MIGRANTS, BORDERS, AND NATIONAL SECURITY: U.S. IMMIGRATION POLICY SINCE SEPTEMBER 11, 2001

By Donald Kerwin
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I. INTRODUCTION

The catastrophic events of September 11, 2001 caused a tectonic shift in the United States. Ten months later, it may still seem trivial and disrespectful to discuss the policy implications of that day, much less to use it to advance particular positions. However, the terrorist attacks and ongoing threat should not preclude robust discussion of measures proposed or adopted to prevent future abominations. Since September 11th, policy changes in the immigration arena have occurred almost weekly, many with little press or fanfare through Department of Justice ("DOJ") "interim" regulations and internal instructions. With due respect to the Attorney General, it does not aid or comfort terrorists to examine policies that may not advance national security, or to identify how such policies implicate other national values or damage immigrant communities in perhaps unintended ways.

Commentators have strongly supported, in light of the terrorist threat, recalibrating or shifting the balance between individual rights and national security. In the U.S. tradition, however, respect for core rights does not conflict with security, but undergirds it. "They that can give up essential liberty to obtain a little temporary safety," wrote Benjamin Franklin, "deserve neither liberty nor safety."1 In his First Inaugural Address, Thomas Jefferson said: "Freedom of religion; freedom of the press; and freedom of person under the protection of habeas corpus, and trial by juries impartially selected .... They should be the creed of our political faith, the text of civil instruction, the touchstone by which we try the services of those we trust; and should we wander from them in moments of error or alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty, and safety."2 The United States identifies itself as a nation of immigrants, unified by these values.

Soon after the attacks, President Bush, New York City Mayor Giuliani, Immigration and Naturalization Service (“INS”) Commissioner Ziglar and others spoke forcefully on the need to avoid equating terrorism and immigrants. This needed to be said and taken to heart. Low-income immigrants have fled persecution, seek to reunify with their families, and want to work so that their families might escape crushing poverty. They do not resemble terrorists, but evoke the hard-working immigrants who perished at the World Trade Center’s Windows on the World restaurant, who helped rebuild the Pentagon, and whose children fought in Afghanistan.

While the needs and aspirations of U.S. immigrants did not change on September 11th, the nation’s recognition of the security threat posed by terrorists did. The U.S. immigration system depends on overseas and domestic intelligence to prevent the admission and to initiate removal (deportation) proceedings against dangerous persons. On October 26, 2001, President Bush signed into law the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the “USA PATRIOT Act” or the “Act”).3 Despite its well-documented excesses,4 the Act included a number of common-sense reforms related to intelligence and inter-governmental communication.

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1Benjamin Franklin, Historical Review of Pennsylvania (1759).
2Thomas Jefferson, First Inaugural Address, Washington, D.C., March 4, 1801.
4See generally American Civil Liberties Union, Insatiable Appetite: The Government’s Demand for New and Unnecessary Powers After September 11 (April 2002) ("The USA PATRIOT Act showers abundant new law enforcement powers on federal agents. Most of its provisions are not limited to terrorism offenses, but instead apply to all federal investigations; in fact, the Justice Department had unsuccessfully sought many of the proposals well before September 11 to bolster routine drug cases and other nonterrorism investigations.") [hereinafter “Insatiable Appetite”] at 4.
5The USA PATRIOT Act § 403(b)(1).
6Id. at § 403(c)(1).
7Id. at §§ 414(a) and 414(c).
In particular, it required: the Federal Bureau of Investigation ("FBI") to share criminal history information from the National Crime Information Center ("NCIC") with the INS and Department of State ("DOS"); the development of technology to verify the identity of those seeking a visa or entry; a working system to track entries and exits; increased monitoring of foreign students; and an audit to assure that countries whose nationals can enter the United States without visas have developed tamper-resistant passports. Similarly, the Enhanced Border Security and Visa Entry Reform Act of 2001, signed by the President on May 14, 2002, sought to improve technology and information sharing, to track the entry and exit of visa recipients, to develop immigration documents with biometric identifiers, to improve monitoring of foreign students, and to harmonize United States, Canadian and Mexican immigration enforcement efforts. These measures garnered broad, bipartisan support.

This article reviews the more controversial changes in immigration law, policy and practice since September 11, 2001, particularly those that involve refugees and asylum seekers, border and interior enforcement, anti-terrorism efforts, and INS detainees. Portions of this article, summarizing legal developments in the immigration field in 2001, have been adapted from an earlier article by the author. See generally R. Hill and D. Kerwin, "Immigration and Nationality Law," The International Lawyer, Vol. 36, No. 2 (American Bar Association, Summer 2002).

This task assumes particular significance at a time of heightened patriotism and national unity. In fighting terrorism, it would be counterproductive to isolate the United States' 30 million foreign-born residents or to lose sight of its core values. We need to respect the immense intelligence, law enforcement and military challenges faced by the United States, but carefully critique policy changes offered for reasons of safety or security.

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8 Id. at § 416.
9 Id. at § 417(b).
11 The terrorist attacks also put on hold policy initiatives designed to relax the anti-family provisions of U.S. immigration law and to promote the integration of immigrants in U.S. society. See generally Catholic Legal Immigration Network, Inc., Placing Immigrants at Risk: The Impact of our Laws and Policies on American Families (2000).
II. REFUGEES AND ASYLUM SEEKERS

The least effective changes to immigration policy from a national security perspective and certainly the most devastating from a humanitarian viewpoint target refugees and asylum seekers. The narrow legal standard for political asylum (granted in the United States) and refugee status (granted abroad) excludes millions who have suffered from generalized persecution or hardship, and who have been displaced within their countries. Still, an estimated 14.9 million persons meet the refugee definition world-wide and the events of September 11th have made traditional receiving nations, like the United States, less receptive to them.12

REFUGEES

On October 1, 2001, the United States began a two-month moratorium on refugee admissions pending a security review of the program. The review affected roughly 22,000 refugees who had previously been approved for admission. On November 21, 2001, President Bush set a ceiling of 70,000 refugees for admission in FY 2002. This number fell below the 80,000 ceiling set in FY 2001, and well below the historic high of 207,116 in FY 1980.13 Making matters worse, the 70,000 ceiling will not nearly be met, due to the resettlement moratorium and lack of INS processing capacity in the first half of the year. The INS admitted only 8,096 refugees during the first six months of FY 2002.

A security review may ultimately have been necessary, but political expediency best explains the decision to single out perhaps the most difficult path a terrorist could take to the United States. The September 11th terrorists entered legally on temporary visas, including student visas. However, a moratorium on student admissions would have damaged U.S. colleges and universities who depend heavily on foreign student tuition. During the academic year 2000 to 2001, an estimated 547,867 foreign students, representing 3.8 percent of the total enrollment, studied in the United States.14 The students brought more than $11 billion into the U.S. economy, including more than $6 billion in tuition and fees.15

MIGRANT INTERCEPTION PROGRAMS

In its November 2001 report on the U.S.-Mexico border, the Catholic Legal Immigration Network, Inc. ("CLINIC") described the increase in U.S.-funded migrant interception programs in Mexico.16 Mexican officials have estimated that they intercept 250,000 migrants a year.17 A delegation of U.S. bishops to Central America reported in November 2000 that intercepted migrants do not receive refugee or asylum interviews prior to their repatriation.

In April and June 2001, CLINIC submitted requests under the Freedom of Information Act ("FOIA") for information on the size of the U.S.-funded interception initiative and any refugee screen-
ing program in place. In February 2002, INS responded that they could not find any documents responsive to CLINIC's requests. When CLINIC pointed out that it had already collected relevant documents, INS conceded that it had not forwarded CLINIC's FOIA requests to its International Affairs division, the department most likely to have responsive documents. INS agreed to take this step, but only by treating CLINIC's longstanding FOIA requests as a new submission. As of July 2002, CLINIC still had not received a reply to its requests.18

Interception programs occupy a central position in U.S.-Mexico talks on migration and economic development. Since September 11th, in particular, Mexican President Vicente Fox has championed a hemispheric approach to immigration control. Creation of a “North American Security Zone” or a continental “security perimeter” would require the United States, Canada, and Mexico to coordinate their immigration control policies. In practice, this would entail expansion of migrant interception programs. These programs can be designed to safeguard the rights of asylum seekers, but to date they have not been.

**ASYLUM AT THE BORDER**

CLINIC's border report also documented the difficulties faced by migrants who attempt to seek asylum at U.S. ports-of-entry. In one incident, a group of 11 asylum seekers from the Republic of Georgia requested asylum at an international bridge in El Paso, but were told that they needed to contact the U.S. consulate in Ciudad Juarez.19 Mexican officials detained the men and sent them to Mexico City for deportation. Following intense advocacy, INS agreed that the men should be allowed to seek political asylum in the United States.

Prior to September 11th, migrants could request political asylum at certain U.S. land ports-of-entry, but remain in Mexico until they had received a “recommended” asylum approval notice. At that point, INS “paroled” (physically admitted) them into the United States, where they awaited the results of a security review. On January 29, 2002, the INS officially ended this practice.20

On September 12, 2001, Mexican officials arrested and detained a group of 95 Iraqi Chaldeans who had availed themselves of this process. Some had received recommended asylum approval notices. Like many caught in the post-September 11th fervor, Iraqi Christians, who fled Saddam Hussein's regime, seemed unlikely targets for a probe of Muslim fundamentalist terrorists.

After three months of intense advocacy, Mexican officials began to release the Chaldeans in groups. Casa del Immigrante, a non-profit shelter for migrants, transported them to the U.S.-Mexico Border, where they requested asylum a second time, were placed in expedited removal, and detained. INS determined that all of them had a “credible fear” of persecution. Nonetheless, many remained in detention for months. Of the 38 still in custody, 11 have been detained since January 2002. INS has held one since November 2001. Most have been imprisoned since April or May of 2002. The INS has informed advocates that it cannot release the remaining Chaldeans without security clearance. Three of the 38 detainees have been placed under a “hold.” Advocates have not been able to obtain information on the security clearance process or even on the federal agency responsible for the “hold.” Many of the detainees do not have access to translators and cannot afford attorneys.

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18 CLINIC's difficulties follow an October 12, 2001 memorandum from the Attorney General warning the heads of federal departments and agencies that: “Any discretionary decision . . . to disclose information protected under FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.” Memorandum from John Ashcroft, Attorney General, to Heads of All Federal Departments and Agencies, “The Freedom of Information Act” (October 12, 2001).

19 *Chaos on the U.S.-Mexico Border at 35.*

EXPEDITED REMOVAL

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the "1996 Immigration Act") erected multiple legal barriers to political asylum.21 The most egregious, known as "expedited removal," applies to asylum seekers who reach U.S. ports-of-entry without proper documents.22 Unless such a person can muster the confidence and presence of mind to request asylum or to express a fear of persecution to a government official, he or she faces immediate repatriation. This raises the possibility that a bona fide asylum seeker will be returned to his or her persecutor.

An arriving asylum seeker who meets this threshold burden and goes on to establish a "credible fear of persecution" can be released from detention.23 However, even prior to September 11th, release practices varied by INS district office, with asylum seekers often kept in detention for reasons as flimsy as the availability of INS detention space.24 Asylum seekers with "credible fear" often remain detained, only to receive asylum months later, occasionally without even opposition from INS trial counsel.25

Since September 11th, release standards have been tightened, with INS offices requiring identity documents, like birth certificates and passports. Few would contest the need to establish an asylum seeker's identity.26 At the same time, many asylum seekers cannot secure these kinds of documents. In Somalia, for example, there is no central government to provide documents. In other countries, certain ethnic groups destroy their identity papers for protection. In many cases, to request an identity or travel document would place a would-be migrant at risk. As in the Chaldean cases, asylum seekers have also remained imprisoned pending the apparently open-ended security clearance process.

One local INS official informed CLINIC that after September 11th he would begin to refer for criminal prosecution (for use of false documents) persons denied asylum by Immigration Judges ("IJ s"). Officials at INS headquarters have insisted that this does not constitute a national policy. However, even sporadic prosecution of asylum seekers will undermine the right to seek asylum. Migrants with bona fide asylum claims simply will not risk applying if the end result might be prison time.

DETAINED ASYLUM SEEKERS

Detention undermines the right to seek asylum, primarily by making it difficult to secure counsel. Immigrants in removal proceedings have a right to legal counsel, but not at the government's expense.27 Unrepresented asylum seekers face a distinct disadvantage in this process.28 In FY 1999, roughly one third of asylum seekers in removal lacked legal counsel.29 Represented asylum seekers in Immigration Court enjoyed an overall approval rate of 37 percent, while IJs approved 8.6 percent of pro se asylum claims for persons placed directly in removal proceedings and 5.8 percent of removal cases originally denied by the Asylum Corps.30

22The 1996 Immigration Act also requires that migrants file for asylum within a year of their arrival. INA § 208(a)(2)(B). If they do not, they cannot apply for asylum, unless they can show changed circumstances. INA § 208(a)(2)(D).
23Immigration and Nationality Act ("INA") § 235(b)(1)(B)(iii)(IV).
26Under the USA PATRIOT Act, aliens who are inadmissible or removable for terrorist activity cannot receive political asylum, with an exception for those who have endorsed terrorist activity if the Attorney General determines that they do not pose a security risk. INA § 208(b)(2)(A)(v).
27INA § 292.
29Executive Office for Immigration Review, "Immigration Court Asylum Decisions" (April 14, 2000).
30Id.
These statistics can be easily understood. Asylum seekers need counsel to elicit and explain the legally significant events in their lives, and to negotiate the complex laws and procedures that govern their cases. Over many meetings with counsel, asylum claims become more nuanced. Counsel can resolve apparent inconsistencies and can corroborate testimony with human rights reports, newspaper articles, and third-party affidavits.

Asylum seekers in INS custody suffer from the kind of conditions—commingling with U.S. criminals in remote county jails, predatory phone rates, open-ended confinement—that mirror the persecution that they fled. This regularly leads them to abandon their claims and assume the risks of returning to the countries that they fled.

Since January 2001, CLINIC has administered a legal project for unrepresented asylum seekers and others in detention whose cases have been appealed to the Board of Immigration Appeals (the “Board” or “BIA”). Many of the cases handled by the project have been reversed and remanded, highlighting the importance of counsel to the right to seek asylum. The project has afforded CLINIC a first-hand view of the practical and legal barriers faced by detainees with cases on administrative appeal. In several project cases, INS has lost track of detainees in its custody. As a result, the BIA did not receive accurate notice of the detainees’ locations and detainees did not receive legal correspondence in a timely manner, if at all.

In other cases, pro bono attorneys have not received complete trial records, which serve as the basis of an appeal. In one case, the record of proceeding (“ROP”) included an oral decision that did not pertain to the case on appeal and did not contain trial transcripts. On December 11, 2001, the attorney filed a FOIA request for the transcript. The Board granted him an extension to January 2nd to file a brief. After repeated requests, he received the transcript on January 19th. However, the BIA dismissed the case on January 25th and the INS subsequently removed his client.

It can also be difficult for counsel to reach a detained client. Phone policies vary among detention facilities. Two pro bono attorneys with clients at the York County Detention Facility informed CLINIC that the only way their clients could contact them was by placing collect calls. The attorneys had received bills charging them $5.14 for the first minute of calls and 90 cents per minute thereafter. Neither could afford this expense. In certain state and local jails, inmates can make long distance phone calls from the offices of their case counselors. However, these calls must be made to an “approved” person. In other facilities, the attorney must call the detainee at a specific time. In the latter case, the prison often requires that a written request (made up to five days in advance) be submitted to schedule a call. In several cases, mail sent by CLINIC has not reached detainees, and forms sent by detainees have not reached attorneys willing to represent them.

In two project cases, the BIA issued its decision without reviewing the brief submitted (on time) by the attorney. In one case, the attorney filed his brief by express mail and confirmed delivery one day prior to its due date. Three months later, the BIA dismissed the case, stating that the respondent had not filed a brief.

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1 C. DeConcini and M. McKenna, "BIA Pro Bono Project: Representing Detained Migrants Before the BIA and Uncovering Government Obstacles to Pro Se Detainees Appealing Their Cases," Bender’s Immigration Bulletin (August 15, 2001).

2 This kind of error may be more common with project cases because pro se asylum seekers occasionally file briefs on their own, leading the BIA to send the case to docket, prior to securing counsel.
ASYLUM ADJUDICATIONS

The disparate treatment of asylum cases by IJs also raises due process concerns. Practitioners have long known that individual IJs can influence the outcome of a case, as much or more than its merits. Despite an overall IJ asylum approval rate of 23.3 percent from FY 1989 to 2000, certain judges grant asylum in less than one percent of their cases. The increased use of videoconferencing to adjudicate asylum claims can also undermine even the strongest of cases.

As disturbing as biased judges is the degree to which judges view themselves as compromised by their position within DOJ. In January 2002, the National Association of Immigration Judges (“NAIJ”) proposed that IJs and the BIA be removed from DOJ and placed in a newly-created executive branch agency. According to NAIJ, the fact that IJs and the INS (including INS trial counsel who prosecute removal proceedings) both report to the Attorney General creates an inherent conflict; IJs appear “to be dominated” by their “more powerful, older sibling, the INS.” NAIJ characterized “the taint of inherent conflict” as “insidious and pervasive.” As an example, it reported that objections from the INS prevented IJs from receiving contempt power over INS trial attorneys. NAIJ also referred to the October 31, 2001 DOJ interim rule that grants an automatic stay of IJ release decisions, if the initial bond set by the INS equals or exceeds $10,000. As NAIJ pointed out, this rule allows INS to control release decisions, since it makes the initial bond determination.

On February 19, 2002, DOJ issued a proposed regulation to limit the BIA’s authority and reduce its size. The rule would strip the BIA of authority to review de novo IJ factual determinations, unless they are clearly erroneous. In practice, the rule would limit the BIA’s ability to remand cases for development of the factual record, as it must frequently do in pro se asylum cases.

The rule also provides that individual Board members (appeals judges) will initially review cases, precluding panel review unless the case falls into one of five narrow categories. If it does not, the appeal would be summarily affirmed or disposed of with a brief order. Since the beginning of 2002, the BIA has reduced its 57,000 case backlog to roughly 49,000 cases, many of them by summary dismissal. Under the rule, the Board would be reduced from 23 to 11 members. Although the Attorney General has articulated general criteria for downsizing, advocates believe that only the most enforcement-minded judges will survive. Based on current filing rates, the remaining judges would need to review 50 cases a week, many with long transcripts and legal briefs. With this kind of time pressure, cases that demand heightened attention will almost certainly be handled summarily.

The rule would also limit, from 30 to 21 days, the immigrant’s brief filing deadline. This would effectively prevent pro se immigrants from securing counsel. In CLINIC’s experience, it takes at least seven days for the transcript to reach the detainee, leaving just 14 days to obtain counsel, write the brief, and make sure that the BIA has received it. Nor would the immigrant be able to review the government’s brief before filing his or her own. The rule would retroactively apply to all appeals before the Board when the rule takes effect.

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P. Gleason, "Reality TV For Immigrants: Representing Clients in Video Conference Hearings," *Bender's Immigration Bulletin* (September 1, 2000).


Id.

Id.

SAFE THIRD-COUNTRY EXCEPTION

On December 3, 2001, the United States and Canada signed a joint statement on border security and a "smart border" declaration agreement. In both documents, the nations agreed to discuss a safe third-country exception to the right to seek asylum. Under such an agreement, a migrant who has passed through a "safe" nation cannot seek asylum in his or her country of final destination. A 1997 agreement by European Union members on a safe third-country procedure has led to "chain" deportations or "refugees in orbit," as desperate migrants must journey backwards to the one country where they might request asylum.39 A U.S.-Canada agreement would bar some asylum claims in the United States, but its main impact would be felt by the high percentage of Canadian asylum seekers who transit through the United States.40 These migrants would be barred from seeking asylum in Canada and, presumably, would be returned to the United States.

GENDER-BASED ASYLUM CLAIMS

The attacks of September 11, 2001 also diminished the likelihood that a proposed rule governing gender-based asylum claims will be adopted.41 In Matter of R.A., the BIA rejected the asylum claim of a Guatemalan woman who had suffered years of domestic violence.42 The BIA ruled that the abuse had not occurred "on account of" the woman's membership in a particular social group because her husband did not pose a risk to other members of the asserted group.

In December 2000, the INS issued a proposed rule that addressed the meaning of "persecution," the "on account of" requirement, and membership in a "particular social group" in asylum claims based on domestic violence.43 The rule stipulates that a subjective intent to harm or punish need not be present for "persecution" to be found. Instead, the asylum seeker must show that the harm or suffering inflicted was objectively serious, and had been subjectively experienced by the applicant as serious.44 Under the proposed rule, gender-specific violence may constitute "persecution," even though its practitioners regard it as a cultural rite and may not have a subjective intent to harm.

The rule also recognizes that persecution can be directed by the government or a group or individual that the government cannot or will not control.45 In cases involving a nongovernmental actor, the persecution determination turns on "whether the government has taken reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to the state that exists."46

Persecution must occur "on account of" race, religion, nationality, membership in a particular social group, or political opinion.47 Under the Supreme Court's decision in Elias Zacarias, the applicant must show that the persecutor seeks to harm the victim because of a protected characteristic. The proposed rule reflects post-Elias Zacarias caselaw to recognize the possibility of a "mixed motive" persecutor, but still requires that the "protected characteristic [be] central to the persecutor's motivation to act against the applicant."48 The "on account of" requirement would be satisfied if the persecutor acted based on what

39 The Mercy Factory at 204-207.
40 According to the Canadian Council for Refugees, 14,807 of the roughly 43,000 Canadian asylum seekers in 2001 (34%) transited through the United States. The Canadian Embassy in Washington, D.C., reported that this figure climbed to 39 percent in the first three months of 2002.
41 For an excellent summary and analysis of the proposed rule, see L. Gilbert, "Endgame: INS Issues Final Asylum Regs and Proposed Domestic Violence Asylum Regs," Catholic Legal Immigration News (December 2000).
43 Proposed 8 CFR § 208.15.
44 Proposed 8 CFR § 208.15(a).
45 Id.
46 Id.
48 Proposed 8 CFR § 208.15(b).
it "perceive[d] to be" the applicant's race, religion, nationality, political opinion, or membership in a social group.\textsuperscript{49} In short, the rule would extend the long-standing doctrine of "imputed political opinion" to other grounds of asylum. Evidence that the persecutor seeks to harm others in the asserted group would not be "required" to meet the "on account of" requirement.\textsuperscript{50}

The proposed rule tracks the BIA's decision in \textit{Matter of Acosta},\textsuperscript{51} by defining a particular social group as one "composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it."\textsuperscript{52} The rule recognizes that gender can serve as the basis for social group membership, but provides that the asserted group must exist independently and cannot be defined only by harm classified as persecution.\textsuperscript{53} "Women who have been battered," for example, would not constitute a particular social group. Past experience can define a social group if, at the time it occurred, the member could not have changed or should not have been required to change the characteristic because it was "fundamental to his or her identity or conscience."\textsuperscript{54}

On January 19, 2001, in one of the Clinton administration's last acts, the Attorney General vacated \textit{Matter of R.A.}, and directed the BIA to stay reconsideration of the case until enactment of the new asylum regulation. As of this writing, the INS has not issued these regulations in final form.

\begin{thebibliography}{99}
\bibitem{footnote} \textsuperscript{50}Id.
\bibitem{footnote} \textsuperscript{51}Id.
\bibitem{footnote} \textsuperscript{52}19 I & N Dec. 211, 233 (BIA 1985).
\bibitem{footnote} \textsuperscript{53}Proposed 8 CFR § 208.15(c)(1).
\bibitem{footnote} \textsuperscript{54}Proposed 8 CFR § 208.15(c)(2).
\end{thebibliography}
III.
BORDER AND INTERIOR ENFORCEMENT

The September 11th attacks have forced the United States to balance its security with its dependence on foreign-born workers and its role in the global economy. The volume of individual border crossers and trade between the United States and its neighbors makes it inconceivable that the United States would or even could seal its borders. In FY 2000, INS inspected 534 million persons at ports of entry, admitting 437 million persons. In addition, 11.2 million trucks and 2.2 million railroad cars enter the U.S. legally each year. In 2001, U.S. trade with Canada reached $380.6 billion and with Mexico $232.9 billion.

The Bush administration's 2003 budget calls for nearly $3 billion in spending on border control, a one-year increase of $558 million. Without improved intelligence and information sharing, however, terrorists will continue to be able to enter the United States legally with relative ease.

Nor would it be tremendously difficult for a terrorist to enter the country illegally. The U.S.-Mexico border extends 2,000 miles over forbidding terrain that offers countless crossing routes and hiding places. The 5,000 mile Canadian border, patrolled by less than four percent of the nation's Border Patrol agents, presents greater opportunities for illegal entry. Individual Border Patrol sectors cover tens of thousands of miles. In the circumstances, the enforcement challenge becomes how to make it more difficult for terrorists and criminals to enter the United States, not how to preclude this possibility.

U.S.-MEXICO BORDER

CLINIC's report on the U.S.-Mexico border documents the impact of increased immigration control activities on migrants and border residents. The United States should heed the report's lessons, as it considers embarking on a period of further growth in its border enforcement capacity.

In 1993, the Border Patrol initiated a blockade, concentrating agents and enforcement resources, along traditional crossing routes in El Paso. The new strategy, which quickly spread to other Border Patrol sectors in the southwest, was supported by steady increases in agents and other resources. Monies obligated to the Border Patrol quadrupled from 1990 to 2001, and Border Patrol positions more than doubled. The INS employs roughly 60 percent of all federal law enforcement agents. By 2001, 93 percent of Border Patrol agents were stationed on the U.S.-Mexico border.

Between 1998 and 2001, more than 1,500 migrants perished trying to cross into the United States from Mexico. Given the treacherous and remote routes taken by migrants, this figure almost certainly understates the actual death toll. In addition, these deaths occurred at a time of heightened search and rescue efforts by the Border Patrol. While the U.S.-Mexico border has always been perilous, deaths from hypothermia, dehydration and other environmental causes increased as the blockades redirected migrants to their peril.

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55 Immigration and Naturalization Service Statistical Report, "Inspections" (June 29, 2001), available at www.im.usdoj.gov/graphics/aboutus/statistics/mm7001//INS2HTM.
56 A. Mohammed, "Bush Seeks Extra $2.1 Billion to Protect Borders," Reuters (January 25, 2002).
57 U.S. Census Bureau, Foreign Trade Division, available at www.census.gov/foreign-trade/balance.
59 "Chaos on the U.S.-Mexico Border" at 10.
60 Id. at 8-37.
61 Id. at 6.
64 "Chaos on the U.S.-Mexico Border" at 12-14.
Since September 11th, undocumented migrant flows and crossing deaths have decreased. The Border Patrol apprehended 569,507 persons from October 1 to May 14, 2002, a 33 percent decline from the previous year. During the same period, 99 migrants died trying to cross the border, compared to 140 the previous year. This still represents, by any measure, an unacceptable number of deaths. With the onset of summer, deaths have occurred more frequently, with at least 25 deaths and hundreds of rescues during one grisly two-week stretch in June. Highlighting crossing dangers, Border Patrol rescues in FY 2002 significantly exceed last year’s numbers.

Decreased migrant traffic since the terrorist attacks indicates that migration does not primarily depend on enforcement policies, as the Border Patrol claims, but on larger socio-economic forces. Since September 11th, some migrants have decided to forego visits home and remain in the United States. Others have left or opted not to come due to the U.S. economic slowdown. The attacks led to widespread layoffs in industries that depend heavily on immigrant labor. From September 12, 2001 to January 21, 2002, the AFL-CIO counted 1,054,000 layoffs, including 426,948 lost manufacturing jobs and 139,840 in the hospitality, tourism and entertainment sectors. This added to the 1.1 million jobs lost in 2001 prior to September 11th.

Beyond decreased employment opportunities, in March 2002, the Supreme Court held that undocumented workers, illegally fired for union organizing, cannot receive back pay under the National Labor Relations Act. This decision will expose the undocumented to greater workplace abuses and provide an incentive for unscrupulous employers to hire them.

CLINIC’s report also found that Border Patrol agents inundate border communities. INS funding for enforcement and border affairs now exceeds the “general funds” of all southwest border counties combined. CLINIC’s account of a raid on an El Paso homeless shelter highlighted the problem of placing an immense federal police force in local communities. The report also describes the death of an infant at a port-of-entry, which occurred while agents demanded that his father produce the child’s U.S. birth certificate. The INS complaint system, CLINIC found, has become notorious for its inability to stem civil rights abuses, its unresponsiveness to immigrants, its delays in resolving cases, and its failure to identify problems and trends that could be addressed proactively.

CLINIC’s report reveals the costs, limitations, and hardships caused by strict enforcement policies. It recommends, among other steps, that the United States: (1) reconsider its border blockade strategy in light of the unacceptably high number of migrant crossing deaths, and expand Border Patrol rescue efforts; (2) enact a broad legalization program for persons with strong equitable ties to the United States; (3) strengthen and make transparent the INS complaint system; (4) end the Border Patrol’s use of “hollow point” bullets which cause massive internal injuries; (5) not accompany local police in their work.

65U.S. Border Patrol, “Southwest Border Sector/Station FY Cumulative Totals October 1 Through May 14” (May 2002).
69Information available at <www.aflcio.org/sept_11/econchart.htm>
70Id.
72In a recent report, the AFL-CIO described how dangerous the workplace can be for immigrants: “Immigrant workers have a disproportionate rate of injuries, illnesses and fatalities in the workplace. Between 1995 and 2000, the rate of fatal occupational injuries to Hispanics increased while the national fatality rate decreased and while the total number of fatal injuries declined by 295, the number of fatalities involving Hispanics increased by nearly 200. Immigrants are hired to do the most undesirable and dangerous jobs at the lowest wages. They often do not know what rights they have or what laws protect them and they receive no training in safety and health. Language and cultural barriers make it difficult for them to learn their rights and those who lack immigration status are particularly fearful of speaking out. Employers frequently view immigrant workers as disposable and easy to exploit.” AFL-CIO Report, Death on the Job: The Toll of Neglect (April 2002) at 8.
73Id. at 23.
because this dissuades the undocumented and their family members from contacting the police; (6) stop enforcement activities at churches, schools, hospitals, charitable agencies, homeless shelters and other places of sanctuary; (7) determine whether migrants intercepted on the way to the United States would be at risk of persecution or torture if repatriated; (8) support economic development in Mexico and other migrant-sending countries.75

The need for these reforms, particularly for a legalization program, has increased in recent months. Legal status would strengthen the position of immigrants who are subject to workplace abuses and would place thousands of immigrant families beyond the reach of harsh immigration laws passed in 1996. It would also reduce border crossing deaths (by allowing for legal crossings) and would bring to the U.S. government’s attention millions of law-abiding residents. The latter would allow INS to concentrate its border and interior enforcement efforts on drug traffickers and potential terrorists, potentially reducing the need for Border Patrol growth. As CLINIC’s report found, the rapid hiring of agents, coupled with high attrition rates, would likely lead to increased civil rights abuses.

In March 2002, the United States and Mexico entered a 22-point “smart border” agreement, designed to strengthen border infrastructure (like roads and bridges), to facilitate the flow of goods and people across the border, and to screen-out potential threats.76 The agreement provides that precertified companies who seal their goods in containers in Mexico would receive expedited treatment at the border. A similar pre-clearance program would be available for frequent individual crossers. The agreement also called for exchanging intelligence and for sharing information on those applying for visas to the United States, Mexico, and Canada.

The September 11th attacks derailed the U.S.-Mexico dialogue on migration and economic development. Once a centerpiece of U.S. and Mexican foreign policies, the wide-ranging discussions covered border safety initiatives, regularization of the flow of undocumented workers, anti-smuggling efforts, migrant interdiction, and other enforcement issues. They culminated in President Fox’s state visit to the United States, just before September 11th.77 Despite diminished expectations, this process still represents the best hope for the kind of deep-seated reforms necessary to address the border problems documented in CLINIC’s report.

**U.S.-CANADA BORDER**

The tension between security and the steady flow of goods and people can be seen most acutely on the U.S.-Canada border. In recent years, several terrorists have entered or attempted to enter the United States from Canada. Nabil Al-Marabh, a Kuwaiti national who lived in Canada for seven years, shared a phone number with two of the September 11th terrorists.78 He was arrested in Chicago. INS caught Ahmed Ressam, an Algerian national and member of the Armed Islamic Group, as he tried to enter at Port Angeles in Washington state in December 1999, his car trunk filled with explosives.79 Ressam has been dubbed the “millennium bomber” for his plan to attack L.A. International Airport on New Year’s Day 2000. Abu Mezer, a Hamas terrorist, was caught three times in Washington state, and ultimately arrested in Brooklyn, with four pipe bombs.80 He planned to detonate the bombs in a suicide attack in

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75Id. at 73-77.
76“Smart Border: 22 point agreement,” available at <www.whitehouse.gov/infocus/usborder/22points.html>
79Id.
80Id.
the New York subway system. Al Rauf bin Al Habib bin Yousef al-Jiddi, a Tunisian al-Qaeda operative who lived in Montreal, appeared in a martyrdom video in Afghanistan.81

By FY 2001, 369 agents (3.9% of nation's total) patrolled the 5,000 mile U.S.-Canada border.82 In 2000, a report by DOJ's Office of Inspector General ("OIG") concluded that the Border Patrol could not quantify the size of the drug and human smuggling problem across the border, and did not even guard certain ports-of-entry at night.83 OIG also found that known smuggling rings listened to nonsecure Border Patrol radio communications and simply waited for agents to go off duty.84 In one 300-mile stretch, OIG identified 65 smuggling routes.85 The report also found that Border Patrol agents on the northern border were many times more likely to encounter weapon and drug smuggling than agents in the southwest.86

The USA Patriot Act authorized a tripling of Border Patrol and U.S. Customs officials along the U.S.-Canada border.87 INS does not place new hires on the northern border, but moves experienced agents there. Since September 11th, roughly 100 agents have been shifted.88 According to INS officials, a total of 245 agents will be transferred in FY 2002, bringing the number of agents assigned to the United States' northern border to roughly 600.89 An additional 285 agents would be added under the administration's FY 2003 budget.90 Even at full capacity, however, vast stretches of the border will remain unguarded.

The border build-up, although modest, could raise civil rights, family reunification, and local economic challenges in Canadian border communities. Canada sends roughly 85 percent of its exports to the United States,91 and 90 percent of its citizens live within 100 miles of the border.92 It depends even more heavily than Mexico on a relatively open border.

The December 3, 2001 U.S.-Canada statement on migration called for: integrated border enforcement teams; coordination between federal, state and local law enforcement on both sides of border; coordinated gathering and dissemination of intelligence information; an attempt to synchronize visa waiver programs; and joint development of biometric identifiers for travel documents.93 The "smart border" declaration, signed the same day, includes a 30-step action plan designed to increase security and facilitate the lawful flow of legitimate goods and people.94

**MILITARIZATION OF THE BORDERS**

After U.S. Marines killed an 18-year-old U.S. citizen in Redford, Texas, the Department of Defense announced in early 1998 that it would cancel armed military patrols along the U.S.-Mexico border.95

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84 Id.
85 Id.
88 Interview with Nicole Crulick, INS Public Affairs Officer (June 20, 2002); W. King, "INS to Hire 6,000 Border Workers," *Associated Press* (April 22, 2002).
89 Immigration and Naturalization Service, "Executive Summary: The President's Fiscal 2003 Immigration Budget" (February 4, 2002).
90 See note 81 above.
93 The agreement calls for: preclearance programs; inspections where cargo is loaded; joint passenger analysis teams; development of secure cards with biometric identifiers; negotiated safe third-country agreements; infrastructure improvements; shared intelligence; and expanded joint enforcement activities. "Action Plan for Creating a Secure and Smart Border," available at <www.can-smg.ca/menus>
Troops have remained, however, to assist in noncombat projects like repairing and building walls, fences and roads, intelligence gathering, and aerial reconnaissance. Since that time, the “Joint Task Force-6” has also continued to coordinate counter-drug smuggling operations out of Fort Bliss.96

On September 25, 2001, the House adopted an amendment to the National Defense Authorization Act for FY 2002 that would have allowed the Secretary of Defense, upon a request by the Attorney General or the Secretary of the Treasury, to assign members of the armed forces to assist in preventing the entry of terrorists, drug traffickers, weapons, or illegal drugs.97 While this provision did not pass, support for an increased military presence on U.S. borders rose sharply following September 11th.98

On December 2, 2001, the Attorney General announced that 419 National Guard soldiers would be assigned to the U.S.-Canadian border.99 In February 2002, the Department of Defense agreed to place 734 national guard with the Customs Service and 824 with INS for six months, beginning March 8th.100 The soldiers will mostly support inspection functions at ports-of-entry (on the northern and southern borders) until INS and the Customs Service can hire and train new staff.

**INTERIOR ENFORCEMENT**

Under the administration's FY 2003 budget, funding for INS interior enforcement would grow next year by only $7 million, to $439 million.101 To supplement this modest increase, DOJ has considered a significant expansion of the role of state and local police in enforcing federal immigration law.102

By early 2002, DOJ had developed a sweeping legal opinion, which has not been released at this writing, that recognizes the “inherent” power of local police to enforce immigration law. The new opinion has a curious provenance. In November 2001, DOJ’s Office of Legal Counsel (“OLC”), by reports, had favorably reviewed OLC’s February 5, 1996 legal opinion on this same issue. The earlier OLC opinion concluded that: (1) if state law permits, state and local police can arrest and detain aliens who have committed immigration crimes, as opposed to civil infractions; (2) California law allows state police to enforce the criminal provisions of federal immigration law, but they cannot make a warrantless arrest for an immigration misdemeanor unless it occurs in their presence; (3) state police can detain carloads of suspected undocumented immigrants only if they have “reasonable suspicion,” defined as “objective, articulable facts suggesting the commission of a criminal offense by the person detained, rather than mere stereotypical assumptions, profiles, or generalities”; (4) state police can detain alien suspects for as long as 45 to 60 minutes, if necessary, to allow for the arrival of the Border Patrol; (5) transporting detained aliens to a Border Patrol office would generally be considered an arrest, and would require “probable cause”; and (6) state police can be deputized to perform federal enforcement functions.103

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96 U.S./Mexico Border Counties Coalition, “Illegal Immigrants in U.S./Mexico Border Counties Coalition: The Costs of Law Enforcement, Criminal Justice, and Emergency Medical Services” (February 2002) at 7.
100 NewsMax.com Wires, “U.S. Arms Some Border Guards” (March 27, 2002).
102 DOJ has long flirted with a more modest role for state and local police in enforcing immigration laws. Under INA § 287(g), the INS may contract with states to deputize state officers and employees, provided they receive proper training and supervision. The INS has also established “quick response teams” to work with state and local law enforcement officers to arrest and remove undocumented persons. Testimony of Acting Commissioner Kevin Rooney, Immigration and Naturalization Service, before the Judiciary Committee Subcommittee on Immigration and Claims (May 15, 2001).
By February 2002, OLC had reversed course. Certain states, by statute, allow their police to make arrests for federal immigration felonies, although not misdemeanors or civil infractions. Other states do not have laws that address this question. The new opinion apparently assumes from a state’s silence its tacit agreement to enforce federal law.

Opposition to this potential change has come from police departments, editorial boards, think tanks, academics, and politicians of every political stripe. By reports, a debate also rages on this issue within the Bush administration. Opponents argue that immigrants will not trust state and local police to report serious crimes, or even terrorist concerns, if this might lead to their deportation or the deportation of family members. Local enforcement of immigration violations would also divert police from their normal duties and might well lead to profiling of people who look or sound like immigrants.

On June 5, 2002, DOJ announced a plan that will require persons with “non-immigrant” visas from targeted countries and others who fit established profiles to be fingerprinted and photographed at the border, and to register and report to INS after 30 days, after 12 months, and in one-year increments thereafter. The names of those who fail to register will be entered in the NCIC database.

In announcing this initiative, the Attorney General averred that state and local police have “inherent authority” to arrest aliens “who have violated criminal provisions of the Immigration and Nationality Act or civil provisions that render an alien deportable, and who are listed on the NCIC.” However, he concluded that DOJ had “no plans to seek additional support from state and local law enforcement in enforcing our nation’s immigration laws, beyond our narrow anti-terrorism mission.” While cryptic and vague, this statement raised the possibility that DOJ had decided not to release its new legal opinion or to rely significantly on state and local police to enforce immigration laws.

105 Statement of John Ashcroft, Attorney General, “Prepared Remarks on the National Security Entry-Exit Registration System” (June 6, 2002).
106 Id.
IV.
ANTI-TERROR MEASURES

After September 11th, DOJ initiated a multifaceted investigation, involving the arrest and detention of select Middle Eastern and South Asian immigrants and “consensual” interviews with nonimmigrants from targeted countries. DOJ took these steps to investigate the September 11th attacks and to prevent future terrorist acts. The investigation’s secrecy has made it difficult to assess its effectiveness as an anti-terror tool. However, the “dragnet” arrests and the new powers assumed by the government since September 11th have raised extensive civil liberty concerns. In particular, the USA PATRIOT Act and a series of “interim” DOJ regulations have expanded the government’s authority to investigate and to detain noncitizens. The Bush administration also announced the creation of military tribunals and now holds at least two U.S. citizens in open-ended military custody, characterizing them as “enemy combatants.”

ANTI-TERROR ARRESTS AND DETENTION

DOJ responded to September 11th with a sweeping investigation designed primarily to disrupt and prevent planned terrorist attacks. The investigation ushered in a new form of detention, not primarily intended to assure the removal of persons in violation of immigration laws or to protect the public from dangerous individuals, or to dissuade the entry of others, but to secure information and to stem a broad-ranging terrorist conspiracy.

The investigation centered on roughly 1,200 Middle Eastern and South Asian immigrants. By early November, DOJ had arrested 1,147 noncitizens. By November 27, 2001, 548 remained in custody. Of these, 207 came from Pakistan, 74 from Egypt, 46 from Turkey, 38 from Yemen, 22 from Tunisia, 16 from Saudi Arabia, 15 from Jordan, and 15 from Morocco. Detainees have been held for months without a showing of probable cause or a charge. By June 2002, 104 were still detained. INS also detained and even refused to deport nationals from terrorist-producing countries who were in detention prior to September 11th. It also took back into custody asylum seekers and others from targeted countries who had been released prior to September 11th.

The post-September 11th detainees have suffered from the poor conditions that characterize the INS detention system. Like typical INS detainees, they have endured imprisonment in local jails, commingling with criminals, shackling, poor recreational opportunities, verbal and physical abuse, a one-size-fits-

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108 Id.
110 Post September 11 Detentions at 8.
111 W. Parry, “U.S. Secrecy on Detainees Upheld,” Associated Press (June 12, 2002).
114 Detainees in INS custody languish in dormitory-style rooms, up to 23 hours a day, with few educational, recreational or pastoral services. The INS warehouses most in local jails, far from family, legal counsel, and support services. Local jailers commingle immigrants with criminals who are awaiting trial or serving prison sentences. Frequent transfers make it difficult for detainees to obtain or to retain counsel. INS often pressures detainees to sign orders, which they do not understand, that stipulate to their own removal. Officials neglect to provide detainees with basic information about their status. Jailers often fail to provide religiously and culturally appropriate food. Medical care ranges from perfunctory to horrific. Released immigrants often test positive for tuberculosis. Jailers strictly limit visits by family members and legal counsel. Immigrants often abandon their legal claims to avoid further detention, only to remain detained for weeks and months afterwards. Guards harass and abuse detainees, particularly women, with few disciplinary consequences. Jailers use segregation punitively. Depression is pervasive. Hunger strikes and suicide attempts occur with regularity.
all diet, frequent transfers, problems with phone access and cost, few translators, and lack of legal counsel.\textsuperscript{115} One 55-year-old Pakistani national, charged with overstaying his nonimmigrant visa, died after five weeks in custody.\textsuperscript{116} In other ways, the “dragnet” detainees have been treated worse than other INS detainees, enduring prolonged solitary confinement, shackling, and abuse by guards and inmates.\textsuperscript{117} DOJ’s OIG has begun a review of detainee mistreatment, limited to the Passaic County Jail in Paterson, New Jersey and the Metropolitan Detention Center in Brooklyn, New York.\textsuperscript{118}

Many detainees signed waivers forfeiting their rights to contact their consulate, to contest their removal, and to secure counsel, under the mistaken belief that they would be allowed to leave the country quickly.\textsuperscript{119}

Secrecy has also characterized the treatment of post-September 11th prisoners. Particularly in the investigation’s first weeks, families, attorneys, and consulates could not locate those arrested, sometimes for weeks.\textsuperscript{120} Once located, jailers denied families and counsel access to detainees for extended periods of time.\textsuperscript{121} They also reportedly denied detainee requests to contact counsel.\textsuperscript{122} As stated, the investigation’s secrecy makes it difficult to judge its contribution to national security. Only one person, who INS arrested previously, has been charged with involvement in the September 11th terrorist plot. A few other detainees reportedly have terrorist ties.

Increasing the prisoners’ isolation and anonymity, DOJ has consistently refused to release their names and other basic information about them.\textsuperscript{123} After a New Jersey court interpreted state law to allow the release of information on detainees held in New Jersey, DOJ issued a rule to “clarify” that state and local prisons could not release information on federal detainees in their custody.\textsuperscript{124} A state appeals court held that the federal rule preempted and superseded the earlier state court ruling.\textsuperscript{125} When INS mistakenly turned over a list of detainees to the General Accounting Office, the Bush administration demanded that it be returned and not shared with Congress.\textsuperscript{126} GAO obliged. On October 12, 2002, the Attorney General warned all federal agencies and departments that “any discretionary decision . . . to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information” and after consultation with the relevant DOJ offices.\textsuperscript{127} The memorandum concluded that “[w]hen you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact. . . .”\textsuperscript{128}

A DOJ rule, issued on September 20, 2001, increased the permissible period of pre-charge detention for certain noncitizens from 24 to 48 hours, or for an undefined “reasonable period of time” in “an emergency or other extraordinary circumstances.”\textsuperscript{129} In practice, this rule has allowed detention without a

\textsuperscript{115} Post September 11 Detentions at 2, 18-23, 27-28, 36-39.
\textsuperscript{116} Human Rights Watch, “United States: Rights Group Denied Jail Access” (December 14, 2001).
\textsuperscript{117} Post September 11 Detentions at 28-34; R. Serrano, “Detainees Face Assaults, Other Violations, Lawyers Say,” Los Angeles Times (October 15, 2001).
\textsuperscript{120} Post September 11 Detentions at 5-7, 17-22.
\textsuperscript{121} Id. at 21-22.
\textsuperscript{122} Id. at 15-17.
\textsuperscript{123} Id. at 15.
\textsuperscript{124} Id. at 9.
\textsuperscript{125} 67 Fed. Reg. 19508 (April 22, 2002).
\textsuperscript{126} American Civil Liberties Union v. County of Hudson, et al., No. A-4100-01T5 (New Jersey Superior Court, June 12, 2002).
\textsuperscript{127} M. Valbrun and G. Fields, “GAO Surrenders List of Detainees Received from Immigration Agency,” Wall Street Journal (May 7, 2002).
\textsuperscript{128} Memorandum from John Ashcroft, Attorney General, to Heads of All Federal Departments and Agencies, “The Freedom of Information Act” (October 12, 2001).
\textsuperscript{129} Id.
\textsuperscript{130} 66 Fed. Reg. 48334 (September 20, 2001).
charge for weeks for many noncitizens arrested after September 11th.\textsuperscript{130} In one case, INS held a Saudi Arabian for 119 days without a charge.\textsuperscript{131}

Most of those arrested have not been held based on probable cause or individualized suspicion of involvement in terrorist activity, but in the hope that they might aid the ongoing investigation. In CLINIC’s experience, INS seems to be extending custody, under a variety of pretexts, so that investigators can pressure detainees for information on acquaintances who may or may not be in custody. Most detainees have been held for immigration violations and a smaller group have been charged with criminal offenses not related to terrorism.\textsuperscript{132} In one case, a Roman Catholic from the Ivory Coast has been held in 11 different prisons on a succession of grounds since his September 14th arrest.\textsuperscript{133} Recently, he was charged with making a false statement to a government investigator. The man allegedly claimed to be a resident alien, when in fact he had overstayed his visa.\textsuperscript{134}

Several detainees have been held for extended periods as “material witnesses.”\textsuperscript{135} Under the “material witness” statute, a person may be arrested, without probable cause that he or she has committed a crime, if the person’s testimony is “material in a criminal proceeding” and it “may become impracticable” to secure the person’s presence by a subpoena.\textsuperscript{136}

At least one federal court has found that this statute allows detention only in the pre-trial context, not during grand jury investigations.\textsuperscript{137} In that case, between his September 21st arrest and October 10th, a “dragnet” detainee had been transferred between several prisons, shackled, strip-searched, placed in solitary confinement, denied showers, prevented from calling anyone and (by appearances) physically abused. Ultimately, the government charged him with making a false statement before a grand jury, in circumstances that seemed to suggest a good-faith effort to provide accurate information. The court suppressed his grand jury testimony, finding that it had been the product of an unlawful seizure. “[S]ince 1789,” the court concluded, “no Congress has granted the government the authority to imprison an innocent person in order to guarantee that he will testify before a grand jury conducting a criminal investigation.”\textsuperscript{138} The government has appealed this decision.

Attorneys for the detainees have reported trouble in finding clients, high IJ bonds, and continued detention even of those who the FBI has no further interest in investigating.\textsuperscript{139} The INS regularly holds detainees beyond the dates set for their departure.\textsuperscript{140} This often occurs due to the opaque security “clearance” process.\textsuperscript{141} In one case, a Mauritanian waited more than four months for his voluntary departure to be processed.\textsuperscript{142}

DOJ has also identified significant numbers of cases that require special security procedures. On September 21, 2001, the Chief Immigration Judge notified IJs about these “special interest” cases.\textsuperscript{143} Subsequent instructions stipulated that “special” cases be handled only by judges with security clearances, that courtrooms be closed to visitors, family, and press, and that court personnel not discuss such cases or even confirm if they had been docketed.\textsuperscript{144}

\textsuperscript{130}Post September 11 Detentions at 10-11; D. Eggen, “Delays Cited in Charging Detainees,” Washington Post (January 15, 2002).
\textsuperscript{131}Id. at 11.
\textsuperscript{132}Id. at 8.
\textsuperscript{133}A. Goldstein, “U.S. Won’t Release or Deport Prisoner,” Washington Post (May 27, 2002).
\textsuperscript{134}Immigration advocates report increases since September 11th in criminal prosecutions for immigration violations, like the failure to depart, document fraud, and marriage fraud.
\textsuperscript{136}8 USC § 3144. Detention cannot continue if the testimony can be secured by deposition and if detention “is not necessary to prevent a failure of justice.” However, release “may be delayed for a reasonable period of time” until the witness can be Deposited.
\textsuperscript{138}Id.
\textsuperscript{140}Post September 11 Detentions at 5, 13-15.
\textsuperscript{141}Id. at 11-15.
\textsuperscript{142}Id. at 14.
\textsuperscript{143}Memorandum from Michael Creppy, Chief Immigration Judge, to All Immigration Judges, on “Cases requiring special procedures” (September 21, 2001).
\textsuperscript{144}Executive Office for Immigration Review, “Instructions for cases requiring additional security,” DETREQ-00314 (undated).
In April 2002, a federal court in Michigan enjoined the closure of a “special interest” hearing on First Amendment grounds, finding a “tradition of public and press accessibility to removal proceedings” and reasoning that “[o]penness is necessary for the public to maintain confidence in the value and soundness of the Government’s actions . . . .”145 The court also found that the asserted government interest – the alleged danger in disclosing the detainee’s name, date and place of arrest – was undermined by the fact that this information had already been made public and that the September 21, 2002 directive did not prevent “special interest” detainees, their families or counsel from disclosing this information.146 The government has appealed this decision.

In May, a federal court in New Jersey held that the “special interest” scheme violated the media’s First Amendment right to access (removal proceedings) because it did not require a particularized showing that a case’s closure advanced an important government interest.147 The court pointed out that current regulations allow IJs to close immigration proceedings, mitigating any harm that might be caused by enjoining an unconstitutional practice.148 The government has appealed this decision and it appears on a fast track to the Supreme Court.

On May 28, 2002, DOJ hedged its bets on the outcome of this litigation, issuing an interim final rule that allowed IJs to issue protective orders and to seal records that implicate national security and law enforcement issues.149 This rule has initially, at least, had the intended effect, leading an immigration court to close a bond hearing for a Lebanese national.150

**NONIMMIGRANTS AND “ABSCONDERS”**

On November 9, 2001, the Attorney General announced a plan to interview more than 5,000 men, ages 18 to 33, from select Middle Eastern and South Asian countries, who had entered the United States on nonimmigrant visas after January 1, 2000.151 According to the Attorney General, persons meeting these criteria “might have knowledge of foreign-based terrorists.”152 DOJ characterized these interviews as “consensual” and instructed the interviewers generally to “avoid mentioning the individual’s criminal exposure,” but to contact INS in the event of a suspected immigration violation.153 Of the 2,261 men interviewed as of March 2002, 20 had been arrested, most for alleged immigration violations and none on charges related to terrorism.154 In late March, DOJ announced plans to interview roughly 3,000 additional men, fitting the same profile, but who entered the United States after compilation of the original list.155

On January 25, 2002, DOJ announced plans to arrest and deport roughly 6,000 noncitizens from select nations, who had been ordered removed but who remained in the United States.156 Those targeted

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146*Id.*
1488 CFR §§ 3.37, 240.10(b).
152*Id.*
153Memorandum from the Deputy Attorney General, to All United States Attorneys, All Members of the Anti-Terrorism Task Forces, “Guidelines for the Interviews Regarding International Terrorism” (November 9, 2001).
155*Id.*
156Memorandum from The Deputy Attorney General, to the Commissioner of the Immigration and Naturalization Service, the Director of the Federal Bureau of Investigation, the Director of the U.S. Marshals Service, and United States Attorneys, “Guidance for Absconder Apprehension Initiative” (January 25, 2002).
came from a pool of 314,000 "absconders" whose names will be entered in the NCIC database.\textsuperscript{157} DOJ stipulated that "absconders" could be arrested for civil immigration violations (if INS participated in the arrest) or for "failure to depart," a federal felony.\textsuperscript{158} As of May 2002, less than 600 had been caught, none of them terrorists or their associates.\textsuperscript{159} On May 9, 2002, INS issued a proposed rule to require those subject to a final order of deportation to surrender to INS within 30 days.\textsuperscript{160} The rule denies various forms of relief from removal for 10 years (after departure or removal) to those failing to surrender, precludes them from filing motions to reopen, and subjects them to criminal prosecution.

After September 11th, INS offices also targeted visa overstayers. In San Diego, for example, INS arrested students who had violated the terms of their student visas, targeting nationals from Iran, Iraq, Sudan, Pakistan, Libya, Saudi Arabia, Afghanistan, and Yemen.\textsuperscript{161} On March 11, 2002, six months after the attacks, a Florida flight school received notice that the INS had approved temporary visa extensions for two of the September 11th terrorists. INS Commissioner Ziglar subsequently announced that INS would reduce the period of visitors’ visas from six months to 30-days, a change that will create additional work and backlogs for the INS. In fact, application processing in certain INS offices has come to a standstill and backlogs have increased, as INS struggles to master a new security database.\textsuperscript{162}

**THE USA PATRIOT ACT**

The USA PATRIOT Act expanded the security-related grounds for inadmissibility, removal (deportation), and mandatory detention. The Act bars from admission representatives of a "foreign terrorist organization" or of a group whose endorsement of terrorism undermines the U.S. anti-terror campaign.\textsuperscript{163} This includes persons who have used their "position of prominence" anywhere "to endorse or espouse terrorist activity, or to persuade others to support terrorist activity or a terrorist organization."\textsuperscript{164} The spouses and children of persons inadmissible on these grounds cannot be admitted if the terrorist activity occurred within the previous five years.\textsuperscript{165} However, there is an exception for a spouse or child who "did not know or should not reasonably have known" about the terrorist activity or who renounced it.\textsuperscript{166} The Act defines terrorist activity to include acts that would be unlawful under the laws of the countries where they were committed.\textsuperscript{167} The Act also bars from admission persons associated with terrorist organizations and those who intend to engage in activities that could endanger the United States’ "welfare, safety or security."\textsuperscript{168} It provides for the deportation of those who engage in "terrorist activity" after their admission to the United States.\textsuperscript{169}
The Act defines “engage in terrorist activity” to include incitement, planning, gathering information on targets, solicitation of recruits and funds,\textsuperscript{170} joining a terrorist organization,\textsuperscript{171} or committing an act that the “actor knows, or reasonably should know, affords [terrorists] material support.”\textsuperscript{172} The term “terrorist organization” encompasses organizations designated as such by the State Department or a group (two or more persons) that commits, incites to commit, prepares or plans, or gathers information for terrorist activity.\textsuperscript{173} The Act broadens the definition of organizations that can be designated as terrorist organizations, and revises the procedures for doing this.\textsuperscript{174}

Persons certified by the Attorney General to be suspected terrorists or terrorist supporters face mandatory detention. These include noncitizens who the Attorney General has “reasonable grounds to believe” can be barred or deported for terrorism or related activity.\textsuperscript{175} The Attorney General can “certify” noncitizens who are “engaged in any other activity that endangers the national security of the United States.”\textsuperscript{176}

The Act requires the Attorney General to charge a “certified” person with an immigration violation or a crime within seven days, or to release him or her.\textsuperscript{177} Such persons cannot be released prior to their removal.\textsuperscript{178} It provides that the Attorney General review his own certification decisions every six months,\textsuperscript{179} and allows habeas review of certification and detention decisions, with an appeal to the D.C. Court of Appeals.\textsuperscript{180}

\textbf{NEW REGULATIONS RELATED TO DETENTION}

Beyond the USA PATRIOT Act's detention provisions, DOJ has issued a state of interim final regulations related to detention. As discussed, a DOJ rule increased the period of pre-charge detention for certain noncitizens from 24 to 48 hours, or for “a reasonable period of time” in “an emergency or other extraordinary circumstances.”\textsuperscript{181} This open-ended detention need not be triggered by a terrorist threat. As discussed, the USA PATRIOT Act limited pre-charge detention to seven days for those certified by the Attorney General as national security risks or terrorists.\textsuperscript{182} In its original iteration, introduced a week after the attacks, the Act would have granted the Attorney General indefinite, pre-charge detention authority. In the circumstances, the rule can be viewed as an attempt by DOJ to arrogate to itself detention authority that Congress denied it.

On October 31, 2001, DOJ issued a regulation that allows greater restrictions to be placed on detainees who pose a national security risk, and allows for monitoring of attorney-client communications to prevent violence and terrorism.\textsuperscript{183} The Attorney General could previously impose administrative restrictions – like segregation, and limitations on visits, telephone use, and media access – on detainees who possessed information that might pose a national security risk.\textsuperscript{184} The rule lengthens the maximum

\textsuperscript{170}The Act offers an exception for those who solicit funds for (undesignated) terrorist organizations, if the alien "did not know" and "should not reasonably have known, that the solicitation would further the organization's terrorist activity." INA § 212(a)(3)(v)(IV)(cc).
\textsuperscript{171}An exception is available for those who recruited for a terrorist organization, if he or she "did not know, and should not reasonably have known" that the solicitation would further the terrorist activity. INA § 212(a)(3)(iv)(V)(cc).
\textsuperscript{172}INA § 212(a)(3)(B)(v).
\textsuperscript{173}INA § 212(a)(3)(B)(v).
\textsuperscript{174}8 USC § 219(a)(1) and (2).
\textsuperscript{175}INA § 236A(a)(3)(A).
\textsuperscript{176}INA § 236A(a)(3)(B).
\textsuperscript{177}INA § 236A(a)(3)(B).
\textsuperscript{178}INA § 236A(a)(3)(B).
\textsuperscript{179}INA § 236A(a)(3)(B).
\textsuperscript{180}INA § 236A(a)(3)(B).
\textsuperscript{181}66 Fed. Reg. 48334 (September 20, 2001).
\textsuperscript{183}66 Fed. Reg. 55062 (October 31, 2001).
\textsuperscript{184}28 CFR § 501.2(a).
The period of these restrictions to one year (from 120 days) and allows one-year extensions.\textsuperscript{185} It also extends the authority to authorize these restrictions to appropriate INS and other DOJ officials, no longer just to the Director of the Bureau of Prisons.\textsuperscript{186}

By regulation, the Attorney General enjoys parallel authority to place “special restrictions” on detainees to prevent violence and terrorism.\textsuperscript{187} The new rule increases the maximum initial period and subsequent extensions of “special” restrictions to one year (from 120 days), and also extends to the appropriate INS and DOJ officials the authority to authorize these restrictions.\textsuperscript{188}

The rule also allows for monitoring of attorney-client communications to deter “future acts that could result in death or serious bodily injury . . . or substantial damage to property.”\textsuperscript{189} To trigger this provision, the Attorney General must simply declare that “reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism.”\textsuperscript{190} Written notification of monitoring must be provided to the detainee and his or her attorneys.\textsuperscript{191} The regulation creates “privilege teams,” comprised of officials not involved in the terrorism investigation, to assure the nondisclosure of information, unless “acts of violence or terrorism are imminent” or a federal judge approves.\textsuperscript{192}

On October 31, 2001, DOJ issued an interim rule that allows INS to stay IJ release decisions if the INS initially decided against release on bond or set a bond of $10,000 or more.\textsuperscript{193} Under prior regulations, IJ release decisions were automatically stayed only in mandatory detention cases based on criminal, national security or terrorist grounds in which the INS denied release or set a bond of $10,000 or more.\textsuperscript{194}

\textbf{MILITARY TRIBUNALS}

On November 13, 2002, the Bush administration ordered the creation of military tribunals to try designated noncitizens.\textsuperscript{195} The order concluded that terrorists had created a state of armed conflict, that the rules of evidence governing criminal trials could not practicably be provided in military cases, and that “an extraordinary emergency” required the establishment of military tribunals.\textsuperscript{196} The order is not limited to noncitizens captured in a “zone of combat,”\textsuperscript{197} but extends to those who have participated in, aided or abetted, or conspired to commit terrorist acts, or who have “knowingly harbored” such persons.\textsuperscript{198} Persons tried in military proceedings would face penalties, including life imprisonment and death.\textsuperscript{199} The order precludes remedies, proceedings, or appeals outside a tribunal’s jurisdiction.\textsuperscript{200}

\begin{itemize}
  \item \textsuperscript{185}28 CFR § 501.2(c).
  \item \textsuperscript{186}28 CFR § 501.2(c).
  \item \textsuperscript{187}28 CFR § 501.3(a).
  \item \textsuperscript{188}28 CFR §§ 501.2(c), 501.3(c).
  \item \textsuperscript{189}28 CFR § 501.3(d).
  \item \textsuperscript{190}Id.
  \item \textsuperscript{191}28 CFR § 501.3(d)(2).
  \item \textsuperscript{192}28 CFR § 501.3(d)(3).
  \item \textsuperscript{193}66 Fed. Reg. 54909 (October 31, 2001).
  \item \textsuperscript{194}Former 8 CFR § 3.190(d)(2).
  \item \textsuperscript{195}"Military Order of November 13, 2001," 66 Fed. Reg. 57833 (November 16, 2001) [hereinafter "Military Order"].
  \item \textsuperscript{196}Id. §§ 1(a), 1(f), 1(g).
  \item \textsuperscript{197}Insatiable Appetite at 7.
  \item \textsuperscript{198}"Military Order," § 2(a)(1).
  \item \textsuperscript{199}Id. § 4(a).
  \item \textsuperscript{200}Id. § 7(b).
\end{itemize}
On March 21, 2002, the Secretary of Defense issued an order that outlined the procedures for military commissions and trials.\textsuperscript{201} The order provided that: only military personnel would serve as commission members (judges), prosecutors or defense attorneys; persons before the commission(s) would be presumed innocent; the accused could put on evidence, elect to testify (or not), and cross-examine witnesses; trials could be closed in certain cases; it would take a two-thirds vote to convict and to sentence, except that a death sentence would require a unanimous vote; only the President or (if designated) the Secretary of Defense could finalize a finding of guilt or a sentence.\textsuperscript{202} To date, the Secretary of Defense has not appointed a military commission and nobody has been designated for military proceedings, including Zacarias Moussaoui, the one person charged with participation in the September 11th terrorist conspiracy.

At least two U.S. citizens, however, have been placed in open-ended military custody as “enemy combatants.” Yasser Esam Hamdi, captured in Afghanistan, and Jose Padilla, caught in the United States for allegedly plotting to detonate a “dirty bomb,” have been held incommunicado, without being charged or provided access to counsel.\textsuperscript{203} These cases exemplify how U.S. anti-terror efforts have impinged on the civil rights even of U.S. citizens. The Bush administration has asserted broad authority to declare anyone an “enemy combatant,” to detain them indefinitely (without a charge), and to deny them judicial recourse.

\textsuperscript{201}Department of Defense, “Military Commission Order No. 1” (March 21, 2002).
\textsuperscript{202}Id.
V. POST-SEPTEMBER 11TH DETENTION DEVELOPMENTS

The administration’s response to September 11th has placed pressure on the INS’s detention system, which has long been troubled. In recent months, there have been significant legal and policy developments related to indefinite detainees, mandatory detainees, and Haitians. Most have not resulted directly, if at all, from the terrorist attacks. The administration has also signaled its abandonment of a process to establish standards governing the treatment of migrants throughout North and Central America.

BACKGROUND

The 1996 Immigration Act mandated the confinement of: virtually every immigrant in removal proceedings on criminal and national security grounds;\(^\text{204}\) asylum seekers at the border who lack proper travel documents until they can demonstrate a “credible fear” of persecution;\(^\text{205}\) persons seeking admission to the United States who appear inadmissible for other than document problems;\(^\text{206}\) and persons ordered removed for 90 days or for longer in some circumstances.\(^\text{207}\)

The 1996 Immigration Act and the Anti-terrorism and Effective Death Penalty Act of 1996 (“AEDPA”)\(^\text{208}\) expanded the crimes for which immigrants could be removed and limited their ability to challenge removal based on equitable ties to the United States, including U.S. families. Since 1996, long-term, lawful permanent residents, with U.S. citizen spouses and children, steady jobs, and no ties to their countries of birth, have regularly been deported for minor crimes that they committed many years in the past. One category of crimes that triggers removal and mandatory detention — “aggravated felonies” — encompasses offenses like document fraud, perjury, money laundering, tax evasion, shoplifting, receipt of stolen property, obstruction of justice, smuggling family members (in some cases), certain gambling offenses, and illegal re-entry following removal for an “aggravated felony.”\(^\text{209}\)

The INS has consistently failed to meet the statutory reporting requirements on detention set for it in 1998.\(^\text{210}\) In May 2001, INS was holding more than 19,000 detainees per night, a three-fold increase since 1996 and a figure that has certainly grown in the interim.\(^\text{211}\) The INS detention population includes petty offenders who have served their criminal punishments, unaccompanied children, persons ordered removed whose countries will not accept their return, persons with claims to U.S. citizenship, torture survivors, and those fleeing persecution.

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\(^{204}\)INA § 236(c)(1).

\(^{205}\)INA § 235(b)(1)(B)(iii)(IV).

\(^{206}\)INA § 235(b)(2)(A).

\(^{207}\)INA § 241(a)(2).


\(^{209}\)INA § 101(a)(43).


In recent years, a network of local governments, for-profit prisons, and prison contractors has emerged with a financial self-interest in the INS detention system. Localities and for-profit prisons benefit handsomely from INS contracts for detention beds. Contractors, like phone companies, enjoy predatory pricing arrangements.

Under current law, thousands of immigrants in INS custody could be released under supervision. In addition, the law’s “mandatory detention” provisions could be satisfied through home detention and other alternative forms of custody. Yet, INS has refused to adopt effective “alternative-to-detention” (supervised release) programs or to explore cost-effective alternative forms of detention (like home detention enforced through electronic monitoring).212 In May 2002, INS announced its decision to divert $3 million appropriated for “alternatives-to-detention” to expansion of its detention capacity. After years of advocacy and successful model “alternative-to-detention” programs, the INS has opted to increase detention bed space, rather than release (under strict supervision) people that represent neither a threat nor a flight risk.

**INDEFINITE DETENTION**

In *Zadvydas v. Davis*, long-term U.S. lawful permanent residents, who could not be removed because no country would accept them, challenged their indefinite detention. The Immigration and Nationality Act provides that immigrants ordered removed “may be detained” past a 90-day removal period if the Attorney General determines that they would be a flight risk or a danger.213 In a five-to-four decision, the court interpreted this language to allow detention for only “a period reasonably necessary” to remove the detainee.214 It found that, following a final removal order, six months represented a “presumptively reasonable period of detention.”215 After six months, the detainee must offer “good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future.”216 If he or she can meet this burden, the government must either release the detainee, or continue his or her detention by showing that removal will occur in the “foreseeable future.”217

The court decided the case based on a statutory interpretation to avoid having to invalidate it on due process grounds. In considering the possible “non-punitive” government interests served by detention, the court judged the risk of flight “weak or nonexistent” since removal could not be effected.218 While conceding possible dangerousness, it held that punitive detention could be upheld “only when limited to specially dangerous individuals and subject to strong procedural protections” and that the Constitution “may well” preclude affording an administrative body unreviewable authority over decisions that implicate fundamental rights.219

The court acknowledged the distinction between migrants caught prior to entering the United States (who have no constitutional rights as relate to immigration) and those who have legally entered (who have constitutional rights). However, it rejected the government’s argument that post-order detention could be equated, as a matter of constitutional law, with pre-entry detention.220

The court found that the government’s broad power over immigration could not be implemented through indefinite detention.221 It distinguished the petitioners (lawful permanent residents with crimi-
nal records) from cases involving "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."222

Shortly after the decision came down in July 2001, the Attorney General issued an instruction that narrowly, if not defiantly, interpreted the case. He argued that the court had "made it clear" that the decision did not apply to detainees caught at the border or prior to having made a legal entry.223 This encompasses nearly half of all indefinitely detained immigrants, including Mariel Cubans and others caught trying to enter. The instruction also placed the burden on the detainee to request release and to demonstrate that his or her removal was not "reasonably foreseeable."224 It provided for continued custody based on "special circumstances" for certain detainees whose removals were not "reasonably foreseeable."

On November 14, 2001, DOJ issued an interim rule to implement Zadvydas v. Davis. The rule mirrored the earlier DOJ instruction.225 It repeated DOJ's position that Zadvydas did not apply to "arriving aliens."226 Subsequent district court decisions have rejected this interpretation, finding that Zadvydas necessarily applies to "arriving aliens" since it turns on a reading of a statute that covers them.227

The DOJ rule also provides that the INS need not release a detainee until the six-month period ends.228 It treats the removal period, which the Supreme Court identified as "presumptively reasonable," as a floor. During this period, INS must determine if there is "a significant likelihood of removal in the reasonably foreseeable future."229

If INS decides that the detainee has not made adequate efforts to effect his or her removal, it will notify the detainee of what he or she must do to comply.230 Until the detainee responds, INS will not consider the release request. The rule excludes from the custody review process those: (1) with highly contagious diseases; (2) whose release would raise "serious foreign policy concerns"; (3) who cause "national security and terrorism concerns"; and (4) who are "specially dangerous due to a mental condition or personality disorder."231 Detainees denied release can make a new request after six months or on a showing of "materially changed circumstances."232

For the last several years, CLINIC has monitored the custody review process(es) for indefinite detainees. In its most recent monitoring report, it found several problems.233 Among them, INS refused to release certain noncitizens whose removal it incorrectly claimed was "imminent" or "reasonably foreseeable." The Chinese government, for example, wrote that it would not accept the return of U.S. lawful permanent residents, yet several Chinese nationals in this status (including one who has been detained for three years) remain in custody. In Pennsylvania, a Jordanian woman has been detained for five years, although the Jordanian Embassy said it would not allow her back. A Sudanese man has been detained for 31 months, but INS continues to deny release, offering boilerplate language that he will "be removed in the reasonably foreseeable future."

222 Id. at 2502.
224 Id. at 38434.
226 Id. at 56968-56969.
228 8 CFR § 241.13(b)(2).
229 Id.
230 8 CFR § 241.13(a)(2).
231 8 CFR §§ 241.14(a) and (d).
232 Id.
In other cases, the custody review process operates as a sham. A Nigerian in Louisiana, for example, received notice on July 30, 2001 that his custody would be reviewed. The same day, he received a letter stating that his request for release had been denied. In Los Angeles, INS officials asked two Cambodian and one Vietnamese indefinite detainees to write (undated) letters stating that they wanted to stay in detention.

The INS has also denied release in several cases on the grounds that the detainee has not proven that he or she took “measures to facilitate” removal. In the past, the INS has always approached consulates for travel documents with signed requests by detainees. It now puts the burden on detainees to obtain basic documents as a precondition for a custody review. These include copies of nationality documents, correspondence with countries regarding removal, and responses from embassies, consulates and governmental offices regarding requests for travel documents. Additional evidence must be provided if the detainee argues that removal will not be possible in the reasonably foreseeable future.

The INS also continues to detain, often for several weeks, indefinite detainees who have been approved for release. Often, this occurs because of INS conditions of release. In New Orleans, the INS has tried to force INS detainees to attend “boot camp” prior to release. The New Orleans office has also failed to forward the files of indefinite detainees to INS headquarters for custody reviews. In other cases, INS has refused to grant work authorization to detainees prior to their release, consigning them to weeks of unemployment.

MANDATORY DETENTION

Over the last year, three Circuit Courts have held that mandatory detention violates substantive due process norms.\(^{234}\) Substantive due process protects against violations of “fundamental liberty interests” or government action that “shocks the conscience.” The courts relied on the substantive due process test enunciated in United States v. Salerno.\(^{235}\) Under Salerno, a substantive due process violation can be established upon a finding that: 1) Congress intended the restriction to constitute a “punishment”; 2) no “alternative purpose” can be assigned it; or 3) it is “excessive” in relation to the legitimate goal it seeks to further.

Each court held that detention, without the possibility of bond, implicates a fundamental liberty interest, and constitutes an excessive means to accomplish the legitimate government goals of protecting the community and preventing detainee flight. Each held that due process requires individual hearings on these issues. Each criticized the one circuit court decision that upheld the constitutionality of mandatory detention.\(^{236}\) In Parra v. Perryman, the court held that persons in pending removal proceedings did not enjoy a substantial liberty interest since they were, in effect, “no longer entitled to remain.”\(^{237}\) This position has subsequently been eviscerated by Zadvydas, which held that even persons ordered removed retain a fundamental liberty interest.

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\(^{234}\) Patel v. Zemski, 275 F.3d 299 (3d Cir. 2002); Kim v. Ziglar, 276 F.3d 523 (9th Cir. 2002); Hoang v. Comfort, 282 F.3d 1247 (10th Cir. 2002).


\(^{236}\) Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999).

\(^{237}\) Id. at 958.
DETENTION TO DETER

In its history, the United States has often detained individuals to deter others from seeking admission to the country. This strategy has typically been employed in response to perceived threats of large-scale or emergency migrations. Recently targeted groups have included Haitian boat people in the early 1980s and Chinese nationals after the freighter Golden Venture ran aground several hundreds yards off a Brooklyn, New York beach on June 3, 1993. Detention-to-deter flies in the face of international standards that disfavor detention for asylum seekers and that require individual custody determinations.

On December 14, 2001, 11 days after the Coast Guard rescued 167 Haitian boat people and following a period of significant increases in Haitian interdictions, the Bush administration returned to this discredited policy and ordered that no arriving Haitians should be released without the approval of INS headquarters. The order covered even Haitians determined to have a “credible fear” of persecution. In April 2002, the INS slightly relaxed this policy to allow for case-by-case release decisions for Haitians “arriving by regular means” who had established a “credible fear.” By mid-May, the INS reportedly detained 270 Haitians. Many had been held for months.

On April 15, 2002, the United Nations High Commissioner for Refugees (“UNHCR”) issued an advisory opinion that restated established law on this practice. It averred that asylum seekers should be detained only in narrow circumstances, where strictly necessary. It pointed out that detention diminishes the likelihood of obtaining counsel and causes suffering for those who have previously been imprisoned and tortured. The opinion concluded that detention-to-deter subverts the right to seek asylum and the right to liberty and, under international law, can be considered arbitrary and discriminatory.

REGIONAL STANDARDS

In 1996, the United States, Canada, Mexico, the Central American countries, and the Dominican Republic established the Regional Conference on Migration (RCM), known as the “Puebla Process,” to improve communication and to work toward cooperative agreements on migration. In recent years, non-governmental organizations (“NGOs”) have promoted a campaign to set nonbinding guidelines by RCM member nations regarding the arrest, detention, deportation, and reception of migrants. The proposed guidelines provide for basic human and due process rights. Prior to September 11th, their adoption seemed likely. In early 2002, U.S. government officials informed NGO representatives that the United States had little interest in committing itself to regional standards for migrant protection. The officials said that they needed leeway, following September 11th, to accommodate changes in migration policy from the administration.

238Declaration of Peter Michael Becraft, INS Acting Deputy Commissioner (March 18, 2002), in In re Canedy et al., Case No. 2:02-CIV-01236 (S.D. Fla., dismissed May 17, 2002).
239Memorandum from Johnny Williams, INS Executive Associate Commissioner, Office of Field Operations, “Parole of Haitians Arriving by Regular Means at a Designated Port of Entry in South Florida” (April 5, 2002).
241Letter from Guenri Guebre-Christos, UNHCR Regional Representative, to Rebecca Sharpless, Florida Immigrant Advocacy Center (April 15, 2002).
The Center for Migration Studies is an educational, nonprofit institute founded in New York in 1964 to encourage and facilitate the study of sociodemographic, economic, political, historical, legislative, and pastoral aspects of human migration and refugee movements. The opinions expressed in this work are those of the author.

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MIGRANTS, BORDERS, AND NATIONAL SECURITY: U.S. IMMIGRATION POLICY SINCE SEPTEMBER 11, 2001

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