

THE IMPORTANCE OF IMPROVING U.S.
IMMIGRATION LAW AND THE CHANGES MADE
SINCE 9-11

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I. INTRODUCTION

There were the remains of some sort of fence The fence posts had been painted a rich green, but that had mainly rusted off. The fencing material was in even worse shape ‘That fence is all there is?’ Mustafa asked in amazement.¹

In Tom Clancy’s novel, *The Teeth of the Tiger*, Mustafa and a group of terrorists are smuggled across the Mexico-U.S. border to strike terror into the hearts of average Americans by turning several shopping malls across America into shooting galleries.²

The above quote occurs during the terrorists’ journey across our southern border and suggests the ease with which terrorists could bypass our security measures against illegal immigration.

Although only fiction, Clancy frames well a real-life problem facing the U.S. today: how to ensure that Islamist terrorists bent on harming the U.S. do not enter the country through our porous southern border with Mexico. Clancy’s story raises the question of cracking down on illegal immigration at our border. Moreover, the book accurately describes the pathetic shape the fence along our southern border is in,³

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¹ TOM CLANCY, *THE TEETH OF THE TIGER* 238 (2004).

² *Id.* at 238, 376.

³ *Id.* at 238.

which has led at least one pundit to call for erecting a high-tech security fence.⁴

This paper will examine the importance of immigration policies with respect to national security, especially in light of the events of 9-11 and the War on Terror. Entry points have become very important focus points of national security due to the ease of travel in today's world and the increase in terrorist threats.⁵ "A broken immigration system" was "partly to blame" for the tragedy of 9-11,⁶ signifying the importance of efficient and effective methods of regulating immigration.

Part II will discuss the importance of regulating immigration and how immigration relates to national security. It will discuss the state of immigration policy before 9-11 and describe how terrorists have taken advantage of several of our immigration regulations to sneak into the country. It will then examine briefly three critical areas in need of the most improvement—the process of entering the country at ports of entry and of tracking immigrants, the process of applying for visas overseas, and the process of interior enforcement⁷—and why they are so important to national security.

Part III will break down the three critical areas discussed in Part II and examine various proposed and actual changes to immigration policy intended to strengthen national security. This section will examine these policies in light of the following goals: "prevention of the movements of terrorists, prosecution of suspected foreign terrorists, and protection of the rights of foreign nationals who are unfairly suspected of terrorism."⁸

For entry points, Part III will examine why building a security fence along our southern border—similar to efforts by other countries—would be justifiable in view of international law. Further, it will analyze Title IV of the USA PATRIOT Act of 2001 (Patriot Act),

⁴ See Justin C. Glon, Note, "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).

⁵ Mark Krikorian & Steven Camarota, *How Did the Terrorists Get In?*, S.F. CHRON., Sept. 19, 2001, at A19.

⁶ *Id.*

⁷ Mark Krikorian, *It's Time to Plug Our Leaky Borders*, CITY J., Autumn 2001, Vol. 11, No. 4, available at <http://www.cis.org/articles/2001/markoped110101.html>.

⁸ Susan Martin & Philip Martin, *National Security Discussion: International Migration and Terrorism :Prevention, Prosecution, and Protection*, 18 GEO. IMMIGR. L.J. 329, 329 (2004).

which deals specifically with protecting the border.⁹ Finally, several other options exist to improve port of entry security such as increased manpower at ports of entry, increased border patrol, and an entry-exit system such as the US-VISIT biometric system that would allow the U.S. to ensure an immigrant or foreigner does not overstay his or her visit.¹⁰

Several options also exist to improve the visa process overseas. Changes to the visa lottery and the development of Mexico's Matricular Consular concept have played key roles in new immigration policies, creating new problems that need to be addressed. Finally, abuse of certain types of visas—such as the religious worker, student, and political asylum visas—have also led to the need for significant changes.

The last area of concentration—interior enforcement—also presents several options for improving the regulation of immigration. Legislation could be passed encouraging states to correct some of the lax procedures immigrants and terrorists have taken advantage of in the past. Additionally, another change could be increased participation in regulating immigration by local law enforcement officers, which would take some of the pressure off the federal government. Finally, this section will discuss the wisdom of using our military domestically to help crack down on terrorists abusing our immigration policies.

Part IV will conclude with a concise overview of the paper and an evaluation of what the best possibilities may be for developing a more efficient immigration system.

II. IMPORTANCE OF REGULATING IMMIGRATION

A. *State of Immigration Policy Pre-September 11, 2001*

Before the tragedy of 9-11, America's immigration procedures were lax, and the general attitude of "America's elite"—such as the Wall Street Journal, Congress, Cato Institute, and prominent businesses involved in the international scene—towards our borders could be summed up in the phrase, "[t]here shall be open borders."¹¹ Many

⁹ See USA PATRIOT Act, Pub. L. No. 107-56, §§ 401-28, 115 Stat. 272, 342 (2001).

¹⁰ See Jessica M. Vaughan, *Modernizing America's Welcome Mat: The Implementation of US-VISIT*, BACKGROUND, Aug. 2005, available at <http://www.cis.org/Articles/2005/back905.pdf>.

¹¹ Krikorian, *supra* note 5.

examples support these assertions. In order to address the problem of foreigners overstaying their visas, Congress in 1996 initially ordered the Immigration and Naturalization Services (INS) to develop a tracking system to monitor when foreigners entered and left the country.¹² This requirement, however, was postponed and eventually eliminated altogether by Congress¹³ because, although Congress did pass a bill that would give the INS more support to track illegal immigrants, it failed to appropriate any money to pay for that support.¹⁴ Another example supporting the open borders assertion was the deplorable state of our border patrol. Even with recent increases in numbers, “only about 1,700 agents patrol[] the southern border, an average of less than one agent per mile, and the northern border is even less defended.”¹⁵ Illegal immigrants—including terrorists—would have a relatively easy time sneaking across either border.

There are several other procedural and policy shortcomings worth mentioning with regard to regulating immigration before 9-11. Prior to 9-11, a fully computerized entry-exit system did not exist—not because of technological obstacles but instead due to a lack of desire to provide funding for such a venture.¹⁶ This further serves to illustrate Congress’s lax attitude towards our borders and the lack of concern that no one would take advantage of this to threaten America’s national security.

Another problematic area involved the issuing of visas overseas. State Department visa officers were placed in difficult situations where they had only a few minutes to evaluate an application while facing increased pressure to accept a large percentage of the applicants rather than risk offending the host country.¹⁷ Furthermore, on the “morning of the September 11 attack,” Congress was reconsidering section 245(i) of the Immigration and Nationality Act, which would have bypassed the usual process of acquiring a visa in an immigrant’s home country prior to departing for the United States and, instead, would have allowed them to acquire one “within the United States”

¹² *Id.*

¹³ *Id.*

¹⁴ William Branigan, *INS Is Told to Hire Hundreds, But No Funds Are Earmarked*, WASH. POST, Oct. 2, 1996, at A15.

¹⁵ Krikorian, *supra* note 5.

¹⁶ *Id.*

¹⁷ *Id.*

following their arrival on our shores.¹⁸ This provision would have negated the entire purpose behind issuing visas overseas because, usually, personnel abroad are much more capable of determining one's visa eligibility. In effect, section 245(i) would provide an opportunity for those immigrants who would have been denied visas overseas to gain them within the very borders of America.¹⁹ U.S. officials abroad are much more familiar with the conditions and political climate of the countries in which they serve, enabling them to make better informed decisions when screening a visa applicant in comparison to officials within the U.S. who may possess little knowledge of an immigrant's home country.²⁰

These examples provide just a cursory glimpse into the general attitude towards immigration before the events of 9-11. Many immigration policies and procedures appeared to be nothing more than an afterthought, as evidenced, for example, by the call for completely open borders by media services such as the Wall Street Journal.²¹ Such beliefs were shattered by the terrorist attacks on the World Trade Center and the Pentagon leading many to wonder how the terrorists managed to bypass our security measures and focusing national attention on the regulation of immigration.

B. How Terrorists Took Advantage of Immigration Regulations

Many foreign terrorists who have either perpetuated an attack on American soil or been apprehended within America's borders have done so in violation of U.S. law. Thus, in one way or another, foreign terrorists discovered a way to take advantage of lax immigration policies and procedures to enter into the United States.

Janice L. Kephart, who served on the 9-11 Commission and was an author of *9/11 and Terrorist Travel: A Staff Report of the National*

¹⁸ *Id.* See 8 C.F.R. § 245.1(i)(2005). See also Mary Beth Sheridan, *Tougher Enforcement by INS Urged; Lawmaker Wants Continual Checks of Visa Holders' Status, More Staff at Borders*, WASH. POST, Sept. 18, 2001, at A15.

¹⁹ Krikorian, *supra* note 5.

²⁰ *The Visa Waiver Program and The Screening of Potential Terrorists: Hearing Before the Subcomm. on Int'l Terrorism, Nonproliferation and Human Rights of the H. Comm. on Int'l Relations*, 108th Cong. (2004) [hereinafter Testimony] (statement of Mark Krikorian, Executive Director, Center for Immigration Studies), available at <http://www.cis.org/articles/2004/msktestimony061604.html>.

²¹ Krikorian, *supra* note 5.

Commission on Terrorist Attacks Upon the United States,²² recently prepared a report adding to the findings of the 9-11 Commission and the Center for Immigration Studies concerning how terrorists have taken advantage of weaknesses within our immigration system.²³ The study found that fifty-nine out of the ninety-four terrorists who operated within America had committed some form of immigration fraud either prior to or in conjunction with participating in terrorism, and many of those violated multiple immigration laws.²⁴ One of the most common means of entering was through temporary visas. For example, out of the ninety-four terrorists in the study, eighteen had acquired student visas, and seventeen had received visitor visas such as tourist or business.²⁵ Also, another common form of entry was through political asylum. The study found seventeen of the ninety-four terrorists “had applied for asylum,” usually “at a port of entry,” asserting they had lost all their travel documents.²⁶

Once having gained admittance into the country, there were forty-seven instances where terrorists used immigration benefits to extend their stay within the country to pursue their terrorist activities, and there were some who even became legal permanent residents of America through sham marriages to American citizens.²⁷ The report discusses in detail the stories of several terrorists who married Americans in an effort to gain permanent residency within the United States.²⁸ For example, El Sayyid Nosair “married an American citizen in 1981.”²⁹

²² STAFF OF NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., 108TH CONG., 9/11 AND TERRORIST TRAVEL: A STAFF REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004), available at http://www.9-11commission.gov/staff_statements/911_TerrTrav_Monograph.pdf.

²³ Janice L. Kephart, *Immigration and Terrorism: Moving Beyond the 9/11 Staff Report on Terrorist Travel*, CENTER PAPER 24, Sept. 2005, at 1, 5, available at <http://www.cis.org/articles/2005/kephart.pdf>.

²⁴ *Id.* at 5. The report covers ninety-four terrorists who have been convicted and indicted as operatives of al-Qaeda, Hamas, Hizballah, and other terrorist groups between 1990 and the end of 2004. Only terrorists who had abused the U.S. immigration system by gaining admittance into the U.S. through fraudulent behavior, or by obtaining legal benefits to stay in the U.S., are included in this report. *Id.* at 7.

²⁵ *Id.* at 5.

²⁶ *Id.*

²⁷ *Id.* Examples of immigration benefits the terrorists used to extend their stay in the United States include naturalization and legal permanent residency. *Id.* at 7. Ten of the terrorists in the report obtained residency in the U.S. through sham marriages. *Id.* at 12.

²⁸ *Id.* at 12.

²⁹ *Id.* at 13.

The INS then granted him citizenship in 1989, but the INS was “unaware” of the FBI’s knowledge that Nosair had once given “weapons training” to “Islamic militants.”³⁰ Nosair “was later indicted because he had participated [in] the 1993 World Trade Center bombing” after secret documents stolen from Fort Bragg were found in his possession during a search of his apartment.³¹

Other terrorists have taken advantage of the Visa Waiver Program to gain admittance into the United States.³² This program allows a foreigner to skip screening at a local consulate, i.e., by a U.S. official who is much more familiar with the conditions of the country and more qualified to determine visa eligibility. Instead, the foreigner only has to appear before an immigration inspector at the U.S. port of entry who only has a few minutes to look over the passport and do a quick name check.³³ At a U.S. embassy, the burden is on the applicant to prove he qualifies for the visa, whereas, at the airport, the burden is on the immigration inspector to prove that the foreigner has broken the law before he can deny admittance.³⁴ A denial at the port of entry would, in turn, have to be reviewed by a supervisor, leading to hours and hours of paperwork.³⁵ One can understand the attractiveness to a terrorist of using the Visa Waiver Program to gain entry into the United States.

Two captured terrorists, Zacarias Moussaoui and Richard Reid, using their own French and British passports, respectively, took advantage of the Visa Waiver Program.³⁶ Two other apprehended terrorists who were also part of the first World Trade Center bombing, Ahmed Ajaj and Ramzi Yousef, also used the Visa Waiver program to gain admittance into the United States.³⁷ These examples exemplify how easy it was for terrorists to take advantage of U.S. immigration policy and indicate the necessity for substantial changes.

The above mentioned findings and examples only begin to scratch the surface of how terrorists have managed to manipulate our own

³⁰ *Id.*

³¹ *Id.*

³² Testimony, *supra* note 20.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

immigration system against us.³⁸ In order to change the system to make it more effective, the government needs to organize the system in such a way as to focus on the most problematic areas.

C. Three Critical Areas of Concern

If the government hopes to develop a better immigration system, it must first identify the most problematic areas that need fixing. There are three areas of concern: (1) the process of entering the country at ports of entry and of tracking immigrants, (2) the process of applying for visas overseas, and (3) the process of interior enforcement.³⁹

The first area of focus should be at ports of entry. There are two elements to protecting ports of entry: at an actual port of entry, “which [is] the point[] where people traveling by land, sea, or air enter the United States;” and at the border.⁴⁰ Ports of entry also include airports well within the borders of the U.S. and are not exclusive to those physically situated on the border. In addition, ports of entry are monitored by inspectors working for the Bureau of Customs and Border Protection, which is part of the Department of Homeland Security (DHS), while the border is traversed by the Border Patrol and/or the Coast Guard, both of which now operate under the DHS.⁴¹ Ports of entry—wherever they are located—and the border are important because many terrorists who committed terrorist acts through 2001 had interacted with immigration agents in some fashion at ports of entry, and the borders of the United States are immense making it difficult patrol with a limited number of agents.⁴²

It is easy to overlook the visa process overseas, because, when one thinks about fixing immigration problems, one usually tends to focus on initial entry into the country or tracking immigrants once they have entered the United States. However, the visa process is essential, because physical presence in the United States by foreigners makes it easier for them to gain lawful admittance.⁴³ Thus, the visa process overseas serves as a first line defense in weeding out undesirables.

³⁸ See generally Kephart, *supra* note 23 (providing a case study of terrorists who have operated within the United States by taking advantage of the U.S. immigration system).

³⁹ Krikorian, *supra* note 7.

⁴⁰ Mark Krikorian, *Keeping Terror Out: Immigration Policy and Asymmetric Warfare*, NAT'L INT., Spring 2004, at 77.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

The final area of focus is interior enforcement of immigration laws. Interior enforcement means enforcing immigration law once an immigrant or foreigner has successfully passed through a port of entry. Interior enforcement has two important elements: conventional measures and checkpoints.⁴⁴ Conventional measures include “arrest, detention, and deportation,” while checkpoints refer to verifying the legal status of an immigrant or foreigner when performing certain activities in such a way as to cause such disruption in the lives of illegal aliens or terrorists that it encourages them to go home on their own or abandon the execution of any terrorist acts.⁴⁵

All three areas of concern have been penetrated by terrorists in the past, and the rest of this paper will discuss various changes the government has implemented in order to prevent terrorism and crack down on illegal aliens as well as some proposed changes to improve the system.

III. PROPOSED AND ACTUAL CHANGES IN IMMIGRATION SYSTEM

A. Three Goals of Improvement

At the outset, one must admit that changes in immigration policy may not be able to prevent every terrorist attack, but they can serve as a strong deterrent against them.⁴⁶ However, it is important that any change made to immigration policy have a clear goal. The remainder of this paper will discuss actual and proposed changes in light of three main goals: (1) preventing terrorists’ movements, (2) prosecuting suspected terrorists, and (3) ensuring that foreign nationals’ rights are protected and that they are treated fairly.⁴⁷ Each actual and proposed change will be evaluated on how well it would contribute to achieving these goals.

Regarding any change to the immigration system, the first two goals would appear to be obvious ones of any immigration system. It is the third goal that is perhaps the trickiest but may also be the most important. Regarding the third goal, Supreme Court Justice Sandra Day O’Connor said it best: “[A]t what point does the cost to civil liberties from legislation designed to prevent terrorism outweigh the

⁴⁴ *Id.*

⁴⁵ *Id.* Such checkpoints include obtaining employment, receiving a driver’s license, opening a bank account, and dealing with immigration services. *Id.*

⁴⁶ Martin, *supra* note 8, at 329.

⁴⁷ *Id.*

added security that that legislation provides?”⁴⁸ At what point does protecting national security go too far in infringing on the rights enumerated in the Constitution, and to what extent do foreign nationals enjoy those rights?⁴⁹ For example, in *Zadvydas v. Davis*,⁵⁰ the Supreme Court held that an alien found to be illegally within the United States could not be held indefinitely because the Fifth Amendment’s Due Process Clause “applie[d] to all ‘persons’ within the United States;” thus, an illegal alien detained within the United States would have a right to due process.⁵¹ Based on *Zadvydas*, foreign nationals, legal or illegal, do enjoy some of the rights granted by the Constitution when they are within the borders of the country. Thus, each of the changes to the immigration system will be examined to determine whether or not they would protect the rights of foreign nationals who are not terrorists.

B. Border Policies

1. “The Great Wall of America”

If the United States chose to do so, it would not be the first nation to construct a security wall to guard its national interests. Historically, there have been the Great Wall of China and Hadrian’s Wall in England, barriers that have been meant to keep certain people out and protect those residing within the walls.⁵²

Even today, a multitude of nations have built security fences in order to protect their borders. For example, India has built a 1,800-mile barbed-wire, security fence along its border with Pakistan with the primary objective being to staunch the flow of terrorists and Islamic militants who might cross over into India from Pakistan.⁵³ Not satis-

⁴⁸ Linda Greenhouse, *A Nation Challenged: The Supreme Court; In New York Visit, O’Connor Foresees Limits on Freedom*, N.Y. TIMES, Sept. 29, 2001, at B5.

⁴⁹ See generally *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (distinguishing substantive from non-substantive immigration law and holding that rights can be implicated if the immigration law is non-substantive); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (holding that decision by government officials to exclude foreigner from entry is a substantive immigration policy that outweighs any First Amendment rights).

⁵⁰ *Zadvydas v. Davis*, 533 U.S. 678 (2001).

⁵¹ *Id.* at 693.

⁵² Glon, *supra* note 4, at 371; See *It’s Time for Israel to Get Over Its Walls and Deal With Hamas to Find Peace*, CANBERRA TIMES (Austl.), Apr. 1, 2006, § National.

⁵³ Glon, *supra* note 4, at 371-72.

fied with one security fence, India is also constructing a security fence along its border with Bangladesh which will eventually extend over 2,000 miles in order to prevent armed rebels from infiltrating into India and attacking its citizens.⁵⁴

Saudi Arabia has also begun constructing a security fence along its border with Yemen, claiming that it is needed to protect the safety of its citizens from terrorists and smugglers.⁵⁵ However, the construction of the barrier will be done with the cooperation of the Yemeni government and in accordance with a Saudi-Yemeni border treaty.⁵⁶

In the 1970's, "[t]he British government . . . construct[ed an array] of separation fences" known as the "Peace Line" in Northern Ireland.⁵⁷ These "brick, iron, and steel" barriers were made in an effort to "curb the [] violence hostility between Catholic and Protestant neighborhoods."⁵⁸ There are currently over forty of the fences, each over forty feet in height, and they have proven to be highly effective in preventing terrorist attacks as well as efficient because the gates are closed at night, requiring only two policemen to keep watch, whereas before it required dozens.⁵⁹

Other countries such as Thailand and Uzbekistan have also constructed similar security fences for the purpose of protecting their citizens from potential terrorist attacks, smugglers, and illegal aliens.⁶⁰ The important thing to note is that each security fence has not encroached on another country's land or sovereignty, and the primary purpose behind each has been to protect the country's citizens from potential terrorist attacks and smugglers.

In contrast, one of the most controversial security fences to be constructed is the one built by Israel in 2003 in the West Bank area.⁶¹ In an advisory opinion, the International Court of Justice (ICJ) found the wall to be "contrary to international law" because it would infringe on the rights of the Palestinians and restricted their freedom of movement.⁶² The Palestinian Liberation Organization (PLO) argued the

⁵⁴ *Id.* at 372.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 373.

⁶⁰ *Id.* at 372-73.

⁶¹ *Id.* at 374.

⁶² *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. LEXIS 20, 136, 140 (July 9) [hereinafter Advisory Opinion].

wall was an attempt by Israel to annex the disputed territory, which would be a violation of international law.⁶³ Israel claimed the wall was only meant as a temporary barrier to act as a deterrent against terrorist attacks from the West Bank.⁶⁴ To support its assertions, Israel generated data “showing a 90 percent drop in . . . terror[ist] attacks since the [wall] was constructed.”⁶⁵

The ICJ appears to have ignored the fact that Israel’s wall is similar to the one separating India and Pakistan in that both walls are built in disputed areas. Thus, using the same logic, the wall built by India likely infringes on the rights of Muslims in the Kashmir region, and yet the ICJ has not given a decision or made an advisory opinion concerning the situation. The wall also appears to be a successful deterrent supporting Israel’s claim of self-defense, but the court placed more value on the alleged infringement of rights than on loss of actual lives. Further, the ICJ’s reasoning that the wall restricts freedom of movement seems weak because all walls restrict some freedom of movement. Yet, if the United States were to construct a similar wall, it would be in line with the international norm according to the ICJ⁶⁶ because it would be building a security fence in its own territory (and not disputed territory) and would not be infringing on the rights of citizens of another country.

However, there has been much criticism of the idea of a security fence in America. Some of the reasons for opposition include “supposed human rights abuses, destruction of environmental habitats and the prevention of animal migration, racial and ethnic discrimination, and impediments to trans-border Indian reservation movement.”⁶⁷ In addition, the corporate community has been one the biggest detractors of a security fence because it could deny it a cheap-labor base, which could in turn lower corporate net profits.⁶⁸

Despite these criticisms, none should prevail over the overwhelming interest a nation has in protecting the safety of its citizens. In light of the three goals of any change in immigration policy, a security fence would greatly decrease the movement of terrorists, but would not have much affect on the prosecution of suspected terrorists. The

⁶³ *Id.* at 108.

⁶⁴ *Id.* at 109.

⁶⁵ Liat Collins et al., *Moving Fences*, JERUSALEM POST, July 23, 2004, § News, at 3.

⁶⁶ *See* Advisory Opinion, *supra* note 62, at 131-37.

⁶⁷ Glon, *supra* note 4, at 374-75.

⁶⁸ *Id.* at 375.

only concern would be whether it would deprive foreign nationals of their rights while in the United States by restricting their freedom of movement. The answer to that concern would be a resounding no because the ICJ, when dealing with the Israeli security fence, stated that as long as the fence was built on a sovereign's own territory, it did not infringe on the rights of another nation's citizens.⁶⁹

2. Title IV of the USA PATRIOT Act

The USA PATRIOT Act of 2001 "was signed into law on October 26," primarily in "response to the terrorist of September 11."⁷⁰ As discussed previously, one of the main reasons terrorists were able to infiltrate into the United States was because of a lax immigration system. The Patriot Act would have served as the perfect vessel to address certain problems with the immigration system. Instead, Congress missed out on a golden opportunity to address these immigration issues and only included minimal provisions in the Patriot Act dealing with immigration. The primary section of the Patriot Act which deals with immigration and protecting the border specifically is Title IV.⁷¹

Section 402 authorizes allocating enough money to triple the number of agents along the Canadian border as well as an additional \$50 million for technological improvements in monitoring the Canadian border.⁷² Section 403 allows personnel of the Immigration and Customs Enforcement (ICE) and State Department to access the FBI's National Crime Information Center's Interstate Identification Index (NCIC-III) and the Wanted Persons File for the purposes of doing a background check on a visa applicant.⁷³ However, that access would be limited only to extracts, and in order to receive a full criminal history, the ICE and State officials would have to submit the visa applicant's fingerprints.⁷⁴ Other sections within Title IV include the implementation of an integrated entry-and-exit system, the development of

⁶⁹ See Advisory Opinion, *supra* note 62, at 131-37.

⁷⁰ Rosemary Jenks, *The USA PATRIOT Act of 2001: A Summary of the Anti-Terrorism Law's Immigration-Related Provisions*, BACKGROUNDER, Dec. 2001, at 1, available at <http://www.cis.org/articles/2001/back1501.pdf>.

⁷¹ USA PATRIOT Act, Pub. L. No. 107-56, §§ 401-28, 115 Stat. 272, 342-63 (2001).

⁷² USA PATRIOT Act § 402.

⁷³ USA PATRIOT Act § 403.

⁷⁴ USA PATRIOT Act § 403.

machine-readable passports, and an easier standard for excluding terrorists and other aliens with ties to terrorists.⁷⁵

Title IV devotes an entire section to the Canadian border but fails to address any special provisions for the Mexican border.⁷⁶ Many of the other provisions apply to both borders, but the absence of any special provisions for the border with Mexico is conspicuous. Title IV—a significant step in the right direction—will enable officials to better identify, exclude, and prosecute terrorists or other aliens with terrorist connections, but it is still just a first step in reforming the immigration system to more effectively protect national security.⁷⁷

3. Other Changes

Other changes to the immigration system include increased manpower at entry ports, increased border patrols between entry ports, and the US-VISIT biometric entry-exit system. The first two changes were implemented in Title IV of the Patriot Act, but whether or not they will be enough remains to be seen. “Increasing border patrols is not militarization” of the border, which can be distinguished when one compares the role of a soldier to that of a law enforcement agency such as the Coast Guard: “soldiers are supposed to find and kill the enemy,” whereas “law enforcement agencies” are tasked with the deterrence or apprehension of those who would break the law.⁷⁸ To the contrary, increasing the manpower of the border patrols would decrease the likelihood that the United States would have to station troops on the border, which could be construed as an act of “militarization.”⁷⁹

US-VISIT is a sophisticated entry-exit system that employs “advanced biometric technology” to “screen[] foreign visitors” in order to “deter and detect the entry of terrorists” or others who might present a danger to national security.⁸⁰ It performs three primary functions: (1) checking the identity of the visitor to protect against fraud, (2) screening visitors against more enhanced security and watch lists, and (3)

⁷⁵ USA PATRIOT Act §§ 411, 414, 417.

⁷⁶ See generally USA PATRIOT Act §§ 401-28.

⁷⁷ Jenks, *supra* note 70, at 1.

⁷⁸ STEVEN CAMAROTA, CENTER FOR IMMIGRATION STUDIES, IMMIGRATION AND TERRORISM: TESTIMONY PREPARED FOR THE U.S. SENATE, COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON TECHNOLOGY, TERRORISM, AND GOVERNMENT INFORMATION (2001), <http://www.cis.org/articles/2001/sactestimony1001.html>.

⁷⁹ *Id.*

⁸⁰ Vaughan, *supra* note 10, at 2.

tracking the entry and exit of visitors, thereby enabling authorities to know when a visitor has left or overstayed the length of his visit.⁸¹ Under this new system, a “consular officer [will] collect applicants’ fingerprints,” which will then be checked by an inspection officer at an entry port, who will have access to a “computerized database” linked to each agency involved in the process.⁸² This will provide the inspector “access to more information . . . than ever before.”⁸³

The first phase of the program began operating in airports and sea-ports in January 2004, and, despite fears that it would only lead to congestion at entry ports, it went off without a hitch.⁸⁴ The program has enjoyed sterling success, “including [singling out] a Swiss pedophile, a St. Lucian rapist, and a Georgian murderer” who had entered the United States on previous occasions without having been caught.⁸⁵

Despite its initial success, there is still room for improvement of the system. US-VISIT currently screens only regular non-immigrant visa holders and visa waiver program visitors but curiously exempts the vast majority of visitors from Mexico and Canada, who make up approximately seventy-eight percent of all visitor entries.⁸⁶ If US-VISIT is going to truly protect national security, then it should enroll all Mexican and Canadian visitors, implement an exit procedure for all visitors, and link itself to interior enforcement.⁸⁷

By the end of 2004, US-VISIT made its appearance at the land-border crossings without much fanfare.⁸⁸ Currently, only Canadians who need a visa (typically students and guest workers) and Mexicans who plan on staying for an extended period of time (thirty or more days) or leaving the immediate vicinity (within twenty five miles of the border) are enrolled in the program, which adds up to less than three percent of the foreign visitors who use these land ports.⁸⁹ The Mexican visitors subject to US-VISIT will be identified by whether they use their Border Crossing Card (BCC) as a B1/B2 visa, which indicates they plan on leaving the border zone or staying in the U.S. for more than thirty days.⁹⁰ The reason behind the limited enrollment

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Id.

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Id. at 2-3.

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Id. at 3.

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Id.

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Id.

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Id.

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Id.

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Id.

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Id. at 4.

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8 C.F.R. § 235.1(f) (2005).

is likely politically motivated since it is technologically feasible to increase the number enrolled. However, even though only a limited number of Canadian and Mexicans are required to enroll in the program, US-VISIT does apply to all other visitors to the U.S. with limited exemptions.⁹¹

US-VISIT will also be able to aid interior enforcement by generating data that could provide insight on problem groups and leads on particular foreign visitors who may be suspected terrorists.⁹² It can be used by other immigration agencies to supplement other existing databases to create a more comprehensive database of more complete data on individuals entering into the United States.⁹³

Despite excluding most Mexicans and Canadians, the US-VISIT system is a step in the right direction. It will clearly assist in limiting the movements of terrorists and will help lead to the capture and prosecution of terrorists. Again, the only question is whether it would unduly burden the rights of a foreign national. The United States has the right to exclude foreigners and deport them, which would outweigh any possible rights to privacy the foreign visitor might possess under the Ninth Amendment.⁹⁴ The US-VISIT system is designed to ensure terrorists or others who may be dangerous to national security cannot get admitted in the first place; so, even if a mistake did occur, it would only lead to denying admittance to the foreign national.

C. Overseas/Visas Policies

1. Visa Lottery

The visa lottery, also known as the “diversity lottery,” was originally devised by Congress in 1986 as an affirmative action program for white immigrants but has since evolved into a new creation offering up to “50,000 visas every year” to people from those countries which are “not in the top dozen [as] sources of immigration” into the United States.⁹⁵ The purpose of the lottery was to try and create diver-

⁹¹ Homeland Security, Travel and Transportation: US-VISIT Enrollment Requirements, http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0527.xml (last visited Jan. 5, 2005). See also 8 C.F.R. § 235.1(d) (2005) (listing the exemptions from US-VISIT).

⁹² Vaughan, *supra* note 10, at 8.

⁹³ *Id.*

⁹⁴ See generally *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

⁹⁵ Mark Krikorian, *Taking Chances: The Folly of the Visa Lottery*, BACKGROUND, July 2004, at 1, available at <http://www.cis.org/articles/2004/Back>

sity among immigrants who were coming into the country since, originally, most were from Latin America or Asia.⁹⁶ Nowadays, the majority of the immigrants who participate in the visa lottery are from Islamic countries because immigrants from countries with large demand such as Mexico and Canada are not eligible for the visa lottery.⁹⁷

Since the visa lottery no longer serves its purpose of diversifying the flow of immigrants, it needs to be dissolved or improved. One of the main reasons for the visa lottery was to diversify immigration. However, since the inception of the visa lottery, studies have shown that the nation's total immigration population has actually grown less diverse.⁹⁸ Studies conducted "by the Center for Immigration Studies found that from 1990 to 2000," the percentage of Mexican immigrants increased from twenty-two to thirty percent and that the percentage of all Latin American immigrants increased from thirty-seven to forty-six percent.⁹⁹ If the lottery was realistically expanding the sources of immigration, then either there would be a decrease in the number of Mexican and Latin American immigrants, or else a significant increase in the amount of immigrants from other countries.¹⁰⁰

The visa lottery also opens the door for widespread fraud, because it invites applications from virtually everyone with a minimum requirement of showing that they are qualified after being chosen¹⁰¹ Thus, an applicant could put whatever he wanted to on the application whether it was true or not. If he were a winner in the lottery and had falsified his information, he would then seek to obtain falsified documents to match the falsified information on his application.¹⁰² "According to Transparency International's Corruption Perceptions Index 2003," Nigeria and Bangladesh both grade as "the two most corrupt nations in the world," and they just happen to annually place "among the top ten lottery winners."¹⁰³

804.pdf.

⁹⁶ *Id.*

⁹⁷ *Id.* Other countries not eligible for the visa lottery include: "Mainland China (except for Hong Kong and Macau), Colombia, the Dominican Republic, El Salvador, Haiti, India, Jamaica . . . Pakistan, the Philippines, Russia, South Korea, the United Kingdom (except for Northern Ireland), and Vietnam." *Id.* at 3 n.1.

⁹⁸ *Id.* at 1.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 2.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

A final reason the lottery should be dissolved or fixed is because of the security risks it poses. Hesham Mohamed Ali Hedayet was an Egyptian immigrant who became an illegal alien when he overstayed his temporary visa.¹⁰⁴ He received a green card only because his wife eventually won the lottery, and he would later open fire at the Israeli El Al counter killing two at the Los Angeles International Airport in 2002.¹⁰⁵ Hedayet is only one example of several in which terrorists have managed to enter the country in order to perform terrorist attacks.¹⁰⁶

Eliminating the visa lottery would plug at least one hole in our immigration system, helping to prevent the movements of some terrorists into the United States. However, if the United States wanted to fix the visa lottery (instead of just completely eliminating it), it could tighten up the process instead of making it so accessible. For example, the U.S. could raise the requirements of entry so that only the most qualified of the millions who apply would be accepted.¹⁰⁷ Another solution would be to first take the families of already legal permanent residents, instead of people we know nothing about.¹⁰⁸ Finally, officials could refuse to accept applications from certain countries (such as Nigeria and Bangladesh), because of the high rate of fraud perpetuated by those countries' applicants.¹⁰⁹

2. Mexico's Matricula Consular

Another hole that needs to be plugged in our immigration system is Mexico's idea of a Matricula Consular. The concept behind the Matricula Consular is to provide Mexicans living illegally (i.e. without a visa) within United States borders an official Mexican government document called a matricula card which verifies the bearer's name and

¹⁰⁴ *Id.* at 2-3.

¹⁰⁵ *Id.* at 3. See also Julia Malone, *Airport Shooter Raised INS Suspicions in Mid-90's*, ATLANTA JOURNAL-CONSTITUTION, Oct. 10, 2002, at 6A.

¹⁰⁶ Krikorian, *supra* note 95 at 2. Karim Koubriti, "a lottery winner from Morocco," was convicted on charges of terrorism in Michigan while Ahmed Hannan, also a "lottery winner," was convicted at the same trial of "document fraud." *Id.*

¹⁰⁷ *Id.* Currently, the requirements are a high school education or its equivalent or "two years of work experience within the last five years in an occupation requiring at least two years of training or experience to perform." *Id.*

¹⁰⁸ *Id.* at 3.

¹⁰⁹ *Id.* at 2.

age and legitimizes their presence in the United States.¹¹⁰ A new matricula card has been created including new information such as a U.S. address and a telephone number of the local Mexican consulate.¹¹¹ One of the superficial reasons for the new card is that it is secure enough to prevent counterfeiting, thereby making it more reliable.¹¹²

However, the underlying idea behind the card is to make life easier on Mexican citizens living “in the United States *illegally*.”¹¹³ The purpose of an effective immigration system is to discourage illegal immigration and to find and deport those who are in our country illegally. The matricula card serves only to circumvent the purpose of our own immigration system. Instead of helping to discourage illegal immigration, the card encourages illegal immigration by granting illegal Mexican immigrants the right to continue living in the United States. It allows illegal Mexican immigrants to continue to live in the United States because the card is recognized as valid by many government officials in place of a visa.¹¹⁴

Not only does the matricula card attempt to circumvent our immigration system, but it is not even a secure identification record and can shield criminals and terrorists.¹¹⁵ Several problems exist with the card. For example, with no computer network in place to link the forty-seven Mexican consulates together, it is virtually impossible to keep accurate records of who has been issued a matricula card.¹¹⁶ Due to these problems, almost anyone can receive the card because the person’s identity is never properly verified, and one must only show Mexican citizenship to receive the card.¹¹⁷ Even terrorists might be able to take advantage of the matricula card if they can either acquire forged papers indicating they are a citizen or they steal the identity of an actual citizen. Additionally, if the United States accepts the matricula card, it could set a dangerous precedent in which other foreign governments may wish to have similar cards for their own illegal populations within the United States.¹¹⁸ This would only increase the

¹¹⁰ Marti Dinerstein, *IDs for Illegals: The ‘Matricula Consular’ Advances Mexico’s Immigration Agenda*, BACKGROUND, Jan. 2003, at 2, available at <http://www.cis.org/articles/2003/back303.pdf>.

¹¹¹ *Id.* at 3.

¹¹² *Id.*

¹¹³ *Id.* at 10 (emphasis added).

¹¹⁴ *Id.* at 2.

¹¹⁵ *Id.* at 1.

¹¹⁶ *Id.* at 4.

¹¹⁷ *Id.* at 6.

¹¹⁸ * *Id.* at 10.

chances of terrorists gaining entry into the U.S. while at the same time allowing them even more freedom to operate within our borders.

The best solution would be for the United States to reject the matricula card as a feasible identification document for illegal Mexican immigrants. The card would not be useful to legal immigrants because they would have the necessary documents to stay legally within the United States.¹¹⁹ Although, the card would be a more efficient way of convicting an illegal immigrant who has committed a crime, the fact still remains that an immigrant in possession of the card cannot be arrested solely because he is in the country illegally. The card legitimizes his presence in the United States without having to go through the proper authorities. Not only does it subvert our immigration system, but it can be taken advantage of by both criminals and terrorists. Eventually, the matricula card may become so ineffective that if a terrorist does use a matricula card to gain entrance into the United States and then performs a terrorist attack, all kinds of Mexican foreign nationals who possess a matricula card may be rounded up and harassed.

3. Abuse of Certain Types of Visas

Terrorists have abused three main types of visas: (1) student, (2) religious worker, and (3) political asylum visas.¹²⁰ All three areas are important aspects of our immigration system, and all three are susceptible to abuse.

Hani Hanour, the 9-11 pilot who crashed into the Pentagon, had gained admittance into the United States on a student visa to attend an English-language school in September of 2000.¹²¹ The other pilots who manned the flights that crashed during 9-11 also had student visas to various schools in the United States.¹²²

The religious worker visa is another one that is easily abused by terrorists.¹²³ In order to obtain this type of visa, one must file an application from a primary religious organization certifying the applicant is a religious minister or worker, who is in the United States for the sole purpose of conducting a religious vocation.¹²⁴ The applicant must have

¹¹⁹ *Id.* at 1.

¹²⁰ See generally Kephart, *supra* note 23 (discussing several cases where terrorists abused these types of visas).

¹²¹ *Id.* at 23.

¹²² *Id.*

¹²³ *Id.* at 24-26.

¹²⁴ Immigration Act of 1990, Pub. L. No. 101-649, § 209, 104 Stat. 5004, 5027 (1990) (hereinafter Immigration Act).

been a member of the religious organization for “a period of at least two years,” and the applicant must have received a job offer to be a religious worker and not work in a secular job.¹²⁵ The religious worker visa, like other visas, is very susceptible to fraud in that applicants may lie about their religious worker qualifications or a conspiracy may exist between the sponsoring organization and the individual to lie about an applicant’s qualifications.¹²⁶

Muhammad Khalil was the imam and director of a mosque in Brooklyn who was convicted of religious worker fraud in September of 2004.¹²⁷ Non-religious workers had been paying Khalil thousands of dollars so that Khalil would sponsor them for a religious worker visa, even though they did not qualify for the religious worker visas.¹²⁸ In order to get them into the country under the religious worker visa, Khalil forged driver’s licenses and undergraduates degrees and even lied to law enforcement officials about the people he was sponsoring so that they would qualify as a religious worker.¹²⁹

The final type of visa that has been abused by terrorists is the political asylum visa. “About 50,000 to 75,000 asylum cases are filed annually,” making it easy for a terrorist to sneak in through the cracks.¹³⁰ Even with revisions to this aspect of immigration law, terrorists will find asylum claims to be attractive options to buy them more time to remain in the United States.¹³¹ Just by making the claim, the applicant can prevent an “automatic removal or detention,” and if the “applicant . . . does not appear to pose a threat to public safety,” the applicant will generally be free to roam around within our borders at will.¹³² Finally, “the only information available to [the] judge [will be] the word of the applicant,” leaving the door open for “fraudulent claims.”¹³³

All three of these visas are open to abuse by terrorists because of the lack of information and knowledge of the applicants’ background. However, with the inception of the US-VISIT system, some of these errors may finally be fixed with larger databases providing more detailed information that will hopefully solve many of the fraud issues

¹²⁵ Immigration Act § 151.

¹²⁶ Kephart, *supra* note 23, at 24-25.

¹²⁷ *Id.* at 25

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 26.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

that are usually perpetuated with these visas. No longer will a judge have no information other than the applicant's word; instead, he will have access to a comprehensive database with all types of information. Student visas and religious worker visas can be checked more thoroughly to see if the applicant had been granted the visas before and whether he actually did what he said he was going to do or whether or not he overstayed his visa on previous visits. Overall, the best solution to solving the abuses of these visas is providing access to as much information about the applicant as possible.

D. Interior Enforcement

1. Legislation

One way to improve interior enforcement in the immigration system is for states to take the initiative to help federal agencies with homeland security by shoring up some of their own lax procedures and laws that make it easier for terrorists to stay within America's borders undetected.¹³⁴ Another possibility is to provide incentives to people to act as informants who possess sensitive information about alien smuggling and identification fraud.¹³⁵ This could greatly aid federal and state law enforcement agencies in tracking down and apprehending terrorists and other illegal aliens who might present a threat to national security by providing the agencies with informants who have first-hand knowledge about those smuggling aliens into the United States and those involved in creating fraudulent identification documents.¹³⁶

Ever since several of the 9-11 hijackers used Virginia and Florida identification documents to travel within the United States, motor vehicle licensing laws have been examined with greater scrutiny.¹³⁷

¹³⁴ See generally *Post-9/11, States Fail to Do Enough to End ID Fraud*, USA TODAY, Sept. 17, 2003, at 10A [hereinafter *States Fail to Do Enough*] (discussing how federal agents used the same techniques as 9-11 terrorists to acquire fraudulent driver's licenses).

¹³⁵ *Pushing the Border Out on Alien Smuggling: New Tools and Intelligence Initiatives: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 108th Cong. (2004) [hereinafter *Alien Smuggling*] (statement of Michael W. Cutler, Fellow, Center for Immigration Studies), available at <http://www.cis.org/articles/2004/cutlertestimony051804.html>. Cutler "spent 30 years as an INS employee, 26 of those years as a special agent," including time in a unit concerned with stopping human smuggling. *Id.*

¹³⁷ Jessica Vaughan, *No Time like the Present for Driver's License Reform*, BENNINGTON BANNER (Vt.), Jan. 17, 2004, available at <http://www.cis.org/articles/>

Vermont represents one state whose licensing laws many would consider to be lax due to the lack of a requirement of a photograph on a driver's license and the fact it has no stipulations for barring illegal immigrants from gaining driver's licenses.¹³⁸ Undercover federal agents found that many workers at motor vehicle offices in states such as Maryland and Arizona did not have proper training in recognizing fake documents.¹³⁹ Worse, those workers who did spot irregularities or nonconformities in documents did not confiscate them and alert the proper authorities, which is required by most states.¹⁴⁰ If states would improve their policies or their workers' training, then it might aid in cutting down on the number of illegal immigrants and possible terrorists who acquire identifying documents such as a driver's license that allows them to more freely operate within the United States.

Another way to increase the efficiency of interior enforcement is by recruiting more informants who are legal or illegal aliens. Sometimes it helps to recruit the smaller fish to catch the bigger fish. In his testimony before the Subcommittee on Immigration, Border Security, and Claims, Michael Cutler advocated a bill which would provide greater incentives for informants to assist in eliminating or disrupting the operations of those who participate in human smuggling.¹⁴¹ By offering certain visas (such as an S visa) to these informants, it can help authorities catch those responsible for smuggling illegal aliens into the country, cutting down on costs and time spent trying to track down leads.¹⁴² An alien will be much more likely to help federal authorities knowing he will not be deported or that he will be reunited with his family, since the government can agree to issue S visas to family members as well.¹⁴³

Both of these options illustrate ways in which the government can pass legislation that would encourage others, whether it is informants or state governments, to help aid in tracking down dangerous illegal aliens or terrorists within our borders. The federal government could pass laws—such as withholding highway funds—that penalize states

2004/jessicaoped011704.html.

¹³⁸ *Id.*

¹³⁹ *States Fail to Do Enough*, *supra* note 134.

¹⁴⁰ *Id.*

¹⁴¹ *Alien Smuggling*, *supra* note 135

¹⁴² *Id.* See also USCIS Application Procedures, http://www.rapidimmigration.com/usa/1_eng_info_svisa.html (last visited Jan. 7, 2005) (explaining that an S visa is issued to aliens who assist federal agencies in investigations concerning illegal or terrorist activity).

¹⁴³ *Alien Smuggling*, *supra* note 135.

for having lax procedures with respect to obtaining a driver's license.¹⁴⁴ Others laws could be similar to the one advocated by Cutler, which would provide incentives to alien informants to aid federal agencies in tracking down those responsible for forging identification documents. Moreover, legislation such as this would not deprive any foreign national within the United States of any rights, since the goal of the legislation is only to crack down on lax procedures and find ways to catch lawbreakers.

2. Participation of Local Law Enforcement

With approximate eight to ten million illegal aliens inside our country, the help of more than 650,000 local law enforcement officers nationwide can represent the difference between success and failure in achieving a quality immigration system.¹⁴⁵ The issue then revolves around whether local law enforcement agencies have the intrinsic power to arrest someone for disobeying a federal law.¹⁴⁶ The answer is yes, because local law enforcement officers may arrest an alien who has committed a criminal act as long as they transfer the custody of the alien within a reasonable time to federal immigration officers.¹⁴⁷ Unfortunately, if the federal immigration officers do not agree to take these aliens, it is unclear just how far a state can go to enforce federal immigration law. For example, Arizona is attempting to expand its trespassing laws to allow local law enforcement agencies to arrest illegal aliens.¹⁴⁸ The state legislature has proposed several options such as making it a felony for aliens who are violating federal immigration law while in Arizona and making "immigrant trespassing a top-tier misdemeanor, punishable by 6 months in jail and a \$2,500 fine."¹⁴⁹ However, New Hampshire attempted adopting similar provisions only to have them struck down because of a state's lack of power to "enforce federal immigration law."¹⁵⁰

¹⁴⁴ See generally *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding Congress's attempt to impose a national drinking age by threatening to withhold federal highway funds as constitutional under Congress's spending powers under the 11th amendment).

¹⁴⁵ Kris W. Kobach, *State and Local Authority to Enforce Immigration Law: A Unified Approach for Stopping Terrorists*, BACKGROUND, June 2004, at 1, available at <http://www.cis.org/articles/2004/back604.pdf>.

¹⁴⁶ *Id.* at 2.

¹⁴⁷ *Id.* at 2-3.

¹⁴⁸ *Nation Briefs*, NEWSDAY, Feb. 6, 2006, at A24.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

Once the power to arrest an alien for a violation of federal law is established, it cannot be stressed enough the importance of local law enforcement officers in the interior enforcement of immigration laws. Local law enforcement officers can play a vital role in observing potential terrorist activity on a daily basis, by arresting both suspected terrorists and absconders (those aliens who disobeyed an Immigration court's removal order), by catching and disrupting alien smuggling, and by undertaking limited enforcement actions of immigration law in isolated areas where federal agencies cannot reach because they are spread too thin.¹⁵¹

3. Using the Military Domestically

The government always has the option—as the most extreme measure of interior enforcement—of using the military to combat terrorists and enforce the immigration system within our borders.¹⁵² This would only be an option in the direst of circumstances. Even then, however, one must be careful not to violate the posse comitatus law, which makes it illegal for anyone to use “any part of the Army or Air Force” “to execute the laws” domestically without authorization from either “the Constitution or an Act of Congress.”¹⁵³

The concerns of using the military internally are two-fold: it impairs the ability of the military to focus on operations overseas, and it has the potential to undermine civil liberties of citizens and foreign nationals alike.¹⁵⁴ For example, “[d]uring the Civil War, . . . the Army [was used] to arrest, try, and imprison . . . many . . . Northerners, . . . [some of whose only crime was] legitimate dissent or opposition to the Lincoln administration.”¹⁵⁵ “During World War II, the Army” was used in “the evacuation of Japanese Americans from the West Coast” and their subsequent internment.¹⁵⁶ Whether or not these actions were correct is not at issue here, but what is important is that it caused much dissension among American citizens and the armed forces in later years as well as some general mistrust.¹⁵⁷ Using the military domestically can also impair the ability of the military to focus on operations

¹⁵¹ Kobach, *supra* note 145, at 6-7.

¹⁵² Richard H. Kohn, *Roundtable Essay: Posse Comitatus: Using the Military at Home: Yesterday, Today, and Tomorrow*, 4 CHI. J. INT'L L. 165 (2003).

¹⁵³ Posse Comitatus Act, 18 U.S.C. § 1385 (2005).

¹⁵⁴ Kohn, *supra* note 152, at 177.

¹⁵⁵ *Id.* at 188.

¹⁵⁶ *Id.* at 189.

¹⁵⁷ *Id.* at 190.

overseas by diverting money, manpower, and concentration away from areas that need it the most.¹⁵⁸ Sensitive to these concerns, the Department of Homeland Security has identified only nominal roles for the military domestically, including the following:

1. Conventional military activities in those “extraordinary” situations “such as combat air patrols or maritime defense operations” where the military “would take the lead in defending people” and American “territory” with support “by other agencies”;
2. “responding” to “emergencies such as ... an attack or ... forest fires, floods, tornadoes, or other catastrophes,” for which the Defense Department would react “quickly to provide capabilities that other agencies do not have”; and
3. “limited scope” situations “where other agencies have the lead—for example, security at a special event like the recent Olympics.”¹⁵⁹

The role given to the military as detailed above allows for the possibility of using the military domestically in special circumstances, but, at the same time, it prevents the military from abusing the civil rights of American citizens. Out of all the actual changes and proposed changes to the immigration system, the deployment of the military domestically could lead to the infringement of rights, not only of foreign nationals, but also our own citizens.¹⁶⁰ However, the possibility always exists that someday the military might be needed to respond to an extraordinary terrorist threat, and in that case, it would not be wise to completely disregard the use of the military as an interior enforcement mechanism.

¹⁵⁸ *Id.* at 184.

¹⁵⁹ *Id.* at 177.

¹⁶⁰ *Id.* at 188-189. For example, during the Civil War, the federal government employed the Army as a police force to arrest, try, and imprison many citizens suspected of disloyalty, even though some were only voicing legitimate dissent against certain policies of the Lincoln administration. *See generally* *Ex parte Milligan*, 71 U.S. 2 (1866). The military was employed as a police force again when it was ordered to relocate all Japanese Americans on the West Coast to internment camps during World War II, even though many were loyal to the United States and showed no signs of treason. *See generally* *Korematsu v. United States*, 323 U.S. 214 (1944).

IV. CONCLUSION

Immigration will always be linked with national security in this age of advanced technology and speedy transportation. Before 9-11, the United States' general attitude leaned towards a lax immigration system with some major media pundits even calling for completely open borders. Unfortunately, terrorists perceived this as an opportunity to sneak into our country in an attempt to strike fear into America. Instead, it served as a wake up call that the United States had a leaky immigration system that needed to be fixed.

There are three critical areas of the immigration system in need of improvement. First, the government revamped the immigration system at the border through such policies as increasing manpower both at the ports of entry and the stretches of land between the ports of entry along the northern border as part of Title IV of the Patriot Act. Another major innovation is the development of the US-VISIT entry-and-exit system, which allows immigration and law enforcement officials to keep better track of information about a foreign national entering the country. Building a security fence along our southern border similar to ones built by other countries also presents a viable option.

Second, by making some changes to the overseas visa process, the government could plug some of the holes in our immigration system. The visa lottery should be dissolved because it no longer fulfills its purpose and instead only provides ample opportunity for fraud. Mexico's matricula card should not be recognized by the U.S. because it gives validity to illegal aliens being in our country, and Mexico's system of tracking who it gives a card to is unreliable. Finally, the US-VISIT program and other computer databases will now help cure some of the problems that occurred with terrorists taking advantage of the student, religious worker, and political asylum visas.

The final area of concentration is internal enforcement. The previous two areas are concerned with keeping terrorists out or apprehending them before they gain entrance into our country. Yet, no system is perfect, and some terrorists and illegal aliens will still manage to get through, making internal enforcement a very important area of focus. The federal government can only do so much. Yet, by passing legislation that would force states to revise lax policies—that could open the door to terrorists and illegal aliens to stay within the United States without being detected—the federal government can ensure state cooperation in the immigration system. Participation of local law enforcement agencies in the immigration system would also help the federal government because of the large number of local law enforce-

ment officials who can attend to matters in areas where the federal government might only have limited resources. The final and most drastic option would be to employ the military domestically.

Any changes or proposed changes to the immigration system should keep in mind the three important goals of restricting the movement of terrorists, prosecuting terrorists, and protecting the rights of foreign nationals who are not terrorists or illegal aliens. In light of these goals, all these changes would be appropriate remedies with the exception of utilizing the military within the borders. Foreign visitors do have certain rights under our Constitution (such as due process). However, most of these remedies do not involve an implication of rights, but even if they did, most are substantive immigration policies which would outweigh any possible rights the foreign visitor might possess. The government has taken appropriate steps to fix the holes in our immigration system, but they are only the first steps in a long, ongoing process. Only time will tell how successful these changes will be and whether or not some of the proposed changes will ever come into existence, but the changes adopted since 9-11 seem to have had some success since no new major terrorist attacks have occurred within our border since 9-11. As an old Chinese proverb says, “[a] journey of a thousand miles must begin with a single step.”¹⁶¹ The United States has taken that first step.

¹⁶¹ Lao Tzu, *Tao Te Ching* 125 (D.C. Lau trans., Penguin Books 1963).