



## **FEDERAL IMMIGRATION POLICY: ENFORCEMENT ISSUES**

### **By Barbara Margerum**

#### **Legislation**

In the late 1970s, border control received growing attention after the United States terminated the U.S.-Mexico *bracero* program and implemented per-country limits on legal immigration. Following a decade of debate, the Immigration Reform and Control Act (IRCA) was passed in 1986 and greatly increased Border Patrol funding. In 1988, the Immigration and Naturalization Service (INS) enforcement budget benefited from the War on Drugs and the Anti-Drug Abuse Act; once IRCA-related budget increases declined this was the only discretionary funding the INS received.

Beginning with the Immigration Act of 1990, legislation increasingly focused on illegal immigration and border enforcement issues. In the 1990s, the INS initiated a series of strategies designed to stop immigrants from illegally crossing the U.S. southern border – “Operation Hold the Line” in the El Paso, TX, area and “Operation Gatekeeper” in California.

Also, in the '90s several events involving immigrants and national security increased concern about illegal immigration – the bombing of the World Trade Center led by a Kuwaiti who had entered with a false Iraqi passport, the shooting at CIA headquarters by a Pakistani who had entered the U.S. illegally, and the issuance of a visa to enter the U.S. to someone whose name was on a watch list of suspected terrorists.

Signaling broad bipartisan support for aggressive border enforcement, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996. IIRIRA included provisions to “increase by not less than 1,000” the number of full-time active-duty Border Patrol agents for each of the next five years for use in areas with the most illegal crossings. IIRIRA also authorized additional barriers and funds for expansion of an existing automated fingerprint system, IDENT.

As part of IIRIRA, Congress, defining enforcement more broadly to reflect the need to cover air and land ports of entry, mandated a system for tracking entries and exits of students and foreign-born visitors be fully operational by 2003. IIRIRA also allowed local law enforcement agencies to train and deputize their officers for immigration enforcement. Eight such federal-local agreements currently exist, and 30 more agreements are in the works.

After the September 11, 2001, terrorist attack on the U.S., public and political attention on border enforcement intensified, and immigration functions were perceived as a key element of national security. Congress quickly passed legislation to address security gaps, notably the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (U.S.A. PATRIOT Act). Other laws focused on enacting 9/11 Commission recommendations. In short, all of the laws required greater information sharing at

all levels of government and took steps to bring visa issuance and documentation requirements at home and abroad under tighter control. They also mandated the inclusion of biometric technology and tamper-resistant machine-readable entry-exit documents.

In 2003, the INS was abolished and its functions transferred into the newly created Department of Homeland Security (DHS). This change required merging employees from 22 different agencies.

In 2006, Congress passed the Secure Fence Act, with the primary purpose of building 700 miles of new fencing and enhancing the technology to make the U.S.-Mexico border more secure. The cost of building the fence is estimated at \$9 billion (about \$2.5 billion more than the total budget of U.S. Customs and Border Protection in FY 2005). Questions regarding land acquisition costs and environmental impacts are still being debated

### **Workplace Enforcement/Employer Sanctions**

The 1986 IRCA was the first legislative attempt to comprehensively address the issue of unauthorized immigration. The employer sanctions in the Act represent considerable compromise and a balance between strong enforcement at the workplace and the rights of employers and workers.

IRCA's provisions make the following activities illegal:

- knowingly hiring persons not authorized to work in the U.S.;
- continued employment of persons not authorized to work (those employed prior to IRCA's enactment are not subject to these restrictions);
- hiring individuals without verifying or correctly documenting their identity and eligibility to work legally in the U.S.

However, by any measure, employer sanctions have not been effective. Although most employers consistently and technically comply with the law by requiring necessary documentation, unauthorized immigrants with falsified identification papers are being employed in increasing numbers. The tug of war between groups demanding strict enforcement of immigration laws and labor-intensive industries with their need for a large labor pool remains unresolved.

To comply with the law, employers must maintain a record (I-9 form) demonstrating they have asked for and examined specified documents. Meanwhile, employees have the right to select the identification documents, and, unless the documents appear to be forged, employers must accept them. Employers must also verify Social Security numbers with the Social Security Administration – a process that can take months.

Thus, employers are unable to verify quickly and reliably the authenticity of workers' identity documents. While a federal online system, Basic Pilot, is available for employer use to verify job-seekers' documents through a federal database, questioning the documents or asking for further documentation could lead to discrimination charges. The result is that roughly half of all unauthorized workers are hired by employers who fully comply with I-9 requirements.

The ineffectiveness of the current system was illustrated very publicly when six Swift and Company meatpacking plants were raided by immigration agents in mid-December 2006. This highly publicized action involved more than 1,000 Immigration and Customs Enforcement (ICE) agents with warrants to search for illegal immigrants. According to Swift spokespersons, the company has participated since 1997 in the Basic Pilot federal online system. However, the company said that they have been careful not to inquire too deeply into job applicants “paper work” because in 2001 they were sued by the Justice Department for what was charged as discrimination against immigrant workers. The federal government sought \$2.5 million, but settled for \$200,000. This, according to the Justice Department, was the largest employment discrimination case based on immigration status in history.<sup>1</sup>

As of 2006, only 3,624 employers are registered with Basic Pilot. That is less than one-twentieth of 1 per cent of the total numbers of employers in the U.S.<sup>2</sup> ICE efforts to get employers to join a new program, IMAGE, which calls for employers to voluntarily hand over all of their workers’ documents, has met with skepticism and very little enrollment.

The current system has spawned a burgeoning false document industry, subverting the law’s documentation requirement. In addition, according to the Migration Policy Institute, employer sanctions have not been aggressively and systematically enforced and few prosecutions of violations have been carried out successfully. Between 1991 and 2003, an average of fewer than 5,000 employer investigations were completed per year, targeting less than one-tenth of 1 percent of U.S. worksites. Only 10 percent of these cases led to final orders to fine, and an average of just \$2.2 million in fines were collected (1991-1999). Between 2000 and 2003 the number fell to fewer than 2,200 cases per year, less than 3 percent of its case activity. Only three notices of intent to fine were issued.<sup>3</sup>

In 2006, the federal government arrested 716 individuals for employing illegal immigrants compared to 25 arrested in 2002. Some argue that the cost savings from employing illegal labor can often outweigh any fine imposed on employers for non-compliance.

Total immigration enforcement spending increased fivefold between 1985 and 2002 – from \$1 billion to almost \$5 billion. During this period, the southwest border consistently received the largest share of that funding, with interior investigations lagging far behind.<sup>4</sup>

Spending on interior investigations increasingly lagged behind spending on border enforcement and detentions during the 1990s. After the 9/11 attacks, the INS shifted its focus to terror prevention. Less than 10 percent of immigration enforcement spending was dedicated to interior investigations of any kind in 2002, and only 2 percent of these interior investigations targeted employers. This shift in focus was formalized in 2003 when responsibility for interior investigations passed to the ICE division within the DHS.

Since the DHS took over most of the immigration duties, funding increases have largely gone to border enforcement, the only component of immigration funding that consistently wins bipartisan political support.

While most agree that a serious overhaul of the system is needed, the problem is compounded by the huge number of unauthorized immigrant workers currently employed. Many argue that

elimination of this significant portion of the workforce could seriously impact this country's economy.

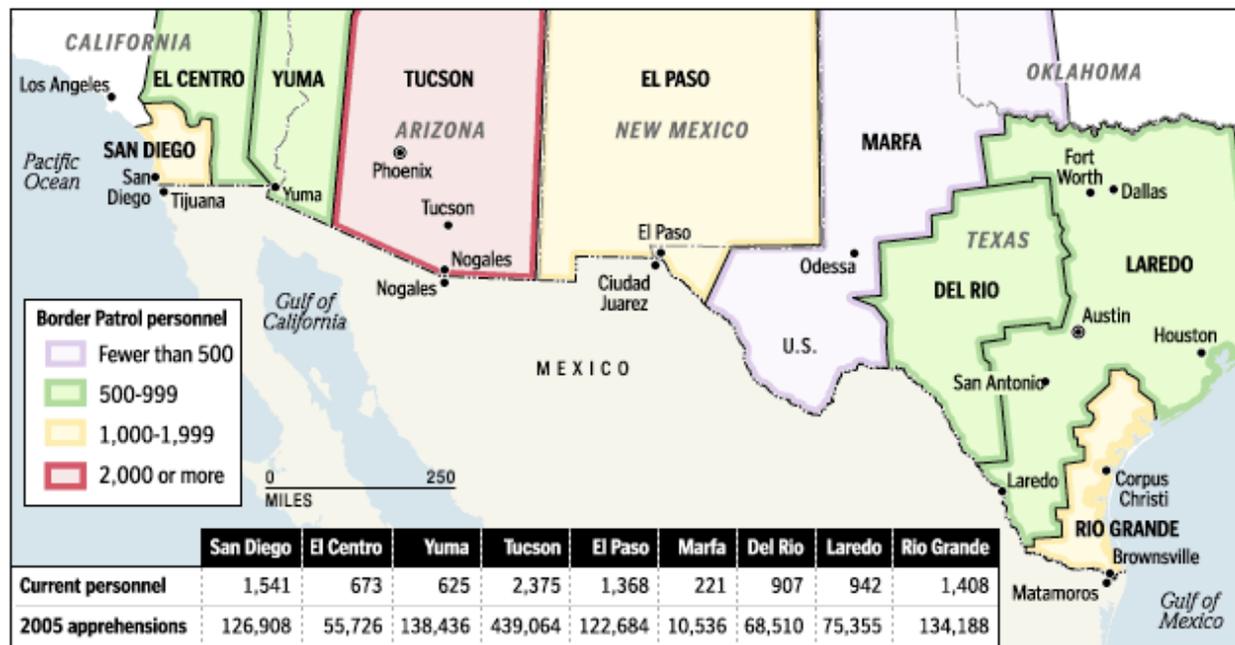
## Border Enforcement

Construction of San Diego's triple fencing in 1993-94 resulted in a drop of undocumented immigrant apprehensions in that sector from 450,152 in FY 1994 to 100,000 in FY 2002.<sup>5</sup> However, during the same period, Tucson sector's apprehensions soared 342 percent, making the Tucson sector the most popular crossing point for migrants along the entire border. See Figure 1, Manning the Border.

**Figure 1**

### Manning The Border

The southern U.S. border is divided into nine Border Patrol sectors. The Tucson sector has the largest number of personnel and made the most apprehensions last year.



SOURCE: U.S. Border Patrol | GRAPHIC: Seth Hamblin and Laris Karklis, The Washington Post - May 16, 2006

Border Patrol funding and staffing increases between 1986 and 1990 grew by 40 percent, and the focus on drug enforcement helped supplement the INS enforcement budget once the IRCA budget increases declined. In the two decades since passage of IRCA, the Border Patrol's budget has grown more than 500 percent and its personnel over 200 percent. Despite these increases, it is estimated that 10.3 million unauthorized immigrants now live in the United States, with annual inflows averaging well over half a million a year and perhaps as high as 600,000-700,000 per year.<sup>6</sup>

For many years, the Border Patrol has persuaded hundreds of thousands of undocumented Mexican citizens caught crossing the border to return voluntarily to Mexico. But the majority of non-Mexican immigrants also caught crossing the boarder are released and ordered to appear in court at a future date – a practice known as “catch and release.” According to a report in the *San Diego Union-Tribune*, the detention system has been taxed by a rising

number of border crossers from countries other than Mexico. The number of non-Mexicans caught by the Border Patrol has more than doubled in one year from FY 2004 to FY 2005.<sup>7</sup> Immigration officials maintain that if they do not release most non-Mexican immigrants with a notice to appear in court, the only alternative is to detain tens of thousands of them in a time-consuming deportation process - a difficult process compounded by a drastic shortage of detention space. However, “Catch and release” is not particularly effective; as the chart below indicates, few show up in court. See Figure 2, Catch and Release.

**Figure 2**

## Catch and release

The majority of non-Mexican immigrants caught trying to enter the United States illegally are released and given a notice to appear in court because there isn't room to hold them. Few of those who are released show up in court.

*Fiscal year 2005 (Oct. 1, 2004 to Sept. 30, 2005)*

| Sector (state)  | Non-Mexican apprehensions | Released for lack of bed space | Percentage released for lack of bed space |
|-----------------|---------------------------|--------------------------------|---|
| San Diego       | 1,961                     | 272                            | 14%                                       |
| El Centro       | 952                       | 134                            | 14%                                       |
| Yuma (Ariz.)    | 1,670                     | 73                             | 4%  |
| Tucson (Ariz.)  | 12,665                    | 460                            | 4%  |
| El Paso (Texas) | 4,899                     | 2,807                          | 57%                                       |
| Marfa (Texas)   | 968                       | 400                            | 41%                                       |
| Del Rio (Texas) | 31,235                    | 27,730                         | 89%                                       |
| Laredo (Texas)  | 20,790                    | 7,315                          | 35%                                       |
| McAllen (Texas) | 79,859                    | 71,663                         | 90%                                       |

SOURCE: U.S. Customs and Border Protection

SHAFFER GRUBB / Union-Tribune

Undocumented immigrants face increased dangers and costs in order to cross the border, which means that those who used to go back and forth across the border, now stay longer. Fencing and increased Border Patrol activity may be keeping more unauthorized immigrants in the country than keeping them out. That fact, plus an undiminished flow across the border, has resulted in a rising undocumented population in the U.S. See Figure 3, Percentage of Immigrants Returning to Mexico Within One Year, 1992-2000.<sup>8</sup>

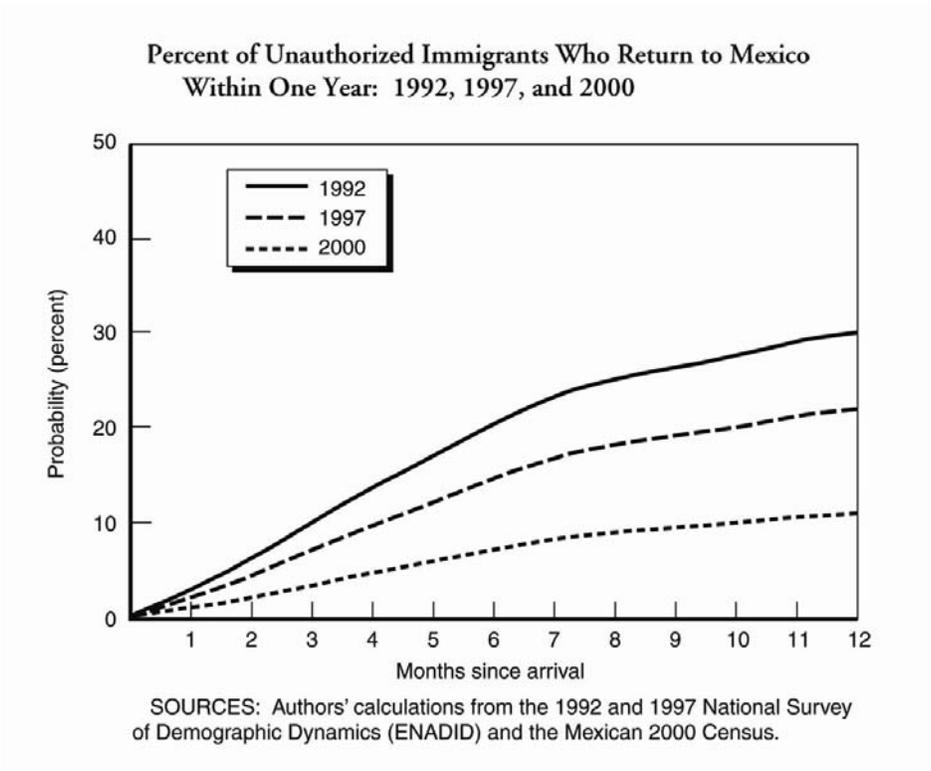


Figure 3. Percentage of Immigrants Returning to Mexico Within One Year 1992-2002

The increase in border enforcement has resulted in higher deaths rates for immigrants attempting to cross the border. See Figure 4, Reported Migrant Deaths.<sup>9</sup>

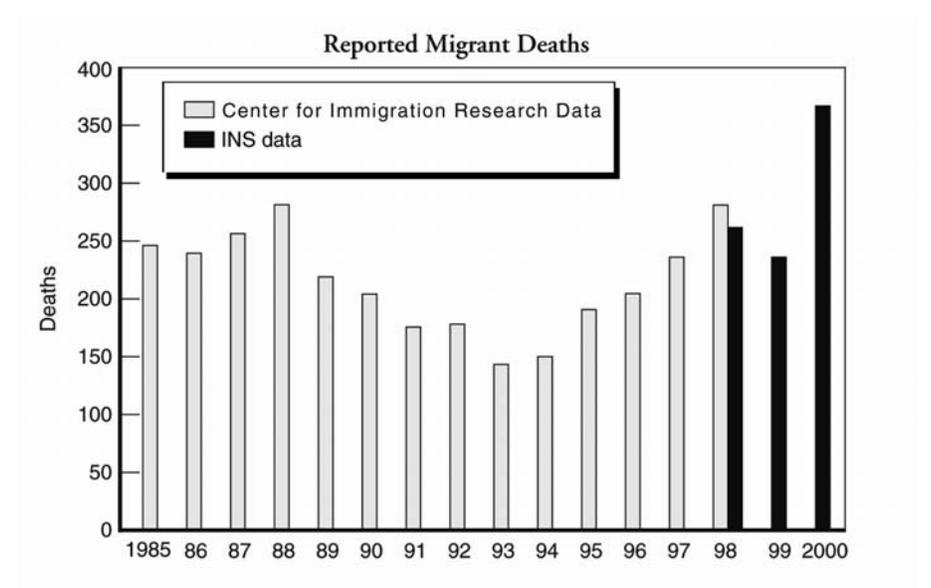


Figure 4. Reported Migrant Deaths

Increased Border Patrol staffing/funding on the U.S.-Mexico border and the increased probability of apprehension has made the smuggler (coyote) a powerful and increasingly costly alternative for illegal immigrants trying to enter the U.S.

## Visas and Entry-Exit Monitoring

A significant proportion of the unauthorized population enters the country legally, but then they overstay their visas and become illegal. Because several of the 9/11 terrorists were in the country with expired visas, tracking visitors has become increasingly important. According to a *New York Times* article about a Government Accountability Office (GAO) report, nearly 30 percent of all illegal immigrants are believed to have overstayed their visas. DHS officials concede that they lack the funding and technology to meet their deadline to have exit-monitoring systems at the 50 busiest crossings by December 2007; this means that officials will continue to be unable to track exits. The GAO also announced that the screening technology called for in the 1996 legislation, known as US-VISIT, has proven prohibitively expensive and would take five to ten years to develop. In January 2004, domestic security officials began fingerprint screening of arriving visitors. They have screened more than 64 million travelers and prevented more than 1,300 criminals and immigration violators from entering. But, as the *New York Times* reports, the efforts to determine whether visitors leave have faltered.<sup>10</sup>

## Conclusion

Despite a 500 percent growth in the Border Patrol's budget since the passage of IRCA more than 20 years ago, border control improvements have been sporadic at best. A significant body of scholarly work concludes that border control has not been successful.<sup>11</sup> In addition, a Migration Policy Institute publication states that, "one of the primary problems is the lack of metrics to measure such deterrence."<sup>12</sup>

The GAO (then the General Accounting Office) issued a report one month prior to the 9/11 attacks noting that "the extent to which INS's border control efforts may have affected overall illegal entry along the Southwest border remains unclear".<sup>13</sup>

Current border control programs that attempt to deal simultaneously with protection against terrorists, apprehension of criminals, and the illegal entry of people and goods using a single approach may not be effective or efficient.

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<sup>1</sup> Preston, Juli. "U.S. Raids 6 Meat Plants in ID Case," *New York Times*. December 13, 2006.

<sup>2</sup>Basic Pilot program SAVE/USCIS/DHS Washington, D.C. as of 6/7/2005

<sup>3</sup> Migration Policy Institute. "Immigration Enforcement at the Worksite: Making it Work," MPI Policy Brief, No. 6, November 2005.

<sup>4</sup> Dixon, David and Julia Gelatt, "Immigration Enforcement Spending Since IRCA," Migration Policy Institute, Task Force Fact Sheet No. 10, November 2005.

<sup>5</sup>Blas Nunez-Neto and Stephen Vina, "Border Security: Fences Along the U.S. International Border," CRS Report to Congress (13 January 2005)

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<sup>6</sup> Passel, Jeffery, "Unauthorized Migrants: Numbers and Characteristics," Background Briefing for the Independent Task Force on Immigration and America's Future, Pew Hispanic Center, 2005.

<sup>7</sup> Bernstein, Leslie. "Immigration Detention System Strained," *San Diego Union-Tribune*. November 30, 2005.

<sup>8</sup> Public Policy Institute of California, Research Brief, *Holding the Line? The Effect of Recent Border Build-up on Unauthorized Immigration*, Issue #61, July 2002

<sup>9</sup> *Holding the Line? The Effect of Recent Border Build-up on Unauthorized Immigration*, Issue#61, July 2002

<sup>10</sup> Swarms, Rachel L., and Eric Lipton. "U.S. is Dropping Effort to Track if Visitors Leave." *The New York Times*. December 15, 2006.

<sup>11</sup> Cornelius, Wayne A., *Death at the Border*, (681-685); Peter Andreas, *Escalation of U. S. Immigration Control*, 589, 606; Belinda I.Reyes, Hans P. Johnson and Richard Van Swearingen, Public Policy Institute of California, Research Brief, *Holding the Line? The Effect of Recent Border Build-Up on Unauthorized Immigration*.

<sup>12</sup> Migration Policy Institute. *US Border Enforcement: From Horseback to High-Tech*. November 2005

<sup>13</sup> General Accounting Office, *INS' Southwest Border Strategy*. August, 2002.