

Testimony of Margaret Stock on Securing Our Borders Under a Temporary Guest Worker Program

Statement of

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On

Securing Our Borders Under a Temporary Guest Worker Program

Before the

Senate Judiciary Committee
Subcommittee on Immigration, Border Security, and Citizenship

April 1, 2004

Washington, D.C.

Mr. Chairman and distinguished Members of the Subcommittee, my name is Margaret Stock. I am honored to be here in two capacities: on behalf of the American Immigration Lawyers Association (AILA) and as an expert in the field of constitutional, military, national security, and comparative law. I am an Assistant Professor at the United States Military Academy at West Point, New York. The statements, opinions, and views expressed herein are my own, and do not represent the views of the United States Military Academy, the Department of the Army, or the Department of Defense.

AILA is the immigration bar association with more than 8,500 members who practice immigration law. Founded in 1946, the association is a nonpartisan, nonprofit organization and is an affiliated organization of the American Bar Association (ABA). AILA members represent tens of thousands of American families who have applied for permanent residence for their spouses, children, and other close relatives to lawfully enter and reside in the United States; U.S. businesses, universities, colleges, and industries that sponsor highly skilled foreign professionals seeking to enter the United States on a temporary basis or, having proved the unavailability of U.S. workers when required, on a permanent basis; and healthcare workers, asylum seekers, often on a pro bono basis, as well as athletes, entertainers, exchange visitors, artists, and foreign students. AILA members have assisted in contributing ideas for increased port of entry inspection efficiencies and continue to work through their national liaison activities with federal agencies engaged in the administration and enforcement of our immigration laws to identify ways to improve adjudicative processes and procedures.

As I mentioned previously, I am an Assistant Professor at the United States Military Academy at West Point, New York, where I teach National Security Law, Constitutional Law, Military Law, Comparative Law, and International Law to future military officers. As an attorney and a graduate of the Harvard Law School, I have practiced in the area of immigration law for more than ten years, and have written and spoken extensively on the issue of immigration and national security. I am also a lieutenant colonel in the Military Police Corps,

United States Army Reserve. Over the years, I have represented hundreds of businesses, immigrants, and citizens seeking to navigate the difficult maze of US immigration law.

I am honored to be appearing before you this afternoon to discuss the issue of "Securing Our Borders under a Temporary Guest Work Program." This hearing could not be more important or timely because it connects two important issues: border security and reforming our immigration laws. This hearing can help us focus on the central issues that our nation must address successfully if we are to enhance our security and thrive as a nation. Hopefully, we can clarify the major issues at stake, judge where we have succeeded and failed, and question any false assumptions we may hold. For instance, we need to be clear about what we mean when we talk about our "borders." We also need to be willing to take a hard look at the measures we have taken to enhance our security and evaluate honestly whether or not they actually make us safer. In addition, we need to acknowledge that we cannot enhance our security unilaterally. Most of all, we must realize that in these times of unprecedented challenges, we need to work together.

I want to make three key points:

- **First, we secure our borders best by enhancing our intelligence capacity.** National security is most effectively enhanced by improving the mechanisms for identifying actual terrorists, not by implementing harsher immigration laws or blindly treating all foreigners as potential terrorists. Policies and practices that fail to properly distinguish between terrorists and legitimate foreign travelers are ineffective security tools that waste limited resources, damage the U.S. economy, alienate those groups whose cooperation the U.S. government needs to prevent terrorism, and foster a false sense of security by promoting the illusion that we are reducing the threat of terrorism. Reforming our immigration laws will help us to identify those who seek to enter our country or are already residing here.
- **Second, we need to make our borders our last line of defense.** The physical borders of the United States should be our last line of defense because terrorism does not spring up at our borders. In fact, we need to re-conceptualize how we think about our "borders," because in our modern world they really start at our consulates abroad. The Enhanced Border Security and Visa Entry Reform Act of 2002, a law that AILA actively supported, is based on that assumption and must be actively implemented.
- **Third, comprehensive immigration reform is an essential component of enhanced security.** Our current immigration system is an obstacle to enhancing our security because it is dysfunctional. We currently allocate massive resources in a futile attempt to enforce a system that simply does not work. Our enforcement efforts could be far more effective if our laws made sense. A new "break-the-mold" guest worker program is an essential component to sensible reform that would help enhance our security and secure our borders because it would legalize the flow of people who enter our country. However, it is insufficient by itself. We also need to offer to those who are residing here AND working, paying taxes, and otherwise contributing the opportunity to earn their permanent legal status. We also need to recognize that blood is thicker than borders and deal squarely with the issue of family reunification and family backlog reductions so that nuclear families are not separated for up to twenty years by our dysfunctional laws. S. 2010, the Immigration Reform Act of 2004, introduced by Senators Chuck Hagel (R-NE) and Tom Daschle (D-SD), is the only initiative introduced to date that includes all three components necessary for comprehensive reform.

In this mission to secure our borders, we need to grapple with the following questions:

1. What security measures are most effective in preventing attacks? In the hours following the deadly terrorist attacks of September 11, 2001, the United States government took the extraordinary step of sealing U.S. borders to traffic and trade by grounding all aircraft flying into or out of the country and imposing a lock-down on the networks of transportation and commerce that are the lifeblood of our economy and society. Given the uncertainty over what might happen next, these emergency procedures were a necessary and appropriate

short-term response to the attacks. In the long run, however, a siege mentality and the construction of a fortress America are ineffective and unrealistic responses to the dangers we face.

If we are to succeed in reducing our vulnerability to further terrorist attacks, we must focus our attention and resources on the gaps in intelligence gathering and information sharing that allowed nineteen terrorists to enter the United States. National security is most effectively enhanced by improving the mechanisms for identifying actual terrorists, not by implementing harsher immigration laws or blindly treating all foreigners as potential terrorists. Policies and practices that fail to properly distinguish between terrorists and legitimate foreign travelers take us down the wrong path as ineffective security tools that do more harm than good. The report I co-authored with Benjamin Johnson, "The Lessons of 9/11: A Failure of Intelligence, Not Immigration Law," for the Immigration Policy Center of the American Immigration Law Foundation focuses on those immigration proposals, including comprehensive immigration reform, that can enhance our security without jeopardizing the important role immigration plays in the war against terrorism and in our economy. I would like to submit this report for the record.

Comprehensively reforming our immigration laws (which I will discuss in more detail) is an essential tool to help us distinguish between those who mean to do us harm and those who are here to fill our labor market needs and reunite with close family members.

2. What is the role of our "borders" in enhancing security? What and where are our borders? When people refer to our "borders," they usually mean the geographic boundaries that separate the United States from Canada and Mexico. Yet to enhance our security we must make our physical borders the last line of defense against terrorism, not the first. We must pursue initiatives including multilateral strategies with Canada and Mexico to create a North American Perimeter Safety Zone, and increase the use of pre-clearance and pre-inspection programs that provide U.S. officials the opportunity to check passengers for admission before those passengers board a flight to the United States (while including safeguards to allow asylum protection for those who truly deserve it).

Our government has been touting the United States Visitor and Immigrant Status Indicator Technology program (US VISIT) as a tool that will help to make us safer by identifying terrorists. While US VISIT can help to identify people, its utility as a security tool is unclear. This new automated entry/exit system is being implemented at our nation's ports of entry and is designed to collect and share information on foreign nationals traveling to the United States (including travel details and biometric identifiers), confirm identity, measure security risks, and assess the legitimacy of travel in an effort to determine who is welcome and who is not. The program is also intended to help speed traffic flow. The overall plan for the implementation of US VISIT calls for the collection of personal data, photos, and fingerprints at U.S. consular offices abroad and at our ports of entry, as well as broad database and information sharing. The system also is intended to track changes in foreign nationals' immigration status and make updates and adjustments accordingly. Ultimately, the Department of Homeland Security (DHS) plans to make available information captured through

US VISIT at all ports of entry and throughout the entire immigration enforcement system.

Will US VISIT help to enhance our security? While the jury is still out, serious questions need to be addressed as to the achievable mission of US VISIT. A June 1998 Senate Judiciary Committee Report (Senate Judiciary Report 105-197 on S. 1360, the Border Improvement and Immigration Act of 1998, June 1, 1998) makes the following apt comment:

The Committee is keenly aware that implementing an automated entry/exit control system has absolutely nothing to do with countering drug trafficking, and halting the entry of terrorists into the United States, or with any other illegal activity near the borders. An automated entry/exit control system will at best provide information only on those who have overstayed their visas. Even if a vast database of millions of visa overstayers could be developed, this database will in no way provide information as to which individuals might

be engaging in other unlawful activity. It will accordingly provide no assistance in identifying terrorists, drug traffickers, or other criminals. (emphasis added)

With regard to tracking visa overstayers, the report further states:

Even if a list of names and passport numbers of visa overstayers would be available, there would be no information as to where the individuals could be located. Even if there was information at the time of entry as to where an alien was expecting to go in the United States, it cannot be expected that 6 or more months later the alien would be at the same location. Particularly, if an alien were intending to overstay, it is likely that the alien would have provided only a temporary or false location as to where the alien was intending to go.

AILA members have previously testified that immigration can best contribute to our national security through another approach: enhancing our intelligence capacities. To that end, AILA strongly supports the Enhanced Border Security and Visa Entry Reform Act. The goal of this law is to make our borders the last line of defense. To that end, the Act authorizes increased funding for the DOS and the immigration components of DHS, requires federal agencies to coordinate and share information needed to identify and intercept terrorists; encourages the use of new technologies by authorizing funds to improve technology and infrastructure at DHS and DOS, targeting much of this effort at strengthening our nation's borders; mandates the transmittal of advance passenger lists; and implements a study to determine the feasibility of a North American Perimeter Safety Zone. (This study includes a review of the feasibility of expanding and developing pre-clearance and pre-inspections programs).

Given this law's ambitious provisions, Congress needs to step up to the plate and provide the federal agencies impacted with the staffing and funding levels they need to implement this measure's provisions, as well as perform adequate oversight. It is simply unacceptable for Congress to pass this bill and not give the federal agencies the funding they need to do a good job. It is also unacceptable for the agencies not to implement the mandates of this law.

3. Does it make sense from a security perspective to treat differently our northern and southern borders?

From a security perspective it does not make sense to treat our two borders differently. But the United States does just that. There is an extraordinary degree of cross-border cooperation between Canada and the U.S. to facilitate the \$1 billion a day in trade and the travel of 220 million people each year. On the northern border, we usually manage to deal with our security needs without disrupting the flow of people and goods. Our southern border is another story altogether. In contrast to the northern border where our government's actions reflect the view that our security imperatives need not disrupt the flow of people and goods, our southern border is characterized by a hardening that I fear does not make us safer. In fact, long lines and delays make it more difficult for our ports-of-entry personnel to screen people and goods adequately and appropriately as they seek to enter this country. This situation is unwise because our relationship with Mexico is one of our most important bilateral relationships as we seek to enhance our security.

The Canadian/U.S. bilateral relationship should be a model for our relationship with Mexico because it embraces security and economic facilitation as twin goals. Improving our relationship with Mexico will enhance our security as it reflects the importance of our economic relationship. While the United States currently absorbs over 80% of Mexican exports, Mexico has become the third largest export market for the U.S. and an important destination for U.S. direct investment. Furthermore, U.S./Mexico trade has now reached \$232 billion, with our long common border being the busiest in the world, with over 340 million legal crossings annually. Family and social ties between the United States and Mexico are just as strong as those with Canada. The United States should reach out to a willing Mexico to strengthen our important bilateral relationship.

Such an improved relationship is essential for immigration reform because so much of our documented and undocumented immigration flows from Mexico. With regard to crafting a successful guest worker program, the cooperation of the sending country - and we would expect Mexico to be the primary sender - is essential if we

are to implement a successful program. Finally, reforming our immigration laws will help us to more easily verify cross border flows. People who have earned their adjustment and participants in worker programs can be easily identified and separated out from those whom we don't know. If a guest worker and earned adjustment program is implemented properly, it will help bring from the shadows many of the eight (8) to fifteen (15) million illegal or "out of status" aliens who live within our borders. These aliens, the vast majority of whom pose no security threat, can come forward to be identified, fingerprinted, and registered; they can also provide us with information that we can use to focus on the very serious security threats that we face.

4. How do we balance the flow of people and goods with securing our borders? The United States has over 300 ports of entry through which authorized travelers and commercial goods enter the country. In 2001, over 510 million people (63% of whom were foreign nationals) and over \$1.35 trillion in imports entered the U.S. through these ports. If the inspection of each of these entrants took even a little longer than it currently does, the flow of goods and people (particularly at land ports) would come to a grinding halt. The Department of Homeland Security thus has the challenge of streamlining current border procedures and evaluating future initiatives so that the border crossing processes are both more secure and efficient. Otherwise, security measures that do not take into account travel and trade could cripple our nation's economic viability. As we think about our security needs, we must remember that we need a strong economy to pay for our national security.

Our economic prosperity depends on the free movement of people and goods. We must be careful not to create an environment conducive to terrorists and criminals at our ports-of-entry. I concur with Stephen Flynn, who in his March 23 testimony before the Senate Committee on Foreign Relations emphasized that the "hemisphere's economic prosperity depends on an open continental system that facilitates the free movement of people and goods." He is concerned, as I am, that "security has trumped cross-border facilitation as our abiding interest" at our southern border, which is a "mistake because it wrongly presumes that there is an automatic trade-off between advancing greater degrees of openness to support the movement of people and goods and the need for more rigorous border controls." Mr. Flynn's "smart border" has many similarities to the "virtual border" approach I outlined above. Both recognize the importance of the continued flow of people and goods, and underscore that effective border management needs to take place away from our physical borders. I would only add that comprehensively reforming our immigration laws is the other component that is necessary for our borders to work and work well because such reform helps identify the people who present themselves at our ports-of-entry, thereby making legality the norm.

5. What is the role of immigration in the post-September 11 world? Because all nineteen of the September 11th terrorists were foreigners, some observers have been quick to blame our vulnerability to terrorist attacks on lax immigration laws. While such a response was predictable, it was misguided and has inevitably resulted in overreaction. Calls to impose a "moratorium" on immigration, halt the issuance of student visas, close the borders with Canada and Mexico, eliminate the Diversity Lottery visa program, draft harsher immigration laws, and similar types of proposals reflect a serious misunderstanding of the relationship between immigration policy and national security.

Although the attacks of September 11th revealed serious management and resource deficiencies in the bureaucracies that administer our borders, U.S. immigration laws in and of themselves did not increase our vulnerability to attack. In fact, U.S. immigration laws already are among the toughest in the world and have long provided the federal government with broad powers to prevent anti-American terrorists from entering or residing in the United States. A careful analysis of the September 11th attacks reveals that deficiencies in U.S. intelligence collection and information sharing, not immigration laws, prevented the terrorists' plans from being discovered.

The recent Joint Inquiry into the events of September 11th, conducted by the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence, confirms that better intelligence - and action on that intelligence - might have prevented the attacks on the Pentagon and World Trade Center. Similarly, a recent comprehensive study by the Migration Policy Institute points out that "Immigration measures

are an important tool in the domestic war against terrorism, but they are not effective by themselves...the lead domestic security response to terrorism should be strengthened intelligence and analysis, compatible information systems and information-sharing and vigorous law enforcement and investigations." In fact, tightening immigration laws and policies in an unfocused manner will make it more difficult for the United States to win the global war on terrorism by damaging the U.S. economy and alienating the immigrant communities and foreign allies whose cooperation the U.S. government most needs. In contrast, immigration reform would allow enforcement efforts to focus on terrorists.

6. What is the role of a temporary guest worker program in helping to secure our borders? The U.S. currently has a guest worker program: It is known as undocumented immigration. We must legalize this flow by creating a new temporary worker program that would give workers the opportunity to work where they are needed, and employers experiencing shortages the workforce they need to remain competitive. Such a program would provide legal visas, family unity, full labor rights, labor mobility, and, if the worker so desires and will not displace a U.S. worker, permanent residence and citizenship over time. Such a program also would diminish significantly future illegal immigration by providing people with a legal way to enter the U.S. and return, as many wish, to their home countries, communities, and families. A program such as this would allow our government to better focus resources on those who mean to do us harm. A properly-designed guest worker program would re-create the circularity that has characterized the worker flow for decades. Workers would come to the U.S. and return to their home countries when they finished their work assignments. Currently, our reinforced borders dramatically change that traditional migratory pattern as undocumented workers are now forced to stay in the U.S. or risk death by crossing the borders through increasingly hostile terrain.

A workable guest worker program, while insufficient as an overall strategy (see my comments below), would help us secure our borders by allowing our government at and between our ports of entry to focus on the people who mean to do us harm, not on those who are filling our labor market needs and trying to reunite with their family members.

The Bush Administration, on January 7, 2004, unveiled its immigration proposal. The President was eloquent in his recognition that immigration is in America's self-interest, and that "one of the primary reasons America became a great power in the 20th century is because we welcomed the talent and the character and the patriotism of immigrant families." The President correctly recognizes that our current immigration system makes more difficult the urgent task of securing the homeland. Importantly, President Bush also succinctly identifies a problem that needs immediate attention when he said that "[a]s a nation that values immigration and depends on immigration, we should have immigration laws that work and make us proud. Yet today we do not." Our immigration laws do not make us proud.

AILA agrees with the President that our current immigration laws do not make sense, do not make us safer, do not support our economy, and do not reflect our tradition as a nation of immigrants. Does the Administration's proposal adequately address these concerns that the President so eloquently raises? The Administration's reform proposal is centered on an uncapped temporary worker program intended to "match willing foreign workers with willing U.S. employers when no Americans can be found to fill the job." The program would grant program participants temporary legal status and authorize working participants to remain in the U.S. for three years, with their participation renewable for an unspecified period. Initially, the program would be open to both undocumented people as well as foreign workers living abroad (with the program restricted to those outside of the U.S. at some future, unspecified date). American employers must make reasonable efforts to find U.S. workers. Under this proposal, participants would be allowed to travel back and forth between their countries of origin and "enjoy the same protections that American workers have with respect to wages and employment rights." The proposal also includes incentives for people to return to their home countries and calls for increased workplace enforcement as well as an unspecified increase in legal immigration.

While these and other general provisions of the plan are known, much is still unclear and could spell the difference between a proposal that works and one that does not. For example, it is unclear if the proposal would

create meaningful access to permanent legal status because, while it does not prohibit temporary workers from applying for legal permanent residency, it would allow them to do so only under existing immigration law. The question thus remains whether the Administration's plan would adequately deal with the three-year, ten-year, and permanent bars, as well as the grounds of inadmissibility that put roadblocks in the way of undocumented people using this program to adjust. A program that includes no real prospects for people to earn permanent resident status will not generate full participation. The proposal also would allow temporary worker program participants who seek to remain in America to pursue citizenship, and calls for a "reasonable increase in the annual limit of legal immigration" for others who seek to immigrate to this country. These temporary workers would be placed in line behind those already in line. However, unless current law is changed, the process to become a legal permanent resident could take decades for these temporary workers. Finally, the proposal is silent on the pressing issue of family backlog reductions. Our current immigration system is characterized by long backlogs that keep close family members separated for 20 years or longer. AILA has long maintained that comprehensive immigration reform is needed to address the current situation. (See below for more details.)

7. Is a guest worker program sufficient in itself to secure our borders and enhance our security? No. It is my view that to secure our borders and effectively reform our immigration laws we need comprehensive immigration reform (such as that included in S. 2010, the Immigration Reform Act of 2004) that includes, along with a worker program, an earned adjustment and family backlog reduction. People who work hard, pay taxes, and contribute to the U.S. should be allowed to obtain permanent residence. Reform should stabilize the workforce of U.S. employers, encourage people to come out of the shadows to be scrutinized by our government, and allow immigrants to work and travel legally and be treated equally. Many have been here for years, are paying taxes, raising families (typically including U.S. citizen and lawful permanent resident spouses and children), contributing to their communities and are essential to the industries within which they work. In order to unite families and keep them together, appropriate waivers must be available for grounds of admissibility and deportability. In addition, our immigration system has been characterized by long backlogs in family-based immigration and long delays in business-based immigration. Illegal immigration is a symptom of a system that fails to reunify families and address economic conditions in the U.S. and abroad. To ensure an orderly future process, our system must reduce bureaucratic obstacles and undue restrictions to permanent legal immigration. Developing an increased legal migration flow will make immigration more orderly and legal. It also will allow more people to reunite with their families and work legally in the U.S., and would facilitate fair, equitable, and efficient immigration law, policy, and processing. It is essential to make legal future immigration that otherwise will happen illegally.

Because many of the problems with the current U.S. immigration system are interrelated, reform must be comprehensive to successfully address our nation's needs and realities. The status quo is unacceptable, especially in a post-September 11 world. Enhanced security is central, but part of that security is keeping our economic security through the continued flow of people and goods. Our current system is characterized by families being separated for long periods of time and U.S. employers unable to bring in needed workers. People are forced to live an underground existence, hiding from government for fear of being separated from their families and jobs. The current enforcement system fails to prevent illegal immigration, and precious resources that should be spent on enhancing our security are wasted on stopping hard-working people from filling vacancies in the U.S. Our immigration system needs to be reformed so that legality is the norm, and immigration is legal, safe, orderly, and reflective of the needs of American families, businesses, and national security.

Immigration reform that legalizes hard-working people already here and that creates a new worker program will help the U.S. government focus resources on enhancing security, not on detaining hard-working people who are filling vacancies in the U.S. labor market and/or seeking to reunite with their close family members. In addition, an earned adjustment program will encourage people to come out of the shadows and be scrutinized by our government, and a new worker visa program will create a legal flow through which people can enter and leave the U.S. The legality that results from these initiatives will contribute to our national security by helping to focus resources on those who mean to do us harm. Such legality also will facilitate enforcement efforts by

allowing our government to focus resources. Enforcing a dysfunctional system only has led to more dysfunction, not better enforcement.

Two bipartisan measures now before Congress constitute important "down payments" on comprehensive immigration reform. They are: the Agricultural Job Opportunity, Benefits and Security (AgJobs) Act (S. 1645/H.R. 3142) and the DREAM /Student Adjustment Act (S. 1545/H.R.1684). Both these bipartisan measures would implement needed reforms.

- AgJobs is a landmark example of business, immigration, agriculture, labor, civic and faith-based groups working together to propose solutions to long-standing problems with agricultural labor policy. This measure would reform the H-2A process so that agricultural employers unable to find American workers would be able to hire needed foreign workers. The legislation also provides a reasonable mechanism for undocumented agricultural workers to earn legal status.
- Despite the fact that many undocumented children have grown up in the U.S., attended local schools, and have demonstrated a sustained commitment to learn English and succeed in our educational system, our immigration laws provide no avenue for these students to become legal. Many were brought to the U.S. by their parents at an age at which they were too young to understand the legality of their arrival, let alone take action to rectify this decision. The DREAM/Student Adjustment Act would allow immigrant students who have grown up in this country, graduated from high school, been acculturated as Americans, and have no criminal record, to go to college and legalize their immigration status.

8. Is it important to move ahead on comprehensive immigration reform to secure our borders? Yes, absolutely. Our nation has no choice but to move ahead on comprehensive immigration reform if we are to secure our borders and enhance our security. Immigration reform is an essential tool to make us safer. We must proceed post haste.