

CRS Report for Congress

Received through the CRS Web

Border Security and the Southwest Border: Background, Legislation, and Issues

September 28, 2005

Lisa M. Seghetti, Coordinator,
Jennifer Lake, Blas Nuñez-Neto, and Alison Siskin
Domestic Social Policy Division

K. Larry Storrs
Foreign Affairs, Defense and Trade Division

Nathan Brooks and Stephen Viña
American Law Division

Border Security and the Southwest Border: Background, Legislation, and Issues

Summary

Border security has emerged as an area of public concern, particularly after the September 11, 2001 terrorist attacks. Although recent public concerns pertaining to border security may be attributed to the threat of potential terrorists coming into the country, past concerns that centered around drug and human smuggling and the illegal entry of migrants remain important issues. As Congress passes legislation to enhance border security (e.g., P.L. 109-13) and the Administration puts into place procedures to tighten border enforcement, concerns over terrorists exploiting the porous southwest border continue to grow.

The U.S. border with Mexico is some 2,000 miles long, with more than 800,000 people arriving from Mexico daily and more than 4 million commercial crossings annually. The United States and Mexico are linked together in various ways, including through trade, investment, migration, tourism, environment, and familial relationships. Mexico is the second most important trading partner of the United States and this trade is critical to many U.S. industries and border communities. In an effort to facilitate the legitimate flow of travel and trade, the governments of the United States and Mexico signed the U.S.-Mexico Border Partnership agreement. The agreement was accompanied by a 22-point action plan that included several immigration and customs-related border security items.

While the northern and southwest borders share common issues, the southwest border has issues that are unique. For example, the US-VISIT program was reportedly implemented at selected southwest land ports of entry. Concerns about Mexican nationals who have Mexican border crossing cards being excluded from the requirements of the program have been raised. Additional issues such as the system used to verify Mexican border crossing cards (Biometric Verification System) and the consolidation of immigration and customs inspectors have also raised concerns. Arguably, the most pressing concern at the southwest border is the number of undocumented aliens who still manage to cross the border every day, the majority of which are Mexican nationals.

As the number of illegal aliens that are present in the United States continues to grow, attention is directed at the border patrol and the enforcement of immigration laws within the interior of the country. The Department of Homeland Security's (DHS's) Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) units have launched several initiatives aimed at apprehending illegal aliens and dismantling human and drug smuggling organizations. Despite these efforts, the flow of illegal migration continues. Issues such as enforcement of immigration laws and organizational issues such as inter- and intra-agency cooperation, coordination and information sharing continue to be debated. In the view of some, a more comprehensive approach that addresses the "push factors" of the sending countries and the "pull factors" of the United States, coupled with more effective enforcement of current laws in the interior of the country may once again merit examination. This report will not be updated.

Contents

Introduction	1
Differences Between the Southwest and Northern Borders	2
Context of Overall United States-Mexico Relations	3
Importance of Mexico and the Bilateral Relationship	3
Mechanisms for Mexico-U.S. Interactions	4
Bilateral/Trilateral Migration and Border Security Agreements	4
Bilateral Migration Talks	4
Bilateral Partnership for Prosperity	6
Bilateral Border Partnership (“Smart Border”) Agreement	6
Trilateral Security and Prosperity Partnership of North America	7
Monitoring the Border	7
Monitoring the Border At Ports of Entry	8
People-Related Inspections	9
Border Partnership (“Smart Border”) Agreement	10
Secure Electronic Network for Travelers’ Rapid Inspection	10
Goods-Related Inspections	11
Border Partnership (“Smart Border”) Agreement	12
Cargo Inspection Technology	14
Customs-Trade Partnership Against Terrorism (C-TPAT)	15
FAST	15
Customs Mutual Assistance Agreements (CMAA)	16
Selected Inspections Issues	16
U.S.-VISIT	17
Laser Visas (Mexican Border Crossing Cards)	17
Biometric Verification System (BVS)	19
One Face at the Border	19
Monitoring the Border Between Ports of Entry	20
Air and Marine Operations	20
Threats	20
Rationalization of Air and Marine Assets, Border Patrol and AMO ..	21
U.S. Border Patrol (USBP)	21
Evolution of Border Patrol Strategy	21
New National Border Patrol Strategy	24
Apprehension Rates	25
Other Than Mexican Apprehensions	28
Selected Issues Between Ports of Entry	28
Border Patrol Checkpoints	28
Expedited Removal	30
Physical Barriers	32
Migrant Deaths	33
<i>Border Safety Initiative</i>	35
Civilian Patrol Groups	37

Illegal Migration and Indian Country	38
Impact of Illegal Migration on Federal Protected Land	40
Interior Enforcement	41
ICE Investigations	42
Arizona Border Control (ABC) Initiative	42
Human Smuggling	43
Drug/Contraband Smuggling	44
DHS Anti-Smuggling/Trafficking Strategy	45
ICE Storm	45
Department of Justice Efforts	46
Organized Crime Drug Enforcement Task Force (OCDETF)	46
Southwest Border Prosecution Initiative (SWBPI)	47
High Intensity Drug Trafficking Area (HIDTA)	47
Detention and Removal	47
Selected ICE Issues	50
ICE Resources	50
Customs Patrol Agents (Shadow Wolves)	50
State and Local Law Enforcement	51
Detention Bed Space	52
Selected Crosscutting Issues	53
Systems Integration and Interoperability	53
Technology and Staffing	54
Port of Entry Infrastructure	55
Repatriation	56
Organizational Issues	58
Overall Effectiveness of Current Policies	59
Appendix A: Legislation Affecting the Southwest Border	61
103 rd Congress	61
The Violent Crime Control and Law Enforcement Act of 1994	61
104 th Congress	61
The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)	61
Automated Entry and Exit Data System (US-VISIT)	62
107 th Congress	62
The USA PATRIOT Act	62
The Enhanced Border Security and Visa Entry Reform Act of 2002	63
108 th Congress	63
The Intelligence Reform and Terrorism Prevention Act of 2004	63
109 th Congress	63
The REAL ID Act of 2005 (P.L. 109-13)	63

List of Figures

Figure 1. Busiest Land POE FY2002 - FY2004	9
Figure 2. Top Five Busiest Land Ports of Entry, 2001through 2003	12

Figure 3. SW Border Apprehensions by Fiscal Year	26
Figure 4. SW Border Apprehensions, by Sector and Fiscal Year	27
Figure 5: Migrant Deaths Along the Southwest Border, by Fiscal Year	34
Figure 6. Migrant Mortality Rate per Apprehensions	35
Figure 7: Deportable Alien <i>Located</i> by ICE's Southwest Field Offices, FY2000 to FY2003	48
Figure 8: Number of Aliens <i>Expelled</i> by ICE's Southwest Field Offices, FY2001 to FY2003	49

Border Security and the Southwest Border: Background, Legislation, and Issues

Introduction

Border security has emerged as an area of concern for many, particularly after the September 11, 2001 terrorist attacks. Although recent concerns pertaining to border security may be attributed to the threat of potential terrorists coming into the country, past concerns that centered around drug and human smuggling and the illegal entry of migrants are still important issues. As the southwest border increasingly becomes a focal point due to its myriad of problems, an issue for Congress is how to successfully balance competing strategic goals while balancing the tactical policies to achieve these goals. The *strategic* concern rests in a complex question: How do we balance the need for more effective border control with the needs of free trade and economic growth? The *tactical* concerns focus on balancing increased resources such as an ever-expanding workforce at the border with the use of technology and intelligence without compromising the free flow of commerce and travel. As Congress and Administration policymakers seek to achieve balance between the strategic and tactical concerns the southwest border pose, they do so during an unprecedented time of illegal migration across the border. In an attempt to normalize the flow of needed workers across the border and address the economic imbalances in Mexico and other parts of Latin America that drive the *push* incentive structure of migration to the United States, several bills have been introduced that would overhaul the U.S. immigration system and tighten enforcement of U.S. immigration laws in the interior of the country.¹

Traditionally, border management consists of securing the border at ports of entry through the inspections process as well as between ports of entry (POE) through the patrolling of the border by the border patrol. Increasingly, border management, particularly along the southwest border, also involves enforcing immigration and other laws well into the interior of the country. This report discusses border security-related programs and initiatives that have an impact on the southwest border. The programs and initiatives discussed are presented in a two-dimensional framework: (1) enforcement efforts at the POE, between the POE and within the interior of the United States; and (2) programs and initiatives that *facilitate* the flow of people and goods across the border versus those initiatives that are geared towards controlling and interdicting people and things that may be a threat to the national security. The report opens with a discussion of the differences between the southwest and northern border. It then details the relationship between the United States and Mexico, as it

¹ This report will not discuss or track legislation that has been introduced in the 109th Congress. **Appendix A** of the report, however, does discuss legislation in the current and past Congresses that have been enacted.

pertains to border security. Next, each major control point (i.e., inspections, border patrol and interior investigations) that has a border security-related component is discussed. The report then focuses on past and current congressional efforts to secure the southwest border. It concludes with a discussion of some of the issues that are crosscutting to the major areas covered in the report. An appendix is provided for additional discussion of legislation.

Differences Between the Southwest and Northern Borders

The U.S. border with Mexico is approximately 2,000 miles long and is comprised of six Mexican and four U.S. states.² It features large tracts of desert land where temperatures average more than 100 degrees for part of the year, includes mountain ranges and rugged terrain, as well as the waters of the Rio Grande River. The U.S. border with Canada, on the other hand, is more than twice as long as the southwest border and covers seven Canadian provinces and 10 U.S. states.³ Among the northern border's many challenging natural features are vast mountain ranges such as the Rockies, the Great Lakes, many different river systems, and heavy snow and bitter cold temperatures in the winter.

Although smaller by some 2,000 miles than its northern counterpart, the southwest border exceeds the northern border with respect to the volume of travelers crossing it. For example, there were 173 million inspections conducted at southwest land ports of entry in FY2004, compared to 52 million at northern land ports of entry.⁴ In addition to the volume of traffic at southwest land ports of entry, the southwest border has a longstanding history of illegal migration and human and drug smuggling activities. On average, the southwest border accounts for over 94% of all illegal alien apprehensions each year.⁵ While efforts have been underway to strengthen both borders, the southwest border efforts focus primarily on stemming illegal migration and human smuggling and interdicting illegal drugs, while the northern border efforts focus on sharing information and streamlining policies between the United States and Canada as well as facilitating trade.⁶

² The six Mexican states are Baja California, Sonora, Chihuahua, Coahuila, Nuevo Leon and Tamaulipas. The four U.S. states are California, Arizona, New Mexico, and Texas.

³ The seven Canadian provinces are British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, and New Brunswick. The 10 U.S. states are Washington, Idaho, Montana, North Dakota, Minnesota, Michigan, New York, Vermont, New Hampshire, and Maine.

⁴ Data received from CBP Congressional Affairs Office on Jan. 6, 2005.

⁵ Ibid.

⁶ For additional information on immigration-related northern border security, see CRS Report RS21258, *Border Security: U.S.-Canada Immigration Border Issues*, by Lisa M. Seghetti.

Context of Overall United States-Mexico Relations

Importance of Mexico and the Bilateral Relationship

Sharing a 2,000-mile common border and extensive interconnections through the Gulf of Mexico, the United States and Mexico are so intricately linked together in a multiplicity of ways that President Bush and other U.S. officials have stated that no country is more important to the United States than Mexico. The southern neighbor is linked with the United States through trade and investment, migration and tourism, environment and health concerns, and family and cultural relationships. Mexico is the second most important trading partner of the United States, and this trade is critical to many U.S. industries and border communities. At the same time, Mexico is a major source of undocumented migrants and illicit drugs and a possible avenue for the entry of terrorists into the United States. As a result, cooperation with Mexico is essential in dealing with migration, drug trafficking, and border, terrorism, health, environment, and energy issues.

With a population of 105 million people, Mexico is the most populous Spanish-speaking country in the world, and the third most populous country in the Western Hemisphere. This gives it a diplomatic weight in the hemisphere as a leader of Latin American and Caribbean countries and in the world as a leader of developing countries. With a gross domestic product (GDP) for 2004 of \$657 billion, and worldwide turnover trade (exports and imports) for 2003 of \$336 billion, Mexico is a leading trader in the world, principally through its partnership with Canada and the United States in NAFTA. In large part because of the United States, NAFTA is the world's largest free trade area, with about one-third of the world's total GDP, and it accounts for about 19% of global exports and 25% of global imports. Mexico is viewed by some as the least important member of NAFTA, although its population of over 100 million is more than three times Canada's 32 million, and its GDP is nearly equal to that of Canada (\$757 billion). About 37% of the United States' trade with NAFTA countries is with Mexico.

Under NAFTA, Mexico had total turnover trade (exports and imports) with the United States for 2004 of \$266 billion, making it the second most important trading partner of the United States (following Canada), while the United States is Mexico's most important partner by far, providing the market for 88% of Mexico's exports and supplying 68% of Mexico's imports. Since NAFTA entered into force in 1994, total trilateral trade has more than doubled to \$621 billion, while Mexico-U.S. trade more than tripled from \$82 billion to \$266 billion. However, the United States has experienced a generally growing trade deficit and critics argue that many U.S. jobs were lost in the process. United States foreign direct investment was encouraged by NAFTA as well, although the amount and proportion of U.S. direct investment in Mexico have declined from \$20.4 billion (77% of total investment) in 2001 to \$5.3 billion (56% of total investment) in 2003.⁷

⁷ Major sources for this paragraph and the previous paragraph are The United States and Mexico at a Glance, U.S. Embassy in Mexico website t [http://www.usembassy.gov/Mexico/reade_info.html] and NAFTA [at 10] on USTR website (continued...)

Mechanisms for Mexico-U.S. Interactions

The United State and Mexico have developed a wide variety of mechanisms for consultation and cooperation on the issue areas in which the countries interact — with some overlapping in the functioning of the various mechanisms. These include (1) periodic presidential meetings, (2) annual cabinet-level Binational Commission meetings with 10 Working Groups on major issues, (3) annual meetings of congressional delegations in the Mexico-United States Interparliamentary Group Conferences, (4) NAFTA-related trilateral meetings under various groups, and (5) bilateral border area cooperation meetings hosted by such entities as the Border Environment Cooperation Commission (BECC), the U.S.-Mexico Border Health Commission, and the Binational Group on Bridges and Border Crossings.

Bilateral/Trilateral Migration and Border Security Agreements⁸

Turning to the central focus of this report, Presidents Bush and Fox have engaged regularly in a series of discussions and agreements on closely related migration and border security issues, and they were joined by Prime Minister Martin of Canada on March 23, 2005, for a trilateral meeting.⁹ These discussions and agreements have fallen predominantly under the rubrics of the Bilateral Migration Talks, the Bilateral Partnership for Prosperity, the Bilateral Border Partnership Agreement, and the Trilateral Security and Prosperity Partnership of North America.¹⁰

Bilateral Migration Talks. When President Bush met with President Fox in February 2001, migration issues were among the main topics, with Mexican officials expressing concern about the number of migrants who die each year while seeking a non-sanctioned entry into the United States. For some time President Fox has been pressing proposals for legalizing undocumented Mexican workers in the United States through amnesty or guest worker arrangements as a way of protecting their human rights. In the Joint Communique following the Bush-Fox meeting, the two presidents agreed to instruct appropriate officials “to engage, at the earliest opportunity, in formal high level negotiations aimed at achieving short and long-term

⁷ (...continued)

[http://ustr.gov/Trade_Agreements/Regional/FAFTA/NAFTA_at_10/Section_Index].

⁸ While the discussions and agreements center primarily on migration and border security issues, it is important to note that Congress sets these policies.

⁹ Information on the meetings may be found on the websites of the U.S. Embassy in Mexico [<http://www.usembassy-mexico.gov/emenu.html>], the Mexican Embassy in the United States [<http://www.embassyofmexico.org>], the U.S. Presidency [<http://www.whitehouse.gov>] and the Mexican Presidency [<http://envivo.presidencia.gob.mx/?NLang=en>].

¹⁰ For more information, see CRS Report RL32735, *Mexico-United States Dialogue on Migration and Border Issues*, by K. Larry Storrs. Information on closely related cooperation on counter-narcotics matters may be found in CRS Report RL32699, *Mexico's Counter-Narcotics Efforts under Fox, December 2000 to October 2004*; and CRS Report RL32724, *Mexico-U.S. Relations: Issues for the 109th Congress*, by K. Larry Storrs.

agreements that will allow us to constructively address migration and labor issues between our two countries.”¹¹

During President Fox’s visit to Washington, DC, in 2001, the Presidents reviewed the progress made by the joint working group on migration chaired by the U.S. Secretary of State and Attorney General and the Mexican Secretaries of Government and Foreign Relations. The Presidents instructed the high-level working group “to reach mutually satisfactory results on border safety, a temporary worker program and the status of undocumented Mexicans in the United States ... as soon as possible.” However, the talks stalled following the terrorist attacks upon the United States in September 2001, and U.S. executive and legislative action focused on strengthening border security and alien admission and tracking procedures.

When President Bush met President Fox in 2002, they noted that “important progress has been made to enhance migrant safety ... by discouraging and reducing illegal crossings in dangerous terrain,” and they charged the cabinet level migration group to continue the discussions under the previous instructions.

In January 2003, President Fox designated Economy Minister Luis Ernesto Derbez as Mexico’s new Foreign Minister, replacing Jorge Castaneda, who reportedly resigned, in part, out of frustration with the lack of progress on a migration accord with the United States. Around that time, disagreements were emerging between the countries over U.S. military action in Iraq, although Mexico ordered special troops to secure airports, border posts, and other access points to the United States when the military action began in March 2003. In mid-year, partly in reaction to deaths of migrants, both countries took more forceful measures against smugglers and increased warnings of the dangers of illegal entry into the United States.

In January 2004, President Bush offered an outline to overhaul the U.S. immigration system to permit the matching of willing foreign workers with willing U.S. employers when no Americans can be found to fill available jobs. Under the President’s outline, temporary legal status would be available to new foreign workers who have work offers in the United States and to undocumented workers already employed in the United States for a term of three years that could be renewed but would end at some point. The proposal included some incentives to encourage workers to return to their home countries, such as credit in the worker’s national retirement system and tax-deferred savings accounts that could be collected upon their return.¹²

¹¹ U.S. Department of State, Joint Communiqué, *U.S.- Mexico Migration Talks and Plan of Action for Cooperation on Border Safety*, June 22, 2001. See [<http://www.state.gov/r/pa/prs/ps/2001/3733.htm>].

¹² For information on the President’s outline and various congressional initiatives, see CRS Report RL32044, *Immigration: Policy Considerations Related To Guest Worker Programs*, by Andorra Bruno. On the migration issue, see also CSIS Mexico Project, *Managing Mexican Migration to the United States — Recommendations for Policymakers: A Report of the U.S.-Mexico Binational Council*, Center for Strategic and International Studies (CSIS) and Autonomous Technological Institute of Mexico (ITAM), Apr. 2004.

Bilateral Partnership for Prosperity. During President Fox's official visit to Washington, DC., in early September 2001, the Presidents launched the Partnership for Prosperity (P4P), a public-private alliance of Mexican and U.S. governmental and business leaders, to promote economic development throughout Mexico, but particularly in regions where lagging economic growth has fueled out migration.¹³ In accordance with the instructions of the Presidents, a concrete plan of action was announced in March 2002 at the time of the Monterrey conference, focusing on lowering the cost of sending money home, promoting private investment in housing, promoting small and medium sized businesses to generate employment, strengthening farmers and infrastructure, sharing ideas and best practices, and linking institutions with shared goals.

Since then, Entrepreneurial Workshops have been held in 2003 and 2004 to encourage networking between businesses, and reports on the Partnership were made to the Presidents at the time of the annual Binational Commission meetings in 2002, 2003, and 2004. Following the 2004 meetings, then Secretary Powell noted that P4P programs had lowered the fees for transferring funds from the United States to Mexico, brought together more than 1,400 business and government leaders from both countries, and developed innovative methods to finance infrastructure projects. Other major accomplishments were the establishment for the first time of a Peace Corps program in Mexico; and the recent establishment of the Overseas Private Investment Corporation (OPIC) in Mexico that is expected to provide over \$600 million in financing and insurance to U.S. businesses in Mexico.¹⁴

Bilateral Border Partnership ("Smart Border") Agreement. When President Bush met President Fox in 2002, the Presidents announced the U.S.-Mexico Border Partnership Agreement with a 22-point Action Plan. The agreement is also known as the "Smart Border Agreement" because it calls for enhancing security by utilizing technology to strengthen infrastructure while facilitating the transit of legitimate people and goods across the border.¹⁵ Under the first goal, to strengthen infrastructure, the countries pledged to take joint action to harmonize, protect, finance, and plan border operations. Under the second goal, to facilitate the secure flow of people, the countries agreed to advance mechanisms for pre-clearing regular automobile travelers, obtaining advanced airplane passenger information, saving endangered migrants, deterring alien smuggling, and sharing viewpoints and intelligence. Under the third goal, to ease the safe flow of goods, the countries pledged to encourage private sector involvement and to implement technology sharing programs to place nonintrusive inspection systems at cross-border rail lines and high-volume ports of entry.

¹³ For background and results, see the information on the P4P on the Department of State website go to [<http://www.state.gov/p/wha/ci/mx/c7980.htm>].

¹⁴ See Remarks [by then Secretary of State Colin Powell] with Foreign Minister of Mexico, Luis Ernesto Derbez at a Joint Press Availability, Nov. 9, 2004 on State Department website [<http://www.state.gov/secretary/rm/37998.htm>].

¹⁵ See information on the Border Partnership under the broader U.S.-Mexico Partnership heading on the Department of State website [<http://www.state.gov/p/wha/rt/c6287.htm>].

When the former Secretary of Homeland Security Tom Ridge and Secretary of Government Santiago Creel met in 2003, they noted progress under the Border Partnership (see discussion on U.S.-Mexico 22-point plan in *Monitoring the Border at Ports of Entry*). When the leaders met in 2004, they signed the U.S.-Mexico Action Plan for Cooperation and Border Safety for 2004, as well as a Memorandum of Understanding on the Safe, Orderly, Dignified and Humane Repatriation of Mexican Nationals that provides for the return of migrants to their home towns. Still later, following the 2004 Binational Commission meetings, former Secretary of State Colin Powell emphasized the growing bilateral cooperation on border security matters between the countries, including the creation of a new Working Group on Cyber-Security.

Trilateral Security and Prosperity Partnership of North America. In 2005, President Bush hosted meetings in Texas with President Fox and Canadian Prime Minister Martin, in which the leaders established the trilateral “Security and Prosperity Partnership (SPP) of North America,” that seeks to advance the common security and the common prosperity of the countries through expanded cooperation and harmonization of policies. To implement this partnership the leaders established ministerial-led working groups that are to develop measurable and achievable goals and to report back to the leaders within 90 days and semi-annually thereafter.¹⁶

To promote security the leaders committed to establish common approaches to security to protect against external and internal threats and to further streamline legitimate trade and travel. Among these efforts the countries would implement common border security and bioprotection strategies, enhance infrastructure protection and emergency response plans, improve aviation and maritime security and intelligence cooperation against transnational threats, and continue to facilitate the legitimate flow of people and cargo at the borders.

To promote prosperity the leaders committed to enhance North American competitiveness and to improve the quality of life. To achieve this, the countries would improve productivity through regulatory cooperation and harmonization; enhance cross-border cooperation on health, food safety, and environmental protection projects; promote sectoral collaboration in energy, transportation, and financial services; and reduce the costs of trade by increasing the efficiency of the cross-border operations.

Monitoring the Border¹⁷

Prior to the creation of the Department of Homeland Security (DHS), many federal agencies and subagencies were responsible for some aspects of border security. Today, DHS is the primary agency that has border security-related

¹⁶ See the Joint Press Conference, the Joint Statement and the Fact Sheet on the initiative on the White House website available at [<http://www.whitehouse.gov/news/releases/2005/03/20050323-5.html>].

¹⁷ For additional information on agencies responsible for border security, see CRS Report RS21899, *Border Security: Key Agencies and their Missions*, by Blas Nuñez-Neto.

responsibilities.¹⁸ DHS' Directorate of Border and Transportation Security includes the U.S. Coast Guard, the Bureau of Customs and Border Protection (CBP) and the Bureau of Immigration and Customs Enforcement (ICE), among other agencies. Within CBP is the U.S. Border Patrol, inspections activities of the former Immigration and Naturalization Service (INS), U.S. Customs Service and the U.S. Department of Agriculture. Within ICE are the investigative activities of the former INS and U.S. Customs Service; detention and removal activities of the former INS; the Federal Law Enforcement Training Center; the Transportation Security Administration; and the Federal Protective Service.

Monitoring the Border At Ports of Entry¹⁹

In 1789, Congress passed legislation that authorized the collection of duties on imported goods.²⁰ In a subsequent piece of legislation, Congress established the U.S. Customs Service, which was charged with collecting duties at U.S. ports of entry.²¹ The position of immigration inspectors was formally created in 1891 after Congress passed legislation that created the Bureau of Immigration in the Department of the Treasury.²² Due to the increasing complexity of regulating immigration, a new supervisory position was created in the then-Bureau of Immigration that oversaw the duties of the new immigration inspectors. Prior to the creation of this specialized group of inspectors that were charged with regulating immigration at U.S. ports of entry, customs inspectors were the only presence at the ports of entry.²³

Inspectors regulate people and goods that present themselves for entry at a designated port of entry. While emphasis on the southwest border tends to be placed on *who* is seeking entry to the United States, in recent years there has been a growing concern over *what* is coming into the country. This section provides a description of the *who* and *what* that are present at southwest land ports of entry (POE).²⁴ In

¹⁸ DHS was statutorily created by Congress with the passage of the Homeland Security Act of 2002 (P.L. 107-296).

¹⁹ For additional information on the inspections process at the border, see CRS Report RL32399, *Border Security: Inspections Practices, Policies, and Issues*, by Ruth Ellen Wasem, Coordinator, Jennifer Lake, Lisa Seghetti, James Monke, and Stephen Viña.

²⁰ 1 Stat. 73.

²¹ The authority to collect duties and tariffs was established by the Tariff Act of 1789, passed by Congress on July 4, 1789. The fifth Act of the first Congress, passed on July 31, 1789, established the U.S. Customs Service.

²² See the Immigration Act of 1891.

²³ Customs inspectors were charged with levying a head tax on foreign nationals seeking entry to the United States.

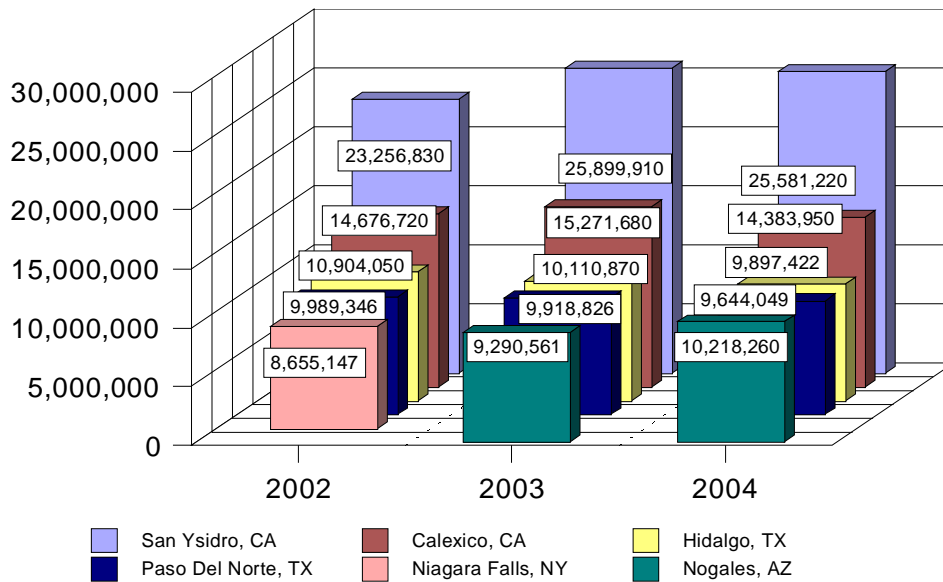
²⁴ For a discussion of the challenges facing lawmakers and policy makers to secure the border and the various programs and initiatives in place at the border, see CRS Report RL32839, *Border and Transportation Security: The Complexity of the Challenge*, by Jennifer E. Lake, William H. Robinson, and Lisa M. Seghetti; CRS Report RL32840,

doing so, the section is divided into two parts: people-related and goods-related²⁵ inspections. While this may be a useful construct for the purpose of this report, it is important to note that since the consolidation of the immigration and customs inspections activities into CBP, efforts have been underway to present “one face at the border” and move away from looking at inspections in terms of separate organizational structures for *immigration* and *customs* inspections.

People-Related Inspections

There are 25 land POE along the southwest border,²⁶ with over 800,000 people arriving from Mexico daily. Over recent years, the southwest border has seen the highest volume of travelers seeking entry into the United States. As **Figure 1** illustrates, four of the top five busiest land POE in FY2004 were in the southwest, with the San Ysidro land POE consistently ranking the busiest of all land POE for passenger travel for several years. The majority of travelers seeking entry into the United States at a southwest land POE are Mexican nationals who possess a Mexican border crossing card (also known as Laser Visa). U.S. citizens and Legal Permanent Residents of the United States make up the next largest group of individuals who seek entry to the United States at a southwest land POE.

Figure 1. Busiest Land POE FY2002 - FY2004



²⁴ (...continued)

Border and Transportation Security: Selected Programs and Policies, by Lisa M. Seghetti, Jennifer E. Lake, and William H. Robinson; and CRS Report RL32841 *Border and Transportation Security: Possible New Directions and Policy Options*, by William H. Robinson, Jennifer E. Lake, and Lisa M. Seghetti.

²⁵ This section does not discuss the inspections activities performed by agriculture inspections. See CRS Report RL32399, *Border Security: Inspections Practices, Policies, and Issues*, by Ruth Ellen Wasem, et al.

²⁶ There are six land POE in California; six in Arizona; two in New Mexico; and 11 in Texas.

Source: CRS Analysis of DHS Performance Analysis System (PAS) data.

Border Partnership (“Smart Border”) Agreement. As discussed above, on March 22, 2002, President Bush and President Fox of Mexico met and endorsed the U.S.-Mexico Border Partnership agreement that was signed by Santiago Creel, Secretary of Governance, and Colin Powell, former Secretary of State. The agreement was accompanied by a 22-point action plan that included several immigration-related border security items under the heading “Securing the Flow of People.” Following is a description of these items:

- expanding the use of the Secure Electronic Network for Traveler’s Rapid Inspection (SENTRI) program;²⁷
- establishing a mechanism to exchange advance passenger information for flights between Mexico and the United States;
- accelerating border safety collaboration to safeguard migrants who enter between official POE or are smuggled into the United States; and
- enhancing cooperative efforts to detect, screen and take appropriate measures to deal with dangerous third-country nationals.²⁸

In addition to the aforementioned immigration-related border security items contained in the 22-point plan, both countries have agreed to several items that pertain to securing the common border infrastructure.²⁹

According to the Administration, progress has been made with respect to some of the immigration-related border management items in the plan. For example, there are plans to expand SENTRI to an additional three POE in 2005³⁰ and add additional SENTRI designated lanes at the existing POE. Moreover, the United States is planning to establish a dedicated lane for pedestrians at the San Ysidro (California) border crossing, and Mexico has begun efforts to implement the Advanced Passenger Information System (APIS).³¹ Both governments also “plan to accelerate their border safety collaboration to safeguard migrants by placing additional personnel and life-saving equipment along the border....”³²

Secure Electronic Network for Travelers’ Rapid Inspection. The Secure Electronic Network for Travelers’ Rapid Inspection (SENTRI) program is used at several southwest land POE to facilitate the speedy passage of low-risk,

²⁷ For additional information on the SENTRI program, see discussion below.

²⁸ See [<http://www.whitehouse.gov/infocus/usmxborder/22points.html>].

²⁹ Ibid.

³⁰ The three POE are Calexico, CA; Laredo, TX; and Brownsville, TX.

³¹ APIS is used by airline carriers to submit electronically passenger manifests to customs and immigration officials before arriving in or departing from the United States. The submission of the passenger manifests electronically prior to arrival allows immigration officials to perform inspections on travelers in advance of their arrival.

³² U.S. DHS, “U.S.-Mexico Border Partnership Joint Statement on Progress Achieved,” [<http://www.dhs.gov/dhspublic/display?content=570>].

frequent travelers.³³ Unlike its northern counterpart, NEXUS, the SENTRI program is a unilateral initiative.³⁴ Ports of entry are selected based on the following criteria: (1) they have an identifiable group of low-risk frequent border crossers; (2) the program will not significantly inhibit normal traffic flow; and (3) there is sufficient CBP staff to perform primary and secondary inspections. Travelers can participate in the program if (1) they are citizens or legal permanent residents of the United States, citizens of Mexico or Canada, or legal permanent residents of Canada; (2) they have submitted certain documentation and passed a background check; (3) they pay a user fee; and (4) they agree to abide by the program rules. Participants in the SENTRI program are given a radio transponder that triggers an automated system to review the Interagency Border Inspection System (a background check system) and other records related to the vehicle and its designated passengers once the vehicle enters a SENTRI lane.

Since the partial implementation of entry/exit controls at U.S. ports of entry, there have been discussions on consolidating the SENTRI program and its northern counterpart (NEXUS). The National Commission on Terrorist Attacks Upon the United States (9/11 Commission) recommended consolidating frequent traveler programs into a single program and integrating it with the databases and data systems that comprise the US-VISIT program.³⁵ Subsequent to the 9/11 Commission's recommendation, Congress mandated the integration of all databases and data systems that process or contain information on aliens in the Intelligence Reform and Terrorism Prevention Act of 2004.³⁶ In addition to the integration of these databases and data systems, the act requires the Secretary to develop and implement a plan to expedite the processing of registered travelers through a single registered traveler program that can be integrated into the broader automated biometric entry and exit data system.

Goods-Related Inspections³⁷

While the majority of the focus at the southwest border is due to the volume of illegal migrants who attempt to cross the border, commercial trade coming across the southwest border also poses a potential risk. Similar to balancing enforcement

³³ SENTRI is at the following southwest POE: Otay Mesa, CA; San Ysidro, CA; and El Paso, TX.

³⁴ The NEXUS program, which is at selected northern land POE, permits U.S. citizens and legal permanent residents and Canadian citizens and landed immigrants of Canada to pass through the United States or Canadian port without being inspected.

³⁵ See [<http://www.9-11commission.gov/>].

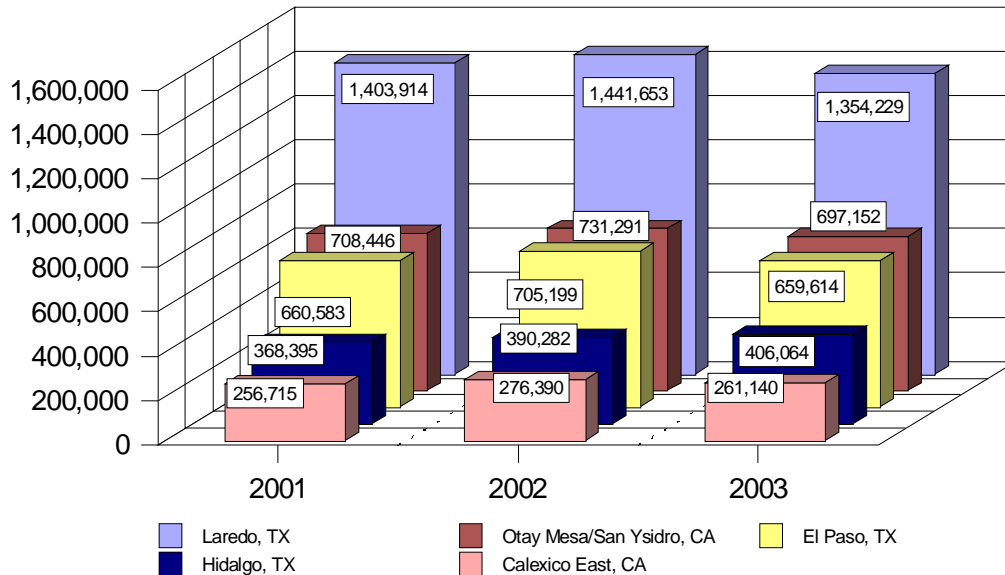
³⁶ §7208(e) of P.L. 108-447.

³⁷ In addition to the programs and activities that are mentioned below, CBP has an attache office in Mexico (as well as in two other countries) that supports its border activities and programs including C-TPAT; the Immigration Security Initiative (ISI); and the Container Security Initiative (CSI). CBP, "U.S. Customs and Border Protection Establishes Attaché Program," accessed at [http://www.cbp.gov/xp/cgov/newsroom/press_releases/archives/2004_press_releases/10042004/10202004.xml].

without compromising the legitimate flow of travel across the border, DHS officials must also balance enforcement with the free flow of trade and commerce.

In FY2003,³⁸ there were over 4 million commercial crossings at the southwest border. The majority of the crossings were made by trucks (4,238,045), with rail crossings accounting for less than 1% of commercial crossings at southwest land POE.

Figure 2. Top Five Busiest Land Ports of Entry, 2001 through 2003



Source: CRS analysis of Bureau of Transportation Statistics, *Border Crossing: US-Mexico Crossing Data*, **Tables 1, 5, and 6**. Accessed at [http://www.bts.gov/programs/international/border_crossing_entry_data/us_mexico/pdf/entire.pdf].

Notes: Data represent the number of truck crossings. Data are for both loaded and empty trucks.

As **Figure 2** depicts, southwest POE saw a substantial volume of commercial crossings during the period examined (2001-2003). The Laredo, TX POE consistently ranked number one in the southwest for 2001-2003, leading the Otay Mesa POE (the next busiest crossing) by an additional 657 thousand commercial crossings in 2003.

Border Partnership (“Smart Border”) Agreement. The U.S.-Mexico Border Partnership Agreement includes several customs-related items under the heading “Securing the Flow of Goods.” These goal-related actions include

- *public/private sector cooperation:* expand partnerships with private sector trade groups and importers/exporters to increase security and compliance of commercial shipments while expediting clearance processes;

³⁸ The latest data available on border crossings from the Bureau of Transportation is 2003.

- *electronic exchange of information*: continue to develop and implement joint mechanisms for the rapid exchange of customs data;
- *secure in-transit shipments*: continue to develop and implement a joint in-transit shipment tracking mechanism and implement the Container Security Initiative;
- *technology sharing*: develop a technology sharing program to allow deployment of high technology monitoring devices such as electronic seals and license plate readers;
- *secure railways*: continue to develop a joint rail imaging initiative at all rail crossing locations on the U.S.-Mexico border;
- *combat fraud*: expand the ongoing Bilateral Customs Fraud Task Force initiative to facilitate joint investigative activities; and
- *contraband interdiction*: continue joint efforts to combat contraband, including illegal drugs, drug proceeds, firearms, and other dangerous materials, and to prevent money laundering.³⁹

On April 23, 2003, DHS issued a joint statement on progress achieved on the U.S.-Mexico Border Partnership.⁴⁰ Three working groups have been created to develop and implement initiatives identified in the 22-point plan: the Border Working Group; the Enforcement Working Group; and the Technology and Customs Procedures Working Group. According to DHS these groups have been meeting on a quarterly basis, and their activities are coordinated by a central Coordinating Committee. These groups were working primarily on the following specific goods-related initiatives:

- harmonizing and extending the hours of service, in coordination with the trade communities, at the POE located at the border with Mexico;
- deploying gamma ray inspection machines at railroad crossings;
- expanding programs and partnerships with the private sector, such as the Business Anti-Smuggling Coalition (BASC), the Customs - Trade Partnership Against Terrorism (C-TPAT) and Mexico's Compliant Importer/Exporter Program (110 of the 300 largest traders, that account for 66% of the bilateral trade, had already been certified by this program as of the 2003 update);
- exchanging core data on every transaction occurring through the common border in an electronic environment;
- testing and implementing cutting-edge technology such as electronic seals;
- conducting joint investigations concerning fraudulent trade, which have led to significant seizures of illegally transhipped or undervalued goods; and

³⁹ The White House Office of the Press Secretary, "Smart Border: 22 Point Agreement — U.S.-Mexico Border Partnership Action Plan," Washington, DC, Mar. 21, 2002, [<http://www.state.gov/p/wha/rls/fs/8909.htm>].

⁴⁰ U.S. DHS, "U.S.-Mexico Border Partnership Joint Statement on Progress Achieved," [<http://www.dhs.gov/dhspublic/display?content=570>].

- developing systems to monitor in-transit shipments.⁴¹

DHS and the Mexican Department of the Interior released a further update on the progress of the U.S.-Mexico Border Partnership Agreement on January 17, 2005. In terms of the goods-related action items, updates on progress include

- *rail security*: capability to inspect 100% of rail cargo entering the United States by the end of 2005;
- *harmonizing port operation schedules*: at Otay Mesa, for example, both countries have agreed to extend operating hours at the port to better accommodate the flow of trade;
- *exchange of information*: information exchange on all shipments and increasing communications with the private sector to better secure the supply chain; and
- *Free and Secure Trade (FAST)*: FAST lanes have been implemented at the six largest POE along the southwestern border.⁴²

Cargo Inspection Technology. Cargo shipments may be targeted or randomly selected for a secondary inspection for both security and trade compliance purposes.⁴³ CBP has deployed a number of non-intrusive inspection (NII) technologies at POE to assist customs inspectors with the inspection of cargos. Large scale NII technologies include a number of x-ray and gamma ray systems. The Vehicle and Cargo Inspection Systems (VACIS), which uses gamma rays to produce an image of the contents of a container for review by the CBP inspector, can be deployed in a mobile or stationary capacity depending upon the needs of the port. CBP has also deployed a rail VACIS system to screen railcars. Other large scale NII systems include truck x-ray systems, which like the VACIS can be deployed in either a stationary or mobile configuration; the Mobile Sea Container Examinations Systems; and the Pallet Gamma Ray System. CBP is also continuing to deploy nuclear and radiological detection equipment including personal radiation detectors, radiation portal monitors, and radiation isotope identifiers to POE. Various canine teams are also deployed at POE to assist in the inspection of cargo and passengers. CBP uses canine teams trained to detect several types of contraband including narcotics, explosives, chemicals, and currency.

Many of the systems mentioned above are deployed at POE along the southern border. As a part of the U.S.-Mexico Border Partnership agreement, both CBP and Mexican Customs are deploying the Rail Vehicle and Cargo Inspection Systems (RVACIS). In 2005, when the eighth RVACIS becomes operational, CBP and Mexican Customs will have the capability to screen 100% of rail traffic crossing the

⁴¹ Ibid.

⁴² DHS and the Mexican Department of the Interior, *The U.S.-Mexico Border Partnership: Progress Report 2002-2004*, Jan. 17, 2005, [http://www.dhs.gov/interweb/assetlibrary/2004_US-Mex_Book.pdf]. See below for a description of FAST.

⁴³ Secondary inspection could include a more detailed document check, passing the container through a radiation portal monitor, taking an x-ray or gamma ray image of the contents of the container, and/or physically examining the cargo.

U.S.-Mexico border. Several POE along the southern border have installed radiation portal monitors (RPM). RPMs are stationary devices that are passive detectors of radiation that might be emitted from the vehicles passing between them. The most recent RPM to become operational on the southern border is at the port of Calexico, CA, in January 2005.

Customs-Trade Partnership Against Terrorism (C-TPAT). Initiated in April 2002, C-TPAT offers importers expedited processing of cargo if they comply with CBP requirements for securing their entire supply chain. Applicants who receive a certification from the CBP may benefit from fewer cargo inspections, as membership in C-TPAT reduces a company's overall risk score in the ATS.⁴⁴ In developing C-TPAT, CBP consulted with the trade community to arrive at a set of security recommendations specific to the various segments of the supply chain: carriers, brokers, importers, manufacturers, warehouses, freight forwarders, and domestic ports.

Eligibility for C-TPAT has rolled out in phases since the program's inception. Currently, C-TPAT is open to: all air, rail and sea carriers; brokers; freight forwarders; non-vessel operating common carriers; United States, Canadian and Mexican highway carriers; and port authorities and terminal operators. Beginning August 18, 2003, Mexican, and other CBP-invited foreign manufacturers became eligible to participate in C-TPAT.

FAST. The FAST program is a bilateral agreement between the United States and Mexico⁴⁵ that seeks to "promote free and secure trade by using common risk management principles, supply chain security, industry partnership, and advanced technology to improve the efficiency of screening and clearing commercial traffic at the border."⁴⁶ The objectives of the program include offering expedited clearance to carriers and importers enrolled in C-TPAT by reducing information requirements, dedicating or designating lanes of approach for FAST traffic, and physically examining cargo transported by low-risk participants with minimal frequency; streamlining and integrating the registration process for drivers, carriers, and importers; ensuring that only low-risk participants are enrolled; and providing a catalyst for both Customs administrations to participate in enhanced technologies, such as transponders.⁴⁷ In order for a shipment to qualify as a FAST shipment and receive the expedited processing and clearance, the shipment must contain qualifying goods from a C-TPAT approved manufacturer; be transported to the border (FAST lane where available) by a C-TPAT certified highway carrier, in a truck with a driver carrying a FAST-Commercial Driver card; and be destined for a C-TPAT approved importer. In addition, manufacturers, importers, and carriers enrolled in the U.S.-

⁴⁴ U.S. General Accounting Office, *Container Security: Expansion of Key Customs Programs will Require Greater Attention to Critical Success Factors*, GAO-03-770, July, 2003, p. 14.

⁴⁵ FAST also operates on the northern border under a bilateral agreement with Canada.

⁴⁶ CBP, "Fact Sheet: U.S. Customs and Border Protection — FAST Program," [http://www.cbp.gov/xp/cgov/newsroom/fact_sheets/fact_sheet_fast1.xml].

⁴⁷ Ibid.

Mexico FAST program are responsible for ensuring that all U.S.-bound loaded containers or trailers are secured with high security mechanical seals.⁴⁸

FAST is currently operational at six POE on the southern border: Laredo, TX; Hidalgo/Pharr, TX; El Paso, TX; Otay Mesa, CA; Brownsville, TX; and Calexico, CA. Each of these six FAST ports has a dedicated FAST lane.⁴⁹ CBP had plans to have FAST operational at the following additional eight POE by the summer of 2005: Tecate, CA; San Luis, AZ; Douglas, AZ; Nogales, AZ; Santa Teresa, NM; Del Rio, TX; Eagle Pass, TX; and Rio Grande City, TX.⁵⁰ These FAST ports accounted for 92% of commercial traffic along the southern border; and as of January, 2005, 15% of U.S.-Mexico bilateral trade is being cleared through FAST lanes.⁵¹

Customs Mutual Assistance Agreements (CMAA). CBP has negotiated CMAAs with 49 countries since joining the international Customs Cooperation Council (CCC) in 1970. These agreements were based on the model bilateral convention on mutual assistance adopted by the CCC in 1967, and are recognized by domestic and foreign courts as a legal basis for cooperation.⁵² The agreements allow for the exchange of information, intelligence, and documents to assist in the prevention and investigation of customs offenses. Each agreement is tailored to the capacities and policies of the country's customs administration, and can therefore be of particular use to ICE and CBP foreign attache offices. CBP signed the CMAA with Mexico on September 30, 1976, which went into force January 20, 1977. This agreement was updated with the signing of a new CMAA on June 20, 2000.

Selected Inspections Issues

With respect to the inspections process at the southwest border, several issues are evident. While there continues to be debate over *what* and *who* should be inspected and the extent of the inspections (i.e., actual physical inspections versus a cursory review of the travel documentation), there is also considerable debate with respect to the inspection technology used at POE, in particular the entry/exit controls present at some POE.

⁴⁸ See, CBP, *U.S./Mexico C-TPAT/FAST Seal Requirements*, [http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/fast/us_mexico/mexico_manuf/manuf_seal_requirements.xml].

⁴⁹ CBP, "Homeland Security Secretary Ridge Visits New FAST Lane at Calexico," [http://www.cbp.gov/xp/cgov/newsroom/press_releases/departmental_press_releases/01142005_2.xml].

⁵⁰ As of Sept. 8, 2005, CBP's website still has these POE listed as "operational by summer 2005." See [http://www.cbp.gov/xp/cgov/newsroom/fact_sheets/fact_sheet_fast1.xml].

⁵¹ DHS and the Mexican Department of the Interior, "The U.S.-Mexico Border Partnership: Progress Report 2002-2004," Jan. 17, 2005, , pp. 3, 12, [http://www.dhs.gov/interweb/assetlibrary/2004_US-Mex_Book.pdf]

⁵² CBP, "Customs Mutual Assistance Agreements by Country," at [http://www.cbp.gov/xp/enforcement/international_activities/international_agreements/cmaa.xml].

U.S.-VISIT.⁵³ In 1996, Congress first mandated that the former INS implement an automated entry and exit data system (now referred to as the U.S.-VISIT program) that would track the arrival and departure of every alien.⁵⁴ The objective for an automated entry and exit data system was, in part, to develop a mechanism that would be able to track nonimmigrants⁵⁵ who overstayed their visas as part of a broader emphasis on immigration control. Following the September 11, 2001 terrorist attacks, however, there was a marked shift in priority for implementing an automated entry and exit data system. While the tracking of nonimmigrants who overstayed their visas remains an important goal, border security has become the paramount concern.

Initial concerns surrounding the implementation of U.S.-VISIT centered on the potential disruption in tourism and commerce. While these concerns have been abated by measures taken by the Administration,⁵⁶ additional concerns with respect to the program's implementation still exist. Some observers believe that the cost of fully implementing such a system will outweigh the benefits.⁵⁷ Others express concern about the inadequacy of current infrastructure.⁵⁸ Many continue to question the purpose of such a system. Some argue that resources should be directed at immigration interior enforcement, rather than on an expensive system whose capability is not fully known. Despite these concerns, the Administration has reported successes in the program since its implementation.⁵⁹

Laser Visas (Mexican Border Crossing Cards). Since 1953, the United States has made special accommodations for Mexican nationals who frequently visit and conduct business in border communities. While both governments benefit economically from the arrangement, critics have long complained about the difference in treatment of Mexican nationals at the border when compared to their Canadian counterparts.⁶⁰ Mexican nationals applying for admission to the United States as visitors are required to obtain a visa or hold a Mexican border crossing card,

⁵³ For a complete discussion on the U.S.-VISIT program, see CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Program*, by Lisa M. Seghetti and Stephen R. Viña.

⁵⁴ Section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208).

⁵⁵ A nonimmigrant is a foreign national admitted to the United States on a temporary basis.

⁵⁶ See for example the Administration's current exemption of Mexican Border Crossing Card holders from the requirements of the U.S.-VISIT program below.

⁵⁷ EWeek, *US-VISIT Is No Bargain*, by Bruce Schneier, July 6, 2004; [<http://www.eweek.com/article2/0,1759,1619924,00.asp>] visited Apr. 25, 2005).

⁵⁸ See discussion in Selected Crosscutting Issues Section.

⁵⁹ DHS, "Transcript of Press Conference with former Acting Secretary of Homeland Security Admiral James Loy on the FY2006 Budget," Feb. 7, 2005, at [<http://www.dhs.gov/dhspublic/display?theme=43&content=4338&print=true>].

⁶⁰ See for example, the Border Trade Alliance [<http://www.thebta.org/home.cfm>].

now referred to as the Laser Visa.⁶¹ Canadian nationals, on the other hand, are waived from the documentary requirements.⁶² These waivers, including the passport requirement, may be made on the basis of unforeseen emergency in individual cases, on the basis of reciprocity with respect to nationals of foreign contiguous territory, and for other reasons specified in the law. Canadian citizens, except after a visit outside the Western Hemisphere, and American Indians born in Canada having at least 50% American Indian blood, are among those who currently are waived from the documentary requirements for admission.⁶³

The Laser Visa is used by citizens of Mexico to gain short-term entry (up to six months) for business or tourism into the United States. The visa can be used for multiple entries and is valid for 10 years. Mexican citizens can get a laser visa from the Department of State (DOS) Bureau of Consular Affairs if they are otherwise admissible as B-1 (business) or B-2 (tourism) nonimmigrants.⁶⁴ If the individual intends to go 25 miles or further inland and/or stay longer than 30 days,⁶⁵ they are also required to obtain a Form I-94, Arrival/Departure Record.⁶⁶ Upon departure, Mexican nationals who have to complete an I-94 form are to deposit them in boxes at POE.

Critics⁶⁷ contend that Mexican nationals should be treated the same as most Canadian nationals who also come into the country to shop or visit, but are not

⁶¹ From 1992 to 1998, border crossing cards were also issued to Canadian citizens. DOS and the former INS ceased issuing the BCC and the combination B-1/B-2 visa and BCC to Canadian citizens, British subjects who reside in Canada and landed immigrants in 1998.

⁶² The Canadian exception to the documentary requirements is based upon provisions in INA [found in §212(d)(4)(A)] that permit the Attorney General, acting jointly with the Secretary of State, to waive either or both requirements of §212(a)(7)(B)(i). Since the Homeland Security Act (P.L. 107-296) transferred most immigration-related functions from Department of Justice (DOJ) to DHS, it is assumed that the Attorney General's authority for this provision now rests with the Secretary of DHS.

⁶³ With the passage of the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458), Canadian nationals and others for whom documentary requirements are waived, will need documentation to enter the United States beginning in 2008.

⁶⁴ For additional information on nonimmigrant admission to the United States, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

⁶⁵ Mexican nationals who possess a Laser Visa and are traveling into the United States via the Tucson Border Patrol Sector are permitted to travel within 75 miles of the border (see 8 CFR 235.1(f)(1)).

⁶⁶ For many years, the former INS had recorded nonimmigrant arrivals at airports on Form I-94, the Arrival/Departure Record, which is a paper-based system that contains information that is later keyed into the Nonimmigrant Information System (NIIS). The Form is a perforated numbered card and is composed of an arrival portion collected upon entry and a departure portion that is returned to the alien passenger. Upon departure, the reverse-side of the departure portion is completed by the departure carrier and submitted to DHS at the port of departure. Under current regulations, the outbound carrier has 48 hours to submit the departure Form I-94 to DHS.

⁶⁷ See for example, the Border Trade Alliance at [<http://www.thebta.org/home.cfm>].

required to present travel documentation.⁶⁸ Others assert, however, that some Mexican nationals who possess a border crossing card overstay the terms of the card, which was, in part, the impetus for §110 of IIRIRA (the entry/exit system requirement). Moreover, there had been additional concerns that the Mexican border crossing card was increasingly being used fraudulently by individuals who would not otherwise be eligible for admission to the United States. They point to the 1996 Congressional requirement that Mexican border crossing cards contain biometrics before such a requirement was imposed on other travel documents in 2001.

While the Administration has maintained that Mexican nationals who have a Laser Visa will not be subjected to the requirements of the U.S.-VISIT program, it is not clear if the administrative exception will be permanent. Because of the exclusion of Mexican nationals who possess a Laser Visa from the requirements of the program, anticipated concerns that the program would cause massive delays at the border have abated. However, security concerns have been raised with respect to the Administration's decision to exclude travelers who have a border crossing card from the requirements of the program (see discussion below).

Biometric Verification System (BVS). As stated previously, Mexican nationals who plan to stay in the United States for a specified period of time, travel within a certain geographical distance from the border and have a Laser Visa will be exempt from the requirements of the US-VISIT program. The Administration exempted this category of individuals primarily due to the extensive background check that includes the querying of several criminal and watchlisting databases that are already being conducted on all Laser Visa applicants. The Administration also contends that the Laser Visa document is read and scanned at the time the Mexican national presents himself for entry to the United States at a POE, thus providing an extra layer of security. Observers contend, however, that the equipment necessary to read and scan the documents is not present at every POE. The POEs where the equipment is being piloted are reportedly in the secondary inspections area and do not operate 100% of the time. Moreover, the BVS is not integrated with other critical data systems and databases.

One Face at the Border. On September 3, 2003, CBP announced that it had developed a unified inspection force at the border comprised of immigration and customs inspectors.⁶⁹ It was believed that by merging these inspection forces and cross-training the inspectors, the law enforcement responsibilities of the individual inspector would be greatly increased. These expanded responsibilities compete for the inspectors' attention and include such diverse areas as evaluating terrorist threats; enforcing customs rules relating to commerce; and enforcing immigration laws. Questions, however, have been raised with respect to this initiative, including

⁶⁸ Under current law (P.L. 108-458), by 2008 Canadian nationals and other foreign nationals who are currently exempt from the documentary requirements will have to show an approved document before entering the United States.

⁶⁹ The inspections function of the Animal and Plant Health Inspection Service (APHIS) remained separate.

- Is the initiative working to its fullest potential, that is, are customs inspectors performing secondary immigration inspections duties and are immigration inspectors performing secondary customs inspections?
- Is there an equal or otherwise appropriate amount of training in both customs and immigration inspections?
- What types of measures are in place to evaluate whether the cross-training of inspectors is more efficient and produces a more secure border than the former system of having inspectors with detailed expertise concentrated on one area?

Monitoring the Border Between Ports of Entry⁷⁰

While the federal inspections process was codified by Congress in the 1700s and 1800s, it was 1924 when Congress recognized the need for enforcement measures to stem illegal entries between ports of entry and passed legislation that formally created the border patrol.⁷¹ Prior to the formal creation of a border patrol, the Bureau of Immigration in the Department of Labor had maintained a small force of mounted guards on the U.S.-Mexico border. Recently, the Office of Air and Marine Operations (AMO) was transferred to CBP. For the purpose of this report, AMO is placed with the border patrol as an entity that monitors the border *between* the ports of entry.

Air and Marine Operations

The Office of Air and Marine Operations is a component of CBP, whose mission is to “protect the American people and critical infrastructure by using an integrated and coordinated air and marine force to deter, interdict, and prevent acts of terrorism and smuggling arising from the threats of unlawful movement of people and goods across the borders of the United States.”⁷² In addition to enforcement efforts in New York and Washington state, AMO has 12 Air and Marine branches, two Surveillance branches, 11 Air Units and 16 Marine units located across the southern tier of the United States and Puerto Rico.⁷³

Threats. According to AMO, their operations are threat driven and the threat environment is, to some extent, shaped by the operational successes and failures of the AMO itself, as well as other foreign and domestic counter-narcotic operations. According to AMO, this relationship can be seen, for example, where “interdiction

⁷⁰ For additional information on the border patrol, see CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*, by Blas Nuñez-Neto.

⁷¹ See the 1924 Immigration Act (4. Stat. 153) and a subsequent appropriations act (43 Stat. 240).

⁷² Customs and Border Protection, “Air and Marine Operations,” at [http://www.cbp.gov/xp/cgov/border_security/amo/].

⁷³ Customs and Border Protection, “AMO Overview,” at [http://www.cbp.gov/xp/cgov/border_security/amo/overview.xml].

successes in Central America, Mexico, and the Bahamas pushed smugglers from the air to the water.” As evidence of this, AMO cites the Interagency Assessment of Cocaine Movement, which reports that 96% of cocaine movement from South America has a maritime component.⁷⁴ AMO has noted that the adaptability and flexibility of smugglers and their organizations make the specific threat environment somewhat fluid. AMO briefing materials indicate that in northern Mexico air drug smuggling consists of both marijuana and cocaine transported from central and southern Mexico to the southwest border of the United States; and that ‘go-fast’ boats and fishing vessels move multi-ton loads in the eastern Pacific, while ‘go-fast’ vessels dominate the Caribbean in the marine environment.

Rationalization of Air and Marine Assets, Border Patrol and AMO.

AMO was effectively transferred to CBP with the passage of the FY2005 DHS Appropriations Act (P.L. 108-334), which moved the AMO funding lines from ICE to CBP. One of the outstanding questions posed by this transfer is the degree to which (if at all) AMO assets (aircraft, boats, and/or bases) will be consolidated with the air and marine assets of the border patrol. Another outstanding question is whether or not the missions of AMO and the border patrol are sufficiently similar to support this consolidation.

U.S. Border Patrol (USBP)

While the USBP patrols both the northern and southwestern borders, the border with Mexico has long been the flash point for illegal migration into the United States. Over the last seven years, 97% of all illegal alien apprehensions were made along the southwest border. As a result of the heavy concentration of illegal migration, the USBP currently deploys 90% of their agents along the border with Mexico. Operationally, the USBP divides the southwest border into nine sectors: two in California, two in Arizona, and five in Texas.

The majority of illegal migration takes place *between the ports of entry*. As such, the border patrol plays a central role in securing the southwest border and is where the majority of the programs and initiatives are found. This section discusses the activities of the border patrol in some detail, particularly as it pertains to the southwest border, including (1) a discussion of the border patrol strategy; (2) the authority of the border patrol to stop and question individuals in vehicles that pass through one of its interior checkpoint stations; and (3) the authority of the border patrol to remove aliens from the United States without a formal court proceeding. The section concludes with an analysis of selected issues that have an impact on border security at the southwest border.

Evolution of Border Patrol Strategy. A 1993 study commissioned by the Office of National Drug Control Policy concluded that the southwest border was “being overrun.” According to the study, every night 6,000 illegal immigrants attempted to enter the United States through a 7.5 mile stretch of the border near San Diego. Additionally, the study concluded that drug smuggling was a serious problem

⁷⁴ Briefing materials supplied by AMO, during briefing attended by CRS Mar. 5, 2004, p. 8.

along the southwest border. Among several recommendations, the study concluded that the INS should change its border security focus from arresting illegal migrants within the United States to preventing their entry into the country.⁷⁵

In 1994, the former INS began to implement a multi-year strategy, the National Strategic Plan (NSP),⁷⁶ aimed at strengthening enforcement of U.S. immigration laws. The strategy placed an emphasis on decreasing the number of illegal immigrants coming into the United States by increasing controls at the nation's borders. By the United States fortifying more visible and popular urban entry points for illegal migrants, less desirable and remote areas became the focal point for the illegal migrants. The strategy had four phases that began with the border patrol sectors with the highest levels of illegal migration activity.⁷⁷

- Phase I: San Diego, CA and El Paso, TX sectors
- Phase II: Tucson, AZ, Del Rio, TX, Laredo, TX and McAllen, TX sectors
- Phase III: El Centro, CA, Yuma, AZ and Marfa, TX sectors
- Phase IV: The northern border, gulf coast and coastal waterways

The focus of the NSP was an operational strategy known as “Prevention Through Deterrence.” The strategy’s goal was to place border patrol agents and resources directly on the border in order to deter the entry of illegal aliens, rather than attempting to arrest aliens after they have already entered the country. According to CBP, achieving optimum deterrence would mean that increasing the number of agents and resources in a sector would not necessarily result in an increase in the number of unauthorized migrants apprehended in that sector.⁷⁸ The “Prevention Through Deterrence” policy was embraced by Congress, with both the House and Senate Appropriations Committees in 1996 directing the INS to hire new agents, reallocate border patrol agents stationed in the interior to front line duty, and staff the interior offices with investigative staff instead.⁷⁹

As a result of the massive buildup in agents and resources precipitated by the NSP, about 90% of border patrol agents are deployed along the southwest border.

⁷⁵ U.S. Government Accountability Office, *Border Control: Revised Strategy Is Showing Some Positive Results*, GAO/GGD-95-30, Dec. 1994, pp. 5-8.

⁷⁶ NSP has also been referred to as the National Border Patrol Strategy.

⁷⁷ U.S. Department of Justice, INS Fact Sheet, *INS' Southwest Border Strategy*, May 1, 1999.

⁷⁸ U.S. Customs and Border Protection, *Performance and Annual Report: Fiscal Year 2003*, p. 41.

⁷⁹ U.S. Congress, Senate Committee on Appropriations, *Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Bill, 1996*, report to accompany H.R. 2076, 104th Cong., 1st sess., S.Rept. 104-139; and U.S. Congress, House Committee on Appropriations, *Making Appropriations for the Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies For the Fiscal Year Ending September 30, 1996, and for Other Purposes*, report to accompany H.R. 2076, 104th Cong., 1st sess., H.Rept. 104-378.

The majority of these agents are concentrated in nine border corridors that encompass the major travel arteries in the region and account for over 80% of the illegal migrant traffic (in terms of apprehensions).⁸⁰ This deployment reflects the border patrol's goal of rerouting the illegal border traffic from traditional urban routes to less populated and geographically harsher areas, providing border patrol agents with a tactical advantage over illegal border crossers and smugglers.⁸¹

The former INS had claimed success in improving the quality of life in border communities along the affected areas as a result of enforcement efforts.⁸² As the border patrol has increased its enforcement practices along the border, some evidence exists that border related crimes have diminished in border communities. The overall crime rate in communities bordering with Mexico was 30% higher than the national average in 1990, but only 12% higher in 2000. The majority of this improvement has come in San Diego and El Paso, which are the most populous communities along the border. San Diego and El Paso aside, however, most border counties' crime rates did not decline as much as the national average between 1990 and 2000. This means that, relative to the rest of the country, most border communities were actually more crime ridden in 2000 than in 1990.⁸³ This reduction in the overall crime rate along the border is seen by some as tangible proof that the "Prevention Through Deterrence" policy is achieving its goal of reducing illegal immigration and the crime it engenders. Others point out that the policy has shifted illegal immigration away from population centers in order to explain why crime rates fell relative to the national average in San Diego and El Paso but increased in communities along the less populated stretches of the border. It is unclear, however, whether illegal migration has declined along the southwest border.⁸⁴ The number of apprehensions typically increased in the areas that were targeted by the border patrol and subsequently decreased as enforcement ramped up. Some contend, however, that the increase in apprehension may simply be due to the concentration of manpower in these areas and subsequent decreases in apprehension can be attributed to the technological "hardening of the border" (e.g., the erection of fences, sensors and lighting). While this may be the case, it is also possible that the policy is indeed working, and simply shifting the illegal migration pattern to more severe terrain

⁸⁰ U.S. Department of Justice, INS, *Immigration Enforcement Estimates for Fiscal Year 2003*, pp. 78, 108.

⁸¹ U.S. Government Accountability Office, *Border Security: Agencies Need to Better Coordinate Their Strategies and Operations on Federal Lands*, GAO-04-590, June 2004, pp. 10-11 and testimony of George Regan, Acting Associate Commissioner, Enforcement, INS, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration and Claims, *Combating Illegal Immigration: Progress Report*, 105th Cong., 1st sess., Apr. 23, 1997.

⁸² For example, INS has reported that several initiatives have been successful in decreasing the crime rate in the communities that were impacted (see INS Fact Sheet, *INS' Southwest Border Strategy*).

⁸³ Federal Reserve Bank of Dallas, "Falling Crime and Rising Border Enforcement: Is There a Connection?" *Southwest Economy*, May/June 2003.

⁸⁴ U.S. Department of Justice, Office of Inspector General (OIG): *INS' Southwest Border Strategy: Resource and Impact Issues Remain After Seven Years*, GAO report GAO-01-842.

where more migrants may be getting through despite the arduous nature of the trip, as discussed below.

According to the Administration, a consequence of the strategy has been a shift in illegal immigration to more open areas.⁸⁵ For example, efforts to secure the San Diego and Tucson areas have led to increased illegal migration in the Western Arizona area, including the Tohono O'odham Nation and several federal land areas, as discussed below. Moreover, a possible unintended consequence of these initiatives is the danger posed by the shift of illegal migration away from urban areas to open, more sparsely populated areas that could be dangerous for the illegal immigrant.⁸⁶ In some cases, illegal migrants have lost their lives or suffered injuries in an attempt to avoid being caught by border patrol agents. According to some critics, these illegal migrants cross rough terrain, exposing themselves to extreme weather, or swim through dangerous waters (i.e., the Rio Grande River in Texas) in an attempt to gain entry into the United States.⁸⁷

As security efforts at official points of entry become more sophisticated and stringent, terrorists and other criminals may attempt to illegally enter the country between points of entry. In order to prevent and deter terrorist entry, the Border patrol, in conjunction with DHS' Immigration and Customs Enforcement's (ICE's) Anti-Smuggling Units and CBP's Office of Intelligence, focuses its intelligence and surveillance operations on known smuggling operations that have previously trafficked aliens from significant interest countries. Additionally, the agencies develop joint operations to target and disrupt these especially high-interest smuggling activities.⁸⁸ It is important to note, however, that the increased emphasis on preventing terrorist entry into the United States has not changed the scope of the USBP's mission — preventing unauthorized aliens from entering the country.

New National Border Patrol Strategy. In March of 2005, the USBP released a new National Border Patrol Strategy (NS). The new national strategy has five main objectives:

- establish the substantial probability of apprehending terrorists and weapons of mass destruction between POE;
- deter illegal entries between POE through improved enforcement;

⁸⁵ INS has contended that the shift of illegal immigration to open areas is part of the strategy. According to INS, the movement of illegal immigration away from urban areas and into more open spaces provides an advantage for border patrol agents in apprehending aliens. See INS' Fact Sheet, *INS' Southwest Border Strategy*.

⁸⁶ For example, the San Diego Border Patrol Sector was one of the first sectors targeted by the strategy because it was a popular crossing point for illegal immigrants. As a result of increase resources, studies have shown the shift of illegal migration away from the San Diego area to the deserts of El Centro.

⁸⁷ OIG, *INS' Southwest Border Strategy: Resource and Impact Issues Remain After Seven Years*, pp. 16-21; 24-26 and Orrenius, Pia M. Federal Reserve Bank of Dallas, *The Border Economy*, June 2001. p. 9.

⁸⁸ DHS, CBP, "Fact Sheet: U.S. Customs and Border Protection — Protecting Our Southern Border Against the Terrorist Threat," Fact Sheet, Aug. 20, 2004.

- detect, apprehend, and deter smugglers of humans, drugs, and other contraband;
- leverage “Smart Border” technology to multiply the enforcement effect of border patrol agents; and
- reduce crime in border communities, thereby improving the quality of life and economic well-being of those areas.⁸⁹

The USBP’s new NS also identifies different strategic focuses for each of the agency’s theaters of operation. Regarding the Southwest border, the NS notes that while some observers categorize the aliens 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 and then use these masses of illegal aliens as ‘cover’ for a successful cross-border penetration.”⁹⁰ In order to combat this threat, the NS calls for the continuing expansion of the Prevention Through Deterrence strategy through the deployment of sensing technologies, enhanced intelligence gathering, cooperation with other law enforcement agencies operating along the border, and the deployment of more mobile personnel and improved air support.

Apprehension Rates. 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 people⁹¹ 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.⁹² While caution should be taken when attempting to draw conclusions about the efficacy of policy measures based solely on apprehensions statistics, they remain the only way available at the moment to trace trends in illegal migration along the border. While Mexican nationals make up the majority of apprehensions at the southwest border (94% in FY2004), apprehensions of nationals from other countries have recently begun to receive Congressional attention.

Figure 3 shows that the total number of unauthorized aliens apprehended by the border patrol along the southwest border increased steadily through the late 1990’s, reaching a peak of 1.65 million in FY2000. This increase in apprehensions occurred even as the number of personnel and resources deployed along the border more than doubled over that period. The increase in apprehensions may have been due to the increased presence of agents and resources along the border, or it may have been due

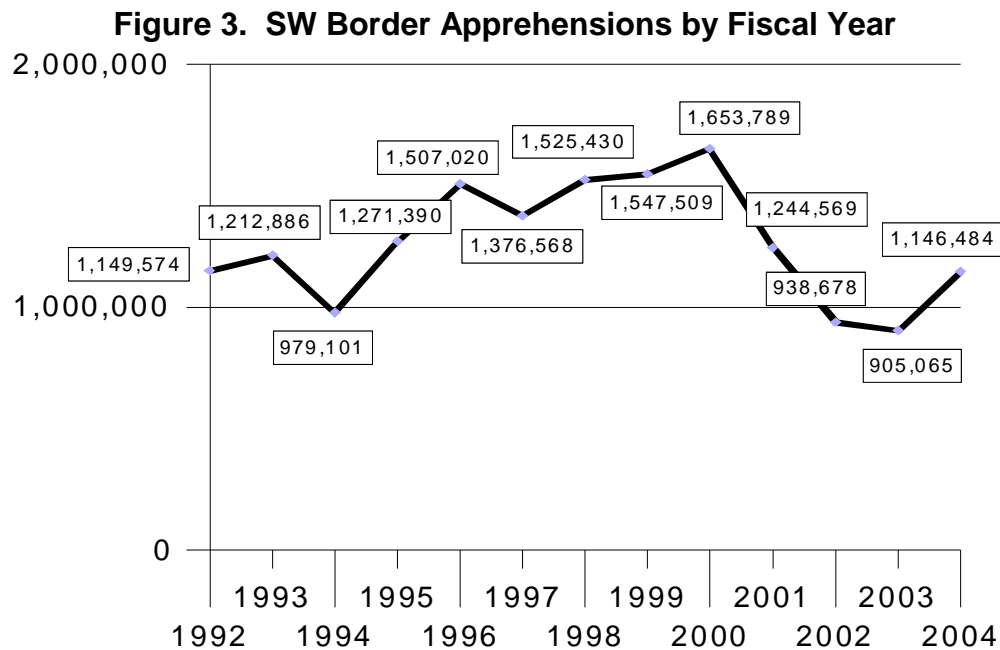
⁸⁹ DHS, CBP, “National Border Patrol Strategy,” Mar. 2005, p. 13.

⁹⁰ *Ibid.*, p. 5.

⁹¹ 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.

⁹² For an expanded discussion of these problems, please refer to CRS Report RL32562, *Border Security: The Role of the US Border Patrol*, by Blas Nuñez-Neto, pp. 7-8.

to an increase in the number of aliens attempting to enter the United States in order to benefit from the rapidly growing economy during that period. Since FY2000, however, apprehensions have been declining, reaching a low of 905,065 in FY2003. This reduction could be attributed to a number of factors. For example, the decline could signify that the “Prevention through Deterrence” strategy succeeded in placing enough agents and resources directly on the border to effectively deter unauthorized migrants from entering the country. However, the reduction also occurred during a period of economic decline and mounting unemployment within the United States which may have contributed to the decrease in apprehensions during that time by discouraging would-be economic migrants.



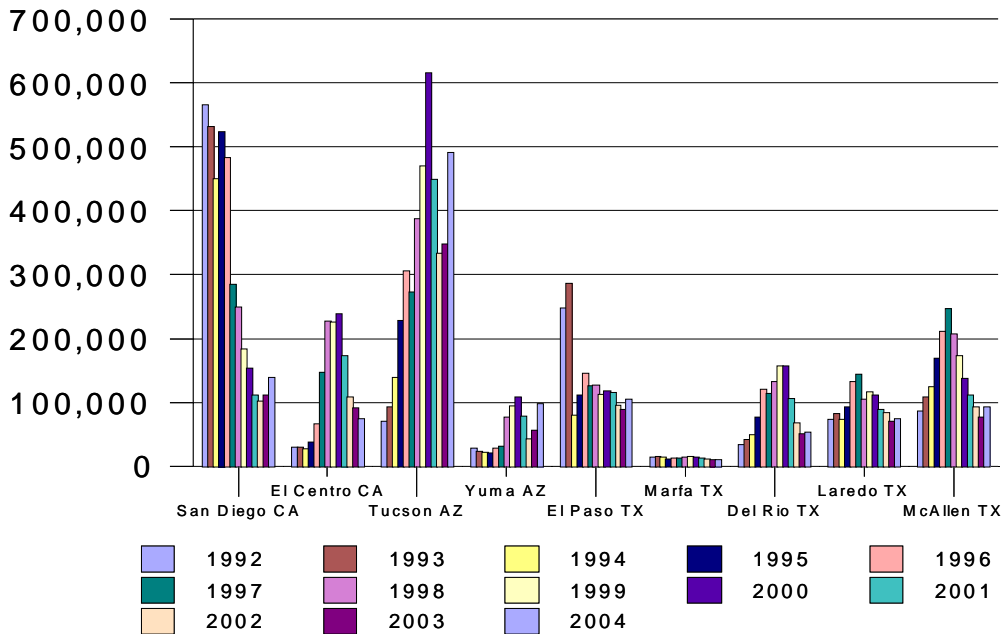
Source: CRS presentation of CBP data.

While **Figure 3** shows that the level of apprehensions leveled off at around 900,000 in FY2002 and FY2003; apprehensions in FY2004 rose by almost 250,000. This is the first increase in apprehensions since FY1999-FY2000. This increase may suggest that despite the increase in manpower and resources along the southwest border, unauthorized migrants have not been deterred from attempting to illegally enter the country. However, analyzing border patrol apprehensions by sector complicates this analysis and sheds some light on the trends along the border.

Figure 4 breaks down the southwest border apprehensions by sector. This analysis suggests that the “Prevention Through Deterrence” strategy has accomplished its goal of rerouting unauthorized migrant traffic from heavily populated areas to more remote areas. The data show that in the late 1990s apprehensions decreased significantly along the California and Texas sectors, instead pushing out into the harsh conditions of the Arizona desert along the Tucson sector. Apprehensions in the Tucson sector rose in the last years of the 1990s, even as they declined in the traditional hot-spots of San Diego, El Paso, and McAllen. Following

their peak in FY2000, apprehensions in the Tucson sector declined from FY2001 through FY2003. In FY2004, however, apprehensions increased by over 140,000 in the Tucson sector and remain higher than they were before the NSP was instituted. Apprehensions in the Yuma sector followed a similar pattern; they also increased in FY2004 and remain above their pre-NSP levels. The data seem to suggest that the Prevention Through Deterrence strategy has succeeded in changing the focal point of illegal migration from heavily populated areas such as the San Diego sector to more remote and challenging areas such as the Tucson and Yuma sectors.

Figure 4. SW Border Apprehensions, by Sector and Fiscal Year



Source: CRS presentation of CBP data.

Figure 3 showed that overall apprehensions have increased by over 240,000, or 27%, from FY2003 to FY2004. This could suggest that the *deterrent* effect of focusing resources directly along the border has waned somewhat, or that as the U.S. economy began to emerge from a sluggish period that more aliens than before are attempting to enter the country in order to benefit from the increase in opportunities. However, this analysis is tempered by the observation that 76% (184,818) of the overall increase in apprehensions occurred in the Tucson and Yuma sectors in Arizona. In 2004, these sectors participated in the Arizona Border Control (ABC) initiative which significantly increased manpower and resources along the Arizona border. This could suggest that the increase in apprehensions is attributable to the increase in enforcement in those sectors during the same period. Interestingly, the only other sector to exhibit a significant increase in apprehensions in FY2004 was the San Diego sector in California, which after seven years of decreases from FY1995 to FY2002 experienced back-to-back increases in apprehensions in FY2003 and FY2004. However, overall apprehensions in the San Diego sector remain far below their pre-NSP levels.

Other Than Mexican Apprehensions.⁹³ In FY2004, the border patrol apprehended 1.1 million people. The majority (94%) of these apprehensions were Mexican nationals. Because the vast majority of people apprehended each year by the border patrol are Mexican, the agency distinguishes between Mexicans and Other Than Mexicans (OTM). The issue of non-Mexican nationals has received publicity recently due to Congressional testimony by DHS former acting Secretary Admiral James Loy that Al-Qaeda may be considering infiltrating the southwest border due to a belief that “illegal entry is more advantageous than legal entry for operational security reasons.”⁹⁴

Over the past three years, OTM apprehensions have more than doubled, from 37,316 in FY2002 to 75,389 in FY2004. Ninety eight percent of this increase came from five countries, in descending order: Honduras, El Salvador, Brazil, Guatemala, Nicaragua, and the Dominican Republic. The Peoples’ Republic of China showed the sixth largest increase over the three-year span. Despite the recent concerns about terrorist infiltration, apprehensions from Middle Eastern countries have actually declined 27% from FY2002 to FY2004, from 465 persons to 341.⁹⁵

Selected Issues Between Ports of Entry

In recent years, the border patrol has received increased attention, primarily due to the growing concern over the number of aliens who illegally gain entry into the United States between official ports of entry. Consequently, several issues that are unique to the border patrol have gained prominence.

Border Patrol Checkpoints.⁹⁶ In terms of securing the border, immigration checkpoints are viewed by the border patrol as the third layer of defense and generally entail the stopping of vehicles passing through a particular location, usually on a highway leading away from the border.⁹⁷ The purpose of an inland immigration checkpoint is to verify the immigration and citizenship status of the persons in the passing vehicles. The border patrol conducts three types of inland traffic-checking

⁹³ For additional information on OTMs, see CRS Report RL33097, *Border Security: Apprehensions of “Other Than Mexican” Aliens*, by Blas Nuñez-Neto.

⁹⁴ U.S. Congress, Senate Select Committee on Intelligence, *National Security Threats to the United States*, 109th Cong. 1st Sess., Feb. 16, 2005.

⁹⁵ CRS presentation of data provided by CBP Congressional Affairs on Jan. 6, 2005.

⁹⁶ For additional information on the border patrol’s checkpoints, see the Government Accountability Office Report to Congressional Requesters GAO-05-435, *Border Patrol: Available Data on Interior Checkpoints Suggest Differences in Sector Performance*, July 2005.

⁹⁷ According to the USBP, the first two layers of defense at the border are line watch and patrol operations. Inland immigration checkpoints, from a legal perspective, are generally different from “functional or border equivalent” checkpoints, which normally fall under the “border search” exception to the Fourth Amendment’s warrant and probable cause requirements (i.e, may allow an officer to conduct a limited search without any suspicion). For more information, see CRS Report RL31826, *Protecting Our Perimeter: “Border Searches” under the Fourth Amendment*, by Stephen R. Viña.

operations: permanent checkpoints, temporary checkpoints, and roving patrols. These operations are conducted pursuant to statutory authorizations empowering border patrol agents to interrogate those believed to be aliens as to their right to be in the United States and to inspect vehicles for aliens.⁹⁸ Under current regulations, the authority to place a checkpoint may be exercised anywhere within 100 air miles of the border.⁹⁹ The Supreme Court has recognized that the maintenance of a traffic-checking program in the interior is permissible because the flow of illegal aliens cannot effectively be controlled solely at the border.¹⁰⁰

Border Patrol Checkpoints in the Tucson Sector. The Tucson Border Patrol Sector is the only sector that is prohibited from having permanently operating checkpoints. Since 2003, Congress has limited the Tucson Border Patrol Sector's ability to erect permanent checkpoints through annual Appropriation Acts. According to the DHS Appropriations Act for 2005,¹⁰¹ for example, CBP is required to relocate its tactical (fixed) checkpoints in the Tucson sector at least once every 14 days in a manner that prevents people subject to inspections from predicting the location of the checkpoint. Additionally, Congress requires CBP to submit to Congress "a plan for expenditure that includes location, design, costs, and benefits of each proposed Tucson sector permanent (i.e., fixed) checkpoint." Language in the DHS Appropriations Act for 2004¹⁰² prohibited appropriated funds to be used toward site acquisition, design, or construction of *any* checkpoint in the Tucson sector and required the border patrol to relocate its checkpoints in the Tucson sector at least once every *seven days*.¹⁰³ CBP asserts that these congressional restrictions impaired their ability to control the border. According to CBP, "closing and moving a checkpoint every seven days creates a national security vulnerability that allows smugglers of any kind to further their entry into the United States unabated."¹⁰⁴ The constant movement of these checkpoints may also make the placement of the checkpoint within the categories discussed above (and thus, the suspicion level required for a stop or search) difficult to determine. A possible issue for Congress is how to balance the need for uncertainty in location (to keep illegal migrants from evading fixed points) against the administrative necessities of having some permanence both for management and legal requirements.

⁹⁸ INA, §287(a)(1) & (3).

⁹⁹ 8 C.F.R. §287.1(b). This section, however, mandates that the agents in charge of establishing the checkpoint consider topography, density of population, inconvenience to travelers, and types of conveyances used, among other factors. It also provides a limited exception to the 100-mile rule.

¹⁰⁰ *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976).

¹⁰¹ P.L. 108-334.

¹⁰² P.L. 108-90, Title II.

¹⁰³ Similar language was placed in the 2003 Consolidated Appropriations Act, P.L. 108-7, Division B, Title I (Department of Justice).

¹⁰⁴ Office of Border Patrol PowerPoint Presentation, *Traffic Checkpoint Operations*, U.S. Customs and Border Protection, Feb. 2004.

CBP measures success of its checkpoints by the number of arrests made as a result of the measure. Similar to criticism that has been asserted with respect to the border patrol's apprehension rates, relying on the *number of arrests* made at these checkpoints as a reliable method to measure success may be problematic. The high arrest numbers may simply be due to the concentration of resources at these checkpoints. Moreover, there are no reliable estimates for how many aliens successfully evade capture.¹⁰⁵ This makes it difficult to establish a firm correlation between the number of arrests at or near a checkpoint and the number of people attempting to enter through that checkpoint.

Expedited Removal. The likelihood of terrorists entering the United States through its vast land borders, especially with the help of human smuggling networks, was a concern of the 9/11 Commission and may have grown now that aliens are facing much higher scrutiny at official ports of entry.¹⁰⁶ To address this concern, DHS announced in August of 2004 that border patrol officers would be allowed to exercise “expedited removal” authority at locations between the ports of entry.

Expedited removal authority was originally established in §302 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).¹⁰⁷ It allows immigration officers to deny admission and order an alien removed, without a hearing before an immigration judge, if the alien arrives without proper documentation or by other fraudulent means. Aliens who indicate an intention to apply for asylum or who assert a fear of persecution or torture if returned home, however, are to be referred to an asylum officer and may receive a hearing before an immigration judge.¹⁰⁸ People removed from the United States under expedited removal are barred from re-entry for a period of five years but can apply for a waiver.

Since 1997, expedited removal has traditionally only been used by immigration officers at air and sea ports of entry. 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.¹⁰⁹ The INA allows expedited removal proceedings to be

¹⁰⁵ Although CBP contends that permanent checkpoints provide a platform to install infrastructure and technology that greatly increase detection and interdiction capabilities....” See Office of Border Patrol PowerPoint Presentation, *Traffic Checkpoint Operations*, U.S. Customs and Border Protection, Feb. 2004.

¹⁰⁶ 9/11 Report, p. 384.

¹⁰⁷ P.L. 104-208, Division C, §302, 110 Stat. 3009-546 (amending §235 of the INA).

¹⁰⁸ INA 235(b)(1); 8 U.S.C. 1225(b)(1). Specially, expedited removal proceedings may be applied to aliens who violate INA §§ 212(a)(b)(C) or 212(a)(7).

¹⁰⁹ Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 *Federal Register* 10312, 10314-15 (Mar. 6, 1997) (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 (continued...)

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.” “Arriving aliens” are defined in regulation (8 C.F.R. §1.1(q)) to mean “an applicant for admission coming or attempting to come into the United States at a port of entry....” Section 235(b)(1)(A)(iii), *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.¹¹⁰

The use of expedited removal was recently extended to the border patrol. DHS has elected to assert and implement only that portion of the authority granted by the statute¹¹¹ that bears close temporal and spatial proximity to illegal entries at or near the border. Accordingly, the expanded authority only applies to aliens encountered within fourteen days of entry without inspection and within 100 air miles of any U.S. international border. Furthermore, DHS plans, as a matter of prosecutorial discretion, to apply the new expedited removal authority only to (1) third-country nationals (i.e., aliens other than Canadians or Mexicans) and (2) to Mexican and Canadian nationals with histories of criminal or immigration violations, such as smugglers or aliens who have made numerous illegal entries.¹¹² Currently, non-Mexican nationals who are apprehended along the southern border cannot be returned to Mexico, and instead, are either voluntarily returned to their country of citizenship (via aircraft) or placed in formal removal proceedings. DHS claims that because of a lack of resources, non-Mexican nationals are often released in the United States with a notice to appear for removal proceedings.¹¹³ Many of these aliens subsequently fail to appear for their removal proceedings and stay in the United States illegally.

Some view the limitations on the new expanded authority as making the procedures applicable only to a “minute fraction of the illegal flow.”¹¹⁴ For example, of one million foreigners apprehended in the first 10 months of FY2005, all but 57,000 were Mexican; 3,000 of these other-than-Mexicans were from the Eastern

¹⁰⁹ (...continued)

more complex determinations of fact and would be more difficult to manage.

¹¹⁰ 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.”

¹¹¹ See §235(b)(1)(A)(iii) of the INA.

¹¹² 69 *Federal Register* 48877, 48878.

¹¹³ *Ibid.*

¹¹⁴ 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>].

hemisphere.¹¹⁵ Conversely, others are concerned about the lack of adequate training, deficiencies in previous applications at ports of entry, and minimal due process protections afforded.¹¹⁶ Others are especially concerned for asylum seekers under the new procedures, since their problems over the past seven years have been reportedly well-documented.¹¹⁷ Still, in spite of all these criticisms, DHS claims that expanding expedited removal between the ports of entry 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.

Physical Barriers.¹¹⁸ As part of the “Prevention Through Deterrence” strategy, the USBP incorporated the construction of physical barriers directly on the border into their NSP in the early 1990s. In 1990, the border patrol chief in the San Diego sector began erecting physical barriers chiefly to deter drug smuggling. The ensuing fence covered 14 miles of the border and was constructed of 10 foot high welded steel.¹¹⁹ Congress expanded the existing fence by requiring the border patrol to construct a triple-layered fence along the same fourteen miles of the US-Mexico border near San Diego.¹²⁰

Today, the border patrol maintains 96.7 miles of border fencing along the southwest border. A possible issue for Congress to consider concerns the potential tradeoff between preserving the environment in border regions and the requirements of domestic security. On the one hand are environmental activists who believe that the border fencing does not contribute significantly to national security but does degrade the environment in those regions.¹²¹ On the other hand are those who believe that the border fences have been an effective tool in discouraging aliens from crossing the border in those areas, and that the environmental damage caused by their construction is an unfortunate but necessary reality.¹²²

¹¹⁵ See Migration News, USCIS, ICE, CBP, available at [http://migration.ucdavis.edu/mn/comments.php?id=3044_0_2_0].

¹¹⁶ 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]; 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>].

¹¹⁷ *Ibid.*, (citing reports by the United Nations, the Government Accountability Office, and the American Bar Association).

¹¹⁸ For additional information, see CRS Report RS22026, *Border Security: Fences Along the U.S. International Border*, by Blas Nuñez-Neto and Stephen R. Viña.

¹¹⁹ U.S. Government Accountability Office, *Border Control — Revised Strategy is Showing Some Positive Results*, GAO/GGD-95-30, Jan. 31, 1995.

¹²⁰ See P.L. 104-208, Div. C, §102.

¹²¹ See Defenders of Wildlife at [http://www.ems.org/nws/2005/02/08/conservation_gro].

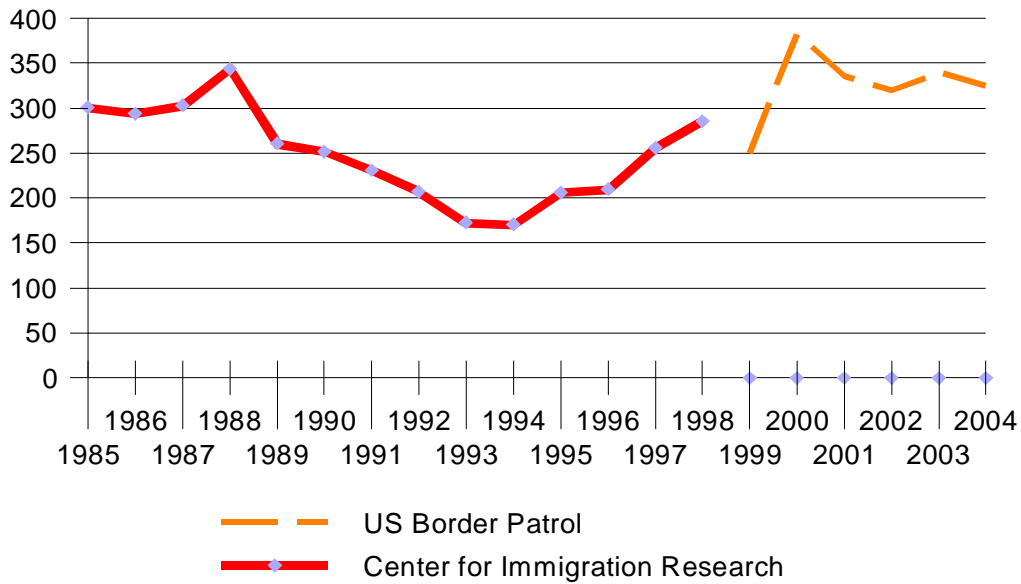
¹²² For example, see [http://moorewatch.com/index.php/weblog/comments/the_real_id_act/].

Migrant Deaths. An unintended consequence of the USBP's "Prevention Through Deterrence" strategy has been an increase in the number of accidental migrant deaths along the border. This is viewed as due to the border patrol's focus on pushing illegal migration away from population centers, which has led unauthorized migrants to attempt to cross the border in remote desert regions. The issue of migrant deaths along the border gained national prominence due to a succession of tragic events, including the discovery of 19 dead migrant workers in an airless truck trailer in Texas in May, 2003.¹²³

The border patrol began collecting data on migrant deaths in 1998. Prior to 1998, the best data available was compiled by the University of Houston's Center for Immigration Research (CIR) from a census of local medical investigators' and examiners' offices in every county along the US-Mexico border. Regardless of which entity collected the data, however, it may not be accurate due to the large number of different federal, state, and local jurisdictions represented along the border. Additionally, the border patrol's data does not include information from the Mexican side of the border, which probably means it undercounts the number of fatalities. **Figure 5** incorporates CIR and USBP data. The CIR data show that migrant deaths decreased steadily from a high of 344 in 1988 to a low of 171 in 1994. With the advent of the "Prevention Through Deterrence" strategy in 1995, migrant deaths appear to have increased sharply. USBP data shows a peak of 383 migrant deaths in FY2000. While migrant deaths decreased slightly to 340 in FY2003, the 11% reduction in deaths over this period is significantly lower than the 44% decline in apprehensions over the same period. This means that the overall mortality rate (or, the number of deaths per attempted border crossing) seems to have increased despite the overall reduction in deaths. This evidence seems to support the supposition that border crossings have become more hazardous since the "Prevention through Deterrence" policy went into effect in 1995, resulting in an increase in illegal migrant deaths along the southwest border.

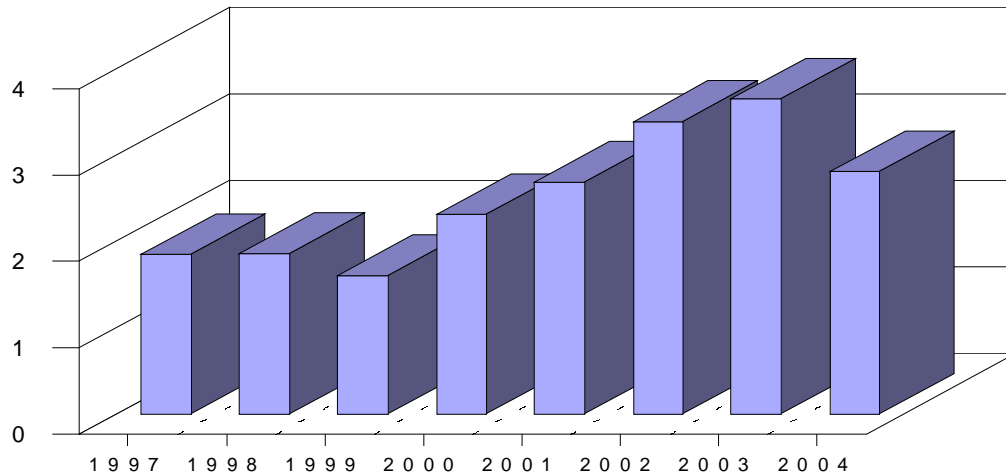
¹²³ Juan A. Lozano, "Migrant Toll Hits 19 in Texas Case; 2nd Truck Found," *The Associated Press*, May 17, 2003.

Figure 5. Migrant Deaths Along the Southwest Border, by Fiscal Year



Source: CRS analysis of CBP and CIR data.

Another way to visualize the increasing hazard for unauthorized migrants may be to analyze the ratio between migrant deaths and border patrol apprehensions. This ratio shows how many unauthorized immigrant fatalities there are for every apprehension made by a border patrol agent along the Southwest border. **Figure 6** shows that the mortality rate per apprehension more than doubled in five years, from 1.6 deaths per 10,000 apprehensions in FY1999 to 3.7 deaths per 10,000 apprehensions in FY2003. However, in FY2004 the ratio declined to 2.8 deaths per 10,000 apprehensions, marking the first decrease since FY1998-FY1999. The decline may be due to special measures to mitigate deaths emanating from several sources. Nevertheless, it appears that as the pattern of unauthorized migration has shifted away from population centers to remote border regions that the migrant fatality rate has increased significantly from 1999.

Figure 6. Migrant Mortality Rate per Apprehensions

Source: CRS presentation of USBP data.

The border patrol has drawn criticism from human rights activists who claim that the agency's migrant death count understates the number of fatalities. Some contend that the Border patrol undercounts fatalities by excluding skeletal remains, victims in car accidents, and corpses discovered by other agencies or local law enforcement officers.¹²⁴ Others point to inconsistencies in how the agency counts migrant deaths, with some sectors counting smugglers and guides who perish, but others excluding them, even though official USBP policy is to include all deaths in the 43 counties within a 100 miles of the US-Mexico border.¹²⁵ Border patrol officials counter that local law enforcement agencies often do not inform the border patrol when they encounter dead migrants, and that deaths that occur outside the 100 mile belt or on the Mexican side of the border are outside their operational purview.¹²⁶

Border Safety Initiative. Regardless of the debate over numbers, the USBP has taken several steps to address the problem of migrant deaths in recent years, including the Border Safety Initiative (BSI). In June 1998, the USBP launched BSI in part to address concerns about the increasing number of migrant deaths along the border. The BSI is a collaborative campaign with the Mexican government that focuses on decreasing the life-threatening dangers involved in crossing the border. As part of the BSI, the USBP produces television, radio, and print advertisements warning would-be migrants about the dangers involved in crossing the border. Additionally, the USBP maintains some water stations and rescue beacons in the desert and has increased border patrol agents in the areas that have been greatly impacted.¹²⁷ As part of the collaboration with Mexico, the USBP has trained over

¹²⁴ For example, see [<http://www.stopgatekeeper.org/English/bonner-040604.htm>].

¹²⁵ For example, see [http://www.uh.edu/cir/Deaths_during_migration.pdf].

¹²⁶ Andrea Almond, "How Best to Count Border Deaths?" *The Associated Press*, Nov. 7, 2004.

¹²⁷ U.S. Department of State, "U.S. Campaign on Mexican border Aims to Prevent Migrant (continued...)"

1,320 Mexican firefighters and law enforcement personnel in sophisticated search and rescue techniques and cooperates with the Mexican government to disrupt smuggling routes.¹²⁸

Border Patrol Search, Trauma, and Rescue (BORSTAR) teams form an important part of the BSI. These specialized rescue teams are composed of agents who volunteer to undergo a rigorous training regimen that includes physical fitness, emergency medical skills, technical rescue, navigation, communication, swift-water rescue, and air operation rescues. BORSTAR's primary mission is to respond to all incidents involving distressed people along the border. While the individuals rescued are typically illegal aliens, BORSTAR teams have also rescued American citizens who reside along the border as well as border patrol agents. In the almost three years the initiative has been operational, border patrol agents have rescued 3,977 people along the southwest border. There are currently nine BORSTAR teams comprised of 141 specially trained border patrol agents.

Civilian Humanitarian Groups. Believing that the border patrol's response to the issue of migrant deaths along the border is inadequate, some humanitarian organizations, such as Humane Borders, Samaritan Patrol, and the Border Action Network, have begun providing services to unauthorized migrants in order to decrease the dangers associated with the border crossing. These services include maintaining water stations in the desert and providing medical supplies to aliens. Humane Borders, for example, maintains 50 water stations throughout the Arizona desert, while a sister organization maintains 133 water stations in California's Imperial Valley.¹²⁹ Additionally, a network of faith-based organizations recently instituted the "No More Deaths" campaign. This campaign works toward reducing fatalities along the border by maintaining two 24-hour camps, called "Arks of the Covenant," in southern Arizona where unauthorized migrants can receive food, water, and medical attention. According to the campaign's spokesperson, the USBP and the U.S. Attorney's Office have confirmed that providing humanitarian aid to migrants is legal and that the camps they operate are within the law.¹³⁰

These kinds of activities concern those who believe that the humanitarian aid, no matter how well intentioned, assists unauthorized immigrants in their efforts to subvert immigration laws and enter the country. Others believe that the number of migrant deaths along the border is unacceptably high, and that these organizations are saving lives through their humanitarian aid. Still others fear that if migrants believe

¹²⁷ (...continued)

Deaths," press release, June 4, 2003.

¹²⁸ U.S. DHS, CBP, "US Customs and Border Protection Announces Border Safety Initiative Aimed at Preventing Migrant Deaths," press release, May 6, 2004.

¹²⁹ Ben Winograd, "Mercy in the Desert," *San Jose Mercury News*, Aug. 21, 2004, p. M01.

¹³⁰ Arthur Rotstein, "Advocates: Desert Camps Have Saved Migrant Lives," *The Associated Press*, July 26, 2004.

that water is readily available in the desert more will perish as they attempt to cross without carrying adequate amounts of water.¹³¹

Civilian Patrol Groups. A related issue that has gained attention in the past two years has involved civilian patrol groups attempting to assist the border patrol in its enforcement efforts through a variety of means, reportedly including sometimes apprehending unauthorized aliens along the border. One such group, American Border Patrol, recently gained notoriety by launching an unmanned plane that uses cameras and GPS technology to identify unauthorized aliens attempting to cross the border.¹³² These groups have increasingly been targeted by human rights organizations for the tactics they allegedly use, including threatening border crossers with firearms and wearing uniforms similar to those worn by the border patrol. In the summer of 2003, two such groups, Ranch Rescue and Citizen Border Patrol, curtailed their activities on the Arizona border due to mounting publicity and concern about their practices, including allegations that they were dressing like border patrol agents.¹³³

More recently, the Minuteman Project in Arizona drew national media attention to the problem of unauthorized migration. The Minuteman Project drew hundreds of volunteers from across the United States to monitor a stretch of the eastern Arizona border with Mexico near Douglas, in the Tucson Sector. According to the Minuteman organizers, the project succeeded in dramatically reducing the flow of illegal immigration in Arizona. The USBP contests this claim, noting that while apprehensions in eastern Arizona declined from 24,842 in April of 2004 to 11,128 in April of 2005, apprehensions in western Arizona increased from 18,052 in 2004 to 25,475 in 2005.¹³⁴ USBP officials also stated that the volunteers were disrupting their operations by unwittingly tripping sensors deployed along the border, forcing agents to respond to false alarms. Others believe that the decrease in eastern Arizona is attributable to increased patrolling on the Mexican side of the border by Mexican police and military authorities.¹³⁵

There is some debate about the relative impact that these groups have on securing the border. Some argue that these groups are vigilante organizations that are taking the law into their own hands, and that their operations can conflict with those of border patrol agents. Others counter by contending that these groups are harmless and provide valuable assistance to the border patrol by identifying and sometimes capturing unauthorized migrants. In congressional testimony, some

¹³¹ For examples of these groups, see Ibarra, Ignacio, "'No more deaths camp' an oasis for migrants," *Arizona Daily Star*, Mar. 2, 2005, available at [<http://www.azstarnet.com/sn/faith/63746.php>].

¹³² Kevin Johnson, "Private Spy Plane Patrols Border," *USA Today*, May 22, 2003, p. 3A.

¹³³ "Outlawed Arizona Border Patrol to Cease Operations," EFE News Service, June 16, 2003.

¹³⁴ Gail Gibson, "For Minutemen, chance to patrol a porous border," *Baltimore Sun*, May 1, 2005, p. 1A.

¹³⁵ Arthur Rotstein, "Border Patrol complains that volunteers are tripping sensors used to detect illegal crossers," *The Associated Press*, Apr. 5, 2005.

Border Patrol officials have discounted the overall impact of vigilantes along the border.¹³⁶ It is not clear if or to what extent the operations of these civilian patrolling groups present an obstacle to the Border Patrol or a danger to unauthorized migrants.

Illegal Migration and Indian Country. Several Indian reservations are located near the U.S.-Mexican border, and a few — including the Tohono O’odham Reservation in Arizona and the Kickapoo Reservation in Texas — are directly connected to the border. While federal authorities routinely patrol the border in these areas, the Indian tribes’ quasi-sovereign status presents some unique challenges to those guarding the border.¹³⁷

The question of which law enforcement authorities — state, federal, or tribal — have adjudicatory jurisdiction in Indian country is not easy to answer, as the answer can change according to the civil/criminal nature of the offense, the seriousness of the offense, the tribal status of those involved, and the state in which the offense is committed. For example, the Supreme Court ruled in the landmark 1978 case, *Oliphant v. Suquamish Indian Tribe*,¹³⁸ that Indian tribes do not possess criminal jurisdiction over non-Indians. As the Court put it, “By submitting to the overriding sovereignty of the United States, the tribes ... necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.”¹³⁹

As a result of *Oliphant*, several federal statutes,¹⁴⁰ and other Supreme Court cases reigning in tribal civil jurisdiction,¹⁴¹ tribal adjudicatory jurisdiction is very limited, in many instances forced to yield to the power of state and federal authorities.¹⁴² *Oliphant* in particular has led some to question the authority of tribal

¹³⁶ U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims, *Hearing on Illegal Immigrant Smuggling*, 108th Cong., 1st sess., June 24, 2003.

¹³⁷ The following four Indian reservations are contiguous with the Mexican border: (1) the Tohono O’odham Nation (AZ); (2) the Cocopah Tribe (AZ); (3) the Kickapoo Traditional Tribe (TX); and (4) the Quechan Tribe of the Fort Yuma Indian Reservation (CA/AZ). There are also two tribes that are very close but not actually on the border: the Campo Band of Diegueno Mission Indian tribe in California and the Ysleta Del Sur Pueblo tribe in Texas.

¹³⁸ 435 U.S. 191 (1978).

¹³⁹ *Ibid.*, at 210. Various bills have been introduced in Congress to overturn *Oliphant*, but none have been enacted into law. See, e.g., S. 578, §14 (108th Cong.).

¹⁴⁰ The Major Crimes Act, for example, ensures federal jurisdiction over fourteen crimes (including murder and burglary) when Indians are charged with committing those crimes. 18 U.S.C. §1153. In addition, the Indian Civil Rights Act limits the jurisdiction of tribal courts to sentences not exceeding one year’s imprisonment and/or a \$5,000 fine. 25 U.S.C. § 1302(7).

¹⁴¹ See, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Nevada v. Hicks*, 533 U.S. 353 (2001).

¹⁴² Usually, federal authorities will have jurisdiction, although a handful of states possess criminal jurisdiction over offenses committed by Indians in Indian country under Public Law
(continued...)

police to arrest and detain non-Indians.¹⁴³ For practical purposes in the border patrol context, however, tribal law enforcement authorities are not as constrained as they may be in other areas. One reason for this is that, as part of their limited sovereignty, tribes possess the authority to expel non-members from Reservations for violations of tribal trespassing restrictions.¹⁴⁴ In addition, while tribal courts may lack the power to try non-Indians, tribal police possess the power to detain suspected offenders for pick-up by state or federal authorities,¹⁴⁵ and tribal authorities on reservations on or near the U.S.-Mexico border routinely detain undocumented aliens (UDAs) with that purpose in mind.¹⁴⁶

Still, because they possess only limited authority, many tribal law enforcement groups also lack the resources, funding, and training of state and federal officials.¹⁴⁷ In addition, many reservations — particularly those in the southwest — are in remote locations far from the nearest police or border patrol station. One method that has been used sparingly to get around these difficulties is the cross-commission of tribal officials by state or federal authorities, so that these officials may arrest non-Indian criminal suspects under state or federal law.¹⁴⁸

Similarly, in at least one instance — on the Tohono O’odham Reservation in southern Arizona — federal authorities have created a special unit made up entirely of American Indians to assist in patrolling the U.S.-Mexican border. The Reservation is home to a special unit of CBP Customs Patrol Officers, commonly known as the “Shadow Wolves.” These officers — numbering between 20-23 individuals — are all American Indians that patrol the 76 miles of international border that bisects the Tohono O’odham Reservation. Formed in 1972, the Shadow

¹⁴² (...continued)

280 (18 U.S.C. 1162). In the Southwest, the only state that possesses full Public Law 280 criminal jurisdiction in Indian country is California.

¹⁴³ See, e.g., *United States v. Medearis*, 236 F.Supp.2d 977, 982 (D.S.D. 2002).

¹⁴⁴ See, e.g., *United States v. Becerra-Garcia*, 397 F.3d 1167 (9th Cir. 2005).

¹⁴⁵ See, e.g., *Duro v. Reina*, 495 U.S. 676, 697 (1990).

¹⁴⁶ See, e.g., statement of Vivian Juan-Saunders, chairperson, Tohono-O’odham Nation of Arizona, in U.S. Congress, Senate Indian Affairs Committee, *Tribal Government Amendments to the Homeland Security Act of 2002*, hearings, 108th Cong., 1st sess., S.Hrg. 108-312 (2003), pp. 38-39 [hereinafter “Hearing”]. (“In 1999, our officers assisted the border patrol with 100 apprehensions per month and in 2002, our tribal police officers recorded 6,000 undocumented immigrants detained pending U.S. border patrol pick-up.”)

¹⁴⁷ See, e.g., *Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, by the U.S. Commission on Civil Rights (2003), at [<http://www.usccr.gov/pubs/na0703/na0204.pdf>].

¹⁴⁸ See Hearing, at 23 (statement of Thomas B. Heffelfinger, U.S. Attorney, State of Minnesota, on Behalf of the Department of Justice) (“Unfortunately, [cross-commissions] are not made in many jurisdictions due to various factors such as local political issues or concerns over civil liability”).

Wolves' original mission centered around drug interdiction but, in the years since the 9/11 attacks, the group has focused more on immigration issues.¹⁴⁹

The Tohono O'odham Reservation presents particularly thorny problems for border patrol authorities, in that, not only is it the second-largest Indian reservation in the country, but it also extends across the border into Mexico. As a result, some Tohono O'odham members are U.S. citizens, while others have Mexican citizenship. Until relatively recently, members were allowed to cross the border (within the Reservation) with ease, regardless of their nationality.¹⁵⁰ In the mid-1980s, however, the federal government erected a fence along the border to stem the tide of drug smugglers that were taking advantage of the Reservation's location, and border-crossing by members continues to be a difficult issue for authorities patrolling the border on the Reservation.¹⁵¹

Impact of Illegal Migration on Federal Protected Land.¹⁵² Five federal agencies oversee federally protected land that either sits on the border or is adjacent to the border.¹⁵³ Because the areas are remote and isolated from more populated areas and are in close proximity to the international border, they have become a popular route for illegal migration and smuggling operations. Of concern is the volume of illegal migrants who cross federal land and contribute to the environmental damage of the land and place themselves at risk. In addition to the migrants who cross the land, of equal concern is the border patrol's use of the land to conduct its operations. While a vast portion of the land in question is located in

¹⁴⁹ See generally, Mark Wheeler, *Shadow Wolves*, Smithsonian Magazine, Jan. 2003, at 40.

¹⁵⁰ This is still the case for the Kickapoo in Texas and across the border in Mexico. In 1983, Congress passed legislation granting them the right to cross the border freely. See P.L. 97-429 (codified at 25 U.S.C. § 1300b-11).

¹⁵¹ See Courtney E. Ozer, *Make it Right: The Case for Granting Tohono O'odham Nation Member U.S. Citizenship*, 16 Geo. Immigr. L.J. 705 (2002). In the 108th Cong., Rep. Grijalva introduced a bill that would have granted U.S. citizenship to all enrolled members of the Tohono O'odham Nation. See H.R. 731 (108th Cong.).

¹⁵² Information in this section was taken from the U.S. Department of the Interior Report to Congress, *Report to the House of Representatives Committee on Appropriations on Impacts Caused by Undocumented Aliens Crossing Federal Lands in Southeast Arizona*, Apr. 29, 2002.

¹⁵³ The five agencies and their missions include (1) the Bureau of Land Management oversees approximately 2.4 million acres in Arizona that are within 62 miles of the border; (2) the National Park Service (Department of the Interior) oversees five monuments or historic sites that are either adjacent to or within 62 miles of the border; (3) the U.S. Fish and Wildlife Service oversees six wildlife refuges that are either adjacent to or within 62 miles of the border; (4) the U.S. Forest Service (Department of Agriculture) oversees a national forest that shares 60 miles of its border with Mexico and has a significant portion of its land within miles of the border; and (5) the Bureau of Indian Affairs (Department of the Interior), which assists in the management of tribal land, has four tribes that are within 60 miles of the border. U.S. Department of the Interior, *Report to the House of Representatives Committee on Appropriations on Impacts Caused by Undocumented Aliens Crossing Federal Lands in Southeast Arizona*, Apr. 29, 2002, p. C-1.

southeast Arizona and represents only 8% of the entire U.S.-Mexico border,¹⁵⁴ the impact to the land caused by the migrants is significant.

In an effort to address these concerns, the USBP entered into a Memorandum of Understanding (MOU) on March 20, 2001 with the Natural Resources Conservation Service and the Environmental Protection Agency. The purpose of the MOU is threefold:

- provide general procedures for the border patrol's use of public land to conduct its routine operations of search and rescue, training, and apprehensions of undocumented aliens, while protecting the public's right to use public land;
- develop and implement a plan to mitigate environmental degradation caused by undocumented aliens crossing federal lands in Arizona and New Mexico;
- provide and encourage opportunities for all parties to operate more effectively and achieve their missions.¹⁵⁵

In addition to the MOU, a plan was implemented by the Department of the Interior to mitigate the environmental and other impacts caused by the migrants. Despite these initiatives, a report by the Government Accountability Office (GAO) concluded that coordination between federal agencies appears to be insufficient.¹⁵⁶

Interior Enforcement

The Bureau of Immigration and Custom Enforcement's (ICE) is the investigative arm of DHS. ICE is charged with immigration and customs-related investigations in the interior of the country, which includes enforcing policy initiatives aimed at apprehending and deporting foreign nationals who are not authorized to be in the United States as well as interdicting illegal substances and contraband that was brought into the United States from another country. The activities of ICE are an extension of the activities that are conducted at and between ports of entry. ICE has 22 field offices that are located throughout the country, with seven located in the southwest.

In addition to the immigration and customs-related investigative activities, ICE also contains the former INS detention and removal program, the Federal Air Marshal Service and the Federal Protective Service. This section discusses selected ICE investigative activities, including its initiative to thwart terrorist activities and other illegal acts. Other investigative activities such as countering human and drug smuggling are also discussed as well as ICE's detention and removal function.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid, p. C-2.

¹⁵⁶ See GAO Report GAO-04-490, *Border Security: Agencies Need to Better Coordinate Their Strategies and Operation on Federal Land*, June 2004.

ICE Investigations

ICE investigates various immigration, customs and criminal-related matters. ICE's immigration-related investigations include investigating aliens who violate the INA and other related laws. Prior to September 11, 2001, the main categories of crimes that were investigated by immigration and customs investigators included the following suspected activities:

- activities that could threaten national security;
- criminal acts;
- fraudulent activities (i.e., possessing or manufacturing fraudulent immigration documents);
- smuggling of aliens and illegal substances;
- work-site violations, most frequently involving aliens who work without permission and employers who knowingly hire illegal aliens;
- money laundering and other suspected financial crimes; and
- cyber crimes.

While the terrorist attacks prompted DHS to reassign many investigators to work on terrorism-related investigations, the *traditional* investigative categories continue to be a focus of ICE.

Arizona Border Control (ABC) Initiative. The ABC Initiative, unveiled on March 16, 2004, is a DHS initiative involving local, state, and federal law enforcement officials in Arizona aimed at detecting and deterring terrorist activity and smuggling operations. Several agencies coordinate efforts and resources as part of the ABC, including ICE, CBP, and the Transportation Security Administration, as well as the Department of the Interior, the Tohono O'odham Nation, the U.S. Attorney's Office, and other law enforcement agencies. In order to execute the mission, 200 additional permanent border patrol agents and 60 special operations agents trained for search and rescue operations were assigned to the Tucson sector over the summer of 2004, raising the number of agents assigned there to over 2,000. Additionally, two Unmanned Aerial Vehicles¹⁵⁷ (UAV) and four additional helicopters were deployed to the Arizona border.¹⁵⁸ While ABC is an administrative initiative, Congress has expressed strong support for the initiative through the appropriations process.¹⁵⁹

According to ICE, in the first six months of the ABC, apprehension of unauthorized aliens increased 56% from apprehensions during the same period of the

¹⁵⁷ For an expanded discussion of UAVs and border security, please refer to CRS Report RS21698, *Homeland Security: Unmanned Aerial Vehicles and Border Surveillance*, by Christopher Bolkcom.

¹⁵⁸ U.S. Immigrations and Customs Enforcement, *Fact Sheet: Arizona Border Control Initiative*, [http://www.ice.gov/graphics/news/factsheets/bordercontrolfs_031604.htm].

¹⁵⁹ U.S. Congress, House Committee on Appropriations, *Department of Homeland Security Appropriations Bill, 2005*, report to accompany H.R. 4567, 108th Cong., 2nd sess., H.Rept. 108-541, p. 19.

previous year. From March 16, 2004 to September 7, 2004, 351,700 unauthorized aliens were apprehended compared to 225,108 unauthorized aliens during the same period in 2003.¹⁶⁰ ABC agents uncovered 225 drop houses¹⁶¹ both on the border and in the cities of Phoenix and Tucson, and initiated investigations which led to the prosecution of 1,431 felony and 2,955 misdemeanor cases, an increase of 47 and 144% respectively over FY2003. Also as part of the ABC initiative, in FY2004, agents confiscated over 388,000 pounds of marijuana, a 105% increase over FY2003, and 5,242 pounds of cocaine. The data show that the ABC initiative has yielded results on the enforcement side, with increases in the number of aliens apprehended and drugs confiscated, as well as felony and misdemeanor prosecutions initiated. However, despite the deployment of 60 additional BORSTAR agents to the region migrant deaths increased by 7% in FY2004 from 132 in FY2003 to 141.

Human Smuggling. Most alien smuggling into the United States reportedly occurs along the U.S.-Mexico border. Mexico is a staging area for aliens from Mexico and other parts of the world to attempt to illegally enter the United States.¹⁶² According to DHS, alien smuggling of persons into the United States constitutes a significant risk to national security and public safety.¹⁶³ In addition, smuggling pipelines which are used by unauthorized aliens and criminals seeking to enter the United States could also be used by terrorists.¹⁶⁴ It is estimated that the international alien smuggling and sex trafficking trade generates \$9.5 billion for criminal organizations worldwide, and the profits are used to finance additional criminal enterprises, such as the trafficking of drugs, weapons, other contraband or even terrorist acts.¹⁶⁵ Nonetheless, it is not known how many people are smuggled into the United States in a year.

As the border patrol makes it more difficult for smugglers to cross at one point along the border, the smugglers move their operations elsewhere. The success of

¹⁶⁰ DHS, "Border Security: At Six Months, Arizona Border Patrol Initiative Marks Success," *Inside ICE* vol 1, no. 12, Sept. 27, 2004, at [http://www.ice.gov/graphics/news/insideice/articles/insideice_092704_web6.htm].

¹⁶¹ Drop houses are apartments or houses on the American side of the border used by alien smugglers to temporarily hold unauthorized aliens while they await transportation from the border region into the interior of the United States.

¹⁶² Testimony of Michael W. Cutler, Fellow, Center for Immigration Studies, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims, *Pushing the Border Out on Alien Smuggling: New Tools and Intelligence Initiatives*, hearings, 108th Cong., 2nd sess., May 18, 2004. (Hereafter cited as Cutler, *Pushing the Border Out on Alien Smuggling*.)

¹⁶³ Testimony of John P. Torres, Deputy Assistant Director, Smuggling and Public Safety, U.S. Immigration and Customs Enforcement, U.S. DHS, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims, *Pushing the Border Out on Alien Smuggling: New Tools and Intelligence Initiatives*, hearings, 108th Cong., 2nd sess., May 18, 2004. (Hereafter cited as Torres, *Pushing the Border Out on Alien Smuggling*.)

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

Operation Gatekeeper in San Diego and Operation Hold the Line in El Paso, have been cited as one of the causes for the increase in smuggling in the Arizona corridor. In addition, smuggling organizations are attracted to the Arizona corridor due to the following: (1) the terrain is challenging for law enforcement; (2) the area is a major transportation hub with a highly developed highway system and an international airport for getting into the interior quickly and easily; (3) the corridor has an extensive staging area comprised of homes, hotels and apartments; and (4) the area has a robust financial services infrastructure.¹⁶⁶

Often alien smuggling can lead to collateral crimes including kidnaping, homicide, assault, rape, robbery, auto theft, high speed flight, identity theft, and the manufacturing and distribution of fraudulent documents. For example, smugglers may hold an alien hostage to extort a ransom from the alien's family.¹⁶⁷ In addition, smugglers often establish "safe houses" (also called "drop houses") where aliens are kept until they can be moved into the interior of the United States. The often squalid conditions of these "safe houses" endanger the lives of the aliens and creates health and safety issues for people living in the community.¹⁶⁸ Also, some have noted an increase in motor vehicle casualties due to the unsafe condition of vehicles used by smugglers. (Often smugglers rig the vehicles to hide as many aliens as possible, often making the vehicle unsafe to operate.)¹⁶⁹ Furthermore, a proportion of border deaths is tied to smuggling, as some smugglers mislead their charges about how far it is to the United States, and how much water is needed to make the journey.¹⁷⁰

Drug/Contraband Smuggling. For several decades, the federal government and Congress have created and legislated initiatives as well as dedicated resources to tackle the illicit drug trade. The illicit drug trade is a billion-dollar business that often involves the perpetration of violent crimes. Although not a new concern, the potential for terrorists to exploit the illicit drug market as a means to facilitate their cause has received heightened attention since the 2001 terrorist attacks. Because Mexico is a major corridor for the transport of illicit drugs to the United States, several initiatives are specific to the southwest border region, as discussed below.¹⁷¹

DHS' anti-drug trafficking efforts are directed at and along the border in addition to efforts that are carried out in the interior by ICE agents. According to

¹⁶⁶ Interview with Patricia A. Schmidt, Action Associate Special Agent in Charge, Phoenix, Arizona office of the Bureau of Immigration and Customs Enforcement, Aug. 2, 2004.

¹⁶⁷ Statement of Representative Linda T. Sanchez, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims, *Pushing the Border Out on Alien Smuggling: New Tools and Intelligence Initiatives*, hearings, 108th Cong., 2nd sess., May 18, 2004.

¹⁶⁸ Cutler, *Pushing the Border Out on Alien Smuggling*.

¹⁶⁹ Personal Communication with Kevin Burns, Chief Financial Officer of the University Medical Center in Tucson, Arizona, Aug. 3, 2004.

¹⁷⁰ Personal Communication with Sister Elizabeth Ohmann, Secretary, Humane Borders, Aug. 3, 2004.

¹⁷¹ The initiatives discussed in this section are not a comprehensive list of all possible initiatives that may be directed at stemming illicit drugs at the southwest border.

DHS, more than 56,321 drug seizures were made at and between POEs in FY2004, which totaled to over two million pounds of illicit drugs estimated to be worth over two billion dollars.¹⁷² While the majority of seizures take place *at* POEs, larger quantities of illicit drugs are seized by the border patrol *between* POEs as well as by ICE agents in the interior. At the southwest border, 15,526 drug seizures were made at and between POEs in FY2004, which totaled to over 1.9 million pounds of illicit drugs.¹⁷³

DHS Anti-Smuggling/Trafficking Strategy. For many years, the former INS (and now ICE) has worked to identify and dismantle large scale transnational smuggling organizations and have done so in collaboration with other law enforcement agencies, both foreign and domestic. ICE places a significant emphasis on targeting alien smuggling organizations that pose a threat to national security, recognizing the possibility that terrorists could align themselves with alien smuggling networks to obtain undetected entry into the United States.¹⁷⁴

ICE Storm. To counter some of the crime related to alien smuggling, DHS created Operation ICE Storm, a multi-agency initiative led by ICE's Office of Investigations which aims to dismantle the finances of violent smuggling organizations responsible for transporting illegal aliens into the United States along the southwest border.¹⁷⁵ Specifically, ICE Storm seeks to eliminate violent crime in Phoenix, Arizona caused by organizations, which smuggle unauthorized migrants across the U.S.-Mexico border. Reportedly, 50 agents from ICE have been assigned to Phoenix as part of ICE Storm.¹⁷⁶ During the first quarter of ICE Storm the Phoenix Police Department reported 30 fewer homicides than the previous quarter.¹⁷⁷ As of March 3, 2004, ICE Storm had resulted in more than 1,526 criminal and administrative arrests. In addition, as of May 18, 2004 ICE Storm had resulted in the prosecution of more than 190 defendants for human smuggling, kidnaping, money-laundering, and weapons and drug violations, the seizure of over 100

¹⁷² See [http://www.cbp.gov/xp/cgov/newsroom/press_releases/0012005/01112005_2.xml], accessed on Apr. 29, 2005.

¹⁷³ Ibid.

¹⁷⁴ Testimony of Interim Associate Special Agent in Charge, Bureau of Immigration and Customs Enforcement Thomas Homan, in U.S. Congress, House Judiciary Committee, Subcommittee on Immigration, Border Security, and Claims, *The Deadly Consequences of Illegal Alien Smuggling* hearings, 108th Cong., 1st sess., June 24, 2003. (Hereafter referred to as Homan, *Deadly Consequences*.)

¹⁷⁵ See [<http://www.ice.gov/graphics/enforce/ops/ICEStorm.htm>].

¹⁷⁶ Gabriela Rico, "Feds to Unleash ICE Storm on Migrant Smugglers," *The Tucson Citizen*, Nov. 11, 2003, p. 1A.

¹⁷⁷ Personal Communication with Patricia A. Schmidt, Action Associate Special Agent in Charge, Phoenix, Arizona office of the Bureau of Immigration and Customs Enforcement, Aug. 2, 2004.

weapons and over \$5.2 million. ICE Storm became a component of the ABC on March 16, 2004.¹⁷⁸

Department of Justice Efforts

The Department of Justice (DOJ) has a presence in the southwest, particularly due to the long-standing problem of drug trafficking across the border. Several task forces led by DOJ agencies that are aimed at stemming the flow of illegal substances across the border are discussed below.

Organized Crime Drug Enforcement Task Force (OCDETF).¹⁷⁹ The OCDETF program was created during President Reagan's Administration in 1982 to pursue major drug trafficking organizations. The OCDETF is a collaborative effort among several DOJ agencies,¹⁸⁰ the Internal Revenue Service, ICE and the U.S. Coast Guard. OCDETF also utilizes the support of state and local law enforcement agencies.

According to the President's 2006 budget proposal, the OCDETF program faces several internal challenges. For example, due to the composition of OCDETF (several agencies within and outside of DOJ comprise OCDETF), "each member agency has mandated its own priorities for carrying out its part of the fight against illegal drugs."¹⁸¹ As a result, OCDETF lacks a single mission. Another concern that is somewhat related to the aforementioned issue is the need for a consolidated budget. Agencies within DOJ as well as DHS' ICE and the Department of the Treasury's Internal Revenue Service all receive appropriations for OCDETF-related activities. The Administration contends that a consolidated budget is "critical to OCDETF's ability to effectively manage the program, to ensure proper use of OCDETF resources and to monitor performance."¹⁸² In FY2004 and FY2005, Congress consolidated all of OCDETF's appropriations into a single appropriation. The congressional committee that has jurisdiction over OCDETF expressed concern with respect to funding DHS and the Department of the Treasury OCDETF-related activities.¹⁸³ Both of these issues raise questions about management and control of OCDETF funds and resources as well as the identification and coordination of

¹⁷⁸ See [<http://www.ice.gov/graphics/enforce/ops/ICESstorm.htm>].

¹⁷⁹ For additional information on OCDETF, see [<http://www.whitehousedrugpolicy.gov/publications/policy/06budget/justice.pdf>].

¹⁸⁰ DEA, FBI, the Bureau of Alcohol, Tobacco, Firearms and Explosives, and the U.S. Marshals Service.

¹⁸¹ U.S. DOJ 2006 Budget Justifications, vol. II, Interagency Crime and Drug Enforcement Budget Estimates to Congress, p. 7.

¹⁸² *Ibid.*

¹⁸³ House Committee on Appropriations Subcommittee on Commerce, Justice, State, Judiciary and Related Agencies Department of Commerce, Justice, and State, the Judiciary, and Related Agencies *Appropriations Bill, FY2005*, H.Rept. 108-576.

program priorities.¹⁸⁴ This issue will probably continue to be a target of congressional oversight.

Southwest Border Prosecution Initiative (SWBPI). The SWBPI funds local prosecution offices in the four southwest border states for the prosecution of selected drug cases. The program also funds the pre-trial detention costs for selected cases. SWBPI supports the enforcement of both federal and state laws through coordination in enforcing and prosecuting foreign nationals and citizens involved in border criminal enterprises.

A similar program, the Southwest Border Initiative (SWBI),¹⁸⁵ was initiated in 1994 and is a cooperative effort among several divisions and agencies within DOJ¹⁸⁶ and DHS. SWBI specifically targets Mexican trafficking organizations that operate along the southwest border.

High Intensity Drug Trafficking Area (HIDTA).¹⁸⁷ The HIDTA program was established by the Anti-Drug Abuse Act of 1988.¹⁸⁸ The Office of National Drug Control Policy (ONDCP) designates areas within the United States that are known to have problems with drug trafficking. The HIDTA program develops partnerships among federal, state and local law enforcement agencies and coordinates drug control efforts among the partnering agencies. The HIDTA program provides federal resources to the identified areas to assist with eliminating drug trafficking. There are HIDTA sites in southern California, Arizona, New Mexico, and west and south Texas, collectively referred to as the Southwest Border HIDTA.

The HIDTA program was faced with similar challenges to those of the OCDEF. The President's FY2006 budget, however, proposes to move HIDTA to DOJ (from the ONDCP), in an effort to better enable law enforcement to target the drug trade.

Detention and Removal

ICE's responsibilities under the detention and removal activity include overseeing the custody of aliens who are detained and facilitating their release or deportation. The INA requires the detention of several classes of aliens, including those who are inadmissible or deportable on criminal, terrorist, or national security

¹⁸⁴ Ibid.

¹⁸⁵ For additional information on the SWBI, see [<http://www.whitehousedrugpolicy.gov/enforce/swborder.html>] and [<http://www.whitehousedrugpolicy.gov/publications/policy/06budget/justice.pdf>].

¹⁸⁶ U.S. Attorneys, DOJ Criminal Division, the Federal Bureau of Investigation, and the Drug Enforcement Agency.

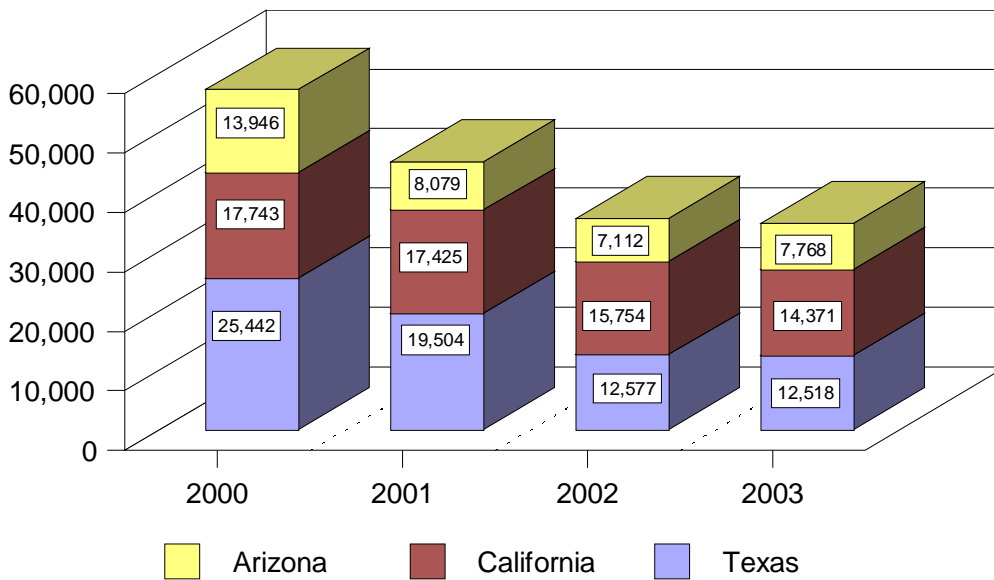
¹⁸⁷ For additional information on HIDTA, see [<http://www.whitehousedrugpolicy.gov/publications/policy/hidta04/overview.html>] and [<http://www.whitehousedrugpolicy.gov/publications/policy/06budget/justice.pdf>].

¹⁸⁸ See P.L. 100-690. The program was reauthorized in the Office of National Drug Control Policy's reauthorization act (P.L. 105-277).

grounds; those who have arrived in the United States without proper documents and have requested asylum (pending a determination of their asylum claims); and those who have final orders of deportation.¹⁸⁹ ICE measures its successes in terms of how many aliens are *located* and *removed*. Following is an analysis of ICE’s activities of locating and removing aliens.

While the border patrol apprehends more deportable aliens than ICE investigations, ICE apprehends a sizeable number of aliens. ICE has a combined total of 5,500 interior investigators, compared to over 9,500 Border Patrol agents. ICE’s investigators are stationed throughout the United States, compared to border patrol agents who are located at the border with the majority at the southwest border. In FY2000, ICE located a total of 138,291 aliens, of which 57,131 (or 41%) were located in southwest jurisdictions (see **Figure 7**).¹⁹⁰ By FY2003, the number of aliens that were located by ICE decreased slightly, by 1%. Throughout the years examined (FY2001 to FY2003), ICE units in the southwest led all ICE units in locating deportable aliens.

Figure 7. Deportable Alien Located by ICE’s Southwest Field Offices, FY2000 to FY2003



Source: CRS analysis of ICE data.

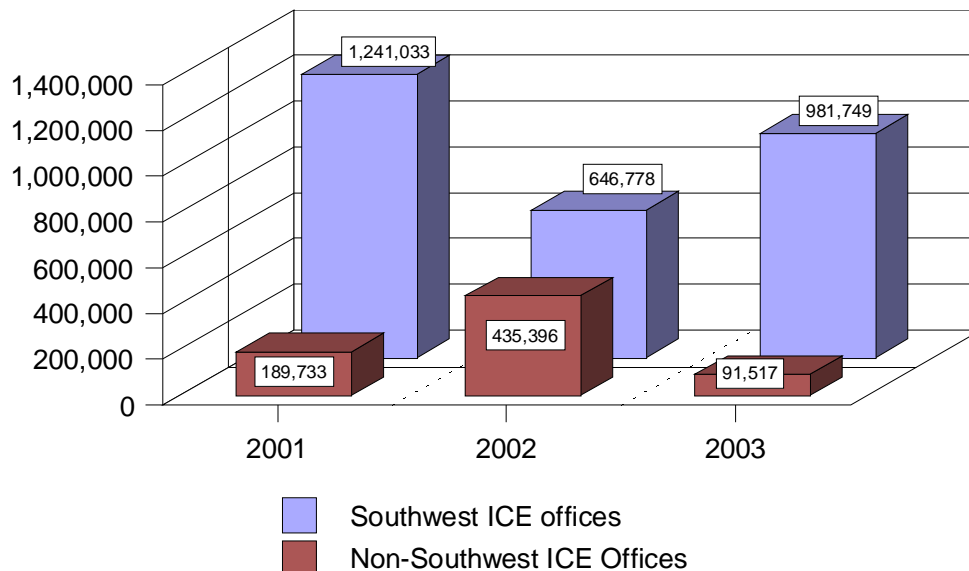
¹⁸⁹ §212, §235 and §237 of INA.

¹⁹⁰ These southwest jurisdictions include Dallas, TX; El Paso, TX; Houston, TX; Los Angeles, CA; San Diego, CA; and Tucson, AZ. Although a sizeable number of aliens are located by ICE’s San Francisco unit, it was not included due to its lack of proximity to the border.

In FY2004, ICE removed a total of 160,284 aliens, of which 84,433 (or 53%) were criminal aliens and 75,851 (or 47%) were non-criminal aliens. Of the total number of aliens ICE removed in FY2003, 72% were removed by one of its units in the southwest (see **Figure 8**). As is the case with the border patrol's apprehension numbers, the majority of foreign nationals who are removed by ICE are Mexican nationals. For FY2001 to FY2003, over 90% of aliens removed were from Mexico.¹⁹¹

In FY2001, ICE expelled over one million aliens, of which 91% were removed by one of ICE's southwest units (see **Figure 8**).¹⁹² In FY2002, the number of aliens expelled by ICE dropped by nearly 50% as a result of greater targeting on terrorism issues. In FY2003, however, the number of aliens expelled by ICE increased by 52% from FY2002. Throughout the years examined, ICE units in the southwest led all others with aliens removals.

Figure 8. Number of Aliens Expelled by ICE's Southwest Field Offices, FY2001 to FY2003



Source: CRS presentation of INS data.¹⁹³

¹⁹¹ For FY2001, 96% of aliens removed were from Mexico; for FY2002 the percentage was 94%; and in FY2003 91%. U.S. DOJ Immigration and Naturalization Service, *2001, 2002 and 2003 Statistical Yearbook of the Immigration and Naturalization Service*.

¹⁹² These units are located in Los Angeles and San Diego, CA; Phoenix, AZ; and El Paso, Houston and San Antonio TX.

¹⁹³ For FY2001, 96% of aliens removed were from Mexico; for FY2002 the percentage was 94%; and in FY2003 91%. U.S. DOJ Immigration and Naturalization Service, *2001, 2002 and 2003 Statistical Yearbook of the Immigration and Naturalization Service*.

Selected ICE Issues

Some of the major issues facing ICE stem from the growing number of illegal aliens present in the United States. While the issues discussed below are not specifically unique to the southwest border region, the southwest border receives a great deal of attention due to the sheer number of illegal migrants that cross it every day and because some of the border communities in the southwest have a large percentage of foreign nationals. Because of this distinction, issues facing ICE (as well as CBP) are usually focused in the southwest.

ICE Resources

Since 1996, Congress has authorized and appropriated funding to increase the number of immigration investigators; and due to the 9/11 terrorist attacks, Congress has specifically authorized increases in the number of ICE investigators. Despite congressional action directed at increasing the number of interior investigators,¹⁹⁴ since the merger of the former INS' interior enforcement activities with those of the U.S. Customs Service, the number of interior investigators has remained approximately the same.¹⁹⁵

Customs Patrol Agents (Shadow Wolves). As discussed previously, in 1972, the U.S. Customs Service created a specialized investigative unit to patrol the portion of the international border that runs through the Tohono O'odham Indian Reservation. The Customs Patrol Agents (Shadow Wolves) unit is comprised solely of Native Americans who are registered with an official Indian tribe. The primary mission of the unit was to investigate drug smuggling operations on the reservation and interdict illegal substances. In 2003, however, DHS merged the Shadow Wolves with the border patrol and changed their mission (they were previously a part of ICE). The group is now primarily responsible for interdicting illegal migrants who cross the border on the reservation.

During a three-year period (2002-2004), the Shadow Wolves seized an average of 75,443 pounds of marijuana.¹⁹⁶ Since the merger of the Shadow Wolves with the border patrol, the only investigative presence on the reservation is ICE. ICE currently has one field office located in Sells, Arizona, which is on the reservation. Previously, there was an additional ICE field office within close proximity to the reservation located in Ajo, Arizona; that office has since been closed. Of concern is the potential for terrorists to exploit the porous southwest border. The portions of the border that are on the reservation pose a security risk, as evident in the amount of drug trafficking taking place on the reservation. Congress faces the question of whether there are sufficient resources on the reservation to combat drug trafficking. The House has already considered this issue in the Department of Homeland Security

¹⁹⁴ See for example, §5203 of P.L. 108-458.

¹⁹⁵ Prior to the creation of DHS, the former INS had approximately 2,000 interior investigators and the U.S. Customs Service had approximately 3,500 interior investigators.

¹⁹⁶ For calendar year 2002, the Shadow Wolves seized 93,321 lbs. of marijuana; 120,440 lbs. in 2003 and 52,569 lbs.

Authorization Act for FY2006 (H.R. 1817), passed on May 18, 2005. An amendment to H.R. 1817 was adopted by the House during the floor debate of the bill. In essence, the amendment would transfer the Shadow Wolves back to ICE.

State and Local Law Enforcement¹⁹⁷

Increasingly, the enforcement of U.S. immigration law is being played out in the interior of the country. Nowhere is this more evident than at the southwest border, particularly in Arizona. While the border patrol's primary responsibility is to prevent illegal people and things from crossing the border between ports of entry, its authority is limited with respect to its geographical boundaries. Moreover, DHS has a limited number of interior investigators who are charged with enforcing immigration, customs and other federal law within the interior of the country, compared to over 600,000 state and local law enforcement officers.¹⁹⁸ In an effort to carry out the country's anti-terrorism mission and strengthen the interior enforcement of immigration law, DHS has entered into agreements (Memoranda of Understanding) with several localities that include the deputizing of local law enforcement officers to assist the federal government with enforcing certain aspects of immigration law.¹⁹⁹ The policy, however, faces a divided reception.

Memoranda of Understanding. As mentioned above, IIRIRA amended the INA by authorizing the Attorney General to enter into written agreements with states or political subdivisions of a state so that qualified officers could perform specified immigration-related duties. This authority was given new urgency following the terrorist attacks in September 2001. In 2002, the Attorney General proposed an initiative to enter into such agreements in an effort to carry out the country's antiterrorism mission. Under the agreement, state and local law enforcement officers could be deputized to assist the federal government with enforcing certain aspects of immigration law.²⁰⁰ To date, Florida, Alabama, and the Los Angeles County Sheriff's Department have entered into such an agreement. Moreover, some jurisdictions located in the southwest are either considering utilizing their law enforcement officers in a similar manner or are in discussions with federal authorities to enter into such an agreement.

Proponents of these agreements argue that the initiative assists DHS to enforce the immigration law deeper into the interior of the United States.²⁰¹ They contend

¹⁹⁷ For additional information, see CRS Report RL32270, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, by Lisa M. Seghetti, Stephen R. Viña and Karma Ester.

¹⁹⁸ According to DHS Congressional Affairs Office, as of Feb. 25, 2005, there are 5,500 ICE agents.

¹⁹⁹ U.S. Department of Justice, *Attorney General Prepared Remarks on the National Security Entry-Exit Registration System*, June 6, 2002.

²⁰⁰ U.S. Department of Justice, *Attorney General Prepared Remarks on the National Security Entry-Exit Registration System*, June 6, 2002.

²⁰¹ See the Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR; H.R. (continued...))

that state and local law enforcement agencies bring additional resources to assist the federal government with enforcing immigration law. Also, they assert that the initiative would make it easier to arrest more potential terrorists and foreign-born criminals, thus providing an elevated level of security for the nation.²⁰²

Opponents, on the other hand, argue that these agreements undermine the relationship between local law enforcement agencies and the communities they serve.²⁰³ For example, potential witnesses and victims of crime who are immigrants and may be illegally present in the United States may be reluctant to come forward to report crimes in fear of immigration action that might be taken against them by DHS. They contend that the initiative could result in the reduction of local law enforcement resources as well as the inconsistent application of immigration law across jurisdictions.²⁰⁴

The issue of using state and local law enforcement to enforce immigration law remains a controversial subject. Legislation has already been introduced in the 109th Congress that would define the proper role of state and local law enforcement officials in enforcing immigration law.²⁰⁵

Detention Bed Space²⁰⁶

The Immigration and Nationality Act gives the Secretary of Homeland Security the authority to issue a warrant to arrest and detain any alien in the United States while awaiting a determination of whether the alien should be removed from the country. While the majority of aliens that are detained by DHS have committed a crime, have served their criminal sentence and are detained while undergoing their deportation proceedings, other aliens are detained due to attempting to fraudulently enter the United States or attempting to enter the country without proper documentation. The sheer number of aliens that are detained or who are eligible to be detained has posed a problem for DHS officials.

²⁰¹ (...continued)

2671) and the Homeland Security Enhancement Act of 2003 (S. 1906), both introduced in the 108th Cong.

²⁰² Statement of U.S. Immigration and Customs Enforcement, in U.S. Congress, Senate Committee on the Judiciary Subcommittee on Immigration, Border Security and Citizenship, Hearing on U.S. Immigration and Customs Enforcement Coordination with State and Local Law Enforcement, Apr. 22, 2004.

²⁰³ Statement of Human Rights Watch, in U.S. Congress, Senate Committee on the Judiciary Subcommittee on Immigration, Border Security and Citizenship, Hearing on U.S. Immigration and Customs Enforcement Coordination with State and Local Law Enforcement, Apr. 22, 2004.

²⁰⁴ Ibid.

²⁰⁵ See for example, the Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2005, H.R. 3137 and the Homeland Security Enhancement Act of 2005, S. 1362.

²⁰⁶ For additional information, see CRS Report RL32369, *Immigration-Related Detention: Current Legislative Issues*, by Alison Siskin.

The apparent shortage of bed space, which results in many illegal migrants being released into the interior of the country, has increasingly concerned lawmakers. In FY2003, there were 231,500 aliens detained, of which nearly 50% were criminal aliens.²⁰⁷ The majority of aliens detained tend to be Mexican nationals, which accounted for 52% of the detention population in FY2003.²⁰⁸

While officials at DHS have asserted that they lack detention space, they have also asserted that those aliens who should be detained are, in fact, detained. Critics, on the other hand, contend that the increase in the number of classes of aliens subject to mandatory detention has impacted the availability of detention space for lower priority detainees. There are reportedly 300,000 noncitizens in the United States who have been ordered deported and have not left the country. Some argue that these 300,000 people would have left the country if they had been detained once they were ordered deported. A study done by DOJ's Inspector General found that almost 94% of those detained with final orders of removal were deported while only 11% of those not detained who were issued final orders of removals actually left the country.²⁰⁹ Concerns have been raised that the decisions on which aliens to release and when to release them may be based on the amount of detention space, not on the merits of individual cases, and that the amount of space may vary by area of the country leading to inequities and disparate policies in different geographic areas.²¹⁰

Selected Crosscutting Issues

While each of the areas above have presented specific policy issues, there are other issues that transcend subject area and apply to the entirety of border security on the southwest border.

Systems Integration and Interoperability

The Enhanced Border Security and Visa Entry Reform Act of 2002²¹¹ mandated the integration of immigration databases. In addition to integrating data systems that contain federal law enforcement and intelligence information relevant to making decisions on visa admissibility and the removal of aliens, the act also mandated that immigration databases be integrated with other relevant data systems.

²⁰⁷ DHS, Office of Immigration Statistics, *2003 Yearbook of Immigration Statistics*, Sept. 2004, p. 148.

²⁰⁸ Ibid.

²⁰⁹ Office of the Inspector General, Department of Justice, *The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders*, Report I-2003-004, Feb. 2003.

²¹⁰ The decision does not usually apply to aliens who are under mandatory detention. A high priority detainee may be released to make space for a mandatory detainee. Nonetheless, DHS does have explicit procedures for choosing between two mandatory detainees if there is not enough bed space. Pearson, *INS Detention Guidelines*, p. 1116.

²¹¹ P.L. 107-173.

CBP officials use several data systems and databases that assist them with identifying aliens who are potentially inadmissible under the INA or otherwise may pose a threat to the country. CBP officials also utilize several data systems and databases with respect to identifying high-risk commercial goods that warrant further inspection or review. ICE officials also query several different data systems and databases in the course of their duties. Of concern are the numerous data systems and databases that are not integrated or not readily accessible. Recently enacted legislation called for the integration of most of these databases and data systems;²¹² and the 9/11 Commission also called for similar integration.²¹³ Several questions are raised when assessing the integration of various data systems and databases:

- What are the potential difficulties with integrating the various data systems and databases and how can these difficulties be reduced?
- Who should have access to the integrated data system and what is the appropriate level of access?
- How will the privacy of information contained in the integrated data system be safeguarded?

Technology and Staffing

Much of the area along the southwest border lacks direct surveillance by border patrol personnel. Recognizing the vulnerabilities posed on the southwest border, starting in 1994, Congress authorized several increases in the number of border patrol agents as well as appropriated funding to enhance technology deployed at the border.²¹⁴ Since the terrorist attacks, both the border patrol and inspectors saw a boost in their resources. Despite the concentration of funding and resources at the border, critics contend that more should be done. For example, concerns about the lack of personnel at the border were expressed in a January 2003 Government Accountability Office (GAO) report. GAO noted that the former INS would need additional staffing and resources in order to gain control of the southwest border.²¹⁵ According to the border patrol, a needs assessment was conducted and it was determined that 22,000 border patrol agents were needed to secure the border, which would increase the border patrol twofold.²¹⁶

Regarding the staffing of the customs functions of CBP, in 1998 the former Customs Service commissioned PricewaterhouseCoopers to develop a resource allocation model (RAM) to determine the most effective deployment of its inspectors and canine enforcement officers at more than 300 international ports of entry. The RAM report concluded that in order to meet its multifaceted mission in FY2002,

²¹² See for example, P.L. 107-56; P.L. 107-173; and P.L. 108-4.

²¹³ See P.L. 107-56, P.L. 107-173 and P.L. 108-458.

²¹⁴ In addition to Congressional action, the border patrol rolled out its “Prevention Through Deterrence” strategy in 1994, which included significantly increasing technology and the number of border patrol agents along the border in targeted areas, as discussed above.

²¹⁵ U.S. General Accounting Office, *Management Challenges and Program Risks: Department of Justice*, (Washington: Jan. 2003), GAO-03-105, p. 14.

²¹⁶ Aug. 16, 2005 CRS site visit at the Yuma Border Patrol Sector.

Customs staffing needed to be increased by 14,776 positions over the FY1998 base (19,428), to bring the total Customs staffing to 34,204 positions. The largest increase would be in the inspector (6,481), special agent (2,041) and canine enforcement officer (650) positions.²¹⁷ While GAO testified in April 2000 that it found some weaknesses (data reliability issues) with the RAM study,²¹⁸ it remains the most comprehensive staffing analysis to date. Since the inspections function of the U.S. Customs Service was merged with the immigration inspections function from the former INS, it is not known what the appropriate staffing level should be for the various missions under CBP.

As Congress continues to exercise its oversight role, the issue of staffing and resources may continue to be of interest. An option includes requiring that a study be conducted to examine the proper staffing level and amount and type of resources necessary to secure the border.

Port of Entry Infrastructure

The adequacy of infrastructure at ports of entry has been a long-standing concern. The Data Management Improvement Act (DMIA) Task Force examined infrastructure at land ports of entry in 2002 and 2003 as a part of its report to Congress on the entry and exit data system. The DMIA Task Force asserted in its report that “resources to expand and improve the infrastructure to support growth in workload and staffing have not kept pace, creating infrastructure weaknesses.”²¹⁹

In 2003, the DMIA Task Force reported the following with respect to the federal inspections area at land ports of entry:

- 64 ports have less than 25% of required space;
- 40 ports have between 25 and 50% of required space; and
- 13 ports have between 50 and 75% of the space required.²²⁰

Improving the infrastructure at land ports of entry, however, may prove to be challenging. For example, the majority of facilities at the nation’s land border have limited space. In most cases, the federal government cannot immediately expand existing facilities due to the adjacent land being owned by other entities. In addition to the spatial limitations, the federal government faces environmental challenges when it seeks to expand port infrastructure. According to the DMIA Task Force, “the U.S. Environmental Protection Agency environmental impact and review processes

²¹⁷ Customs Service, *U.S. Custom Service Optimal Staffing Levels*, 9 pp. and appendixes A-N.

²¹⁸ U.S. General Accounting Office, Testimony before the House Committee on Government Reform Subcommittee on Government Management, Information and Technology, *U.S. Customs Service: Observations on Selected Operations and Program Issues*, T-GGD/AIMD-00-1550 (Washington, Apr. 20, 2000), p. 6.

²¹⁹ Data Management Improvement Act (DMIA) Task Force, *Second Annual Report to Congress*, Dec. 2003, p. 33.

²²⁰ *Ibid.*, p. 32.

can make build-out lengthy, expensive, and burdensome.”²²¹ Other issues such as insufficient roadways and lack of coordination among the various agencies that have a stake in the process also hamper efforts to expand port infrastructure. Finally, as resources become more scarce, CBP officials in charge of infrastructure projects at the northern and southwest border may find themselves competing for resources. Past Congresses exercised an oversight role by requiring studies on port infrastructure.²²² The 109th Congress may choose to follow-up on these studies.

Repatriation

The repatriation of some Mexican nationals has been a long-standing practice, dating back to the former INS. In the first part of the 20th century, there was an active campaign to repatriate Mexican nationals who illegally entered the United States. Typically, U.S. immigration officials would turn back qualified Mexican nationals to the Mexican side of the border.²²³ More recently, however, DHS has piloted two different types of repatriation programs, both aimed at making it more difficult for the illegal alien to return to the United States. (See discussion below.)

Lateral Repatriation. In an attempt to discourage unauthorized migrants from attempting to re-cross the border when they are returned to Mexico, in September 2003 the border patrol instituted a pilot program that airlifted aliens from the Arizona border to Texas. The border patrol originally had attempted to reach an agreement with Mexico to repatriate aliens to the interior of the country, but when the Mexican government declined to participate, the agency instead began to involuntarily repatriate aliens laterally from Arizona to Texas. The Texas border poses a challenge for would-be border crossers due to the Rio Grande river and the number of border patrol agents stationed along it. The border patrol chartered two airplanes in Tucson for the pilot program, with an overall cost of \$1.3 million.²²⁴ The lateral repatriation program ran for 24 days in September of 2003 and repatriated over 6,200 unauthorized migrants apprehended in Arizona to four cities along the Texas border: El Paso, Del Rio, Laredo, and McAllen.²²⁵ According to CBP, the pilot program led to an 18% decline in apprehensions in the Tucson sector and led to only one migrant death during the period, compared with 10 migrant deaths during

²²¹ Ibid., pp. 33-34.

²²² One such study on port infrastructure was completed in 2000. The Treasury Appropriations Act, FY2000 (P.L. 106-58) directed the U.S. Customs Service to assess the current condition and infrastructure needs for U.S. ports of entry on the northern and southwest borders. See U.S. Customs Service, *Ports of Entry Infrastructure Assessment Study*, June 2000.

²²³ Mexican nationals and nationals from other countries who are being processed for formal removal do not qualify for repatriation. Additionally, unaccompanied alien children and nationals who are subject to prosecution (i.e., criminal aliens) are also not eligible for voluntary repatriation.

²²⁴ Richard Boudreaux, “Repatriation Effort Earns Border Patrol Few Fans,” *The Los Angeles Times*, Sept. 29, 2003, p. A1.

²²⁵ Sergio Bustos, “US Deportation Policy Irks Texas Lawmakers, Mexican Government,” *Gannet News Service*, Oct. 2, 2003.

the same period in 2002.²²⁶ Proponents of the program point to the reduction in apprehensions and the low incidence of migrant deaths in Arizona during its operation as proof that the lateral repatriation program is an effective way to discourage unauthorized aliens from immediately attempting to re-enter the country while simultaneously saving lives. The Mexican government objected to the program, claiming that the cities on the Mexican side of the border in Texas were not equipped to handle the influx of returnees.²²⁷ Additionally, some U.S. lawmakers held that the program wasted taxpayer dollars because it did not solve the problem of unauthorized migration but instead shifted Arizona's problem to Texas.²²⁸ Reportedly, CBP is no longer conducting lateral repatriations.

Interior Repatriation. In 1996, Congress authorized the INS to create an interior repatriation program to return apprehended unauthorized Mexican aliens to the interior of their country.²²⁹ Eight years later, on June 9, 2004, the White House announced it had reached agreement with the Mexican government to begin implementing the interior repatriation program. This agreement grew out of the previously mentioned lateral repatriation program, which was unpopular in Mexico and featured the involuntary repatriation of Mexicans apprehended along the Arizona border to the Texas border. The interior repatriation program is a departure from the current practice of returning aliens to the Mexican side of the border, and is aimed at reducing the number of aliens who immediately try to cross back into the United States. Due to constitutional constraints in Mexico, the apprehended aliens' return to the interior must be voluntary²³⁰ and the willingness of their participation will be certified by Mexican consular officers.²³¹ During the pilot phase of the program, which ran through September 2004, 14,058 aliens were repatriated at a cost of approximately \$15.4 million. It remains to be seen whether this program will reduce the recidivism rate of the illegal aliens returned to Mexico. DHS has requested \$39 million to fund this program in FY2006 within the ICE appropriation.²³²

²²⁶ Jerry Seper, "Aliens Pilot Program Reduces Deaths at Borders with Mexico," *The Washington Times*, Oct. 8, 2003, p. A6.

²²⁷ "Mexico-US: Lateral Repatriation Scheme Ends," *Latin American Weekly Report*, Oct. 7, 2003.

²²⁸ Sergio Bustos, "Controversial Repatriation Program Could be Back Next Year" *Gannet News Service*, Nov. 17, 2003.

²²⁹ See §437 of P.L. 104-132.

²³⁰ There is an exception to the volunteer return of the migrant to the interior of Mexico if the border patrol can demonstrate that the migrant is at risk if he/she attempts to illegally enter the country (i.e., risk of ill health or death that is based on the condition of the migrant upon the current apprehension).

²³¹ U.S. DHS, CBP, Office of the Press Secretary, "Department of Homeland Security to Begin Pilot Program for Voluntary Interior Repatriation of Mexican Nationals," press release, June 29, 2004.

²³² For more information on DHS appropriations, please refer to CRS Report RL32863, *Homeland Security Department: FY2006 Appropriations*, coordinated by Jennifer Lake and Blas Nuñez-Neto.

ICE's Role in Repatriation. As discussed above, the border patrol has the authority to repatriate certain Mexican nationals. In its classic form, repatriation was usually done by the border patrol by simply turning the Mexican national back to the Mexican side of the border. With the implementation of both the lateral and interior repatriation programs, resources were drawn from ICE. Unlike CBP, ICE has the resources to detain illegal aliens until they can be repatriated to Mexico. Moreover, because ICE already has a removal program in place, it also has the resources to transport illegal aliens to their home countries.

Organizational Issues

Recent concerns have emerged over the apparent organizational issues in at least one of DHS' agencies. In recent months, ICE has been faced with a budget shortfall and reports of low morale and persisting conflicts over territory.²³³ Similar issues that are now facing ICE were evident in at least one of the legacy agencies that was transferred to ICE. The former INS was heavily criticized for not fully enforcing the immigration law, having poor management practices, and lacking accountability, among other things.²³⁴

In addition to the organizational concerns, questions continue to be raised with respect to the activities of CBP and ICE. While a clear distinction can be made regarding the *border* functions of CBP and the *interior* functions of ICE, both functions represent a continuum of activities that are interrelated. Certainly questions have been raised pertaining to the feasibility of combining these two functions.

Several proposals to restructure ICE and CBP have been advanced and include creating a new agency that would contain the immigration enforcement functions;²³⁵ and consolidating ICE and CBP into one bureau.²³⁶ Critics of the status quo contend that by consolidating CBP and ICE, coordination and sharing of efforts between the two bureaus would be better facilitated. Moreover, the ease of obtaining information from the counterpart bureau would be strengthened.²³⁷

These organizational concerns impact the southwest border. For example, CBP and ICE are dependent upon each other to carry out the various initiatives that are unique to the southwest border (e.g., the ABC initiative and the interior and lateral

²³³ Testimony of Randy Callahan before the House Committee on Homeland Security Subcommittee on Management, Integration, and Oversight, *CBP and ICE: Does the Current Organizational Structure Best Serve U.S. Homeland Security Interests*, Mar. 9, 2005.

²³⁴ For additional information, see CRS Report RL31388, *Immigration and Naturalization Service: Restructuring Proposals in the 107th Congress*, by Lisa M. Seghetti.

²³⁵ Testimony of TJ Bonner before the House Committee on the Judiciary Subcommittee on Immigration, Border Security and Claims, *Oversight Hearing on the "New 'Dual Missions' of the Immigration Enforcement Agencies*, May 5, 2005.

²³⁶ Testimony of Michael Cutler before the House Committee on the Judiciary Subcommittee on Immigration, Border Security and Claims, *Oversight Hearing on the "New 'Dual Missions' of the Immigration Enforcement Agencies*, May 5, 2005.

²³⁷ *Ibid.*

repatriation programs). As Congress considers the challenges facing ICE and CBP and whether another reorganization is necessary, it is faced with the issue of whether a reorganization would improve some of the bureau's inherited longstanding systemic issues, or whether it would mean further unsettling of agencies that are still struggling to obtain stability.

Overall Effectiveness of Current Policies

In the past, concerns pertaining to the southwest border centered on the flow of illegal drugs and contraband being smuggled into the country. While illegal migration has always been an issue at the southwest border, concerns heightened after the September 2001 terrorist attacks due to the potential of terrorists exploiting the border. The concern regarding the possibility of terrorists exploiting the southwest border is noteworthy. However, the data suggest that the vast majority of illegal migrants apprehended at the southwest border are Mexican nationals who are either seeking employment in the United States or reunification with their families.

Congress and the nation have begun a debate on whether current immigration policy is effective in stemming the flow of illegal migration to the United States. Several themes emerge in the discussion. Some believe that the best way to address the flow of illegal migration at the southwest border is to change immigration policy to allow more illegal aliens present in the United States to attain legal status.²³⁸ Proponents of this view contend that the majority of illegal aliens who enter the country do so to work.²³⁹ For several years, legislation has been introduced that would provide a legal alternative for prospective foreign workers.²⁴⁰ Supporters argue that such an alternative would help reduce unauthorized migration. Moreover, some employers are eager to have low-cost labor. Critics, however, contend that such a program would likely exacerbate the problem of illegal migration and point to the growth in unauthorized migration following the Immigration Reform and Control Act of 1986 that legalized illegal aliens and reformed the guest worker program.²⁴¹

Regardless of where one stands on the issue, there appears to be a consensus that immigration interior enforcement, including worksite enforcement, should be an integral part of the policy. Prior to the 2001 terrorist attacks, immigration interior enforcement received under 30% of the former-INS resources.²⁴² Since the terrorist attacks, ICE's resources have increased, partly due to the counterterrorism emphasis and the consolidation of other agencies such as the U.S. Customs Service.

²³⁸ Testimony of Margaret D. Stock before the Senate Judiciary Committee Subcommittee on Immigration, Border Security and Citizenship, *The Need for Comprehensive Immigration Reform: Strengthening Our National Security*, May 17, 2005.

²³⁹ Ibid.

²⁴⁰ For additional information on guest worker programs, see CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

²⁴¹ P.L. 99-603.

²⁴² See FY2002 INS Budget Justifications.

Another critical piece to stemming the flow of illegal migration to the United States is the Mexican economy, especially in the “sending regions” of the country. Several studies have shown that the majority of the illegal migrants from Mexico come from several economically deprived regions of the country.²⁴³ While the United States has entered into partnerships with Mexico to strengthen their economic growth (see above discussion on U.S.-Mexico Relations), many believe that more needs to be done to stabilize these communities. While the discussion in this section and throughout the report has focused on the problems at the southwest border, it is important to note that the same types of issues do not exist at the northern border, primarily due to Canada and the United States not having the same “push-pull” factors because of the economies being somewhat equivalent.

In conclusion, as the number of illegal aliens that are present in the United States continues to grow, attention will likely continue to be directed at the border and the enforcement of immigration laws within the interior of the country. DHS has launched several initiatives aimed at apprehending illegal aliens and dismantling human and drug smuggling organizations. Despite these efforts, the flow of illegal migration continues. Issues such as enforcement of immigration laws and organizational issues such as inter- and intra-agency cooperation, coordination and information sharing continue to be debated. In the view of some, a more comprehensive approach that addresses the “push factors” of the sending countries and the “pull factors” of the United States, coupled with more effective enforcement of current laws in the interior of the country may once again merit examination.

²⁴³ See for example [<http://www.cirsinc.org/pub/mixtec.html>].

Appendix A: Legislation Affecting the Southwest Border

Since 1993, Congress has passed legislation that authorized and appropriated funding to increase border personnel at and along the southwest border. Congress has also passed legislation that was aimed at strengthening resources and technology at the southwest border. Following is a discussion of legislation that has been enacted into law since 1993.²⁴⁴

103rd Congress

The Violent Crime Control and Law Enforcement Act of 1994. Title XIII, §13006 of the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322) authorized appropriations for FY1995-FY1998 to increase the resources for the then-Immigration and Naturalization Service's (INS) border patrol, inspections and deportation programs with respect to apprehending illegal aliens. The act also authorized appropriations to increase the number of border patrol agents up to 1,000 for FY1995-FY1998.

104th Congress

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Congress began addressing the need for greater border security in the 104th Congress when it passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).²⁴⁵ IIRIRA's border security provisions were concentrated at the southwest border and increased border enforcement by authorizing the hiring of 1,000 new border patrol agents each year for FY1997 through FY2001. The act called for the deployment of additional border patrol agents to areas that were in proportion to the level of illegal crossings. The act also authorized an increase in border patrol support personnel by 300 a year for FY1997 through FY2001.

IIRIRA sought to facilitate legitimate travel to the United States by addressing the long delays at the ports of entry by authorizing the hiring of inspectors to a level adequate to assure full staffing during peak crossing hours for FY1997 and FY1998. The act also authorized the Attorney General to establish six inspection projects wherein a fee could be charged. Under the act, the projects could be dedicated commuter lanes at ports of entry that would facilitate the speedy passage of frequent border crossers.

²⁴⁴ Included in the legislation history are bills that have been enacted that address border enforcement issues. Not included are the annual Commerce, Justice, State, the Judiciary and Related Agencies Appropriations Acts (CJS Appropriations Act) and the annual DHS Appropriations Acts. Both Acts authorize appropriations for inspections, border patrol, and interior enforcement activities, among other things.

²⁴⁵ Division C of the Omnibus Consolidated Appropriations Act for FY1997; P.L. 104-208.

In an effort to stem illegal immigration, IIRIRA authorized the expansion of border barriers and authorized the Attorney General to acquire and use any federal equipment that was available for transfer in order to detect, interdict and reduce illegal immigration into the United States. It also authorized appropriations to expand the Automated Biometric Fingerprint Identification System (commonly referred to as IDENT) nationwide to include the fingerprints of illegal or criminal aliens who were apprehended.

IIRIRA also had a provision that for the first time required biometrics in one type of travel document. The act required the Secretary of State to issue border crossing cards that have a biometric identifier that is machine readable. The act required that the biometric identifier must match the biometric characteristic of the card holder in order for the alien to enter the United States.

Automated Entry and Exit Data System (US-VISIT). Section 110 of IIRIRA required the Attorney General to develop an automated data system to record the entry and exit of every alien arriving in and departing from the United States by September 30, 1998. Many expressed concern about the potential for such a system to cause long delays at ports of entry. Consequently, Congress amended §110 of IIRIRA in the FY1999 Omnibus Consolidated Appropriations Act (P.L. 105-277) by extending the deadline for the implementation of an automated entry and exit data system and by prohibiting significant disruption of trade, tourism, or other legitimate cross-border traffic once the data system was in place. In June 2000, Congress further amended §110 in the INS Data Management and Improvement Act of 2000 (P.L. 106-215) by delaying the immediate implementation of the automated entry and exit data system at all ports of entry and requiring the development of a data system that uses available data to record alien arrivals and departures, without establishing additional documentary requirements. Following the September 11, 2001 terrorist attacks, however, Congress requested that resources be directed to the immediate development and implementation of an automated entry and exit control system at all ports of entry, as discussed below.

107th Congress

In direct response to the September 11 attacks, Congress passed several pieces of legislation that impacted border security, including border security at the southwest border.

The USA PATRIOT Act. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act; P.L. 107-56) called for the immediate implementation of the integrated entry and exit data system and that it be interoperable with other law enforcement data systems. The act required the Attorney General and the Secretary of State to develop and certify a technology standard that can be used to verify the identity of persons seeking a visa to enter the United States. Both of these mandates (implementation of an integrated entry and exit data system and the requirement that travel documents contain a biometric identifier) have direct implications for most foreign nationals seeking entry to the United States at a southwest land port of entry.

The Enhanced Border Security and Visa Entry Reform Act of 2002.

The Enhanced Border Security and Visa Entry Reform Act of 2002 (P.L. 107-173) further required the Attorney General (now the Secretary of Homeland Security) to implement an integrated entry and exit data system. The act required biometric data readers and scanners at all ports of entry and extended the deadline for border crossing identification cards (Laser Visas) to contain a biometric identifier that matches the biometric characteristic of the card holder.²⁴⁶ The act also authorized an increase in the number of immigration inspectors and support staff by 200 per group for each fiscal year from FY2002 through FY2006.

108th Congress

The Intelligence Reform and Terrorism Prevention Act of 2004.²⁴⁷

In an effort to implement selected 9/11 Commission recommendations, Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458). The act calls for the Secretary of DHS to develop a plan to accelerate the full implementation of an automated biometric entry and exit data system and submit a report to Congress on the plan by July 17, 2005. The act requires the integration of the entry and exit data system with other databases and data systems. It also requires the Secretary of DHS to develop and implement a plan to expedite the processing of registered travelers through a single registered traveler program that can be integrated into the broader automated biometric entry and exit data system. With respect to resources, the act authorizes 2,000 additional border patrol agents each year, FY2006 through FY2010.²⁴⁸

109th Congress

The REAL ID Act of 2005 (P.L. 109-13). The REAL ID Act of 2005 (P.L. 109-13) contains several provisions that would have an impact on border security-related issues at the southwest border. In addition to its more general immigration-related border security provisions,²⁴⁹ the act contains two provisions that are specific to the southwest border. Title III of the act directs the Under Secretary of Homeland Security for Border and Transportation Security to conduct a study on “the technology, equipment, and personnel needed to address security vulnerabilities ...

²⁴⁶ The Sept. 30, 2002 deadline has been met.

²⁴⁷ In July 2004, the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) published its report. Some of the 9/11 Commission’s findings have direct implications for the southwest border. For example, the 9/11 Commission called for the expeditious implementation of the US-VISIT program and its consolidation with the various border screening systems, including frequent traveler programs such as the Secure Electronic Network for Travelers’ Rapid Inspections (SENTRI). See [<http://www.9-11commission.gov/>].

²⁴⁸ The act requires that 20% of the Border patrol agents go to the northern border.

²⁴⁹ For a discussion on the immigration-related border security provisions in the act, see CRS Report RL32754, *Immigration: Analysis of the Major Provisions of H.R. 418, the REAL ID Act of 2005*, by Michael John Garcia, Margaret Mikyung Lee, Todd Tatelman and Larry M. Eig.

for each CBP field office that has responsibility for U.S. borders with Canada and Mexico.”²⁵⁰ Another provision would permit the Secretary of Homeland Security to waive “*all* laws as necessary” to expedite the construction of barriers and roads along the border.²⁵¹ The impetus for this provision is the construction of a fence in the San Diego Sector of the southwest border that has been delayed due to legal issues that have been advanced by the State of California.²⁵²

²⁵⁰ §301 of the act.

²⁵¹ §102 of the act.

²⁵² For additional information, see CRS Report RS22026, *Border Security: Fences Along the U.S. International Border*, by Blas Nuñez-Neto and Stephen R. Viña.