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IMMIGRATION: MIND OVER MATTER

SHOBA SIVAPRASAD WADHIA*

In August 2005, *The Washington Post* featured a story about a man named Mukit Hossain, an immigrant from Bangladesh who came to the United States thirty years ago to study at Duke University.¹ The story opens with a clear image:

On a frigid winter day two years ago, Mukit Hossain drove past a 7-Eleven in Herndon and noticed a large group of men, some wearing only sweat shirts, shivering like leaves in the parking lot. Something made him stop and ask what they were doing. In broken English, one man explained that they were looking for work. With their chances as bleak as the weather at 3 in the afternoon, Hossain asked why they did not just give up and go home. ‘We don’t have much of a home to go to,’ Hossain recalls the man telling him.²

That conversation inspired Hossain to collaborate with other community and religious leaders and create “Project Hope and Harmony.” As described by *The Washington Post*, Project Hope and Harmony aspired to gain approval for a government-regulated site at which immigrant day laborers could gather. This wish came true in August 2005, when the Herndon Town Council authorized Project Hope and Harmony to build and manage a site “in the parking lot behind a former police station.”³ *The Washington Post* described Hossain’s motivations for helping undocumented workers in Virginia:

For Hossain, helping immigrants, most from Central and South America, is a Muslim issue. Charity is one of the five pillars of Islam. So he raised money from Muslim businessmen in Herndon to buy 400 winter coats for the laborers, brought them food through

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1. Carol Morello, *Brief Encounter at Herndon Store Inspired a Charity*, WASH. POST, Aug. 21, 2005, at C1.

2. *Id.*

3. *Id.*

another charity he started, called Food Source, and even rounded up day laborers to attend a Thanksgiving dinner at an Iraqi restaurant where falafel, not turkey, was served. 'I consider them my neighbors,' said Hossain⁴

Hossain is equally determined to reach out to members of the community who expressed opposition to the day laborer site:

The strategy is to address some of the fears that led so many neighbors to oppose the proposal. To that end, Hossain wants to buy bicycles for the day laborers so they can get to the site without taking shortcuts across private property. The All Dulles Area Muslim Society Center, a large mosque in Sterling, has offered to provide a van to transport workers to and from the site.⁵

Hossain's story is a touching reflection of who we are as a nation and as a community. Additionally, the story exhibits that the American public is not resistant to immigrants but rather is concerned about them, and, in some cases, disturbed that the federal government has been unable to regulate immigration in an orderly way. Finally, Hossain's story speaks positively of a community targeted by immigration laws and policies issued by the government in the wake of the September 11, 2001 attacks. It is reassuring to read about Hossain and to be aware that individuals like him are contributing far and wide, despite the targeted policies that they are victims of.

America's tradition as a nation of immigrants⁶ continues, as is reflected by the growth in the foreign-born population, which increased from 9.6 million in 1970 to 19.8 million in 1990,⁷ and reached thirty-four million by 2004.⁸ The immigration population is made up of four groups: lawful permanent residents or "green card"

4. *Id.*

5. *Id.*

6. Throughout this article, the terms "immigrant," "non-citizens" and "foreign born" are used interchangeably. When the term "immigrant" is used for legal purposes, the reference generally applies to those who hold a "permanent" immigration status, like lawful permanent residence.

7. JEFFREY S. PASSEL & ROBERTO SURO, PEW HISPANIC CENTER, RISE, PEAK AND DECLINE: TRENDS IN U.S. IMMIGRATION 1992-2004 1 (2005), <http://pewhispanic.org/files/reports/53.pdf>.

8. CONG. BUDGET OFFICE, THE ROLE OF IMMIGRANTS IN THE U.S. LABOR MARKET 1 (2005), <http://www.cbo.gov/ftpdocs/68xx/doc6853/11-10-Immigration.pdf>.

holders; “naturalized” United States citizens; those in the United States for a temporary reason, such as business, education and tourism; and those living in the United States without legal papers or “undocumented” immigrants.⁹

Immigrants are represented in diverse occupations at all economic levels. They contribute to “highly skilled” fields including science, medicine, art and business. Based on data from the 2000 Census, the National Science Board estimates that in the field of science and engineering, thirty-eight percent of doctoral holders, twenty-nine percent of master’s degree holders and seventeen percent of bachelor’s degree holders were born outside the United States.¹⁰ The National Science Board notes that “[t]hese individuals contribute talent, scientific ingenuity, and technical sophistication to the U.S. science and technology enterprise.”¹¹ Similarly, immigrants have made enormous contributions to the arts, which include legends such as Zubin Mehta, a native of Bombay, India and longtime Music Director of the New York Philharmonic Orchestra, and Isabel Allende, a native of Santiago, Chile and best-selling author.¹²

Immigrants are also represented in a wide range of low-skilled occupations, such as restaurant and hotel services, housekeeping, janitorial services, construction and agriculture.¹³ While the effect of immigrant labor on native workers is the subject of much debate, recent data indicates that immigrant workers play an increasingly important role in meeting labor needs. One study by the Immigration Policy Center indicates:

Given that labor force participation rates in the United States are trending downward, population growth will be the primary source of labor force growth in the years to come. Because natural population increase is unlikely to provide sufficient workers, immigration will

9. U.S. GOV’T PRINTING OFFICE, ECONOMIC REPORT OF THE PRESIDENT 96-97 (2005).

10. NAT’L SCI. FOUND., NATIONAL SCIENCE BOARD, SCIENCE AND ENGINEERING INDICATORS 2004 O-3 (2004), <http://www.nsf.gov/statistics/seind04/>.

11. *Id.*

12. AM. IMMIGR. LAW FOUND., CELEBRITY IMMIGRANTS, <http://www.aifl.org/notable/famous.htm>.

13. ROB PARAL, AM. IMMIGR. LAW FOUND., ESSENTIAL WORKERS: IMMIGRANTS ARE A NEEDED SUPPLEMENT TO THE NATIVE-BORN LABOR FORCE 3-5 (2005), http://www.aifl.org/ipc/policy_reports_2005_essentialworkers.asp.

play a critical role in sustaining the labor force growth needed to maintain overall economic growth.¹⁴

Much of the labor demand filled by immigrant workers is in low-skilled occupations that are less likely to draw a substantial proportion of United States-born workers because the latter are increasingly older and more educated.¹⁵ Jobs that require fewer skills are likely to involve a high level of physical labor and be a more natural fit for workers who are younger and have less formal education.¹⁶ Another important factor is geography—unemployed native workers and immigrant workers in the same occupations do not necessarily live in the same areas.¹⁷ As exemplified in one study, “[a]n unemployed native meatpacking worker in Pennsylvania, for instance, is probably not competing for the meatpacking job held by an immigrant in Kansas.”¹⁸

Even assuming that the United States labor market will experience periods of economic depression, during which fewer immigrants will be needed to fill jobs, data shows that only in times of economic prosperity, when United States unemployment was low and the job market high, were there peaks in immigration. Analyzing data collected by the United States Census Bureau, the Pew Hispanic Center estimated the number of immigrants flowing into the United States annually from 1991 to 2004. The Pew Center Study found that immigration patterns increased through the 1990s, peaked at the end of the decade, and then fell back after 2001 to mid-1900s levels.¹⁹ After 1991, when the United States experienced an economic downturn, migration levels decreased. The Pew Center Study concluded that decreases and increases in the migration flow over the past fifteen years were driven largely by changes in the United States economy.

It is also important to note the potential economic benefits immigration brings to United States workers. A study by Gianmarco I. P. Ottaviano of the University of Bologna and Giovanni Peri of the University of California, Davis shows that immigration actually

14. AM. IMMIGR. LAW FOUND., ECONOMIC GROWTH AND IMMIGRATION 1 (2005), http://www.aifl.org/ipc/special_report/2005_bridging.pdf [hereinafter ECONOMIC GROWTH].

15. *Id.* at 8-10.

16. *Id.* at 8.

17. PARAL, *supra* note 13, at 2.

18. *Id.*

19. PASSEL, *supra* note 7, at 1.

increased the average wage of American-born workers by 2.7%.²⁰ Ottaviano and Peri found:

While it is hard to deny that, in any reasonable model, the relative increase of low skill workers will cause a decrease in their relative wage, here we are first interested in determining the overall (average) effect of immigration, aggregating across groups of US born workers. It turns out empirically and theoretically that immigration, as we have known it during the nineties, had a sizeable beneficial effect on wages of US born workers. For a flow of migrants that increases total employment by 10%, with a distribution among skills just as the one observed in the nineties, US-born workers experience an increase of 3-4 percentage points of their wage. This happened because US-born and Foreign-born workers are not perfectly substitutable even when they have similar observable skills.²¹

The significant effect of immigration on the United States economy is summed up in the *2005 Economic Report of the President*, stating that “[i]mmigration has touched every facet of the U.S. economy and . . . America is a stronger and better Nation for it.”²² Future trends show that the United States labor market will continue to demand immigrant labor. The Bureau of Labor Statistics (BLS) estimates that between 2002 and 2012 the Gross Domestic Product will grow by three percent, which will increase the number of jobs in the United States from 144 million to 165 million.²³ It is unlikely that such a demand would be filled by United States born workers alone given that they represent an older and more educated population.²⁴

Despite the invaluable contributions of immigrants to the American culture, economy and population, there is an emotional debate about immigration. Deliberations on immigration enforcement,

20. Gianmarco I. P. Ottaviano & Giovanni Peri, *Rethinking the Gains From Immigration: Theory and Evidence From the U.S.* 15 (Aug. 2005) (unpublished working paper), available at http://www.econ.ucdavis.edu/faculty/gperi/Papers/ottaviano_peri_aug_2005.pdf. See also Virginia Postrel, *Yes, Immigration May Lift Wages*, N. Y. TIMES, Nov. 3, 2005, at C2.

21. Ottaviano, *supra* note 20, at 28.

22. U.S. GOV'T PRINTING OFFICE, ECONOMIC REPORT OF THE PRESIDENT 93 (2005).

23. ECONOMIC GROWTH, *supra* note 14, at 1, 3.

24. *Id.* at 8-10.

legal channels for workers living in the United States without “papers” and those coming in the future, and due process raise legitimate policy questions about the limits of our immigration system, i.e., how many immigrants should be let in, the rights immigrants should be afforded, whether immigrants should be given access to counsel or a hearing before an immigration judge, and many other issues. Much of the tension is fueled by public discontent with the immigration bureaucracy.

Under the current design, the number of people permitted to stay in the United States based on employment or a family relationship is much lower than the demand. This presents a dilemma for well-intentioned people who are unable to come to the United States in a legal way. The result is a “black market” of people who enter and stay in the United States to work in jobs that United States employers are desperate to fill or to reunite with a spouse, sister or parent because they cannot bear separation for years at a time. Many people die at sea or in the desert after attempting to “cross the border” for family or work-related purposes.

Unfortunately, the United States government’s attempt to reduce illegality through enforcement measures and one-time reprieves has been met with failure because the solutions have been incomplete. As expressed in a letter from two Members of Congress to Speaker of the House of Representatives Dennis Hastert (R-Ill.):

[w]e have increased the number of Border Patrol agents on the most vulnerable part of the border—Arizona—by ten-fold, quintupled the immigration enforcement budget, overhauled the arsenal of high-tech equipment along the border—but still the illegal migrants keep coming, at the same rate or faster than they had come in previous years. . . . The border buildup did not stop the flow. . . .²⁵

There is also a national security cost because the government cannot efficiently distinguish the handful of bad actors from the millions of motel maids, bell hops and reunited spouses.

25. Letter from Jeff Flake, U.S. Rep. (R-AZ), & Jim Kolbe, U.S. Rep. (R-AZ), to Dennis Hastert, Speaker of the House (on file with author) (Nov. 15, 2005).

This article examines the current field of debate and legislation on immigration reform and related due process issues.²⁶ “Comprehensive Immigration Reform” is an expression in the immigration debate and embraces five tenets.²⁷ First, reform addresses the eleven million people who are living in the United States without documentation and specifically provide them with an incentive to make themselves known to the government, register for some kind of work visa, and if they wish, get on a path to permanent residence. Second, reform embodies what lobbyists in Washington, D.C. call the “future flow,” which corresponds to the flow of people who enter the United States based on the labor demands of the United States market and the desire by many to earn a decent living or reunite with a loved one. Third, reform deals with the archaic family and employment immigration quotas in the Immigration and Nationality Act (INA) that have led to unconscionable waiting times for immigrants who are eligible to apply for legal status based on a family or employer relationship, but who are unable to receive the actual visa because the statutory caps have been met. For example, children and spouses of lawful permanent residents from Mexico must wait for more than seven years before they can be reunited with their family in the United States.²⁸ Fourth, reform takes on a targeted enforcement plan that operates in tandem with our tradition as a nation of immigrants. Finally, reform imparts a package of safeguards and protections to ensure that immigrants do not displace United States workers who are willing and able to perform a particular job, and that all workers, immigrants and United States born alike, receive equal wages, worker conditions, and bargaining rights.

26. The legislative histories and laws described in this article are not exhaustive. This article does not include every immigration reform and/or enforcement bill introduced in the Congress, nor does it highlight every provision included in the bills described. Please read the actual legislation for their entire contents. They can be accessed through <http://thomas.loc.gov>.

27. Generally, the phrase “comprehensive immigration reform” is used by select Members of Congress, policymakers and advocates to address the five principles outlined in this article. The term does not address every shortfall or inequality in the United States immigration system.

28. U.S. DEP’T STATE, VISA BULLETIN FOR DECEMBER 2005, http://travel.state.gov/visa/frvi/bulletin/bulletin_2744.html.

I. CURRENT POLITICAL DEBATE: IMMIGRATION REFORM

In play now is a medley of congressional proposals that purport to address immigration reform. In the Senate, Senators John McCain (R-AZ) and Edward Kennedy (D-MA) have introduced the Secure America and Orderly Immigration Act of 2005 (Secure America).²⁹ A companion bill has been introduced in the House by Representatives Jim Kolbe (R-AZ), Jeff Flake (R-AZ) and Luis Gutierrez (D-IL).³⁰ Secure America makes modifications to the Immigration and Nationality Act that would raise the limits on visas available for workers entering the United States to work or join a family member. Secure America creates a new visa known as the H-5B which applies to people who are already in the United States working and contributing but who do not have legal status.³¹ In order to qualify for such a visa, the applicant would be required to present evidence of employment in the United States, go through background checks and pay sizeable fees and fines. It also creates a new worker visa known as the H-5A that applies to people entering the United States to fill available jobs in the future.³² The bill provides for 400,000 such visas which can be increased or decreased based on the market demand.³³ In order to qualify for an H-5A visa, the applicant is required to hold a job offer from an employer, go through background checks and a medical exam, and pay sizable fees and fines. Secure America creates a mechanism for immigrants in both categories to adjust to lawful permanent resident status, after meeting employment, tax, English and civic requirements, as well as paying additional fees and fines.³⁴ The bill includes protections for workers to ensure that newly hired immigrant workers receive the same wage and working conditions as similarly situated United States workers.³⁵ Secure America also contains enforcement measures. For example, it creates a mandatory verification system that employers must utilize to determine if

29. Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (2005). Other co-sponsors of the bill: Senators Sam Brownback (R-KS), Joseph Lieberman (D-CT), Lindsay Graham (R-SC) and Ken Salazar (D-CO).

30. Secure America and Orderly Immigration Act, H.R. 2330, 109th Cong. (2005). Other co-sponsors of the bill: Representatives Lincoln Diaz-Balart (R-FL), Mario Diaz-Balart (R-FL), Ileana Ros-Lehtinen (R-FL), Grace Napolitano (D-CA) and Ed Pastor (D-AZ).

31. S. 1033, §701.

32. *Id.* §§ 301-302.

33. *Id.* § 305.

34. Secure America and Orderly Immigration Act, S. 1033, 109th Cong. §§ 306, 702 (2005).

35. *Id.* § 304.

immigrants are eligible to work³⁶ and requires the Department of Homeland Security to develop a national plan for border security.³⁷ It also includes potent sanctions for employers who knowingly hire immigrants unlawfully once a realistic worker program is in place.³⁸ The bill also encourages greater coordination between the United States and neighboring countries to effectively control the border.³⁹

A competing bill known as the Comprehensive Enforcement and Immigration Reform Act of 2005 has been introduced by Senators John Cornyn (R-TX) and Jon Kyl (R-AZ).⁴⁰ One distinction between Secure America and this competing bill relates to the treatment of undocumented immigrants in the United States. The Cornyn-Kyl proposal would permit eligible immigrants who are working in the United States and their family members to stay in the United States for up to five years in a newly created “Deferred Mandatory Departure” (DMD) status. Immigrants would be required to show employment in the United States, pay hefty fines and self-deport to their home countries within five years.⁴¹ Moreover, DMD applicants would be required to waive fundamental due process protections like the right to administrative and judicial review. The bill creates a limitless temporary worker visa known as the “W” visa that applies to people entering the United States to fill available jobs in the future.⁴² In order to qualify for this visa, the applicant would have to establish that he has a job offer from a United States employer, pay fines, take a medical exam, and at the discretion of the Department of Homeland Security, may be required to waive all rights to administrative or judicial review.⁴³ The Cornyn-Kyl proposal does not provide a pathway for lawful permanent residence, nor does it provide protections for United States and immigrant workers to ensure that both categories are fairly treated and adequately paid. The bill also contains a string of interior enforcement measures that include expanded expedited removal, mandatory minimum bond amounts, and greater authority for states and localities to detain immigrants beyond

36. *Id.* § 402.

37. *Id.* § 121.

38. *Id.* § 406.

39. Secure America and Orderly Immigration Act, S. 1033, 109th Cong. § 502 (2005).

40. Comprehensive Enforcement and Immigration Reform Act of 2005, S. 1438, 109th Cong. (2005).

41. *Id.* Title VI.

42. *Id.* Title V.

43. *Id.*

their criminal sentence, among others. These provisions are discussed in greater detail later in this article.

The Senate debate also includes a package of bills introduced by Senator Chuck Hagel (R-NE).⁴⁴ These bills offer a fix for people already in the United States working without legal status. In addition, they also create more legal channels for essential, high-tech, and student workers entering the United States in the future,⁴⁵ modify the current family and employment quotas,⁴⁶ and require employers to participate in the employment eligibility verification program,⁴⁷ in addition to other things. While the Hagel package includes components similar to the Secure America, one key difference relates to the lengthy residency and employment requirements in the former necessary to qualify for adjustment to permanent resident status. Immigrants who are unable to meet the residency and employment requirements spelled out in the bill would be given “Deferred Mandatory Departure” status and unable to be granted admission into the United States until they self-deport.⁴⁸ The Hagel package also includes a variation of the troublesome enforcement measures found in the Cornyn-Kyl proposal.⁴⁹

Senator Arlen Specter (R-PA), Chairman of the Senate Judiciary Committee, the committee with jurisdiction over immigration, has drafted a “Chairman’s Mark” (his own bill) which draws from the above-mentioned Senate proposals.⁵⁰ For example, the modifications made to the family and employment based immigration levels are similar to provisions in the Secure America and Orderly Immigration Act.⁵¹ The more controversial portion of the Chairman’s Mark deals with the “Deferred Mandatory Departure” program that applies to immigrants working and residing in the United States.⁵² The bill adopts the unworkable “work, report and deport” scheme outlined in the bill introduced by Senators Kyl (R-AZ) and Cornyn (R-TX). The Chairman’s Mark includes a temporary worker program similar to

44. Immigrant Accountability Act of 2005, S. 1919, 109th Cong. (2005); Strengthening America’s Workforce Act of 2005, S. 1918, 109th Cong. (2005); Employment Verification Act of 2005, S. 1917, 109th Cong. (2005); and Strengthening America’s Security Act of 2005, S. 1916, 109th Cong. (2005).

45. S. 1918.

46. S. 1919, Title II.

47. S. 1917.

48. S. 1919, § 102.

49. Strengthening America’s Security Act of 2005, S. 1916, 109th Cong. (2005).

50. Chairman’s Mark, Comprehensive Immigration Reform (Draft), November 9, 2005.

51. *Id.* Title V.

52. *Id.* § 601.

that contained in Secure America and adopts many of the robust enforcement provisions of the Cornyn-Kyl proposal.⁵³ In a cover letter to his Mark, Chairman Specter stated that he does not necessarily support every provision of his draft. The Chairman likewise told the Bureau of National Affairs that “[t]here’ll be a guestworker provision, but the key point is whether people have to go back to their native country in order to come back, but I have not signed off on that.”⁵⁴ Unfortunately, Chairman Specter’s disclaimer provides little consolation to immigration advocates, religious groups, unions, businesses, and others who argue that the DMD requirement is unworkable for both immigrant workers and United States businesses.

As the Senate deliberates over a collection of comprehensive options, one segment of Republicans in the House of Representatives has different intentions. They are fixated on increased enforcement of current immigration laws without regard to whether the laws themselves are realistic or even constitutional. This fixation has resulted in dozens of legislative proposals to enforce current immigration laws through a combination of decreased immigration, swift deportations, increased detentions and/or fencing along the border. Representative John Hostettler (R-IN), Chairman of the House Judiciary Committee’s Subcommittee on Immigration, Border and Claims, Committee on Judiciary, introduced the Secure America Act on November 7, 2005.⁵⁵ This bill increases the government’s ability to summarily deport certain third-country nationals (nationals of countries other than Mexico and Canada) who have not been admitted or paroled and are apprehended within 100 miles of the border within fourteen days of their entry.⁵⁶ The bill also authorizes military forces to be deployed at the border “in order to prevent aliens not permitted by law to enter the U.S., terrorists, and drug smugglers from entering the U.S.”⁵⁷ In addition, the bill gives authority to the Department of Homeland Security to deny admission of certain nationals of countries who do not accept or unreasonably delay the return of their citizens subject to deportation by the United States.⁵⁸

53. *Id.* Title III.

54. Fawn Johnson, *Specter Floats Return Requirement for Undocumented Workers in U.S.*, BNA DAILY LABOR REPORT, Nov. 19, 2005.

55. Secure America Act, H.R. 4240, 109th Cong. (2005).

56. *Id.* § 2.

57. *Id.* § 5. See, Press Release, Office of John N. Hostettler, U.S. Rep., Hostettler Introduces the Secure America Act (Nov. 7, 2005), <http://www.house.gov/hostettler/News/Hostettler-news-2005-11-07-Secure-America-Act.htm>.

58. H.R. 4240 § 7.

Another proposal, the Clear Law Enforcement for Criminal Alien Removal Act (CLEAR Act) was introduced in June 2005 by Representative Charlie Norwood (R-GA).⁵⁹ This bill legislates for the “inherent” authority for state and local law enforcement to enforce federal immigration laws. Moreover, the bill makes it a “crime” to be present in the United States without a legal status (currently, presence in the United States without a legal status is a civil violation), and it increases the criminal and civil penalties for people who stay in the United States beyond the authorized period or who re-enter the United States illegally.⁶⁰ The bill further requires that the following immigration violators are placed into the federal criminal database known as the National Crime and Information Center (NCIC): those who have been ordered removed, signed a “voluntary departure” agreement, overstayed their visa, or had their visas revoked.⁶¹ Because the NCIC is routinely accessed by law enforcement in the normal course of their duties, placing immigration information into this database opens the door for unsolicited and inappropriate immigration enforcement by state and local police.

The Rapid Response Border Protection Act has been introduced by Representative Sheila Jackson Lee (D-TX).⁶² The bill requires the Department of Homeland Security to make arrangements for 100,000 additional beds for detaining immigrants.⁶³ It also increases by 15,000 the number of Border Patrol agents made available to secure our borders.⁶⁴ The True Enforcement Border Security Act of 2005 was introduced by Representatives Duncan Hunter (R-CA) and Virgil Goode (R-VA) on November 3, 2005.⁶⁵ The bill mandates that a fence be constructed across the Southern border.⁶⁶ The bill also contains many provisions similar to the CLEAR Act related to the enforcement of immigration laws by state and local police.⁶⁷ As to the cost and feasibility of building a fence, Professor Wayne Cornelius describes:

59. CLEAR Act of 2005, H.R. 3137, 109th Cong. (2005).

60. *Id.* § 4.

61. *Id.* § 5.

62. Rapid Response Border Protection Act, H.R. 4044, 109th Cong. (2005).

63. *Id.* § 201.

64. *Id.* § 301.

65. True Enforcement Border Security Act of 2005, H.R. 4313, 109th Cong. (2005).

66. *Id.* § 101.

67. *Id.* Title II.

Sealing the border is technologically feasible—that has never been the issue. The real question is whether the United States is willing to pay the high costs of doing so, in terms of scarce revenue and widespread disruptions to our economy and society. The cost of erecting nearly 2,000 miles of border fortifications and permanently deploying the staff to monitor and maintain the fence would run into many billions of dollars.⁶⁸

As to whether constructing such a fence would prevent illegal entry, Professor Cornelius explains:

At least 400 to 500 migrants die each year of dehydration, drowning and other causes related to illegal entry. But that is only a tiny fraction of those who try to cross, so the odds of arriving safely in the United States are still quite good. To create a truly effective deterrent, the United States would have to make illegal entry life-threatening by authorizing the use of lethal force. A Berlin Wall without border guards with orders to shoot to kill would not have stopped East Germans. Neither would a high-tech fence along the U.S.-Mexico border.⁶⁹

Similarly, in his remarks to the Houston Forum announcing the “Secure Border Initiative,” Department of Homeland Security Secretary Michael Chertoff remarked “[I]et me be clear—we will not build a giant wall across our borders.”⁷⁰ Meanwhile, the Federation for American Immigration Reform, a restrictionist group that seeks to reduce immigration, dubs the True Enforcement Border Security Act as the “first truly comprehensive enforcement strategy for deterring illegal immigration, reducing the size of the current illegal alien population, and reducing immigration pressures on the system and our national community.”⁷¹

68. Wayne Cornelius, *The Hole in the Push for a Border Fence*, HOUS. CHRON., Nov. 20, 2005.

69. *Id.*

70. Michael Chertoff, Sec’y, Dep’t Homeland Sec., Remarks at the Houston Forum (Nov. 2, 2005), <http://www.dhs.gov/dhspublic/display?content=4920>.

71. Press Release, Federation for American Immigration Reform, Cutting through the Haze: New TRUE Immigration Enforcement Bill Delivers Comprehensive Strategy (Nov. 3,

The Enforcement First Immigration Reform Act has been introduced by Representative Jay Hayworth (R-AZ)⁷² and combines some of the worst elements of the aforementioned bills, including expansion of immigration enforcement by state and local police, increased summary deportations or “expedited removals” without the opportunity to see a judge and an increase of detention beds for holding immigrants.⁷³ Representative Tom Tancredo (R-CO), Chair of the restrictionist Immigration Reform Caucus, introduced the Rewarding Employers that Abide by the Law and Guaranteeing Uniform Enforcement to Stop Terrorism Act of 2005 (REAL GUEST Act) on July 18, 2005.⁷⁴ This bill creates a new “guestworker” program for people who wish to work temporarily in the United States. Like with many of the above-mentioned bills, the REAL GUEST Act provides greater authority for state and local police to enforce immigration laws, “criminalizes” unlawful presence and increases penalties for employers who hire or recruit unauthorized workers. On September 8, 2005, Representative Tancredo introduced another bill known as the Reducing Immigration to a Genuinely Healthy Total Act of 2005, which would reduce United States immigration levels, eliminate programs in the INA that allow for legalization of certain Nicaraguans, Central Americans and Haitians, and prohibit the automatic citizenship by birth unless one of the child’s parents is a United States citizen.⁷⁵

The Border Security and Terrorism Prevention Act was introduced by Representatives Peter King (R-NY), Loretta Sanchez (D-CA) and Ron Lungren (R-CA) on November 14, 2005.⁷⁶ This bill proposes mandatory detention of any individual who enters the United States without legal permission and creates an “interim period” during which some individuals may be released on a mandatory minimum bond of \$5,000.⁷⁷ Like with the Secure America Act and other bills described above, the Border Security and Terrorism Prevention Act gives authority to the Department of Homeland Security to deny

2005), http://www.fairus.org/site/PageServer?pagename=media_release1132005 (on file with the *University of Maryland Law Journal of Race, Religion, Gender and Class*).

72. Enforcement First Immigration Reform Act of 2005, H.R. 3938, 109th Cong. (2005).

73. *Id.* Titles I and II.

74. Rewarding Employers that Abide by the Law and Guaranteeing Uniform Enforcement to Stop Terrorism Act of 2005, H.R. 3333, 109th Cong. (2005).

75. Reducing Immigration to a Genuinely Healthy Total Act of 2005, H.R. 3700, 109th Cong. (2005).

76. Border Security and Terrorism Prevention Act, H.R. 4312, 109th Cong. (2005).

77. *Id.* § 301.

admission to certain nationals of countries who do not accept or unreasonably delay the return of their citizens being deported by the United States.⁷⁸ This bill passed the House Homeland Security Committee on November 17, 2005.⁷⁹

On December 6, 2005, Representatives James Sensenbrenner (R-WI), Chairman of the House Judiciary, and Peter King (R-NY) introduced the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, which contains an all-inclusive package of punitive measures against immigrants. The bill passed the House of Representatives on December 16, 2005.⁸⁰ It is notable that the Sensenbrenner-King legislation was opposed by organizations such as the Chamber of Commerce and Americans for Tax Reform, as well as hundreds of organizations ranging from faith-based groups, labor unions, immigrants' rights and ethnic groups, and civil rights and human rights organizations.⁸¹ These provisions are discussed in greater detail later in this article. Like the aforementioned House bills, the legislation reflects an "enforcement-only" proposal that fails to address the ingredients needed for true reform.

The Bush Administration has also joined in the immigration debate. President Bush has spoken positively about immigration reform since 2001. While President Bush has not endorsed specific legislation, the outline and rhetoric of his January 2004 announcement and subsequent remarks lean towards immigration reform that is comprehensive.⁸² More recently, in an October Radio Address, President Bush stated:

As we improve and expand our efforts to secure our borders, we must also recognize that enforcement cannot work unless it's part of a comprehensive immigration reform that includes a temporary worker

78. *Id.* § 305.

79. Press Release, U.S. House Comm. on Homeland Sec., Committee Approves Bipartisan Border Security Bill (Nov. 18, 2005), <http://homeland.house.gov/files/Border%20Bill%20Post-Markup111705.pdf>.

80. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h4437eh.txt.pdf [hereinafter Sensenbrenner-King legislation].

81. NATIONAL IMMIGRATION FORUM, OPPOSITION TO H.R. 4437 INCLUDES A BROAD SPECTUM OF GROUPS (2005), http://immigrationforum.org/documents/PolicyWire/Legislation/Group_List.pdf.

82. Remarks by President on Immigration Policy, 40 WEEKLY COMP. PRES. DOC. 15, 25 (Jan. 12, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>.

program. If an employer has a job that no American is willing to take, we need to find a way to fill that demand by matching willing employers with willing workers from foreign countries on a temporary and legal basis.⁸³

On November 28, 2005, President Bush delivered a speech in Tucson, Arizona on immigration enforcement and reform.⁸⁴ During this speech, he discussed the need for expanded expedited removal, enforcement personnel and detention bed space. He also appeared to support many of the interior enforcement provisions outlined in the Cornyn-Kyl proposal, among them were increased detention, refusal to admit nationals from countries who unduly delay or do not accept their nationals subject to deportation by the United States, and statutory bars for judicial review for certain immigrants subject to removal.⁸⁵ Regarding the “reform” component of the President’s plan, the White House Fact Sheet states:

As part of comprehensive immigration reform, the President has proposed the creation of a new Temporary Worker Program. To match foreign workers with American employers for jobs that no American is willing to take, temporary workers will be able to register for legal status for a fixed time period and then be required to return home. This plan meets the needs of a growing economy, allows honest workers to provide for their families while respecting the law, and relieves pressure on the border. By reducing the flow of illegal immigrants, law enforcement can focus on those who mean this country harm The President opposes amnesty because rewarding those who break the law would encourage more illegal entrants and increase pressure on the border. A Temporary Worker Program, by contrast, would promote legal immigration and decrease pressure on the border. The President supports increasing the annual

83. The President’s Radio Address, 41 WEEKLY COMP. PRES. DOC. 1571, 1574 (Oct. 31, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/10/20051022.html>.

84. Remarks on Border Security and Immigration Reform, 11 WEEKLY COMP. PRES. DOC. 1773, 1774 (Dec. 5, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/11/print/20051128-7.html>.

85. *Id.*

number of green cards, but for the sake of justice and security, the President will not sign an immigration bill that includes amnesty.⁸⁶

With regard to the legislation pending in Congress, President Bush remarked:

Judiciary Committee Chairman Sensenbrenner and Homeland Security Chairman King are moving bills that include tough provisions to help secure this border. The House plans to vote on this legislation soon; I urge them to pass a good bill. The Senate is continuing to work on border legislation, as well. This legislation improves border security and toughens interior enforcement and creates a temporary worker program. Senators McCain and Kyl have taken the lead. It's two good men taking the lead, by the way.⁸⁷

These statements are vague enough to potentially result in the Administration supporting an almost-comprehensive package that gives immigrants a shot at permanent residency, yet sufficiently detailed to result in the Administration's endorsement of Cornyn-Kyl-like legislation that forces all immigrants under a temporary worker program to return home before their DMD status expires. President Bush's November 28, 2005 remarks are consistent with testimony given by the Department of Homeland Security Secretary Michael Chertoff before the Senate Judiciary Committee on October 18, 2005, which focused on interior enforcement, border security and a temporary worker program. As to the latter, Secretary Chertoff remarked:

The effectiveness of our border security and interior enforcement is closely tied to establishing a workable and enforceable Temporary Worker Program. A well-designed Temporary Worker Program will provide legal channels for U.S. employers and foreign born

86. White House Office of the Press Secretary, Fact Sheet: Securing America Through Immigration Reform (Nov. 28, 2005), <http://www.whitehouse.gov/news/releases/2005/11/print/20051128-3.html>.

87. Remarks on Border Security and Immigration Reform, 11 WEEKLY COMP. PRES. DOC. 1773, 1774 (Dec. 5, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/11/print/20051128-7.html>.

workers to match needs in the best interest of the U.S. economy without disadvantaging American workers.⁸⁸

The Administration's support for enforcement-only proposals is troubling to those who reason that such an approach undermines and contradicts the formula of comprehensive immigration reform and, in fact, may alienate important constituencies, such as the Hispanic electorate. Moreover, the Administration's support of the Sensenbrenner-King legislation raises many questions about how serious it is about enacting immigration reform anytime soon.⁸⁹ The Administration may believe that simultaneously supporting the principles of "comprehensive immigration reform" to appease pro-reform Republicans and constituencies, and endorsing punitive immigration enforcement measures to preserve support by the more anti-immigrant wing of the Republican party is politically beneficial. It remains to be seen how the Administration responds when the immigration debate moves to the Senate.

The American public has also shared its views on immigration. In a Washington Post-ABC poll conducted in December 2005, sixty-one percent of the participants favored offering immigrants a chance to preserve their jobs in the United States and apply for legal status as opposed to being deported.⁹⁰ Similarly, a March 2005 poll of 800 likely voters found that seventy-five percent favored an immigration reform package similar to the Secure America and Orderly Immigration Act. The polling summary indicates that "[t]hree quarters of American voters support a comprehensive, bipartisan immigration reform proposal that combines toughness, fairness, a guest worker program, family reunification, and a path to legal residency for undocumented immigrants who are already here."⁹¹ This support existed across party lines and even after individuals heard affirmative

88. Department of Homeland Security Press Room, Statement by Homeland Security Secretary Michael Chertoff before the United States Senate Judiciary Committee (Oct. 18, 2005), available at <http://www.dhs.gov/dhspublic/display?content=4890>.

89. Executive Office of the President, Statement of Administration Policy: H.R. 4437 – Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (Dec. 15, 2005), available at <http://www.whitehouse.gov/omb/legislative/sap/109-1/hr4437sap-h.pdf>.

90. Marcela Sanchez, *That Divisive Anti-Immigrant Fence*, WASH. POST, Jan. 6, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/06/AR2006010600544.html>.

91. AMERICAN IMMIGRATION LAWYERS ASSOCIATION & THE NATIONAL IMMIGRATION FORUM, A NATIONAL SURVEY OF VOTER ATTITUDES ON IMMIGRATION (2005), available at <http://www.immigrationforum.org/documents/PressRoom/VoterAttitudesOnImmigration.pdf>.

and negative messages about immigration.⁹² In addition, an October 2005 poll of 800 voters, who were most likely Republican, reveals that more than seventy-five percent of them support an immigration proposal that together addresses immigration enforcement and legalization.⁹³

The immigration debate has made for strange bedfellows. Groups ranging from the politician to the public citizen, conservative business to the union organizer, and Muslim to Catholic have converted public frustration into a call to the federal government, members of Congress and the Administration in particular, to renovate the immigration system in a holistic manner so that a portion of good people who want to live in the United States can do so legally. This requires at a minimum that the White House and members of Congress support comprehensive legislation that responds to this call.

II. DUE PROCESS AND CIVIL LIBERTIES

Whatever his status under the immigration laws, an alien is surely a 'person.' . . . Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.—United States Supreme Court Justice William J. Brennan, Plyler v. Doe (1982).

Many of the immigration enforcement policies delivered by the United States government over the past decade have severely diminished due process and freedoms for immigrants. Since 1996, legislative and administrative changes have resulted in increased detentions and deportation of immigrants, fewer opportunities for review or relief for immigrants, forced family separations and serious constitutional questions. This article examines a handful of these policies.⁹⁴

92. *Id.*

93. THE MANHATTAN INSTITUTE, A NATIONAL SURVEY OF REPUBLICAN VOTER ATTITUDES (2005), http://www.manhattan-institute.org/ppt/Tarrance_Poll_files/frame.htm.

94. The administrative and legislative histories and laws described in this section are not exhaustive—it does not include every immigration reform and/or enforcement bill introduced in the Congress, nor does it highlight every provision included in the bills described. Please read the actual bills or laws for a closer study.

A. 1996 Immigration Laws

In 1996, Congress passed and the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) and the Anti-Terrorism and Effective Death Penalty Act (AEDPA).⁹⁵ The 1996 immigration laws contain provisions that profoundly impact long-term and temporary immigrants present within the United States and those seeking admission.

The 1996 immigration laws expanded the definition and penalties associated with “aggravated felony,” a term contained in the INA at § 101(a)(43). When Congress first created the expression “aggravated felony” in 1988, it was used to categorize serious criminal labels, among them murder, drug trafficking and firearms trafficking, as deportable offenses.⁹⁶ The term “aggravated felony” was expanded at several points beginning in 1990 to cover additional offenses and impose further limitations on the available relief.⁹⁷ For instance, the Immigration and Nationality Technical Correction Act of 1994 (INTC) widened the aggravated felony term to include fraud, theft and burglary offenses.⁹⁸

The 1996 immigration laws dramatically expanded the definition of aggravated felony by adding new crimes. The 1996 immigration laws also expanded the scope of aggravated felony by lowering the formal sentence required to constitute an “aggravated felony.” For example, the threshold sentence requirement for convictions involving “theft offense[s],” “crimes of violence” and “commercial bribery, counterfeiting, forgery, and trafficking in vehicles” was lowered from five years to one.⁹⁹ The 1996 aggravated felony definition has been applied to shoplifting, writing of bad checks and public nuisance offenses. The definition applies retroactively,

95. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (codified in scattered sections of 28, 18, 42, 8, 22 U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (codified in scattered sections of 8, 18 U.S.C.) [hereinafter 1996 immigration laws].

96. Anti-Drug Abuse Act of 1988 § 7342, Pub. L. No. 100-690, 102 Stat. 4181 (amending INA § 101(a), 8 U.S.C. § 1101, and adding “(43) The term aggravated felony means murder, any drug trafficking crime or any illicit trafficking in any firearms . . . or any attempt or conspiracy to commit any such act within the United States.”).

97. LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND & THE AMERICAN BAR ASSOCIATION, AMERICAN JUSTICE THROUGH IMMIGRANTS’ EYES (2004), http://www.abanet.org/publicserv/immigration/Due_Process.html.

98. Immigration and Nationality Technical Correction Act of 1994, §222 Pub. L. No. 103-416, (Oct. 25, 1994); *See also* SOCHEAT CHEA, THE EVOLVING DEFINITION OF AN AGGRAVATED FELONY (1999), <http://library.findlaw.com/1999/Jun/1/126967.html>.

99. INA § 101(a)(43)(A)-(U), 8 U.S.C. § 1101 (2000).

which means that immigrants, temporary and permanent residents alike, can be designated as aggravated felons for acts that occurred years ago without regard to whether the offense was even deportable at the time it occurred.¹⁰⁰

The consequences of an aggravated felony are significant and include mandatory detention without bond, deportation and ineligibility of immigration relief such as asylum, voluntary departure and cancellation of removal. By placing a statutory bar to most relief, the 1996 definition of an “aggravated felony” also affected judges because they lost their authority to consider the individual factors and equities in specific cases. For example, a lawful permanent resident mother of two, married to a United States citizen and working in the United States for several years as a registered nurse at a medically underserved hospital, can be deported for a misdemeanor committed twenty years ago. The broad definition of aggravated felony and its retroactive application raises constitutional questions and, as a practical matter, makes it more difficult to distinguish the truly felonious from the ordinarily law-abiding.

The 1996 immigration laws also added a new definition for “conviction” that is different from the common understanding of “conviction.”¹⁰¹ For example, “expunged” convictions can be considered a “conviction” for immigration purposes.¹⁰² Pursuant to INA § 101(a)(48):

(A) The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where-

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to

100. INA § 101(a)(43), 8 U.S.C. § 1101 (2000), *amended by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 321.

101. INA § 101(a)(48), 8 U.S.C. § 1101 (2000).

102. *In Re Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

include the period of incarceration or confinement ordered by a court of law *regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.*¹⁰³

The definition for “conviction” includes situations where a sentence has been suspended, which has a significant effect on immigrants where the sentence determines whether a particular offense is a deportable one (i.e., a theft offense for which the term of imprisonment is at least one year constitutes an “aggravated felony”). This means that a lawful permanent resident who receives a suspended two-year sentence can be classified as an “aggravated felony” if the offense is a “sentence” crime found in the INA at § 101(a)(43). Put another way, a long-term immigrant who did not spend a single day in confinement can be classified as an “aggravated felon.”

Additionally, the 1996 laws expanded the number of immigrants, including lawful permanent residents, whose criminal activities can be classified as a deportable offense as a “crime involving moral turpitude” (CMT). The expression “moral turpitude” is defined largely by case law, and refers to conduct that is “inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.”¹⁰⁴ Generally, assault with a deadly weapon, aggravated DWI, fraud, larceny and forgery are found to be crimes involving moral turpitude.¹⁰⁵ As a result of the 1996 laws, a person is deportable for a crime of moral turpitude if she is convicted within five years of admission and *could* receive a sentence of one year or more.¹⁰⁶ This means that individuals who received probation or a suspended sentence can be deported nonetheless. Before 1996, immigrants who committed a crime of moral turpitude within five years of entry were deportable only if a sentence of one year or more was actually imposed. Pursuant to the 1996 immigration laws, a single moral turpitude offense can also trigger grounds of inadmissibility for long-time lawful permanent residents if they depart from the United States and attempt to make a new admission, even if they left for a brief

103. INA § 101(a)(48), 8 U.S.C. § 1101 (2000) (emphasis added).

104. In Re Danesh, 19 I. & N. Dec. 669 (BIA 1999); In Re Flores, 17 I. & N. Dec. 225, 227 (BIA 1980).

105. See DAN KESSELBRENNER & SANDY LIN, NAT’L IMMIGRATION PROJECT OF THE NAT’L LAWYERS GUILD, SELECTED IMMIGRATION CONSEQUENCES OF CERTAIN FEDERAL OFFENSES (2003), available at <http://www.nlada.org/DMS/Documents/1067629132.3/fedchart.pdf>.

106. INA § 237(a)(2)(A), 8 U.S.C. § 1227 (2000).

period of time.¹⁰⁷ These lawful permanent residents with only one moral turpitude conviction are now categorized under the legal fiction “arriving alien,” and can be detained and left with limited options for preventing deportation.

B. Expedited Removal

Another feature of the 1996 immigrations laws is “expedited removal,” a process that requires immigration officers to summarily remove immigrants who arrive in the United States without proper documents or who attempt to enter the United States through fraud or misrepresentation.¹⁰⁸ Those who are subject to expedited removal are removed without an administrative or judicial hearing or review. Before the 1996 laws, only a trained immigration judge was allowed to issue an order of deportation. Immigrants who are removed through expedited removal are barred from entry into the United States for a period of five years.¹⁰⁹

The expedited removal program contains a limited exception for immigrants who claim to be lawful permanent residents, admitted as refugees or United States citizens.¹¹⁰ Similarly, an exception applies if the immigration officer determines that an immigrant fears persecution or torture upon return to her home country. Such individuals are referred by the immigration officer to an asylum officer for a “credible fear” interview. The statute requires that every referred individual be detained pending a “credible fear interview.”¹¹¹ The purpose of the credible fear interview is to determine if there is a “*significant possibility*, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208.”¹¹²

If the asylum officer determines that the individual does have a credible fear, then she is referred to an immigration judge for a formal removal hearing at which she is afforded the opportunity to present the individual facts of her case to a judge and apply for asylum-related

107. INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182 (2000). The INA contains a limited exemption known as the “petty offense” exception to the ground of inadmissibility based on a crime involving moral turpitude. See INA § 212(a)(A)(ii), 8 U.S.C. § 1182 (2000).

108. INA § 235(b), 8 U.S.C. § 1225 (2000); See also 8 C.F.R. § 235.3(b)(1) (2005).

109. INA § 212(a)(9)(A), 8 U.S.C. § 1182 (2000).

110. 8 C.F.R. § 235.3(b) (2005).

111. INA § 235(b), 8 U.S.C. § 1225 (2000).

112. INA § 235(b), 8 U.S.C. § 1225 (2000) (emphasis added).

relief. Asylum applicants are held in “mandatory detention” pending a credible fear determination, after which the Department of Homeland Security has discretionary authority to parole or “release” such aliens from detention.¹¹³

When expedited removal was first implemented, it applied only to immigrants arriving at ports of entry. However, the 1996 immigration laws authorize the government to subject any group of individuals who entered without inspection in the last two years to expedited removal.¹¹⁴ Since September 11, 2001, expedited removal has been expanded administratively to certain aliens apprehended inside the United States. In November 2002, the Department of Homeland Security issued regulations that extended expedited removal to certain immigrants arriving in the United States by sea in the last two years (an exception was made for Cubans).¹¹⁵ In August 2004, the Department of Homeland Security issued regulations further expanding expedited removal to certain aliens apprehended within fourteen days after entry and within 100 miles of the border patrol sectors at Tucson, Arizona and Laredo, Texas. This policy does not generally apply to nationals of Canada or Mexico.¹¹⁶ In September 2005, the Department of Homeland Security extended this policy to all southern border patrol sectors.¹¹⁷ In addition, several of the pieces of legislation described above propose the statutory expansion of expedited removal. This trend reflects the position of the Administration and certain members of Congress who believe expedited removal is an effective deterrent to immigrants who cross the border without valid documents.

From its inception, immigration advocates have criticized expedited removal because it gives immigration officers from a non-neutral federal agency, the power of a judge—namely, authority to

113. See generally INA § 235(b), 8 U.S.C. § 1225 (2000); INA § 212(d)(5)(A), 8 U.S.C. § 1182 (2000); 8 C.F.R. § 235.3(b) (2000); 8 C.F.R. § 212.5(a) (2005). Pursuant to guidance issued from legacy INS, the following factors should be considered in parole determinations: risk of flight; danger to the community; humanitarian need; establishment of identity; family ties in the community; credible asylum claim; among others. See also INS Memorandum, Expedited Removal: Additional Policy Guidance (Dec. 30, 1997) from Michael A. Pearson, Executive Associate Commissioner for Field Operations, Office of Field Operations, to Regional Directors, District Directors, Asylum Office Directors, *reprinted in* 75 INTERPRETER RELEASES 270, Feb. 23, 1998.

114. INA § 235(b), 8 U.S.C. § 1225 (2000); 8 C.F.R. § 235.3(b) (2005).

115. 67 Fed. Reg. 68924 (Nov. 13, 2002).

116. 69 Fed. Reg. 48877 (August 11, 2004).

117. Department of Homeland Security Press Room, DHS Expands Expedited Removal Authority Along Southwest Border 6 (Sept. 14, 2005), <http://www.dhs.gov/dhspublic/display?content=4816>.

remove individuals because they lack proper documents or invalid documents. Also, individuals may have genuine fears of persecution or torture but are unable to express such fears when they arrive. This raises a legitimate concern that immigration officers may fail to refer genuine refugees for a credible fear interview. On February 8, 2005, the United States Commission on International Religious Freedom issued a report on the treatment of asylum seekers in expedited removal.¹¹⁸ The report found that in “15 percent (12/79) of observed cases when an arriving alien expressed a fear of return to the inspector, the alien was not referred. Moreover, among these twelve cases were several aliens who expressed fear of political, religious, or ethnic persecution, which are clearly related to the grounds for asylum. Of particular concern, in seven of these twelve cases, the inspector incorrectly indicated on the sworn statement that the applicant claimed he had no fear of return.”¹¹⁹

Legislation has been introduced to ameliorate some of the harshest provisions of the 1996 laws. One bill, known as the Family Reunification Act, has been introduced by Representative Barney Frank (D-MA) in the last four Congresses and most recently in May 2005.¹²⁰ The Family Reunification Act of 2005 authorizes the Department of Homeland Security to cancel the removal of certain lawful, permanent residents with “aggravated felony” convictions if they meet other statutory requirements. The bill also allows certain returning lawful, permanent residents with criminal convictions to re-enter the United States without having to seek “admission” and authorizes the Department of Homeland Security to release certain immigrants from detention who are non-dangerous, likely to appear at future hearings, and otherwise eligible. Notably, when the Family Reunification Act of 2002 was marked up in the House Judiciary Committee, it passed with modifications by a vote of eighteen to fifteen in November 2002. The bill drew more than fifty co-sponsors from both sides of the political aisle.¹²¹

118. UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS ON EXPEDITED REMOVAL (2005), available at http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/Volume%20I.pdf.

119. *Id.*

120. Family Reunification Act of 2005, H.R. 2055, 109th Cong. (2005); Family Reunification Act of 2003, H.R.2585, 108th Cong. (2003); Family Reunification Act of 2002, H.R.1452, 107th Cong. (2002); Family Reunification Act of 1999 H.R.1485, 106th Cong. (1999).

121. H.R. 1452, 108th Cong. (2002).

A handful of decisions by the United States Supreme Court also have addressed concerns raised by the 1996 immigration laws. For example, in June 2001, the Court determined that immigrants who pled guilty prior to April 24, 1996 should be given the opportunity to apply for a discretionary waiver that was repealed by the Immigration and Nationality Act (INA) after the enactment of the 1996 immigration laws because they were eligible at the time they pled guilty or pled *nolo contendere*.¹²² This enabled a handful of lawful permanent residents with strong equities (including United States citizen family, long-term employment, and business ties) to present to the Immigration Court why they should be given a second opportunity to stay in the United States. The Court also found that the 1996 immigration laws did not eliminate habeas corpus jurisdiction for immigrants who have been ordered removed.¹²³

In *Zadvydas v. Davis*, the Court analyzed whether a post-removal-period statute authorized the Attorney General to detain indefinitely an alien subject to removal.¹²⁴ The Court found that indefinite detention of such immigrants is unconstitutional:¹²⁵

The post-removal-period detention statute, read in light of the Constitution's demands, implicitly limits an alien's detention to a period reasonably necessary to bring about that alien's removal from the United States, and does not permit indefinite detention. A statute permitting indefinite detention would raise serious constitutional questions. Freedom from imprisonment lies at the heart of the liberty protected by the Due Process Clause.¹²⁶

In *Clark v. Martinez*, the Court extended the protections outlined in *Zadvydas* to "inadmissible aliens" from Cuba whose deportation was not "foreseeable."¹²⁷ The Court held that "[e]ven if the statutory purpose and constitutional concerns influencing the *Zadvydas* construction are not present for inadmissible aliens, that cannot justify giving the same statutory text a different meaning

122. *INS v. St. Cyr*, 533 U.S. 289, 326 (2001).

123. *Id.* at 308-09.

124. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

125. *Id.* at 679.

126. *Id.*

127. *Clark v. Martinez*, 125 S. Ct. 716, 727 (2005).

depending on the characteristics of the aliens involved.”¹²⁸ But, in *Demore v. Kim*, the Court ruled that it was constitutionally permissible for the government to detain certain lawful permanent residents subject to “mandatory detention” without an individualized bond determination as to whether they pose a flight risk or danger to the community.¹²⁹ However, the Court distinguished *Demore* from *Zadvydas*, reasoning that mandatory detention in the former is constitutionally permissible because the period of detention has a defined termination point and, generally, lasts for less than ninety days.¹³⁰

In November 2004, the Court ruled unanimously in *Leocal v. Ashcroft* that a lawful permanent resident’s conviction for driving under the influence does not constitute a “crime of violence,” and for that reason, does not extend to the “aggravated felony” definition under INA 101(a)(43)(F).¹³¹

Finally, on October 31, 2005, the United States Supreme Court granted certiorari in a case involving the retroactive application of a 1996 immigration provision known as “reinstatement.”¹³² The “reinstatement” provision applies to non-citizens who enter the United States without authorization after having been removed, or having departed voluntarily under an order of removal.¹³³ Under the statute, “the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed.”¹³⁴ Individuals who are subject to reinstatement are barred from applying for discretionary relief such as cancellation of removal and adjustment of status.¹³⁵

128. *Id.* at 719.

129. *Demore v. Kim*, 538 U.S. 510, 531 (2003).

130. *Id.* at 529.

131. *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004).

132. *Fernandez-Vargas v. Ashcroft*, 394 F.3d 881 (10th Cir. 2005), *cert. granted*, *Fernandez-Vargas v. Gonzales*, 126 S. Ct. 544 (2005).

133. INA § 241(a)(5).

134. *Id.*

135. *Id.*

III. HOMELAND SECURITY

The September 11, 2001 attacks prompted the Administration and members of Congress to deliberate over proposals for merging the immigration functions into a larger, security-minded agency. As a result of these deliberations, the former “Immigration and Naturalization Service” (INS) was abolished and many immigration functions were transferred to a new “Department of Homeland Security” (DHS).¹³⁶ Immigration services, interior and border related enforcement, and policy became part of the DHS. The Homeland Security Act merged twenty-two federal agencies, including the United States Customs Service, the Transportation Security Administration, part of the Animal Plant and Health Inspection Service and the Federal Emergency Management Agency (FEMA), among others.¹³⁷ The Homeland Security Act also created an Office of Civil Rights and Civil Liberties, an Office of the Inspector General, both of which serve as important venues for raising oversight and accountability matters with respect to immigrants, due process and liberties.¹³⁸ The immigration court system (Executive Office for Immigration Review) was retained by the Department of Justice. Meanwhile, the care and custody of unaccompanied children was transferred to the Office of Refugee Resettlement at the Department of Health and Human Services. This reorganization leaves a clear impression that immigrants are a threat to national security. Select officials in the Department of Homeland Security and in Congress, the immigration bar, and Non-Governmental Organizations (NGOs) continue to monitor how immigration matters are handled by DHS to ensure that America’s commitment to serving immigrants and protecting refugees is upheld.

The September 11, 2001 attacks on the United States also resulted in a consortium of immigration laws and policies by the government that diminished due process for immigrants.¹³⁹ Many of the new “post 9-11” laws and policies were selectively enforced on people from Muslim, Arab and South Asian countries. To the extent that information was accessible, several organizations, among them

136. Homeland Security Act, 6 U.S.C. § 111 (2003).

137. *Id.*

138. *See id.* §§ 705, 811.

139. In this article, policies and laws borne out of the September 11, 2001 attacks may be referred to as “post-9-11 policies.” Similarly, immigrants who were detained immediately after September 11, 2001 as part of the PENTTBOM investigation may be referred to as “September 11 detainees.”

Human Rights Watch, Human Rights First, Center for National Security Studies, Amnesty International, Asian American Legal Defense and Education Fund, Migration Policy Institute, American-Arab Anti-Discrimination Committee, and the Leadership Conference for Civil Rights, documented and analyzed the treatment of individuals targeted under the government's post 9-11 policies.¹⁴⁰ In June 2003, the Department of Justice's Inspector General (IG), Glenn Fine, released a report on the treatment of 762 detained immigrants, of whom 738 were arrested after September 11, 2001 as a result of the Federal Bureau of Prison's "PENTTBOM"¹⁴¹ investigation. The IG Report focused on immigration detainees at the Metropolitan Detention Center (MDC) in Brooklyn, New York and the Passaic County Jail in Paterson, New Jersey,¹⁴² and examined issues related to prolonged detention, conditions of confinement, access to counsel and medical care, and possible physical or verbal mistreatment.¹⁴³ The IG Report reveals how many of the post 9-11 laws were implemented and, more importantly, reflects broader concerns around immigrant detentions and due process.

A. *Detentions without Charge and Notice*

After September 11, 2001, the Department of Justice issued regulations requiring that, absent an emergency or other extraordinary circumstance, a charging determination must be made within forty-eight hours.¹⁴⁴ The regulations do not define "extraordinary circumstances or reasonable period of time."¹⁴⁵ Before September 11, the regulations required all charges to be made within twenty-four hours of arrest. The IG Report found that September 11 detainees were held without charge pursuant to the regulation's broad exception—that in the event of an "emergency or other extraordinary

140. For a link to resources related to post 9-11 due process, please see National Immigration Forum, *Due Process—Post 9/11: Resources*, <http://immigrationforum.org/DesktopDefault.aspx?tabid=545>.

141. PENTTBOM is shorthand for "Pentagon/Twin Towers bombing."

142. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, *THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS* (2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf> [hereinafter IG REPORT].

143. *See id.*

144. 8 C.F.R. § 287.3(d) (2001).

145. *But cf.* *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56 §412 (2001) (allowing suspected immigrants to be detainees for up to seven days, after which the government must initiate removal proceedings or file criminal charges).

circumstances,” a charging determination could be made within an “additional reasonable period of time.”¹⁴⁶ The Notice to Appear (NTA) is a charging document issued to immigrants and the court in connection with a removal proceeding. The NTA contains information about an immigrant’s charges and alleged immigration violations, right to secure counsel, and address-related requirements.¹⁴⁷ Service of the NTA is a minimum safeguard because it enables the immigrant to understand why he is being arrested and/or detained by the immigration agency and his options for obtaining counsel at his own expense. While the law requires the NTA to be served on the immigrant, neither the statute nor the regulations identify a timeframe during which the NTA must be served. The objective of former INS was to serve a NTA on an individual within seventy-two hours. However, the IG Report confirms that many of the September 11 detainees did not receive their NTA for weeks and, for some, more than a month after their arrest. The IG Report found that five of the September 11 detainees were served with NTAs on an average of 168 days after their arrest.¹⁴⁸

In March 2004, Asa Hutchinson, former Under Secretary for Border and Transportation Security of the Department of Homeland Security, issued guidance “to refine and clarify existing procedures to ensure that aliens are promptly notified of their custody status and of the immigration charges to be lodged against them.”¹⁴⁹ Importantly, the guidance puts into place a step-by-step procedure for documenting the time and date a charging determination is made and the NTA served. The March 2004 guidance also states that during an emergency or extraordinary circumstance, “every effort shall be made to make the custody determination and charging decision, and to notify the alien thereof, as soon as practicable.” Notably, Hutchinson issued this guidance with good intentions to uphold immigrant due process and redress some of the procedural holes identified in the IG Report. However, the March 2004 guidance still retains broad flexibility to prolong detention without charge or notice during an “emergency or extraordinary circumstance.” For example, the guidance interprets this exception to include “a compelling law enforcement need including,

146. IG Report, *supra* note 142, at 28.

147. INA § 239(a).

148. IG Report, *supra* note 142, at 30-36.

149. Memorandum from Asa Hutchinson, Undersecretary Border and Transportation Security, to Michael J. Garcia, Assistant Secretary U.S. Immigration and Customs Enforcement 1-2 (March 30, 2004), <http://immigrationforum.org/documents/TheDebate/DueProcessPost911/ICEGuidance.pdf> [hereinafter March 2004 Guidance].

but not limited to, an immigration emergency resulting in the influx of large numbers of detained aliens that overwhelms agency resources and makes it unable to logistically meet the general servicing requirements.”¹⁵⁰ This interpretation of “emergency or extraordinary circumstance” is extensive enough to allow for future blanket arrests and detentions.

B. Blanket Bond Denials

While the INA applies “detention without bond” to immigrants with certain criminal convictions (“mandatory detention”), the vast majority of immigrants are given the opportunity to request bond to the Department of Homeland Security or to an Immigration Judge, who in turn determines if an individual poses a flight risk or a danger to the community. Due process requires that detained immigrants receive individual and fair bond adjudications. However, a collection of post 9-11 policies issued by the Executive Branch ignored this principle and barred classes of detained immigrants from receiving a bond determination. One such policy, known as “Operation Liberty Shield,” declared that all arriving asylum applicants from countries where “al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated” will be detained without bond pending a final decision on their cases.¹⁵¹ This new procedure operated without respect to whether the individual asylum applicants from these countries posed a security threat, danger to the community or flight risk. While the Operation Liberty Shield program was purportedly terminated in May 2004, the government’s authority to unilaterally deny due process to vulnerable populations based on nationality is deeply troubling.

With respect to the September 11 detainees, the former INS was instructed to oppose bond in every case unless the FBI expressed no interest in the case. This expression of “no interest” had to come from FBI Headquarters.¹⁵² The IG Report explains how the “no bond policy” was created and the difficulty former INS attorneys had in producing sufficient evidence to justify continued detention without bond. In his analysis, IG Fine remarked:

150. *Id.* at 3.

151. Press Release, Dep’t of Homeland Security, Operation Liberty Shield (March 17, 2003), http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0115.xml.

152. IG Report, *supra* note 142, at 72-90.

[A]s the Department learned more about the 762 September 11 detainees, the fact that many of these detainees were guilty of immigration violations alone, and were not tied to terrorism, should have prompted the Department to re-evaluate its original decision to deny bond in all cases. . . . The policy continued to place the INS in the untenable position of opposing bond unless it obtained a sign-off from FBI Headquarters stating that the FBI had no interest in the detainee, which was exceedingly hard to come by in the months immediately after the terrorist attacks. Thus, the INS still had to argue for “no bond” even when it had no information from the FBI to support that argument.¹⁵³

Notably, the Department of Homeland Security’s March 2004 guidance requires that ICE personnel and attorneys “independently review the individual circumstances of each case in which the FBI requests detention solely based upon information regarding an alien’s possible association with terrorism.”¹⁵⁴ While the March 2004 guidance is a step in the right direction, what is ultimately needed is objectivity—judges, not the immigration agency, must determine on a case-by-case basis whether detention without bond is appropriate.

C. *Special Registration*

On August 12, 2002, the Department of Justice rolled out the National Security Entry-Exit System (NSEERS), a tracking scheme that required visitors from certain countries—and others whom an immigration inspector decides meets certain secret criteria—to be fingerprinted, photographed and interrogated when they enter the country.¹⁵⁵ Following this announcement, the Justice Department expanded NSEERS to four groups of men already in the United States. The initiative, known as “call-in” registration, applied to certain men sixteen years of age and older from twenty-four predominantly Muslim and Arab countries, plus North Korea. Call-in registration drew more than 80,000 men to local immigration offices, where they

153. *Id.*

154. March 2004 Guidance, *supra* note 149, at 4.

155. Registration and Monitoring of Certain Nonimmigrants; Final Rule, 67 Fed. Reg. 52,584 (Aug. 12, 2002) (to be codified at 8 C.F.R. pts. 214 and 264).

were fingerprinted, photographed, and subjected to lengthy interrogations. Men were questioned on a range of subjects, including video rental history, frequency and location of prayer, family living outside of the United States, nature of coursework, and opinions on Islam. The consequences for non-compliance with the NSEERS program are severe and include arrest, detention and monetary fines.¹⁵⁶ An individual who is required to register under NSEERS also faces immigration consequences, such as removal, for non-compliance with the program. For example, an individual who fails to comply with NSEERS can be deemed to have failed to maintain immigration status under the INA unless he can show that such failure was excusable or not willful.¹⁵⁷ Similarly, an individual who fails to register upon departure without good cause is presumed to be “inadmissible” under the INA.¹⁵⁸

The fallout of the call-in registration program is evidenced by the flight of many immigrants to Canada, the inability of local immigration offices to handle the influx of registrants, and the unlawful detentions and interrogations that accompanied the program. Nearly 14,000 men who complied with call-in registration were placed in removal proceedings. In many cases, immigration officers failed to exercise prosecutorial discretion favorably towards those non-citizens who may have had pending immigration applications, strong family, educational, and professional ties, and other equities.

In 2003, the NSEERS program was transferred from the Department of Justice to the Department of Homeland Security. In December 2003, the DHS announced by interim rule that it would suspend the thirty day and annual interview requirements related to special registration. However, many elements such as departure registration, registration at ports of entry and the government’s authority to conduct domestic special interviews remain.¹⁵⁹ Despite the many criticisms of NSEERS and public announcements by DHS that special registration would be terminated and replaced by a tracking system that applied universally to certain temporary visa holders, recent meetings between NGOs and DHS officials indicate

156. For links to the regulations associated with the NSEERS program, please see U.S. Immigration and Customs Enforcement, Special Registration Archives, <http://www.ice.gov/graphics/specialregistration/archive.htm> (last modified Dec. 12, 2005).

157. 8 C.F.R. 214.1(f) (2005).

158. *Id.*

159. Suspending the 30-Day and Annual Interview Requirements From the Special Registration Process for Certain Nonimmigrants; Interim Rule, 60 Fed. Reg. 67,578 (Dec. 2, 2003).

that NSEERS is alive and well. Moreover, in written correspondence to Senator Durbin (D-IL), DHS suggested that NSEERS has been helpful and noted that it would be “premature” at this juncture to determine whether NSEERS will be further modified or terminated.¹⁶⁰

D. The Civil Liberties Restoration Act

Legislation that redresses some of the most extreme post 9-11 policies outlined above, the Civil Liberties Restoration Act (CLRA), was introduced in both chambers during the 108th Congress.¹⁶¹ In April 2005, the CLRA was introduced in the House of Representatives by Howard Berman (D-CA) and William Delahunt (D-MA).¹⁶² The CLRA requires that every immigrant be charged and served with an NTA within forty-eight hours of his arrest or detention or else be given the opportunity to see a judge within seventy-two hours for determination on whether continued detention without charge is appropriate.¹⁶³ With respect to bond, the CLRA requires that the government make individual determinations of bond for all detainees, except for those specified in the INA as subject to “mandatory detention.”¹⁶⁴ In making such determinations, the CLRA requires the agency or judge to assess whether the detainee poses a flight risk or a threat to public safety. With respect to special registration or NSEERS, the CLRA repeals the regulations associated with this program and provides relief for certain individuals who were placed in removal proceedings after complying with the program.¹⁶⁵ Specifically, CLRA extends relief in the form of “administrative closure” to immigrants placed in removal proceedings solely for failure to comply with the NSEERS program or those placed in removal proceedings while complying with the NSEERS program who (1) had a pending application before the Department of Labor or the Department of Homeland Security for which there is a visa available; (2) did not have a pending application before these agencies but were

160. Letter by Pamela Turner, Assistant Secretary for Legislative Affairs, Dep’t of Homeland Security to Sen. Dick Durbin (Dec. 1, 2005) (on file with author).

161. In the Senate, The Civil Liberties Restoration Act was introduced as S. 2528 by Senators Edward Kennedy (D-MA), Jon Corzine (D-NJ), Richard Durbin (D-IL), Russell Feingold (D-WI), and Patrick Leahy (D-VT). In the House, The Civil Liberties Restoration Act was introduced as H.R. 4591 by Representatives Howard Berman (D-CA) and William Delahunt (D-MA).

162. Civil Liberties Restoration Act, H.R. 1502, 109th Cong. (2005).

163. *Id.* § 201.

164. *Id.* § 203.

165. *Id.* § 301.

eligible for an immigration benefit; or (3) were eligible to apply for other forms of relief from removal.¹⁶⁶ The bill also allows individuals with a final order of removal as a result of NSEERS to reopen their case irrespective of the limits associated with “motions to reopen” for the purpose of applying for relief for removal.¹⁶⁷

The CLRA contains a number of additional safeguards, including the right to an open hearing, the creation of a more independent immigration court so that people in removal proceedings receive fair review and process, and the requirement that the federal criminal database, known as the National Crime and Information Center (NCIC), comply with accuracy requirements specified in the Privacy Act.¹⁶⁸

In June 2005, the House Judiciary Committee’s Subcommittee on Immigration, Border Security, and Claims held an oversight hearing on four provisions found in the CLRA.¹⁶⁹ Representative Berman opened the hearing with a discussion about the CLRA. When he spoke about the provisions on prolonged detentions without charges, Representative Berman mentioned the section of the Patriot Act allowing for detention without charge of non-citizens suspected of terrorism for up to seven days and mentioned specifically how the Department of Justice ignored this more measured rule in favor of its own regulation allowing for prolonged detention without charge in the event of an “emergency” or “extraordinary circumstance.” At the June 2005 hearing, Representative Delahunt spoke about “long-held and profound American values,” “transparency and fairness,” and stated that “consultation and oversight” are the keys to our democratic foundation. In response to a possible administrative burden on the government to implement the fixes raised in CLRA, Representative Delahunt remarked that “democracy isn’t cheap.” He identified “individualized justice and transparent government” as the “essence of what we are.” At the hearing, Representative Meehan (D-MA) raised the issue of NSEERS and mentioned his outstanding request to DHS for a list of individuals impacted by NSEERS with pending applications for adjustment. He identified the section in CLRA that would terminate the NSEERS program, provide relief for certain

166. *See id.*

167. Civil Liberties Restoration Act, H.R. 1502, 109th Cong. § 301 (2005).

168. *See id.* at §§ 101, 204, 304.

169. *Immigration Removal Procedures Implemented in the Aftermath of the September 11th Attacks: Hearing Before the House Subcomm. on Immigration, Border Sec., and Claims of the House Comm. on the Judiciary*, 109th Cong. (2005), available at http://commdocs.house.gov/committees/judiciary/hju22188.000/hju22188_of.htm.

individuals who complied and were placed in removal proceedings, and codify congressional findings regarding the former INS memo on prosecutorial discretion.¹⁷⁰ At the June 2005 hearing, the minority witness was Paul Rosenzweig, formerly the Senior Legal Research Fellow in the Center for Legal and Judicial Studies at the Heritage Foundation. He spoke persuasively about the benefits of presumptively open immigration hearings, timely charges and notice, and individualized bond determinations. On the issue of NTAs, he testified:

[E]ven those extraordinary circumstances cannot explain the absence of a legal standard. Notice of charges is a fundamental core aspect of what we consider reasonable due process. Indeed the requirement of notice of criminal charges goes back to the 1500s as a response to the Star Chamber of England.¹⁷¹

Rosenzweig stated that non-individual concerns, like resources, should not “blind” us into denying individualized bond—that to adopt blanket denial of bond by group characteristics is contrary to the ideas of “individualized justice.” While the progress appears small, the “floor time” CLRA received in the 109th Congress is impressive in light of the politics and priorities surrounding the Supreme Court nominations, natural disaster relief, Social Security, Medicare and immigration reform. NGOs continue to work closely on education and advocacy around CLRA-like issues to ensure that due process survives any “exceptional circumstance” or future enforcement measures that pass with “comprehensive immigration reform.”

170. H.R. 1502 at §§ 301, 302. See also Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service, to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel (Nov. 17, 2000) (stating that INS officers are authorized by law and expected to exercise discretion during enforcement), available at <http://uscis.gov/graphics/lawsregs/handbook/discretion.pdf>.

171. See *Immigration Removal Procedures Implemented in the Aftermath of the September 11th Attacks: Hearing Before the House Subcomm. on Immigration, Border Sec., and Claims of the House Comm. on the Judiciary*, 109th Cong. 5 (2005) (statement of Paul Rosenzweig, Senior Legal Research Fellow, The Heritage Foundation), available at <http://judiciary.house.gov/media/pdfs/rosenzweig063005.pdf>.

IV. REAL ID AND BEYOND

The REAL ID Act of 2005 passed as part of an emergency supplemental bill and was signed into law on May 11, 2005.¹⁷² While the supplemental bill was intended to assist troops in Iraq, victims of the 2005 Tsunami disaster, and others, the REAL ID Act makes a number of changes to the immigration process. It modifies the burden of proof in a host of removal and relief cases, including asylum and relief under the Convention Against Torture. For example, the bill authorizes judges to base credibility determinations on the applicant's demeanor, candor, responsiveness or inconsistency with any statement made at any time to anyone, "whether or not under oath and considering the circumstances under which the statements were made."¹⁷³ This provision could affect the asylum seeker or torture survivor who describes her story with less detail when she enters the United States because of language and culture barriers who then provides a more complete story months later on the stand when testifying before an Immigration Judge for asylum. The judge can base credibility determinations on any of the above factors "without regard to whether an inconsistency, inaccuracy or falsehood goes to the heart of the applicant's claim."¹⁷⁴ The REAL ID Act also authorizes judges to deny relief to immigrants if they lack written or "corroborating" evidence to support the facts in their case.¹⁷⁵ This requirement continues even if the applicant herself presents credible and comprehensive testimony, "unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence."¹⁷⁶ The bill also bars judicial reversal of decisions that were based on the availability (or lack of availability) of corroborating evidence, unless a judge is "compelled to conclude that such corroborating evidence is unavailable."¹⁷⁷ While some of the concepts described above are included in select administrative and judicial case law, wholesale codification of these standards has the potential to limit independent adjudications by the immigration courts.

The REAL ID Act of 2005 also limits judicial review to "questions of law" or "constitutional claims."¹⁷⁸ Similarly, the bill

172. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).

173. *Id.* § 101.

174. *Id.*

175. *Id.*

176. *Id.*

177. REAL ID Act of 2005, Pub. L. No. 109-13, § 101, 119 Stat. 231 (2005).

178. *Id.* § 106.

bars habeas corpus review in cases where “judicial review” and “jurisdiction to review” are already barred under the immigration statute.¹⁷⁹ This could limit the ability for an immigrant to challenge the legality of her removal order in federal court. For some, habeas was the only avenue of relief. Also included in the REAL ID Act is a new driver’s license scheme that imposes federal standards for issuance of drivers’ licenses and identifications.¹⁸⁰ If the state documents do not comply with these standards, they are barred under the statute from being accepted as evidence of identity by federal agencies.¹⁸¹ Moreover, the bill makes legal immigration status a requirement for receiving a state ID or driver’s license and sets up a two-class structure where certain legal immigrants receive “temporary” driver’s licenses.¹⁸² The REAL ID Act of 2005 further requires that state agencies verify every document that is submitted by individuals, including United States citizens, in support of their application.¹⁸³ This means that if a person submits a Cingular telephone bill to show her local address, then the DMV official would be required to contact the telephone company to ensure that the contents of the bill are accurate.

V. PENDING LEGISLATION

On the table now are a number of “stand alone” proposals that would erode immigrant rights by expanding the “aggravated felony” definition,¹⁸⁴ authorize state and local police to enforce federal civil immigration laws,¹⁸⁵ and expand the definition of and make deportable non-citizens who are members of gangs.¹⁸⁶ The Gang Deterrence and Community Protection Act of 2005 passed the House of Representatives on May 11, 2005 and would, among other things, expand the definition of “crime of violence” in the United States Code and, by extension, the “aggravated felony” definition.¹⁸⁷ This bill also

179. *Id.*

180. *Id.* § 202.

181. *Id.*

182. REAL ID Act of 2005, Pub. L. No. 109-13, §202, 119 Stat. 231 (2005).

183. *Id.*

184. Gang Deterrence and Community Protection Act of 2005, H.R. 1279, 109th Cong. (2005); S. 524, 109th Cong. (2005) (strengthening the consequences of the fraudulent use of United States or foreign passports and other immigration documents).

185. H.R. 1279; CLEAR Act of 2005, H.R. 3137, 109th Cong. (2005).

186. H.R. 1279; Alien Gang Removal Act of 2005, H.R. 2933, 109th Cong. (2005).

187. H.R. 1279 § 112.

would require the Department of Homeland Security to place the following groups of individuals into the NCIC: aliens with a final order of removal, aliens who have signed a voluntary departure agreement and all aliens who have overstayed their visa.¹⁸⁸ The Alien Gang Removal Act extends the “gang” label to immigrants who are not actually involved in gang activity or criminal wrongdoing.¹⁸⁹ As stated by Professor David Cole at a related congressional hearing:

What this bill does is make people deportable who have never committed a crime in their life, who are not suspected of committing a crime, who are merely deemed by the Department of Homeland Security to be a member of a group which is deemed by the Attorney General to be a bad group. Bad groups have bad people in them. They also have good people in them. This bill makes no distinction between the two. It deports anyone who is found to be a member of any group which has been blacklisted by the Attorney General. That's guilt by association. If you took the McCarthy era laws that this Congress repealed in 1990, and you just substitute “criminal street gang” for “communist,” that's what this bill would be. It essentially takes that approach where we punished people not for their own individual culpable conduct, but for their association with groups that we didn't like, and rendered them deportable. That's what this bill does, and it violates the first amendment right of association, and violates the fifth amendment right of an individual to be treated as an individual and not treated as culpable based on your associations.¹⁹⁰

Additional measures that threaten due process are found in the collection of House immigration bills that purport to “reform” immigration with an “enforcement first” approach. The most dramatic provisions can be found in the 257 page-long Sensenbrenner-King bill, which contains proposals that would (1) criminalize immigrants who

188. *Id.* §§ 117, 119.

189. H.R. 2933.

190. *Alien Gang Removal Act of 2005: Hearing on H.R. 2933 Before the House Subcomm. on Immigration, Border Sec., and Claims of the House Comm. on the Judiciary*, 109th Cong. 28-49 (2005) (statement of David Cole, Professor, Georgetown University Law School), available at <http://judiciary.house.gov/media/pdfs/printers/109th/22187.pdf>.

are “unlawfully present” in the United States, as well as organizations and individuals who assist such immigrants; (2) grant state and local police the “inherent authority” to enforce federal immigration laws; (3) extend the “aggravated felony” definition to such a degree that refugees and trafficking victims seeking protection, immigrant workers filling labor needs, and immigrants spouses and children seeking to reunite with their family members in the United States are detained and deported.¹⁹¹

Similarly, the above-described Cornyn-Kyl proposal authorizes the Department of Homeland Security to apply “expedited removal” to the entire Southern border, and imposes a minimum bond of \$5000 to aliens of certain nationalities or those who pose a flight risk if they are apprehended without being admitted or paroled within 100 miles of the border.¹⁹² Imposing a mandatory minimum to classes of aliens undermines the fundamental requirement that people detained are judged individually and released on bond if they are non-dangerous and likely to appear at future hearings.¹⁹³ The bill also provides greater authority for states and localities to detain immigrants beyond their criminal sentence until the Department of Homeland Security is able to pick them up; as well as statutory authority for states and local officials to apprehend, detain and arrest individuals for immigration violations.¹⁹⁴ The Cornyn-Kyl proposal also increases the mandatory sentence minimum to five years for undocumented immigrants who are convicted of crimes of violence or drug trafficking crimes—applying a different punishment based on immigration status raises constitutional concerns.¹⁹⁵ Under the bill, undocumented immigrants in the United States who are granted Deferred Mandatory Departure (DMD) status and working in the United States are required to waive fundamental due process protections like the right to administrative and judicial review.¹⁹⁶ Certain nationals determined by the Department of States as having terrorist ties are actually barred from the DMD program—barring this program to people based on their nationality opens a number of profiling related concerns and also potentially bars individuals fleeing violence or torture from receiving protection in the United States. These represent only a few of the

191. Sensenbrenner-King legislation, *supra* note 80, at II, IV, VI and VIII.

192. Cornyn-Kyl Proposal, *supra* note 40, §§ 102, 107.

193. *Id.* § 107.

194. *Id.* § 221.

195. *Id.* § 203.

196. *See supra* note 40.

provisions in the Cornyn-Kyl proposal that fail to meet minimum due process requirements.

VI. CONCLUSION

We stand to benefit greatly from advancing proposals that together reform our immigration laws and restore due process. The year 2005 marks the fortieth anniversary of the passage of the 1965 Immigration Act, which ended the national origin and racial quotas in our immigration system. The 1965 Immigration Act provided immigrants from Asia, Latin America and Africa with opportunities to build and contribute to America. The time is ripe to open doors again by modernizing our immigration system to provide opportunities for today's immigrants.

