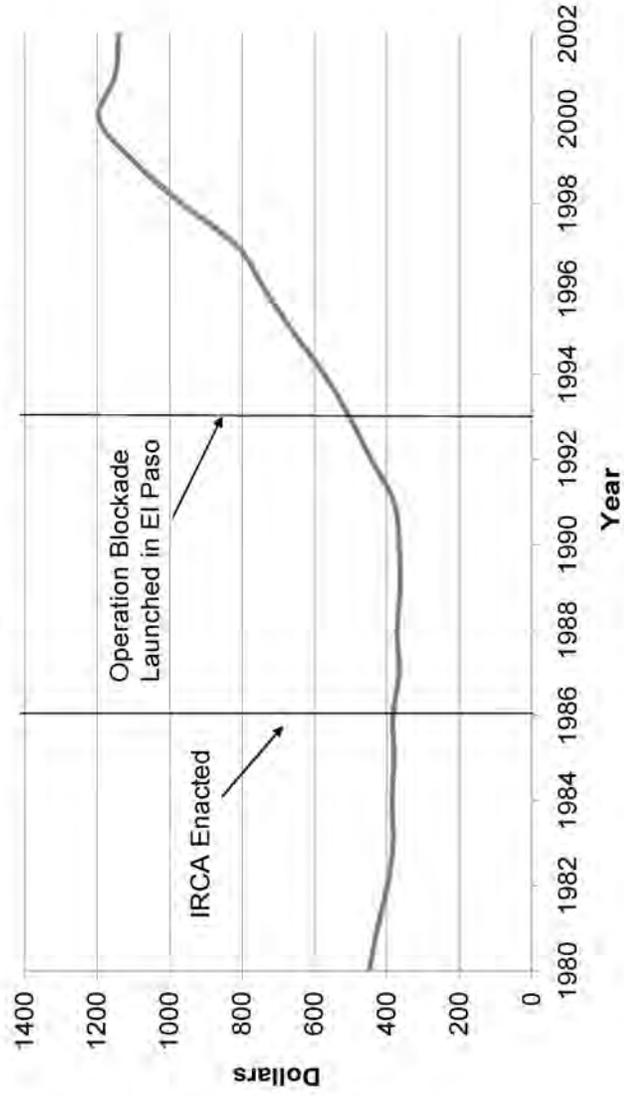


Figure 7. Probability of First Undocumented Migration and Return 1980-2001

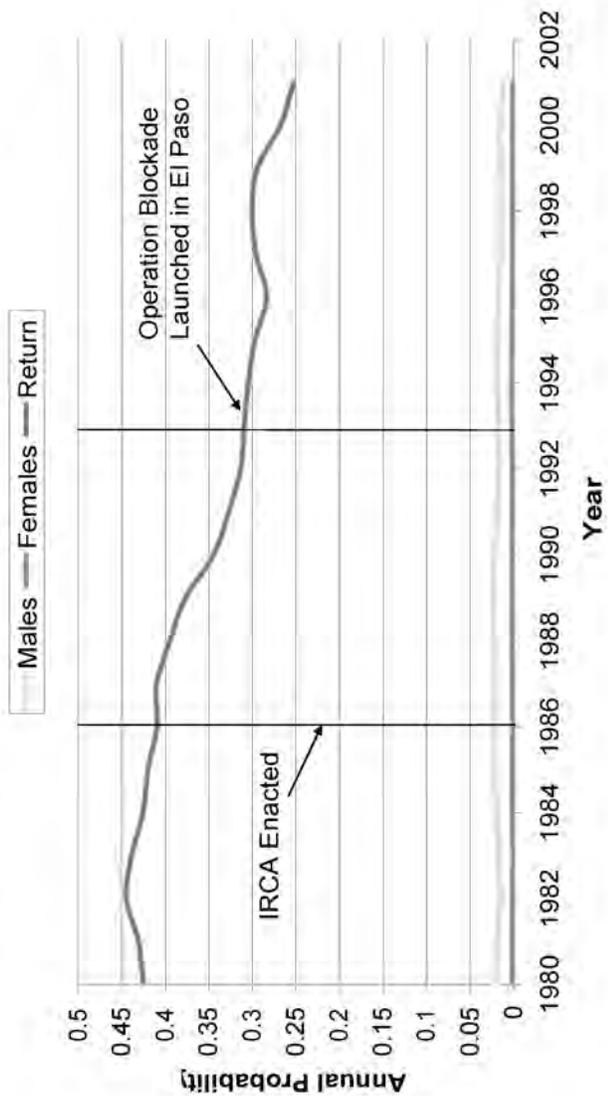


Figure 8. Number of Mexicans in the United States 1980-2002

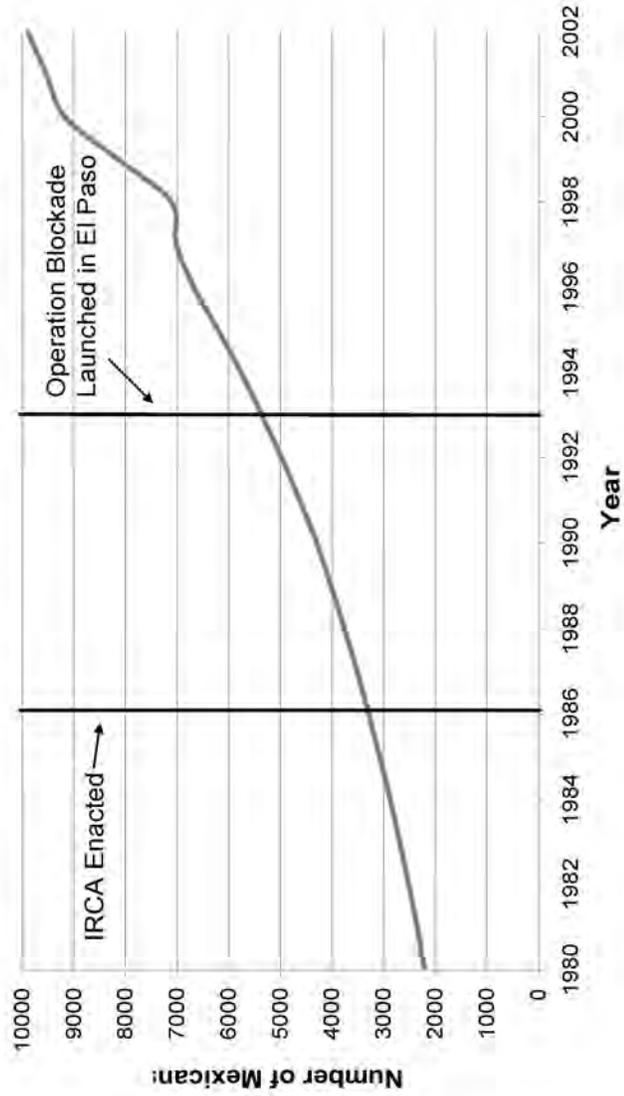
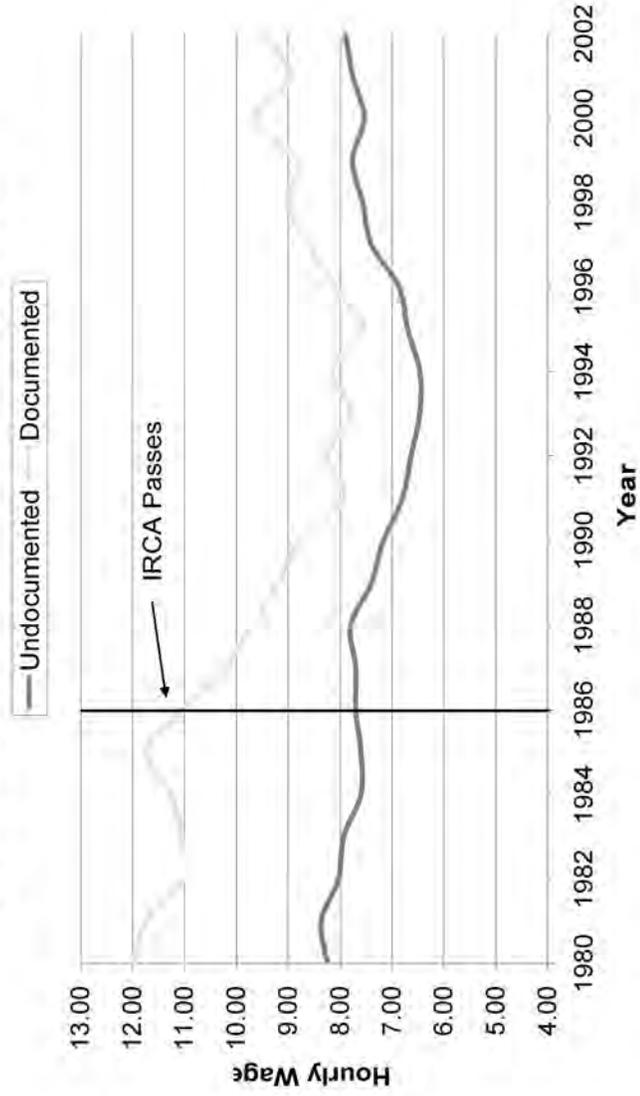


Figure 9. Average Wages Earned by Mexican Migrants to US



Ms. LOFGREN. Thank you very much.

Mr. Virtue, we will time this. When your yellow light goes on, you have about a minute left, and when the red light goes on, your 5 minutes are up.

TESTIMONY OF PAUL W. VIRTUE, FORMER INS GENERAL COUNSEL AND EXECUTIVE ASSOCIATE COMMISSIONER, AND PARTNER, HOGAN & HARTSON

Mr. VIRTUE. Thank you, Madam Chair, Ranking Member King and Members of the Subcommittee. Thank you for the opportunity to appear before you this afternoon.

The IIRIRA amended virtually every section of title two of the Immigration and Nationality Act. It represented the most comprehensive immigration legislation since the McCarran-Walter Act of 1952.

For example, the Act authorized a substantial increase in Border Patrol agents, increased the penalties for illegal entry, eliminated the distinction concerning the rights of aliens based on entry to the United States, added a number of immigration-related crimes, including smuggling and visa fraud to the RICO predicate offenses, authorized expedited removal without a hearing for aliens who commit fraud or fail to present a proper visa, restricted eligibility for relief from removal, overhauled the process for the removal of inadmissible and deportable aliens from the United States, barred aliens from returning to the U.S. following periods of unlawful presence in the United States, added new crimes to the growing list of aggravated felonies, making that definition retroactive, and mandated detention for aggravated felons, including permanent residents, and placed significant limits on judicial review.

Indeed, given the scope of the 1996 Act, it is difficult to conceive of an area, with the possible exception of a reliable system for verifying employment authorization, in which the Federal Government lacks powerful authority today to enforce our immigration laws.

What we do lack, and always have lacked, are the adequate resources to secure the border against unlawful entry; to identify, detain and remove aliens who have committed serious crimes, to properly investigate and prosecute those who commit alien smuggling and document fraud; and to enforce measures against unauthorized employment.

The challenge, thus, facing this Congress will be to find a balance in terms of the statutory mandates and to move to efficiently enforce the immigration laws, while keeping a keen focus on excluding or deporting the bad guys. The threshold question in that analysis, one that is outside the scope of this hearing, is whether we should continue to expend limited resources on the large percentage of the undocumented population in the United States to continue to contribute to an economic boom.

The question that is within the scope of this hearing, however, is, in removing discretion from the authorities charged with enforcing our immigration laws, whether IIRIRA of 1996 went too far. I submit that in a number of areas it did and by doing so actually limited the ability of the agencies responsible for enforcement to develop a rational set of enforcement priorities.

Those areas are mandatory custody. Immigration detention is designed to serve two important enforcement goals. It ensures the alien's availability for proceedings and possible removal, and it protects the community from any potential danger the alien might pose. In a society like ours, however, those legitimate goals must be balanced against an alien's equally legitimate liberty interests.

Historically, aliens taken into custody were afforded an opportunity to have these competing interests weighed by an immigration officer and by an immigration judge who could order them removed, or order them released or detained pending completion of removal proceedings and any appeals.

In 1996, however, Congress enacted the mandatory detention scheme for aliens, including permanent residents, whose criminal convictions might subject them to removal. The impetus behind this change in the law was a concern that criminal aliens subject to removal proceedings were climbing at high rates.

But even before Congress passed this legislation, concerns about absconders had been addressed effectively by the provision of increased detention resources, which gave immigration officers and judges greater flexibility and order in detention. In fact, the Clinton administration consequently advised Congress against including the broad mandatory detention provisions that ultimately were enacted.

Secondly, restrictions on discretionary relief from removal. Prior to IIRIRA, aliens who were otherwise deportable could apply to an immigration judge to have their deportations suspended. If the application was granted, the alien would be eligible to adjust status. To qualify, aliens had to show they were continuously present for a minimum of 7 years, they were persons of good moral character and their deportations would result in extreme hardship. The IIRIRA changes increased that standard and severely limited the availability of discretionary relief.

The other aspects are the limitations on judicial review of immigration decisions. Under IIRIRA, those court-stripping provisions provide that administrative findings of fact are conclusive unless a reasonable adjudicator would be compelled to conclude to the contrary. So, consequently, those provisions have substantially diminished the ability of non-citizens to have their cases heard before a neutral arbiter.

And, finally, the 3-and 10-year bars on admission. As we know, the IIRIRA created bars to admissibility for people who have been in the U.S. for more than 6 months or more than 1 year and who return to their home country. The problem that that created has been a paradoxical one and that is that it has, actually, created an incentive for people who are here unlawfully to remain here unlawfully rather than to be able to go home and apply for immigrant visas.

So, in conclusion, the net result of the enforcement measures enacted in IIRIRA has been a reduction in the discretion available to immigration authorities in administering the immigration laws. I would submit that discretion should be restored in a number of years.

Thank you.

[The prepared statement of Mr. Virtue follows:]

PREPARED STATEMENT OF PAUL W. VIRTUE

TESTIMONY OF PAUL W. VIRTUE

**Before the
House Judiciary**

**SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER
SECURITY, AND INTERNATIONAL LAW**

CONCERNING

**HEARING ON SHORTFALLS OF
1996 IMMIGRATION REFORM LEGISLATION**

April 20, 2007
10:00 A.M.

2141 Rayburn House Office Building

INTRODUCTION -

SCOPE OF THE PROBLEM

On September 30, 1996, President Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). IIRIRA represented the culmination of immigration-reform efforts that began with the Republican Party assuming majority control of the House and the Senate in 1994. Congress was faced with the task of trying to strengthen our national security in the wake of the 1992 terrorist attacks on the World Trade Center, while at the same time trying to find a way to discourage illegal migration. What had started as separate bills, one designed to reduce the annual number of family and employment-based immigrants to the United States (legal immigration) and the other designed to address border security and deportation issues (illegal immigration), were combined in each house and then split again due to a concerted grass-roots lobbying effort. Separated from the more popular illegal-immigration bills, the legal-immigration measures were defeated in both houses. As in 1996, Congress today continues to seek ways to make our country more secure in the wake of the 9/11 terrorist attacks, at the same time it is faced with unprecedented levels of undocumented immigration and a need for reform of our system for access to essential workers.

Touted as legislation that would control illegal immigration, IIRIRA actually includes many provisions that significantly affect legal immigrants and others seeking to enter the United States legally. IIRIRA took a "one size fits all" approach to immigrants and treats otherwise law-abiding legal permanent residents (LPRs) the same as dangerous criminals. Legal immigrants who have lived here for many years are being deported for minor crimes committed long ago; family members and workers who are otherwise eligible to apply for permanent resident status instead remain in the U.S. in unlawful

status as a result of new bars to admissibility; lawful permanent residents face mandatory detention and are subject to deportation without ever seeing an immigration judge as a result of retroactive changes to the definition of “aggravated felony”; long-time immigrants with substantial ties to their communities and their families are being deported because the law no longer allows for consideration of the hardship they would suffer if deported.

Individual equities—such as longevity in the U.S., the age of the individual, the severity of an offense, how long ago the offense occurred, rehabilitation, employment, payment of taxes, contributions to one’s community and to the church, financial support of U.S. and LPR children, spouses and parents, and the break-up of families—have been put aside in favor of an inflexible, intolerant, punitive approach. The failure to look at the totality of circumstances, to exercise discretion and compassion where warranted, and to evaluate each case on the merits, reflects a failure in our system.

The events of September 2001 have made reform even more urgent. It is clear now that the U.S. must focus on individuals who pose a serious threat to Americans. We cannot afford to have our immigration-enforcement resources diverted to the prosecution and deportation of legal immigrants who committed minor crimes many years ago. Rather, IIRIRA must be changed to restore some balance in our law, to make the punishment fit the crime, and to stop the irrational diversion of immigration-enforcement resources that current law requires.

The Supreme Court has repeatedly emphasized that freedom from government detention lies at the core of the liberty that the Due Process Clause protects. Less than two years ago, the Supreme Court reaffirmed that “[F]reedom from imprisonment, from government custody, detention or other forms of physical restraint – lies at the heart of the liberty that the [Due Process] [Clause of the Fifth Amendment] protects. *Zadvydas v. Davis*, 533 U.S., 678, 690, (2001).

We cannot throw aside due-process protections in the name of national security. Indeed, as Supreme Court Justice O’Connor stated in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004):

“It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad. It would indeed be ironic if in the name of national defense, we would sanction the subversion of one of those liberties which make the defense of the nation worthwhile.”

This principle applies with full force to immigrants as it does to citizens. The Due Process clause requires, at a minimum, individualized determinations, discretion, and judicial review.

Any new system Congress develops to address the need for enhanced security and to stem illegal immigration must be sufficiently flexible such that decision makers can

exercise appropriate discretion consistent with the basic rules and overarching goals of a tough but fair immigration system. It must also preserve the checks and balances mandated by our Constitution, checks and balances that not only set appropriate limits on the power of one branch of government versus another, but also ensure that each individual in this country will be treated fairly.

SPECIFIC SHORTCOMINGS OF IIRIRA

The fact that Congress continues to wrestle with many of the same immigration challenges a decade after IIRIRA suggests that the statute has not achieved the hoped for results. Despite good-faith efforts to discourage illegal immigration and remove dangerous criminals and terrorists, unfortunately, the law has encouraged undocumented immigrants to remain unlawfully in the United States and has made enforcement of measures against criminals and terrorists less efficient. Prior to IIRIRA, immigrants would come here to work for a season and then return to their home country; or family members would visit their husbands or wives, their children or their parents here, and then return home while they waited for their visa numbers to become available.

However as the penalties for leaving the United States and the risks of returning increased, more immigrants began to establish permanent homes in the U.S., bringing their families, buying homes and integrating into the fabric of our society.

In particular, the following provisions of IIRIRA have posed problems:

1. Three and Ten-Year Bars to Admission;
2. "Aggravated felons," Retroactivity and Mandatory Detention;
3. Cancellation of Removal;
4. Lack of Judicial Review;

Three and Ten-Year Bars to Admissibility

IIRIRA created new bars to admissibility to the U.S. for people who have been unlawfully present in the U.S. for six months or longer. Section 212(a)(9)(B)(i)(I) and (II) of the Immigration & Nationality Act ("INA") were amended by § 308(c) of IIRIRA.

INA § 212(a)(9)(B)(i)(I) as amended bars anyone who has accumulated more than 180 days but less than one year of unlawful presence in the US, and who departs the U.S., from seeking readmission within three years of the date of such alien's departure. This section is known as the three-year bar.

INA § 212(a)(9)(B)(i)(II) as amended bars anyone who has accumulated more than one year of unlawful presence in the U.S., and who voluntarily departs the U.S., from seeking readmission within ten years of the date of such alien's departure or removal. This is the ten-year bar.

There is a waiver of the three and ten-year bars in INA § 212(a)(9)(B)(v) in the case of an immigrant who is the spouse or son or daughter of a United States citizen if the refusal of

admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. Hardship to the individual alien or the U.S.-citizen or LPR child is not a factor to be considered. "Extreme hardship" involves more than economics or the usual level of hardship associated with being separated from one's family. There are no bright lines and, in practice, this standard has proven very difficult to meet. Family separation and economic impact alone are insufficient to show extreme hardship. Hardship to an employer, to a child or to the applicant may not be considered. The applicant must show an aggregate of hardships that places the case beyond economic and social hardships "ordinarily" associated with deportation.

Unreviewable waiver determinations made in connection with an application for an immigrant visa offer no predictability of success for the otherwise qualified immigrant. Moreover, an applicant may have to wait anywhere from 6–12 months outside the U.S. while a waiver application is being considered. Leaving the U.S. to apply for a visa for an indefinite period alone is a disincentive. Knowing that if the waiver is denied an applicant will be barred from reentry for three or ten years makes it even more unlikely that people will assume that risk notwithstanding the fact that they qualify for family or employment-based immigrant visas.

As a result, far from curtailing illegal immigration and deterring people from overstaying their visa as intended, IIRIRA's new bars to admissibility are actually contributing to the unprecedented rise in the number of undocumented immigrants. Thus, faced with the choice of voluntarily leaving their families in the United States for a period of three or ten years, or being forced underground but remaining united with their families, many naturally chose the latter, joining the legions of undocumented individuals in this country and virtually eliminating the circular migration patterns that had characterized immigration to and from Latin America for many decades.

Examples

Perhaps the best way to see how IIRIRA really impacts immigrants and their families is to look at real-life example of how it tears apart families and discourages legal immigration. All names used are aliases.

The Case of Jose Gonzalez: Jose originally entered the U.S. without inspection in 2000 and has lived and worked in the U.S. since that time. His wife is a U.S. citizen and they have 2 children born in the U.S. His employer is willing to file a labor certification on Jose's behalf.

Jose has never been outside the U.S. since entering in 2000. He has no criminal convictions or prior deportations and has built a good life for his family in the U.S. The only possible way for Jose to become a permanent resident is if his wife files a family petition on his behalf. Because he entered without inspection, Jose would have to leave the U.S. to apply for a visa and will need to get a waiver of the ten-year bar to admissibility.

Jose can apply for a waiver of the ten-year bar, but he is not sure whether it will be granted. Furthermore, it could take up to one year before his application for a waiver is processed. The waiver will be denied if he fails to prove that his wife would suffer extreme hardship. (Hardship to his U.S.-citizen children is not considered under the current waiver.) Even if his waiver is approved, he has to wait for the consulate to interview him again for his immigrant visa. It could take another year for this interview to be scheduled. As a result, he could be separated from his family for at least two years. As an alternative, his family could accompany him to his home country. In this case, the consequences of the bar go well beyond the inadmissibility of those who have violated immigration laws because U.S. citizens also would suffer greatly. The risks of being barred from the U.S. for ten years are a substantial deterrent even to those immigrants for whom a legal channel of immigration exists.

The Case of Mario Ortega: A landscape supervisor named Mario Ortega worked for his U.S. employer for ten years. Mario entered the U.S. with a border-crossing card in 1996 and overstayed. He has a Mexican wife and two children born in the U.S. He is a highly valued employee because he supervises the landscaping crew, he knows the business extremely well and he is highly reliable. His U.S. employer is aware of his status and would like to sponsor Mr. Ortega for a green card. However, even if the employer pursued the appropriate channels to obtain permanent residence for Mr. Ortega, Mr. Ortega is ineligible to obtain any benefit. Mr. Ortega cannot apply to adjust his status in the U.S. because he overstayed his original visa. If he returns to Mexico to apply for an immigrant visa, he will trigger the ten-year bar. Mr. Ortega is ineligible for a waiver of the ten year bar because he does not have a U.S. citizen or permanent resident spouse or parent. Thus, his employer cannot help him to regularize his status.

Aggravated Felons, Retroactivity and Mandatory Detention

Although our lawmakers hoped that IIRIRA would control illegal immigration and combat terrorism, these laws did very little to address those issues. Instead, as interpreted by the Department of Homeland Security (DHS), these laws expanded our nation's deportation laws to such an extent that thousands of lawful permanent residents have been removed from this country for relatively minor offenses, many of which occurred years ago.

The penalties associated with the 1996 aggravated-felony definition are severe and include mandatory detention and deportation, disqualification from most forms of relief from removal, and retroactive application of the new definition. As originally intended, the term was rightly applied to crimes which were both felonious and aggravated, such as murder, drug trafficking crimes, select crimes of violence, and child pornography.

As a result of IIRIRA, the definition of aggravated felony for immigration purposes now includes such offenses as misdemeanor theft of a video game, valued at approximately \$10; the sale of \$10 worth of marijuana; breaking into an Alcoholics Anonymous in 1968 and drinking a bottle of wine with friends; one woman pulling the hair of another during a fight over a boyfriend; or shoplifting \$15 worth of baby clothes.

In addition, the new definition was made retroactive, which means that many long-term residents can be deported for relatively minor offenses that occurred years ago, that were not classified as “aggravated felonies” for immigration purposes when they were committed. The end result has been the forced removal of many immigrants from their adoptive country, notwithstanding the length of time they lived in the U.S. IIRIRA has effectively taken away any agency discretion, adopts a “one size fits all” approach, and disregards equities such as whether or not these immigrants paid taxes, had good jobs, owned property, were employers, or had children and spouses who were either U.S. citizens or LPRs.

These harsh outcomes demonstrate an expanding conflict between immigration law and federal and state criminal-justice law and policy. For example, IIRIRA’s definition of “conviction” for immigration purposes requires the DHS to deport immigrants whose offenses are not even considered “crimes” under criminal law or whose charges have been dropped after successful participation in a rehabilitative program.

As another example, the DHS has applied the definition of “term of imprisonment” to disregard whether a criminal court has decided to suspend an immigrant’s sentence in light of the minor nature of his or her offense. This conflicts with federal and state criminal law and sentencing-reform policies that encourage treatment, rehabilitation, alternatives to incarceration and other fair and proportional responses to minor and non-criminal offenses.

In addition, DHS’ interpretations of the aggravated-felony definition have led to overreaching enforcement and to two near-unanimous Supreme Court decisions rejecting the DHS interpretations that led to the unlawful deportation of thousands of immigrants. [See 8-1 decision in *Lopez v. Gonzales*, 127 S. Ct. 625 (2006) (rejecting broad application of the drug trafficking aggravated felony category to simple possession offenses); 9-0 decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (rejecting the broad application of the crime of violence aggravated felony category to DWI offenses)]. Moreover, IIRIRA and its interpretation have greatly expanded the reach of other deportation-law provisions to apply to offenses which are even more minor or to cases where criminal charges have actually been dropped or expunged.

By imposing mandatory detention on a person classified as an aggravated felon, DHS once again took away the agency’s discretion to consider the individual factors in each case. Any person classified as an “aggravated felon” is subject to mandatory detention without the right to release on bond pending completion of removal proceedings even if the individual can demonstrate that he or she does not pose a flight risk or a threat to the community.

Furthermore, an individual who has never spent a night in jail is treated the same as a person who spent years in jail. Although our immigration laws must be enforced, sound enforcement of immigration laws requires processes that take individual circumstances into account regarding an alien’s admissibility into or deportation from the U.S.

Finally, prior to the 1996 laws, an immigrant had to be sentenced to at least one year for a “crime involving moral turpitude” in order to be deportable for a one-time minor offense. As a result of IIRIRA, this deportability ground is applied to any crime that could lead to a year’s sentence—even relatively minor crimes for which no jail time was imposed. In addition, the immigration law fails to extend inadmissibility exceptions for one-time minor offenders to individuals with a single low-level drug violation.

Retroactive application leads to deportation of people for old conduct even if the offense was not a deportable offense at the time it was committed. This violates basic fairness principles that one’s conduct should only be subject to the laws existing at the time of the conduct.

Examples

Sal Loayza emigrated from Ecuador as a young boy as a lawful permanent resident in the 1970s. He served honorably in the U.S. Navy for more than eight years, married, and had a U.S.-citizen son, Jeremy. Sal became Jeremy’s primary caretaker after his marriage ended. Sal was later convicted of mail fraud. During his three years in prison, Sal called Jeremy three times a day—before school, after school, and at bedtime. Jeremy struggled with adjusting to his father’s absence, but looked forward to their reunification. But on the day of his release, Sal was detained by the INS and put in removal proceedings and deemed an aggravated felon. Jeremy, convinced he would never see his father again, attempted suicide. Sal was deported in 2000 and was never able to ask for relief based on his honorable service to this country or the extreme toll his removal would take on his U.S.-citizen son.

Mi-Choong O’Brien, a native of South Korea, met her U.S.-citizen husband when he was working in South Korea as a Peace Corps volunteer. She entered the United States as a legal permanent resident in 1985, and has been married to her U.S.-citizen husband for 25 years. Together they have three U.S.-citizen children, two of them current university students, as well as an adopted child from South Korea. Mi-Choong was convicted for taking money from the cash register of the restaurant where she worked, received a one-year suspended sentence, and has already paid restitution for her crime. Yet, despite clear evidence of Mi-Choong’s rehabilitation—her employer’s statement that he was satisfied with the punishment and had no desire to see her detained or removed, and her probation officer’s testimony that Mi-Choong was doing everything possible to make up for her crime—Mi-Choong was seized one day when she showed up for her regular probation meeting and ordered removed. Because her crime is classified as an aggravated felony, deportation is mandatory; neither her length of time in the United States, her extensive rehabilitative efforts, nor the extreme hardship to her family can serve as grounds for permitting Mi-Choong to remain here in the United States.

Sonia and her son, Pedja, entered the U.S. as permanent residents in 2002 when she married George, a U.S. citizen. Sonia and George had met and courted during his regular business trips to Bulgaria. After several months in the U.S., George began subjecting both Sonia and Pedja to physical violence and emotional abuse, threatening to have them

deported if they called the police. In July 2003, when a neighbor overheard the violence and called the police, George convinced them to arrest Sonia (who spoke only limited English) due to a scratch he had on his arm where Sonia had resisted his assaults. Though Sonia subsequently moved to a shelter, obtained a protection order, and sent Pedja to live with relatives elsewhere in the U.S., Sonia was still charged with assault and pled guilty to a one-year suspended sentence. She never served any prison time. Yet, this plea satisfied the aggravated-felony definition and Sonia now faces deportation. Sonia is ineligible for any domestic-violence waiver due to this aggravated-felony conviction, and she cannot request any sort of relief from removal based on her individualized circumstances because removal is mandatory and there is an absolute bar to relief.

Cancellation of Removal

Prior to IIRIRA, aliens who were otherwise deportable could apply to an immigration judge to have their deportation suspended. If the application was granted, the alien would be eligible to adjust to the status of an alien lawfully admitted for permanent residence status. This form of relief was known as “suspension of deportation” and was governed by the provisions under section 244(a) of the Act. To qualify for this relief, aliens had to show that (1) they were continuously present in the U.S. for a minimum of seven years; (2) they were persons of “good moral character”; and (3) their deportations would result in “extreme hardship” to themselves and their parents, spouses and children who were U.S. citizens or permanent residents.

Under IIRIRA, suspension of deportation was replaced by “cancellation of removal” as it applies to nonpermanent residents. And with that change came a substantive change to the hardship standard; to the physical presence requirement; to criminal convictions; and to the number of applicants who could be granted cancellation in any given year.

Now, an alien must establish that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. Hardship to the alien is no longer a consideration, regardless of how long the alien has lived here and regardless of why and how they entered. An alien can only apply for this relief if the alien has a qualifying U.S.-citizen or LPR spouse, parent or child. In addition, the alien must now show that he or she has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application. There is now a numerical limit of 4,000 on the number of aliens who can be granted cancellation of removal in any given fiscal year.

Requiring an applicant to show “exceptional and extremely unusual” hardship to a U.S.-citizen or LPR spouse, child or parent is an almost impossible burden. Factors such as family separation; economic hardship; requiring U.S.-citizen or LPR children and/or spouses to leave the U.S. for the sake of family unity or to avoid breaking up the family; and/or losing the alien breadwinner of a family are rarely sufficient to meet the “exceptional and extremely unusual hardship” standards. It is of little consequence that an alien has not lived in their native country since they were babies; that they have no

relatives in their native country; or that they do not remember the country or their native language.

This standard severely restricts an immigration judge's ability to utilize his or her discretion in granting cancellation to an otherwise worthy applicant. Based on the current standard, few cases qualify for this form of relief.

Unmarried, undocumented immigrants who have no qualifying family members are disqualified from demonstrating hardship even if they have lived most of their lives here. Therefore, many hardworking individuals, who would be otherwise eligible based on good moral character and continuous physical presence are barred from this form of relief. Prior to the enactment of IIRIRA, this was a significant form of relief for many individuals who have become contributing members of our society. Since IIRIRA's enactment, many undocumented immigrants who have made such contributions have been left without this vital form of relief.

Example

Consider the true case of Francisco Monreal, who was a nonpermanent resident in the United States for over 20 years when placed in removal proceedings. He entered the U.S. in 1980 at the age of 14. He was married and has three children, all of whom are U.S. citizens. At the time of the removal proceeding, one of the children was an infant, the others were 8 and 12 years old. Mr. Monreal's parents were both lawful permanent residents of the U.S. and seven of his siblings were LPRs, as well. Mr. Monreal had been gainfully employed in the U.S. since he was 14 years old and was the sole financial supporter of his wife and three children.

The government did not dispute the fact that Mr. Monreal met the 10-year physical presence requirement and good moral character requirement. However, his application for cancellation of removal was denied for failure to meet the stringent hardship requirements. The Board of Immigration Appeals (BIA) upheld the Judge's decision and ordered Mr. Monreal to return to Mexico. Mr. Monreal, who had never committed a crime and had always been an asset to the United States, was deported to Mexico, where he had not lived in 20 years. The decision to deport Mr. Monreal also effectively deported his 12 and 8-year-old U.S.-citizen children and also separated them from their cousins, aunts, uncles and grandparents.

Judicial Review

Judicial review provisions under IIRIRA provide that administrative findings of fact (made by the Immigration Judge or the BIA) are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary. Consequently, these provisions have substantially diminished the ability of noncitizens to have their cases heard before a neutral arbiter. Among the most troubling restrictions are those restricting federal court review over life-altering decisions made by the immigration agencies. While the REAL ID Act of 2005 restored some judicial review, specifically of constitutional claims and questions of law, it left un-reviewable many other errors made

by the administrative agencies involved, as well as eliminating *habeas corpus* review, a critical safety net provision.

Judicial review provisions under IIRIRA, which became effective on April 1, 1997, apply to the following types of cases, which are not reviewable by the court of appeals in a petition for review:

- Any determinations on an individual case relating to an expedited removal order including: the procedures and policies adapted to implement expedited removal provisions; a decision to invoke the expedited removal procedures; or a decision on an individual case.
- Any judgment regarding the granting of relief under the waiver provisions of INA §§212(h) and 212(i); cancellation of removal for certain LPRs or non-permanent residents (INA § 240A); or adjustment of status (INA § 245).
- Any final orders of removal against an alien who is removable for certain criminal grounds covered in the grounds of inadmissibility and removability, including:
 - crimes of moral turpitude;
 - controlled substance violations;
 - drug trafficking;
 - prostitution;
 - firearms offenses;
 - multiple criminal convictions;
 - human trafficking;
 - money laundering; and
 - aggravated felonies;

Examples

Mr. X is in removal proceedings and has applied for adjustment of status based on his long-time marriage to a U.S. citizen who is disabled. Many years ago he filled out an immigration application and failed to put down that he had once been arrested (but not convicted). He files an application for a 212(i) waiver for having committed “fraud” but the Immigration Judge denies it because the respondent does not have children. The BIA affirms. This decision may not be appealed to the federal courts and Mr. X is removed without further recourse.

Ms. Y has one conviction and in another case was charged but the charges were ultimately dismissed. The Immigration Judge finds that Ms. Y is removable because she has two or more convictions. The BIA affirms without opinion. This decision may not be appealed to the federal courts and Ms. Y is removed without further recourse.

Conclusion

The net result of the enforcement measures enacted in IIRIRA has been a reduction in the discretion available to immigration authorities in administering immigration laws. Congress should re-visit the question of whether restoration of some discretion will lead to more efficient use of resources and the ability for DHS to focus its limited enforcement resources on identifying, detaining and removing those people who pose real threats to our national security and the safety of our communities. I would encourage the consideration of more comprehensive immigration reform that looks to balance the very real need for security with the critical need for a legal immigration system that works. Thank you for your kind consideration of my remarks.

Ms. LOFGREN. Thank you, Mr. Virtue.
Mr. Motomura?

**TESTIMONY OF HIROSHI MOTOMURA, KENAN DISTINGUISHED
PROFESSOR OF LAW, UNIVERSITY OF NORTH CAROLINA
SCHOOL OF LAW**

Mr. MOTOMURA. Madam Chair, Ranking Member King, Members of the Subcommittee, thank you for the privilege of appearing before you today.

I would like to suggest two ways to think about the 1996 Act. I will state them briefly and then elaborate. First is that an enforcement-only approach to immigration legislation will undermine the rule of law, and the second is that any evaluation of the Act needs to look closely at the effects on U.S. citizens.

First, on enforcement, an immigration system that respects the rule of law needs to include not only enforcement but three other essentials of our legal system. One is discretion, subject to legal standards; second is decision-making that is based on expertise and subject to checks and balances; and the third is due process.

Now, speaking to discretion, that can mean different things, but I think it is very important to see the difference between unreviewable discretion that is outside the law and the sort of discretion that respects the rule of law. Especially in the early part of the 20th century, discretion and immigration was largely discretionary. This was most extreme for Mexican immigrants. They were tolerated when the economy needed them but deported when they were deemed expendable.

Now, this discretion, historically, was unreviewable and arbitrary but was gradually channeled, first for Europeans and Canadians and later for all immigrants, into formal mechanisms with legal standards, like suspension of deportation and adjustment of status.

Now, the 1996 Act produced opportunities to apply discretion, subject to legal standards and review. For example, it curtailed eligibility for cancellation of removal and it provided for mandatory detention.

So to illustrate the problems that result, mandatory detention makes it much harder, for example, to obtain counsel, and when we impair access to counsel, we don't know what errors are being made in rule proceedings.

The 1996 Act also increased the number of discretionary decisions that aren't subject to legal standards or meaningful administrative or judicial review. For example, the Acts have really reduced judicial review or discretionary denials of relief.

In short, the 1996 Act moved away from discretion that is case-by-case justice, according to legal standards, and it moved back toward discretion that can be arbitrary, unpredictable and discriminatory.

Now, thinking about discretion leads us to think more generally about decision-making based on expertise and subject to checks and balances. One example here is expedited removal, which applies, in theory, only to someone who lacks any defenses to removal. But the question is whether any individual is really such a person lacking defenses.

Expedited removal gives ultimate authority to low-level officials and thus eliminates the procedural protections afforded in immigration court by judges and counsel. Again, we don't know what mistakes are being made, for example, denying asylum to someone who has a right to protection under both U.S. and international law.

I mentioned lack of judicial review of discretionary decisions, but lack of judicial review is a broader problem. Although the Supreme Court has essentially compelled some restorations, significant bars to review remain, and they are especially troubling because of a parallel reduction in BIA review.

Along with accuracy, a related casualty is uniformity, which can only be achieved with recorded, formal administrative and judicial decisions. A lot of it isn't uniform. It is unequal, it is unpredictable, and its unpredictability means inadequate notice. Any system of immigration law is doomed to make mistakes if we simply hope that they will come to light without any mechanism being established to discover them, and a system that can't have confidence in its accuracy diminishes respect for the rule of law.

And most of what I have identified as problems of discretion or decision-making can also be thought of as due process problems, but the 1996 Act has other kinds of due process problems as well. I will just mention one: retroactive changes to immigration law. This practice pre-dates '96, but the Act made it much worse by making many non-citizens deportable for reasons that had no immigration consequences originally.

Retroactive laws fail to give the notice that is essential to due process so that individuals can understand the consequences of their actions, and lawyers can give reliable advice.

Let me quickly address my second major theme, which is effects on U.S. citizens. An enforcement-only approach leads to mistakes that cause devastating harm to many citizens who may be the non-citizen's husband or wife, father or mother or child. When our immigration system doesn't adhere to the rule of law, we diminish and we devalue what it means for them to be American citizens.

An example is the cutback on cancellation eligibility for applicants who typically have immediate family members who are citizens. Another is the failure to consider citizen children for waivers of the 3-and 10-year bar.

My two main points today are that any assessment of the 1996 Act should adopt two yardsticks: The rule of law and effects on U.S. citizens.

Let me close by suggesting that if we are to foster the integration of immigrants into American society, it is essential to build confidence in an immigration law system on the part of immigrants and the citizens who are closest to them. And integration of immigrants, in turn, is essential to the long-term success of any immigration policy.

Thank you.

[The prepared statement of Mr. Motomura follows:]

PREPARED STATEMENT OF HIROSHI MOTOMURA

Testimony of Hiroshi Motomura

Kenan Distinguished Professor of Law
University of North Carolina School of Law, Chapel Hill

Before the
Subcommittee on
Immigration, Citizenship, Refugees, Border Security, and International Law
Committee on the Judiciary
United States House of Representatives

Hearing on Shortfalls of the 1996 Immigration Reform Legislation

April 20, 2007
10:00 A.M.
2141 Rayburn House Office Building

Madam Chairman Lofgren, Ranking Member King, and members of the Subcommittee:

Thank you for the opportunity to appear before you this morning. My name is Hiroshi Motomura. I am a professor at the University of North Carolina School of Law in Chapel Hill, and I have been teaching and writing about immigration and citizenship law for the past twenty years.

Rather than go topic-by-topic through the 1996 immigration legislation, I might best contribute to the subcommittee's work by suggesting broader ways to evaluate the 1996 Act. From this perspective, I have two main points, which I'll state briefly and then elaborate.

First, enforcement is an important aspect of the rule of law, but an enforcement-*only* approach creates some real problems that actually undermine the rule of law. Second, any evaluation of the 1996 Act needs to look closely at its impact on U.S. citizens.

Enforcement and the rule of law. Proponents of the 1996 Act have explained its emphasis on enforcement as an effort to uphold the rule of law. The idea was that any noncitizen who is in the United States unlawfully undermines the rule of law simply by being here. Or that any lawfully present noncitizen who becomes deportable undermines the rule of law by contesting his removal. And so, for example, the 1996 Act limited the availability of discretionary relief, introduced mandatory detention under INA § 236(c), and severely curtailed access to the courts. It introduced new inadmissibility and deportability grounds, and it made existing grounds much harsher.

Real problems arise from thinking that the rule of law is about enforcement *only*. An immigration system that respects the rule of law needs to include not only enforcement, but also at least three other essentials of the American legal system: (1) discretion subject to legal standards, (2) decisionmaking that is based on expertise but

subject to checks and balances, and (3) due process. I'll address them roughly in that order but also show how they overlap.

Discretion subject to legal standards. Discretion historically has played a large role in immigration law.¹ In fact, the history of immigration law is one of blanket rules that are fine-tuned in practice through various types of discretionary decisions. In the 100 years up to 1996, the general trend was to move away from unreviewable exercise of discretion outside the law toward the sort of discretion that respects the rule of law.

To illustrate what I mean by discretion outside the law, consider the emergence in the early 20th century of labor migration from Mexico in patterns that persist today. Much of this migration, whether legal or not, was invited by labor recruitment with the cooperation of the U.S. government. Immigration law enforcement against Mexican immigrants was largely discretionary, but this discretion was not benign. Mexican workers were welcomed when the economy needed them, but deported when they became expendable.²

Gradually, discretion took a different shape that reflected the rule of law. Rather than discretion being unreviewable and arbitrary, it was channeled into formal mechanisms for case-by-case discretionary relief, including suspension of deportation and adjustment of status. At first, these forms of discretionary relief were limited to European and Canadian immigrants, but gradually they became generally available.³ The result by 1996 was a body of law with broad categories for admission and expulsion that were tempered by discretion to reach fair results in individual circumstances.

Against this background, the 1996 Act's approach to discretion undermined the rule of law in two ways. First, it reduced opportunities to reach fair case-by-case results using the sort of discretion that was subject to legal standards and a system of review that minimized mistakes and fostered uniformity. For example, the 1996 Act curtailed eligibility for discretionary relief under the new cancellation of removal provisions in § 240A, and it provided for mandatory detention under INA § 236(c).

Because this sort of discretion within the rule was reduced, a number of problems have arisen. Some are fiscal—consider the tremendous cost of mandatory detention—but other problems directly undermine the rule of law. Detaining individuals makes it much harder for them to obtain counsel. As long as immigration law violations are civil violations, there is no constitutional right to appointed counsel, so detainees must either pay for counsel or rely on pro bono counsel. Pro bono counsel is hard to find in the

¹ See Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States 176-80* (Oxford Univ. Press 2006).

² See Kitty Calavita, *The Immigration Policy Debate: Critical Analysis and Future Options*, in *Mexican Migration to the United States: Origins, Consequences, and Policy Options* 151, 155-59 (W. Cornelius & J. Bustamante, eds., 1989).

³ See Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton Univ. Press 2005); Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 *Law & Hist. Rev.* 69, 103 (2003); Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 *J. Am. Hist.* 67 (1999).

remote locales of many detention facilities. Paid counsel is hard to retain if the detainee can't work. Many detention facilities lack adequate access to telephones and legal materials.

When we severely impair access to counsel in this way, we don't know what errors are being made in applying immigration law to a given individual. We don't know if he would have a meritorious case for relief from removal. We don't even know if he is a U.S. citizen. A system that cannot have confidence in its accuracy is a system that undermines respect for the rule of law.

At the same time as the 1996 Act reduced the sort of discretion that can enhance the rule of law, it undermined the rule of law in a second way. The Act enlarged opportunities for the government to make discretionary decisions that are outside the rule of law, in that they aren't subject to legal standards or meaningful administrative or judicial review.⁴ An example is waivers of the 3/10-year bars in INA § 212(a)(9)(B)(i)(I) and (II). The breakup of the Immigration and Naturalization Service into separate service and enforcement agencies reduced the likelihood that the agency's service orientation would temper its enforcement decisions. Moreover, the 1996 Act severely reduced judicial review in key categories of cases, including many discretionary denials of relief and discretionary decisions to commence proceedings, adjudicate, or execute removal orders.

Decisionmaking authority. The lack of meaningful review is a problem not only for discretionary decisions, but also for several types of unreviewable enforcement decisions that the 1996 Act gave to low-level officials rather than immigration judges. In other words, the general problem is that the 1996 Act damaged immigration decisionmaking. Three examples are expedited removal under § 235(b), administrative removal of noncitizens with criminal convictions under § 238, and reinstatement of removal under § 241(b)(5).

In theory, these three mechanisms apply only to persons who seem to lack defenses to removal. But often the question is whether any individual is really such a person. These provisions eliminate the procedural protections afforded in immigration court. Some essential protections would come from immigration judge supervision. Counsel for the noncitizen would provide other safeguards. As with impaired access to counsel due to mandatory detention, the problem is that these procedural protections are no longer available, so we don't know what mistakes are being made.

Similarly, the problems with lack of judicial review aren't limited to barring review of discretionary decisions. Courts were also cut out of a variety of situations. The 1996 Act tried to eliminate judicial review of removal orders for many noncitizens deportable for criminal convictions. Other provisions curbed injunctions against government agency practices, limited legal challenges to expedited removal, and eliminated automatic stays of removal. Though the U.S. Supreme Court's *St. Cyr*

⁴ Even more troubling is this trend's logical extension to unreviewable decisions by state and local officials, and even by private groups.

decision in 2001⁵ confirmed that habeas corpus remained available, and the REAL ID Act of 2005 restored judicial review for constitutional claims and questions of law (while purporting to eliminate jurisdiction in habeas corpus),⁶ significant judicial review bars remain. All of these bars have been especially troubling because of the parallel reduction in review by the Board of Immigration Appeals.⁷

The 1996 Act pushed decisions away from the locus of expertise in immigration judges down toward lower level decisionmakers such as port of entry inspectors. Other decisions that used to be subject to meaningful judicial review in the federal courts are being pushed down toward immigration judges. Rather than a system that benefits from the synergy of having various decisionmakers apply their expertise to different stages in the process—inspectors, immigration judges, the Board of Immigration Appeals, and then federal judges—some of these actors are being asked to do too much, and others are being asked to do too little. A poor fit between decisionmaking and competence undermines the rule of law.

A related issue is uniformity, which can only be achieved with the key feature of serious administrative and judicial oversight: a body of formal decisions that are reported and accessible to private parties, government agencies, and decisionmakers in similar cases. Law that isn't uniform means unequal treatment. It is also unpredictable and therefore gives inadequate notice.

The overall effect has been a pervasive reduction in the quality of justice and an undermining of the rule of law. This isn't a matter of bad intent or incompetence on the part of inspectors or judges. The problem is a failure of systems, not of individuals. Much more after the 1996 Act than before, we have a system that tolerates a high risk of error. Any system is doomed to make mistakes if we simply hope that they come to light without providing a mechanism to discover them. The real problem is that we don't know how many mistakes are being made.

Due process. Most of the problems with the 1996 Act that I have identified as matters of discretion or decisionmaking can also be considered problems of due process. That would be an accurate way to view how mandatory detention impairs access to counsel, or how cutting off access to courts eliminates the major check on mistakes by agencies and immigration judges. But those aren't the only due process problems with the 1996 Act.

Another due process problem consists of retroactive changes to immigration law. This started long before 1996, but the 1996 Act made it much worse by enacting so many retroactive provisions, especially for crime-related deportability.⁸ To be sure, the Supreme Court's *St. Cyr* decision limited retroactivity by confirming that immigration

⁵ 533 U.S. 289 (2001).

⁶ Pub. L. 109-13, 119 Stat. 231 (2005).

⁷ See Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 *Conn. L. Rev.* 459, 473-75, 492-93 (2006).

⁸ See 1996 Act § 321(b), amending INA § 101(a)(43) (aggravated felony definition applies "regardless of whether the conviction was entered before, on, or after the date of enactment").

law is governed by the general presumption that new laws aren't retroactive unless Congress clearly says so.⁹ But the Court confirmed that Congress can pass retroactive immigration laws because deportation is a civil penalty for constitutional purposes, which means that the prohibition on retroactive criminal penalties in the Constitution's Ex Post Facto clause doesn't apply.¹⁰

As a result, noncitizens are being deported for reasons that had no immigration consequences originally. They never had notice that deportation was possible when, for example, they pled guilty to an offense that was considered too minor to have immigration consequences, but since that time has become a deportable offense. Retroactive immigration laws fail to give the basic notice that due process implies, so that individuals can understand the consequences of their actions and lawyers can give reliable advice.¹¹ Such notice is a fundamental component of the rule of law.

Effects on U.S. citizens. I now get to my second major point—the effects of the 1996 Act on U.S. citizens—by asking why it is important to understand that the rule of law includes much more than enforcement alone. Perhaps it should be enough to say that our American system of justice is based on the rule of law, and anything that undermines the rule of law is fundamentally corrupting of American justice as a whole.

But there is even more at stake. When we decide how seriously we take the rule of law in the immigration context, the real question is: what mistakes are we willing to tolerate? The 1996 Act moved too far toward believing that mistakes are not being made, or that even if they are, those mistakes are acceptable.

My second major point is to draw attention to who suffers because of these rule-of-law problems. If noncitizens of the United States are the only ones who suffer, that might seem to make the outcome less troubling. It is tempting to think that justice in immigration law can be justice on the cheap. But the real world of immigration law doesn't divide neatly into citizens and aliens. An enforcement-only approach to the rule of law leads to mistakes that cause devastating harm to many U.S. citizens who may be a noncitizen's husband or wife, father or mother, or child. When our immigration law system doesn't adhere to the rule of law, then we diminish and devalue what it means for them to be American citizens.

Though I use the rule of law to illustrate the need to show how immigration law decisions affect citizens, once we look through this U.S. citizen lens, further problems with the 1996 Act become clear. One is the cutback in eligibility for cancellation of removal under § 240A. Typically, the noncitizens eligible for this relief must show close connections with U.S. citizens, so severe restrictions on eligibility directly harm those citizens. The same defect is evident in limits on eligibility criteria or adjudication

⁹ See, e.g., *United States v. Yacoubian*, 24 F.3d 1, 9-10 (9th Cir.1994); *Campos v. INS*, 16 F.3d 118, 122 (6th Cir.1994).

¹⁰ See *Galvan v. Press*, 347 U.S. 522, 531 (1954); *Harsiades v. Shaughnessy*, 342 U.S. 580, 593-95 (1952).

¹¹ A similar problem arises when a detainee is transferred to a facility in a different federal circuit, which may apply different legal rules to the case.

standards for other forms of discretionary relief, such as the failure to consider hardship to U.S. citizen children for the 3/10-year bars in INA § 212(a)(9)(B)(i).

* * *

My two main points today—the rule of law and the effects on U.S. citizens—have particular importance for several reasons. One is that understanding the shortcomings of the 1996 Act isn't just a matter of correcting those specific mistakes. It is also a matter of understanding that an enforcement-only approach undermines the rule of law in a broader sense. This underscores the importance of comprehensive immigration reform.

Another, deeper reason to consider the rule of law and the effects of immigration law decisions on U.S. citizens is that confidence in the immigration law system on the part of immigrants and the U.S. citizens who are closest to them is essential to foster integration of immigrants. And in turn, the integration of immigrants is essential to the long-term success of any immigration policy.

Thank you for inviting me to today's hearing. I look forward to your questions.

* * *

Ms. LOFGREN. Thank you very much.
And, finally, Mr. Krikorian?

**TESTIMONY OF MARK KRİKORIAN, EXECUTIVE DIRECTOR,
CENTER FOR IMMIGRATION STUDIES**

Mr. KRİKORIAN. Thank you, Madam Chairwoman and Members of the Subcommittee.

The shortcomings of the 1996 immigration law come in two parts. One is a defect in the bill itself, and I think more important is the defect in the execution of the law.

As far as the bill itself, the law itself, there was one very large mistake in the 1996 law and that was rejecting the recommendations of Barbara Jordan's Commission on Immigration Reform to cut overall legal immigration. The Jordan commission recommended a reduction of about one-third in total legal immigration, focusing in particular the family portions of the flow more tightly and eliminating certain categories.

The original versions of what became the 1996 law incorporated all of the Jordan commission's recommendations, including those regarding legal immigration, but Congress split the legislation and passed only the illegal immigration portions and abandoned the legal immigration parts of Ms. Jordan's recommendations.

This was a mistake for two reasons. One, immigration is simply too high. Mass immigration is not compatible with the goals and the characteristics of a modern society, but that is the subject for a different hearing.

Secondly, the goal of the 1996 law, ultimately, was the reduce illegal immigration, and even in this respect, the decision not to streamline and reduce legal immigration was a mistake because of the intimate connection between legal and illegal immigration. In other words, it is simply not possible to have high levels of legal immigration without at least creating very intense pressures for high levels of illegal immigration.

But I would submit the bigger problem with '96 is the execution of the '96 law provisions and immigration law, in general, since then.

Barbara Jordan told this very panel in 1995, "Credibility and immigration policy can be summed up in one sentence: Those who should get in, get in; those who should be kept out are kept out; and those who should not be here will be required to leave." And that simply hasn't happened.

To understand why that hasn't happened, the storyline has developed that the enforcement efforts, starting in the 1990's, had the perverse effect of increasing settlements of illegal immigrants. This is what Professor Massey was talking about. And the storyline goes this way: that illegal aliens were happily coming and going in circular migration flow, as they put it, until enforcement made it harder to get back in, and, therefore, the incentive was to stay here rather than to come and go. The broad claim, basically, is that border enforcement creates illegal immigration.

The absurdity of this claim is clear from the top of the two figures that I have here. The Census Bureau shows that long before new border enforcement measures, Mexican immigration, which is a pretty good proxy for illegal immigration since it accounts for

most illegal aliens and most Mexicans either are or were illegal aliens, Mexican immigration has been growing rapidly for at least a generation. There weren't even 800,000 Mexicans in the United States in 1970, and that has doubled each decade, long before there was any border enforcement of significant consequences.

But let's concede, for the sake of argument, that there actually is something to this, that the rate of return of illegals, that the minority of Mexican immigrants who went back and forth, that minority has gotten even smaller.

The reason, though, is not just border enforcement because something else was going on in the 1990's, not just increases in border enforcement, modest though they were, frankly, but also an almost complete abandonment of interior enforcement, as the lower second of the figures I have shows.

And so what has caused, to the extent there has been an interruption of this back and forth, it is the combination, the dysfunctional combination of increased border enforcement with the complete abandonment of interior enforcement, which simply reduces the incentive for illegal aliens to leave. This is well-documented. The bottom graph shows the number of fines issued to employers, which fell to three, a total of three in 2004. Other factors also declined related to interior enforcement. And this sends illegal aliens the message that it is hard to get in or a little harder, but if you can make it, you are home free.

We have seen a minor change in that over the past year. The Administration has permitted and asked for funding for some modest increases of an enforcement, and it actually seems to be doing what it is intended to do, which is reduce illegal settlement and increase the return migration of illegal aliens.

This doesn't mean the problem is solved. This means that we have taken some baby steps now over the past year in the right direction and that the proposals for what has come to be called comprehensive immigration reform would actually short-circuit this progress and return us to where we were before, which is continually increasing illegal populations.

Thank you.

[The prepared statement of Mr. Krikorian follows:]

PREPARED STATEMENT OF MARK KRIKORIAN

“Shortfalls of the 1996 Immigration Reform Legislation”

Statement of Mark Krikorian
Executive Director
Center for Immigration Studies

Before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and
International Law
Committee on the Judiciary
U.S. House of Representatives
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The shortfalls of the 1996 immigration law come in two parts – defects in the legislation itself and, more important, defects in the execution of the law.

As to the first, there can always be debate over the specifics of any piece of legislation. This is also the case with the three major laws passed in 1996 relating to immigration – the Illegal Immigration Reform and Immigrant Responsibility Act of 1996; the Personal Responsibility and Work Opportunity Reconciliation Act of 1996; and Antiterrorism and Effective Death Penalty Act of 1996. For instance, should illegal aliens have been given an entire year after arrival to apply for asylum, as the law allowed, or should it have been only six months? Should expedited removal have been expanded more than it was? These are the kinds of questions that lawmakers always face, and although we will each have our own opinions on the merits of specific measures, compromise is an inevitable part of the legislative process. Such issues can't really be described as mistakes or shortcomings.

But there was one very large mistake made by Congress in the 1996 law, and that was rejecting the late Barbara Jordan's recommendations to cut overall legal immigration. The U.S. Commission on Immigration Reform, headed by Jordan during most of its existence, spent years examining all aspects of the immigration issue and delivered reports on illegal immigration, legal immigration, refugees, and Americanization policy. (See the reports at <http://www.utexas.edu/lbj/uscir/reports.html>.)

With regard to legal immigration, the Jordan Commission recommended a reduction of about one-third in total immigration, in particular focusing the family portion of the immigration flow more tightly and eliminating categories outside the nuclear family of husband, wife, and young children. Jordan's recommendations would also have eliminated the small but unjustifiable unskilled worker category (the Commission noted that "Unless there is another compelling interest, such as in the entry of nuclear families and refugees, it is not in the national interest to admit unskilled workers") and the egregious visa lottery.

The original versions of what became the 1996 immigration law incorporated Jordan's recommendations regarding legal immigration. But the supporters of continued mass immigration successfully maneuvered to split off the legal immigration sections of the bill as a tactic to spike those widely popular measures to moderate immigration.

This was a mistake for two reasons. First, we have too much immigration; mass immigration is simply incompatible with the goals and characteristics of a modern society. But that's a subject for another hearing.

Second, even if the goal of the 1996 law was solely to reduce illegal immigration, the decision not to streamline the legal immigration system and moderate the level of inflows was a mistake. As James Edwards, an Adjunct Fellow at the Hudson Institute, has written, "Because of the inextricable link between legal and illegal immigration, there is no way to continue massive legal immigration and reduce illegal immigration. To cut illegal immigration, legal immigration must be curtailed. To assert otherwise attempts to maintain a fiction that is unsustainable, judging from fact and experience." (See "Two Sides of the Same Coin: The Connection Between Legal and Illegal Immigration," <http://www.cis.org/articles/2006/back106.html>.)

But the bigger problem has been in the execution of the 1996 measures. As Barbara Jordan told this very panel in 1995, "Credibility in immigration policy can be

summed up in one sentence: Those who should get in, get in; those who should be kept out, are kept out; and those who should not be here will be required to leave.”

Needless to say, this has not happened.

In trying to understand why this didn't happen, a myth has developed that the enforcement initiatives dating from the mid-1990s had the perverse effect of *increasing* the settlement of illegal aliens. The story line goes like this: Illegal aliens – Mexican illegals, in particular – had been happily coming and going across the border since time immemorial, never even entertaining the idea of remaining permanently in the United States. “Circular migration,” is how such a process is described by scholars. Then, increased border enforcement – the additional agents and fencing authorized by Congress in 1996, as well as new tactics already being implemented by the Border Patrol – made it more difficult and expensive to cross the border, interrupting the “circularity” of the flow by forcing illegals to stay here, so they wouldn't get caught up in the dragnet the next time they left and tried to return. In other words, the claim is that border enforcement causes illegal immigration.

This line of argument is so comically absurd that it deserves a place in *The Onion*, or in cable TV's fake-news shows. To begin with, the research used to buttress this claim does nothing of the kind. The data from the Mexican Migration Project show that the probability of a Mexican illegal returning home within 12 months has been declining since at least the early 1980s, especially since 1986, and that the decline actually stopped around the time of the 1996 legislation. (See Douglas Massey's “Backfire at the Border: Why Enforcement without Legalization Cannot Stop Illegal Immigration,” <http://www.freetrade.org/pubs/pas/tpa-029.pdf>, and “Beyond the Border Buildup: Towards a New Approach to Mexico-U.S. Migration,” http://www.aifl.org/ipc/policy_reports_2005_beyondborder.shtml.) This might actually suggest that the IRCA amnesty was the reason for increased likelihood of permanent settlement, but it certainly wasn't caused by Operation Gatekeeper in San Diego.

What's more, Mexican immigration has been growing very rapidly for at least a generation, long before the 1990s increases in border enforcement. Massey's own data suggest this, since even at the beginning of the period he studied, the majority of Mexicans stayed here, and that majority has simply grown.

The census provides clear proof of massive and growing Mexican immigration. In 1970, there weren't even 800,000 Mexicans living in the United States; by 1980, the number had more than doubled, then doubled again by 1990, then doubled again by 2000. In fact, the rate of growth of the Mexican immigrant population has actually *slowed* since new enforcement measures were implemented at the border, though mainly because the base number has grown so large, that even with the continuing huge increases, it's mathematically impossible for it to keep growing at such a rapid rate. In short, it cannot be argued with a straight face that mass Mexican immigration is the result of increased border enforcement interrupting circular migration.

But let us concede for the sake of argument that Prof. Massey's research has indeed discovered something – that the minority of Mexican immigrants deciding to return to Mexico within 12 months of entry grew even smaller during a period of enhanced border control. Border control, however, is not the only thing that has happened since Operations Hold the Line and Gatekeeper were initiated early in the Clinton Administration. Specifically, the expansion of border enforcement has been accompanied by an almost complete abandonment of interior enforcement. To the extent the “circularity” critique has any validity, it is caused not by border enforcement alone, but by the dysfunctional combination of somewhat tougher border enforcement with a virtual absence of interior enforcement. In other words, if it is somewhat harder to get across the border *and* increasingly easy to remain in the United States illegally, then very little incentive remains for an illegal alien to return home, and there are great incentives for him to risk the dangers of a crossing.

The decline in interior enforcement of the immigration laws is well documented. The number of employers issued a “notice of intent to fine” for hiring illegal aliens fell

from nearly 1,500 in 1992 to a total of three (3) by 2004. The number of full-time equivalent workers devoted to worksite enforcement fell by more than half from 1999 to 2003. And the number of worksite enforcement arrests fell by nearly 95 percent from 1999 to 2004. (“Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts,” U.S. Government Accountability Office, August 2005, <http://www.gao.gov/new.items/d05813.pdf>.) Illegal aliens had thus been sent the very clear message that it would be a little bit harder to sneak into the United States, but those that survived were home free.

Over the past year, there has been a partial reversal of this process, with the administration finally permitting the Department of Homeland Security to modestly increase interior enforcement efforts, as seen in the larger number of worksite raids, employer prosecutions, and other efforts across the country. This modest and still-limited enforcement push is transparently political, intended by the White House as a last-minute effort to burnish its credibility on enforcement to strengthen its case for an amnesty. Be that as it may, even the limited, tentative enforcement measures we’re now seeing seem to be moving – very slowly and incompletely – in the right direction. Secretary Chertoff himself has said that the decline in illegal-alien arrests along every section of the border is because the flow itself has decreased. Although it’s still early and the data are not conclusive, the Census Bureau’s Current Population Survey suggests that the illegal population has grown somewhat more slowly (this at a time when legal immigration ballooned in 2006 to nearly 1.3 million, an 80 percent increase from 2003). Likewise, data from the Department of Labor suggest that wages for the poorest workers have increased slightly, yet another indication that immigration enforcement may be working, tightening the labor market and enabling low-skilled Americans to charge more for their labor.

This does not mean the immigration problem is “solved,” as the president seems to have suggested, and that it is therefore time to legalize the illegals and enact huge increases in immigration. What has come to be called “comprehensive immigration reform” would completely undo the baby steps toward improved enforcement that we’ve

seen over the last year, and put us back on the path to ever-increasing illegal immigration. On the contrary, the tiny glimmers of success we're seeing underline the need for *expanded* enforcement measures to solidify these small gains and change the momentum so that illegals increasingly give up and deport themselves, thus reducing the illegal population through attrition. Such expanded enforcement would include, in no particular order, aggressive marketing of the 287(g) program to promote cooperation between local police and federal immigration authorities; a reversal of the Treasury Department's decisions that banks are permitted to accept the Mexican government's illegal-alien ID card for purposes of opening a bank account; systematic, ongoing cooperation among IRS, Social Security, and DHS to identify illegal aliens in the workforce; and many other measures.

Specific policies aside, there are two broad approaches to the immigration question. The logic of one side leads to open borders, with all immigration redefined as legal; thus, there would be no meaningful interior enforcement *and* no border enforcement. The alternative – the only alternative – is a tightly controlled immigration system, with strict enforcement at the border *and* in the interior. If our experience since 1996 has shown us anything, it's that immigration enforcement is indivisible – to be successful, it needs to happen everywhere, both at the border and the interior.

Ms. LOFGREN. Thank you very much.

Before we go to questions, I learned that Dr. Massey has a train to catch, and I don't know whether you want to miss your train and take our questions or have us submit our questions in writing to you. The choice is entirely yours with no hard feelings on our part. Okay.

I am going to stick very closely with the 5 minutes, given the lateness of the hour.

If I understand your testimony correctly, Dr. Massey, you basically are saying that the level of in-migration is about the same every year. It is who stays here that has contributed to the increase in the number of people who are here without their documents.

Is that pretty much a correct summary?

Mr. MASSEY. As far as I can tell, the rate of in-migration from Mexico hasn't changed much in 25 to 30 years. What changed was the rate of out-migration back to Mexico, and that is largely a function of our own border policy. So by militarizing the border with your friendly trading nation, you decrease the rate of out-migration.

Ms. LOFGREN. I have a question. I am just looking at this chart. It looks to me, and I am not suggesting that it is causative so much as correlative, that the amount of fines for employers, which I guess you could use a rough-cut measure of increased workplace enforcement, seems to correlate with an increase in the number of illegal immigrants here. I don't know, this is an interesting chart.

But let me tell a story and ask a question of Mr. Virtue and Mr. Motomura, since you are experts in current immigration law from your testimony.

We had a situation in Santa Clara County. Things like this happen all the time, but it was in the newspaper and there was a tremendous outcry in the public as a consequence. And here is the situation. A Jewish woman from Russia, she was a Russian, came to the United States. She didn't apply for asylum; she came on a temporary visa. I believe it was a visitor's visa. She might have actually been qualified for asylum because of the oppression against Jews in Russia at the time, but she didn't have the right visa.

She overstayed her visa, she violated the rules in that regard, but she met and fell in love with an American man, and they got married, and they had a baby. And she was teaching piano in her home with the infant and was associated with the Jewish temple in Sunnyvale, CA.

Well, he was an American citizen, born and raised here. They went to apply to make her a legal resident and instead they arrested her because she had overstayed her visa and they would not allow her to leave, even though she was nursing this infant. And then, ultimately, they deported her back to Russia and said that she could not come back for 10 years, even though by then her infant, obviously, would have no memory of her at all.

What in the 1996 Act would lead to that result, and what changes would we need to make so that a woman like that would be able to stay with her U.S. citizen husband and infant?

Mr. Virtue and Mr. Motomura, just real quickly.

Mr. VIRTUE. As I understand the case, she actually should have been permitted to remain here, even under the laws that existed in the 1996 Act, because she came lawfully on a visa, and even though she overstayed and was now out of status, her marriage to a U.S. citizen should have made her eligible. The agency, however, doesn't have to permit the person to pursue the green card, pursue the visa petition and adjust status, but normally they would. So, I am not exactly sure what happened in that particular case, but I—

Ms. LOFGREN. Maybe it is not fair to ask the particulars of the case, but there have been many cases on the 3- and 10-year bar that have come to—I hear that all the time on the floor of the House where Members on both sides of the aisle say they have these situations that are just really very tough ones and how do we fix this. How would we fix this?

Mr. VIRTUE. If she had come without a visa, for example, she had come from—well, if she had come in without a visa, then she would not be eligible to adjust her status here because of the elimination of section 245(i), and the 3-and 10-year bar would prevent her from returning to her home country to apply for an immigrant visa without a waiver that is pretty difficult to get.

So a change would be to eliminate the 3-and 10-year bar. That would—

Ms. LOFGREN. Or maybe make it some other way that it is applied?

Mr. VIRTUE. Exactly. Maybe have a waiver that is more reasonable in terms of approval.

Ms. LOFGREN. My time is almost up.

Mr. Motomura, do you have anything to add?

Mr. MOTOMURA. Well, I would endorse everything that Mr. Virtue said on the legal front. I would only add that this may illustrate a couple of other points. One is that we have processing delays that make it very difficult for people to obtain the relief to which they are entitled. And, secondly, we have information gaps in this and in other areas, particularly where there is no right to counsel. You have to add those to the legal issues that Mr. Virtue addressed.

Ms. LOFGREN. Thank you very much.

I will now yield to Mr. King for his 5 minutes.

Mr. KING. Thank you, Madam Chair.

First, Mr. Massey, you testified that the numbers of deaths in the desert between 1992 and 2002 essentially tripled over that decade period of time. Would you care to reiterate your analysis of the reasons for that?

Mr. MASSEY. The concentration of enforcement resources in urban areas, namely San Diego and El Paso, basically diverted the flows around them.

Mr. KING. And those resources would be?

Mr. MASSEY. Those resources would be more Border Patrol officers, more equipment, more intensive patrolling efforts and building of walls.

Mr. KING. And in fact if we looked at the Border Patrol increase in numbers, that took place in probably the second half of that decade rather than the first half. So one might believe that the facili-

ties had the initial impact on that, that being the physical structures, such as the fencing?

Mr. MASSEY. People went around the fencing.

Mr. KING. I thank you.

And so, Mr. Massey, if we could build—and what you said is fencing is effectively, at least for that area, and they will go around the end.

Mr. MASSEY. They will go around the end, right.

Mr. KING. So if we could build a fence from San Diego to Brownsville—and let me go to the extreme and hypothetical so we don't have to do definitions here—all the way down to hell and all the way up to heaven, it was entirely impermeable but directed all traffic to the ports of entry and we had our ports of entry beefed up so that we had the kind of surveillance there that is more effective than we have today, would you agree that that would solve a lot of the illegal traffic across our border?

Mr. MASSEY. Not unless you had officers patrolling—

Mr. KING. I would agree with that.

Mr. MASSEY. If you had officers stationed every 500 yards along the entire border and built a fence, you would probably—

Mr. KING. Let me say it is impermeable. Our hypothetical covers that.

Mr. MASSEY. Well, if you assume the border is impermeable, then it is, by definition, impermeable.

Mr. KING. Okay. And I am going to go to another point here then, and I didn't think you could actually out-hypothetical me here. [Laughter.]

Let me go to another point. If you were going to import people from another population, and they had a violent crime rate of, say, three times greater than the one of the recipient population, would you expect then to see the crime rate increase in the recipient nation?

Mr. MASSEY. No, I would not.

Mr. KING. Would you care to explain that answer?

Mr. MASSEY. Because migration is highly selective, and the criminals aren't the ones that are likely to be moving.

Mr. KING. Could you explain why 28 percent of the inmate population in our Federal penitentiaries are criminal aliens?

Mr. MASSEY. They are largely on immigration offenses, immigration-related offenses.

Mr. KING. That really, I don't think, will hold up under analysis. But, also, a GAO study that was done and released in April of 2005 does report to those things and has analyzed the staff funding, and I would ask unanimous consent to introduce into the record the GAO study from 2005.

Ms. LOFGREN. Without objection.

[The information referred is available in the Appendix.]

Mr. KING. Thank you.

Just to make a couple of points here is that I think this analysis actually does hold up and that if you are going to take a general population of a country that is more violent, you can expect at least a cross-section of those people to yield a more violent result.

If there are \$65 billion worth of illegal drugs coming across that border, that also is a self-filtration process that brings in people

that are more likely to at least be involved in the drug trade and one would presume more violent. And if you bring in people who demographically are more violent, for example, young men, you can expect your crime rate to go up.

And I would submit that the violent death rate here in the United States is 4.28 per 100,000; in Mexico, it is 13.2 per 100,000; in Honduras, it is nine times; in Colombia, it is 15.4 times. There are no numbers for El Salvador.

I think that it adds up, and the demographics that we know predict why 28 percent of our population in our prisons are criminal aliens, Mr. Massey.

In the short time that I have—and I thank you for your answers—Mr. Krikorian, would you care to comment on that, on what one could expect if one looked at those demographics?

Mr. KRIKORIAN. Well, there actually has been a report on this not that long ago that actually contradicted the point you are making, in other words, that immigrants are less likely to engage in crime. Unfortunately, the data source used from the census was a corrupted source. The point is we don't really know the answer to this using data.

What we do know, though, or what we are pretty sure of is that the crime rate explodes from the first to the second generation, that actually the children of immigrants are dramatically more likely to engage in criminal activity than native-born Americans, and that is a consequence, clearly, of immigration policy and one we have to address.

Mr. KING. Thank you, Mr. Krikorian.

Thank you, Madam Chair. I yield back.

Ms. LOFGREN. The gentleman's time has expired.

The gentleman from Massachusetts is recognized for just 5 minutes.

Mr. DELAHUNT. I thank the Chair.

These are all very fascinating figures, and we can do an analysis on a gut basis. I have my own analysis about the \$65 billion. If we didn't have people consuming the drugs in this country that are violating our own statutes, then maybe we wouldn't be having the \$65 billion coming from South America.

So I don't know if we are doing a very good job about treating in a holistic way the—but why don't—and I would ask the Chair and the Ranking Member if there ought to be an examination in terms of whether this 28 percent—I mean, if there are immigration violations, then let's find out the answers to this. I think we should know that because I think it is important we get on the same page as far as the statistics are concerned.

I have heard everywhere from 8 million to 20 million undocumented, illegal—

Ms. LOFGREN. If the gentleman will yield.

Mr. DELAHUNT. I will yield.

Ms. LOFGREN. We are going to have a series of hearings, two to three a week, and we will be examining many of the data points, because we can argue about our opinions but hopefully we will not be arguing about the facts.

Mr. DELAHUNT. Yes. I mean, my opinion and yours, the Chair, and the Ranking Member's opinion is just simply that, opinion, and

it has no validity in terms of the discussion, with all due respect to all of us.

I would also like to pose a question. You know, we hear a lot about our labor needs, and there was a panel yesterday that talked about our labor needs, and of course that shifts over time. And one problem that was put forth was that it is not timely in nature or timely in reality. How do we go about determining what our labor needs are to continue to fuel our national economy appropriately?

And ought there be, if none really exists other than snapshots at a particular time, should there be some sort of advisory group, comprised of members of the business community, members from academia, members of organized labor, working with the appropriate Federal agency to determine what our labor needs are so we can match the availability of the slots for legal immigrants to come into this country to assist us in terms of meeting our economic needs as far as the workforce is concerned?

Mr. KRIKORIAN. Is that a question for any of us?

Mr. DELAHUNT. Yes.

Mr. KRIKORIAN. I would like to respond to that. I would have to say it is really not Congress or the executive's job to gauge labor needs; that is for the market to deal with. And we have—

Mr. DELAHUNT. But I am relating it, Mr. Krikorian, to that might be for the market to do, but if we don't have enough workers in this country to meet the demand, then the market is fine, but I want to make sure that our economy continues or hopefully prospers.

Mr. KRIKORIAN. But that is what I would challenge. Labor shortage is just a market signal that employers need to both pay more for the available labor and use the available labor more efficiently. In other words, my view would be that there should be no solely labor-related immigration at all, that people should be admitted for some other reason, family members, what have you, and then allowed to make their own way within the labor market.

Mr. DELAHUNT. Fair point. But my point is, is there any gauge that currently exists that—

Mr. KRIKORIAN. There is no good gauge for that. If there were, the Soviet Union would still be around, because, in a sense, it is a kind of central planning—

Mr. DELAHUNT. No. Don't try to—

Mr. KRIKORIAN. I am not trying to—

Mr. DELAHUNT. What I am talking about is to have available data so that employers, the business community, can make decisions.

Mr. KRIKORIAN. By the time that data gets to someplace, it is already too old. That is the whole problem.

Mr. DELAHUNT. My point is then, is it possible to make that data timely for a decision, to the other three witnesses?

Mr. MOTOMURA. Well, what I would add to that is that I agree that the market is important and determinative in many respects. I would agree with the gentleman's suggestion that the information needs to be had, but I also would caution against seeing labor needs as the ultimate driving force.

Ms. LOFGREN. The gentleman's time has expired.

And we ask, since people are running for planes, the gentlelady from Texas to ask her 5 minutes' worth of questions, understanding that follow-on in writing questions are available to all of them.

Ms. JACKSON LEE. Let me thank the gentlelady for holding this important hearing and also to compliment this Subcommittee for the approach which we are now taking, which we have taken in the past but now taking it, I hope, with a direct target, and that is to try and, if you will, to move toward reasonable, rational but with certainty for immigrants, status immigrants who are likewise in limbo, those who are documented, and that is, I think, the important responsibility that we have.

So I thank the witnesses, and I do apologize for not hearing your testimony. I was in a Homeland Security hearing.

But I do know that IRCA, having been here at that time, was supposed to be the great savior. I think it was a great boon for lawyers, and I have no angst against them, being one myself, but it greatly limited the availability of discretionary relief. I think it even presented some of the concerns we have about immigration judges who failed to listen to any reputable response on confusion that might have abounded and caused the individual before them to be in this dilemma.

We know that the INS lost fingerprints, applications. We know that children that were on lines with their families aged out waiting so long. We know that the IRCA restricted access to Federal courts, I think, in complete objection to the values we have here on due process. It established expedited removal proceedings unfairly, and it imposed mandatory detention, and it also, I think, had this uncanny ability to send thousands home deported who had never been to their home place, based upon some juvenile infraction that was turned into a felony.

Some might think that my position is to be loose on immigration, and that is not the case. I want to be balanced and fair.

So let me ask Dr. Massey, we have had a decade of enforcement, and as we look at Mr. Krikorian's graph, I don't think it shows anything except for the fact that we have failed in some way.

Can we solve this problem with enforcement, enforcement, enforcement or do we need to fix some aspect of what was called 696—or not 696, what was called the 1996 bill? Do we need to fix '96 with some consideration on these restrictive procedures, and we do we need to balance enforcement with a reasonable structure of immigration?

Mr. MASSEY. I think that '96 and other legislation has really created a very unforgiving system and a very rigid system that needs to be reformed, because it limits discretion and puts people in impossible positions and forces them out of status, sometimes even if they tried to play by the rules.

In terms of enforcement, I don't think that more border enforcement is going to help anyone. It is as if a homeowner has built a steel wall in the front of his house and he wants to get more secure so he is going to build a second layer of steel wall but he has no wall on either side and his back door is flapping open. It is not going to enhance your security in any way.

I think if you want to do enforcement, it should be internal enforcement and for that you would need some kind of tamper-proof ID card that an employer could use to verify the right to work in the United States. Border enforcement is not a good way to control immigration, and my data shows that it backfired.

Ms. JACKSON LEE. Not the only way.

Mr. Virtue, I have legislation that has a provision for providing immigration judges with discretion when the basis for removal is a non-serious incident. As you well know, '96 wanted to go back and get—and I don't promote any of this, I want to criminals in jail, but is it important to train immigration judges and give some discretion as lawyers present hardship cases in the courtroom?

Mr. VIRTUE. I don't think there is any question about that, Mrs. Jackson Lee. It is going to be important to make a judgment about where we use our limited resources, because they are always going to be limited. And so I think we have to make a judgment about whether we continue to expend resources to detain and deport people whose only offense is to be here unlawfully.

We also have to make a judgment about whether we mandatorily detain and eliminate relief for permanent residents who have committed crimes 20 years ago that are coming back because of the retroactive effect of the definition of aggravated felony.

So I agree with you, that, yes, there has to be discretion restored, not just at the immigration judge level, although that is very important, but also at the officer level.

Ms. LOFGREN. The gentlelady's time has expired.

I would note that we have gotten a tremendous amount out of this hearing, despite the fact that we were interrupted by more than an hour of voting on the House floor, and I do thank all the witnesses for their testimony, their written testimony as well as their willingness to stick with us for questions.

Member will have 5 legislative days to pose additional questions in writing to the witnesses, and we ask that you answer as promptly as you are able to so that your answers may be made part of the record. And, without objection, the record will remain open for 5 legislative days for the submission of any other additional materials.

This hearing has helped illuminate numerous issues about the 1996 Act. I know that it will prove helpful to us as we move forward in our consideration of comprehensive immigration reform.

We will see everyone at Tuesday, 11 a.m. next week for our next hearing, which will begin to examine enforcement, workplace enforcement.

With that, this hearing is adjourned, with thanks.

[Whereupon, at 12:55 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

SUBMISSION TO THE RECORD BY THE HONORABLE STEVE KING, RANKING MEMBER,
SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND
INTERNATIONAL LAW: "INFORMATION ON CRIMINAL ALIENS INCARCERATED IN FED-
ERAL AND STATE PRISON AND LOCAL JAILS" FROM THE U.S. GOVERNMENT AC-
COUNTABILITY OFFICE, APRIL 7, 2005



United States Government Accountability Office
Washington, DC 20548

April 7, 2005

The Honorable John N. Hostettler
Chairman, Subcommittee on Immigration,
Border Security, and Claims
Committee on the Judiciary
House of Representatives

The Honorable Steve King
House of Representatives

The Honorable Melissa Hart
House of Representatives

Subject: *Information on Criminal Aliens Incarcerated in Federal and
State Prisons and Local Jails*

When the United States incarcerates criminal aliens—noncitizens convicted of crimes while in this country legally or illegally—in federal and state prisons and local jails, the federal government bears much of the costs. It pays to incarcerate criminal aliens in federal prisons and reimburses state and local governments for a portion of their costs of incarcerating some, but not all, criminal aliens illegally in the country through the Department of Justice's State Criminal Alien Assistance Program (SCAAP) managed by the Bureau of Justice Assistance (BJA). Some state and local governments have expressed concerns about the impact that criminal aliens have on already overcrowded prisons and jails and that the federal government reimburses them for only a portion of their costs of incarcerating criminal aliens.

You requested that we provide information concerning criminal aliens incarcerated at the federal, state, and local level. For the criminal aliens incarcerated in federal prisons, and for criminal aliens for which state and local governments received reimbursement through SCAAP, this report addresses the following questions:

- For recent years, how many criminal aliens were incarcerated?
- What is the country of citizenship or country of birth of these criminal alien inmates?
- What are the estimated costs of incarcerating criminal aliens?

To obtain information to answer these objectives, we analyzed population and cost data from the Bureau of Prisons (BOP) on criminal aliens incarcerated in federal prisons. We analyzed data on criminal aliens submitted to BJA by state and local governments seeking reimbursement under SCAAP and incarceration cost data from the 5 states and 5 local jails that incarcerated the largest number of criminal aliens reimbursed through SCAAP in fiscal year 2003. This methodology was used because there was no reliable population and incarceration cost data on criminal aliens incarcerated in all state prisons and local jails. Our data represent only a portion of the total population of criminal aliens who may be incarcerated at the state and local level, since SCAAP does not reimburse states and localities for all criminal aliens.

To assess the reliability of the data, we discussed the data collection methods and internal control processes for ensuring data quality with responsible officials and staff, reviewed the data and information for reasonableness, and reviewed relevant audits and evaluations related to the data. We found that the data we used for our analyses were sufficiently reliable for the purposes of this report.

In March 2005, we discussed with your offices the results of our work. This document conveys the information provided during those discussions (see encl. I). We also plan to issue a report on the number and types of crimes committed by criminal aliens and the coordination between federal and local law enforcement agencies to identify criminal aliens.

We performed our work from January 2004 through March 2005 in accordance with generally accepted government auditing standards. Further details on our scope and methodology are discussed in enclosure II.

Results

The briefing slides in enclosure I address each of our three questions for the federal, state, and local level. In summary, we found the following:

- At the federal level, the number of criminal aliens incarcerated increased from about 42,000 at the end of calendar year 2001 to about 49,000 at the end of calendar year 2004—a 15 percent increase. The percentage of all federal prisoners who are criminal aliens has remained the same over the last 3 years—about 27 percent. The majority of criminal aliens incarcerated at the end of calendar year 2004 were identified as citizens of Mexico. We estimate the federal cost of incarcerating criminal aliens—BOP's cost to incarcerate criminals and reimbursements to state and local

governments under SCAAP—totaled approximately \$5.8 billion for calendar years 2001 through 2004. BOP's cost to incarcerate criminal aliens rose from about \$950 million in 2001 to about \$1.2 billion in 2004—a 14 percent increase. Federal reimbursements for incarcerating criminal aliens in state prisons and local jails declined from \$550 million in 2001 to \$280 million in 2004, in a large part due to a reduction in congressional appropriations.

- At the state level, the 50 states received reimbursement for incarcerating about 77,000 criminal aliens in fiscal year 2002 and 47 states received reimbursement for incarcerating about 74,000 in fiscal year 2003.¹ For the 5 states incarcerating about 80 percent of these criminal aliens in fiscal year 2003,² about 68 percent incarcerated in midyear 2004 reported that the country of citizenship or country of birth as Mexico, the Dominican Republic, or Cuba. We estimate that 4 of these 5 states spent about \$1.6 billion to incarcerate criminal aliens reimbursed through SCAAP during fiscal years 2002 and 2003.³ We estimate that the federal government reimbursed these four states about 25 percent or less of the estimated cost to incarcerate these criminal aliens in fiscal years 2002 and 2003.
- At the local level, in fiscal year 2002, SCAAP reimbursed about 750 local governments for incarcerating about 138,000 criminal aliens. In fiscal year 2003, SCAAP reimbursed about 700 local governments for about 147,000 criminal aliens, with 5 local jail systems⁴ accounting for about 30 percent of these criminal aliens. The 147,000 criminal aliens incarcerated during fiscal year 2003 spent a total of about 8.5 million days in jail. Mexico leads as the country of birth for foreign-born arrestees at these 5 local jails in fiscal year 2003. We estimate that 4 of these 5 local jails spent an estimated \$390 million in fiscal years 2002 and 2003 to incarcerate criminal aliens and were reimbursed about \$73 million through SCAAP. We estimate that the federal government reimbursed these localities about 25 percent or less of the estimated criminal alien incarceration cost in fiscal years 2002 and 2003.

¹In fiscal year 2003, Illinois, Montana, and Oregon did not submit claims for reimbursement.

²The five states are Arizona, California, Florida, New York, and Texas.

³We omitted Texas from our analysis since fiscal year 2003 cost data were not available. Texas spent about \$130 million in fiscal year 2002 to incarcerate SCAAP criminal aliens.

⁴The five local jails are Maricopa County, Arizona; Los Angeles County, California; Orange County, California; New York City, New York; and Harris County, Texas.

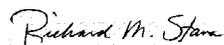
**Agency Comments and
Our Evaluation**

We requested comments on a draft of this report from Departments of Justice and Homeland Security. The Departments of Justice and Homeland Security had no comments.

As we agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution of it until 30 days from the date of this letter. We will then send copies to the Departments of Justice and Homeland Security, other interested congressional committees, and make copies available to others who request them. In addition, the report will be available at no charge on GAO's Web site at <http://www.gao.gov>.

If you or your staff have any questions concerning this report, please contact me at (202) 512-8816 or by e-mail at Stana@gao.gov or Michael Dino, Assistant Director, at (213) 830-1150 or Dinom@gao.gov. Key contributors to this report were Amy Bernstein, Ann H. Finley, Evan Gilman, Frederick Lyles, Karen O'Connor, Jason Schwartz, and Carla Wilhoit.

Sincerely yours,



Richard M. Stana, Director
Homeland Security and Justice Issues

Enclosures

Enclosure I: Briefing Slides



**Information on Criminal Aliens Incarcerated in
Federal and State Prisons and Local Jails**

**Briefing for Congressional Requesters
March 29, 2005**



Introduction

- Generally, criminal aliens are considered to be noncitizens who are residing in the United States legally or illegally and convicted of a crime.
- The federal government bears total cost of incarcerating all criminal aliens in federal prisons and reimburses state and local governments for portions of their incarceration costs for certain criminal alien populations through the State Criminal Alien Assistance Program (SCAAP).
- Any costs related to incarcerating criminal aliens not reimbursed by the federal government are borne by state and local governments.

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Definitions of Terms Used in This Report

Term	Definition
Criminal aliens	Noncitizens who are residing in the United States legally or illegally and convicted of a crime.
SCAAP criminal aliens	A subgroup of criminal aliens; noncitizens illegally in the United States at the time of incarceration for whom state and local jurisdictions received federal reimbursement through SCAAP; the aliens must meet specific legal requirements.
Alien	Any person who is not a citizen of the United States.
Foreign-born individuals	Any person who is not born in the United States; includes individuals who may be naturalized United States citizens.

Source: GAO.

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Objectives

For criminal aliens incarcerated in federal prisons and for SCAAP criminal aliens incarcerated in state prisons and local jails:

- For recent years, how many criminal aliens were incarcerated?
- What is the country of citizenship or country of birth for these criminal alien inmates?
- What are the estimated costs of incarcerating criminal aliens?

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Results in Brief—Federal Prisons and Reimbursements

How many incarcerated:

- Criminal aliens incarcerated increased from about 42,000 at year-end 2001 to about 49,000 at year-end 2004.

Country of citizenship:

- For 2004, the majority of incarcerated criminal aliens were identified as citizens of Mexico.

Costs of incarceration:

- We estimate the federal cost of incarcerating criminal aliens totaled about \$5.8 billion from 2001 through 2004:
 - direct federal costs (\$4.2 billion) and
 - federal reimbursements to state and local governments (\$1.6 billion).

5



Results in Brief—State Prisons

How many incarcerated:

- Fiscal year 2002—SCAAP reimbursed all 50 states for incarcerating about 77,000 criminal aliens.
- Fiscal year 2003—SCAAP reimbursed 47 states for incarcerating about 74,000 criminal aliens.
- 5 state prison systems incarcerated about 80 percent of these criminal aliens in fiscal year 2003—Arizona, California, Florida, New York, and Texas.

Country of citizenship:

- Data on citizenship of criminal aliens reimbursed through SCAAP not available.
- In mid-2004, most of the foreign-born inmates for the 5 state prison systems with the most criminal aliens were born in Mexico (60 percent).

Costs of incarceration:

- We estimate that 4 of these 5 states spent a total of \$1.6 billion in fiscal years 2002 and 2003 to incarcerate SCAAP criminal aliens and were reimbursed about \$233 million through SCAAP.

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Results in Brief—Local Jails

How many incarcerated:

- Fiscal year 2002—SCAAP reimbursed 752 local jurisdictions for incarcerating about 138,000 criminal aliens.
- Fiscal year 2003—SCAAP reimbursed 698 local jurisdictions for about 147,000 criminal aliens.
- 5 municipal and county jails incarcerated about 30 percent of these criminal aliens in fiscal year 2003—Los Angeles County, California; New York City, New York; Orange County, California; Harris County, Texas; and, Maricopa County, Arizona.

Country of citizenship:

- Data on citizenship of criminal aliens reimbursed through SCAAP not available.
- In fiscal year 2003, most of the foreign-born inmates from these 5 jails were born in Mexico (65 percent).

Costs of incarceration:

- We estimate that 4 of these 5 local jails spent a total of \$390 million in fiscal years 2002 and 2003 to incarcerate SCAAP criminal aliens and were reimbursed about \$73 million through SCAAP.

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Background

Prison systems

- Federal prisons include 112 prisons managed by the Bureau of Prisons (BOP), 10 privately managed facilities, and other contract facilities including community correction centers and short-term detention facilities.
- More than 1,300 state prisons operated by state correctional agencies in all 50 states, as of 2000.
- More than 3,300 local jails operated by cities, counties, and municipalities, as of 1999.

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Background (continued)

SCAAP

- SCAAP is a Department of Justice (DOJ), Bureau of Justice Assistance (BJA), program that partially reimburses state and local jurisdictions annually for the cost of incarcerating some but not all criminal aliens illegally in the country. Not all jurisdictions submit for SCAAP reimbursement.
- State and local jurisdictions voluntarily submit data annually on inmates they suspect to be criminal aliens for possible reimbursement. The program reimburses these jurisdictions for criminal aliens who
 - were convicted of a felony or two misdemeanors and incarcerated for a minimum of 4 days and
 - entered the U.S. without inspection, or were in immigration removal proceedings at the time they were taken into custody, or were admitted as a nonimmigrant and failed to maintain nonimmigrant status.⁹
- Jurisdictions are reimbursed for those criminal aliens who the Bureau of Immigration and Customs Enforcement (ICE) within the Department of Homeland Security determines are eligible and for a portion of the alien inmates whose eligibility cannot be confirmed through a match with ICE records.

⁹ (U.S.C. 1291(i)). Fiscal year 2003 and 2004 SCAAP guidelines.

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Scope and Methodology—Federal Prisons and Reimbursements

To determine the number of criminal aliens incarcerated in federal prisons and their country of citizenship, we analyzed:

- BOP data on all criminal aliens incarcerated in federal prisons at year-end 2001, 2002, 2003, and 2004.¹
- BOP country of citizenship data for criminal aliens incarcerated in federal prisons at year-end 2004.

To estimate the federal cost of incarcerating criminal aliens, we analyzed:

- BOP inmate incarceration cost data.
- SCAAP reimbursements to state and local governments for fiscal years 2001 through 2004.

¹Aliens in the country legally or illegally.

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Scope and Methodology—State Prisons

To determine the number of SCAAP criminal aliens incarcerated in state prisons, we analyzed:

- Data on criminal aliens incarcerated in state prisons and submitted for SCAAP reimbursement in fiscal years 2002 and 2003.
- Data represent only a portion of the total population of criminal aliens who may be incarcerated at the state level, since SCAAP does not reimburse states for all criminal aliens.

To obtain data on country of birth for state criminal aliens, we analyzed:

- Data from the 5 state prison systems that incarcerated about 80 percent of SCAAP criminal aliens in fiscal year 2003.

To estimate the cost of incarcerating SCAAP criminal aliens:

- We calculated the annual cost of incarcerating SCAAP criminal aliens for 4 of these 5 state prison systems that provided us cost data for fiscal years 2002 and 2003 using SCAAP data and cost data provided by these 4 states. Cost data for the 45 other state prison systems were not readily available.

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Scope and Methodology—Local Jails

To determine the number of SCAAP criminal aliens incarcerated in local jails, we analyzed:

- Data on criminal aliens incarcerated in local jails and submitted for SCAAP reimbursement in fiscal years 2002 and 2003.
- Data represent only a portion of the total population of criminal aliens who may be incarcerated at the local level, since SCAAP does not reimburse localities for all criminal aliens.

To determine data on the country of birth of foreign-born inmates, we analyzed:

- Data from the ICE Institutional Removal Program (IRP) National Workload Study for the 5 municipal and county jails that incarcerated about 30 percent of SCAAP criminal aliens in fiscal year 2003.¹

To estimate the cost of incarcerating SCAAP criminal aliens:

- We calculated the cost of incarcerating SCAAP criminal aliens for 4 of these 5 jails that provided cost data for fiscal years 2002 and 2003 using SCAAP data and cost data provided by the 4 jails.

¹ICE established the IRP to identify and remove criminal aliens incarcerated in federal and state prisons and local jails. United States Immigration and Customs Enforcement, U.S. Department of Homeland Security. Institutional Removal Program National Workload Study (Washington, D.C.: September 2004).

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Data Reliability

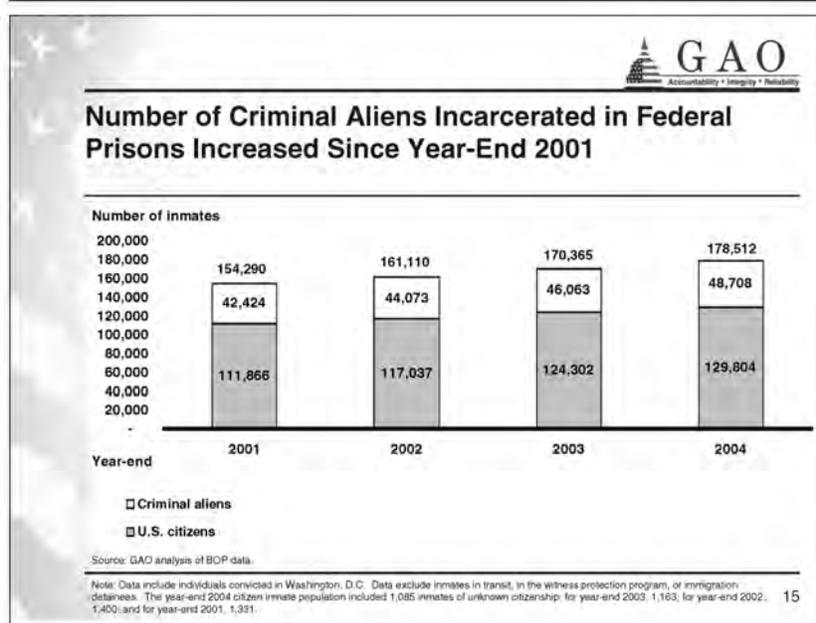
- To assess the reliability of the data, we (1) discussed the data collection methods with responsible agency staff, (2) reviewed the data and information for reasonableness, and (3) obtained related documentation where available.
- We found the BOP data we used for our analyses were sufficiently reliable for the purposes of this report.
- We found the SCAAP data we used for our analyses to be sufficiently reliable for presenting the number of inmates reimbursed under SCAAP.
- We found the citizenship or country of birth and cost data provided by the 5 state corrections departments were sufficiently reliable for the purposes of this report.
- We found that the cost data from the 4 local jails were sufficiently reliable for the purposes of this report.

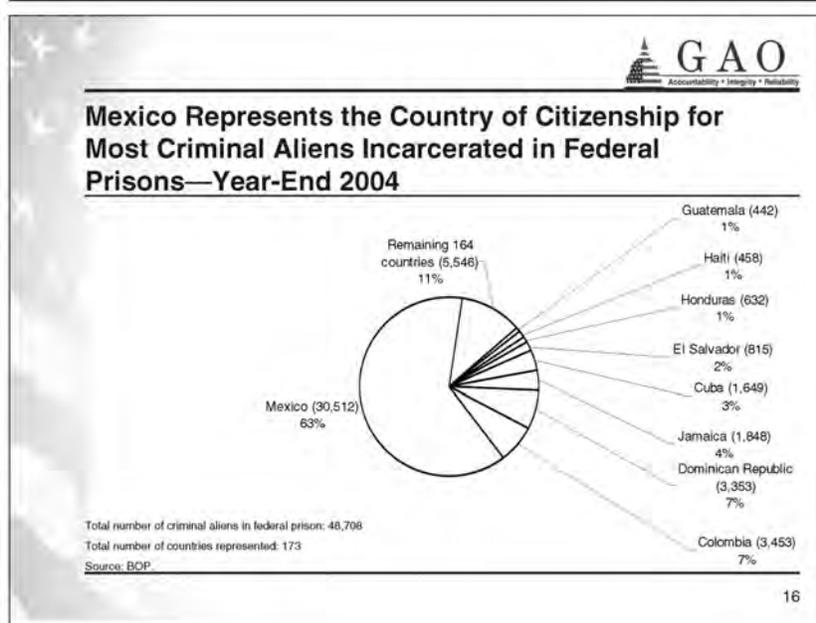
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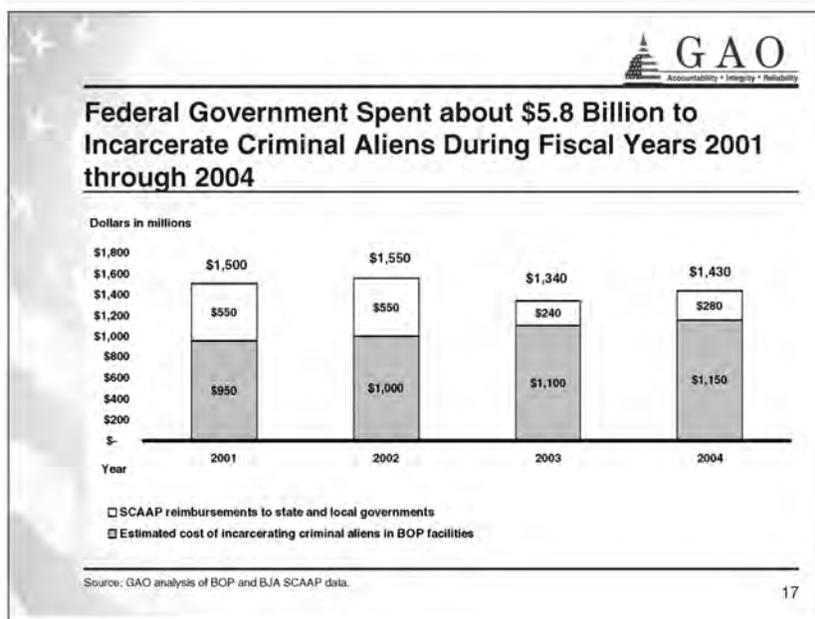


Federal Prisons and Reimbursements

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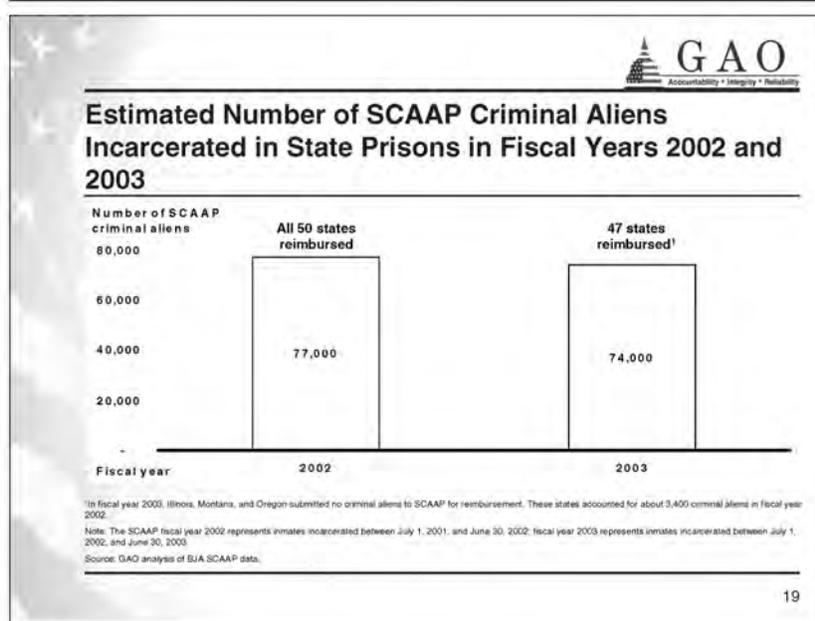


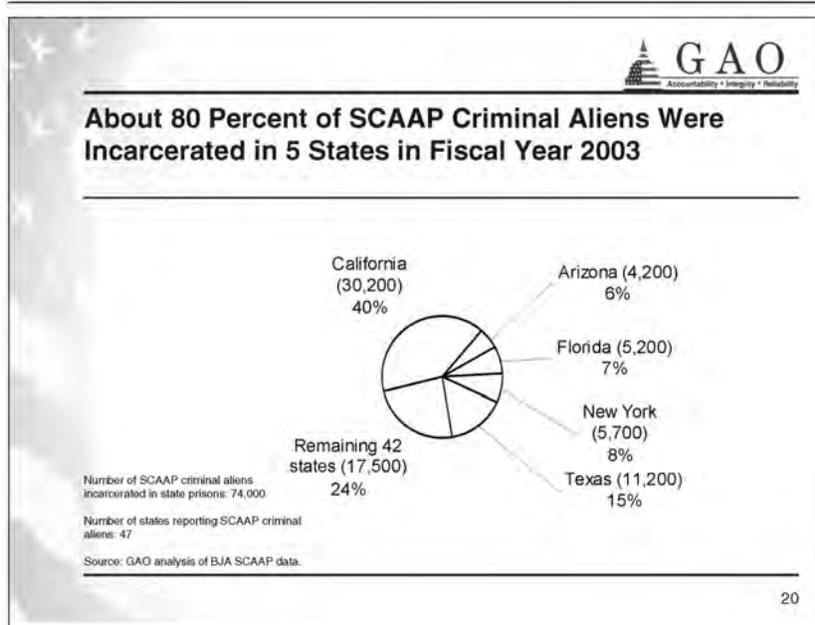


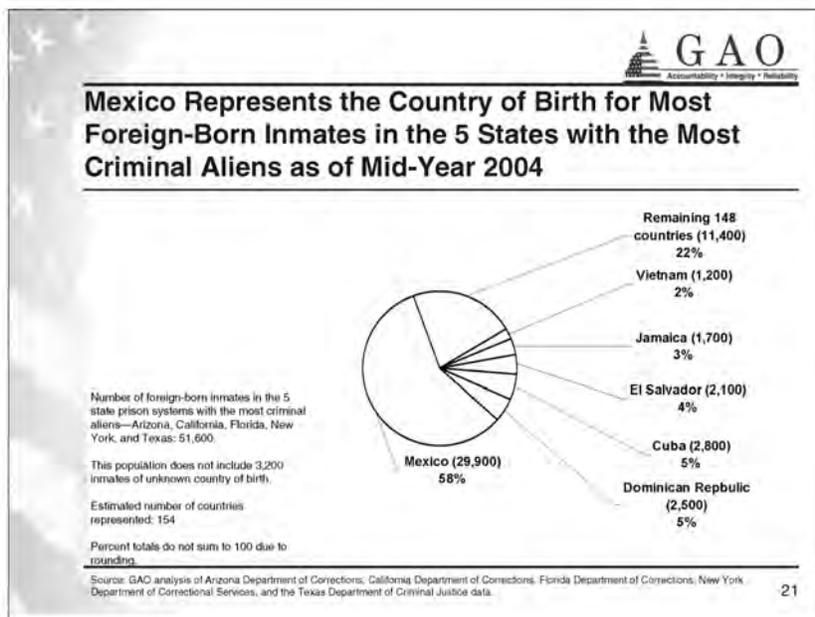


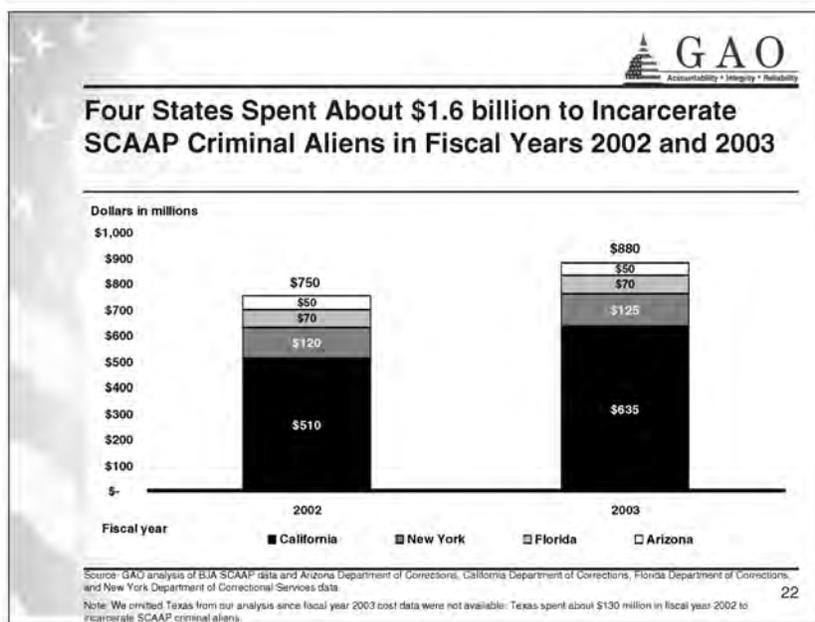
State Prisons

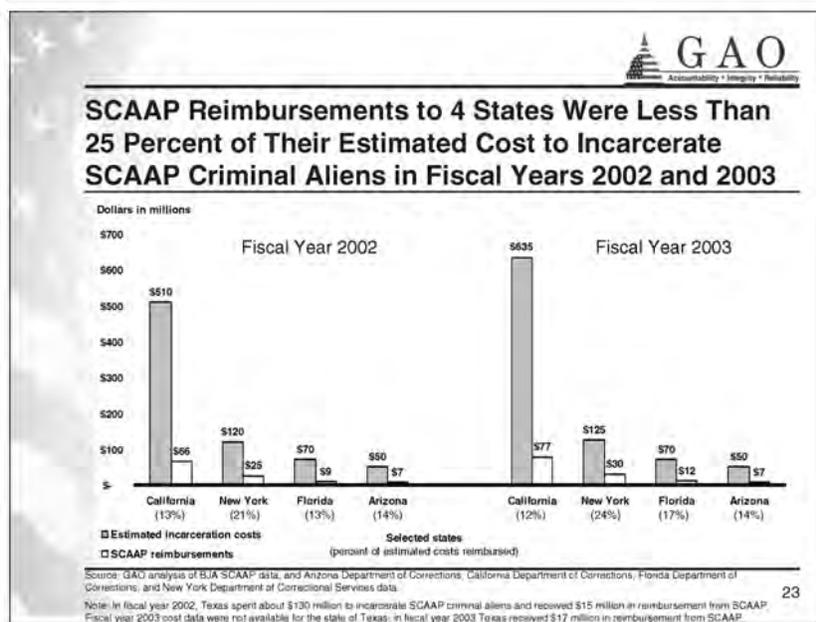
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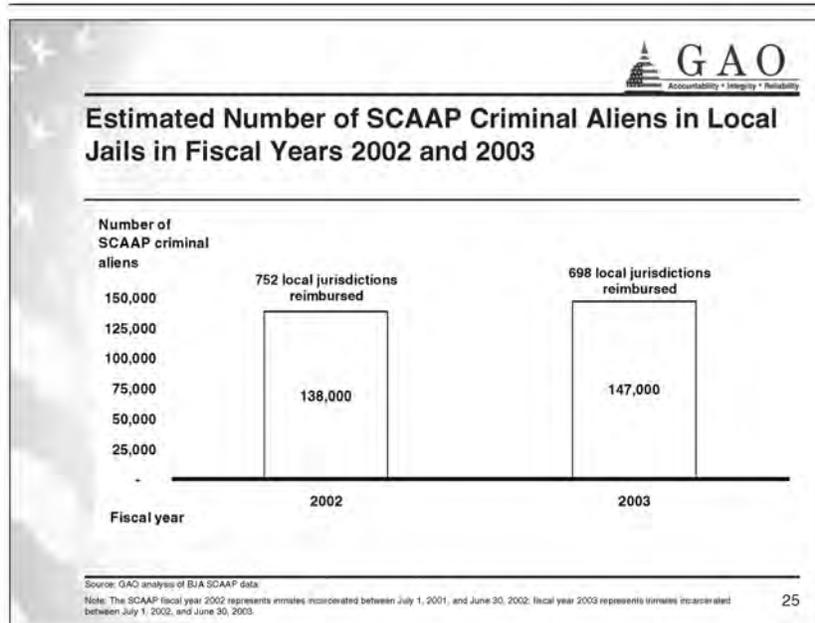


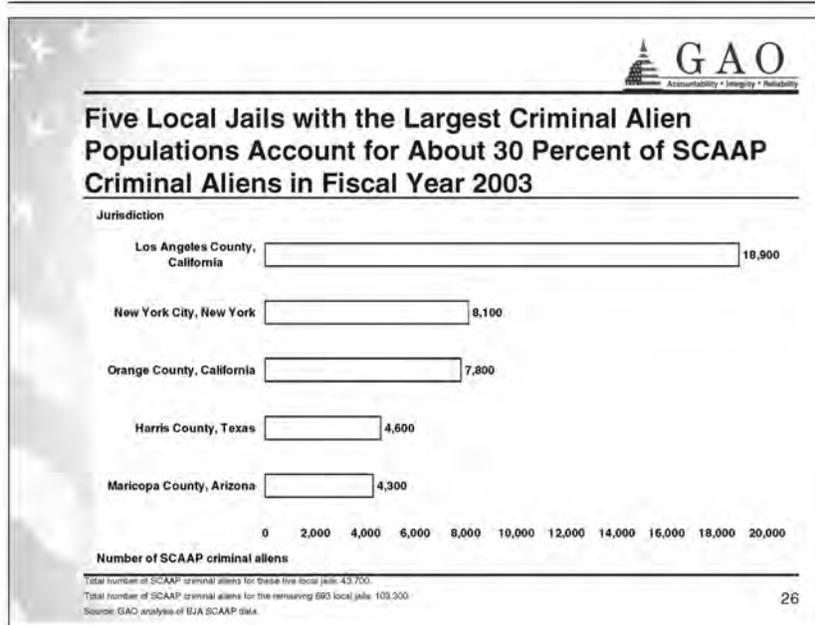


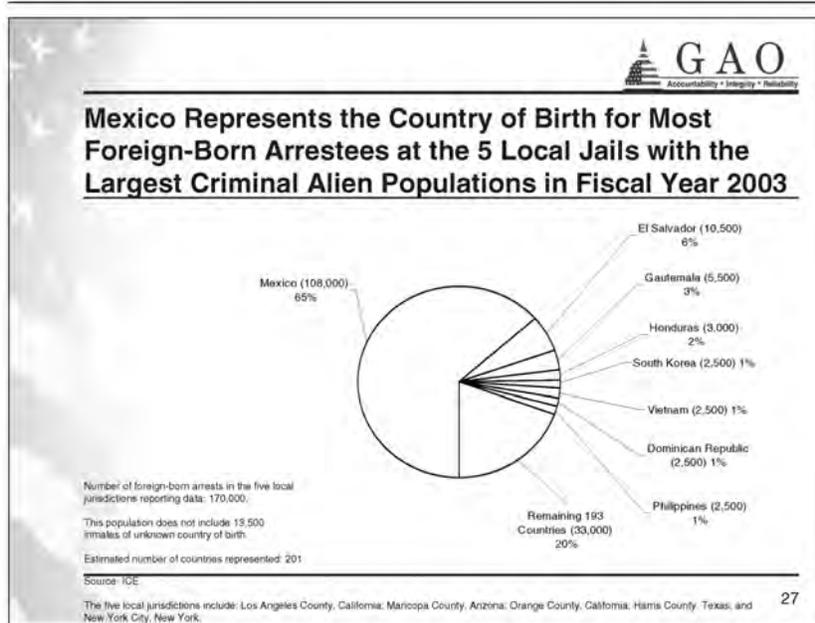


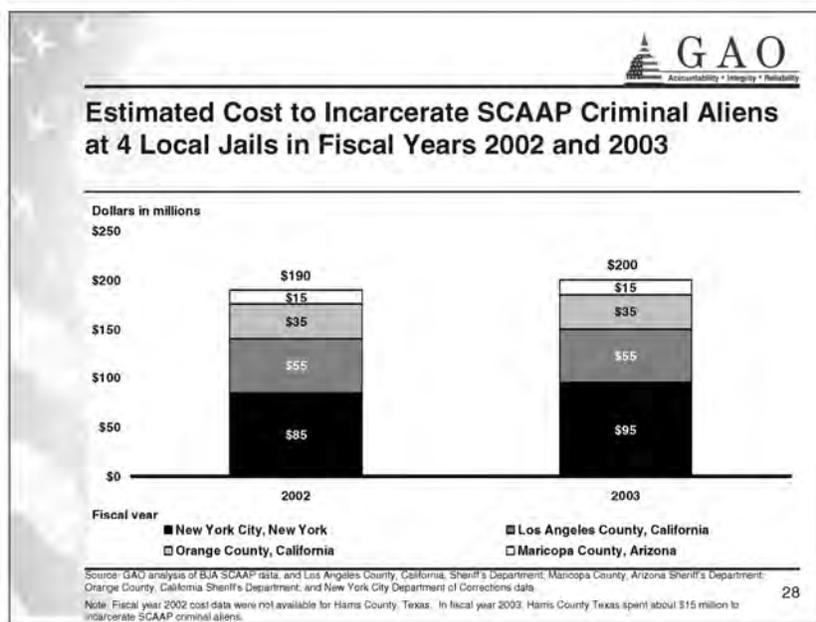
Local Jails

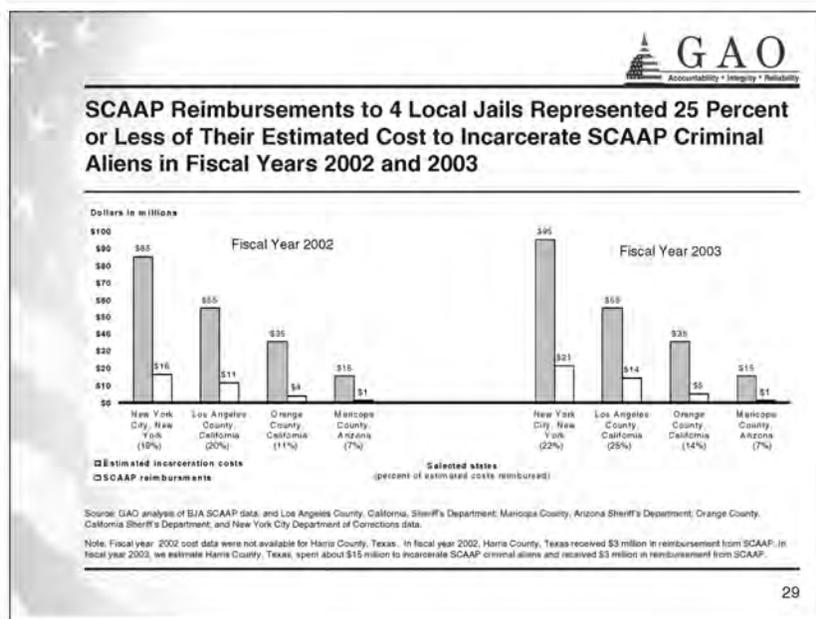
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Enclosure II: Objectives, Scope, and Methodology

At the federal level, to determine the number of criminal aliens incarcerated and their country of citizenship, we analyzed data¹ provided by BOP on the number of criminal aliens incarcerated in federal prison on December 30, 2001, December 29, 2002, December 27, 2003, and December 25, 2004. To identify the country of citizenship for these criminal aliens, we analyzed country of citizenship data provided by BOP at year-end 2004. To estimate the cost of incarcerating criminal aliens, we obtained data from BOP on the average yearly cost to incarcerate an inmate and multiplied that by the number of criminal aliens incarcerated at the end of each year. According to BOP officials, the cost of incarcerating criminal aliens is the same as the cost of incarcerating U.S. citizen inmates. In addition, we analyzed BJA data on the federal reimbursements to state and local governments under SCAAP in fiscal years 2001 through 2004. To calculate the total federal cost, we added the BOP and BJA costs for each calendar year.

At the state level, to estimate the number of criminal aliens incarcerated, we analyzed data on criminal aliens incarcerated in state prisons for whom states received SCAAP reimbursement in fiscal years 2002 and 2003. All 50 states submitted criminal aliens to BJA for SCAAP reimbursements in fiscal year 2002. Forty-seven states submitted criminal aliens to BJA for reimbursements in fiscal year 2003.² To determine the country of birth, we analyzed data provided by the correction departments of the 5 states that incarcerated about 80 percent of the criminal alien population reimbursed by SCAAP in fiscal year 2003—Arizona, California, Florida, New York, and Texas. To estimate the cost of incarceration in fiscal years 2002 and 2003, we obtained the average daily cost to incarcerate an inmate from 4 of these 5 states.³ We calculated the estimated incarceration costs by multiplying the number of days the criminal aliens reimbursed by SCAAP were incarcerated in fiscal years 2002 and 2003 by the average daily cost of incarceration. According to officials from each of these 5 states, the cost of incarcerating criminal aliens is the same as the cost of incarcerating U.S. citizen inmates.

¹Includes BOP prisons, contract community corrections facilities, Intergovernmental Agreement long-term contract facilities, and privately managed BOP facilities. This information does not include inmates in transit, in the witness security program, or immigration detainees.

²Illinois, Montana, and Oregon did not submit undocumented criminal aliens to BJA for SCAAP reimbursements in fiscal year 2003.

³Cost of incarceration data were not available from the state of Texas in fiscal year 2003.

Enclosure II: Objectives, Scope, and Methodology

At the local level, to estimate the number of criminal aliens incarcerated, we analyzed data on criminal aliens incarcerated in local jails for which local governments received SCAAP reimbursement in fiscal years 2002 and 2003. Seven hundred and fifty-two local jurisdictions submitted criminal aliens to BJA for SCAAP reimbursements in fiscal year 2002, and 698 submitted criminal aliens to BJA in fiscal year 2003. To determine the country of birth, we obtained data on the number of foreign-born persons arrested at 5 local jails that accounted for about 30 percent of SCAAP criminal aliens in fiscal year 2003—Maricopa County, Arizona; Los Angeles County, California; Orange County, California; New York City, New York; and Harris County, Texas from a Department of Homeland Security contractor prepared study.⁴ To estimate the cost of incarceration, we analyzed fiscal year 2002 and 2003 incarceration data from 4 of these 5 local jails.⁵ We calculated the estimated incarceration costs by multiplying the number of days the criminal aliens reimbursed by SCAAP were incarcerated in fiscal years 2002 and 2003 by the average daily cost of incarceration. According to officials from each of these 5 local jurisdictions, the cost of incarcerating criminal alien inmates is the same as the cost of incarcerating U.S. citizen inmates.

Data Reliability

BOP data are sufficiently reliable for the purposes of this report. To assess the reliability of the data, we discussed with responsible BOP officials how data on the number of federal inmates and their country of citizenship are collected and maintained in BOP's inmate tracking system called SENTRY. We reviewed BOP policies and procedures related to entering data into the SENTRY system and reviewed a Department of Justice Inspector General review of the SENTRY system. We discussed with BOP officials their methodology for estimating the yearly cost to incarcerate an inmate and obtained related documentation.

SCAAP data are sufficiently reliable for the purposes of this report. To assess the reliability of the SCAAP data, we discussed with the responsible BJA officials how data on criminal aliens reimbursed through SCAAP are collected and maintained. We reviewed BJA SCAAP policies and procedures and guidance on how state and local jurisdictions can apply

⁴U.S. Department of Homeland Security, U.S. Bureau of Immigration and Customs Enforcement, *Institutional Removal Program National Workload Study*, (Washington, D.C.: September 2004).

⁵Cost of incarceration data was not available for Harris County, Texas in fiscal year 2002.

Enclosure II: Objectives, Scope, and Methodology

for reimbursement under the program. State and local jurisdictions submit inmates to BJA for reimbursement based on the inmates self-reporting their country of citizenship or place of birth. The state and local jurisdictions certify they have exercised due diligence in determining which inmates to submit for reimbursement, the cost associated with incarceration, and the number of days an inmate was incarcerated. The Bureau of Immigration and Customs Enforcement within the Department of Homeland Security attempts to verify the immigration status of the inmates using various federal immigration databases to ensure only eligible inmates are reimbursed through SCAAP. Inmates known or believed to be illegally in the country are then reimbursed through SCAAP.

The data collected from the 5 state correction departments are sufficiently reliable for the purposes of this report. We discussed with state corrections officials how inmate data on country of citizenship or birth are collected and maintained. We also discussed with them and obtained related documentation regarding their methodology for calculating the average daily cost of incarceration.

The data collected from the 4 local jails are sufficiently reliable for the purposes of this report. We discussed with officials from the 4 local jails their methodology for calculating the average daily cost of incarceration and obtained related documentation.

For the Department of Homeland Security's Institutional Removal Program National Workload Study data on country of birth for foreign-born arrestees, we reviewed the study's methodology and discussed data collection and analysis with the study's authors. These data represent foreign-born inmates, who may include some naturalized U.S. citizens who are not considered to be criminal aliens. This study is not generalizable to all local jails. However, the data are sufficiently reliable for the purposes of this report.

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ANSWERS TO POST-HEARING QUESTIONS FROM DOUGLAS S. MASSEY, PH.D.,
PROFESSOR OF SOCIOLOGY AND PUBLIC AFFAIRS, PRINCETON UNIVERSITY

Professor Douglas S. Massey
Page 1
May 25, 2007

From the Honorable Sheila Jackson Lee

1. IIRIRA does not provide immigration judges with discretion to grant relief in the case of an alien who has an aggravated felony conviction. My Save America Comprehension Immigration Act has a provision for providing immigration judges with discretion when the basis for removal is a nonserious aggravated felony conviction. It provides that an aggravated felony conviction can be ignored for immigration purposes, as a matter of discretion, if the alien was not incarcerated for a year or more on the basis of the conviction. Do you have suggestions on other forms of relief that would provide the judges with discretion in cases where the alien has an aggravated felony conviction?

It would also be humane to allow the judge to ignore the felony conviction if the person was brought into the country as a minor. It seems unfair to deport someone who was brought into the US as a baby or child back to a country he or she does not know. If the person grew up in the United States, the crime would seem to be on our account, not that of the origin country.

2. IIRIRA eliminated the form of relief known as suspension of deportation and replaced it with a similar provision that has different eligibility requirements. Should we reinstate suspension of deportation?

The earlier form of relief was more flexible and allowed for individual circumstances. I would favor reinstating suspension of deportation.

3. IIRIRA makes someone subject to removal on the basis of criminal convictions that occurred before it was enacted, and this is the case even if the conviction was not a basis for removal when the offense was committed. My Save America Comprehension Immigration Act would eliminate retroactive applications of changes in the removal grounds. Are you aware of injustices that have occurred as a result of removals on the basis of criminal offenses that were not deportation grounds when they were committed?

I have read in the news and seen on television cases of people who have been deported for offenses that were only declared deportable after the fact. This seems quite unfair and amounts to a kind of double jeopardy.

4. IIRIRA's provisions have not eliminated or even reduced the number of undocumented immigrants in the United States. In fact, that number has gone up substantially since IIRIRA was enacted. Do you think IIRIRA failed in part because of the fact that it took an enforcement only approach to immigration reform?

Yes, my studies show that efforts to curb undocumented migration through

unilateral police actions generally backfire by inducing circular migrants to become settled migrants, at least in the absence of accompanying reforms to open up legal channels of immigration. Operation Wetback is often touted as an example of how get-tough reforms solved undocumented migration in 1953-1954, but what the hard liners fail to mention is that it was accompanied by the doubling of the Mexican guestworker program to more than 450,000 workers per year.

From the Honorable Bob Goodlatte

5. Do you believe that the increased number of illegal aliens that came into and stayed in the U.S. in the late 1990's and this decade is more likely (1) a result of the increased penalties in the '96 law, or (2) a result of the beliefs among foreign nationals and those already illegally present in the U.S. that the 1986 amnesty would be repeated and that employer sanctions would continue to remain unenforced?

I think it is a result of the increased costs of border-crossing associated with the build-up of enforcement resources along the border, which has raised the hazards of crossing and the costs of getting smuggled in. In order to avoid those costs, immigrants minimize border crossing—not by declining to come in the first place, but by settling in for the long haul once they are here. There is no evidence that the amnesty had any effect in encouraging additional undocumented migration—the best study I have seen shows no effect at all.

6. The allegation that the 3-year and 10-year bars on reentry into the U.S. somehow "trap" illegal aliens in the United States seems to ignore the fact that a large portion of those illegally present in the U.S. today came to the country legally. Didn't this subgroup of current illegal aliens chose to overstay their visas "despite" the 3-year and 10-year bars instead of "because" of those bars as some argue, since they would not have faced the bars if they left on time?

That is true of those who entered on visas after the bars were imposed, but many people had already made the decision to overstay when the bars were imposed, thus "trapping" them in the U.S.

ANSWERS TO POST-HEARING QUESTIONS FROM PAUL W. VIRTUE, FORMER INS GENERAL COUNSEL AND EXECUTIVE ASSOCIATE COMMISSIONER, AND PARTNER, HOGAN & HARTSON

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July 2, 2007

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BY COURIER

Subcommittee on Immigration, Citizenship,
Refugees, Border Security, and International Law
Attention: Mr. Benjamin Staub
2138 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Staub:

I testified before the Committee on the Judiciary's Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law at the April 20, 2007 hearing. I received additional questions from members of the Subcommittee to supplement the information I provided at the hearing. Below, please find my responses to the questions that I received from the Honorable Sheila Jackson Lee and the Honorable Bob Goodlatte. The questions are also reprinted below for your convenience.

From the Honorable Sheila Jackson Lee:

Question 1:

IIRIRA does not provide immigration judges with discretion to grant relief in the case of an alien who has an aggravated felony conviction. My Save America Comprehension Immigration Act has a provision for providing immigration judges with discretion when the basis for removal is a nonserious aggravated felony conviction. It provides that an aggravated felony conviction can be ignored for immigration purposes, as a matter of discretion, if the alien was not incarcerated for a year or more on the basis of the conviction. Do you have suggestions on other forms of relief that would provide the judges with discretion in cases where the alien has an aggravated felony conviction?

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Response 1:

I would recommend amending the definition of an aggravated felony to remove some of the less serious crimes that you describe. This would likely be the most efficient approach given that the definition of an aggravated felony affects so many areas of immigration law. Specifically, what constitutes an aggravated felony implicates mandatory custody as well as eligibility for such benefits as asylum, withholding of removal, cancellation of removal, adjustment of status, and voluntary departure. Removing less serious crimes from the definition of an aggravated felony would more uniformly ensure that the DHS and the immigration judges are able to exercise discretion in deserving cases.

Question 2:

IIRIRA eliminated the form of relief known as suspension of deportation and replaced it with a similar provision that has different eligibility requirements. Should we reinstate suspension of deportation?

Response 2:

I would not advocate a complete return to the pre-IIRIRA form of suspension of deportation. However, I would recommend reinstatement of an "extreme hardship" standard that considers the hardship that removal would cause to the individual alien. The "exceptional and extremely unusual hardship" standard has proven to be difficult to apply; whereas, the "extreme hardship" standard has a substantial body of case law behind it that provides necessary guidance to aliens, immigration judges, and immigration law practitioners. Additionally, I would recommend giving immigration judges more discretion in deserving cases when they make determinations as to aliens' continuous physical presence. Provided immigration judges have this discretion in appropriate cases, I don't feel there is a need to revise the ten-year continuous physical presence requirement to return to the seven-year requirement. Moreover, I do not believe that the provision of pre-IIRIRA law that allowed aliens in deportation or removal proceedings to continue to accrue continuous physical presence for purposes of suspension of deportation eligibility should be reinstated.

Question 3:

IIRIRA makes someone subject to removal on the basis of criminal convictions that occurred before it was enacted, and this is the case even if the conviction was not a basis for removal when the offense was committed. My Save America Comprehension Immigration Act would eliminate retroactive applications of changes in the removal grounds. Are you aware of injustices that have occurred as

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a result of removals on the basis of criminal offenses that were not deportation grounds when they were committed?

Response 3:

The most compelling cases are those where the alien is a lawful permanent resident who is subject to removal or inadmissibility for a conviction that occurred years earlier even though the conviction was not a basis for removal at the time that the crime was committed. For instance, in Matter of Truong, 22 I. & N. Dec. 1090 (B.I.A. 1999), the alien was a national of Vietnam who had been admitted to the United States in 1981 as a refugee. He obtained lawful permanent residence the same year. He committed a second degree robbery in 1985, and was convicted for the offense in 1987. At the time of his conviction, the offense did not constitute an aggravated felony. However, in its 1999 decision, the Board of Immigration Appeals concluded that the alien's deportability had been established because his offense was an aggravated felony following IIRIRA's enactment.

Another example of a case where the criminal offense was not an aggravated felony when committed is Alvarez-Barajas v. Gonzales, 418 F.3d 1050 (9th Cir. 2005), which involved an alien who entered the United States in approximately 1986 and became a lawful permanent resident in 1990. In mid-1996, the alien pled guilty to receipt of stolen property, but, at that time, his conviction did not constitute an aggravated felony. Specifically, at that time, conviction for receipt of stolen property was only an aggravated felony if the alien was sentenced to at least five years of imprisonment. IIRIRA made receipt of stolen property if the possible term of imprisonment was at least one year an aggravated felony. Thus, in 1997, the alien received a notice to appear, which alleged that he was removable due to his conviction for an aggravated felony. The Ninth Circuit concluded that the enlarged definition of an aggravated felony could be applied retroactively to the alien.

Question 4:

IIRIRA's provisions have not eliminated or even reduced the number of undocumented immigrants in the United States. In fact, that number has gone up substantially since IIRIRA was enacted. Do you think IIRIRA failed in part because of the fact that it took an enforcement only approach to immigration reform?

Response 4:

Yes, IIRIRA's enforcement-only approach has not brought about the expected results. IIRIRA's emphasis on enforcement has not lowered the level of illegal immigration in the United States because it removed the discretion from law enforcement officials, thus eliminating in large measure the ability to establish

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enforcement priorities. Relying only on enforcement is an unrealistic approach because it has created such a large number of enforcement targets that the government cannot efficiently focus on those aliens who do pose a threat to the United States. Comprehensive immigration reform would respond to these shortcomings by creating additional legal migration channels and reducing the incentive that presently exists for individuals and employers to evade the immigration laws. Further, comprehensive immigration reform is necessary to balance enforcement with discretion, checks and balances, and due process.

From the Honorable Bob Goodlatte:

Question 5:

Do you believe that the increased number of illegal aliens that came into and stayed in the U.S. in the late 1990's and this decade is more likely (1) a result of the increased penalties in the '96 law, or (2) a result of the beliefs among foreign nationals and those already illegally present in the U.S. that the 1986 amnesty would be repeated and that employer sanctions would continue to remain unenforced?

Response 5:

I believe that the increased number of undocumented aliens who came into and stayed in the U.S. in the late 1990's is more a function of the labor conditions in the United States than either the penalties of the '96 law or a belief that 1986 amnesty would be repeated and that employer sanctions would remain unenforced.

Question 6:

The allegation that the 3-year and 10-year bars on reentry into the U.S. somehow "trap" illegal aliens in the United States seems to ignore the fact that a large portion of those illegally present in the U.S. today came to the country legally. Didn't this subgroup of current illegal aliens choose to overstay their visas "despite" the 3-year and 10-year bars instead of "because" of those bars as some argue, since they would not have faced the bars if they left on time?

Response 6:

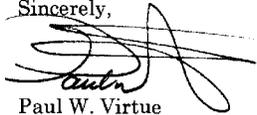
In my experience, many of the people who have overstayed are unaware of the harsh consequences of the three- and ten-year bars until it is too late. I have been approached by numerous individuals, as have other immigration attorneys, who would have been eligible for family-based or employment-based immigration but for these bars on admissibility. With the bars in place, these individuals find

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themselves with no option to leave the United States to apply for a visa, so they stay, with no legal status.

Thank you for the opportunity to assist the Subcommittee as it moves forward with comprehensive immigration reform. Please do not hesitate to contact me should you require additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul W. Virtue", with a large, stylized flourish extending to the right.

Paul W. Virtue

ANSWERS TO POST-HEARING QUESTIONS FROM HIROSHI MOTOMURA, KENAN Distinguished Professor of Law, UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW



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June 28, 2007

The Honorable Zoe Lofgren
Chairwoman
Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law
Committee on the Judiciary
Washington DC 20515-6216

Dear Chairwoman Lofgren,

You have asked me to answer additional questions as a follow up to my written and oral testimony before the Subcommittee on April 20, 2007. You also asked for corrections to my transcript of remarks.

In order to get this to you without delay, I am sending this letter as a PDF attachment to an email. If you would like a paper copy, please let me know by return email to motomura@email.unc.edu

First, here are my answers:

Answers to questions from the Honorable Sheila Jackson Lee:

1. With the tremendous expansion of the aggravated felony definition in the past decade, it has become imperative to restore discretion, depending on the facts of the case, to immigration judges to grant relief from removal. As a more general suggestion, however, I would advocate a considerable narrowing of the "aggravated felony" definition so that it returns to its original meaning, namely "felonies" that are "aggravated." A definition of aggravated felony that includes nonserious crimes (and even misdemeanors) makes no sense. It undermines the rule of law when words do not mean what they say.

2. We should restore the general sort of eligibility requirements for discretionary relief from removal that were required for suspension of deportation. Whether the terminology for the relief is changed back to "suspension of deportation" or remains "cancellation of removal" doesn't matter as long as the requirements are amended to something much closer to the pre-1996 law.

3. Any retroactive application of deportability rules is unjust, given the pervasive nature of plea bargaining in our criminal justice system. Noncitizen criminal defendants must be given notice of the consequences of their choice to plead guilty or to go to trial. It undermines the rule of law for the consequences of their actions to change unpredictably with the passage of time.

4. Yes, IIRIRA failed in part because it took an enforcement-only approach to immigration reform. No enforcement-only approach can provide a lasting solution to immigration problems, because immigration reflects a much broader, complex set of economic and social forces. Lasting solutions will require, in addition to enforcement, a lawful admissions system that reflects the needs of the U.S. economy, as well as economic development in sending countries.

Answers to questions from the Honorable Bob Goodlatte:

5. Immigration reflects a broader, complex set of economic and social forces. It is possible that the prospect of a future amnesty has a small psychological effect on a migrant's decision to come to the United States unlawfully. But this is a marginal factor. Much more determinative will be the economic needs of him/her and his family, as well as the social networks that allow him/her to travel to the border and into the United States and find housing and employment. Similarly, I believe that the penalties in the immigration statutes of the United States play some small psychological role, in that they may cause a potential migrant to pause and ponder his/her choices a little more carefully, but in the end the decision to come or not come to the United States are the product of larger economic and social forces.

6. It is true that a large portion of those illegally present in the United States came to the country legally and overstayed their periods of lawful admission. However, a significant part of this group will have become eligible for lawful status after some period of unlawful presence. For example, a lawfully admitted nonimmigrant might have his/her status expire and then be in unlawful status for a period of nine months. He/she would then be subject to a three-year bar if he/she leaves the country. Often, such a person will have qualifying family relationship or an employment offer and thus qualify under one of the lawful admission categories. This person would be "trapped" in the United States. Without the three- and ten-year bars, he/she could leave the country and secure her lawful admission while waiting outside the United States. In this sense, the three- and ten-year bars have a truly perverse effect, in that they penalize only those unlawfully present noncitizens who are qualified (but for the bars) to lawful admission to the United States. They have no effect on the noncitizen who is truly unlawfully present in the sense that he/she qualifies for no lawful admission category.

Second, I have two small corrections to the transcript. Both are simple punctuation errors.

On page 29, lines 595-596: this should read: "I will mention just one: retroactive changes to immigration law. This practice..."

On page 30, line 622: this should read: "them. And integration of immigrants, in turn, is essential to..."

Please contact me if I can help the Subcommittee in any further way. It was an honor to appear before the Subcommittee and I would be pleased to do so again as your business requires.

Sincerely,

Hiroshi Motomura

Hiroshi Motomura
Kenan Distinguished Professor of Law

Responses to the questions from Rep. Jackson Lee:**Question 1**

IIRIRA does not provide immigration judges with discretion to grant relief in the case of an alien who has an aggravated felony conviction. My Save America Comprehensive Immigration Act has a provision for providing immigration judges with discretion when the basis for removal is a nonserious aggravated felony conviction. It provides that an aggravated felony conviction can be ignored for immigration purposes, as a matter of discretion, if the alien was not incarcerated for a year or more on the basis of the conviction. Do you have suggestions on other forms of relief that would provide the judges with discretion in cases where the alien has an aggravated felony conviction?

Response:

Your question seems to suggest that your Save America Comprehensive Immigration Act of 2007 (H.R. 750) provides a waiver for only certain forms of discretionary relief. However, as I interpret section 809 of H.R. 750, it provides for a very broad discretionary waiver of the consequences of an aggravated felony conviction for *any* purpose under the INA (i.e. any form of relief or the aggravated felony removal ground itself). Therefore, I'm unable to respond to your request for suggestions on "other forms of relief" that could be subject to a discretionary waiver. I will note, however, that the designation of a category of convictions as aggravated felonies means that Congress has determined such convictions are *per se* serious. I would therefore have to respectfully disagree that there is such a thing as a "nonserious" aggravated felony conviction. In my opinion, there should be no waiver of an aggravated felony conviction for discretionary relief.

Question 2

IIRIRA eliminated the form of relief known as suspension of deportation and replaced it with a similar provision that has different eligibility requirements. Should we reinstate suspension of deportation?

Response:

The legislative history of IIRIRA shows that the elimination of suspension of removal was a response to Congress's assessment that suspension of deportation was being granted too frequently and in situations where the hardships presented did not warrant relief. *See* H.R. Rep. 1040828 at 213-14 (1996). So the answer would be no, we should not reinstate suspension of deportation.

Question 3

IIRIRA makes someone subject to removal on the basis of criminal convictions that occurred before it was enacted, and this is the case even if the conviction was not a basis for removal when the offense was committed. My Save America

Comprehension Immigration Act would eliminate retroactive applications of changes in the removal grounds. Are you aware of injustices that have occurred as a result of removals on the basis of criminal offenses that were not deportation grounds when they were committed?

Response:

No, the retroactivity would only lead to an unjust result if a criminal alien specifically relied on the fact that the offense he was contemplating was not a deportable offense or entered a plea of guilty to offense he did not believe he was guilty of committing because he expected to be granted relief from removal. I'm not personally aware of a case where an alien specifically pondered whether an offense was a ground of deportation before deciding to commit it, though I suppose it's possible. Nor do I know of any case where a judge has accepted a guilty plea, whether or not that plea was made under a belief that the alien might be awarded a discretionary waiver, when the judge was not satisfied that the defendant was admitting guilt to conduct for which he/she was in fact guilty.

As is the case regarding suspension of deportation, expanding discretion is impossible in the current lawless environment. Only when order has been permanently restored to our immigration system, and the illegal population has been dramatically reduced through enforcement, will it be appropriate to even consider greater flexibility in such matters.

Question 4

IIRIRA's provisions have not eliminated or even reduced the number of undocumented immigrants in the United States. In fact, that number has gone up substantially since IIRIRA was enacted. Do you think IIRIRA failed in part because of the fact that it took an enforcement only approach to immigration reform?

Response:

No. The problem goes back further than IIRIRA. Illegal immigration has dramatically increased in the years following the Immigration Reform and Control Act of 1986 (IRCA), which traded an illegal-alien amnesty for a first-ever ban on the employment of illegal aliens. The point was to turn off the magnet of jobs that is the main reason illegals come here in the first place.

More than 2.7 million illegals got legalized up front, with promises of future enforcement. But the law itself was hobbled such that it became unworkable. Only if employers had a means of verifying the legal status of new hires against Social Security or INS databases could the new system succeed -- but Congress refused to require the INS to start developing such a verification system. Instead, employers were expected to do the verifying themselves, by examining a bewildering array of easily forged documents, and then they were threatened with discrimination lawsuits by the Justice Department if they looked too hard. It would be hard to imagine a system more obviously intended to fail.

During the first several years after the passage of the IRCA, illegal crossings from Mexico fell precipitously, as prospective illegals waited to see if we were serious. Apprehensions of aliens by the Border Patrol -- an imperfect measure but the only one available -- fell from more than 1.7 million in FY 1986 to under a million in 1989. But then the flow began to increase again as the deterrent effect of the hiring ban dissipated, when word got back that we were not serious about enforcement.

The passage of IIRIRA in 1996 was intended to send the message that we are serious about enforcement. It contained broad interior and border enforcement provisions. Unfortunately, these too were never fully implemented, resulting in millions more illegal immigrants flaunting our immigration laws.

IIRIRA also didn't go far enough in the area of worksite enforcement, which is critical to reducing the job magnet and to the attrition of illegal immigrants. It took only tentative moves toward a verification system by introducing a pilot program and did not move us toward an end goal of requiring more tamper-resistant identification to address the rampant fraud problem.

What's more, the original version of what became IIRIRA included the late Barbara Jordan's recommendations about streamlining legal immigration by eliminating the extended family categories and the visa lottery. Because legal and illegal immigration are intimately connected, Congress's decision not to include these modest reductions in legal immigration contributed to the continued flow of illegal aliens.

Response to the question from Rep. Goodlatte:

Question 5

Do you believe that the increased number of illegal aliens that came into and stayed in the U.S. in the late 1990's and this decade is more likely (1) a result of the increased penalties in the '96 law, or (2) a result of the beliefs among foreign nationals and those already illegally present in the U.S. that the 1986 amnesty would be repeated and that employer sanctions would continue to remain unenforced?

Response:

I believe that the answer is #2. See my response to question 4, above.