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## **Border Security: Apprehensions of “Other Than Mexican” Aliens**

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Blas Nuñez-Neto, Coordinator  
Analyst in Domestic Security  
Domestic Social Policy Division

Alison Siskin  
Analyst in Social Legislation  
Domestic Social Policy Division

Stephen Viña  
Legislative Attorney  
American Law Division

# Border Security: Apprehensions of “Other Than Mexican” Aliens

## Summary

The United States Border Patrol (USBP) within the Department of Homeland Security (DHS) is charged with securing our nation’s borders between official ports of entry (POE). As the USBP discharges its mission it encounters unauthorized aliens from around the world attempting to illegally enter the United States. In fiscal year (FY) 2004, USBP agents apprehended 1.16 million people attempting to enter the country illegally between official POE; 93% of these aliens were Mexican nationals. Because the vast majority of people apprehended each year by the USBP are Mexican nationals, the agency categorizes aliens as Mexicans or Other Than Mexicans (OTM). Over the past three years, OTM apprehensions have more than tripled nationwide and have been concentrated along the South Texas border. The reasons for this dramatic increase, and its geographical concentration in Texas, are not altogether clear.

The number of people entering the country illegally between POE, and the concomitant proliferation of human and drug smuggling networks, can present risks to national security due to the ever-present threat of terrorism. Terrorists and terrorist organizations could leverage these illicit networks to smuggle a person or weapon of mass destruction into the United States, while the large number of aliens attempting to enter the country illegally could potentially provide cover for the terrorists. Additionally, the proceeds from these smuggling networks could potentially be used to finance terrorism. The issue of OTM apprehensions has received publicity recently for many of these reasons, which were highlighted during congressional testimony by DHS then-Deputy Secretary Admiral James Loy when he stated that Al-Qaeda is considering infiltrating the Southwest border due to a belief that “illegal entry is more advantageous than legal entry for operational security reasons.”

OTMs apprehended along the Southwest border by the USBP between official POE cannot be returned to Mexico because Mexico will not accept them. Instead, they must be returned to their countries of origin, or third countries that will accept them, by the Office of Detention and Removal Operations (DRO) within Immigration and Customs Enforcement (ICE). However, DRO does not have enough detention beds to accommodate every OTM that is apprehended. As a result of this, the majority of OTMs apprehended by the USBP are released into the interior of the United States with notices to appear before an immigration judge. Most of these released OTMs fail to show up for their hearings and are not ultimately removed. In order to address the increasing number of OTMs being apprehended and circumvent the regular removal process, the USBP is currently expanding its Expedited Removal (ER) program. Issues for Congress include the potential for terrorist infiltration, the lack of detention bed-space that causes OTMs to be released into the interior of the country, and how best to deploy DHS resources to address the growing number of OTMs entering into the country illegally.

This report will be updated as necessary.

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# Border Security: Apprehensions of “Other Than Mexican” Unauthorized Aliens

## Introduction

The United States Border Patrol (USBP) within the Department of Homeland Security (DHS) is charged with securing the United States’ borders.<sup>1</sup> Located within DHS’ Customs and Border Protection (CBP), the USBP’s primary mission is to detect and prevent the entry of terrorists, weapons of mass destruction, and unauthorized aliens into the country, and to interdict drug smugglers and other criminals *between* official ports of entry (POE). USBP agents have no official role *at* points of entry; instead, CBP inspectors stationed there are responsible for conducting immigration, customs, and agricultural inspections on entering aliens.

As the USBP discharges its mission along the nation’s borders, it encounters unauthorized aliens from around the world attempting to illegally enter the United States. In fiscal year (FY) 2004, USBP agents apprehended 1,158,802 people attempting to enter the country illegally between official POE. Of these apprehensions, 93% were Mexican nationals. In the new National Border Patrol Strategy, the agency notes that while some observers categorize the aliens being apprehended as economic migrants, “an ever present threat exists from the potential for terrorists to employ the same smuggling and transportation networks, infrastructure, drop houses, and other support then use these masses of illegal aliens as ‘cover’ for a successful cross-border penetration.”<sup>2</sup>

Because the vast majority of people apprehended each year by the USBP are Mexican nationals, the agency categorizes the aliens it apprehends as Mexican or “Other Than Mexican” (OTM). The issue of OTM apprehensions has received publicity recently due to Congressional testimony by DHS’s then-Deputy Secretary Admiral James Loy that Al-Qaeda is considering infiltrating the Southwest border due to a belief that “illegal entry is more advantageous than legal entry for operational security reasons,”<sup>3</sup> and due to the fact that over the past three years, OTM

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<sup>1</sup> For a more detailed analysis of the U.S. Border Patrol, refer to CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*, by Blas Nunez-Neto. For a more detailed account of the formation of DHS, refer to CRS Report RL31549, *Department of Homeland Security: Consolidation of Border and Transportation Security Agencies*, by Jennifer Lake, and CRS Report RL31560, *Homeland Security Proposals: Issues Regarding Transfer of Immigration Agencies and Functions*, by Lisa Seghetti.

<sup>2</sup> Department of Homeland Security, Bureau of Customs and Border Protection, “National Border Patrol Strategy,” Mar. 1, 2005, p. 5.

<sup>3</sup> U.S. Congress, Senate Select Committee on Intelligence, *National Security Threats to the* (continued...)

apprehensions have more than tripled. The reasons for this dramatic increase are not altogether clear and will be explored in greater detail subsequently.

OTMs apprehended along the Southwest border by the USBP between POE *cannot* be returned to Mexico because Mexico will not accept them. Instead, they must be returned to their countries of origin or a third country that will accept them. However, the Office of Detention and Removal Operations<sup>4</sup> (DRO) within Immigration and Customs Enforcement (ICE) does not have enough detention beds to detain every OTM that is apprehended until their removal date. DRO prioritizes its limited detention space for criminal aliens and threats to national security; as a result of this, the majority of OTMs apprehended by the USBP are released into the interior of the United States with notices to appear before an immigration judge on a certain date. The majority of the OTMs that are released do not appear on the specified date. In order to address the increasing number of OTMs being apprehended, the USBP is expanding an expedited removal (ER) program, which allows OTMs to be removed without appearing before an immigration judge. However, OTMs removed through this program must be mandatorily detained and there are currently not enough detention beds to expand ER to the entire Southwest border.

## Other Than Mexicans: DHS Procedures

### Border Patrol

When the USBP apprehends an alien attempting to enter the country illegally, the alien is processed in the field, which includes filling out the alien's name, date of birth, place of birth, and country of citizenship and reading them their administrative rights on Form I-826. Form I-826 gives the arrested alien the choice of requesting a hearing before an immigration judge, seeking asylum because they have a credible fear of being harmed if they are returned to their home country, or admitting to being in the United States illegally and requesting a voluntary departure. Aliens are to initial their choice and sign the bottom of the form. After that they are transported to the nearest USBP station for processing.<sup>5</sup> During this processing, the alien's ten fingerprints are to be entered into the Automated Biometric Fingerprint Identification System (IDENT). IDENT combines a photograph, two flat fingerprints, and biographical data into two databases which can be used to track repeat entrants and better identify criminal aliens. In the past few years, IDENT has been modified to allow for a ten fingerprint search of the Federal Bureau of Investigation's (FBI) Integrated Automated Fingerprint Identification System (IAFIS). According to DHS, and linked IDENT/IAFIS workstations have been

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<sup>3</sup> (...continued)

*United States*, 109<sup>th</sup> Cong. 1<sup>st</sup> sess., Feb. 16, 2005.

<sup>4</sup> For a more detailed account of immigration-related detention, refer to CRS Report RL32369, *Immigration-Related Detention: Current Legislative Issues*, by Alison Siskin.

<sup>5</sup> From CBP Congressional Affairs, Aug. 3, 2004.

deployed to every USBP station.<sup>6</sup> IAFIS is an automated 10 rolled fingerprint matching system linked to a database that holds over 40 million records, including wanted persons, stolen vehicles, deported felons, gang members, and terrorists. The biographical information received is placed in the Enforcement Case Tracking System (ENFORCE) database, an immigration case management system.<sup>7</sup>

Once the alien's biometric information has been entered into IDENT and has been checked against IAFIS, the alien's citizenship can be verified through criminal histories or immigration histories found in the databases if they have a record on file. If the alien is Mexican or Canadian, they can be voluntarily returned across the respective border if they have not committed a felony, been previously removed or deported from the United States, or have any outstanding warrants in the IAFIS system. Along the Southwest border, processing Mexicans who can be voluntarily returned takes only 10-15 minutes. After they are processed, the aliens are briefly held at the USBP station while they await the buses or vans that are used to return them to a nearby Mexican port of entry.<sup>8</sup>

If the alien that has been apprehended is not Mexican, however, the process of returning them to their nation of origin is more complicated. When a USBP agent apprehends an OTM, the agent must determine what the alien's country of origin is. If the OTM is *not* from a "special interest country"<sup>9</sup> and does not have any outstanding warrants or criminal history in the initial biometric IDENT/IAFIS check, they are designated for removal. If the OTM *is* from a "special interest country," then the agent in charge must check with the Terrorist Screening Center at the FBI, the Joint Terrorism Task Force, and CBP's National Targeting Center in order to ensure that the OTM does not pose a threat.<sup>10</sup> Once the agent is satisfied that all available avenues have been checked to verify whether the OTM poses a threat to American security the alien is placed into the formal removal process. If the OTM was apprehended in the Tucson or Laredo sectors, then the alien can be processed

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<sup>6</sup> Statement of USBP Chief David Aguilar in the U.S. Congress, House Appropriations Committee, Subcommittee on Homeland Security, Customs and Border Protection Operations, July 12, 2005.

<sup>7</sup> U.S. Department of Justice, Office of the Inspector General, *The Rafael Resendez-Ramirez Case: A Review of the INS's Actions and the Operation of Its IDENT Automated Fingerprint Identification System*, USDOJ/OIG Special Report, Mar. 2000, Appendix B.

<sup>8</sup> Testimony of U.S. Border Patrol Chief David Aguilar, in the U.S. Congress, Senate Committee on the Judiciary, Joint Hearing of the Terrorism, Technology, and Homeland Security Subcommittee and the Immigration, Border Security, and Citizenship Subcommittee, *The Southern Border in Crisis: Resources and Strategies to Improve National Security*, June 7, 2005. (Hereafter referred to as: testimony of USBP Chief Aguilar, June 7, 2005, and conversation with CBP Congressional Affairs on Aug. 3, 2005.)

<sup>9</sup> The terms "special interest country" and "country of interest" have been used interchangeably in Congressional testimony by DHS officials and refer to nations known to harbor terrorists or foment terrorism.

<sup>10</sup> For more information on the TSC, refer to CRS Report RL32366, *Terrorist Identification, Screening, and Tracking Under Homeland Security Presidential Directive 6*, by William J. Krouse.

through a special removal process called expedited removal (ER) which is being piloted there.<sup>11</sup> ER will be discussed in greater detail subsequently in this report.

Once an OTM is placed into the formal removal process, the USBP contacts the DRO at ICE in order to ascertain whether DRO has detention bedspace available for that OTM. At this point, the OTM will either be transferred to DRO for detention if bedspace is available, or the USBP, with DRO's sanction, will release the OTM with a notice to appear in court before a judge on a certain date.<sup>12</sup> This has led some critics to charge that the current OTM procedures amount to a "catch and release" program.<sup>13</sup>

## Detention and Removal Operations

**Overview of Detention.** The INA gives the Attorney General the authority to detain any alien in the United States while awaiting a determination of whether the alien should be removed from the United States.<sup>14</sup> As a result of the Homeland Security Act of 2002 (P.L. 107-296), the daily responsibility for detaining aliens is exercised by Immigration and Customs Enforcement's (ICE) Office of Detention and Removal (DRO). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>15</sup> amended the INA, effectively specifying levels of detention priority and classes of aliens subject to mandatory detention. Mandatory detention is required for certain criminal and terrorist aliens who are eligible for removal, pending a final decision on whether the alien is to be removed. Mandatory detention is also required for those subject to expedited removal.<sup>16</sup> Aliens apprehended by DHS entities that are not subject to mandatory detention can be paroled,<sup>17</sup> released on

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<sup>11</sup> Testimony of USBP Chief Aguilar, June 7, 2005.

<sup>12</sup> From a conversation with CBP Congressional Affairs, Aug. 2, 2005.

<sup>13</sup> Pauline Arrilaga, "'Catch and release' policy lets immigrants roam the United States freely," *The Associated Press*, July 15, 2005.

<sup>14</sup> INA §236(a). For detailed information on detention see, CRS Report RL32369, *Immigration-Related Detention: Current Legislative Issues* by Alison Siskin.

<sup>15</sup> Subtitle C of the Omnibus Consolidated Appropriations Act, 1997, P.L. 104-208, signed into law Sept. 30, 1996.

<sup>16</sup> Aliens subject to expedited removal must be detained until they are removed and may only be released due to medical emergency or if necessary for law enforcement purposes. If the arriving alien expresses a fear of persecution or an intent to apply for asylum, the alien is placed in detention until a "credible fear" interview can be held. If the alien is found to have a credible fear, he may be paroled into the United States. If the credible fear is unsubstantiated, the alien is detained until the alien is removed from the United States.

<sup>17</sup> "Parole" is a term in immigration law which means that the alien has been granted temporary permission to enter and be present in the United States. Parole does not constitute formal admission to the United States and parolees are required to leave when the parole expires, or if eligible, to be admitted in a lawful status.

bond,<sup>18</sup> or detained. Nationally, approximately 75% of the aliens in DRO detention facilities are mandatory detainees.<sup>19</sup>

In October 1998, the former Immigration and Naturalization Service (INS) issued a memorandum establishing detention guidelines consistent with the changes made by IIRIRA.<sup>20</sup> According to the guidelines, detainees are assigned to one of four detention categories: (1) required (mandatory); (2) high priority; (3) medium priority; and (4) lower priority.<sup>21</sup> Aliens in required detention must be detained<sup>22</sup> while aliens in the other categories may be detained depending on detention space and the facts of the case. Higher priority aliens should be detained before aliens of lower priority.<sup>23</sup>

**Border Patrol, OTMs, and Detention.** When the USBP encounters an OTM, they are to contact ICE's DRO to inquire about the availability of bed space. If bed space is available or if the alien falls into one of the mandatory detention categories (e.g., criminal alien, terrorist suspect), DRO is to take custody of the alien, placing the alien in detention.<sup>24</sup> If there is no available bed space and the alien is not a mandatory detainee, the USBP is to issue the alien a "notice-to-appear"<sup>25</sup> and release the alien on his or her own recognizance. The USBP cannot release aliens on bond, because aliens have to be placed in detention before they can be released on bond. Importantly, the availability of bed space tends to differ by geographic region. Through the end of May in FY2005, the USBP had released 65,709 OTMs.<sup>26</sup> In

<sup>18</sup> To be released on bond, the alien must prove that he is not a threat to people or property, and will appear at all future immigration proceedings and pay some amount of money; the minimum amount is \$1,500.

<sup>19</sup> Personal communication with Ricardo Velazquez, Congressional Relations, Bureau of Immigration and Customs Enforcement, Aug. 24, 2005.

<sup>20</sup> Memorandum from Michael Pearson, INS Executive Associate Commissioner, Office of Field Operations, to Regional Directors, *Detention Guidelines Effective October 9, 1998*.

<sup>21</sup> High priority detainees are aliens removable on security related or criminal grounds who are not subject to required detention, and aliens who are a danger to the community or a flight risk. Medium priority detainees are inadmissible, non-criminal arriving aliens not in expedited removal and not subject to mandatory detention. Low priority detainees are other removable aliens not subject to required detention, and aliens who have committed fraud while applying for immigration benefits with DHS.

<sup>22</sup> There are some very limited exceptions to mandatory detention.

<sup>23</sup> Michael A. Pearson, *INS Detention Guidelines*, Oct. 7, 1998. Reprinted in *Bender's Immigration Bulletin*, vol. 3, no. 21, Nov. 1, 1998, p. 1111. (Hereafter cited as Pearson, *INS Detention Guidelines*.)

<sup>24</sup> Mexican nationals who have a criminal record in the United States, who have previously been removed, or who have multiple attempts to enter the United States illegally are also detained.

<sup>25</sup> This document gives the alien a court date to appear for removal proceedings before an immigration judge.

<sup>26</sup> Unpublished Statistics from the Bureau of Customs and Border Protection. In FY2004, (continued...)



FY2004, only 37% of aliens released on bond or their own recognizance appeared for their removal proceedings.<sup>27</sup>

## Expedited Removal

**Expedited Removal Authority.** In order to deal more effectively with the large volume of persons seeking illegal entry and to address apparent shortcomings in the normal removal process, the DHS announced in August of 2004 that USBP agents would be allowed to exercise “expedited removal” authority at locations between the POE.<sup>28</sup> Expedited removal authority originated in §302 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),<sup>29</sup> which amended §235 of the INA. This authority allows immigration officers (USBP agents are formally designated as immigration officers in Federal Regulations) to deny an alien admission into the country and order an alien removed to their country of origin, without the opportunity for a formal hearing before an immigration judge, if the alien arrives without having proper documentation or by other fraudulent means.<sup>30</sup> The law makes an exception for aliens who intend to apply for asylum or who claim that they will be persecuted or tortured if they are returned to their country of origin. In such cases, the aliens are to be referred to an asylum officer to determine the credibility of their claims and they may receive a hearing before an immigration judge. Once an alien has been removed from the United States under the expedited removal authority, he is barred from re-entering the country for a period of five years, unless he applies for a waiver.

Since 1997, expedited removal has traditionally only been used at air and sea POE. In its 1997 implementing regulations, the Department of Justice announced that it would apply expedited removal proceedings only to “arriving aliens,” because it wished to gain insight and experience by initially applying the new procedures on a more limited and controlled basis, but it reserved the right to apply the procedures to additional classes of aliens within the limits set by statute at any time.<sup>31</sup> “Arriving aliens” are defined in regulations to mean “an applicant for admission coming or

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<sup>26</sup> (...continued)

Border Patrol released 34,164 OTMs and 3,200 Mexicans on their own recognizance. Unpublished Statistics from the Bureau of Immigration and Customs Enforcement.

<sup>27</sup> U.S. Department of Justice, Executive Office of Immigration Review, *FY2004 Statistical Yearbook*, p. H-3.

<sup>28</sup> 69 *Federal Register* 48877, 48878.

<sup>29</sup> P.L. 104-208, Div. C, §302, 110 Stat. 3009-546 (codified as amended at 8 U.S.C. §1225).

<sup>30</sup> INA §235(b)(1); 8 U.S.C. §1225(b)(1). Specifically, expedited removal proceedings may be applied to aliens who violate INA §§ 212(a)(b)(C) or 212(a)(7).

<sup>31</sup> 62 *Federal Register* 10312, 10314-10315 (codified as amended at 8 C.F.R. §235.3). The Department of Justice also acknowledged applying the procedures to aliens already in the United States would involve more complex determinations of fact and would be more difficult to manage.

attempting to come into the United States at a port of entry.”<sup>32</sup> The INA allows expedited removal proceedings to be applied to two categories of aliens. First, §235(b)(1)(A)(i), requires that expedited removal proceedings be applied to aliens “arriving in the United States.” Section 235(b)(1)(A)(iii) additionally permits the Secretary to apply (by designation) expedited removal proceedings to aliens who arrive in, attempt to enter, or have entered the United States without having been admitted or paroled following inspection by an immigration officer at a port of entry, and who have not established to the satisfaction of the immigration officer that they have been physically present in the United States continuously for the two-year period immediately prior to the date of determination of inadmissibility.<sup>33</sup>

The expedited removal authority recently granted to the United States Border Patrol (USBP) stems from the discretionary authority granted in §235(b)(1)(A)(iii) of the INA.<sup>34</sup> DHS has elected to assert and implement only that portion of the authority granted by the statute that bears close temporal and spatial proximity to illegal entries at or near the border. Accordingly, the expedited removal authority granted to USBP agents only applies to aliens who are discovered to have entered the country without having proper documentation or by other fraudulent means and:

[W]ithout having been admitted or paroled following inspection by an immigration officer at a designated port of entry, who are encountered by an immigration officer within 100 air miles of the U.S. international land border, and who have not established to the satisfaction of an immigration officer that they have been physically present in the United States continuously for the fourteen-day (14-day) period immediately prior to the date of encounter.<sup>35</sup>

DHS, as a matter of prosecutorial discretion, only plans to apply this authority to non-Mexican or non-Canadian citizens apprehended along the border and to Mexican and Canadian nationals with criminal or immigration violation histories (such as drug or alien smugglers or aliens who have made numerous illegal entries).<sup>36</sup> Currently, the USBP exercises its new expanded expedited removal authority only along the Laredo and Tucson sectors, but has authority to implement it within all of its northern and southern land border sectors.<sup>37</sup>

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<sup>32</sup> 8 C.F.R. §1.1(q).

<sup>33</sup> Pursuant to INA §235(a)(1), an alien present in the United States who has not been admitted is deemed to be an “applicant for admission.”

<sup>34</sup> The INS also used the authority in INA §235(b)(1)(A)(iii) to expand expedited removal authority to all aliens who arrive in the United States by sea, either by boat or other means, who are not admitted or paroled, and who have not been physically present in the United States continuously for the two-year period prior to a determination of inadmissibility by a Service officer. See *67 Federal Register* 68924.

<sup>35</sup> *69 Federal Register* 48877.

<sup>36</sup> *Ibid.* at 48878.

<sup>37</sup> *69 Federal Register* 48880 (citing the following sectors: Laredo, McAllen, Del Rio, Marfa, El Paso, Tucson, Yuma, El Centro, San Diego, Blaine, Spokane, Havre, Grand Forks, Detroit, Buffalo, Swanton, and Houlton).

At POE, where ER has been in use since 1997, aliens can be denied admission and returned to the country they attempted to enter from, often on the next available airplane flight.<sup>38</sup> In effect, the alien can be removed in a matter of hours through the ER process at POE. For aliens entering the country between POE (i.e., non-arriving aliens), §241(b)(2) of the INA provides a three-step process to determine the country of removal: (1) the country designated by the alien; (2) an alternative country of which the alien is a subject, national, or citizen, with certain conditions; and (3) an additional country, such as the country from which the alien boarded a conveyance to the United States or the country of the alien's residence or birth. An OTM would apparently not be eligible for removal to Mexico under categories (1) and (2) if he is not a native, citizen, subject, national of, or has resided in, Mexico.<sup>39</sup> If the alien cannot be removed under categories (1) and (2), category (3) lists additional criteria for eligible removal countries. Most particularly, §241(b)(2)(E)(vii) states that if it is "impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph," the alien can be removed to "another country whose government will accept the alien into that country." Because the Mexican government is currently not accepting the return of OTMs apprehended between the POE and subject to ER,<sup>40</sup> they must be detained until they are removed to an appropriate country, a process which on average takes about a month.

**Expedited Removal In Practice.** When a USBP agent in a sector where ER is available (currently the Tucson, Arizona and Laredo, Texas sectors) apprehends an OTM, they are to make an initial determination as to whether that person has a legal right to be in the United States. Once that initial determination about their legal status is made, the USBP agent must then interview the OTM to establish whether he or she has a credible fear of being persecuted if they are returned to their nation of origin. If the OTMs are not seeking asylum and do not establish credible fear of persecution, they can be removed from the country without appearing before an immigration judge. As part of the ER process, the OTMs must be mandatorily detained.<sup>41</sup> Once an OTM is placed in the ER process, on average it takes 32 days for that alien to be removed. This compares to an average of 89 days for an alien who has been detained and is in the regular removal process. However, thus far in FY2005 over 70% of aliens in the regular removal process were not detained and were instead released with a notice to appear (NTA) before an immigration judge; only 30% of those who were released actually appeared at their hearing; and only

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<sup>38</sup> See INA §§241(b)(1), 241(c).

<sup>39</sup> Under INA §241(b)(2)(B), an alien cannot "designate" a foreign territory contiguous to the United States as the place to which the alien is to be removed, unless they are a native, citizen, subject, national of, or have resided in, that designated territory. Under INA §101 (a)(33), the term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

<sup>40</sup> From Immigration and Customs Enforcement Congressional Affairs, June 16, 2005. *But cf.* Final Rule, *Execution of Removal Orders; Countries to Which Aliens May be Removed*, 70 *Federal Register* 661 (Jan. 5, 2005) (finding only one acceptance requirement within §241(b)(2) of the INA, §241(b)(2)(E)(vii)).

<sup>41</sup> Testimony of USBP Chief Aguilar, June 7, 2005.

15% of those who appeared at their hearings and are ordered removed, but are not detained, appeared for their removal.<sup>42</sup>

Aliens placed in expedited removal are subject to mandatory detention, but many of those subject to expedited removal do not have criminal records, multiple re-entries, or other characteristics which would make them subject to mandatory detention absent a determination of expedited removal. If there is no bed space available, aliens encountered by the USBP who are subject to expedited removal, and who do not have another reason to be mandatorily detained, may be released on their own recognizance despite the legal requirement that they be detained.<sup>43</sup> According to Congressional testimony, the ER program has returned over 20,000 OTMs<sup>44</sup> to their nations of origin since September 2004.<sup>45</sup> USBP Chief David Aguilar recently maintained that in those sectors where ER has been implemented, “the reducing impact of ER on OTM apprehension rates, as compared to other sectors, is clear.” Chief Aguilar also noted that Secretary Chertoff has approved the expansion of ER to “additional Border Patrol sectors upon satisfactory completion of training and within the parameters of available detention space.”<sup>46</sup> However, given the mandatory detention requirement associated with ER, it does not appear that there are currently enough detention beds to expand the program to every USBP sector. On September 14, 2005, DHS announced that it is expanding “Expedited Removal authority” throughout the southwest border.<sup>47</sup> It is unclear how this expansion will be implemented given the current lack of detention resources.

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<sup>42</sup> Testimony of Detention and Removal Operations Acting Director Wesley Lee, Senate Committee on the Judiciary, Joint Hearing of the Terrorism, Technology, and Homeland Security Subcommittee and the Immigration, Border Security, and Citizenship Subcommittee, *The Southern Border in Crisis: Resources and Strategies to Improve National Security*, June 7, 2005. Hereafter referred to as testimony of DRO Director Lee, June 7, 2005.

<sup>43</sup> Personal communication with Ricardo Velazquez, Congressional Relations, Bureau of Immigration and Customs Enforcement, Aug. 24, 2005.

<sup>44</sup> This number does not appear to match the statistics CRS received from DRO for the Tucson and Laredo sectors which were presented in **Table 1**.

<sup>45</sup> Testimony of USBP Chief Aguilar, June 7, 2005

<sup>46</sup> Testimony of USBP Chief David Aguilar, in U.S. Congress, House Committee on Appropriations, Subcommittee on Homeland Security, *Coping With Illegal Immigration on the Southwest Border*, July 12, 2005.

<sup>47</sup> Department of Homeland Security, Public Affairs, “DHS Expands Expedited Removal Authority Along Southwest Border,” Sept. 14, 2005.

## Other Than Mexican Apprehensions

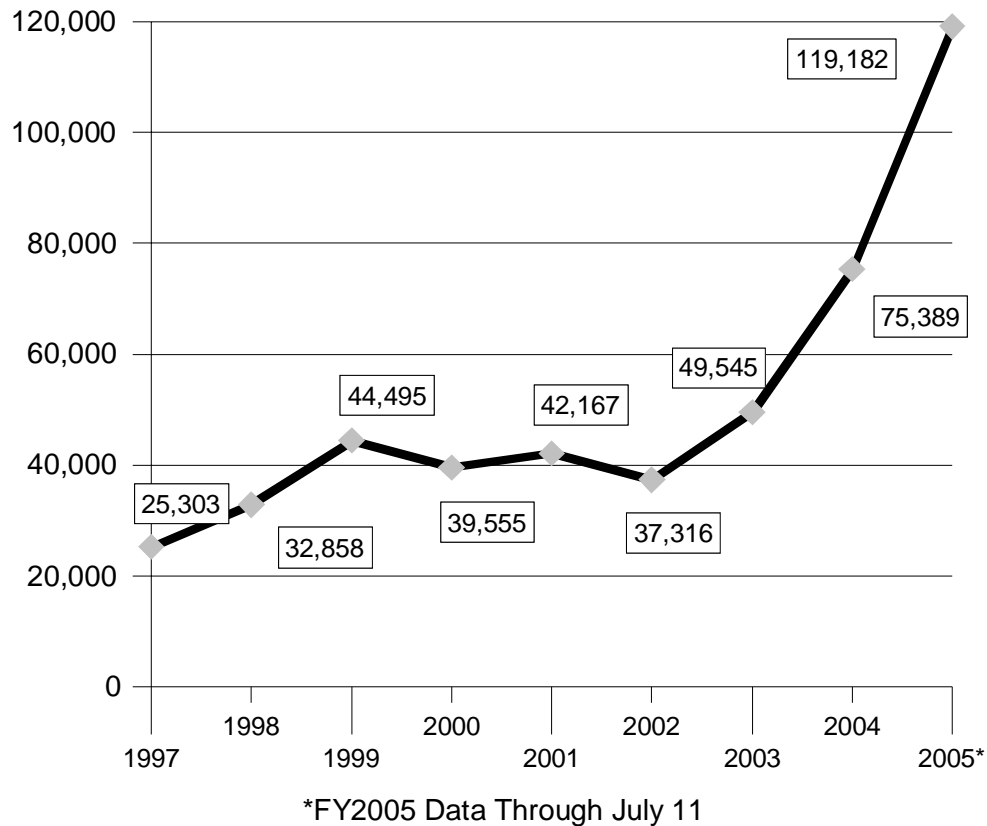
Apprehension statistics have long been used as a performance measure by the USBP. However, the number of apprehensions may be a misleading statistic for several reasons, including the data's focus on events rather than people<sup>48</sup> and the fact that there are no reliable estimates for how many aliens successfully evade capture. This makes it difficult to establish a firm correlation between the number of apprehensions in a given sector and the number of people attempting to enter through that sector. While caution should be taken when attempting to draw conclusions about the efficacy of policy initiatives based solely on apprehensions statistics, *they remain the most reliable way to codify* trends in illegal migration along the border.

### Overall OTM Apprehensions

**Figure 1** shows the overall number of OTMs apprehended by the Border Patrol over the past nine years. The number of OTM apprehensions remained relatively stable from 1998 to 2002, averaging almost 37,000 a year over the six-year time period. Apprehensions increased by 33% from FY2002 to FY2003, and 52% from FY2003 to FY2004. Roughly three-quarters of the way into FY2005, OTM apprehensions have increased by 58% from FY2004. Indeed, over the last three years OTM apprehensions have more than tripled, increasing by almost 220%. This trend is in stark contrast to apprehensions of Mexican aliens, which have remained relatively stable over the same period. **Figure 1** illustrates the dramatic increase in OTM apprehensions over the past three years.

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<sup>48</sup> If the same person is apprehended multiple times attempting to enter the country in one year, each apprehension will be counted separately by the USBP in generating their apprehension statistics. This means that apprehension statistics may overstate the number of aliens apprehended each year.

**Figure 1. OTM Apprehensions by Fiscal Year**

**Source:** CRS Analysis of CBP Data.

The dramatic increase in the number of OTMs being apprehended may be of concern to Congress for several reasons. First, the rapid increase in OTM apprehensions over the past two years suggests that, for some reason, many more non-Mexican immigrants may be attempting to enter the country illegally today than in the past (It is also possible that the USBP has become increasingly effective in apprehending OTMs). This phenomenon is too recent for any in-depth analysis of its causes to exist, but there are several plausible scenarios that have been the focus of the increasing popular press coverage of the issue. For example, the OTM increase may be due to the ramping up of enforcement measures at POE. As the U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT)<sup>49</sup> system has been implemented at our nation's airports and some land POE, it is possible that an increased number of non-Mexican aliens have decided that their best option for entering the country is the land border between POE rather than through the regular immigration process at POE.

<sup>49</sup> For a more detailed discussion of the US-VISIT program, refer to CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT)*, by Lisa Seghetti.

Another possible cause for the increase could be the growing number of gangs specializing in smuggling human beings across the Mexican border into the United States. As the USBP has increased the number of agents assigned to the southwest border, making the border crossing more difficult and demanding for unauthorized aliens, there is growing evidence that a number of smuggling networks have sprung into existence to accommodate the increased demand. These networks can be formal or informal, spanning from sophisticated organizations that alter vehicles and other conveyances to conceal human beings or drugs, to the “coyotes” that guide migrants across the border for a fee. There have been some reports that the more organized groups have focused on OTMs because they can typically charge more to non-Mexicans. One of the main groups smuggling aliens and drugs into the United States from Mexico is known as “Los Zetas” and contains many ex-members of the Mexican military according to the Federal Bureau of Investigation (FBI). A recent FBI bulletin reportedly noted that “FBI intelligence indicates that Los Zetas are becoming increasingly reportedly involved in systematic corruption as well as alien smuggling ... (including smuggling) special interest aliens into the United States.”<sup>50</sup> Other criminal groups involved in cross-border smuggling include the Mara Salvatrucha, or MS-13, gang which has established a growing presence in cities across the United States.

A third possible reason for the influx of non-Mexican migrants may be the growing international awareness that a “loophole” may exist in the immigration system. While Mexican (and Canadian) nationals can be voluntarily returned across the border, non-Mexican nationals must be returned to their nation of origin or some other third country that will accept them. Mexico will not accept OTMs apprehended by the USBP along the border.<sup>51</sup> However, DHS does not have sufficient detention bed space to accommodate every OTM that is apprehended, so the majority of the OTMs that are apprehended are released on their own recognizance or on bond into the interior. According to a Border Patrol spokesman from the Del Rio Sector, “word is out that we are unable to detain the other than Mexican crossers, and they are exploiting a bottleneck in the system.”<sup>52</sup>

## OTM Apprehensions along the southwest Border

The southwest border has long been the flashpoint for illegal immigration into the United States. Each year, on average 97% of the overall apprehensions made by the USBP occur along the U.S. border with Mexico. While the vast majority of the people apprehended by the USBP have historically been Mexican, as **Figure 1** shows the number of OTMs attempting to enter the country illegally has increased significantly in the last two years. **Figure 2** breaks down the number of OTMs apprehended by the USBP over the past four years, which is the period of time during which OTM apprehensions have surged, along the southwest border’s USBP sectors.

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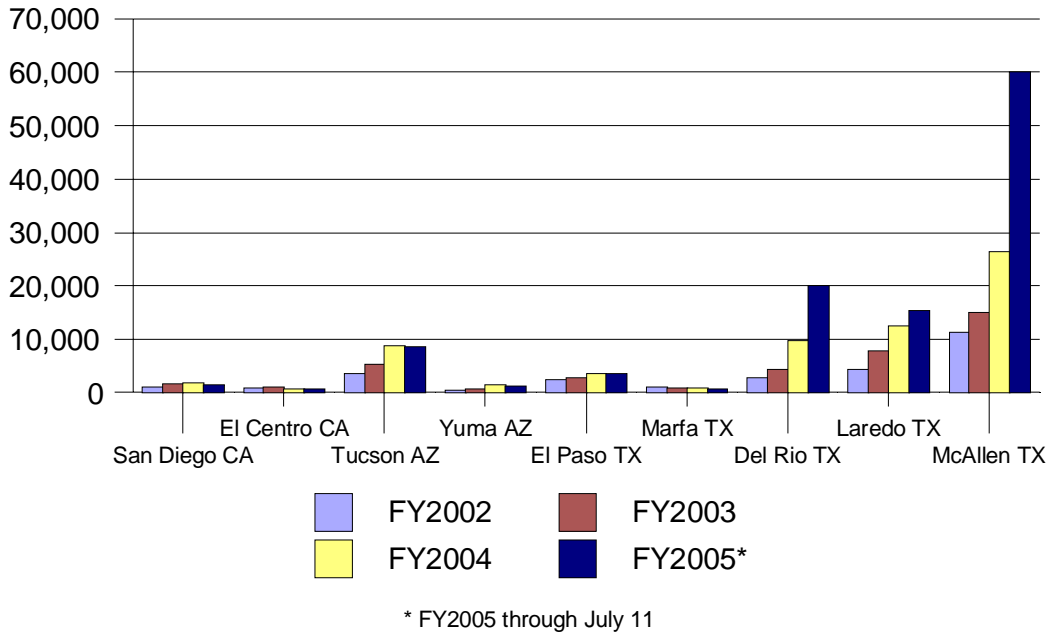
<sup>50</sup> Alfredo Corchado and Jason Tracham, “FBI Bulletin Outlines Possible Terrorist Plot at Texas Border,” *Dallas Morning News*, July 16, 2005.

<sup>51</sup> From Immigration and Customs Enforcement Congressional Affairs, June 16, 2005.

<sup>52</sup> As quoted by Tim Gaynor, “Non-Mexican Immigrants Swamp Texas Border City,” *Reuters News*, May 30, 2005.

Thus far in FY2005, 80% of all OTM apprehensions have occurred along the Texas border, with the McAllen sector alone accounting for just over 50% of overall OTM apprehensions. The concentration of OTM apprehensions in Texas generally and in McAllen specifically is intriguing because it contrasts with overall USBP apprehensions figures. Nationwide, Arizona accounted for 51% of all apprehensions along the southwest border in FY2004, and for 76% of the overall national increase in apprehensions between FY2003 and FY2004. In FY2004, the McAllen sector accounted for only 8% of all apprehensions made but for 35% of all OTM apprehensions. Through July 11 in FY2005, this disparity has grown even more stark, with McAllen accounting for 6% of all apprehensions but for 50% of all OTM apprehensions.

**Figure 2. OTM Apprehensions by southwest Border Sector**



**Source:** CRS Analysis of CBP Data.

**Figure 2** demonstrates the clear escalation in OTM apprehensions in the Del Rio, Laredo, and McAllen sectors in Texas. From FY2002 to FY2005, OTM apprehensions increased by 613% in Del Rio, 258% in Laredo, and 429% in McAllen. Because FY2005 data were available only through July 11, these numbers will likely increase once the year ends. The increase in OTM apprehensions along much of the Texas border thus clearly outstrips overall increase in OTM apprehensions nationwide.

There are a variety of causes for this disparity in the migration patterns between Mexican and non-Mexican nationals. The increase in OTM apprehensions along the Texas border may be related to the lack of detention bedspace in Texas. Some have speculated that news of this shortfall in detention space in Texas, which leads most OTMs to be released on bond with a notice to appear before an immigration judge, has been circulating in Central and South America and has led OTM aliens to enter the country along the Texas border. According to a USBP agent’s published account, OTMs do not attempt to avoid capture but rather turn themselves in freely knowing



that they will be released: “[y]ou see them [OTMs] cross over the river together in a line and come around like a snake to where the (patrol agent’s) flash light is ... and just give themselves up.”<sup>53</sup>

Another possible cause for this phenomenon may be geographical. South Texas is the nearest U.S. border for migrants crossing Mexico from Central America and thus the most easily accessible. In effect, migrants may be choosing the shortest route to the border and thus are being funneled into South Texas. While this does not explain the rapid increase in OTM apprehensions, it could explain why OTM apprehensions are concentrated in South Texas.

Yet another possible explanation for the concentration of OTM apprehensions along the South Texas border may be that there are currently more smuggling networks operating along the Texas border. These smuggling networks reportedly take advantage of the lack of detention bedspace along the Texas border. According to a USBP supervisor interviewed by National Public Radio, “[a] lot of times, smugglers educate their groups of aliens and they tell them that if they’re arrested by the Border Patrol and they are issued these papers to walk, they will pick them up again after they are released and continue their trip to wherever they are going.”<sup>54</sup>

Lastly, it may be that over the last couple of years these networks have turned their attention to the smuggling of OTMs instead of drugs. CRS analysis of CBP data shows that the majority of drugs seized by USBP agents occurs along the Texas border. **Figure 3** illustrates this point by showing the pounds of cocaine seized by USBP agents along the southwest border from FY1999 through February 2005. **Figure 3** shows that the majority of the cocaine seized by USBP agents over this period of time has been along the Texas border. The Laredo and McAllen sectors in Texas, in turn, are the hot-spots along the southwest border for cocaine smuggling. The same relationship holds true for heroin smuggling along the southwest border. For marijuana smuggling, Texas as a whole continues to lead other states in overall pounds seized, but the Tucson sector in Arizona has seen the largest amount of marijuana seized over the past three years<sup>55</sup> — possibly due to the Arizona Border Control Initiative (ABCI), a large-scale multi-disciplinary initiative that seeks to coordinate federal, state, and local authorities to control the Arizona border. ABCI is specifically aimed at stopping cross-border smuggling operations by detecting, arresting, and deterring all groups seeking to bring people, drugs, weapons, and other merchandise into the country illegally.<sup>56</sup>

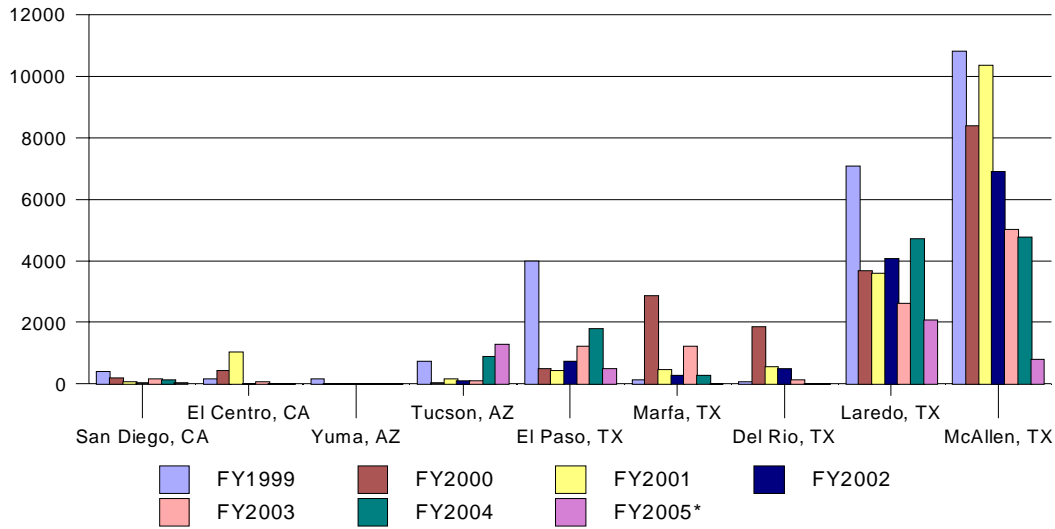
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<sup>53</sup> Tim Gaynor, “Non-Mexican Immigrants Swamp Texas Border City,” *Reuters News*, May 30, 2005.

<sup>54</sup> John Burnett and Susan Stamberg, “Non-Mexican Immigrants Who Are Detained Allowed to Stay in the United States,” *National Public Radio Morning Edition*, July 11, 2005.

<sup>55</sup> From CRS analysis of CBP data.

<sup>56</sup> For more information about the Arizona Border Control Initiative, refer to CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*, by Blas Nunez-Neto.

**Figure 3. Pounds of Cocaine Seized by USBP, by SW Sector and FY**

\* FY2005 through February 28

**Source:** CRS Analysis of CBP Data.

This analysis suggests that there is a network of smuggling organizations operating along the Texas border that have been bringing drugs into the United States. Interestingly, a comparison of **Figure 2** and **Figure 3** reveals that while OTM apprehensions have been increasing in the Del Rio, Laredo, and McAllen sectors since 2002, the amount of cocaine being seized by USBP agents in those sectors has been decreasing. It may be that over the last couple of years these networks have turned their attention to the smuggling of OTMs instead of drugs. This relationship may give credence to those who argue that smuggling organizations are highly adaptable and will substitute the goods they smuggle in order to maximize profit. This would likely be of concern to Congress given the ever-present threat that terrorists may leverage these smuggling organizations to bring weapons or people into the country. However, this relationship may be due to other factors. For example, the workload generated by the dramatic increase in OTM apprehensions may have made it more difficult for USBP agents to focus on drug seizures. Or, it may be that other smuggling organizations have sprung up in the same locations to serve the growing numbers of OTMs seeking illegal entry into the United States. Nevertheless, the existence and possible proliferation of smuggling organizations along the Texas border specializing in bringing drugs and human beings into the United States is clearly of concern to Congress, and presents an ever-present threat to homeland security. In the words of then-Deputy DHS Secretary Admiral James Loy, “[e]ntrenched human-smuggling networks and corruption in areas beyond our borders can be exploited by terrorist organizations.”<sup>57</sup>

<sup>57</sup> U.S. Congress, Senate Select Committee on Intelligence, *National Security Threats to the United States*, 109<sup>th</sup> Cong. 1<sup>st</sup> sess., Feb. 16, 2005.

## OTM Removal Statistics

**Table 1** shows that between FY2004 and FY2005,<sup>58</sup> there was an increase in both the number of OTMs apprehended, and the percentage of OTMs released on their own recognizance. Mc Allen, TX and Del Rio, TX, the two sectors with the highest numbers of OTM apprehensions, had the highest percentage of OTMs released on their own recognizance. In addition, Mc Allen, TX, experienced the largest increase in the percentage of OTMs released on their own recognizance, from 61.9% to 90.2%. All the southwestern border sectors with the exceptions of Tucson, AZ, Yuma, AZ, and Livermore, CA, had increases in the percent of OTMs released on their own recognizance. In FY2005, over 70% of the OTMs apprehended by the USBP have been released on their own recognizance. Along the Texas border, 80% of the OTMs apprehended in FY2005 were released on their own recognizance.

**Table 1. Number of OTMs Arrested and Number and Percent of OTMs Released on Their Own Recognizance (OR), FY2004 and FY2005**

Border Patrol Sector	FY2004 OTM Arrests	FY2004 Total OR	FY2005 <sup>a</sup> OTM Arrests	FY2005 <sup>a</sup> Total OR	FY2004 % OR	FY2005 <sup>a</sup> % OR
Del Rio, TX	9,896	8,696	15,642	14,219	87.9%	90.9%
El Paso, TX	3,571	1,058	2,949	1,566	29.6%	53.1%
Laredo, TX	12,506	3,698	12,670	4,707	29.6%	37.2%
Marfa, TX	793	207	642	238	26.1%	37.1%
Mc Allen, TX	26,432	16,374	46,616	42,060	61.9%	90.2%
Tucson, AZ	8,787	2,407	6,553	379	27.4%	5.8%
Yuma, AZ	1,420	141	980	27	9.9%	2.8%
El Centro, CA	742	70	596	100	9.4%	16.8%
Livermore, CA	98	4	6	0	4.8%	0.0%
San Diego, CA	1,768	127	1,294	198	7.2%	15.3%
<b>Total: SW Border</b>	<b>66,013</b>	<b>32,782</b>	<b>87,948</b>	<b>63,494</b>	<b>49.7%</b>	<b>72.2%</b>
Total: all other areas	9,487	1,382	6,120	2,215	14.6%	36.2%

**Source:** CRS presentation of CBP data

**Note:** Aliens not released on an order of recognizance were detained by DRO. Nonetheless, those aliens may have been released on bail at a later date.

a. Data for FY2005 are through May 30, 2005.

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<sup>58</sup> Data for FY2005 are from Oct. 1, 2004, through May 30, 2005.

## OTM Apprehensions by Nationality

**Table 2** tracks the top 25 OTM countries in FY2005 over the three previous fiscal years, showing the percent change from FY2002 to July 11 in FY2005. Over the four-year period, the top four countries have been: Honduras (84,345), El Salvador (60,929), Brazil (44,595), and Guatemala (41,950). The drop off to the fifth largest OTM contributing nation is steep: Cuba had 6,394 OTMs apprehended over the almost four-year period.

**Table 2. Top 25 OTM Countries in FY2005**

Country	FY2002	FY2003	FY2004	FY2005 <sup>a</sup>	% Change FY02-FY05
Honduras	9,316	14,491	24,420	36,118	288%
Brazil	3,100	5,240	8,859	27,396	784%
El Salvador	7,036	9,602	16,974	27,317	288%
Guatemala	6,021	7,728	11,628	14,866	147%
Nicaragua	581	765	1,460	2,498	330%
Cuba	1,541	1,303	1,406	2,144	39%
China	688	576	1,096	1,653	140%
Ecuador	664	521	679	989	49%
Dominican Republic	1,183	2,057	2,023	969	-18%
Costa Rica	233	382	450	700	200%
Canada	1,836	1,611	1,497	697	-62%
Peru	312	366	370	388	24%
Colombia	347	368	335	308	-11%
India	345	316	378	235	-32%
Jamaica	287	269	215	162	-44%
Bolivia	48	59	140	161	235%
Albania	167	115	117	155	-7%
Argentina	207	252	168	138	-33%
Haiti	295	324	165	131	-56%
Poland	228	205	231	122	-46%
Romania	42	58	85	103	145%
South Korea	143	218	161	98	-31%
Pakistan	167	228	164	91	-46%
Venezuela	69	126	132	88	28%
Israel	103	109	91	68	-34%

**Source:** CRS Analysis of CBP Data  
a. FY2005 Data Through July 11.

**Table 2** shows the increasing scale of the OTM problem. Honduras has consistently been the largest contributor of OTMs from FY2002 to July 11, 2005. However, in FY2002 there were 9,316 Honduran OTMs; thus far in FY2005 there have been 36,118 Hondurans apprehended. This means that from FY2002 to today, apprehensions of Honduran OTMs increased by 288%. While this sharp increase is significant, it pales in comparison to the 784% increase in Brazilian OTMs apprehended at the border over the same period. Not surprisingly, the number of Brazilians being apprehended at the border has received a large amount of popular press coverage.

**Brazilian OTM Apprehensions.** The increase in Brazilian OTM apprehensions may be attributed to a variety of factors. First, non-immigrant visa issuances to Brazilians seeking to enter the United States legally have dropped significantly in the past decade, from roughly 500,000 in 1997 to 100,000 in 2002<sup>59</sup>. CRS does not currently have data on visa-refusal rates for Brazil. The visa-refusal rates could demonstrate whether the demand for visas in Brazil has declined during this period, accounting for the decrease in visa issuances, or whether the demand has remained stable but fewer visas have been issued. This decrease in visa issuances has taken place during a period of severe economic stagnation in Brazil. Meanwhile, in 2000, Mexico dropped its entry visa requirements for Brazilians. Faced with increasing difficulty in acquiring visas to enter the United States legally and a souring economy in Brazil, many Brazilians appear to be exploiting their ability to enter Mexico without a visa, using Mexico as a jumping off point to enter the United States illegally.<sup>60</sup> Second, information about U.S. OTM procedures appears to have been disseminated widely in Brazil. This may be due in part to the Brazilian soap opera “America,” which follows a young woman’s illegal journey to the United States through Mexico and has drawn a nightly viewing audience of over 40 million people since its inception in March.<sup>61</sup> According to a USBP supervisor in Texas, Brazilians “seem to know the process. It seems to be common knowledge that they won’t be immediately deported.”<sup>62</sup> Lastly, there appear to be well-organized smuggling networks in Brazil which specialize in bringing Brazilians into the United States. These networks sometimes operate legal storefronts as “travel agencies,” charging roughly \$10,000 for door-to-door transportation from Brazil to U.S. cities such as Boston and Atlanta. A typical journey would involve flying to Mexico City, traveling either by airplane or bus to the city of Reynosa, and then crossing the border illegally into McAllen, Texas. Many of these “travel agencies” furnish the Brazilian OTMs with money to pay the immigration bond that will be needed to release the Brazilian if they are apprehended by the USBP.<sup>63</sup> According to published reports,

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<sup>59</sup> U.S. Department of State, *Nonimmigrant Visas Issued by Issuing Office (Including Border Crossing Cards) Fiscal Years 1992-2004*, available at [[http://travel.state.gov/pdf/visa\\_office\\_report\\_table\\_xix.pdf](http://travel.state.gov/pdf/visa_office_report_table_xix.pdf)].

<sup>60</sup> Testimony of USBP Chief Aguilar, June 7, 2005.

<sup>61</sup> Larry Rohter, “Brazilians Streaming Into the United States Through the Mexican Border,” *The New York Times*, June 30, 2005, Sect. A, Col. 1.

<sup>62</sup> Teresa Borden, “Loophole Allows Brazilians to Slip Into the United States, Stay Illegally,” *The Atlanta-Journal Constitution*, July 6, 2005, p. 1A.

<sup>63</sup> See Rohter, Larry; “Brazilians Streaming Into the United States Through Mexican (continued...)”

Mexico will suspend its visa-waiver policy with Brazil beginning October 26, 2005.<sup>64</sup> It is unclear what effect this will have on the influx of Brazilian OTMs.

**Other Significant OTM Nations.** While the sharp increase in Brazilian OTMs has generated much popular press coverage, the number of OTMs being apprehended from Honduras, Guatemala, and El Salvador has also increased rapidly over the past few years. While these countries do not have visa-waiver agreements with Mexico, making their entry into Mexico more complicated, the rapid increase in OTM apprehensions from these countries suggests that they are also taking advantage of the lack of detention facilities to enter the United States illegally between POE. Economic conditions in these countries may also be a factor. Additionally, non-immigrant visa issuances to Honduras, Guatemala, and El Salvador have also decreased: Honduras declined from 35,000 in 2001 to 22,000 in 2004; Guatemala declined from 72,000 in 2001 to 30,000 in 2004; and El Salvador declined from 96,000 to 24,000.<sup>65</sup> The declining rate of non-immigrant visas issued to these countries may be a push factor leading people to enter the country illegally.

### Special Interest OTM Apprehensions

DHS is to pay special attention to OTMs apprehended by the USBP who originate from 35 nations designated as “special interest” countries. According to USBP Chief David Aguilar, special interest countries have been “designated by our intelligence community as countries that could export individuals that could bring harm to our country in the way of terrorism.”<sup>66</sup> OTMs from special interest countries are to be processed more carefully by the USBP. In addition to the normal background checks that are conducted, the USBP is to notify the FBI, the Joint Terrorism Task Force, and the National Targeting Center in order to consult with counter-terrorism specialists concerning the OTM in question.<sup>67</sup> **Figure 4** shows USBP special interest OTM apprehensions from FY1997 to July 11, 2005.

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<sup>63</sup> (...continued)

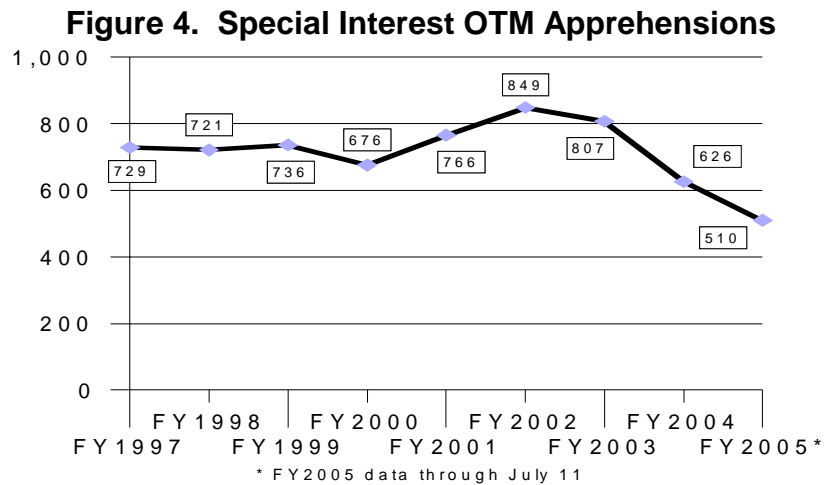
Border,” *The New York Times*, June 30, 2005, Sect. A, Col. 1; and Teresa Borden; “Loophole Allows Brazilians to Slip Into the United States, Stay Illegally,” *The Atlanta-Journal Constitution*, July 6, 2005, p. 1A.

<sup>64</sup> Chris Kraul and Nicole Gauoette, “No-Visa Agreement Backfired on Mexico,” *Los Angeles Times*, Sept. 14, 2005.

<sup>65</sup> U.S. Department of State, *Nonimmigrant Visas Issued by Issuing Office (Including Border Crossing Cards) Fiscal Years 1992-2004*, available at [[http://travel.state.gov/pdf/visa\\_office\\_report\\_table\\_xix.pdf](http://travel.state.gov/pdf/visa_office_report_table_xix.pdf)]

<sup>66</sup> Testimony of USBP Chief David Aguilar, U.S. Congress, Senate Judiciary Committee, Subcommittee on Immigration, Border Security, and Citizenship, “Joint Hearing with the Terrorism, Technology and Homeland Security Subcommittee on Border Security Technology,” 109<sup>th</sup> Cong., 1<sup>st</sup> sess., Apr. 28, 2005.

<sup>67</sup> For information on alien registration, refer to RL31570, *Immigration: Alien Registration*, by Andorra Bruno.



**Source:** CRS Analysis of CBP Data.

As **Figure 4** depicts, apprehensions of OTMs from special interest countries were stable from FY1997 through FY2000. During this period of relative stability apprehensions varied from a high of 736 in FY1999 to a low of 676 in FY2000. Special interest OTM apprehensions then increased to a high of 849 in FY2002. After numbering 807 in FY2003, special interest OTM apprehensions have fallen in FY2004 and thus far in FY2005. In effect, much like overall OTM apprehensions, special interest apprehensions remained relatively stable from FY1997 to FY2003. However, while overall OTM apprehensions have increased by 219% from FY2002 to FY2005, special interest OTM apprehensions have declined by 40% over the same period. In other words, during this period in which the USBP has been apprehending rapidly-increasing numbers of non-Mexican aliens, the number of aliens being apprehended from special interest countries has actually been decreasing. This would suggest that, while the threat of terrorist infiltration along the southwest border may be ever-present, the actual numbers of people from countries known to harbor terrorism trying to enter the United States has been declining somewhat. Some might suggest that the declining rate of apprehensions for special interest OTMs is due to the post 9/11 security enhancements in the United States which have discouraged aliens from these countries from attempting to enter the country illegally. Others could point out that regardless of the decline in special interest OTM apprehensions, the threat of terrorist infiltration along the southwest border is quite real and is exacerbated by the number of human smuggling networks operating there. It is unclear how many aliens of any nationality, much less from special interest countries, evade capture by the USBP each year and succeed in entering the United States illegally. Nevertheless, the data indicate that each year hundreds of aliens from countries known to harbor terrorists or promote terrorism are apprehended attempting to enter the country illegally between POE.

## Issues for Congress

### Threat of Terrorist Infiltration

**Special Interest OTMs.** While OTM apprehensions have increased significantly over the last three years, apprehensions of OTMs from special interest countries known to harbor terrorists or promote terrorism have declined over the same period. However, the sheer increase in non-Mexican aliens coming across the border makes it more difficult for United States Border Patrol (USBP) agents to readily identify and process each OTM, thereby increasing the chances that a potential terrorist could slip through the system. Moreover, there are no reliable data concerning how many OTMs evade apprehensions and successfully enter the country illegally across the border. Additionally, there have been various reports that terrorist organizations, including Al Qaeda, have been operating, recruiting members, and may be training terrorists in South American countries, including Argentina, Brazil, and Paraguay.<sup>68</sup> A potential issue for Congress is whether the increase in OTM apprehensions poses a threat to national security despite indications that special interest OTM apprehensions have been decreasing. Another potential issue for Congress is indication that, despite the downward trend in special interest OTM apprehensions, hundreds of people from countries known to harbor terrorists or promote terrorism are caught trying to enter the United States illegally along the land border.

**Smuggling Networks.** Several DHS and other federal officials have recently voiced concerns that terrorist organizations may attempt to infiltrate the United States through the southwest border. It is unclear whether the overall surge in OTM apprehensions has been the result of an increase in human smuggling networks, which may be exploited by terrorists to enter the country, or if it is due to some other factor or combination of factors. The existence and expansion of cross-border smuggling networks specializing in illicitly bringing human beings into the United States can represent a threat to homeland security. These smuggling networks may be opportunistic, as prominent DHS officials have suggested, and the potential exists that they may be used by Al Qaeda and other terrorist organizations to bring terrorists or weapons of mass destruction into the United States between POE. They may also be growing in sophistication; the Zetas, for example, reportedly include many ex-Mexican military officers trained by the U.S. Special Forces in counter-narcotics tactics,<sup>69</sup> and there is evidence that some of these organizations have access to body armor, fully automatic weapons, night vision equipment, and encrypted radios. The tactics used by these sophisticated networks include placing spotters with high-powered binoculars and encrypted radios in the mountains to guide smugglers

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<sup>68</sup> For examples, see “ARGENTINA: Muslim missionaries spark terrorism alert in Argentina,” *Latin America Weekly*, Sept. 6, 2005; “Terror cells investigated in triborder region — Paraguayan daily,” *BBC Monitoring Latin America*, July 21, 2005; and Ileana Ros-Lehtinen, “Terrorism a growing problem; Latin America,” *Miami Herald*, July 11, 2005.

<sup>69</sup> “Borderline Insanity,” *Texas Monthly*, Aug. 2005.



past the USBP and other law enforcement agencies operating along the border.<sup>70</sup> Additionally, the proceeds from the illicit smuggling activities could be used to finance or otherwise support terrorism. Potential issues for Congress include whether these cross-border smuggling networks have been proliferating, whether they are in fact opportunistic and liable to smuggle any product, including weapons of mass destruction, for the right price, and whether the current resources marshaled against them by DHS and other federal agencies are adequate.

## Lack of Detention Bedspace

The lack of detention beds is a critical issue for this analysis of OTM apprehensions. Because OTMs cannot be returned to Mexico but must instead be removed to their countries of origin or third countries that accept them, the removal process can take several months to complete. However, DRO does not currently have enough beds to detain every OTM that is apprehended until they are removed. For this reason, 70% of OTMs are released into the interior with notices to appear before an immigration judge at a later date. Not surprisingly to many, 70% of those OTMs who are released fail to show up for their hearings. This has led some to describe the process as “catch and release.”

Congress took steps to address this issue in 2004 and 2005. The Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458, §5204) authorized, subject to appropriations, an increase in DRO bed space of 8,000 beds each year from FY2006 through FY2010, for a total increase of 40,000 detention beds. Between the Emergency Supplemental Appropriations Act (P.L. 109-13) and the House and Senate passed versions of the DHS Appropriations bill (H.R. 2360), Congress is on track to provide funding for roughly 4,000 detention beds in FY2006.<sup>71</sup> However, the 4,000 additional beds do not appear to be enough to detain every OTM that is apprehended by the USBP. According to congressional testimony, the detention bedspace within DRO is currently filled to capacity. The majority of those beds are filled with criminal aliens that have been transferred to DRO from county, state, and federal prisons. DRO currently has roughly 2,500 beds which *are* full but which are *not* occupied with mandatory detainees (e.g., criminal aliens). While these are beds that are used to support the USBP and the ER program, *placing an OTM in one of these beds results in another OTM being released.*<sup>72</sup> Given that the USBP is currently apprehending almost 12,000 OTMs every month, and that regular removal proceedings take three months, the additional 4,000 beds scheduled to be added to DRO in FY2006 do not appear to be enough to accommodate the growing numbers of OTMs being apprehended. At issue for Congress is what the adequate number of beds are in order to detain OTMs being apprehended by the USBP. A related issue involves determining the geographical distribution of DRO detention beds. One of

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<sup>70</sup> From interviews with CBP personnel during a CRS site visit to the California and Arizona border, Aug. 15-19, 2005.

<sup>71</sup> The Conference Report (H.Rept. 109-72) for the Supplemental Appropriations Act (P.L. 109-13) contains funding for an additional 1950 beds. H.Rept. 109-79 to H.R. 2360 recommends \$90 million for 1,920 new beds. S.Rept. 109-83 to H.R. 2360 recommends \$77.4 million for 2,240 new beds.

<sup>72</sup> Testimony of DRO Director Lee, June 7, 2005.

the reasons for the surge in OTM apprehensions along much of the Texas border may be the severe lack of detention beds in that region, which leads most OTMs apprehended there to be released. As **Table 1** showed, over 90% of OTMs apprehended in the McAllen and Del Rio sectors are released on their own recognizance by the USBP due to a lack of detention bedspace.

## Alternatives to Detention

Another issue concerns whether every OTM that is apprehended should be detained, given that the majority are not criminal aliens, or whether there are viable alternatives to detention that can be pursued to track the whereabouts of non-criminal OTMs after they have been released into the interior in order to ensure that they appear for their hearings or removal proceedings. DHS is currently piloting the use of several alternatives to detention, such as the use of electronic tracking bracelets and telephonic voice recognition, and the Intensive Supervision Appearance Program which combines electronic bracelets with home and work visits and weekly reporting in order to better track released OTMs. A possible issue for Congress could be whether these alternatives to detention are effective, and if so whether they are being deployed aggressively enough by DHS.

## Expedited Removal

**Expansion Throughout Southwest Border.** During congressional testimony, USBP Chief Aguilar noted that “[i]n both the Laredo and Tucson Sectors, the lower rates of apprehension for OTMs contrast with those of neighboring Sectors that have not been using ER.”<sup>73</sup> Chief Aguilar went on to announce that Secretary Chertoff has approved the expansion of ER to “additional Border Patrol sectors upon satisfactory completion of training and within the parameters of available detention space.” On September 14, DHS announced that it was expanding ER authority throughout the southwest border.<sup>74</sup> Because ER requires that USBP agents make a determination about whether the OTM in question has credible fear of being persecuted if they are returned to their nation of origin, training is required to ensure that the proper questions are being asked and that the agents understand the laws in question. Indeed, many are concerned about the lack of adequate training, deficiencies in previous applications at POE, and minimal due process protections afforded.<sup>75</sup> Some are especially concerned for asylum seekers under the new procedures, since their troubles in seeking entry over the past seven years (under

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<sup>73</sup> Testimony of USBP Chief David Aguilar, in U.S. Congress, House Committee on Appropriations, Subcommittee on Homeland Security, *Coping With Illegal Immigration on the southwest Border*, July 12, 2005.

<sup>74</sup> Department of Homeland Security, Public Affairs, “DHS Expands Expedited Removal Authority Along Southwest Border,” Sept. 14, 2005.

<sup>75</sup> See, e.g., Amanda Branson Gill, *DHS Announces Expansion of Expedited Removal*, Human Rights First (Aug. 10, 2004) available at [[http://www.humanrightsfirst.org/media/2004\\_alerts/0810a.htm](http://www.humanrightsfirst.org/media/2004_alerts/0810a.htm)]; Tyche Hendricks, *Expedited deportations begin this week on Mexican border, Critics say program lacks protections for asylum seekers*, SF Gate.com (Aug. 18, 2004) available at [<http://www.sfgate.com/cgi-bin/article.cgi?f=/chronicle/a/2004/08/18/MNGQO89QM81.DTL>].

existing expedited removal procedures at POE) have been reportedly well-documented.<sup>76</sup>

The available detention bedspace currently poses a severe constraint on the USBP's ability to implement ER throughout the southwest border, especially in the McAllen sector, which alone has averaged almost 6,000 OTM apprehensions a month in FY2005. DRO will not have enough detention beds to accommodate every OTM that is apprehended even with the additional 4,000 beds scheduled to be provided in the FY2006 appropriation. At issue for Congress is whether the expansion of ER, given the lack of detention resources that are available, is the most efficient mechanism for stemming the flow of unauthorized OTMs into the United States. Some have stated, for example, that the limitations on the new, expanded authority are too restrictive and would make the procedures applicable only to a "minute fraction of the illegal flow."<sup>77</sup> DHS, on the other hand, claims that expanding expedited removal between the POE will deter unlawful entry and provide DHS officers with a tool to better secure and improve the security and safety of our nation's land borders. Given the mandatory detention provision of ER and the current lack of detention bedspace, Congress faces consideration of the level of funding and detention space necessary to expand the program throughout the southwest border, given the Administration's recent announcement that it is expanding ER throughout the southwest border.

**Processing Times and Costs.** ER was originally used by the INS in official POE. Because people attempting to enter the country at a POE can be denied entry and, in effect, immediately turned around and sent back to the country they came from, ER was seen as a convenient mechanism for expediting the removal process. Between POE, however, the ER process is more complicated. Because OTMs apprehended between POE are already in the United States illegally, they cannot be denied entry. While the INA stipulates that people apprehended by immigration officers can be returned to third countries (e.g., returning a Brazilian citizen to Mexico), this is contingent on a number of stipulations laid out in INA 241 (b)(2) discussed in more detail earlier in this report. According to ICE, Mexico currently does not accept the return of OTMs apprehended by the USBP between POE. Because the OTMs cannot be returned to the country they crossed into the United States from — Mexico — they must be returned to their country of origin or some other third country that will accept them. While the ER process is demonstrably quicker than the regular removal process, the mandatory detention feature means that OTMs apprehended by the USBP under ER must be detained for the entirety of the time it takes to return them — on average 32 days. In addition to

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<sup>76</sup> Hendricks, *Expedited deportations begin this week on Mexican border, Critics say program lacks protections for asylum seekers*, SF Gate.com (Aug. 18, 2004) (citing reports by the United Nations, the Government Accountability Office, Human Rights First, and the American Bar Association).

<sup>77</sup> Mark Krikorian, *Playing Games with Security: Taking Two Steps Back for Every Step Forward on Immigration*, Center for Immigration Studies, (Aug. 18, 2004) available at [<http://www.cis.org/articles/2004/mskoped081804.html>]. The Human Rights First report is available at [[http://www.humanrightsfirst.org/refugees/reports/due\\_process/due\\_process.htm](http://www.humanrightsfirst.org/refugees/reports/due_process/due_process.htm)]. The GAO report is available at [<http://www.gao.gov/archive/1998/gg98081.pdf>].

bearing the costs of detention, the U.S. government must also provide transportation (usually an airline ticket) for the OTMs to return to their nation of origin or some other third country. As the USBP begins expanding ER to the entire southwest border, a possible issue for Congress could involve whether DHS has the budgetary, manpower, and detention resources in place to effectively implement this expansion.

## **USBP Focus on Arizona**

Because the majority of overall apprehensions made by the Border Patrol occur in Arizona, and specifically in the Tucson sector, the USBP has focused much of its efforts on securing that part of the border. To that end, the Tucson sector has the largest number of USBP agents assigned to it and is the focal point for the multi-agency Arizona Border Control Initiative. However, the Texas border, and specifically the McAllen sector, far outstrip the rest of the country in OTM apprehensions. The OTM apprehension and drug seizure data CRS analyzed suggest that these networks are currently operating more robustly along the Texas border than the Arizona border (This analysis, however, is tempered by the reality that apprehensions and seizure statistics and trends do not necessarily reflect the actual trends of people and drugs coming across the border). Given the ever-present threat posed by Al-Qaeda and other terrorist organizations — a threat that has been underscored by the recent events in London — a possible issue for Congress may be whether the current deployment of USBP resources is adequate for homeland security, or whether additional agents and resources should be provided for the Texas border.

## **Conclusion**

The number of OTMs being apprehended by the USBP has more than tripled over the last three years. The majority of these apprehensions have occurred along the Texas border and have come from four nations: Honduras, Brazil, El Salvador, and Guatemala. Due to a lack of detention bedspace, in FY2005 over 70% of OTMs apprehended were released on their own recognizance into the interior with notices to appear before an immigration judge. Of those released into the interior, only 30% showed up for their hearings. In order to address this issue, DHS has announced that it is expanding the expedited removal program which allows the Department to remove apprehended aliens without the opportunity of a formal hearing before an immigration judge. However, aliens apprehended through the ER process must be mandatorily detained, and DHS does not currently have the detention resources to accommodate the rapidly-increasing numbers of OTMs that are being apprehended. Given the continuing threat posed by terrorists and terrorist organizations, the drastic increase in OTM apprehensions over the past three years may be of concern to Congress. Consequently, the main issues which may be of interest to Congress involve the resources that are available to DRO and the USBP, including the number of detention beds that are available and their geographic allocation, whether there are viable alternatives to detention, and what the appropriate number of USBP agents should be.