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and the Future of North American Integration**

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IMMIGRATION REFORM, NATIONAL SECURITY AFTER SEPTEMBER 11,
AND THE FUTURE OF NORTH AMERICAN INTEGRATION

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Ostensibly to meet the challenge of terrorism after September 11, 2001 but also to soothe the nerves of a tense public, the legal terrain surrounding what can be done in the name of national security changed dramatically in the United States over the last five years. Government, and the public, quickly became ready and willing to trade off civil rights – especially those of minorities – in the hopes of improving public safety. Passed with almost unanimous support in Congress, the USA PATRIOT Act,¹ for example, allows for greater intrusion on Americans’ civil rights by, among other things, expanding the electronic surveillance powers of government. In addition, President Bush pushed the civil rights envelope with aggressive policies directed at Arabs and Muslims that, on several occasions, a conservative Supreme Court rejected outright.²

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¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001). For criticism, see, for example, David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 966-74 (2002); Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1111-28 (2002). After much debate, see Jonathan Weisman & Jeffrey H. Birnbaum, *A Tame End to Patriot Act Debate*, WASH. POST, Mar. 7, 2006, at A15, Congress reauthorized a watered down version of the USA PATRIOT Act, see USA PATRIOT Improvement and Reauthorization Act, Pub. L. No. 109-177, 120 Stat. 192 (2006).

² See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (holding that military tribunals created by Bush administration violated the law); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (ruling that U.S. citizen held as “enemy combatant” had right to hearing to challenge that classification); see also *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (finding that court in which action was filed lacked jurisdiction over defendant to entertain challenge to detention of U.S. citizen classified as “enemy combatant”); *infra* text accompanying notes 36-81 (outlining policies adopted by Bush administration in the “war on terror”). The various anti-terror

With few legal constraints and considerable deference from the courts, immigration law and policy quickly emerged as ground zero in the so-called “war on terror” declared by the Bush administration.³ By many accounts, the measures unnecessarily sacrificed civil rights of noncitizens – and, in certain instances, citizens.⁴ Each year, deportations rose to record levels as the U.S. government annually removed from the country hundreds of thousands of noncitizens – almost all of whom had nothing whatsoever to do with terrorism.⁵ The policies forever changed the lives of thousands of people and their families and friends.

Today it may seem hard to believe, but shortly before September 11, 2001, after much lobbying by immigrant rights advocates, the U.S. Congress had been seriously considering possible liberalization of the immigration laws. “The events of [that day] brought immigration reform to an abrupt halt. Instead of legalization of undocumented workers and reconsideration of the restrictive nature of the 1996 immigration laws, Congress responded six weeks after the attacks with the passage of the USA PATRIOT Act.”⁶ This commenced a long hiatus in the discussion of positive immigration reform as the general public sought to seal the borders.⁷

Only several years after September 11 did the United States again seriously consider much more mundane, and longstanding, issues of immigration reform, particularly the issue of undocumented immigration from Mexico. Those new reform discussions, however, were the mirror image of the ones taking place before September 11. Attention centered not on

measures represented a “new paradigm . . . of prevention,” that is affirmatively seeking to stop terrorism before it is perpetrated. Jules Lobel, *The Preventative Paradigm*, 91 MINN. L. REV. (at 1 of draft) (2007).

³ See *infra* text accompanying notes 36-81.

⁴ See *infra* text accompanying notes 36-81.

⁵ See *Michael Chertoff Holds a Briefing on the Secure Border Initiative*, CQ TRANSCRIPTIONS (Aug. 23, 2006) (offering estimate that the U.S. government would engage in a record number of removals for the year).

liberalizing the immigration laws in any way but on taking steps in an effort to tighten the border, remove undocumented immigrants from the country, and generally restrict access to foreign nationals to the United States.

In March 2006, the Pew Hispanic Center estimated that between 11.5 and 12 million undocumented immigrants lived in the United States, more than half of whom were of Mexican origin.⁸ This represented more than double the approximately five million undocumented immigrants in the country when the U.S. government began in the early 1990s to greatly ramp up border enforcement through a series of military-style operations.⁹ This fact bears repeating: A dramatic *increase* in the undocumented immigrant population followed the largest enforcement build-up of the U.S./Mexico border in history.¹⁰ Put simply, if one measures the effectiveness of border enforcement by the size of the undocumented population in the United States, greatly

⁷ See *infra* text accompanying notes 127-67.

⁸ See JEFFREY S. PASSEL, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. (Pew Hispanic Center, Mar. 7, 2006) (estimating that, as of March 2006, the undocumented immigrant population in the United States at between 11.5 and 12 million).

⁹ See U.S. DEP'T OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION & NATURALIZATION SERVICE 200 (1999) (Table N). For a sampling of literature analyzing the deadly impacts of the U.S. government's increased border enforcement measures, see TIMOTHY J. DUNN, THE MILITARIZATION OF THE U.S.-MEXICAN BORDER, 1978-1992: LOW INTENSITY CONFLICT DOCTRINE COMES HOME (1996); KARL ESCHBACH, JACQUELINE HAGAN, & NESTOR RODRIGUEZ, CAUSES AND TRENDS IN MIGRANT DEATHS ALONG THE U.S./MEXICO BORDER, 1985-1998 (2001); JOSEPH NEVINS, OPERATION GATEKEEPER (2002); Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy*, 27 POPULATION & DEV. REV. 661 (2001); Karl Eschbach et al., *Death at the Border*, 33 INT'L MIGRATION REV. 430 (1999); Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121, 123 (2001); Guillermo Alonso Meneses, *Human Rights and Undocumented Migration in the Mexican-U.S. Border*, 51 UCLA L. REV. 267 (2003); Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 SAN DIEGO INT'L L.J. 1 (2001).

¹⁰ See BELINDA I. REYES ET AL., HOLDING THE LINE? THE EFFECT OF THE RECENT BORDER BUILD-UP ON UNAUTHORIZED IMMIGRATION, at viii, xii (Public Policy Institute of California, 2002).

enhanced border enforcement has failed.¹¹

Many observers agree that the current immigration system is seriously broken and needs to be fixed. The problems and remedies identified by the principals to the national debate, however, diverge dramatically in kind and purpose. Restrictionists alarmed by undocumented immigration play unabashedly on fears of terrorism in insisting upon greater border enforcement and tough treatment of undocumented immigrants.¹² Those advocating on behalf of immigrants demand fairer treatment of immigrants including, for example, the regularization of the immigration status of undocumented immigrants; put differently, they advocate a new amnesty program, such as the one passed by Congress in 1986.¹³

Unfortunately, the national security fears that have gripped the United States since September 11 have tended to drive the most popular reform proposals toward extreme enforcement-oriented policies.¹⁴ Proposals floated in the 109th Congress included border fences, making the mere status of being undocumented a felony, and other harsh measures.¹⁵ Groups like the Minuteman Project,¹⁶ a relatively small movement that received an extraordinary amount

¹¹ Absent the new border operations, the undocumented immigrant population might have grown even more. Nonetheless, at best, the measures only somewhat dampened the growth in the population and, because they resulted in thousands of deaths, *see supra* note 9 (citing authorities), are difficult to justify.

¹² *See infra* text accompanying notes 127-67.

¹³ *See* Immigration Reform and Control Act § 201, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (adding Immigration & Nationality Act § 245A, 8 U.S.C. § 1255a); *see also* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 607-10 (4th ed. 2005) (describing amnesty program).

¹⁴ *See infra* text accompanying notes 127-67.

¹⁵ *See* Nicole Gaouette, *Senate Toughens Border Stand, Approves Miles of New Fence*, L.A. TIMES, May 18, 2006, at A1. In the end, after much acrimony and lengthy debate over 2005-06, Congress failed to enact any comprehensive immigration reform proposal and agreed only to enact a law authorizing the extension of the fence along the United States's southern border with Mexico. *See* Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006).

¹⁶ *See* Leo R. Chavez, *Spectacle in the Desert: The Minuteman Project on the U.S.-Mexico*

of press coverage,¹⁷ supported those and even tougher policies; at times, the Minutemen themselves patrolled the border in search of undocumented immigrants. In contrast, in the spring of 2006, immigrant supporters took to the streets by the tens of thousands in protest of the harsh enforcement-only approach embraced by a bill passed by the U.S. House of Representatives.¹⁸

This article critically examines how national security concerns have come to dominate – inappropriately in our view – the much-needed debate over comprehensive immigration reform.¹⁹ This article specifically contends that the security concerns that animated the conduct of the U.S. government after the horrible events of September 11, 2001, later distorted the debate over reform of the immigration laws.²⁰ When it comes to immigration reform, the myopic fixation with security and the so-called “war on terror,” has made it next to impossible for law- and policy-makers to see the forest through the trees. This is most unfortunate because serious meaningful reform of the U.S. immigration laws is long overdue.²¹

Border, in GLOBAL VIGILANTES: ANTHROPOLOGICAL PERSPECTIVES ON JUSTICE AND VIOLENCE (David Pratten & Atreyee Sen eds, forthcoming 2006); Peter Yoxall, Comment, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIAMI INTER-AM. L. REV. 517 (2006).

¹⁷ See, e.g., Charlie LeDuff, *Poised Against Incursions, A Man on the Border, Armed and Philosophical*, N.Y. TIMES, Aug. 14, 2006, at A1 (profiling one of the Minutemen patrolling the southern U.S. border with Mexico).

¹⁸ See Teresa Watanabe & Hector Becerra, *500,000 Pack Streets to Protest Immigration Bills*, L.A. TIMES, Mar. 26, 2005, at A1 (Los Angeles); Mark Johnson & Linda Spice, *Thousands March for Immigrants*, MILWAUKEE J. SENTINEL, Mar. 24, 2006, at A1 (Milwaukee); Nathaniel Hoffman, *Protest Supports Illegal Workers*, CONTRA COSTA TIMES, Mar. 22, 2006 (San Francisco); Oscar Avila & Antonio Olivo, *A Show of Strength: Thousands March to Loop for Immigrants' Rights*, CHI. TRIB., Mar. 11, 2006, at A1 (Chicago).

¹⁹ See BILL ONG HING, *DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY* 140-63 (2006); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Sovereignty*, 39 CONN. L. REV. (forthcoming 2007).

²⁰ See *infra* text accompanying notes 127-67.

²¹ This is evidenced by the fact that both the House and Senate passed immigration reform legislation in 2005-06. See, e.g., Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H. Rep. 4437, 109th Cong., 1st Sess. (2005); Comprehensive Immigration

If the U.S. government embraces more border enforcement without considering other policy goals, it would not be the first time that fear has triggered the adoption of tough immigration policies of dubious propriety. Economic insecurity inflamed by racism contributed to the passage of the infamous laws excluding Chinese immigrants from the United States in the late 1800s.²² The Red Scare following World War I, combined with racial anxieties, led Congress to create a discriminatory national origins quota system in 1924.²³ In the 1950s, the Cold War brought the nation politically-motivated and ideologically-driven detentions and deportations of noncitizens loosely suspected of Communist sympathies.²⁴ In 1996, in response to the bombing of the federal building in Oklahoma City perpetrated by U.S. citizens, which, strangely enough, fueled fears of *foreign* terrorism, Congress passed two punitive immigration reform laws²⁵ that went well beyond having anything to do with terrorism; these reforms

Reform Act of 2006, S.B. 2611, 109th Cong. 2d Sess (2006).

²² See RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* 110-11 (rev. ed. 1998); ALEXANDER SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 177-78* (1971); see, e.g., *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889) (upholding one of a series of laws excluding immigrants from China).

²³ See JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925*, at 222-33 (3d ed. 1994).

²⁴ See Kevin R. Johnson, *The Antiterrorism Act, The Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons For Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833, 850-60 (1997); see, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (finding the U.S. government could indefinitely detain a long-term lawful permanent resident based on secret evidence – later found to be insufficient to justify exclusion – that he was a danger to the national security); *Galvan v. Press*, 347 U.S. 522 (1952) (sanctioning the removal of long-term lawful resident on account of membership in organization classified as “communist” by the U.S. government); *Harisiades v. Shaughnessy*, 342 U.S. 58 (1952) (upholding deportation of three former Communist party members); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (declining to disturb the U.S. government’s refusal to allow an alien to come to United States to be with her U.S. citizen spouse based on secret evidence – later found to be insufficient to justify exclusion – that she was a danger to national security).

²⁵ See *Illegal Immigration Reform and Immigrant Responsibility Act*, Pub. L. No. 104-208,

punished immigrants convicted of ordinary criminal offenses through detention and harsh new removal grounds with numerous stringent limitations on judicial review of the Executive Branch's immigration decisions. Characterized as "radical" by immigration moderates,²⁶ many, if not most, informed observers see these measures as unfair, ill-advised, and counterproductive.²⁷

Part I of this article analyzes the U.S. government's scatter-shot attempts in the years since September 11 at improving national security by tightening the immigration laws and increasing border enforcement.²⁸ Besides being overbroad, under-inclusive, and, in many instances, grossly unfair, the measures appear to have done little to truly improve the security of the United States but have done much to alienate the very communities whose help is desperately needed to effectively protect national security in modern times.²⁹

Part I further discusses how both Canada and Mexico responded individually to September 11 and worked with the United States on various anti-terrorism measures. Although a certain amount of regional cooperation followed the tragic events of September 11, not nearly enough was done to truly improve the overall security of North America as a region.³⁰ A safer North America will require future cooperation between the United States, Canada, and Mexico.

110 Stat. 3009 (1996); Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

²⁶ PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS* 143 (1998) (characterizing the 1996 reforms as "the most radical reform of immigration law in decades—or perhaps ever").

²⁷ See, e.g., Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889 (2000); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reform and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).

²⁸ See *infra* text accompanying notes 36-81.

²⁹ See *infra* text accompanying notes 36-81.

³⁰ See *infra* text accompanying notes 127-67.

Part II of the article demonstrates how the “war on terrorism” has distorted the recent national debate over immigration reform.³¹ Security concerns have made it nearly impossible to have a rational discussion of changes to immigration law and policy necessary to fulfill important economic, political, and social goals of the United States. In no small part due to the “close the borders” mentality fostered by September 11, more and more border enforcement has increasingly been the only item of consensus in Congress when it comes to immigration reform.³² However, a focus on border enforcement, to the exclusion of other important policy goals, is short sighted.³³ The United States requires more realistic laws that better comport with the economic, political, and social realities of modern immigration.³⁴ A truly multifaceted and comprehensive approach to immigration reform, more far-reaching than any contemplated by the U.S. Congress in recent memory, is needed to bring the nation’s immigration laws in line with its various needs in the twenty-first century.

This article contends that immigration reform in the United States, coupled with multilateral efforts to address migration and national security concerns, are necessary to begin the overhaul of the immigration laws and their enforcement. Specifically, the United States, Canada, and Mexico, the parties to the North American Free Trade Agreement, must work together on issues of migration and regional security. In the end, a more integrated North America, with freer movement of labor than that what currently exists, likely would be a safer continent than it is today. Unfortunately, by alienating other nations with harsh treatment of

³¹ See *infra* text accompanying notes 127-67.

³² See *infra* text accompanying notes 127-67.

³³ See *infra* text accompanying notes 127-67.

³⁴ For a far-reaching argument for more open borders, see KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAW* (forthcoming NYU Press, 2007); see also HING, *supra* note 19 (advocating a more moral

their citizens, U.S. immigration policies in the “war on terror,” as well as its engagement in unpopular military conflicts in Afghanistan and Iraq, may undermine those multilateral efforts.³⁵

I. IMMIGRATION MEASURES IN THE WAR ON TERROR

The horrible events of September 11 transformed the United States in many different ways. Immigration law almost immediately became ground zero in the “war on terror,” and immigrants suffered the consequences.³⁶ “Overreaction” is one way to describe the U.S. government’s swift and immediate response to the tragic loss of life. In a nutshell, the result initially was harsh treatment of Arab and Muslim noncitizens, followed by the imposition of restrictive policies affecting all immigrants.³⁷

A. *The U.S. Government’s Response to September 11*

After September 11, 2001, the U.S. government took a variety of immigration-related measures in the name of national security.³⁸ In part, the U.S. government directed security

immigration policy for the United States).

³⁵ See *infra* text accompanying notes 82-119.

³⁶ See Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59 (2004); Teresa Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005).

³⁷ See *infra* text accompanying notes 38-81.

³⁸ For analysis and criticism of these measures, see, for example, Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURVEY AM. L. 295 (2002); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002); Cole, *supra* note 1; Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1 (2002); Victor C. Romero, *Decoupling “Terrorist” From “Immigrant”*: An Enhanced Role for the Federal Courts Post 9/11, 7 J. GENDER, RACE, & JUST. 201 (2003); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002). Many reports have documented the civil and human rights abuses in the “war on terror.” See, e.g., MIGRATION POLICY INSTITUTE, AMERICA’S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11 (2003); U.S. DEP’T OF JUSTICE, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE

measures at noncitizens because noncitizens were involved in the terrorist acts of September 11.³⁹ Government actors, however, no doubt felt encouraged – or at least not deterred from – taking aggressive measures against noncitizens because well-settled precedent affords “plenary power” to the political branches of government in immigration matters, particularly those that arguably touch on foreign relations and national security.⁴⁰

Deference to the political branches of government on national security matters has a lengthy historical pedigree:

As far back as the Alien and Sedition Acts of 1798, and then in the early federal immigration statutes of the late 1800s, immigration law has barred and deported noncitizens from the United States on ideological and national security grounds. Noncitizens can be arrested, detained, and deported under the immigration laws with little recourse to the constitutional protections that would limit government outside of immigration.⁴¹

In the days after September 11, 2001, when the public unequivocally demanded that government act decisively, immigrants could easily be targeted because the law made immigration measures the path of least resistance.⁴²

National security issues historically have sporadically dominated the U.S. immigration

SEPTEMBER 11 ATTACKS (2003); U.S. OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003).

³⁹ See NAT’L COMM’N ON TERRORIST ACTS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 145-253 (2004) (outlining the background behind, as well as the various persons involved in, the September 11 plot).

⁴⁰ See, e.g., *INS v. Abudu*, 485 U.S. 94, 110 (1988) (“[Immigration & Naturalization Service (INS)] officials must exercise especially sensitive political functions that implicate questions of foreign relations, and therefore the reasons for giving agency decisions . . . apply with even greater force in the INS context.”) (footnote omitted); *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (contending that deference to U.S. government on immigration matters was justified in part because “decisions in these matters may implicate our relations with foreign powers”).

⁴¹ HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 174 (2006).

⁴² See *supra* text accompanying notes 38-41.

laws and their enforcement. At times, the Supreme Court has been willing to invoke national security as justifying racial exclusions in the immigration laws that in reality have only a most attenuated relationship with public safety. For example, in *The Chinese Exclusion Case*,⁴³ which upheld a law excluding most immigrants from China from U.S. shores, the Court in 1889 emphasized that

[t]o preserve its independence, and *give security against foreign aggression* and encroachment, is the highest duty of every nation, and to attain these ends nearly all other “considerations are to be subordinated. *It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from the vast hordes of its people crowding in upon us.* The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth. . . . *If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . , its determination is conclusive upon the judiciary.*

As the rationale upholding racial exclusions in *the Chinese Exclusion Case* suggests, the political branches of government in certain instances may excessively rely on the talisman of national security to justify invidious discrimination in immigration measures. However, as one member of Congress emphasized in analyzing immigration reform over the last ten years, including the 1996 immigration reforms, “[i]nstead of enacting rational immigration reform that will indeed strengthen our national security, Congress has enacted immigration changes that have very little or nothing to do with national security. [Republican] revolutionaries ‘revolutionized,’ the American tradition of immigration but, unfortunately, did not bring revolutionary change to protecting America from terrorists.”⁴⁴

The post-September 11 era is not the first time that the United States targeted specific

⁴³ 130 U.S. 581, 606 (1889) (emphasis added).

⁴⁴ U.S. Representative Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An*

groups of noncitizens in times of social stress emanating from tensions with the Muslim world. When a group of U.S. citizens was held hostage in Iran a little more than 25 years ago, the U.S. government deployed immigration law in numerous ways directed at Iranian nationals. One regulation required only Iranian students on nonimmigrant visas to report to the Immigration and Naturalization Service and provide information about their residence and evidence of school enrollment.⁴⁵ The court of appeals in *Narenji v. Civiletti* upheld the nationality-based regulation because it was founded on a “rational basis”; in so doing, the court emphasized that “it is not the business of courts to pass judgment on the decisions of the President in the field of foreign policy.”⁴⁶ Courts reviewing other federal regulations directed at Iranian citizens during this time period similarly refused to interfere with the President’s judgment.⁴⁷

Narenji v. Civiletti provides legal support for the U.S. government’s use of immigration policies in the war on terror. However, the judicial deference to the federal government’s actions directed at Iranians in the United States during the hostage crisis was criticized in ways that apply equally to the reaction to the nation’s response to the events of September 11:

Narenji is troublesome because an executive classification based on nationality in a foreign affairs crisis poses the danger that *the Executive will overvalue the government interest and undervalue the individual constitutional interest. In a severe crisis, the political and psychological pressures on the Executive are extreme. In this situation,*

Insider Perspective, 16 STAN. L. & POL’Y REV. 349, 377-78 (2005) (emphasis added).

⁴⁵ See *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

⁴⁶ *Narenji*, 617 F.2d at 748; see *supra* text accompanying notes 38-44.

⁴⁷ See, e.g., *Ghaelian v. INS*, 717 F.2d 950, 953 (6th Cir. 1983) (holding that the court lacked jurisdiction to review an Equal Protection challenge to a regulation in a deportation action); *Dastmalchi v. INS*, 660 F.2d 880, 892 (3d Cir. 1981) (same); *Nademi v. INS*, 679 F.2d 811 (10th Cir. 1982) (upholding regulation allowing Iranian citizens only 15 days before voluntarily departing the country); *Malek-Marzban v. INS*, 653 F.2d 113 (4th Cir. 1981) (same). However, when national security concerns were not at their zenith, the courts intervened to halt discrimination against Vietnamese in refugee processing. See *Legal Assistance for Vietnamese Asylum Seekers v. Dep’t of State*, 45 F.3d 469 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996).

executive measures may be motivated by frustration or desperation rather than by an assessment of their actual usefulness, or they may reflect little more than a desire to appear stern and decisive. Conversely, in times of crisis the individual interests of persons selected for special burdens may be grossly undervalued. Indeed, the virulence of popular feeling against Iranian nationals during the hostage crisis raises the possibility that the Executive, in imposing special burdens on Iranian students, may have been reflecting to some extent a constitutionally impermissible hostility based on national origin. *The atmosphere during the hostage crisis was marked by a hostility directed at citizens of Iran that resembled to some extent the hostility that is frequently directed toward citizens of an enemy nation during a war.*⁴⁸

After September 11, the panoply of U.S. government policies directed at immigrants in many respects overvalued security, undervalued the rights of immigrants, and appear to have done little to in fact make the nation much safer. Panic, fear, and anger seized the day.⁴⁹ The U.S. government felt strong pressures to act swiftly and decisively in a tough fashion. The measures unfortunately also reflected generalized hostility toward Arabs and Muslims, with few willing to defend the rights of these immigrant communities. Such hostility no doubt contributed to violence by private citizens against Arabs and Muslims.⁵⁰ In the end, Arab and Muslim citizens as well as noncitizens suffered.⁵¹ Not much later, many different immigrant

⁴⁸ Peter E. Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785, 856 (1984) (emphasis added) (footnotes omitted); see also PETER ANDREAS, BORDER GAMES: POLICING THE U.S.–MEXICO DIVIDE (2000) (analyzing how U.S. government has pursued increased border enforcement for political and symbolic impacts despite its overall lack of effectiveness). Importantly, the policies challenged in cases like *Narenji v. Civiletti* were limited to nationals of one nation, see Akram & Johnson, *supra* note 38, at 338, not the broader, more diffuse – and often religious-based – ones employed in the Bush administration’s “war on terror.”

⁴⁹ See Jonathan H. Marks, *9/11 = 3/11 = 7/7 + ? : What Counts in Counterterrorism*, 37 COLUM. HUM. RTS. L. REV. 559 (2006) (analyzing psychological pressures on society to overreact in times of social stress); Adrian Vermuele, *Libertarian Panics*, 36 RUT. L.J. 871 (2005) (studying how law often cannot restraint the excesses of society caught in a panic over recent events).

⁵⁰ See Muneer I. Ahmad, *A Rage Shared by All: Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1265-77 (2004); Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441 (2002).

⁵¹ See *infra* text accompanying notes 53-76.

communities felt the sting of the “war on terror.”⁵²

1. *Stage 1: Arabs and Muslims*

Among other steps in the name of national security, the U.S. government required special registration of certain Arab and Muslim noncitizens, arrested, detained, and interrogated large numbers of Arab and Muslim noncitizens, and engaged in selective deportations of Arab and Muslim noncitizens.⁵³ The Executive Branch justified the imposition of special registration requirements on Arab and Muslim noncitizens on the ground that the political branches of the federal government had “plenary power” over immigration, with little, if any, room for judicial oversight. In promulgating the regulations, the Attorney General John Ashcroft emphasized that “[t]he political branches of the government have plenary authority in the immigration area. . . . In the context of immigration and nationality laws, the Supreme Court has particularly underscore[d] the limited scope of judicial inquiry.”⁵⁴ Other measures directed at noncitizens no doubt were founded on the plenary power rationale and the notion that the courts would – and should – be inclined to defer to the Executive Branch on matters touching on national security.⁵⁵

Unfortunately, throughout U.S. history, harsh measures with the stated aim of bolstering

⁵² See *infra* text accompanying notes 77-81.

⁵³ See *infra* text accompanying notes 54-81.

⁵⁴ Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52584, 52585 (Aug. 12, 2002) (citations omitted). This position is consistent with other claims by the Bush administration that ordinary legal principles do not govern the Executive Branch in the fight against terrorism. See, e.g., Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085 (2005); Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT’L L. 263 (2004); Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1 (2006).

Even if the plenary power doctrine did not preclude judicial review, there might be a debate over whether the U.S. Constitution applied to the various measures taken by the U.S. government in the war on terror. See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 46 STAN. L. REV. 605 (2003).

national security often have been directed at unpopular racial minorities.⁵⁶ The internment of persons of Japanese ancestry during World War II is perhaps the most well-known example.⁵⁷ Building on previous security-oriented measures, the U.S. government's response to the events of September 11, 2001 proved to be no different.⁵⁸

The months after September 11, 2001 saw the adoption of a flurry of extraordinary policies directed primarily at Arab and Muslim noncitizens. Interrogations, arrests, detention, special registration, and selective deportations of Arab and Muslim noncitizens emerged as a part of national security policy. Secret immigration hearings behind closed doors became the norm in cases involving alleged terrorists.⁵⁹ Long after September 11, preventative detention of Arabs

⁵⁵ See *supra* text accompanying notes 38-52.

⁵⁶ See Gil Gott, *The Devil We Know: Racial Subordination and National Security Law*, 50 VILL. L. REV. 1073 (2005).

⁵⁷ See *Korematsu v. United States*, 323 U.S. 214 (1944); see also Keith Aoki, *No Right to Own?: The Early Twentieth Century "Alien Land Laws" As a Prelude to Internment*, 40 B.C. L. REV. 37, 19 B.C. THIRD WORLD L.J. 37 (1998) (contending that land laws in various states before World War II served as a precursor to internment of persons of Japanese ancestry during World War II). See generally Symposium, *Judgments Judged and Wrongs Remembered: Examining the Japanese American Civil Liberties Cases on Their Sixtieth Anniversary*, 68 LAW & CONTEMP. PROBS. 1 (2005); Symposium, *The Long Shadow of Korematsu*, 40 B.C. L. REV. 1, 19 B.C. THIRD WORLD L.J. 1 (1998) (offering variety of perspectives on the legacy of the internment of persons of Japanese ancestry during World War II); see also text accompanying note 43 (referring to national security rationale offered by the Supreme Court in decision upholding Chinese exclusion law).

⁵⁸ See Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 32-46 (2002) (drawing parallels between Bush administration's "war on terror" and internment of Japanese during World War II).

⁵⁹ Courts have reached conflicting decisions about the constitutionality of the blanket closure of deportation proceedings in "special interest" cases. Compare *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (holding that policy denying press access to hearings violated the First Amendment), with *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (finding policy constitutional), *cert. denied*, 538 U.S.1056 (2003). For criticism of the secret procedures, see Lauren Gilbert, *When Democracy Dies Behind Closed Doors: The First Amendment and "Special Interest" Hearings*, 55 RUTGERS L. REV. 741 (2003); Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the*

and Muslims remained a part of the “war on terror.”⁶⁰ Arrests, detentions, and interrogations, without access to counsel or the handing down of indictments, became commonplace.⁶¹

But there is much more. In Operation Absconder, the U.S. government focused removal efforts selectively on noncitizens from nations that “harbored” terrorists,⁶² identified for the most part as nations populated predominantly by Arabs and Muslims. Although criticized as impermissible racial profiling, the targeting of Arabs and Muslims in various immigration policies flourished for several years after September 11, 2001.⁶³

Consider one prominent example of an extraordinary policy adopted by the Bush administration in the name of counter-terrorism. As part of the National Security Entry/Exit Registration System, generally known as “special registration,” the Department of Homeland

Administrative State, 39 HARV. C.R.-C.L. L. REV. 95 (2004); Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 264-67 (2005).

⁶⁰ See David Cole, *The Priority of Morality: The Emergency Constitution’s Blind Spot*, 113 YALE L.J. 1753 (2004); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 778-85 (2002).

⁶¹ See Akram & Johnson, *supra* 38, at 327-55. For criticism of the Bush administration’s violation of the law through these and other measures, see Raquel Aldana, *The September 11 Immigration Detentions and Unconstitutional Executive Legislation*, 29 S. ILL. L.J. 5 (2004).

⁶² See Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative*, 29 N.Y.U. REV. L. & SOC. CHANGE 573 (2005); Karen C. Tumlin, Comment, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173, 1190-93 (2004).

⁶³ See R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201 (2004); Mariano-Florentino Cuellar, *Choosing Anti-Terror Targets by National Origin and Race*, 6 HARV. LATINO L. REV. 9 (2003); Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45 (2003); Thomas M. McDonnell, *Targeting the Foreign Born by Race and Nationality: Counterproductive in the “War on Terrorism”?*, 16 PACE INT’L L. REV. 19 (2004); Andrew E. Taslitz, *Racial Profiling, Terrorism, and Time*, 109 PENN. ST. L. REV. 1181 (2005); see also Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1413-15 (2002) (discussing controversy over racial profiling following security measures put into place by the U.S. government after September 11, 2001); Stephen H. Legomsky, *The Ethnic and Religious Profiling of Noncitizens: National Security and International Human Rights*, 25 B.C. THIRD WORLD L.J. 161 (2005) (criticizing profiling in many of the Bush administration’s

Security required male noncitizens over age 16 from 25 predominantly Muslim nations to register for fingerprinting, photographing, and interviews.⁶⁴ To their surprise, nearly 14,000 registrants upon voluntarily reporting were placed in removal proceedings and nearly 3000 were detained.⁶⁵ Angry protests followed the arrests and detentions.⁶⁶ As with other anti-terrorism measures adopted by the U.S. government, critics claimed that the special registration program constituted impermissible racial, national origin, and religious profiling.⁶⁷ However, a lawsuit challenging special registration failed, with the court relying heavily on the precedent of the Iranian hostage case of *Narenji v. Civiletti*.⁶⁸ To add insult to injury, the U.S. government never claimed that special registration uncovered any terrorists, which seems unlikely given that the Bush administration discontinued the program.

The post-September 11 security measures were built on a foundation of previous security measures directed at suspected Arab and Muslim “terrorists.”⁶⁹ For example, the definition of

policies in the “war on terror”).

⁶⁴ See *supra* note 54 (citing regulation).

⁶⁵ See Bill Ong Hing, *Misusing Immigration Policies in the Name of Homeland Security*, 6 NEW CENTENNIAL REV. 195 (2006).

⁶⁶ See Emily Bazar, *New Battle on Civil Rights Front*, SACRAMENTO BEE, Jan. 20, 2003, at 1; Wyatt Buchanan, *Hundreds Protest INS Registration*, S.F. CHRON., Jan. 11, 2003, at A13.

⁶⁷ See Hiroshi Motomura, *Immigration and We the People After September 11*, 66 ALB. L. REV. 413, 420-21 (2003); Heidee Stoller, Tahlia Townsend, Rashad Hussain, & Marcia Yablon, *The Costs of Post-9/11 National Security Strategy*, 22 YALE L. & POL’Y REV. 197, 220-22 (2004); Ty S. Wahab Twibell, *The Road to Internment: Special Registration and Other Human Rights Violations of Arabs and Muslims*, 29 VT. L. REV. 407 (2005); see also Kathryn Lohmeyer, Note and Comment, *The Pitfalls of Plenary Power: A Call for Meaningful Review of NSEERS “Special Registration”*, 25 WHITTIER L. REV. 139 (2003) (advocating judicial review of special registration program).

⁶⁸ See *Roundahal v. Ridge*, 310 F. Supp.2d 884, 892 (E.D. Ohio 2003); see also *Kandamar v. Gonzales*, 464 F.3d 65, 69-74 (1st Cir. 2006) (rejecting argument that evidence obtained through registration should be suppressed based on constitutional violations); *Ali v. Gonzales*, 440 F.3d 678, 681-82 (5th Cir. 2006) (finding, in removal case, that special registration did not violate Equal Protection guarantee); *supra* text accompanying notes 45-48 (discussing *Narenji*).

⁶⁹ See Akram & Johnson, *supra* note 38, at 301-26.

“terrorist activity”⁷⁰ has long been a part of the U.S. immigration laws and has been criticized as excessively overbroad.⁷¹ The USA PATRIOT Act⁷² further expanded the definition.⁷³ The terrorism provisions come up most frequently as the basis for denying relief from deportation to noncitizens, such as asylum for those who claim to fear persecution if returned to their native land.⁷⁴ In addition, the U.S. government for a number of years before 2001 conducted so-called “secret evidence” hearings in cases in which the government sought to deport Arabs and Muslims based on evidence never revealed to the noncitizens.⁷⁵ The alienating effects of such measures can only deepen the divide between the Muslim world and the United States and discourage much needed cooperation with the U.S. government.

Besides immigration-related measures, the U.S. government has made some highly publicized criminal arrests in the name of fighting terrorism, almost all of which, despite the initial sensational headlines, have turned out to be of little consequence. Perhaps the most well-known example is the case of Jose Padilla, a U.S. citizen by birth who converted to Islam. The

⁷⁰ Immigration & Nationality Act § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B) provides a lengthy definition of terrorist activities, which includes providing material support to a “terrorist organization” as designated by the U.S. government. For criticism of the material support provisions, as amended, see David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 8-15 (2003)

⁷¹ See Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After AADC v. Reno*, 14 GEO. IMMIGR. L.J. 313, 322-27 (2000); Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1131 (1994); Michael J. Whidden, Note, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825, 2871-74 (1999).

⁷² See *supra* note 1 (citing law).

⁷³ See Cole, *supra* note 1, at 966-70; Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 855-57 (2003).

⁷⁴ See, e.g., *McAllister v. Attorney General*, 444 F.3d 178, 186-87 (3d Cir. 2006), *cert. denied sub nom.*, *McAllister v. Gonzales*, 2006 U.S. LEXIS 9026 (U.S. Nov. 27, 2006); *Kelava v. Gonzales*, 410 F.3d 625, 629-30 (9th Cir. 2005); *Singh v. Ashcroft*, 385 F.3d 293, 296-301 (3d Cir. 2004); *Cheema v. Ashcroft*, 383 F.3d 848, 854-60 (9th Cir. 2004); *Perinpanathan v. INS*, 310 F.3d 594, 598-99 (8th Cir. 2002); *Matter of S-K-*, 23 I. & N. Dec. 936 (BIA 2006).

U.S. government held Padilla, originally accused by Attorney General John Ashcroft of involvement in a plot to detonate a “dirty bomb” on U.S. soil,⁷⁶ as an enemy combatant for more than three years, only to later charge him with relatively minor criminal offenses.

Put simply, the U.S. government initially targeted Arabs and Muslims in the “war on terror.” However, it did not end there.

2. *Stage 2: All Other Immigrants*

The impacts of the U.S. government’s September 11 security measures spread well beyond Arab and Muslim noncitizens. They instead had a general impact on immigrant communities across the United States. Record numbers of deportations, aggressive enforcement of the immigration laws, citizenship requirements for certain jobs, and a general immigration crackdown affected immigrants, with the largest cohort of immigrants being from Mexico.⁷⁷ Immigration raids, citizenship requirements, and removal campaigns resulted in many more ordinary Mexican immigrants affected than suspected terrorists.

This is part of a more general problem. Today, unlike the days of old, the U.S. immigration laws for the most part are facially neutral and do not expressly discriminate on the basis of race. However, the enforcement of immigration law often has racially disparate impacts.⁷⁸ For example, per country ceilings on immigrant admissions from a single country in any year apply to all nations but have a disproportionate impact on prospective immigrants from

⁷⁵ See Akram & Johnson, *supra* note 38, at 321-26.

⁷⁶ See James Risen & Philip Shenon, *Traces of Terror: The Investigation; U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb*, N.Y. TIMES, June 11, 2002, at A1.

⁷⁷ See Johnson, *supra* note 73, at 852-70; see also Steven W. Bender, *Sight, Sound, and Stereotype: The War on Terrorism and Its Consequences for Latinas/os*, 81 OR. L. REV. 115 (2002) (documenting how “war on terror” measures had adversely affected Latina/os in the United States).

⁷⁸ See Kevin R. Johnson, *Race, The Immigration Laws, and Domestic Race Relations: A*

Mexico, and noncitizens from several other developing nations, such as China, India, and the Philippines, because demand for immigration from there for reasons of proximity, jobs, and family ties, greatly exceeds the annual ceiling of 25,600.⁷⁹

Similarly, increased border enforcement on the southern border with Mexico obviously has had, and will continue to have, a disproportionate impact on Mexican citizens. Among other effects, increased border enforcement increases the problem of human trafficking of migrants – an industry that has grown substantially over the last decade – from Mexico.⁸⁰

In 2005-06, most of the immigration reform proposals under consideration would have disproportionately affected certain groups of immigrants. A majority of undocumented immigrants living in the United States are from Mexico.⁸¹ Mexican immigrants thus have a vital interest at stake in the enactment of proposals, for example, to regularize their immigration status. Increased border enforcement also would disparately impact undocumented Mexican migrants, especially because most of the proposals for heightened enforcement focus on the U.S./Mexico border .

B. *North America's Response to September 11*

"Magic Mirror" Into the Heart of Darkness, 73 IND. L.J. 1111, 1131-47 (1998).

⁷⁹ See Bernard Trujillo, *Immigrant Visa Distribution: The Case of Mexico*, 2000 WIS. L. REV. 713 (2000); see also Stephen H. Legomsky, *Immigration Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319, 321 (1993) (commenting on racial impacts of per country ceilings); Jan C. Ting, *"Other Than a Chinaman": How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration*, 4 TEMP. POL. & CIV. RTS. L. REV. 301, 309 (1995) (same).

⁸⁰ See generally Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977 (2006) (analyzing generally modern problem of trafficking of human beings). Human trafficking also is a problem for nationals of other nations as well. See Report, *Transatlantic Workshop on Human Smuggling Conference Report*, 15 GEO. IMMIGR. L.J. 167 (2000) (outlining instances of human trafficking from various countries).

⁸¹ See PASSEL, *supra* note 8, at ii (estimating that about 56% of undocumented immigrants

The national security responses to September 11 were not limited to those of the U.S. government. That fateful day prodded the governments of many nations to bolster their security.⁸² Specifically, the governments of all the nations of North America individually responded to the terrorist acts of September 11. Canada, Mexico, and the United States also worked together in small ways to improve regional security. Much more, however, remains to be done.

1. *National Responses*

Canada passed its own immigration legislation designed to improve national security.⁸³ In December 2001, Canada passed the Anti-Terrorism Act,⁸⁴ which expanded the government's surveillance and other powers in fighting terrorism. Although less extreme than the USA PATRIOT Act, Canada evidently felt – with the encouragement, no doubt, of the U.S. government – that it must do something to protect itself from terrorist acts as well as to aid America's "war on terror."⁸⁵

are Mexican nationals).

⁸² See Kim Lane Scheppele, *Other People's PATRIOT Acts: Europe's Response to September 11*, 50 LOY. L. REV. 89 (2004); see also Kent Roach, *Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain*, 27 CARDOZO L. REV. 2151 (2006) (analyzing trade off between security and civil rights in security measures taken by Canada and Britain).

⁸³ See ABA Immigration and Nationality Committee, International Law Section, Report, *The Canada-U.S. Border: Balancing Trade, Security and Migrant Rights in the Post 9/11 Era*, 19 GEO. IMMIGR. L.J. 199, 218-24 (2004); Kent Roach, *Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism*, 47 MCGILL L.J. 893 (2002); Reg Whitaker, *Keeping Up With the Neighbours? Canadian Responses to 9/11 in Historical and Comparative Context*, 41 OSGOODE HALL L.J. 241 (2003).

⁸⁴ SC, 2001, c.41; see David Jenkins, *In Support of Canada's Anti-Terrorism Act: A Comparison of Canadian, British, and American Anti-Terrorism Law*, 66 SASK. L. REV. 419 (2003).

⁸⁵ See Michael Coutu & Marie-Helene Giroux, *The Aftermath of 11 September 2001: Liberty vs. Security Before the Supreme Court of Canada*, 18 INT'L J. REFUGEE L. 313, 314 (2006).

Mexico also agreed to take steps consistent with the U.S. government's counter-terrorism measures.⁸⁶ Mexico, at the behest of the U.S. government, continued to take actions to restrict immigration through its territory so that fewer migrants from Central America would make the journey to the United States.⁸⁷ The leaders of United States and Mexico frequently discuss cooperation on immigration and security issues.⁸⁸

All told, the nations of North America adopted incremental internal immigration and related reforms ostensibly directed at terrorism. They also cooperated in adopting limited regional measures as well.

2. *Multilateral Responses*

Security is not just an issue for the United States, but one facing North America as well. It also is a global issue. As the process of globalization continues, the world slowly integrates economically and politically. Domestic reform of the U.S. immigration laws unquestionably is necessary. Moreover, international cooperation on the related issues of migration and national security needs is essential. Multilateralism is necessary to help the North American nations to better provide for national and regional security.

A model for regional cooperation is readily available. With the emergence of a common market with a unitary currency, Europe through the emergence of the European Union (EU) is far ahead of North America in terms of the integration of the political and economic institutions

⁸⁶ See *infra* text accompanying notes 87-88.

⁸⁷ See Ginger Thompson, *Mexico Worries About Its Own Southern Border*, N.Y. TIMES, June 18, 2006, at § 1, p.1; Joseph Contreras with Monica Campbell, *Stepping Over the Line: Don't Try Sneaking North Across Mexico's Other Border*, NEWSWEEK, June 5, 2006, at 38.

⁸⁸ See, e.g., Hale E. Sheppard, *Salvaging Trade, Economic and Political Relations with Mexico in the Aftermath of the Terrorist Attacks: A Call for a Reevaluation of U.S. Law and Policy*, 20 B.U. INT'L L.J. 33, 63-64 (2002); Ginger Thompson & David E. Sanger, *Bush and Fox Repeat Vows on Immigration*, N.Y. TIMES, Apr. 1, 2006, at A4.

of the various nations.⁸⁹ Integration through the EU has dramatically changed immigration law and policy in Europe, with labor mobility generally permitted between most of the member nations.⁹⁰ Such mobility has expanded to greater numbers of workers as the EU has expanded to include more member nations.

In sharp contrast, the United States, Canada, and Mexico have accomplished only a partial integration of their economies through the North American Free Trade Agreement (NAFTA).⁹¹ The trade pact provided for the expanded free trade of goods and services in North America. However, the NAFTA parties failed to address immigration and related regional security issues. In the long run, the nations of North America must work together to address common migration and security concerns.⁹²

In formulating the North American trade pact, the United States steadfastly refused to discuss, much less address, labor migration in any meaningful way.⁹³ Consequently, NAFTA left a critical economic issue off the bargaining table and, in the end, failed to provide a comprehensive, integrated regional approach to immigration. For the time being, the United States could thoughtfully improve security by working more closely with Canada and Mexico on common immigration and security concerns. To this point in time, Canada, Mexico, and the

⁸⁹ See *infra* text accompanying note 90.

⁹⁰ See Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937, 971-74 (1994); John A. Scanlan, *A View from the United States: Social, Economic, and Legal Change, the Persistence of the State, and Immigration Policy in the Coming Century*, 2 IND. J. GLOBAL LEG. STUD. 79, 125-38 (1994).

⁹¹ Dec. 17, 1992, 32 I.L.M. 289 (pts. 1-3); 32 I.L.M. 605 (pts. 4-8) (entered into force Jan. 1, 1994).

⁹² See *infra* text accompanying notes 93-119.

⁹³ See Johnson, *supra* note 90, at 956-64; Scanlan, *supra* note 90, at 86-87; M. Jeanette Yakamovich, Comment, *NAFTA on the Move: The United States and Mexico on a Journey Toward the Free Movement of Workers – A NAFTA Report and EU Comparison*, 8 LAW & BUS. REV. AM. 463 (2002).

United States have cooperated to a limited extent.⁹⁴ However, more will be necessary in the future to ensure regional security.

Importantly, the actions of Canada implicate the safety and security of the United States. While the U.S. border with Mexico has received the bulk of attention of U.S. policy-makers, the Northern border of the United States indeed requires consideration.⁹⁵ As former Commissioner of the Immigration & Naturalization Service and well-known student of immigration policy Doris Meissner observed,

I can predict that there will be far more focus on Canada. Canada as a gateway for terrorists is very much on the agenda. I hope that we can be reasonable and recognize the folly of attempting to fortify our land border with Canada. More resources directed at the northern border are needed. But ultimately the security issue with Canada must be handled through international cooperation by joining forces to share intelligence, cross designate personnel, treat Canadian airport operations as equivalent to entering the U.S., and comparable measures. . . . It is the direction that envisions North America perimeter security through bilateral and international cooperation and integration as the only sound platform upon which to build public safety and security for us and for our neighbors.⁹⁶

However, precious little time and effort has been devoted to the security of the Canadian border, with almost all security measures myopically directed to the U.S. border with Mexico.⁹⁷ This is true despite the fact that, just a few years ago, at least one terrorist sought to enter the United States from the North.⁹⁸

⁹⁴ See John Noble, *Fortress America or Fortress North America?*, 11 LAW & BUS. REV. AM. 461, 475-76 (2005) (discussing the possibility of a North American Community with integrated security measures).

⁹⁵ See Russell C. Gray, Note, *Run From the Border: The United States Re-Evaluation of Its Northern Boundary*, 27 SUFFOLK TRANSNAT'L L. REV. 77 (2003); see also Daniel Schwanen, *Deeper, Broader: A Roadmap for a Treaty With North America*, 10 LAW & BUS. REV. AM. 345, 355-56 (2004) (envisioning a community of North America in which security was one of the goals of increased integration).

⁹⁶ Doris Meissner, *Immigration in the Post 9-11 Era*, 40 BRANDEIS L.J. 851, 858 (2002).

⁹⁷ See *infra* text accompanying notes 127-67 (discussing current debate over immigration reform).

⁹⁸ See *infra* text accompanying notes 165 (mentioning the case of the Millennium bomber

There in fact has been a limited amount of regional cooperation on migration and security issues in North America. Increased interest in binational border control programs between the United States and Canada and law enforcement initiatives since September 11 are evident.⁹⁹ In December 2001, the United States and Canada entered into a “smart border” agreement designed to increase security while facilitating lawful cross-border movement of persons and goods between the two nations.¹⁰⁰ Consistent with the NAFTA mission, this agreement included a number of security measures while also facilitating the mobility of goods, services, and people. Canada and the United States also agreed to require migrants to seek asylum in the first country that they enter.¹⁰¹ More recently, in August 2006, no doubt in response to pressure from the United States, Canada promised to take further steps to tighten border security.¹⁰²

The NAFTA nations today all recognize that North America integration is directly related to regional security.¹⁰³ In March 2005, the United States, Canada, and Mexico announced the establishment of a Security and Prosperity Partnership.¹⁰⁴ The partnership seeks through multilateral cooperation to improve the security of North America, strengthen internal security

who attempted to enter the United States from Canada).

⁹⁹ See ABA Immigration and Nationality Committee, International Law Section, Report, *supra* note 83, at 232-33.

¹⁰⁰ See *id.* at 224-33; Joseph L. Parks, Comment and Casenote, *The United States-Canada Smart Border Action Plan: Life in the FAST Lane*, 10 LAW & BUS. REV. AM. 395 (2004).

¹⁰¹ See Audrey Macklin, *Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement*, 36 COLUM. HUM. RTS. L. REV. 365 (2005).

¹⁰² See Christopher Mason, *Canada to Arm Its Border Guards*, N.Y. TIMES, Sept. 1, 2006, at A8. U.S. lawmakers previously had complained of lax Canadian border security. See Stephen Handleman, *Think Outside the Border*, N.Y. TIMES, June 12, 2006, at A17.

¹⁰³ See JASON ACKLESON, ACHIEVING “SECURITY AND PROSPERITY”: MIGRATION AND NORTH AMERICAN ECONOMIC INTEGRATION (Feb. 2006) (Immigration Policy Center); see also Rafael Fernandez de Castro & Rossana Fuentes Berain, *Hands Across North America*, N.Y. TIMES, Mar. 28, 2005, at A17 (suggesting that partnership might move United States, Canada, and Mexico toward greater regional integration akin to that that exists in the EU).

¹⁰⁴ See ACKLESON, *supra* note 103, at 5.

within each nation, and promote regional economic growth.¹⁰⁵ According to a recent report on its progress, discussions between the three partners has continued on a variety of initiatives, with some incremental measures actually implemented.¹⁰⁶ Only time will tell whether the Security and Prosperity Partnership will lead to greater cooperation among the nations on matters of national security.

Future multilateral cooperation in North America will need to focus on immigration and security issues.¹⁰⁷ One important move would be to allow greater internal migration within the United States, Mexico, and Canada akin to that which currently exists in the European Union.¹⁰⁸ Freer labor migration would fit comfortably into the trade relationship that currently exists between the three nations that are party to the North America Free Trade Agreement. One could envision a Fortress North America like the Fortress Europe that has emerged in the EU,¹⁰⁹ with a concentrated focus on securing the perimeter of the member nations. Although that development has been criticized,¹¹⁰ freer migration within North America might be more politically acceptable than wholly open borders.

3. *U.S. Immigration Law and Policy Since September 11 Has Hindered*

¹⁰⁵ See *id.* at 5.

¹⁰⁶ See *Industry Canada: Ministers Report on to Leaders on Security and Prosperity partnership Initiatives*, CANADIAN CORPORATE NEWSWIRE, Sept. 7, 2006.

¹⁰⁷ See Daniel C. Stiles, *Border Crisis: Time for a New Collective Review of Tri-Nation Border Security*, 29 TRANSP. L.J. 299 (2002). For a study of the possibilities, see Symposium, *North American Migration, Trade and Security*, 11 LAW & BUS. REV. AM. 321 (2005).

¹⁰⁸ See T. Alexander Aleinikoff, *Legal Immigration Reform: Toward Rationality and Equity*, in BLUEPRINTS FOR AN IDEAL LEGAL IMMIGRATION POLICY 5, 5-6 (Richard D. Lamm & Alan Simpson eds., 2001).

¹⁰⁹ See Noble, *supra* note 94.

¹¹⁰ See, e.g., Bob Hepple, *Race and Law in Fortress Europe*, 67 MOD. L. REV. 1 (2004); Lydia Esteve Gonzales & Richard MacBride, *Fortress Europe: Fear of Immigration? Present and Future of Immigration Law and Policy in Spain*, 6 U.C. DAVIS J. INT'L L. & POL'Y 153 (2000).

Multilateral Cooperation on National Security Matters.

Rather than facilitate multilateral cooperation to improve global and regional security, U.S. immigration law and policy in the post-September 11 period has had detrimental impacts on such cooperation. The harsh treatment of noncitizens, besides alienating Arab, Muslim, and other communities in the United States, also has estranged their home governments.¹¹¹

Similarly, the harsh impacts of tighter immigration laws and their enforcement, as well as the terms of the immigration debate, have hindered relations with other nations, especially Mexico.¹¹²

Indeed, U.S immigration law and policy in fact has caused serious rifts between Mexico and the United States.¹¹³ In 2005 and 2006, the Mexican government reacted negatively to border enforcement bills pending in the U.S. Congress. Eleven Latin American countries, including Mexico, lobbied against the Sensenbrenner bill,¹¹⁴ the strict border enforcement bill passed by the U.S. House of Representatives at the end of 2005 that provoked mass marches.¹¹⁵ The extension of the fence along the U.S./Mexico border authorized by Congress in 2006 drew loud protests from Mexican leaders as well.¹¹⁶

International tensions over migration are not limited to the United States and Mexico, however. Tighter border controls on the northern U.S. border after September 11 elicited

¹¹¹ See *supra* text accompanying notes 127-67.

¹¹² See *supra* text accompanying notes 82-110.

¹¹³ See *The Border: A Festering Issue*, MEXICO & NAFTA REP., Jan. 17, 2006.

¹¹⁴ See *supra* note 21 (citing bill).

¹¹⁵ See Jerry Seper, *Pro-Immigration Forces to March on Washington*, WASH. TIMES, Feb. 20, 2006, at A3.

¹¹⁶ See Hector Tobar, *Mexicans See Good and Bad Side to Wall*, L.A. TIMES, Oct. 1, 2006, at A27 (Mexican “President Vicente Fox and President-elect Felipe Calderon have denounced the new [border] fence, as have a host of Mexican political leaders.”).

protests from the Canadian government over the treatment of its citizens.¹¹⁷ More generally, the proposed elimination of a visa waiver program for citizens of certain nations, designed to improve U.S. security, may have more general adverse foreign relations repercussions.

According to the U.S. General Accounting Office, “[t]he decision to eliminate the program could negatively affect U.S. relations with participating countries, could discourage some business and tourism in the United States, and would increase the need for State Department resources.”¹¹⁸

Multilateralism will be essential to fighting terrorism in the future,¹¹⁹ as well as ensuring peace. Harsh treatment of immigrants since September 11, 2001 has caused international tensions and have hindered multilateral efforts to improve national security. Consequently, improving foreign relations through immigration reform is a benefit well worth considering.

C. *The End Result*

What is the end result of the security measures implemented after September 11? Noncitizens in the United States experienced removals and increased immigration enforcement – and selective enforcement of the immigration laws.¹²⁰ There is no evidence that any actual terrorists have been deported, and there were few terrorism convictions. The most well-known terrorist arrested in connection with the acts of September 11, 2001, Zacarias Moussaoui, was in custody on September 11. He pled guilty to charges for his involvement for his role in the

¹¹⁷ See Glenn Kessler, *Powell Aims to Reassure Canadians*, WASH. POST, Nov. 15, 2002, at A30; Tonda MacCharles, *We’re Both at Risk, Powell Tells Canada*, TORONTO STAR, Nov. 15, 2002, at A7; see also Jim Rankin, *Canadian in Passport Fiasco*, TORONTO STAR, Feb. 14, 2003, at A1 (reporting that the Immigration and Naturalization Service accused a Canadian citizen of using a forged Canadian passport and subjected her to expedited removal to India).

¹¹⁸ U.S. GEN. ACCOUNTING OFFICE, BORDER SECURITY: IMPLICATIONS OF ELIMINATING THE VISA WAIVER PROGRAM 3-4 (2002).

¹¹⁹ See John W. Head, *What Has Not Changed Since September 11—The Benefits of Multilateralism*, 12 KAN. J.L. & PUB. POL’Y 1 (2002).

¹²⁰ See *infra* text accompanying notes 38-81.

terrorist plot and was given a life sentence.¹²¹ Even if terrorists have been removed from the United States, it is not intuitively obvious that the removals improved public safety. Rather, removal of true terrorists would allow them to operate freely outside the country.

Of course, some increased security measures are necessary to protect the United States. Immigration law and enforcement that considers security in addition to other goals is consistent with the recommendations of the blue ribbon 9/11 Commission Report.¹²² The report suggests the need for a better system of tracking noncitizens within the United States and cooperation with other nations in exchanging information about terrorist activity. It specifically recommends an entry/exit system recording who is present in the United States at any time. Such a system, however, cannot be effective if thousands, if not millions, of people – undocumented immigrants – are entering the country outside authorized channels and thus are not part of any record-keeping system.¹²³ A complete database remains in the works to track lawful immigrants and temporary visitors to the United States.¹²⁴ Even when such a system is created, it would not account for the millions of undocumented immigrants living in the country.

Today, undocumented immigrants live and work under the government's radar. They are

¹²¹ See Neil A. Lewis, *Moussaoui Given Life Term by Jury Over Link to 9/11*, N.Y. TIMES, May 4, 2006, at A1.

¹²² See NAT'L COMM'N ON TERRORIST ACTS UPON THE UNITED STATES, *supra* note 39, at 389-90.

¹²³ See *supra* text accompanying note 8 (offering estimate of 11.5-12 million undocumented immigrants living in the United States).

¹²⁴ See *Statement by Margaret D. Stock Before U.S. House Committee on International Relations, Subcommittee on Oversight and Investigations*, CQ CONG. TESTIMONY (May 11, 2006) (listing U.S. General Accountability Office studies noting various deficiencies in computerized immigrant tracking systems used by the Department of Homeland Security); *Think All Illegal Immigrants Are Sneaking In? Think Again: Years After 9/11, Government Still Can't Track All Who Overstay Visas*, USA TODAY, May 2, 2006, at 12A (discussing flaws in current tracking system); Nicole Gaouette, *U.S. Installs Visitor Tracking Stations*, L.A. TIMES, Dec. 31, 2005, at A17 (to the same effect).

effectively invisible, unidentified, and unknown. Keeping better track of the millions of undocumented immigrants living in this country is essential if we are serious about protecting the nation from terrorist acts. The United States has no record of perhaps as many as 12 million undocumented immigrants in the country.¹²⁵ If one is interested in better tracking of people in the United States, some effort must be made to maintain a record of this population. However, current law ensures that undocumented immigrants remain invisible. Many states, for example, deny undocumented immigrants driver's licenses,¹²⁶ thereby denying them a basic identification document relied upon heavily by law enforcement authorities.

To this end, the United States must work with other nations to secure accurate intelligence about persons who seek entry into the United States. Better coordination between law enforcement agencies of the three North American governments would do much to improve the United States's national security. Some steps have been taken but much more work remains to be done.

II. THE DELETERIOUS EFFECTS OF TERRORISM CONCERNS ON IMMIGRATION LAW AND ENFORCEMENT AND IMMIGRATION REFORM

September 11, 2001 represented a turning point in the debate over immigration reform in the United States. The horrible human losses of that day halted in its tracks the discussion of any easing of immigration restrictions.¹²⁷ Moreover, the fear of terrorism, feeding off of a general

¹²⁵ See *supra* text accompanying notes 8.

¹²⁶ See Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213 (2004); María Pabón López, *More Than A License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91 (2004/05); see also Sylvia R. Lazos Vargas, *Missouri, the "War on Terrorism," and Immigrants: Legal Challenges Post 9/11*, 67 MO. L. REV. 775, 798-807 (2002) (analyzing controversy in Missouri over driver's license eligibility for undocumented immigrants).

¹²⁷ See *infra* text accompanying notes 130-39.

tendency among many U.S. citizens to blame immigrants for the problems of the day, helped to create a general “close the border” mentality that commanded significant support among the general public.¹²⁸ As a result, politicians from a wide variety of political persuasions endorsed some sort of border enforcement strategy.¹²⁹

A. *A Shift in the Terms of the Immigration Reform Debate*

Before September 11, 2001, the U.S. and Mexican governments were seriously discussing entering into a migration accord that would have regularized labor migration between the two nations.¹³⁰ Similarly, immigrant rights advocates appeared to be close to convincing Congress to ameliorate some of the harshest provisions of the 1996 immigration reforms.¹³¹ Both reform efforts stopped in their tracks on September 11, as the United States immediately became preoccupied with public safety and national security. Since then, the focus in reforming U.S. immigration law and policy has been on fortifying the borders with border fences, providing additional officers and resources to the Border Patrol, and related measures; regularizing the flow of migrants from Mexico to the United States, humane treatment of immigrants, and equitable enforcement of the immigration laws took a back seat.¹³²

September 11 thus had serious and detrimental long term consequences on positive immigration reform. It completely reversed the momentum of the debate, shifting it from possible liberalization of admissions and easing of removal and detention to stricter border controls, narrower admissions criteria, and harsher detention and removal proposals. Many of

¹²⁸ See *infra* text accompanying notes 130-67.

¹²⁹ See *supra* text accompanying notes 130-67.

¹³⁰ See Johnson, *supra* note 73, at 866-67.

¹³¹ See Hines, *supra* note 6, at 12; *supra* text accompanying notes 25-27 (discussing harsh effects of 1996 immigration reform laws).

¹³² See *infra* text accompanying notes 133-67.

the most popular proposals would have restricted migration from many different countries, and were in no way limited to excluding Arabs and Muslims noncitizens.¹³³ Immigrant advocates moved from making a concerted effort at advocating for positive immigration reform to devoting energies and resources toward defending against the passage of punitive immigration laws.¹³⁴

As Professor Enid Trucios-Haynes correctly observed,

*[i]mmigration dominates policy discussions in the post-September 11, 2001 world in a manner that has distorted traditional issues and concerns relating to noncitizens. To some, the perception or reality of porous U.S. borders requires the most strenuous methods of border enforcement. In the eyes of many, immigration reform proposals since 2001 have focused exclusively on enforcement without sufficient acknowledgment of the human consequences on the noncitizens, both authorized and unauthorized, throughout our community.*¹³⁵

In a comment typical in the tenor of the current immigration debate, Senator John Cornyn emphasized that the debate over immigration reform “is . . . and I would say first and foremost about our Nation’s security. *In a post-9/11 world, border security is national security.*”¹³⁶

Similarly, conservative pundits Patrick Buchanan and Michelle Malkin have made incendiary arguments on the need to close the borders in the “war on terrorism.”¹³⁷ Such fears unfortunately have generated some of the push for immigration reform in 2005-06. Although the fear of terrorism stemming from ordinary immigration into the United States has been

¹³³ See *supra* text accompanying notes 77-81.

¹³⁴ See *supra* text accompanying notes 130-32.

¹³⁵ Enid Trucios-Haynes, *Civil Rights, Latinos, and Immigration: Cybercascades and Other Distortions in the Immigration Reform Debate*, 44 BRANDEIS L.J. 637, 638 (2006) (emphasis added).

¹³⁶ 152 CONG. REC. S2551 (Mar. 30, 2006) (Cornyn, Sen.) (emphasis added).

¹³⁷ See PATRICK J. BUCHANAN, *STATE OF EMERGENCY: THE THIRD WORLD INVASION AND CONQUEST OF AMERICA* (2006); MICHELLE MALKIN, *INVASION: HOW AMERICA STILL WELCOMES TERRORISTS, CRIMINALS, AND OTHER FOREIGN MENACES TO OUR SHORES* (2002); see also Jan C. Ting, *Unobjectionable but Insufficient – Federal Initiatives in Response to the September 11 Terrorist Attacks*, 34 CONN. L. REV. 1145 (2002) (questioning whether the United

exaggerated, the security arguments provide insights into the kinds of concerns held by many U.S. citizens. In 2005-06, national security concerns greatly influenced the discussion of immigration reform.¹³⁸

The Sensenbrenner bill, passed by the U.S. House of Representatives in December 2005, perhaps was the most extreme enforcement-only immigration reform proposal.¹³⁹ Among other things, the bill would have made the mere status of being an undocumented immigrant a felony subject to imprisonment as well as deportation from the United States, and would have imposed criminal sanctions on persons who provided any sort of humanitarian assistance to undocumented immigrants. The Sensenbrenner Bill's "close the door" approach is consistent with the national security emphasis prevailing in the debate over immigration in recent years.

B. *The Fixation on National Security Has Skewed the Debate Over Immigration Reform.*

We offer two competing models of immigration law, which we call "immigration monism" and "immigration pluralism." Both models persist throughout the history and development of U.S. immigration law, with each model at times dominant, while at other times, subservient.

1. *Immigration Monism*

Immigration monism postulates that all possible objectives of immigration law ultimately collapse into the sole goal of national security, broadly defined. Immigration monism has a long, if inglorious, history. It marred the birth of federal immigration law: Congress' regulation of

States had done enough in the "war on terrorism").

¹³⁸ See *supra* text accompanying notes 130-38.

¹³⁹ See Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H. Rep. 4437, 109th Cong., 1st Sess. (2005).

Chinese migration in the 1880's and the U.S. Supreme Court's subsequent announcement of the "plenary power doctrine" as necessary to protect the United States from "foreign aggression" and corruption of the national identity, which the Court classified as a national security concern.¹⁴⁰ In that foundational instance, the United States deployed immigration law as weapon of national self-definition and self-defense.

The monistic view considers the protection of national sovereignty to be the primary goal of immigration law. All other goals, whether economic, social, and political, are secondary to the defense of the nation-state. The monistic project involves defining and enforcing strong borders, creating categories of "insider" and "other," subsidizing the insider by penalizing the other, and creating mechanisms to transform others into insiders. Immigration monism is entirely consistent with what has been termed "classical immigration law," in which the plenary power of the Executive and Legislative Branches reign supreme, with the Judiciary possessing a very limited role in reviewing the immigration laws, and has resisted the revolution in constitutional rights over the twentieth century.¹⁴¹

Since September 11, 2001, immigration monism – with the dominant goal being served being national security – has predominated in U.S. immigration law and policy. Immigration

¹⁴⁰ See *supra* text accompanying notes 38-52. Similar arguments have been made in modern times, with Samuel Huntington being the most prominent academic making national identity-oriented arguments for restricting immigration from Mexico. See SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* (2004). For criticism of Huntington's arguments, see Kevin R. Johnson & Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347 (2005).

¹⁴¹ See Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984) (analyzing the apparent shift in "classical immigration law" focusing on sovereignty to one more consistent with liberal conception of individual rights).

legislation, including the USA PATRIOT Act,¹⁴² the creation of the Department of Homeland Security,¹⁴³ the REAL ID Act,¹⁴⁴ and the Secure Fence Act of 2006,¹⁴⁵ focus almost exclusively on border enforcement measures, with little attention paid to the other, including economic, political, and social, goals of immigration law and policy. The echoes of immigration monism can be heard in the remarkable consensus, both in Congress and on Main Street, in favor of a “secure the borders first” approach to immigration reform, including more Border Patrol officers and the allocation of ever greater resources to border enforcement.¹⁴⁶ The plenary power doctrine, which some commentators not long before September 11 claimed to be in its death throes,¹⁴⁷ was a central tool of the Bush administration seeking to justify various border enforcement and national security measures.¹⁴⁸

2. *Immigration Pluralism*

On the other hand, immigration pluralism appreciates that immigration law and policy serve many goals, none of which has an absolute structural claim to superiority. Along with the

¹⁴² See *supra* note 1 (citing statute); Johnson, *supra* note 73, at 855-57 (discussing certain immigration provisions of USA PATRIOT Act).

¹⁴³ See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2005 (2002).

¹⁴⁴ REAL ID Act of 2005, Title B of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, 109 Pub. L. No. 12, 119 Stat. 231 (2005).

¹⁴⁵ See *supra* note 15 (citing act).

¹⁴⁶ See *supra* text accompanying notes 36-126.

¹⁴⁷ See, e.g., Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1; Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002); Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000).

¹⁴⁸ See *supra* text accompanying notes 53-55; see also Johnson, *supra* note 24, at 870 (“To paraphrase Mark Twain, any claims of the [plenary power] doctrine’s death have been greatly exaggerated. Though perhaps not as potent as in days past, the plenary power doctrine survives to this day and resurfaces frequently in Supreme Court and lower court decisions.”) (footnotes

important goal of national security, immigration law also must serve the legitimate economic, political, and social needs of the United States. For example, universities and research institutions benefit, along with the entire U.S. economy and technological innovation, from foreign national students and scholars and, for that reason, have been vocal critics of the tightening of visa requirements by the U.S. government as part of the “war on terror.”¹⁴⁹ Sectors of the U.S. economy dependent on highly-skilled labor demand concessions from U.S. immigration law in the securing of workers.¹⁵⁰

While the monist sees the nation as a sovereign to be defined and defended, the pluralist sees the nation as a composite of overlapping societies. The role of the nation-state, according to the pluralist view, is to balance the competing claims of these various societies. The task is not always easy, but it is essential to the formation of sound public policy.

An immigration pluralist view can be seen in some of the more constructive recent immigration reforms of the last few decades. The Immigration Reform & Control Act of 1986 (IRCA),¹⁵¹ the Immigration Act of 1990,¹⁵² and the Legal Immigration Family Equity Act of 2000 (LIFE),¹⁵³ for example, offered multi-faceted, multipurpose reforms to the U.S.

omitted).

¹⁴⁹ See Michael A. Olivas, *The War on Terrorism Touches the Ivory Tower – Colleges and Universities After September 11: An Introduction*, 30 J.C. & U.L. 233 (2004); see, e.g., Sylvia H. Kless, *We Threaten National Security by Discouraging the Best and Brightest Students From Abroad*, CHRON. HIGHER ED., Oct. 8, 2004, at 9.

¹⁵⁰ See Chris Nuttall, *Intel Chief Calls for Easing of Visa Curbs*, FIN. TIMES, Feb. 8, 2006, at 6; S. Mitra Kalita, *For Green Card Applicants, Waiting is the Hardest Part*, WASH. POST, July 23, 2005, at D.

¹⁵¹ Pub. L. No. 99-603, 100 Stat. 3359 (1986); see LEGOMSKY, *supra* note 13, at 1209 (noting that law included both legalization programs and employer sanctions).

¹⁵² Pub. L. No. 101-649, 104 Stat. 4978 (1990).

¹⁵³ Pub. L. No. 106-553, 114 Stat. 2762 (2000). In 2000, Congress also passed the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2001), which added eased the restrictions on various types of employment visas. See Susan

immigration laws. IRCA, for example, included an amnesty program to reduce the undocumented immigrant population while the law sanctioning employers for employing undocumented immigrants was designed to limit the growth of a new undocumented immigrant population.¹⁵⁴ The Immigration Act of 1990 eliminated outdated exclusions regulating political ideology and sexual preference while also creating new employment and diversity visa programs. The LIFE Act, among other things, eased the restrictions on noncitizens seeking to regularize their immigration status.

In an era of much-heralded globalization and the increasing integration of the world economy, pluralistic approaches to immigration regulation are especially important. Immigration pluralism, which recognizes the many goals of immigration law and policy, strives to balance many competing goals and objectives. To this end, in the pursuit of economic development in the United States and Mexico, the movement of labor between the United States and Mexico should be normalized, not militarized.¹⁵⁵ Put differently, we should have Greyhound buses bringing workers from Mexican towns to the United States, not bloodhounds hunting down migrants along the U.S./Mexico border.¹⁵⁶

3. *The Current Immigration Reform Debate*

Some activists and policy-makers seize on fears over terrorism to advocate restrictionist

Martin, B. Lindsay Lowell, & Philip Martin, *U.S. Immigration Policy: Admission of High Skilled Workers*, 16 GEO. IMMIGR. L.J. 619, 628-34 (2002); Enid Trucios-Haynes, *Temporary Workers and Future Immigration Policy Conflicts: Protecting U.S. Workers and Satisfying the Demand for Global Human Capital*, 40 BRANDEIS L.J. 967, 1008-13 (2002).

¹⁵⁴ Employer sanctions, as implemented, proved to be not especially successful in deterring employers from employing undocumented workers. See Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEG. F. (forthcoming 2007).

¹⁵⁵ See *supra* text accompanying notes 89-94.

¹⁵⁶ See Bernard Trujillo, *Bloodhounds or Greyhounds: Reconsidering Optimal Border*

reforms, including those directed at undocumented immigration from Mexico.¹⁵⁷ The U.S. government appears ready to commit tremendous resources to the construction of a wall along the U.S. border with Mexico, and other border enforcement measures have gained great popularity.¹⁵⁸ As one commentator observed, “enhanced border enforcement is a *certain* component for any [immigration reform] legislation.”¹⁵⁹ In a similar overemphasis on enforcement, Attorney General John Ashcroft found that national security concerns justified the detention of a Haitian asylum seeker without bond even though the noncitizen in question had no links whatsoever to terrorism: “there is a substantial prospect that the release of such aliens into the United States will . . . encourage future surges in illegal migration by sea. . . . [Such s]urges . . . injure national security by diverting valuable Coast Guard and [Department of Defense] resources from counterterrorism and homeland security responsibilities.”¹⁶⁰

Unfortunately, national security today dominates the debate over virtually any immigration-related policy. In California, California Governor Arnold Schwarzenegger emphasized national security concerns as justifying repeal of the law and vetoing others laws

Policy for Regulating Mexican Migration to the United States (working paper, 2006).

¹⁵⁷ See, e.g., Michael M. Hethmon, *Immigration Policy: Diversity, Mass Migration, and National Security After 9/11 – An Immigration Reform Movement Perspective*, 66 ALB. L. REV. 387 (2003); *supra* text accompanying notes 138-39.

¹⁵⁸ See, e.g., Sunil Varhese, *Current Development: Developments in the Legislative Branch*, 20 GEO. IMMIGR. L.J. 157, 157 (2005) (discussing proposals in Congress for border fence because of “national security, rising illegal immigration, and increasing crime along the border”); Justin C. Glon, “*Good Fences Make Good Neighbors*”: *National Security and Terrorism – Time to Fence in Our Southern Border*, 15 IND. INT’L & COMP. L. REV. 349 (2005) (endorsing border fence). The Secure Fence Act of 2006 authorized the future appropriation of funds to build a 700 mile wall along the U.S./Mexico border. See *supra* note 15 (citing act).

¹⁵⁹ Katherine L. Vaughns, *Restoring the Rule of Law: Reflections on Fixing the Immigration System and Exploring Failed Policy Choices*, 5 MD. J. RACE, REL., GENDER & CLASS 151, 181 (2005).

¹⁶⁰ Matter of D-J-, 23 I. & N. Dec. 572, 579 (AG 2003); Judy Amorosa, Note, *Dissecting In re D-J-: The Attorney General, Unchecked Power, and the New National Security Threat Posed*

that would allow undocumented immigrants to be eligible for driver's licenses.¹⁶¹ The federal REAL ID Act¹⁶² later created uniform federal standards governing the issuance of driver's licenses by the states. However, a system in which millions of people who live and work in this country but lack basic identification cannot conceivably benefit national security or aid ordinary criminal law enforcement.

One important fact has not yet been mentioned. Throughout the immigration reform debates of 2005-06, in which terrorism fears often arose, there was a myopic focus on bolstering enforcement along the southern border with Mexico despite the fact that there is *no* evidence of terrorists entering the United States through Mexico. Nor is there any evidence of any need from a national security standpoint to greatly fear migration from Mexico. A 2006 study found that no known noncitizen accused of terrorist acts came from the South. Although proposals for increased border enforcement along the U.S. southern border with Mexico have been claimed to improve national security, one study concluded that “[*n*]ot one terrorist has entered the United States from Mexico.”¹⁶³ “Despite media alarms about terrorists concealed in the illegal traffic crossing the Mexican border, not a single [person charged or convicted of terrorist acts, or killed in such acts] entered from Mexico.”¹⁶⁴

Ironically enough, the only terrorists in recent years who attempted to cross physical borders on foot were from the North, with the so-called “Millennium Bomber” seeking to enter

by *Haitian Asylum Seekers*, 38 CORNELL INT’L L.J. 263 (2005) (analyzing the ruling).

¹⁶¹ See Johnson, *supra* note 126, at 232-35.

¹⁶² See *supra* note 144 (citing act).

¹⁶³ Peter Beinart, *The Wrong Place to Stop Terrorists*, WASH. POST, May 4, 2006, at A25 (emphasis added) (discussing study making this finding).

¹⁶⁴ ROBERT S. LEIKEN, *THE QUANTITATIVE ANALYSIS OF TERRORISM AND IMMIGRATION: AN INITIAL EXPLORATION 2* (2006) (footnote omitted).

the United States from Canada probably the most well-known.¹⁶⁵ This demonstrates the need to focus to a greater extent on the United States' northern border with Canada, which is much more open, and much less militarized, than the southern border.¹⁶⁶ The disparate treatment of the northern and southern borders regularly brings forth claims that something else besides border security, such as racial animus, is at work.

As this discussion suggests, the nations of North America need to consider multilateral measures that improve security and address the difficult issues of managing – not halting – migration.¹⁶⁷ To this point, Congress has not seriously considered truly comprehensive immigration reform. Instead, border enforcement and more border enforcement have carried the day. This, we argue, is a mistake and fails to ensure that U.S. immigration law and policy satisfies the multiple goals that it must if the United States wants to remain politically, economically, and socially strong – and safe.

CONCLUSION

Nobody, of course, can dispute that protecting the national security of the United States is an important public policy objective of the U.S. government in the modern world. As a nation, our government, consistent with our constitutional values and commitment to freedom and equality, should do all that it can to make the nation safe. We as a nation, however, should expect and demand that security measures must be calculating, fair, and effective, not overbroad, arbitrary and capricious, and ineffective.

Since September 11, 2001, the United States unfortunately has seen national security

¹⁶⁵ See Sam Howe Verhovek, *2nd Man Sought for Questioning in Bomb Plot*, N.Y. TIMES, Dec. 19, 1999, at § 1, p. 42; Scott Sunde & Elaine Porterfield, *Wider Bomb Plot Possible*, SEATTLE POST-INTELLIGENCER, Dec. 18, 1999, at A1.

¹⁶⁶ See *supra* text accompanying notes 95-98.

concerns skew, distort, and unduly influence immigration law and enforcement. This development is evident in the discussion over immigration reform. The nation must work to avoid the distortion of the debate and reject measures that focus myopically on border enforcement. Border enforcement-only policies are not realistic and simply will not be effective at significantly reducing undocumented immigration. Closing the borders at this time in U.S. history is nothing less than a pipedream.¹⁶⁸ The nation instead desperately needs a rational and comprehensive approach to immigration law and enforcement.

True antiterrorism measures might include such steps as identification of some sort for undocumented immigrants, a new amnesty program, and better tracking of immigrants and temporary visitors. At a most fundamental level, the United States needs an immigration policy so that, as President Bush has acknowledged,¹⁶⁹ there no longer is a shadow population of millions of undocumented persons living in the United States.¹⁷⁰ This is not safe, not sensible, and not consistent with our constitutional values.

Some relatively easy legal steps could be taken in the short term to improve public safety. Professor Bill Hing, for example, has suggested the need for better intelligence strategies and legalization of undocumented immigrants to bring millions of people out of the shadows.¹⁷¹ Along these lines, immigrants can prove helpful in the war on terror. Law enforcement officers need to work with, rather than alienate, immigrant communities through immigration policies.

¹⁶⁷ See *supra* text accompanying notes 89-119.

¹⁶⁸ See Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 245-52 (2003).

¹⁶⁹ See *Address to the Nation on Immigration Reform*, PRESIDENTIAL PAPERS OF THE PRESIDENTS, May 22, 2006) (“[I]llegal immigrants live in the shadows of our society.” . . . [T]he vast majority . . . are decent people who work hard, support their families, practice their faith, and lead responsible lives. They are part of American life, but they are beyond the reach and protection of American law.”).

¹⁷⁰ See *supra* text accompanying note 8.

Immigration policies thus are critical in the promotion of national security.

Making undocumented immigrants eligible for driver's licenses might well improve security.¹⁷² Unfortunately, a preoccupation with national security has poisoned the debate over driver's licenses, just as it has with immigration reform generally.¹⁷³ At a time when the United States needs to retool and revisit its immigration laws to protect national security, as well as to promote legitimate political, social, and economic goals, the nation appears to be the slave of fear. Because fear to this point has prevailed, the United States has failed to thoughtfully reform its immigration laws and, among other things, improve its national security.

National security, however, should not serve as the myopia that bars the United States from factoring economic, political, and social aims in the formulation of immigration law and policy. Well-crafted, manageable, and effective policies must carefully consider all facets of immigration and its impacts on the United States. Tunnel vision simply will not do. In addition, as the national experience since September 11, 2001 has made clear, it is not necessarily the case that efforts to close the borders will result in a more secure America. Rather, a balanced immigration system can make for a safer nation as well as one that better realizes the maximum economic, political, and social benefits from immigrants and immigration.

¹⁷¹ See Hing, *supra* note 65, at 207-16.

¹⁷² See DONALD KERWIN & MARGARET D. STOCK, NATIONAL SECURITY AND IMMIGRATION POLICY: RECLAIMING TERMS, MEASURING SUCCESS, AND SETTING PRIORITIES 45-46 (2006).

¹⁷³ See *supra* text accompanying notes 127-67.