

Statement of
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on behalf of the
American Immigration Lawyers Association
concerning
"Should Mexico Hold Veto Power Over U.S. Border Security
Decisions?"
before the
U.S. House of Representatives
Judiciary Committee
Committee Field Hearing

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Chairman Sensenbrenner, Ranking Member Conyers, Congressman Reyes, and distinguished Members of the Committee, I am Kathleen Campbell Walker, National President-Elect of the American Immigration Lawyers Association (AILA). I am honored to have the opportunity to appear before you today concerning provisions of S. 2611, the *Comprehensive Immigration Reform Act of 2006*, which passed the Senate on May 25, 2006 with the vote of sixty-two senators, including the support of twenty-three Republican senators and thirty-eight Democratic senators. The bill's chief sponsors are: Senators Brownback (R- KS), Graham (R-SC), Hagel (R- NE), Kennedy (D-MA), Martinez (R-FL), and McCain (R-AZ).

AILA is the immigration bar association of almost 10,000 lawyers who practice immigration law. Founded in 1946, the association is a nonpartisan, nonprofit organization and is affiliated with the American Bar Association (ABA). AILA members represent tens of thousands of: U.S. families who have applied for permanent residence for their spouses, children, and other close relatives to enter and reside lawfully in the United States (U.S.); U.S. businesses, universities, colleges, and industries that sponsor highly skilled foreign professionals seeking to enter the U.S. on a temporary basis or, having proved the unavailability of U.S. workers when required, on a permanent basis; applicants for naturalization; applicants for derivative citizenship as well as those qualifying for automatic citizenship; 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 to increased port of entry inspection efficiencies, database integration, security enhancement and accountability, and technology oversight, and continue to work through our 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.

Being from El Paso and practicing immigration law here for over 20 years, my practice has focused on consular processing, admissions, business-based cross-border immigration issues, naturalization, citizenship, and family-based cases. I previously served as the president for four years of the El Paso Foreign Trade Association, a member of the Texas Comptroller's Border Advisory Council; a member of the board of the Border Trade Alliance; and a member of the executive committee of the Texas Border Infrastructure Coalition for the city of El Paso. During my tenure as president of the El Paso Foreign Trade Association, the association served as a leader in creating the first Dedicated Commuter Lane in the State of Texas in El Paso. These experiences have provided me with many opportunities to participate in and observe border inspection infrastructure improvements as well as Department of State ("DOS") and Homeland Security ("DHS") projects related to security, including U.S. VISIT.

Summary

The El Paso/Cd. Juarez area exemplifies what a cross-border community can achieve in attempting to balance the flow of trade and people between countries with the increased need for security in today's world. El Paso represents the historic border town between the U.S. and Mexico. The current border though for the U.S. is not here, it is located in all corners of the globe. The virtual border of today includes as our first line of defense, DOS's U.S. consular posts abroad as well as Pre-Clearance Operations ("PCO") and the Immigration Security Initiatives ("ISI") of Customs and Border Protection ("CBP") at foreign airports, advance passenger manifests from arriving airplanes provided to CBP, the US VISIT registration process, the integration capabilities of our enforcement databases, and the operations of our intelligence networks.

What are the true parameters of "securing" this virtual border? The border demarcated by the Rio Grande between the U.S. and Mexico is a last line, not a first line, of effective control of those coming to the U.S. This border must be porous enough to facilitate our economic growth and yet impervious enough to withstand the efforts of those wishing to do our nation harm. My testimony will review concrete efforts by this border community to achieve such results via numerous security related technologies and infrastructure initiatives. However, it is difficult for a community steeped in secure trade initiatives to support an "enforcement only" or "enforcement first" response to our current immigration problems generally, and to the conundrum of illegal immigration specifically given years of failure to fund and be accountable to the American public for border security issues. Where were the funds and the accountability for trade and inspections infrastructure as well as consular visa processing support in the last fifty years that would meet the joint demands of security and trade?

This Texas border community is used to taking the "bull by the horns" as they say here to achieve security and trade objectives. We expect the same from our elected officials inside the beltway. Recent discussions to use some sort of "trigger" of border security before proceeding with addressing the undocumented in our midst and providing a legal means to meet documented labor needs in the U.S. with foreign workers provides no true substantive answer to this multi-layered issue. For example, if we waited to achieve the integration of the IDENT and IAFIS databases to proceed with biometric intake (two or ten fingerprints) for visa processing or certain admissions, we would not have even commenced the US VISIT project which is heralded as a major security achievement by DHS. Full interoperability of IDENT, IAFIS, and US VISIT is still not expected until December of 2009.¹ So how does one achieve border security without proceeding at the same time to make it easier for employers to establish work authorization or to fill labor needs? It is simple to document the problem of

¹ U.S. Department of Justice, Office of Inspector General, Evaluations and Inspections Division, "Follow-Up Review of the FBI's Progress Toward Biometric Interoperability Between IAFIS and IDENT," July 2006 at p. iv.

worker needs and pressures on U.S. businesses. On August 11, 2006, the Associated Press published an article quoting John McClung, President of the Texas Produce Association, indicating that if Congress does not resolve differences between the House and Senate immigration bills, the produce industry will “outsource” its business south of the border. McClung noted that “We are watching Congress fiddle around while Texas and the rest of the industry burns.”²

A day does not pass without innumerable talking heads lambasting our lack of control of our borders. We here on the border know that talk is cheap and action, including funding and oversight, much harder. For example, the Immigration and Naturalization Service (“INS”) Office of Administration reported in the 2nd Data Management Improvement Act (“DMIA”) report to Congress in 2003, the following shortages in space for the federal inspection area at land border ports of entry:

- 64 ports have less than 25 percent of required space.
- 40 ports have between 25 and 50 percent of required space.
- 13 ports have between 50 and 75 percent of the space required.
- Some existing ports lack any land for expansion.³

The funding backlogs for facility requirements of land ports of entry have been extensive for years. In fiscal year 2003, for example, the funding backlog was over \$500 million.⁴ Where is the follow-up report evaluating this lack of infrastructure and the plan of action to deal with this issue? If “border security” means sufficient infrastructure at our land border ports, when is this objective actually achievable?

The point of these observations is to express a “zero tolerance” policy for empty placebos. We stand ready to support a real plan of action, which includes a multi-pronged approach to a multi-layered challenge. Let’s not sell the issues of our national and economic security short by a quick fix – do the job right and establish the rule of law both from an immigration reform and enforcement lens. Enforcement only or enforcement first legislative fixes are security-light answers to the issue on the table.

BACKGROUND: CROSS-BORDER CONSULTATION AND COOPERATION HAVE A LONG AND SUCCESSFUL HISTORY ALONG OUR SOUTHWEST BORDER

² Elizabeth White, “Texas produce growers say inaction on immigration hurts business,” Associated Press, August 11, 2006.

³ DMIA Task Force: Second Annual Report to Congress, at 33 (December 2003) (herein “2nd DMIA Report”).

⁴ *Id.*

The Paso del Norte region has a rich and long history as a trade region. El Paso was originally founded by Spanish explorers in 1581. In 2003, trade through the land ports along the U.S.-Mexico border represented about 83% of the trade between the countries. As to numbers of inspection of people, El Paso surpasses all ports of entry in Texas. According to data from the Texas Center for Border and Enterprise Development of Texas A&M International University, in March 2006 alone, El Paso ports had approximately 545,299 northbound (to U.S.) and 421,544 southbound pedestrian crossings. In the same month, 450,813 southbound vehicle crossings and 595,500 northbound vehicle crossings are recorded, in addition to 64,457 trucks heading northbound and 29,634 southbound.

This trade volume and active cooperation between local community groups and their corresponding associates from Mexico have resulted in several firsts from a security and trade perspective in El Paso:

1. First Dedicated Commuter Lane in the State of Texas using Secure Electronic Network for Travelers Rapid Inspection (“SENTRI”) through a partnership with the El Paso Chamber Foundation for infrastructure funding.
2. First Expansion of an Existing Cross-Border Bridge (Bridge of the Americas - “BOTA”) funded with local trade community voluntary funding project.
3. First and second commercial Fast and Secure Trade (“FAST”) lanes for commercial traffic in the State of Texas.
4. First pilot land border use of the Pulsed Fast Neutron Analysis (“PFNA”) technology.
5. El Paso Customs and Border Protection Field Office employee develops software to automatically populate the I-94 arrival/departure record with information from a swipe of the applicant’s machine-readable passport or laser visa, which is now used nationwide.

Regular meetings are still held between federal, state, and local U.S. and Mexican counterparts regarding the ongoing operations of the FAST and SENTRI lanes operating between El Paso and Ciudad (Cd.) Juarez, as well as concerning our shared ports of entry over the Rio Grande river.

Further, El Paso serves as home to two bi-national organizations: the International Boundary and Water Commission (“IBWC”), originally created by the Convention of 1889, and the U.S.-Mexico Border Health Commission (“USMXBHC”), created in July of 2000 via agreement between the U.S. Secretary of Health and Human Services and the Mexican Secretary of Health. In December of 2004, the USMXBHC was designated as a Public International Organization by the executive order of President George W. Bush.

The mission of the IBWC is to apply the rights and obligations which the U.S. and Mexican governments assume under numerous agreements in a way “that benefits the social and economic welfare for the peoples on the two sides of the boundary and improves relations between the two countries.” The construction of any international bridge requires the approval of both the U.S. and Mexico. The mission of the USMxBHC is to provide international leadership to optimize health and quality of life along the U.S.-Mexico border.

El Paso and Cd. Juarez are sister cities separated geographically by a river. The culture, families, and traditions, however, are inextricably intertwined. The El Paso City Council unanimously passed a resolution on April 4, 2006, concerning enforcement and immigration reform. The City resolved that:

*“**RESOLVED**, that the complex issues of illegal immigration and a porous border cannot be fixed by an enforcement-only approach. Any solutions must take a multi-layered approach to multi-layered issues created over decades of neglect....*

***RESOLVED**, that the construction of a fence along the entire southern border or the militarization of the border are not reasonable solutions.*

***RESOLVED**, that a solution must address allowing the undocumented in the United States who are filling legitimate employment needs a means to obtain legal status without placing them ahead of those who applied to enter the U.S. legally....*

***RESOLVED**, that the City of El Paso will continue to work in a collaborative manner with our Sister City, Ciudad Juarez, Chihuahua, and other governmental entities in the El Paso/Juarez Borderplex to address issues that are unique to the bi-national, multi-cultural community in which we live....”*

A copy of the City’s resolution is [attached](#). The Greater El Paso Chamber of Commerce passed a similar resolution after a chamber membership survey was conducted on the issue of immigration reform and border security. A copy of the Chamber’s resolution is also [attached](#).

The bottom line is that the El Paso community has been engaged in the challenges and opportunities presented by the geography of our area for decades. The community has supported security efforts balanced by trade facilitation, with real versus optical security results. Those results are based on a strong history of cross-border cooperation and consultation as well as strong economic interdependence ties.

TEXAS ECONOMIC HEALTH AND THE IMPORTANCE OF CROSS-BORDER TRADE

In the recent Report of the Business and Industry Data Center, as provided by the Office of the Governor of the State of Texas, the [Texas gross state product](#) (GSP) is forecast by the Comptroller of Public Accounts to reach \$924.55 billion (in current dollars) in 2005. According to 2005 Texas Comptroller calculations, if Texas were a nation, its economy would rank as the tenth largest in the world.

International Trade In 2005

For the fourth year in a row, Texas was ranked as the number one state by export revenues. [Texas exports](#) for 2005 totaled \$128.7 billion, which is \$11.5 billion more than 2004 and represents a 9.82% increase. The countries of Mexico and Canada, followed by Asian and Pacific Rim countries, were the [leading destinations for Texas exports](#) in 2005. The state's largest export market continued to be its NAFTA trading partners, which accounted for just over 50% of total state exports during 2005. Mexico continued as the top export destination with \$50.1 billion in Texas exports, representing an almost 10% increase from \$45.7 in 2004. Canada ranked second with almost \$14.6 billion, representing a 18.28% increase from \$12.4 billion in 2004.

In 2005, [Port Level data](#) from the Bureau of Economic Analysis indicated Texas Port Level imports totaled \$235.4 billion, up from \$202.3 billion in 2004. [2005 Texas Imports for the top 10 countries of origin](#) accounted for \$181.3 billion. NAFTA trading partner, Mexico, was the top country of origin for Texas imports with approximately \$166.3 billion in imported goods – or 50% of Texas imports. NAFTA trading partner, Canada, ranked 20th for Texas imports, in striking contrast to its number two ranking for Texas exports in 2005.

The June 2006 report of the Office of Trade and Industry Information, International Trade Administration, U.S. Department of Commerce, notes that the Texas exported to 218 foreign destinations in 2005. The state's largest market in 2005, by far, was NAFTA member Mexico, which received exports of \$50.1 billion (39%) of Texas' total merchandise export total. The report further states that, **"In fact, the value of Texas' trade with Mexico alone is larger than the world trade totals of every state but California and New York."**

Anecdotes of Successful Cooperation Between the U.S. and Mexico

Other examples of U.S./Mexican cooperation include the North American Development Bank ("NADB") and its sister institution, the Border Environment Cooperation Commission ("BECC"), which were created under the auspices of the North American Free Trade Agreement (NAFTA) to address environmental issues in the U.S.-Mexico border region. The two institutions initiated operations under the November 1993 *Agreement Between the Government of the United*

States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank (the "Charter"). NADB is headquartered in San Antonio, Texas, while BECC is located in Cd. Juarez. http://www.nadbank.org/english/general/general_frame.htm

Some of the best examples of recent successes stemming from U.S./Mexican cooperation can be viewed at <http://mexico.usembassy.gov/mexico/eborders.html>, which is the website of the U.S. Embassy in Mexico. For years, the State Department has facilitated Border Liaison Mechanism ("BLM") meetings chaired by U.S. and Mexican consuls general along the border to make the border region safer for migrants, residents, and the officials responsible for protecting them. Some pertinent examples from an enforcement perspective, announced by the U.S. Ambassador to Mexico, include:

Ambassador Garza Honors Mexican Law Enforcement Officials at the U.S Embassy

June 1, 2006 – At a ceremony held at the U.S. Embassy in Mexico City, Ambassador Antonio O. Garza, Jr. applauded the joint efforts of Mexican and U.S. law enforcement officials to fight crime in both the United States and Mexico. "It is only by sharing information and resources, and coordinating our efforts, that the U.S. and Mexican governments can curb the tide of violence and crime that is wreaking havoc in our communities," said Ambassador Garza.

The United States and Mexico Cooperate to Prevent Criminals from Selling a Baby

May 11, 2006 – Garza: "While law enforcement agencies on both sides of the border deserve recognition for preventing an infant from being sold and smuggled, Univision reporters should also be credited for preventing a serious crime from taking place. The arrests of Hidalgo-Rivera and Hernandez demonstrate the importance of cross-border cooperation, and provide one more example of why democratic government depends on the press to investigate and report."

Mexico Destroys Record Amounts of Marijuana and Opium Poppy

May 3, 2006 – Garza: "Mexico's military and law enforcement community deserve recognition for the role its brave members have played in identifying and destroying opium poppy and marijuana fields. These eradication efforts are one more example of our ever-increasing effort to fight the war on drugs effectively and in cooperation with one another."

Alleged Cop-Killer, Michael Paul Astorga, Captured in Mexico

April 3, 2006 -Garza: "We extend our appreciation to Mexico's state and federal law enforcement authorities, who used information provided by their American counterparts to apprehend this vicious fugitive. Once again, the efficient exchange of information among our law enforcement

officials has resulted in the rapid apprehension of a fugitive, and demonstrated that our border cannot be used to flee justice."

International Cooperation Brings Success in War on Drugs

Washington – Steadily increasing cooperation among nations led to "significant successes" in reducing international drug trafficking and criminal activity in 2005, the U.S. State Department declared in releasing the 2006 International Narcotics Control Strategy Report (INCSR) March 1.

Ambassador Garza Praises Investigative Persistence and Close Cooperation between U.S. and Mexico

February 24, 2006 - "We have received preliminary reports that agents of the Mexican Federal Investigation Agency arrested U.S. fugitive JORGE ARROYO GARCIA (aka Armando Arroyo) today in Tonalá, in Mexico's state of Jalisco," said U.S. Ambassador Antonio O. Garza, Jr.

Ambassador Garza Praises Joint Efforts of the United States and Mexico in the Arrest of "Most-Wanted" Murder Suspect

February 27, 2006 - Garza: "Thanks to the close cooperation of the Agencia Federal de Investigacion (AFI), the State of Baja California Judicial Police's Anti-Kidnapping Unit, and the United States' FBI, a dangerous fugitive was arrested. The United States, and especially the people of Tennessee, are very grateful for the efforts of these law enforcement officers."

These cooperative efforts are not just with the Department of State. For example, DHS Secretary Michael Chertoff, on March 3, 2006, announced that, in accordance with the Security and Prosperity Partnership ("SPP"), he and the Secretary of Governance of Mexico, Carlos Abascal, met in Brownsville, Texas, to sign an Action Plan to combat border violence and improve public safety. The commitment between the two nations under the SPP is expected to strengthen procedures between federal law enforcement agencies on both sides of the border to respond to different scenarios ranging from accidental crossings to incidents of violence, or other situations that present risks to those who live, work, or travel at our common border. "Being good neighbors starts at the border. With these agreements on border security and public safety we strengthen our bridges of understanding and cooperation," said Secretary Abascal. "We are committed to protecting all persons who live, work or transit the border region against crime and violence, regardless of their migratory status. We sincerely appreciate the commitment of Secretary Chertoff and the Department of Homeland Security to work together in this direction. We are aware that facing violence and crime, there are no magic overnight solutions, but we are convinced that binational systematic efforts are the best we can do to have better results." It is important to remember these achievements in the context of a consultation requirement in any bill.

SECTION 117 of SENATE BILL 2611 -- CONSULTING MEXICO

The title of this field hearing is confusing at best. Section 117 of S. 2611 merely memorializes what the U.S. does with foreign nations every day to achieve its objectives – that is, to consult. In fact, based solely upon Texas' economic dependence on trade with Mexico, it would be imprudent to proceed with any border security measures that would significantly impact both countries without consulting with Mexico. We hope that the Mexican government will do the same with us on a wide variety of cross-border or bi-national efforts. Section 117 provides absolutely NO VETO power to Mexico. The language of section 117 is set forth below:

SEC. 117. COOPERATION WITH THE GOVERNMENT OF MEXICO.

(a) Cooperation Regarding Border Security- The Secretary of State, in cooperation with the Secretary and representatives of Federal, State, and local law enforcement agencies that are involved in border security and immigration enforcement efforts, shall work with the appropriate officials from the Government of Mexico to improve coordination between the United States and Mexico regarding--

- (1) improved border security along the international border between the United States and Mexico;
- (2) the reduction of human trafficking and smuggling between the United States and Mexico;
- (3) the reduction of drug trafficking and smuggling between the United States and Mexico;
- (4) the reduction of gang membership in the United States and Mexico;
- (5) the reduction of violence against women in the United States and Mexico; and
- (6) the reduction of other violence and criminal activity.

(b) Cooperation Regarding Education on Immigration Laws- The Secretary of State, in cooperation with other appropriate Federal officials, shall work with the appropriate officials from the Government of Mexico to carry out activities to educate citizens and nationals of Mexico regarding eligibility for status as a nonimmigrant under Federal law to ensure that the citizens and nationals are not exploited while working in the United States.

(c) Cooperation Regarding Circular Migration- The Secretary of State, in cooperation with the Secretary of Labor and other appropriate Federal officials, shall work with the appropriate officials from the Government of Mexico to improve coordination between the United States and Mexico to encourage circular migration, including assisting in the development of economic opportunities and providing job training for citizens and nationals in Mexico.

(d) Consultation Requirement- Federal, State, and local representatives in the United States shall consult with their counterparts in Mexico concerning the construction of additional fencing and related border security structures along the international border between the United States and Mexico, as authorized by this title, before the commencement of any such construction in order to--

(1) solicit the views of affected communities;

(2) lessen tensions; and

(3) foster greater understanding and stronger cooperation on this and other important security issues of mutual concern.

(e) Annual Report- Not later than 180 days after the date of enactment of this Act, and annually thereafter, the Secretary of State shall submit to Congress a report on the actions taken by the United States and Mexico under this section.

The reasons set forth in section 117 of S. 2611 regarding consultation with Mexico on the construction of fencing and related border security structures (namely, “to foster stronger cooperation and understanding”) are the same reasons that underpin decades of cooperative work between the U.S. and Mexico on a variety of issues of mutual concern. Section 117 does not cede any veto power to Mexico—it merely reflects the norm in our relations with one of our most favored trading partners, Mexico.

The real question here is, why would the U.S. *not* consult with Canada and Mexico as to the construction of any border security structures, including fences? Would you want your neighbor to build a fence on your joint property line without first consulting you?

ADDRESSING THE COMPLEX ISSUES – IMMIGRATION ENFORCEMENT AND REFORM

Polls

Both the Senate and the House of Representatives have come up with immigration proposals, S. 2611 and H.R. 4437, respectively. Only the Senate bill, however, creates a plan of action to address bringing the undocumented population out of the shadows to improve the security of our nation. The issue of immigration in the U.S. is polarizing, but recent polls reflect that the American public by far favors the approach of S. 2611 over the approach of H.R. 4437. According to the TIME magazine poll conducted March 29-30, 2006, 72% of those polled favored S. 2611’s approach to the immigration conundrum, which would allow those in the U.S. without legal status to obtain a temporary work visa, in comparison to the House’s approach, which would criminalize illegal presence. An Associated Press poll conducted on March 28-30, 2006, also reflects that a majority of Americans (56%) favor allowing immigrants who are in the U.S. without legal status to apply for legal, temporary worker status.

According to an NBC/Wall Street Journal poll conducted on June 9-12, 2006, When asked to choose between a plan similar to the House immigration plan and a plan similar to the Senate immigration plan, the preference of voters for the Senate plan was clear: 33% favored the House plan; 50% favored the Senate plan; 14% favored neither; and 3% were unsure.

A CBS News poll conducted on May 16-17, 2006, found that 77% of Americans favored a plan allowing illegal immigrants who have paid a fine, been in the U.S. for at least five years, paid any back taxes they owe, can speak English, and have no criminal record to stay and work in the U.S., while only 19% oppose.

A CNN/Opinion Research Corporation poll conducted on May 16-17, 2006, found that 79% -- almost 8 in 10 Americans -- favored allowing illegal immigrants already living in the U.S. for a number of years to stay in this country and apply for U.S. citizenship if they had a job and paid back taxes. By contrast, only 18% opposed such a measure.

One would hope that such overwhelming poll results would create an impetus for Members of Congress to convene a conference committee before the November elections and tackle the real work of crafting a solution to the immigration dilemma. Unfortunately, despite the will of constituents, such a solution does not appear to be forthcoming.

Fencing in Failure

In a recent Immigration Policy Center (“IPC”) study on the impact of border fencing, Professor Jason Ackleson of New Mexico State University notes, “Viewing border security as a solely national security matter tends to neglect the larger economic and social forces that underpin the flow of Mexicans and others into the United States to fill gaps in the U.S. labor force.”⁵ As to the decisions that must be made to use effective technology as a complement to the human factor, the statement of Nancy Kingsbury, the Managing Director of Applied Research and Methods for the then Government Accounting Office is instructive. Ms. Kingsbury states that three key considerations need to be addressed before a decision is made to design, develop, and implement biometrics into a border control system:

1. *Decisions must be made on how the technology will be used.*
2. *A detailed cost-benefit analysis must be conducted to determine that the benefits gained from a system outweigh the costs.*

⁵ Ackleson, Jason, Ph.D., “Fencing in Failure: Effective Border Control is Not Achieved by Building More Fences,” Immigration Policy Center Brief, American Immigration Law Foundation, p. 6 April 2005.

3. *A trade-off analysis must be conducted between the increased security, which the use of biometrics would provide, and the effect on areas such as privacy and the economy.*⁶

Similar analyses are important in any technology “force-multiplier.” In addition, it is absolutely critical to obtain input from local communities and reviews from the field in order to have a realistic assessment of the potential benefits, costs, and problems generated by implementing technologies.

Accountability and Technology Solutions for Border Security

It is imperative that we have a “no tolerance” policy for technology, which does not enhance security as advertised or for technological failures tied to inadequate funding and oversight by Congress and/or the agency charged with implementing such technology. While technology can provide useful enhancements to security capabilities, even the most promising technological plans can be thwarted or sabotaged based on a variety of factors such as:

- Inadequate pilot testing on sight to determine the true capacity of the technology.
- Failures to perform cost-benefit analyses before implementation as well as appropriate follow-up on performance of implemented technologies.
- Inadequate integration of field testing replies on technology in strategizing implementation methodologies.
- Improper cannibalization of technologies during the request for bid process resulting in potential performance reductions.
- Failure to adhere to implementation schedules due inadequate funding and staffing.
- Inability to provide maintenance due to funding or lack of availability.
- Failure to analyze and address cross-over agency issues in the implementation of technologies.
- Failure to provide adequate initial and on-going training to utilize technologies.
- Failure to admit mistakes and learn from them in technology implementation.
- Mandated percentages of technology use for inspections without consideration of effectiveness.
- Failure to preserve biometric data for future use/review.
- Failure to fully integrate watchlist databases to improve effectiveness.

⁶ Kingsbury, Nancy, Testimony before the Subcommittee on Terrorism, Technology, and Homeland Security and Subcommittee on Border Security, Immigration, and Citizenship, Committee on the Judiciary, United States Senate, March 12, 2003 GAO 03-546T, at 13.

Any implementation of technology is always an experiment. The land border has had its share. The following section provides a few examples:

License Plate Readers - Several years ago, license plate readers were installed in our passenger vehicle lanes to read plates of northbound cars to the U.S. to reduce primary inspection times by ending the need to manually input plate numbers. Unfortunately, the technology had problems with the different Mexican plate permutations and the ability to read such plates would at times be at a less than 50% level. The capacity has improved over time, but usage of the system can still be problematic.

Bollards - At one point in time, pneumatic bollards were installed in certain lanes to try to end port runners' escape attempts. Unfortunately, there were functional issues, to wit, deployment to the destruction of the engine and/undercarriage of cars accidentally. The use of such bollards was terminated in the El Paso area.

Document Scanners - Section 303 of the Enhanced Border Security Bill of 2002 (Pub. L. No. 107-713), requires that as of October 26, 2004, all United States visas and other travel and entry documents issued to aliens and passports with biometric identifiers issued to Visa Waiver Program country applicants for admission must be used to verify identity at all ports of entry via biometric comparison and authentication. This deadline was extended for one year by Pub. L. No. 108-299. Note that this requirement is separate from the recordation of admission under US VISIT procedures. Thus, along the U.S./Mexican border, even exempted Mexican laser visa holders under US VISIT procedures (e.g. crossers within 25 mile area of border/75 miles in Arizona for 30 days or less) will require scanning for admission as well as holders of currently valid I-94s. This requirement would apply to pedestrians, persons in passenger vehicles, as well as commercial vehicles. At El Paso ports alone, those inspected in one day can exceed 100,000 people.

In April and May of 2004, scanners were installed at El Paso ports in preparation for the October 2004 deadline. Mexican laser visas and legal permanent resident cards were scanned using this Biometric Verification System ("BVS"), which involved the scan of a print to confirm identity as well as a scan of the identity document. The system did not record the entry date. In addition, the system did not scan the person against watchlists upon intake of the biometric data without further manipulation by the inspector of the database. The card scanned would often get stuck in the BVS readers. In addition, the no-read rate for the scanners exceeded 40% at certain ports of entry. Such failures were tied to "wallet-crud" on the cards, damaged cards, and sweaty or dry fingers. Where are the reports to Congress on this scanner issue, which will potentially severely impact land border crossings in October of this year? Now, we are contemplating having to require the use of a passport in addition to these

biometric wonder laser visas based on a recent joint proposed rule by DHS and Department of State (“DOS”) on the implementation of the Western Hemisphere Travel Initiative. These laser visas are based on a more secure identity review than the issuance of a U.S. or Mexican passport. What does this say about our capabilities of using biometric documents?

Aerial drones - Customs and Border Protection (“CBP”) pulled its Unmanned Aerial Vehicles (“UAV”) from the Arizona border earlier this year. Two UAVs, RQ-5 Hunters made by Northrop Grumman Corp., cost \$1 million apiece and helped apprehend 287 illegal border crossers and helped seize 1,889 pounds of marijuana from October 1, 2004 to January 23, 2005. The two Hunter UAVs succeeded two Israeli-made Hermes 450s costing about \$2 million each, which helped interdict 965 illegal border crossers and about 850 pounds of marijuana.

According to T.J. Bonner, national president of the National Border Patrol Council, these UAVs crash 100 times more often the piloted aircraft, and they are not as efficient or economical as piloted aircraft and/or mobile agents on the ground. For example, during the time frame in which the Hunter UAVs were used, CBP Black Hawk helicopters helped to seize more than 148,000 pounds of marijuana and apprehended more than 100,000 people.

X-Ray – The ports have used a variety of X-ray imaging systems to conduct non-intrusive inspections of commercial cargo. The current state of the art system is the Eagle cargo inspection system, which moves under its own power from one location to another and it rapidly review trucks and cargo containers, even when loaded with dense cargo. It can penetrate 12 inches of steel to scan the contents of a container. Other x-ray options are the Vehicle and Cargo Inspection System (“VACIS”), which employs gamma rays to produce “x-ray” type density images. The Mobile Truck X-ray (“MXTR”) uses similar x-ray technology, but it is housed in a cabinet on a truck chassis, and operates by slowly driving past a parked vehicle with a detector boom extended over the targeted vehicle. Obviously, such options are not used regarding the detection of people between the ports.

Sensors - Other systems under consideration include fiber optic sensors, which are not as intrusive as fences, in terms of damage to habitat and wildlife. The government is also testing ground-based radar to detect intruders crossing the border. CBP requested \$53.1 million in the FY 2006 budget for America’s Shield Initiative, which would fund more surveillance equipment at the border. The ground radar system uses Frequency Modulated Continuous Wave (“FMCW”) technology to detect people within a 3 mile range and a vehicle up to 10 miles away. The technology allows sweeps of 360 degrees and relays information to cameras, which can zoom in on the area. This option is certainly an improvement over sensors, which do not allow verification of the reason for the sensor signal.

It is important to note that such “force-multipliers” as cameras and sensors may be useful in detecting intrusions, but they are not capable of interdicting or capturing violators. In addition, they are not capable of tracking persons or objects on the move, except UAVs. The use of these sensors should help though in the antiquated “cutting of sign” required to be conducted by the Border Patrol, but practical limitations of the technology may still force the use of such tried and true methods.

The argument can still be forcefully made and supported that there is no substitute for trained Border Patrol officers in this context, but such officers are only a small part of the solution, which will be further described in this testimony. Obviously, the idea of “prevention through deterrence” via such efforts as Operation Hold the Line have not been successful in reducing the flow of undocumented immigration to the U.S. even with ten years of fairly consistent and large increases in the budget for the Immigration and Naturalization Service (now CBP) and a parallel increase in the number of Border Patrol agents stationed at the border.⁷

The success of technology to help secure the border must be subject to ongoing review and analysis to determine its true effectiveness. In addition, as with the implementation of US VISIT, it is essential that DHS and Congress scrutinize the true security dividends on such an enormous theoretical undertaking.

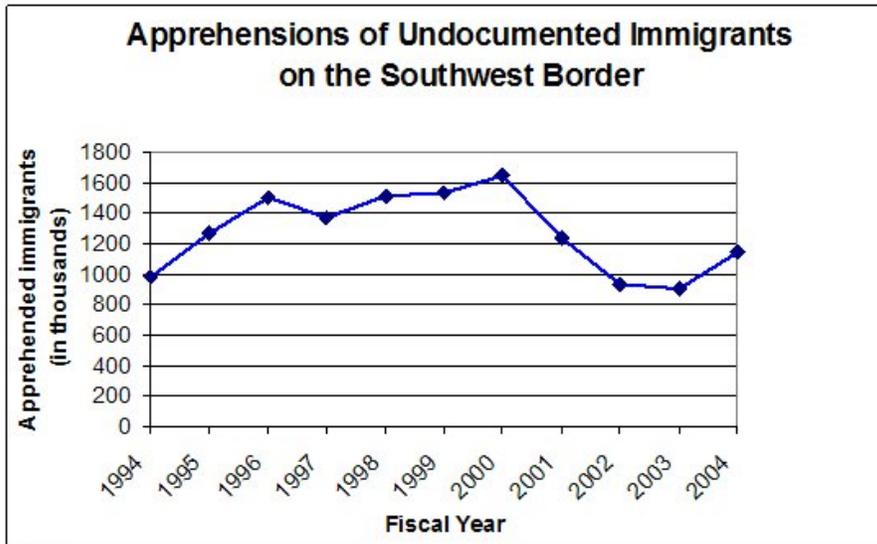
The three charts below, reproduced from an Immigration Policy Brief of the American Immigration Law Foundation (AILF),⁸ demonstrate the failure of our current Southwest border control strategy. The flow of undocumented immigrants has occurred “despite ten years of fairly consistent and large increases in the budget authority for the Immigration and Naturalization Services (now CBP) and a parallel surge in the number of Border Patrol agents” stationed on the border.⁹

⁷Ackleson, Ph.D., Jason, “Fencing in Failure: Effective Border Control is Not Achieved by Building More Fences,” Immigration Policy Center Brief, American Immigration Law Foundation, April 2005.

⁸ Id. at pp. 4-5.

⁹ Id. at 4.

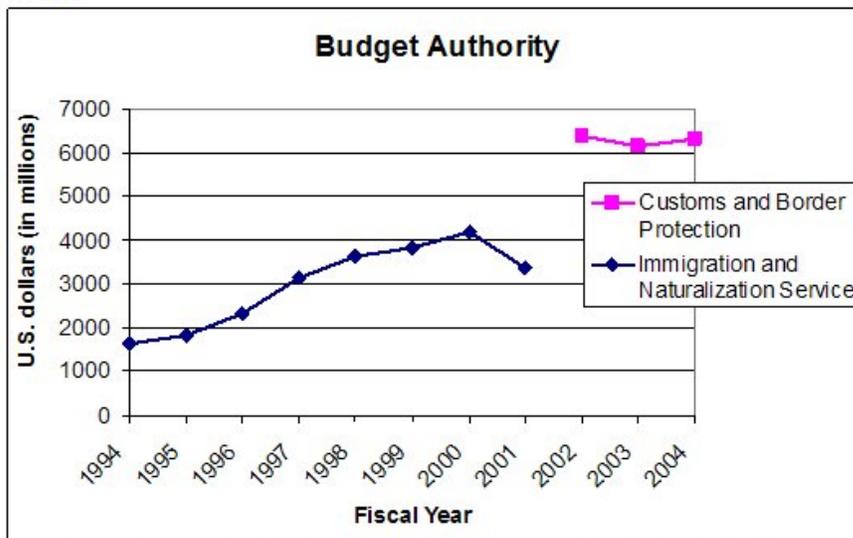
Chart 1



Sources:

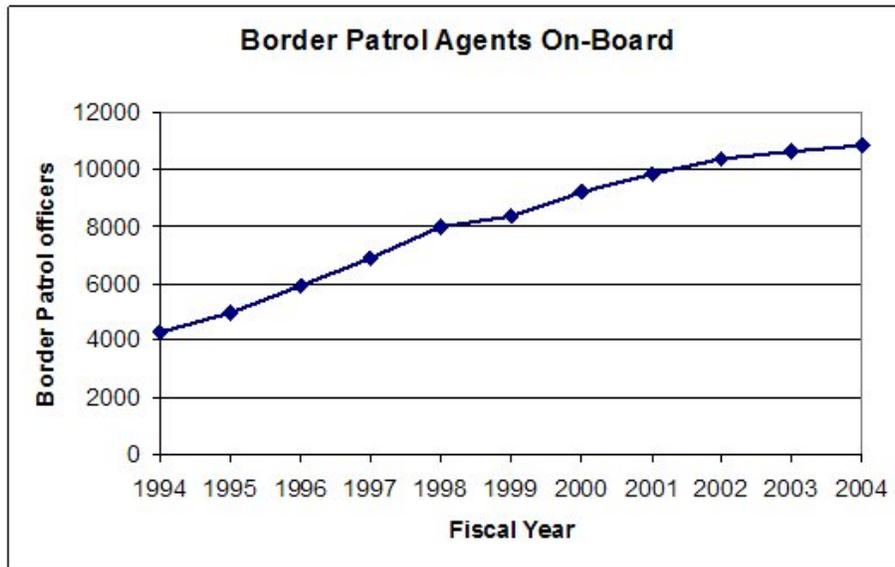
1. U.S. Citizenship and Immigration Services, "Southwest Border Apprehensions" (9 March 2005). Available at [<http://uscis.gov/graphics/shared/aboutus/statistics/msrfeb05/SWBORD.HTM>].
2. U.S. Department of Homeland Security, Office of Immigration Statistics, *2003 Yearbook of Immigration Statistics* (September 2004). Available at [<http://uscis.gov/graphics/shared/statistics/yearbook/2003/2003Yearbook.pdf>].
3. U.S. Department of Justice, Immigration and Naturalization Service, *1999 Statistical Yearbook of the Immigration and Naturalization Service* (March 2002). Available at [<http://uscis.gov/graphics/shared/statistics/yearbook/1999/FY99Yearbook.pdf>].

Chart 2



Source: U.S. Government Printing Office, *Budget of the United States Government* (last updated: February 3, 2005). Available at [<http://www.gpoaccess.gov/usbudget/browse.html>].

Chart 3



Sources:

1. U.S. Department of Justice, Immigration and Naturalization Service, "Border Patrol FY 2000 Recruiting and Hiring Report" (July 2000), p.2. Available at [<http://uscis.gov/graphics/publicaffairs/factsheets/recruit.pdf>].
2. U.S. Department of Justice, "Status of Achieving Key Outcomes and Addressing Major Management Challenges" (June 2001), p.18. Available at [<http://www.gao.gov/new.items/d01729.pdf>].
3. U.S. Department of Homeland Security, U.S. Customs and Border Protection, *Performance and Annual Report Fiscal Year 2004*, p.16. Available at [http://www.cbp.gov/linkhandler/cgov/toolbox/publications/admin/cbp_annual.ctt/cbp_annual.pdf].

According to the U.S. General Accounting Office, the "prevention through deterrence" strategy of Operation Blockade/Hold the Line in El Paso in 1993, Operation Gatekeeper in San Diego in 1994 and El Centro in 1998, Operation Safeguard in Nogales in 1995; and Operation Rio Grande in McAllen and Laredo in 1997, have simply moved migrant traffic from one place to the other.¹⁰

According to Professor Wayne Cornelius in his recent study entitled, *Impacts of Border Enforcement on Mexican Migration: The View from Sending Communities*, he outlines that the basic problem with fortifying borders is that such action does nothing to reduce the forces of supply and demand, which drive illegal immigration. His report further notes that the unintended consequences of the post-1993 border enforcement actions have been: creating new opportunities for people smugglers, making the southwestern border more lethal, and promoting permanent settlement in the U.S.

What else has resulted from "prevention through deterrence?" This failed strategy has led to the deaths of more immigrants in the desert, as the most dangerous areas for crossing become the most available avenues. The Mexican Ministry of Foreign Relations estimates that 2,445 people died from 1997 to

¹⁰ U.S. General Accounting Office (now the Government Accountability Office as of July 7, 2004), *INS' Southwest Border Strategy: Resource and Impact Issues Remain After Seven Years*. GAO-01-842, August 2001.

2003.¹¹ In addition, from FY 1997 to FY 1999, the number of undocumented immigrants apprehended by the Border Patrol who used smugglers in their attempt to enter the U.S. increased by 80 %. As noted by Walter Ewing in his Immigration Policy Center paper, *From Denial to Acceptance: Effectively Regulating Immigration to the United States*, “The smuggling of people from Mexico to the U.S. is now a \$300 million a year business, second in profitability only to drug trafficking, and involves anywhere from 100 to 300 smuggling rings.”¹² The higher costs and risks of illegal border crossings have not stopped immigrants from coming to the U.S. These elevated costs and risks, however, have caused immigrants to stop trying to go back home after arriving here.¹³ This fact is reflective of the failure of our current migration policy and laws to address the dependence of the U.S. on transnational commerce and immigrant labor.¹⁴

According to the U.S. Department of Commerce, from 1985 to 2003, the total value of U.S.-Mexican bilateral trade increased more than seven-fold from \$32.8 billion to \$235.5 billion, which makes Mexico the second largest trading partner for the U.S (with Canada ranking first). In addition, in 2003, Mexico was the largest foreign export market for Texas (\$41.6 billion), California (\$14.9 billion), and Arizona (\$3.2 billion). Mexico also was the recipient of over \$1 billion in exports each year from Florida, Illinois, Georgia, Indiana, Louisiana, Michigan, New York, North Carolina, Ohio, Pennsylvania, and Tennessee.¹⁵ In addition, the Office of the U.S. Trade Representative estimates that the stock of U.S. direct foreign investment in Mexico more than tripled from \$15.4 billion to \$52.2 billion.¹⁶ During this age of globalization, roughly 65,000 transnational corporations cover the globe and hold capital reserves in excess of the budgets of some governments.¹⁷ According to the United Nations Conference on Trade and Development, from 1980 to 2002, merchandise and services exports more than tripled worldwide from \$2.4 trillion to \$8 trillion.¹⁸

Notwithstanding these figures, our trade policies (along with our bilateral and multi-lateral agreements) often ignore workforce needs. We simply appear to be more comfortable dealing with goods rather than people—that is, the workforce needs that result from globalization. Governments of developed nations continue to impose arbitrary numerical limits on immigration. These limits do not reflect the actual movement of workers across international borders, which is a more

¹¹ Ewing, Walter A., Ph.D., “From Denial to Acceptance: Effectively Regulating Immigration to the United States,” Immigration Policy Center paper, American Immigration Law Foundation, Vol.3, Issue 5, p. 6 Nov. 2004.

¹² *Id.* at 6.

¹³ *Id.* at 7.

¹⁴ *Id.* at 1.

¹⁵ TradeStats Express, Office of Trade and Economic Analysis, International Trade Administration, U.S. Department of Commerce (<http://tse.export.gov/>).

¹⁶ Office of the U.S. Trade Representative, *National Trade Estimate Report on Foreign Trade Barriers, 1995 and 2003*.

¹⁷ Ewing, *supra* note 11, at p. 2.

¹⁸ *Id.* at 2.

accurate indicator of need.¹⁹ So, when we are tempted to believe that fencing out such flows of workers will resolve our security problems, we also are denying our actual labor needs, as evidenced by such flows. How do such fences avoid fencing out our ability to compete in this global economy for goods and services?

ENFORCEMENT OF FEDERAL CIVIL IMMIGRATION LAWS BY STATE AND LOCAL LAW ENFORCEMENT OFFICERS WILL INCREASE LACK OF TRUST AND RESULT IN AN INCREASE OF ERRONEOUS INTERPRETATIONS OF IMMIGRATION STATUS

Section 607 of H.R. 4437 (see attached) provides any sheriff or coalition or group of sheriffs from designated counties adjacent to the Southern international border of the U.S. the authority to transfer to the appropriate federal law enforcement officials aliens detained by or in the custody of the sheriff who are not lawfully present in the U.S. That section also provides for payment of the costs of performing such transfers by the Attorney General. Such payment for costs includes: detaining, housing, and transporting aliens who are not lawfully present in the U.S. or who have unlawfully entered the U.S. at a location other than a port of entry and who are taken into custody by the sheriff.

To comprehend the intended potential breadth of this section of H.R. 4437, it is important to read it in tandem with the changes proposed in section 203 of H.R. 4437. That section would upgrade the offense of unlawful presence from an immigration violation subjecting the violator to deportation from the U.S. under section 237 of the Immigration and Nationality Act (INA), to a criminal act punishable as a felony. It also would change the offense of unlawful entry to the U.S. from a misdemeanor under 18 USC § 1325 to a felony. The language provided by Section 103 is far more inclusive than just the issue of unlawful presence. It incorporates any violation of U.S. immigration laws and regulations. Thus, the criminal consequences could extend to a student failing to take a full course load or a nonimmigrant failing to timely submit an AR-11 change of address form. Are these violations really of a criminal nature?

Just the interpretation of the term “unlawful presence” has been the subject of many interpretative memoranda from the Departments of State, Justice, and Homeland Security. Many would-be immigrants and, indeed, even many immigration lawyers, may confuse the term “unlawful presence” with one or more of the following concepts: illegality, deportability, ineligibility to change or adjust status, lack of authorization for employment, etc.

¹⁹ *Id.* at 3.

Unlawful presence may sometimes overlap with each of these concepts, but it differs from each in significant ways. A person may accumulate unlawful presence by any of the three following methods:

1. Entry Without Inspection (“EWI”): If a person entered the U.S. without inspection, all of the time accumulated in EWI status, starting April 1, 1997, counts as unlawful presence.
2. Overstay: If a person entered the U.S. as a nonimmigrant and overstays the date specified on the I-94 entry document, each day after the overstay, starting on April 1, 1997, is considered unlawful presence.
3. Status violator: Persons who appear, on paper, to be legally in the U.S., but are actually violating status (e.g., by working without authorization, by failing to comply with the terms of their status, etc.), are not considered to be unlawfully present unless and until either the DHS or the Executive Office for Immigration Review (“EOIR”) finds that they are violating status. The period of unlawful presence begins on the date that the finding is made by the DHS or the EOIR. Persons who have been lawfully admitted to the U.S. who do not have a definite departure date (e.g., Canadians without I-94s, students and J exchange visitors given “Duration of Status” (D/S) status) cannot be overstays, but may accumulate unlawful presence as status violators upon the appropriate DHS or EOIR determination.

In addition, § 212(a)(9)(B)(iii) of the INA, as amended, provides that the following classes of persons are exempt from accumulating unlawful presence:

1. Minors: No one under 18 years of age may accumulate unlawful presence.
2. Asylees: No time in which a person has a bona fide application for asylum pending counts as unlawful presence unless the person, during this period, was employed without authorization.
3. Family unity: No time in which a person was the beneficiary of family unity protection may be considered as unlawful presence.
4. Certain battered woman and children.

Further, INA § 212(a)(9)(B)(iv) provides that a non-frivolous application for a change or extension of nonimmigrant status, where the person has not worked without authorization before or during the pendency of the application, tolls the period of unlawful presence for a period not to exceed 120 days. Interpretations by the former Immigration and Naturalization Service provide that a pending application for adjustment of status will also toll the period of unlawful presence.

The reason for this background is merely to illustrate just how complex the terms and concepts contained in our current immigration laws are. Hence, it is not

difficult to imagine how the above-described provisions of H.R. 4437 could lead to various incorrect applications of the law, not to mention the unlawful arrest of foreign nationals.

Sections 203 and 607 of H.R. 4437 would create criminal consequences for what currently are considered civil violations of our immigration laws that already subject the violator to removal from the U.S. In a criminal proceeding, additional rights are provided to the accused, including a right to counsel and trial by jury. Removal hearings are not criminal proceedings. Criminal cases are brought before a judicial trial typically, while removal cases are usually conducted before the Executive Office of Immigration Review (“EOIR”) with the Department of Justice (“DOJ”) in an administrative proceeding. The constitutional rights provided to an alien in a removal proceeding are generally less than those to which an accused is entitled in a criminal matter. In addition, felony cases normally require a grand jury to issue an indictment. Further, if unlawful presence is subject to more than six months imprisonment, as proposed by H.R. 4437, such allegation would constitute a “serious crime,” for which the accused would have a right to a jury trial.²⁰ In addition, the burden of proof to convict someone for the criminal offense of unlawful presence would be “beyond a reasonable doubt” versus the current standard in removal proceedings of the alien burden to prove by “clear and convincing evidence.”²¹

Does it really make sense to stretch our already scarce judicial and enforcement resources by criminalizing such actions as violation of status? Isn’t potential removal from the U.S. the correct consequence?

Law Enforcement Reaction

Sections 220, 221, 222 and 225 of H.R. 4437 would: declare that state and local law enforcement authorities have the inherent authority to investigate, identify, apprehend, arrest, detain, or transfer to federal custody aliens in the U.S. for the purposes of assisting in the enforcement of immigration laws; require DHS to provide training on this issue at no cost to the local agency, with the caveat that such training would *not* be a prerequisite to state and local law enforcement personnel participation in immigration law enforcement; provide some financial assistance to states and localities that assist in the enforcement of immigration laws; and bar states and localities that have policies prohibiting law enforcement officials from assisting or cooperating with federal immigration law enforcement from receiving State Criminal Alien Assistance Program (“SCAAP”) funding.

These provisions are similar to those contained in the Clear Law Enforcement for Criminal Alien Removal (“CLEAR”) Act of 2003 provisions (H.R. 2671, introduced by Rep. Norwood (R-GA) in the 108th Congress). Senators Jeff Sessions (R-AL)

²⁰ Michael J. Garcia, “Criminalizing Unlawful Presence: Selected Issues,” *Congressional Research Service Report for Congress*, May 3, 2006 at p. 4.

²¹ *Id.*

and Zell Miller (D-GA) introduced parallel legislation in the Senate (the Homeland Security Enhancement Act (“HSEA”) of 2003, S. 1906). Both bills purported to reaffirm the “inherent authority” of state and local governments to enforce civil immigration laws. Furthermore, both bills attempted to criminalize all immigration status violations for the first time in this country’s history. The CLEAR Act would have *required* state and local police to enforce federal civil immigration laws or lose certain critical funding. The HSEA would have taken a slightly different tack by denying funding to states or localities that have policies or practices in place which prevent their police from enforcing such laws.

In December 2004, the International Association of Chiefs of Police (“IACP”), the world’s oldest and largest nonprofit membership organization of police executives, with over 20,000 members in over 89 different countries, issued a press release in opposition to the CLEAR Act and urged Congress to proceed with caution when considering measures that would compel local and state law enforcement agencies to enforce federal immigration laws.

Other comments from Police chiefs against federal immigration enforcement by their officers include the following:

International Association of Chiefs of Police, Spokesman Gene Voegtlin

“If local police are seen as local immigration officials, there’s a concern that immigrants won’t report crimes, which will then lead to an increase in crime in communities.” (“Police seek to ease crime victims’ fear of being deported,” *Dallas Morning News*, 12/11/2003)

California State Sheriffs’ Association, President Bruce Mix

“CSSA is concerned that the proposed CLEAR Act will undermine our primary mission of protecting the public. In order for local and state law enforcement associations to be effective partners with their communities, we believe it is imperative that they not be placed in the role of detaining and arresting individuals based solely on a change in their immigration status.” (letter to Senator Feinstein, 3/10/2004)

California Police Chiefs’ Association, President Rick TerBorch

“It is the strong opinion of the California Police Chiefs’ Association that in order for local and state law enforcement organizations to be effective partners with their communities, it is imperative that they not be placed in the role of detaining and arresting individuals based solely on a change in their immigration status.” (letter to Senator Feinstein, 9/19/2003)

Connecticut Police Chiefs’ Association, President James Strillacci

“We rely on people’s cooperation as we enforce the law in those communities. With this [legislation], there’s no protection for them.” (“Mayor asks for federal help,” *Danbury News-Times*, 3/26/2004)

El Paso (TX) Municipal Police Officers' Association, President Chris McGill

"From a law-enforcement point of view, I don't know how productive it would be to have police officers ask for green cards. It's more important that people feel confident calling the police." ("Immigration proposal puts burden on police," *El Paso Times*, 10/9/2003)

Hispanic American Police Command Officers Association, National President Elvin Crespo

"The CLEAR Act jeopardizes public safety, it undermines local police roles in enhancing national security, it undermines federal law Enforcement priorities, it piles more onto state and local police officers' already full platters, it bullies and burdens state and local governments, it is unnecessary law-making and most significantly, it forgets the important fact that you can't tell by looking who is legal and who isn't." (letter to National Council of La Raza, 10/21/2003)

National Latino Peace Officers Association, Founder Vicente Calderon

"The role of police is to protect and serve. Clear Law Enforcement for Criminal Alien Removal [CLEAR Act] will greatly contribute toward hindering police from accomplishing these goals." (letter to National Council of La Raza, 10/16/2003)

Federal Hispanic Law Enforcement Officers Association, National President Sandalio Gonzalez

"The CLEAR Act bullies and burdens State and Local governments by coercing them into participating, even though it means burdensome new reporting and custody requirements, because failure to do so means further loss of already scarce federal dollars." (letter to President Bush and Congress, 9/30/2003)

Boston (MA) Police Department, Commissioner Paul Evans

"The Boston Police Department, as well as state and local police departments across the nation have worked diligently to gain the trust of immigrant residents and convince them that it is safe to contact and work with police. By turning all police officers into immigration agents, the CLEAR Act will discourage immigrants from coming forward to report crimes and suspicious activity, making our streets less safe as a result." (letter to Senator Kennedy, 9/30/2003)

Seattle (WA) Police Department, Chief R. Gil Kerlikowske

"Traditionally we have seen that reporting of crime is much lower in immigrant communities because many are leaving countries where the police cannot be trusted for good reason. Adding the fear of arrest or deportation to this could have a tremendous impact on the rate of reporting. At a time when trusting relationships between immigrant communities and the police are vital, the CLEAR Act would have just the opposite effect." (letter, 3/4/2004)

Los Angeles County Sheriff's Department, Sheriff Leroy Baca

"I am responsible for the safety of one of the largest immigrant communities in this country. My Department prides itself in having a cooperative and open

relationship with our immigrant community. [The CLEAR] act would undermine this relationship.” (letter to Los Angeles County Neighborhood Legal Services, 10/6/2003)

History and a Local Example

In 1997, local authorities in Chandler, Arizona conducted a series of roundups to help Border Patrol agents find violators of federal civil immigration laws. Widespread complaints by local residents, including U.S. citizens and at least one local elected official who were stopped during the operations, led to an investigation by the Arizona Attorney General. The official report on the investigation concluded that police stopped Hispanics without probable cause, bullied women and children suspected of being illegal immigrants and made late-night entries into homes of suspected illegal immigrants, among other actions. In 1999, the Chandler City Council unanimously approved a \$400,000 settlement of a lawsuit stemming from police roles in the roundup. Mayors from cities across the country, including New York, Los Angeles, San Francisco, and Chicago have opposed local police becoming immigration agents for the reasons articulated above: state and local police do not understand immigration law and would thus do a poor job of enforcing such laws, important community relationships that are essential to fighting crime would be damaged, state and local resources would be strained, and states and localities would have to deal with the many negative consequences that would result from poorly conceived attempts to enforce federal immigration laws.

Border Security Plan for Texas

Recently Governor Perry of Texas announced the funding of Operation Linebacker, which was conceived by the Texas Border Sheriff’s Coalition as a way to integrate law enforcement resources along the border to increase patrol activity. The funds were supposed to be used to provide an increased patrol presence particularly in rural areas to increase public safety and border security.

Operation Linebacker has received severe criticism for its operation in the El Paso area. In June 2006, 3,000 El Paso residents filed a petition asking Sheriff Samaniego to resign because county residents have been asked for their social security cards and immigration papers by sheriff’s deputies during regular traffic stops, traffic checkpoints or while traveling by bus in the past few months. They said they have even been driven to immigration offices in sheriff’s patrol cars. A complaint was filed by the Paso del Norte Civil Rights Center regarding the actions of El Paso County and its sheriff’s department concerning unlawful searches, seizures, and detentions conducted as part of the County’s Operation Linebacker.

On June 23, 2006, El Paso County Sheriff Leo Samaniego announced that he had suspended controversial traffic checkpoints that some county residents said

were being used to snare undocumented immigrants. Sheriff Samaniego also said that the Sheriff's Office has suspended referrals to the U.S. Border Patrol based only on a person's immigration status, and that it would review deputy raining. Sheriff Samaniego, who reiterated that his deputies were enforcing public safety laws and did nothing wrong, said in a prepared statement that the suspension was "in order to abolish any perception regarding individuals' constitutional rights."

This example points to the difficulties in establishing immigration status under U.S. immigration law, and the inherent need for training of those who are responsible for immigration law enforcement.

Immigrants Have a Positive Financial Impact on the U.S. Economy

According to the Pew Hispanic Center, undocumented immigrants comprised 4.9% of U.S. workers as of March 2005. Undocumented immigrants, however, represented 24% of all workers in the farming, fishing, and forestry industry, 17% of the workers employed in building and grounds cleaning and maintenance, and 14% of construction workers.²² In the August 2006 report by the Pew Hispanic Center entitled, *Growth in the Foreign-Born Workforce and Employment of the Native Born*, noted that Rapid increases in the foreign-born population at the state level are not associated with negative effects on the employment of native-born workers, based on review of data during the 1990's and the downturn and recovery since 2000.²³ The report's analysis of the relationship between growth in the foreign-born population and the employment outcomes of native-born workers revealed wide variations across the 50 states and the District of Columbia. The report concludes that no consistent pattern emerged to show that native-born workers suffered or benefited from increased numbers of foreign born workers.²⁴

Beyond providing a needed labor supply, undocumented workers spend and invest earnings creating new jobs. Based on the report by the Selig Center for Economic Growth at the University of Georgia, Latino buying power totaled \$736 billion in 2005 and is expected to increase to \$1.1 trillion by 2010.

It is also important to remember that undocumented immigrants pay taxes, which benefit the U.S. Social Security system. The 2005 *Economic Report of the President* states that, "more than half of undocumented immigrants are believed to be working 'on the books,' so they contribute to the tax rolls but are ineligible for almost all Federal public assistance programs and most major Federal-state programs." In addition, undocumented immigrants are considered a major

²² Jeffrey S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.; Estimates Based on the March 2005 Current Population Survey*. Washington, DC: Pew Hispanic Center, March 7, 2006, p. 11.

²³ Rakesh Kochar, "Growth in the Foreign Born Workforce and Employment of the Native Born," *Pew Hispanic Center*, Executive Summary, August 10, 2006 at p.1.

²⁴ *Id.*

source of the social security taxes paid into the system by workers who have invalid social security numbers, and who are not entitled to receive social security benefits. The payments to the Social Security suspense fund²⁵ totaled about \$7.2 billion in 2003.²⁶ According to a new analysis by Standard & Poor's, the cost of providing services to undocumented immigrants is largely offset by the economic benefits they generate.²⁷ Unfortunately, although states get the benefit of sales taxes and economic growth that undocumented immigrants provide, they miss out on the social security taxes paid to the federal government by these workers.²⁸

Former Chairman of the Federal Reserve Bank, Alan Greenspan, noted in his August 27, 2004, speech at a symposium sponsored by the Federal Reserve Bank of Kansas that, "Aside from the comparatively lesser depth of required adjustment, our open labor markets should respond more easily to the changing needs and abilities of our population; our capital markets should allow for the creation and rapid adoption of new labor-saving technologies, and our open society should be receptive to immigrants. These supports should help us adjust to the inexorabilities of an aging population. Nonetheless, tough policy choices lie ahead."

In trying to predict the costs of an increase in legal immigration, the Social Security Administration Office of the Chief Actuary, 2004 Board of Trustees Report, found that an increase in legal immigration would provide a significant increase to Social Security and a reduction of the actuarial deficit. In a poll of eminent economists conducted by the CATO Institute in the mid-1980s and updated in 1990, 81 percent of the respondents opined that, on balance, twentieth-century immigration has had a "very favorable" effect on U.S. economic growth.²⁹

Contrary to the belief that an increasing number of people compete for a static number of jobs, in fact, the number of jobs in America has increased by 15 million between 1990 and 2003, according to the DOL's Bureau of Labor Statistics ("BLS").³⁰ Between 2000 and 2010, *more than 33 million new job openings* will be created in the United States that require only little or moderate training, according to the BLS. This will represent 58 percent of all new job

²⁵ If a name or a Social Security Number on a W-2 form does not match SSA records, the Social Security earnings go into a suspense file while the SSA works to resolve discrepancies. In recent years, the SSA has been unable to match employee information with SSA records for 6-7 million workers a year. SSA has deposited \$280 billion dollars in the earnings suspense file as a result of the cumulative effect of these no-matches.

²⁶ Kathleen Pender, *Losing out on a huge cash stash*, Sfgate.com, April 11, 2006.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Julian L. Simon, "Immigration: The Demographic and Economic Facts," Cato Institute and National Immigration Forum (Dec. 11, 1995).

³⁰ Council of Economic Advisers. *Economic Report of the President 2003*, Table B-37.

openings.³¹ A May 2006 U.S. Congressional Budget Office (“CBO”) report on the economic and budgetary impact of S. 2611 found that the increase in the number of workers would probably have a very small negative effect on the growth of average weekly wages of workers already in the U.S. The CBO also estimated that the Senate bill would increase GDP by 0.4 percent on average from 2007 to 2011, and by 1.3% from 2012 to 2016.

In an [open letter](#) dated June 19, 2006, to President George W. Bush and Members of Congress (see attached), more than 500 economists from all 50 states, including 5 Nobel Laureates, proclaimed that “immigration has been a net gain for American citizens.”³² In their letter, the economists note that, “while a small percentage of native-born Americans may be harmed by immigration, vastly more Americans benefit from the contributions that immigrants make to the economy, including lower consumer prices. As with trade in goods and services, gains from immigration outweigh the losses.” The letter also points to many important effects of immigration that may not be widely appreciated: “Immigration is the greatest anti-poverty program ever conceived. Not just because the immigrants are much better off but also because they send billions of dollars of their own money back to their home countries—a form of truly effective foreign aid.”

Enhancing National Security: Comprehensively Reforming our Immigration Laws

Our immigration system is broken. Current laws provide no visa category for many needed workers to enter the U.S. legally and no clear path for undocumented workers to legalize their status. This dysfunctional system requires our government to expend valuable resources to identify, detain, and remove these workers, leaving fewer resources to pursue real national security threats and criminals. This situation is untenable. The public understands that it is unrealistic to deport the eight to ten million immigrants and their families residing here without legal status, or stop the flow of undocumented people crossing our borders to work. We can make immigration legal, safe, and orderly, and improve national security, if we place undocumented immigrants on a path to earned adjustment and create new rules for future immigration that make sense.

Why We Need Comprehensive Reform Legislation, which Includes Effective Enforcement - Make Legality the Norm

To bring immigration under the rule of law. Undocumented immigrant workers and their families are our neighbors, our co-workers, our children's nannies and our parents' caretakers. For too long, our immigration laws have been at odds with economic realities, leading to an increased reliance on smugglers and fake

³¹ Daniel E. Hecker, “Occupational Employment Projections to 2010,” *Monthly Labor Review* (Nov. 2001).

³² “Immigration Consensus,” *Wall Street Journal On-line*, June 20, 2006.

documents. Creating a path to legal status for these valued workers would allow them to come forward, undergo security screenings, and seek legal status. This type of legislation will allow us to know who is here and who is admitted in the future, and create a realistic and orderly immigration system that can be meaningfully enforced.

To make legality the norm and reduce illegal immigration. We need fair and reasonable rules that are realistic and enforceable. We must replace the chaotic, deadly, and illegal flows at our borders with orderly, safe, and legal avenues for immigrant workers and families. In the absence of legal means to obtain work and unite with family members, law-abiding people will take desperate measures. We need laws that embrace reality so that legality becomes the norm.

To improve our enforcement capacity. Enforcing a dysfunctional immigration system leads to more dysfunction and diversion from important objectives. Enforcement resources are inevitably overextended dealing with the undocumented population seeking employment. With laws that encourage illegality, our enforcement agencies waste time and resources investigating workers and families instead of tracking terrorists and criminals. Shrinking the pool of law enforcement targets will enable our officers to train their sights on those who mean to do us harm.

What realistic and effective legislation would accomplish:

It would enable our law enforcement agencies to focus on terrorists and criminals. By bringing undocumented workers and their families out of the shadows and requiring them to pass through security checks, we will dramatically reduce the pool of enforcement targets. Our investigative resources would be more effectively focused on terrorists and criminals.

It would encourage legality at our borders. By providing individuals with a legal mechanism to enter the country to work and reunite with family members, we encourage a legal, orderly admissions process. This limits the dangers confronting both immigrants and border patrol agents, and curtails the use of increasingly violent "coyotes" or human smugglers.

CONCLUSION

The realistic cure to border security involves a multi-layered approach, which reflects the complexity of the issue. The border is our last line of defense. To characterize the achievement of "border security" as the trigger for comprehensive reform of our immigration system is a myopic approach to a much larger issue. In fact, comprehensively reforming our immigration laws is a necessary component to enhancing our security. We must recognize the draw of our economic needs and the total dysfunctionality of our current immigration system. In addition, we must recognize that the "border" is not that line between

Mexico and the U.S. or Canada and the U.S. Intelligent and strategic immigration reform measures address the border at its true starting point: outside of the U.S. Such reform also addresses the problem of our economic needs for workers as well as the need to improve funding and oversight of interior security efforts such as worksite enforcement. The Department of State consular officer, the Department of Homeland Security agent or officer abroad, and our international partners in security and intelligence should all be a part of the true border security effort. Thus, triggering on a “border security” first or enforcement only cure to our immigration related challenges is a failed approach to meet our current and future immigration and economic demands. We ask Congress and the President to have the intestinal fortitude and strength of character in difficult and challenging times to meet this task head on rather than hide within optical sound bytes of achieving “border security” first before addressing the whole equation, which includes immigration reform, to achieve security and economic objectives for the good of this nation we love.

HR. 4437, SEC. 607. DESIGNATED COUNTY LAW ENFORCEMENT ASSISTANCE PROGRAM.

(a) Designated Counties Adjacent to the Southern Border of the United States Defined- In this section, the term `designated counties adjacent to the southern international border of the United States' includes a county any part of which is within 25 miles of the southern international border of the United States.

(b) Authority-

(1) IN GENERAL- Any Sheriff or coalition or group of Sheriffs from designated counties adjacent to the southern international border of the United States may transfer aliens detained or in the custody of the Sheriff who are not lawfully present in the United States to appropriate Federal law enforcement officials, and shall be promptly paid for the costs of performing such transfers by the Attorney General for any local or State funds previously expended or proposed to be spent by that Sheriff or coalition or group of Sheriffs.

(2) PAYMENT OF COSTS- Payment of costs under paragraph (1) shall include payment for costs of detaining, housing, and transporting aliens who are not lawfully present in the United States or who have unlawfully entered the United States at a location other than a port of entry and who are taken into custody by the Sheriff.

(3) LIMITATION TO FUTURE COSTS- In no case shall payment be made under this section for costs incurred before the date of the enactment of this Act.

(4) ADVANCE PAYMENT OF COSTS- The Attorney General shall make an advance payment under this section upon a certification of anticipated costs for which payment may be made under this section, but in no case shall such an advance payment cover a period of costs of longer than 3 months.

(c) Designated County Law Enforcement Account-

(1) SEPARATE ACCOUNT- Reimbursement or pre-payment under subsection (b) shall be made promptly from funds deposited into a separate account in the Treasury of the United States to be entitled the `Designated County Law Enforcement Account'.

(2) AVAILABILITY OF FUNDS- All deposits into the Designated County Law Enforcement Account shall remain available until expended to the Attorney General to carry out the provisions of this section.

(3) PROMPTLY DEFINED- For purposes of this section, the term `promptly' means within 60 days.

(d) Funds for the Designated County Law Enforcement Account- Only funds designated, authorized, or appropriated by Congress may be deposited or transferred to the Designated County Law Enforcement Account. The Designated County Law Enforcement Account is authorized to receive up to \$100,000,000 per year.

(e) Use of Funds-

(1) IN GENERAL- Funds provided under this section shall be payable directly to participating Sheriff's offices and may be used for the transfers described in subsection (b)(1), including the costs of personnel (such as overtime pay and costs for reserve deputies), costs of training of such personnel, equipment, and, subject to paragraph (2), the construction, maintenance, and operation of detention facilities to detain aliens who are unlawfully present in the United

States. For purposes of this section, an alien who is unlawfully present in the United States shall be deemed to be a Federal prisoner beginning upon determination by Federal law enforcement officials that such alien is unlawfully present in the United States, and such alien shall, upon such determination, be deemed to be in Federal custody. In order for costs to be eligible for payment, the Sheriff making such application shall personally certify under oath that all costs submitted in the application for reimbursement or advance payment meet the requirements of this section and are reasonable and necessary, and such certification shall be subject to all State and Federal laws governing statements made under oath, including the penalties of perjury, removal from office, and prosecution under State and Federal law.

(2) LIMITATION- Not more than 20 percent of the amount of funds provided under this section may be used for the construction or renovation of detention or similar facilities.

(f) Disposition and Delivery of Detained Aliens- All aliens detained or taken into custody by a Sheriff under this section and with respect to whom Federal law enforcement officials determine are unlawfully present in the United States, shall be immediately delivered to Federal law enforcement officials. In accordance with subsection (e)(1), an alien who is in the custody of a Sheriff shall be deemed to be a Federal prisoner and in Federal custody.

(g) Regulations- The Attorney General shall issue, on an interim final basis, regulations not later than 60 days after the date of the enactment of this Act--

(1) governing the distribution of funds under this section for all reasonable and necessary costs and other expenses incurred or proposed to be incurred by a Sheriff or coalition or group of Sheriffs under this section; and

(2) providing uniform standards that all other Federal law enforcement officials shall follow to cooperate with such Sheriffs and to otherwise implement the requirements of this section.

(h) Effective Date- The provisions of this section shall take effect on its enactment. The promulgation of any regulations under subsection (g) is not a necessary precondition to the immediate deployment or work of Sheriffs personnel or corrections officers as authorized by this section. Any reasonable and necessary expenses or costs authorized by this section and incurred by such Sheriffs after the date of the enactment of this Act but prior to the date of the promulgation of such regulations are eligible for reimbursement under the terms and conditions of this section.

(i) Audit- All funds paid out under this section are subject to audit by the Inspector General of the Department of Justice and abuse or misuse of such funds shall be vigorously investigated and prosecuted to the full extent of Federal law.

(j) Supplemental Funding- All funds paid out under this section must supplement, and may not supplant, State or local funds used for the same or similar purposes.

H.R. 4437, SEC. 203. IMPROPER ENTRY BY, OR PRESENCE OF, ALIENS.

Section 275 of the Immigration and Nationality Act (8 U.S.C. 1325) is amended--

(1) in the section heading, by inserting `UNLAWFUL PRESENCE;' after `IMPROPER TIME OR PLACE;';

(2) in subsection (a)--

(A) by striking `Any alien' and inserting `Except as provided in subsection (b), any alien';

(B) by striking `or' before (3);

(C) by inserting after `concealment of a material fact,' the following: `or (4) is otherwise present in the United States in violation of the immigration laws or the regulations prescribed thereunder,'; and

(D) by striking `6 months' and inserting `one year and a day';

(3) by amending subsection (c) to read as follows:

`(c)(1) Whoever--

`(A) knowingly enters into a marriage for the purpose of evading any provision of the immigration laws; or

`(B) knowingly misrepresents the existence or circumstances of a marriage--

`(i) in an application or document arising under or authorized by the immigration laws of the United States or the regulations prescribed thereunder, or

`(ii) during any immigration proceeding conducted by an administrative adjudicator (including an immigration officer or examiner, a consular officer, an immigration judge, or a member of the Board of Immigration Appeals);

shall be fined under title 18, United States Code, or imprisoned not more than 10 years, or both.

`(2) Whoever--

`(A) knowingly enters into two or more marriages for the purpose of evading any provision of the immigration laws; or

`(B) knowingly arranges, supports, or facilitates two or more marriages designed or intended to evade any provision of the immigration laws;

shall be fined under title 18, United States Code, imprisoned not less than 2 years nor more than 20 years, or both.

`(3) An offense under this subsection continues until the fraudulent nature of the marriage or marriages is discovered by an immigration officer.

`(4) For purposes of this section, the term `proceeding' includes an adjudication, interview, hearing, or review.'

(4) in subsection (d)--

(A) by striking `5 years' and inserting `10 years';

(B) by adding at the end the following: `An offense under this subsection continues until the fraudulent nature of the commercial enterprise is discovered by an immigration officer.'; and

(5) by adding at the end the following new subsections:

`(e)(1) Any alien described in paragraph (2)--

`(A) shall be fined under title 18, United States Code, imprisoned not more than 10 years, or both, if the offense described in such paragraph was committed subsequent to a conviction or convictions for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony;

(B) whose violation was subsequent to conviction for a felony for which the alien received a sentence of 30 months or more, shall be fined under title 18, United States Code, imprisoned not more than 10 years, or both; or

(C) whose violation was subsequent to conviction for a felony for which the alien received a sentence of 60 months or more, shall be fined under title 18, United States Code, imprisoned not more than 20 years, or both.

`(2) An alien described in this paragraph is an alien who--

`(A) enters or attempts to enter the United States at any time or place other than as designated by immigration officers;

`(B) eludes examination or inspection by immigration officers;

`(C) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact; or

`(D) is otherwise present in the United States in violation of the immigration laws or the regulations prescribed thereunder.

`(3) The prior convictions in subparagraph (A), (B), or (C) of paragraph (1) are elements of those crimes and the penalties in those subparagraphs shall apply only in cases in which the conviction (or convictions) that form the basis for the additional penalty are alleged in the indictment or information and are proven beyond a reasonable doubt at trial or admitted by the defendant in pleading guilty. Any admissible evidence may be used to show that the prior conviction is a qualifying crime, and the criminal trial for a violation of this section shall not be bifurcated.

`(4) An offense under subsection (a) or paragraph (1) of this subsection continues until the alien is discovered within the United States by immigration officers.

`(f) For purposes of this section, the term `attempts to enter' refers to the general intent of the alien to enter the United States and does not refer to the intent of the alien to violate the law.'