Migration and Security:
Crime, Terror and the Politics of Order

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The intersection of migration and security ultimately entails questions of who is allowed access into the country and who can be removed. As argued by migration scholars, the ability of policymakers in advanced industrial democracies to determine the answers to these questions—and ultimately deal with "unwanted" migration—has been constrained since the 1960s by the rise and institutionalization of rights-based protections for migrants.[1] In this context, the politics and practice of immigration control since September 11, 2001 initially appears as a dramatic shift. For the United States, the ramifications of "who is trying to enter" and "who is already here" clearly increased in importance. And in the aftermath of 9/11, rights protections for migrants seeking access to the United States and especially for those already in the United States appeared to be readily sacrificed in the name of security and order.

My argument is that the process of securitization of immigration control in the United States following 9/11 is better understood as an outgrowth of earlier politics, policy and practice focused on criminal and terrorist aliens as existential threats to security and order. Immigration historians will correctly note that criminals and terrorists have long been the focus of state efforts to control the frontier. However, I am interested in the intersection of these efforts with the wave of rights protections that emerged for migrants in the 1960s. Exploring the politics of this intersection reveals a different watershed in the securitization of immigration control—the late 1980s introduction of aggravated felony offenses as excludable and deportable offenses under the Immigration

and Nationality Act. The subsequent expansion of the categories of criminal and terrorist aliens and the erosions of rights protections for those so designated has had an impact on migration. But, the extent to which such steps have enhanced security remains unclear at best.

This chapter briefly traces the origins of the securitization of criminal and terrorist aliens, explores the impact of 9/11 on this process, and addresses its continuation in legislation under consideration in Congress in 2006.

Securitization and Constraints

Securitization as explored in this chapter broadly refers to the presenting of an issue as "an existential threat requiring emergency measures and justifying actions outside the normal bounds of political procedure."[2] Securitization in practice often incorporates elements of "strategic social construction" of threats by governmental and nongovernmental actors for political or other gain, and the creation of moral panics that exaggerate the extent of the threat to social order.[3] The securitization of migration is not a new phenomenon for the United States. Immigration policy from the individual state measures of the late 1700s through the national-level policies of the mid-1900s linked restrictions to the need to combat threats to social order posed by foreign prostitutes, convicts, anarchists, communists, and, more broadly, various ethnic groups equated with criminal activity and other sources of moral turpitude. Non-citizens deemed as falling into these categories often faced exclusion at the border or, for those non-citizens having attained entry to the United States, the prospect of arrest and imprisonment, detention on immigration charges and/or deportation.[4] Elements of these earlier practices were

incorporated into the 1952 Immigration and Nationality Act (INA), and many continue to this day.

The securitization of migration in the United States tended to use the term *immigration* loosely and inaccurately. U.S. immigration law includes distinctions between immigrants (legal permanent residents), nonimmigrants (a diverse category temporarily and legally in the country), refugees and asylees, and illegal aliens (the illegality stemming from patterns of entry, stay, and/or activity). However, securitization arguments have blurred these distinctions between multiple paths and practices. In the United States during the 1980s and 1990s, for example, calls for greater immigration control pointed to the threats posed by aggravated felons and alien terrorists, often making little distinction between the paths and processes of their migration. Securitization since September 11, 2001 similarly has focused on the linkages between immigration broadly (un)defined and the threats posed by criminal and terrorist aliens.

As noted, this chapter focuses on the intersection of securitization and the wave of rights-based protections seen by many scholars as inhibiting the ability of advanced industrial democracies to engage in immigration control. The growth of rights-based protections since the 1960s has stemmed from multiple sources. Wayne Cornelius, Philip Martin and James Hollifield note the rise of a "liberal republicanism" in advanced industrial democracies, extending "rights to ethnic minorities and foreigners" through "legislative acts, partisan and interest group (especially ethnic) politics, and most important of all judicial rulings." The resulting liberal and democratic commitments became a primary source of what the authors posit as a gap between immigration policies and policy outcomes, especially policies seeking to control "unauthorized immigration

and refugee flows from less developed countries."[5] Seeking to refine this "gap hypothesis," Gary Freeman reveals an interest group dynamic where clientilist considerations of concentrated benefits from immigration mobilize employers and ethnic groups against state steps designed to enhance closure.[6] Christian Joppke stresses the importance of the judiciary and historically grounded "moral obligations" towards immigrants as providing a dominant counterweight against populist pressures for restriction. The impact of the judiciary lies in judges and courts "shielded" from populist pressures and "only obliged to the abstract commands of statutory and constitutional law." Historical patterns of immigration experiences also create moral obligations, with protections being more likely to accrue to immigrants where migration was solicited by the receiving country rather than tolerated for broader reasons of foreign policy.[7] James Hollifield links these arguments further by exploring historical patterns in immigration in advanced industrial democracies and their links to the development and institutionalization of "rights-based liberalism." The resulting legal and institutional frameworks that extend rights to foreigners, and make it difficult, all though not impossible, to "roll back" protections in the face of economic and populist political pressures.[8]

Scholarship on the erosion of rights-protections prior to the events of September 11, 2001 reveals rising anti-immigrant pressures during the 1990s. Yet, Freeman, assessing the anti-immigrant backlash that spread from California to the national level during the 1990s, argues that the immigration act finally passed in 1996 was not only much less restrictionist than originally envisioned by its supporters but that legislative and judicial challenges eroded these restrictions over time.[9] Virginie Guiraudon and

Christian Joppke observe that policymakers in advanced industrial democracies have tended to respond to domestic pressure for restriction with strategies of "visibility" that create the "appearance of control" through high-profile steps at the border, and with strategies of "remote control" through pressures on source and transit countries and transportation carriers to prevent migrants from ever reaching the border[10] In effect, though challenges to migrant rights protections had taken place, by the turn of the millennium scholars tended to characterize the protections as largely intact. However, this conclusion downplays the impact of securitization during the 1980s and early 1990s. As I argue in the following sections, this securitization eroded migrant rights protections by expanding statutory conceptualizations of criminal and terrorist aliens, and related policies and practices of exclusion, detention and deportation, and provided the basis for subsequent expansion since 2001.

Aggravated Felons and Terrorist Aliens

Securitization arguments during the 1980s reflected a combination of government officials exploring ties between immigration and the international drug trade, and state and local government officials who focused on the impact of illegal migration on prison overcrowding and local crime. Interest groups, including the Federation for American Immigration Reform, and the media fueled and echoed these concerns. Securitization arguments initially converged in stressing the security threats posed by *criminal aliens*, and, increasingly after the World Trade Center attack in 1993, on threats posed by terrorists. By the mid-1990s, securitization arguments reflected growing concerns over border security in the face of growing incidents of illegal immigration, state/local-level

anti-immigrant initiatives such as California's Proposition 187 that stressed the criminal activities of illegal aliens, and state efforts to obtain federal compensation for incarceration and other costs of what officials saw as the burden of a failed national immigration policy.[11]

The prominence of the drug trade in securitization arguments was not new. Efforts to link migrants with drug trafficking, and constructing drug problems as primarily a foreign threat, have had a long history in the United States, with notable examples including linkages drawn between opium and Chinese migrants in the mid-1800s, and marijuana and Mexican migrants in the 1920s and 1930s. As in most successful social constructions of threats to social order, these arguments leveraged an element of truth—the involvement of *some* migrants in drug trafficking and consumption—into a broader moral panic. During the 1980s, securitization arguments pointed to both internecine violence between rival Colombian drug trafficking organizations and fears of a crack epidemic fueled by migrant groups tied with urban street gangs to create an image of America under siege. The Reagan administration's initial steps against drugs, including under-funded federal drug task forces and the rhetoric exhorting Americans to "just say no" to drugs and violence, did little to challenge this image.[12]

Members of Congress, Democrats and Republicans alike, responded to the limited policy steps by the Reagan administration and to the prospects for electoral gains in leveraging the drug issue by escalating their rhetoric and legislative initiatives. One result of the politics of the war on drugs was to turn to immigration law as a tool of drug control policy. In the deliberations leading up to the 1988 Anti-Drug Abuse Act, Democrat

members of the Senate and House introduced provisions for amending the INA. The provisions called for designating aggravated felonies—narrowly defined as murder, drug trafficking crime and firearms/explosive trafficking—as categories of offenses requiring the exclusion of migrants at the border. For those arrested within the United States, the provisions included mandatory detention after completion of sentence, expedited deportation and criminal penalties for reentry. The proposals were introduced in April 1987 by Senator Lawton Chiles (D-FL) as Senate bill 972. In October, Representative Lawrence Smith (D-FL) introduced the related bill, H.R. 3529, in the House. Florida had long been on the front lines of drug and illegal immigration issues and Chiles had been a vocal and leading advocate of restrictions on both.[13] The linkage between the issues resonated with members of Congress and the administration resulting in the inclusion of the aggravated felony and immigration provisions under Title VII, Subtitle J in the Anti-Drug Abuse Act (ADAA). [14] Such steps helped to set in motion a tightening of immigration control.[15]

Aggravated felony provisions in the INA expanded during the 1990s, a pattern also explored by Jennifer Chacon's chapter in this volume. More and more offenses were added to the list, ranging from drug abuse and money laundering to sexual abuse and theft. Sentencing thresholds qualifying for aggravated felony status were decreased from five years to one year, the definition of "conviction" was broadened and changes were made retroactive. Moreover, protections against measures such as mandatory detention, expedited removal, and indefinite detention steadily eroded. In 1990, for example, Congress added language to the exclusion and deportation provisions of the Immigration Act, and expanded the definition of aggravated felonies to include a broader array of drug

offenses including possession, as well as money laundering offenses and "serious crimes" such as "crimes of violence for which the term of imprisonment imposed is at least five years."[16] In 1994, the Immigration and Nationality Technical Corrections Act added new offenses to the list of aggravated felonies, including offenses related to criminal enterprises, and white-collar offenses such as fraud.[17]

In 1996, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) expanded the INA list of aggravated felonies even further. The Act added offenses including:[18]

> gambling, transportation for purposes of prostitution, alien smuggling, passport fraud, and other forms of documents fraud and expanded the definition to include new offenses involving obstruction of justice, perjury, or bribery offenses for which a sentence of at least five years or more may be imposed; commercial bribery, forgery, counterfeiting, and vehicle trafficking offenses for which a sentence of five years or more may be imposed; offenses committed by an alien previously deported; and offenses related to skipping bail for which a sentence of two or more years may be imposed.

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) introduced a few months after the AEDPA explicitly reconceptualized the linkage between immigration and crime as the threat posed by *criminal aliens*. The IIRIRA expanded the category of aggravated felonies under the INA still further, with new offenses including rape and sexual abuse. New provisions increased the reach of aggravated felony designations by lowering the qualifying sentencing threshold from five years to one year, essentially blurring the line with what had been treated as misdemeanor offenses—such as petty theft/shoplifting, and drunk driving. New provisions also decreased the qualifying financial thresholds for money laundering, fraud and tax evasion cases, from between over $100,000 to $200,000 to only $10,000. The IIRIRA made all these changes to the INA retroactive—applying "regardless of whether the conviction

was entered before, on, or after the date of enactment of the 1996 Act." Furthermore, the IIRIRA redefined the concept of "conviction" to include adjudicated sentences, such as through delays and probation, as well as suspended sentences.[19]

During the 1990s, with growing concerns over terrorism, the United States followed a similar pattern of turning to immigration control as a tool of anti-terrorism policy. The 1990 Immigration Act, drawing in part on the 1988-1989 Foreign Relations Authorization Act, added a definition of terrorism and detailed list of "terrorist activities" to the INA as a subcategory for exclusion and deportation on security related grounds. The list included activities ranging from hijacking, kidnapping, and use of weapon of mass destruction to the provision of material support to individuals, organizations or governments engaged in terrorist activities.[20] The AEDPA explicitly focused on the threat of "alien terrorists." New provisions also expanded the authority of the Department of State to designate groups as terrorist organizations, and, in turn, the grounds for exclusion and removal.[21] Non-citizens, for example, could be excluded if they were members of a terrorist organization or if they were "engaged in," "likely to engage in," or appeared to be "indicating an intention to" cause terrorist activity.[22]

The focus of securitization efforts on criminal and terrorist aliens, and the expansion of these categories under immigration law as a path to security and social order, converged in the 1996 IIRIRA and AEDPA. Leading Republicans in the House and Senate Judiciary committees successfully argued that flawed legal rights protections for criminal and terrorist aliens, including rights to judicial review and waivers from detention and deportation, were threatening the security and safety of the United States. In January 1995, William McCollum (R-FL) introduced the Criminal Alien Deportation

Improvements Act (H.R. 668). The bill called for a wide ranging expansion of aggravated felony offenses—ranging from prostitution to document fraud and obstruction of justice—and the "strengthening" and "streamlining" of the deportation process. Such steps were necessary, McCollum argued, to counter both the rise in organized alien smuggling and other serious crimes and to enhance a deportation system that was "allowing criminal aliens to escape" and undermining the safety of "citizens and noncitizens alike."[23] Speaking on behalf of H.R. 668, Representative Lamar Smith (R-TX), chair of the Judiciary Subcommittee on Immigration, placed the bill in the broader context of promises made in the 1994 Republican Contract with America. Smith argued that the measures proposed were necessary to "counter the escalation of crime [sic] robbing Americans of the freedom to walk their streets, the right to feel secure in their homes, and the ability to feel confident that their children are safe in their schools."[24] The bill as passed by the House in February was referred to the Senate Judiciary Committee and by 1996 its provisions had been incorporated into the AEDPA.[25]

In the Senate, Alan Simpson (R-WY), chair of the Senate Judiciary Subcommittee on Immigration, pushed to curtail legal as well as illegal immigration. His proposals to amend the INA provisions on criminal aliens, introduced in 1994 (S. 2480) and reintroduced in early 1995 (as part of S. 269), called for expanding aggravated felony offenses and curtailing waivers and judicial review for aggravated felons.[26] By February 1996, as the Judiciary Committee turned to what would become the IIRIRA, Spencer Abraham (R-MI), the influential junior member of the committee emerged as the "principle architect of the 1996 aggravated felony provisions."[27] Abraham derailed Simpson's efforts on legal immigration but supported measures for increasing the number

of aggravated felony offenses and curtailing appeals and judicial review of deportation to redress the "problem we have with criminal aliens."[28] Abraham's testimony on behalf of such steps echoed an April 1995 Senate Permanent Subcommittee on Investigations report and noted the "'half a million' convicted noncitizen felons" that had been able to manipulate judicial review opportunities and waivers under the law to avoid deportation or had simply disappeared after being released from an overwhelmed detention system."[29]

As the categories of offenses for those designated as criminal and terrorist alien widened, the rights accorded to those so designated narrowed. The IIRIRA reinstated *mandatory detention* provisions, which had been partially eased in early 1990s for legal aliens who were "not a threat to the community" and seen as "likely to appear for deportation hearings."[30] The AEDPA denied all aggravated felons, regardless of sentence, the right to appeal for *waivers from deportation* and removed court consideration of mitigating factors; the IIRIRA shortly thereafter shifted decisions concerning waivers from the courts to the discretion of the Attorney General to cancel deportations while prohibiting the cancellation of deportation for aggravated felons.[31] The AEDPA and IIRIRA also added provisions to the INA for the *expedited removal* of non-citizens, including new courts and the use of classified information for terrorist aliens and the accelerated proceedings to remove aggravated felons prior to completion of their prison terms.[32] Of even greater concern to immigration advocates, the IIRIRA's provisions on *judicial review* "removed all courts' jurisdiction to review final orders of removal against non-citizens ordered deported as aggravated felons."[33]

On the surface, the steps advocated by securitization arguments appeared to work. Non-citizens serving criminal sentences in U.S. correctional facilities increased from 25,250 in 1990 to 95,043 in 2000.[34] The average daily population of criminal aliens detained under INS jurisdiction increased from 3,300 persons in 1994 to 19,485 in 2000.[35] The numbers if criminal aliens deported/removed increased from 1,100 in 1988 to 72,297 in 2000.[36] However, looking below the surface, the impact of such steps in securing the United States was less clear. First, as the categories of criminal and terrorist alien offenses increased, the absence of any mechanism to prioritize migrants within these categories by the severity of criminal offense or type of terrorist activity simply flooded the already overburdened immigration control system. Second, during the 1990s, those advocating greater security in Congress pointed to the greater number of incarcerations, detentions and deportation of criminal aliens as metrics of success. Simultaneously, they pointed to the broader pool of aggravated felons that had avoided and evaded apprehension, detention and deportation as confirmation of a growing security threat. Both observations were flawed, however, in that the numbers were in large part a reflection of the expanded definitions of aggravated felony offenses. Little attention was paid to this paradox.

Securitization and 9/11

In the aftermath of the terrorist attacks of September 2001, the United States again turned to immigration control as a path to security and social order. Members of the Bush administration and Congress posited the terrorist attacks as an existential threat requiring emergency measures. As is well known, the administration turned to targeted mass

detentions, prioritized deportation, mandatory interviews and registration, and long visa waiting periods for those of Arab or Muslim background and origin.[37] However, broader efforts, such as those incorporated into the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, once again focused on criminal and terrorist aliens.

In deliberations over the PATRIOT Act, Bush administration and congressional officials emphasized that immigration threats to security necessitated expanding the definitions of terrorism and aggravated felonies. Bush administration proposals to Congress in mid-September 2001 for example, stressed how narrow definitions of terrorism, especially regarding the provision of material support "for a 'terrorist activity,'" had undermined the effectiveness of the Alien Terrorist Removal Court established in 1996. The desired and resulting broader language in Section 411 of the PATRIOT Act included "material support" to a group that the "individual knows or reasonably should know" is a terrorist organization, added new broad definitions of a terrorist organization, and expanded the authority of the Secretary of State to designate groups as such.[38]

Administration proposals to Congress also turned to the issue of flawed legal rights for terrorist and criminal aliens. The focus on the protection of rights called for steps to allow indefinite detention and limitations on judicial review. Congressional opposition in the House derailed administration efforts to obtain explicit authority for indefinite detention despite administration calls for the Attorney General to be able to indefinitely detain individuals deemed as threats to national security.[39] However, section 412 of the PATRIOT Act did expand the Attorney General's powers of detention under

the INA. Section 236A greatly added to the immigration act, allowed for detention without arrest and the potential for indefinite re-detention.[40] Administration proposals also called for curtailing judicial review of detention and removal cases, noting the risks of the ability of terrorist aliens to exploit inconsistencies in *habeas corpus* proceedings. House opposition to administration calls for routing all such cases to the federal courts in the District of Columbia limited the PATRIOT Act to restricting appeals of *habeas corpus* decisions to the Appeals Court of the District of Columbia but retained the right of detained terrorist aliens to file *habeas corpus* action in any district court that had jurisdiction.[41]

Securitization of immigration control policy and practice also blurred the line between terrorist and criminal aliens.[42] Although terrorist aliens were prioritized under the PATRIOT Act, the new Department of Homeland Security (DHS), the agency charged with playing a central role in the Act's implementation, prioritized the "apprehension and deportation" of criminal aliens as a central part of its mission in the war on terror.[43] The metrics of DHS success commonly include increases in the numbers of criminal aliens apprehended, detained and removed. For example, according to the DHS primary investigative division, Immigration and Customs Enforcement (ICE), apprehensions of criminal aliens increased from 82,990 in Fiscal Year 2001 to 89,445 in FY 2004; total apprehensions during the period from FY2001 to FY 2004 reached 345,006 criminal aliens.[44] Daily average detention of criminal aliens increased from 20,429 in 2001 to 21,298 in 2004. Formal removals of criminal aliens increased from 72,679 in 2001 to 88,897 in 2004.[45]

Yet these figures say little about success enjoyed by the government in fighting terrorism. For example, migrants from Central America, Latin America and the Caribbean comprise the majority of criminal aliens apprehended from FY2001 to FY 2004, with Mexico alone accounting for 257,718 or 75 percent. A 2006 ICE audit notes that illegal aliens apprehended from countries "other than Mexico (OTM)" increased during the same period; and emphasizes OTM migrants that were from countries of "special interest" (SIC) or from "state sponsors of terrorism" (SST). The total number of SIC and SST aliens increased from 15,652 in FY 2001 to 15,795 in FY 2004; total apprehensions during the period from FY 2001 to FY 2004 of reached 82,803 illegal aliens. Yet, these apprehensions are not indicative of actual numbers of criminal or terrorist aliens. According to ICE, the apprehensions are intended "to determine whether they have a criminal record in the U.S. or are listed on various terrorist watch lists," and can face difficulties with the "effectiveness of background checks." That said, over 50 percent of those SIC and SST aliens apprehended from FY 2001 to FY 2004 were released.[46]

Expanding actionable criminal offenses offers the potential for a wider means to find terrorism suspects, but it is less clear that the blurring of the lines has led to success in this regard. Expanded enforcement measures at the border and within the United States intended to identify terrorist aliens more often have led to the exclusion, arrest and detention of aggravated felons and other criminal aliens.[47] In Operation Tarmac, conducted in April 2002, enforcement agents raided "106 airports and identified 4,271 undocumented aliens" but no terrorists (those non-citizens with false documents) fell under the expanded aggravated felony definitions and were subject to deportation as

criminal aliens.[48] Under Operation Predator, enforcement agents acting under the auspices of the Department of Homeland Security focused on "noncitizens with past sex offenses" as well as migrant traffickers and smugglers, thus led to 1,300 arrests of non-citizens as aggravated felons between July and November 2003.[49] Immigration and Custom Enforcement's *Ten Most Wanted List of Fugitive Criminal Aliens* consists primarily of those wanted for violating deportation orders for past offenses ranging from assault to sex offenses rather than for crimes linked to terrorism, while the *ICE Storm Most Wanted* list is focused on human smugglers.[50]

Administration statements on the effectiveness of enforcement efforts against terrorism have raised further questions about the blurring of crime and terror in the securitization of immigration control. President Bush, speaking in Ohio in July 2005, noted that since 2001 "federal terrorism investigations [had] resulted in charges against 400 suspects" and more than 200 convictions. Subsequent investigations of these figures by reporters from the *Washington Post* revealed that only 39 of the 200 persons convicted were "convicted of crimes related to terrorism or national security" while the remaining had been convicted of immigration and other offenses.[51]

Securitization Redux

Securitization arguments have continued to play a prominent role in legislative steps intended to expand criminal and terrorist alien offenses and challenge rights protections for suspected criminal and terrorist aliens in the name of security and social order. In 2005, citing the broad threat of posed by illegal immigration to homeland security and the risks of terrorists exploiting asylum laws in particular, James Sensenbrenner (R-WI),

chairman of Senate Judiciary Committee, played an influential role in introducing and facilitating the passage of The REAL ID Act.[52] In addition to a general tightening of asylum regulations and raising the burden of proof for asylum claims, the Act expanded the INA's definitions of terrorist and terrorist-related activities as well as the definition of terrorist organizations, thereby increasing the ability of the U.S. government to deny asylum to those seeking entry or already in the United States.[53]

A broader wave of securitization arguments emerged later in the year as members of Congress turned to large-scale reform of U.S. immigration control. By mid-2006, the House and Senate were deadlocked in their advocacy of contending approaches to seeking reform: notably H.R. 4437, The Border Protection, Antiterrorism and Illegal Immigration Control Act, passed by the House on December 16, 2005; and the less restrictive S. 2611, The Comprehensive Immigration Reform Act, passed by the Senate on May 25, 2006. Although efforts to resolve the two positions prior to the 2006 mid-term elections stalled during the summer, several provisions in the bill are relevant to the arguments explored in this chapter.

Sections 201 and 203 of the House bill designated "unlawful presence" in the United States as a criminal rather than a civil offense, with the first offense subject to a year and day imprisonment. The length of sentence was not by accident; such a sentence would automatically result in an estimated 12 to 14 million migrants already illegally in the United States being designated as aggravated felons, and faced with the erosion of rights protections such a designation entailed. Anything short of such a step was portrayed by House supporters of the bill as flawed amnesty for illegal aliens similar to that adopted in the 1986 Immigration and Refugee Control Act (IRCA). With the

parameters of the debate over immigration reform set by the House, Senate proposals initially took a compromised position. Under Sections 203 and 206 of the proposed Securing America's Borders Act (S. 2454) introduced in mid-March 2006, the first offense of unlawful presence in the United States would be punishable by only a six months imprisonment, thus falling short of an aggravated felony designation. However, subsequent legislation considered by the Judiciary Committee, and eventually incorporated into S. 2611, opted for making no changes to existing law and omitted measures designed to criminalize an illegal presence.[54]

Sections 201 and 202 of H.R. 4437 sought to expand the scope of aggravated felonies even further, by broadening the definition of facilitating migrant smuggling and designating as aggravated felons anyone who "assists, encourages, directs or induces a person to unlawfully reside or remain in the United States" or to attempt to do so. Section 205 of S. 2454, and S. 2611, again took a narrower tack, focusing only on encouragement and inducement and excluding language regarding assistance and attempts at unlawful presence.[55] Other provisions in H.R. 4437, albeit attracting less attention in the public debate, included measures that permitted indefinite detention for "dangerous aliens" (Section 602); banning entry by aggravated felons and other criminal aliens and precluding waivers and relief from such bans (Section 604), Furthermore, it broadly interpreted "conviction" for aggravated felonies by giving no bearing to reversals or changes in sentences (Section 613).[56]

The congressional hearings over the House and Senate bills highlighted familiar securitization arguments of the national security threats posed by terrorist and criminal aliens and the need for major new measures to address these threats. Republicans serving

on the House Judiciary Committee, and its Immigration Subcommittee played a leading role. For example, Lamar Smith (R-TX), an active voice in earlier immigration control debates, argued in hearings leading up to the bill providing answers to the questions of who is in the country and why are "essential to our homeland security." As evidence of the purported threat to our safety, Smith pointed to "the fact that over 20 percent of all federal prisoners are illegal immigrants" without offering insight into the nature of the crimes they had committed or the impact of expanded aggravated felony categories.[57] John N. Hostettler (R-IN), chair of the Immigration Subcommittee, pointed the terrorist attacks of September 11 in arguing for measures against illegal aliens:[58]

> We should also not forget the national security danger to the country of having an estimated 10 million illegal aliens in the country, when no one knows who they are and what their intent is. Surely for most of them, they intend to work and perhaps settle here. But a small handful of undocumented illegal aliens may pose the danger of terrorists attacking our country once again.

Criminalization of illegal presence as an aggravated felony offence offered a dramatic step to address these problems.

Observers of the immigration debate noted that with the legal problems of Tom Delay (R-TX), leader of the House GOP Caucus, and the stalemate among Republicans in the Senate over immigration control, provided an opportunity for Sensenbrenner to push forward on his long standing interests in greater restriction of immigration.[59] Sensenbrenner had long been at the forefront of efforts seeking to curtail legal as well as illegal immigration since entering the House in 1979, and in 2001 became chair of the Judiciary committee.[60] He was the author of H.R. 4437, with the stated intent of the bill being to "ensure the proper enforcement of immigration laws, create additional mechanisms to prevent illegal immigration, assist in the prohibition of hiring illegal

immigrants and to enhance border security."[61] The report accompanying the bill, when introduced to the House, noted both the threats posed by illegal immigration including "the drastic increase in crime committed by illegal aliens," especially among members of criminal gangs, and the growing numbers of illegal aliens in Federal correction facilities.[62]

The provisions for criminalization of illegal presence, however, caused an extensive backlash. Opposition to securitization efforts had taken place during the 1990s. Court challenges to IIRIRA and PATRIOT Act provisions focused on the denial of waivers from deportation, expedited deportation without judicial review, and indefinite detention with mixed results.[63] In June 2003, the Department of Justice Inspector General released a "scathing" report on the administration's policies towards those detained in the immediate aftermath of 9/11, challenging practices of detention, access to legal counsel and evidence and recommendations for policy changes.[64] Though an important step, the report fell far short of a broader indictment of the erosion of non-citizen protections that had taken place since 9/11. Prior to 2006 within Congress, despite the arguments of immigrant advocacy groups, calls for protecting the rights of criminal and/or terrorist aliens had been the exception rather than the rule.

In the face of large-scale street protests across the country during the spring of 2006, and rising congressional opposition to the criminalization of unlawful presence, political maneuvering increased in the House. Sensenbrenner sought to amend the provisions, calling for continued criminalization but reducing the offense from a felony to a misdemeanor imprisonment of six months. Democratic opposition to criminalization in the House helped to led to the defeat of the amendment. Charges and countercharges

between Sensenbrenner and his critics, over who was responsible for the aggravated felony provisions remaining in the House bill were played out in the media.[65] Despite the efforts of congressional Republicans to generate support for the H.R. 4437 through a series of hearings held around the country, the combination of controversy over the unlawful presence and other issues and the rapidly approaching mid-term elections temporarily derailed steps towards reform of immigration control.

Conclusion

The securitization of immigration control following September 11, 2001 has built extensively on steps that emerged in the 1980s and 1990s which positioned the threat of criminal and terrorist aliens. Securitization efforts by members of Congress and presidential administrations have successfully widened the statutory definitions of criminal and terrorism alien offenses. They also have successfully eroded rights protections that in the past have constrained efforts to exclude, detain, and remove migrants. Challenges to this securitization have emerged from advocacy groups, the courts, Congress and even within the executive branch. However, they have had limited effect. That said, the proposals in 2006 to turn millions of migrants illegally in the United States into aggravated felons, as well as those that assist them, appeared to reveal the limits of securitization, at least in the context of an election year.

The extent to which such securitization has actually facilitated control over the frontier, and thus, the security of the United States remains questionable at best. Creating broader categories of criminal and terrorist offenses and diminished rights protections for those so designated have increased the potential for greater exclusion at the border for

those migrants seeking legal entry, but may well also increase the numbers of migrants seeking to enter the United States illegally. Both trends will increase pressure on the capacity of the U.S. immigration control system in at least three dimensions: In terms of processing cases at the border, engaging in background checks, and meeting the needs of mandatory detention without the necessary provision of the resources required for more effective border enforcement to prevent greater illegal crossing. Within the borders of the United States, the expansion of criminal and terrorist alien offenses and the erosion of rights protections will allow for greater initial apprehension and detention. However, by definition, such steps also will create larger pools of criminals and terrorists that, in the absence of prioritization by severity of offenses and a dramatic increase in resources, will periodically overburden the immigration control system.[66] Finally, steps under consideration to expand cooperation of Immigration and Customs Enforcement officials with state and local law enforcement, and to rely on state, local and private detention facilities, raise still further security issues. Although Intended to expand the numbers of *de facto* immigration enforcement agents within the United States, such steps have the potential to increase barriers between the police and migrant communities, in doing so, they will impede law enforcement and information sharing, and overload the capacity of the broader criminal justice system—in effect, again undermining instead of enhancing security and social order.[67]

References:

Abraham, Spencer. 1996. Statements on the "Immigration Control and Financial Responsibility Act of 1996," *Congressional Record-Senate*, Thursday, May 2, 1996, 104th Congress 2nd Session, 142 Cong Rec S 4592, Vol. 142, No. 59. Available at LexisNexis Congressional.

American Immigration Lawyers Association. 2005. "The Border Protection, Antiterorism and Illegal Immigration Control Act of 2005 (H.R. 4437), as Amended and Passed by the House on 12/16/05: Section-by-section analysis." Available at http://policycouncil.nationaljournal.com/NR/rdonlyres/8B648050-C027-4E13-BB8D-9C9498F8CBF1/35796/Theborderprotection.pdf

Andreas, Peter. 2000. *Policing the U.S.-Mexico Divide* (Ithaca and London: Cornell University Press).

Buzan, Barry, Ole Waever and Jaap de Wilde. 1998. *Security: A new Framework for Analysis* (Boulder and London: Lynne Rienner).

Cole, David. 2003. *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York and London: Free Press).

Cook, Melissa. 2003. "Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Acts as a Human Rights Violation," *Boston College Third World Law Journal* 23, 2: 293-330.

Cornelius, Wayne, Philip Marten, and James Hollifield, eds. 1994. *Controlling Immigration: A Global Perspective* (Stanford: Stanford University Press).

Cornelius, Wayne, Philip Marten, and James Hollifield. 1994. "Introduction: the Ambivalent Quest for Immigration Control," in *Controlling Immigration: A*

Global Perspective, ed., Wayne Cornelius, Philip Marten, and James Hollifield, (Stanford: Stanford University Press, 1994), 3-42.

Demleitner, Nora V. 2005. "A Vicious Cycle: Resanctioning Offenders," in *Civil Penalties, Social Consequences*, ed., Christopher Mele and Teresa A. Miller (New York and London: Routledge, 2005), pp. 185-201.

"DHS-ICE Sanctions, Registration," *Migration News*, 2003.

Endelman, Gary. 2006. "After the Fall: Making Sense Out of Sensenbrenner," *Immigration Daily*, January 4. Available at http://www.ilw.com/articles/2006,0104-endelman.shtm

Eggan, Dan and Julie Tate. 2005. "U.S. Campaign Produces few Convictions on Terrorism Charges," *Washington Post*, June 12.

Federation for American Immigration Reform. 2003. "Distribution of the Illegal Alien Population," June. Available at http://www.fairus.org

_____. 2006. "Comparison of H.R. 4437 and S. 2611," July 3. Available at http://www.fairus.org/site/DocServer/amnesty_bill_condensed.pdf?docID=1061

Firestone, David and Christopher Drew. 2001. "Al Qada Link Seen in Only a Handful of 1,200 Detainees," *The New York Times*, November 29.

Fitzgerald, Keith. 1996. *The Face of the Nation: Immigration, the State and National Identity* (Stanford: Stanford University Press).

Freeman, Gary P. 1998. "The Decline of Sovereignty? Politics and Immigration Restriction in Liberal States," in *Challenge to the Nation State: Immigration in Western Europe and the United States*, ed., Christian Joppke (London: Oxford University Press), pp. 86-108.

_____. 2001. “Client Politics or Populism? Immigration Reform in the United States,” in *Controlling a New Migration World*, ed., Virginie Guiraudon and Christian Joppke (London and New York: Routledge), pp. 65-95.

Garcia, Michael John. 2006. *Criminalizing Unlawful Presence: Selected Issues*, CRS Report for Congress (Washington, D.C.; Congressional Research Service, May 3).

Garcia, Michael John and Larry M. Eig. 2005. *Immigration Consequences of Criminal Activity*, CRS Report for Congress (Washington, D.C.; Congressional Research Service, July 6).

Michael John Garcia, Margaret Mikyung Lee, Todd Tatelman. 2005. *Immigration: Analysis of the Major Provisions of H.R. 418, the REAL ID Act of 2005*, CRS Report for Congress (Washington, D.C.: Congressional Research Service, February 2).

Gimpel, James G. and James R. Edwards, Jr. 1999. *The Congressional Politics of Immigration Reform* (Boston and London: Allyn Bacon).

Goode, Erich and Nachman Ben-Yehuda. 1994. “Moral panics: culture, politics, and social construction,” *Annual Review of Sociology* 20: 149-71.

Gordon, Diana R. 1994. *The Return of the Dangerous Classes: Drug Prohibition and Policy Politics* (New York: W.W. Norton).

Guiraudon, Virginie and Christian Joppke. 2001. “Controlling a New Migration World,” in *Controlling a New Migration World*, ed., Virginie Guiraudon and Christian Joppke (London and New York: Routledge, 2001), pp. 1-28.

Hollifield, James. 2000. “The Politics of International Migration: How Can We “Bring the State Back In’?” in *Migration Theory: Talking Across the Disciplines*, ed., I n

Caroline Brettel and James Hollifield, eds., (London: Routledge), pp. 137-86.

Hostettler, John N. 2005. Statements on "How Illegal Immigration Impacts Constituencies: Perspectives from members of Congress (Part I)," Hearing Before the Subcommittee on Immigration, Border Security and Claims of the Committee on the Judiciary House of Representatives, 109th Congress, 1st session, November 10, 2005 (Washington DC; US GPO 2006), p. 1. Available at http://judiciary.house.gov/media/pdfs/printers/109th/24507.pdf

House Judiciary Committee. 2001. "Majority Staff Description of the Latest Version of the Patriot Act," October 12. Available at http://www.cdt.org/security/011012patriotinfo.pdf

Jenks, Rosemary. 2001. "The USA Patriot Act of 2001," Center for Immigration Studies, December, available at http://www.cis.org/articles/2001/back1501.html.

Johnson, Kevin R. 2004. *The "Huddled Masses" Myth: Immigration and Civil Rights* (Philadelphia: Temple University Press).

Joppke, Christian. 1997. "Asylum and State Sovereignty: A Comparison of the United States, Germany, and Britain" *Comparative Political Studies,* 30, 3 (June): 259-98.

_____. 1998. "Why Liberal States Accept Unwanted Immigration," *World Politics*, 50: 266-93.

Martin, Susan. 1998. "Politics and Policy Responses to Illegal Migration in the US." ISIM Working Paper.

_____. 2003. "The Politics of US Immigration Reform," *Political Quarterly*: 132-49

McCollum, William. 1995. Statements on the "Criminal Alien Deportation

Improvements Act of 1995," *Congressional Record*, House, Friday February 10, 1995, 104th Congress 1st Session, 141 Cong Rec H 1586, Vol. 141, No. 27. Available at LexisNexis Congressional.

"Media Repeated GOP's False Claim that Democrats are to Blame for Plan to Make Illegal Immigrants Felons." 2006. Media Matters for America, April 17, 2006, Available at http://mediamatters.org/items/200604170005

Mele, Christopher, and Teresa A. Miller. 2005. "Collateral Civil Penalties as Techniques of Social Policy," in *Civil Penalties, Social Consequences*, ed., Christopher Mele and Teresa A. Miller (New York and London: Routledge), pp. 9-26.

Miller, Teresa A. 2005. "By Any Means Necessary: Collateral Civil Penalties of Non-U.S. Citizens and the War on Terror," in *Civil Penalties, Social Consequences*, ed., Christopher Mele and Teresa A. Miller (New York and London: Routledge), pp. 47-66.

National Immigration Forum, "Legislation: State and Local Police Enforcement of Immigration Laws," Available at http://www.immigrationforum.org/DesktopDefault.aspx?tabid=737

Numbers USA, "Immigration Profile of Rep. James Sensenbrenner." Available at http://profiles.numbersusa.com/improfile.php3?DistSend=WI&VIPID=880.

Osuna, Juan P. 1996. "The 1996 Immigration Act: Criminal Aliens and Terrorists," *Interpreter Releases: Report and Analysis of Immigration and Nationality Law*, 73, 47 (December 16): 1713-21.

Potter, Gary W. and Victor E. Kappeler. 1998. *Constructing Crime: Perspectives on Making News and Social Problems* (Prospect Heights, IL: Waveland Press).

Rabkin, Norman. 1997. "Criminal Aliens: INS Efforts to Identify and Remove Imprisoned Aliens Need to be Improved," Testimony before the Immigration and Claims Subcommittee Committee on the Judiciary House of Representatives, July 15. United States General Accounting Office. Available at http://www.gao.gov/archive/1997/gg97154t.pdf

Roth, William. 1996. Statements on the "Immigration Control and Financial Responsibility Act of 1996," *Congressional Record-Senate*, Thursday, May 2, 1996, 104th Congress 2nd Session, 142 Cong Rec S 4592, Vol. 142, No. 59. Available at LexisNexis Congressional.

Sensenbrenner, James. 2005. "Real ID Legislation Introduced in the House." *Press Release*, January 2005. Available at http://www.house.gov/sensenbrenner/wc20050127.html.

"Sensenbrenner Statement on Border Security and Immigration Reform," 2006. News Advisory, March 27, 2006, available at http://judiciary.house.gov/media/pdfs/immcorrectingrecord32706.pdf.

Shannon, Elaine. 1991. *Desperados* (New York: Signet).

Sheridan, Mary Beth. 2005. "Immigration Law as Anti-Terrorism Tool," *Washington Post*, June 13.

Siskin, Alison. 2004. *Immigration-Related Detention: Current Legislative Issues*, CRS Report for Congress (Washington, D.C. Congressional Research Service, April 28).

Siskin, Alison, Andorra Bruno, Blas Nunez-Neto, Lisa M. Seghetti and Ruth Ellen Wasem. 2006. *Immigration Enforcement within the United States*, CRS Report for

Congress (Washington D.C.: Congressional Research Service, April 6).

Smith, Lamar. 1995. Statements on the "Criminal Alien Deportation Improvements Act of 1995," *Congressional Record-Extension of Remarks*, Monday February 13, 1995, 104th Congress 1st Session, 141 Cong Rec E 330, Vol. 141, No. 28. Available at LexisNexis Congressional.

_____. 2005. Statements on "How Illegal Immigration Impacts Constituencies: Perspectives from members of Congress (Part I)," Hearing Before the Subcommittee on Immigration, Border Security and Claims of the Committee on the Judiciary House of Representatives, 109th Congress, 1st session, November 10, 2005 (Washington DC; US GPO 2006), p. 30. Available at http://judiciary.house.gov/media/pdfs/printers/109th/24507.pdf

USA PATRIOT ACT. 2001. Available at http://www.epic.org/privacy/terrorism/hr3162.html

U.S. Commission on Immigration Reform, "U.S. Immigration Policy: Restoring Credibility: Executive Summary," 1994, available at http://www.utexas.edu/lbj/uscir/exesum94.html

U.S, Congress, House of Representatives. 2005. "Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005, Report of the Committee on the Judiciary House of Representatives, to Accompany H.R. 4437, together with Additional and Dissenting Views," December 13, 2005. p. 44. Available at http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr345p1.109.pdf

U.S. Department of Homeland Security, Office of Inspector General. 2006. *Detention*

and Removal of Illegal Aliens: U.S. Immigration and Customs Enforcement. (Washington, D.C: DHS Office of Audits, April).

U.S. Department of Homeland Security, "Department of Homeland Security Launches Operation 'Ice Storm'," *DHS Press Release*, November 10, 2003. Available at http://www.dhs.gov/dhspublic/display?content=3008

U.S. Department of Homeland Security. 2006. *Yearbook of Immigration Statistics 2004* (Washington D.C.: U.S. Department of Homeland Security, Office of Immigration Statistics, 2006),

U.S Department of Justice, "Anti-Terrorism Act of 2001: Section by Section Analysis." September 19, 2001. Available at http://www.epic.org/privacy/terrorism/ATA_analysis.pdf

U.S. Department of Justice, Bureau of Justice Statistics. 1997. *Census of State and Federal Correctional Facilities, 1995*, August 1997, p. v, Available at http://www.ojp.usdoj.gov/bjs/pub/pdf/csfcf95.pdf;

U.S. Department of Justice, Bureau of Justice Statistics. 2003 *Census of State and Federal Correctional Facilities, 2000*, Revised October 15, 2003. Available at http://www.ojp.usdoj.gov/bjs/pub/pdf/csfcf00.pdf

U.S. Department of Justice, Office of Inspector General. 2003. *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*, June 2003. Available at http://www.usdoj.gov/oig/special/0306/index.htm

Welch, Michael. 2002. *Detained: Immigration Laws and the Expanding I.N.S. Jail Complex* (Philadelphia: Temple University Press).

Notes

[1] For example, see Wayne Cornelius, Philip Marten, and James Hollifield, eds., *Controlling Immigration: A Global Perspective* (Stanford: Stanford University Press, 1994); Christian Joppke, "Why Liberal States Accept Unwanted Immigration, *World Politics*, 50 (1998): 266-93; and Gary Freeman, "Client Politics or Populism? Immigration Reform in the United States," in *Controlling a New Migration World,* ed. Virginie Guiraudon and Christian Joppke (London and New York: Routledge, 2001), pp. 65-95.

[2] Barry Buzan, Barry, Ole Waever and Jaap de Wilde, *Security: A new Framework for Analysis* (Boulder and London: Lynne Rienner, 1998), 32-33.

[3] For example, see Erich Goode and Nachman Ben-Yehuda, "Moral Panics: Culture, Politics, and Social Construction," *Annual Review of Sociology* 20 (1994): 149-71; and Gary W. Potter and Victor E. Kappeler, *Constructing Crime: Perspectives on Making News and Social Problems* (Prospect Heights, IL: Waveland Press, 1998). For a discussion of "strategic social construction," see Margaret Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," International Organization 52 (1998): 887-917.

[4] The literature here is extensive and includes Keith Fitzgerald, *The Face of the Nation: Immigration, the State and National Identity* (Stanford: Stanford University Press, 1996); Michael Welch, *Detained: Immigration Laws and the Expanding I.N.S. Jail Complex* (Philadelphia: Temple University Press, 2002); and Kevin R. Johnson, *The "Huddled*

Masses" Myth: Immigration and Civil Rights (Philadelphia: Temple University Press, 2004).

[5] Wayne Cornelius, Philip Marten, and James Hollifield, "Introduction: the Ambivalent Quest for Immigration Control," in *Controlling Immigration: A Global Perspective*, ed., Wayne Cornelius, Philip Marten, and James Hollifield (Stanford: Stanford University Press, 1994), pp. 8-10. See also James Hollifield, "The Politics of International Migration: How Can We 'Bring the State Back In'?" in *Migration Theory: Talking Across the Disciplines*, ed., Caroline Brettel and James Hollifield (London: Routledge, 2000), pp. 148-49.

[6] Gary P. Freeman, "The Decline of Sovereignty? Politics and Immigration Restriction in Liberal States," in *Challenge to the Nation State: Immigration in Western Europe and the United States*, ed., Christian Joppke (London: Oxford University Press, 1998), 86-108.

[7] Christian Joppke, "Asylum and State Sovereignty: A Comparison of the United States, Germany, and Britain," *Comparative Political Studies*, 30, 3 (June 1997)): 261-62; Joppke, "Why Liberal States Accept Unwanted Immigration," 268-71.

[8] Hollifield, "The Politics of International Migration," pp. 150-51.

[9] Freeman, "Client Politics or Populism," pp. 65-95.

[10] Virginie Guiraudon and Christian Joppke, "Controlling a New Migration World," in *Controlling a New Migration World*, ed., Virginie Guiraudon and Christian Joppke (London and New York: Routledge, 2001), pp. 12-13. See also Peter Andreas, *Policing the U.S.-Mexico Divide*. (Ithaca and London: Cornell University Press, 2000).

[11] For example, see James G. Gimpel and James R. Edwards, Jr., *The Congressional Politics of Immigration Reform* (Boston and London: Allyn Bacon, 1999); Freeman,

"Client Politics or Populism," p. 69; Welch, *Detained*; Nora V. Demleitner, "A Vicious Cycle: Resanctioning Offenders," in *Civil Penalties, Social Consequences*, ed., Christopher Mele and Teresa A. Miller (New York and London: Routledge), pp. 185-201;

and Teresa A. Miller, "By Any Means Necessary: Collateral Civil Penalties of Non-U.S. Citizens and the War on Terror," in *Civil Penalties, Social Consequences*, ed., Christopher Mele and Teresa A. Miller (New York and London: Routledge, 2005), pp. 52-53.

[12] For example, see Elaine Shannon, *Desperados* (New York: Signet, 1991), pp. 420-29; and Diana R. Gordon, *The Return of the Dangerous Classes: Drug Prohibition and Policy Politics* (New York: W.W. Norton, 1994).

[13] See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690; and information regarding House Resolution 3529 and Senate Resolution 972, available at http://thomas.loc.gov/cgi-bin/thomas.

[14] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690. The ADAA further required the Immigration and Naturalization Service "to begin and, to the extent possible, complete deportation proceedings for aggravated felons before their release from prison." See Norman Rabkin, "Criminal Aliens: INS Efforts to Identify and Remove Imprisoned Aliens Need to be Improved," Testimony before the Immigration and Claims Subcommittee Committee on the Judiciary House of Representatives, July 15, 1997, p. 4.

[15] For example, see Susan Martin, "The Politics of US Immigration Reform," *Political Quarterly* (2003): 132-49; Michael John Garcia and Larry M. Eig, *Immigration Consequences of Criminal Activity*, CRS Report for Congress (Washington, D.C.:

Congressional Research Service, July 6, 2005); Miller, "By Any Means Necessary," p. 53.

[16] Juan P. Osuna, "The 1996 Immigration Act: Criminal Aliens and Terrorists," *Interpreter Releases: Report and Analysis of Immigration and Nationality Law*, 73, 47 (December 16, 1996): 1714; Miller, "By Any Means Necessary," p. 54.

[17] Miller, "By Any Means Necessary," p. 54.

[18] Ibid.

[19] Osuna, "The 1996 Immigration Act," pp. 1714-15[quote]; Welch, *Detained*, p. 3; Melissa Cook, "Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Acts as a Human Rights Violation," *Boston College Third World Law Journal* 23, 2 (2003): 307-309; Miller, "By Any Means Necessary," pp. 54-55.

[20] See Immigration Act of 1990, PL 101-649, Title VI (Exclusion and Deportation). Proposals influencing these shifts include the Terrorist Alien Removal Act of 1989 (H.R. 1451H) and comparable language found in S. 953 (A Bill to amend the Immigration and Nationality Act to revise the grounds for exclusion from admission into the United States, 1989).

[21] See Title IV, Section 401 (Terrorist and Criminal Alien Exclusion and Removal: Alien Terrorist Removal) PL 104-132. The criteria for designation are a "foreign organization" that "engages in terrorist activity" (as defined in the INA, and "threatens the security of U.S. nationals or the national security of the United States." Osuna, "The 1996 Immigration Act, p. 1720.

[22] Osuna, "The 1996 Immigration Act," p. 1721.

[23] William McCollum, Statements on the "Criminal Alien Deportation Improvements Act of 1995," *Congressional Record*, House, Friday February 10, 1995, 104th Congress 1st Session, 141 Cong Rec H 1586, Vol. 141, No. 27.

[24] Lamar Smith, Statements on the "Criminal Alien Deportation Improvements Act of 1995," *Congressional Record-Extension of Remarks*, Monday February 13, 1995, 104th Congress 1st Session, 141 Cong Rec E 330, Vol. 141, No. 28.

[25] H.R. 668, "Criminal Alien Deportation Improvements Act," Bill and Summary Status for the 104th Congress.

[26] Gimpel and Edwards, *The Congressional Politics*, p. 238. For example, see S. 2480, 103rd Congress, 2nd Session, 1994, "To amend the Immigration and Nationality Act to add provisions relating to the treatment of criminal aliens under the immigration laws of the United States, and for other purposes."

[27] Gimpel and Edwards, *The Congressional Politics*, pp. 245-47; Martin, "The Politics of US Immigration Reform," p. 143 [quote].

[28] Spencer Abraham, Statements on the "Immigration Control and Financial Responsibility Act of 1996," *Congressional Record-Senate*, Thursday, May 2, 1996, 104th Congress 2nd Session, 142 Cong Rec S 4592, Vol. 142, No. 59.

[29] Ibid.; William Roth, Statements on the "Immigration Control and Financial Responsibility Act of 1996," *Congressional Record-Senate*, Thursday, May 2, 1996, 104th Congress 2nd Session, 142 Cong Rec S 4592, Vol. 142, No. 59.

[30]Rabkin, "Criminal Aliens," p. 4 [quote]; Miller, "By Any Means Necessary," p. 54.

[31] Cook, "Banished for Minor Crimes," pp. 301-2, 312.

[32] Osuna, "The 1996 Immigration Act," pp. 1721-22; Cook, "Banished for Minor Crimes," p. 310 note 163.

[33] Cook, "Banished for Minor Crimes," p. 312 note 186.

[34] Drug offenders comprised the primary group in federal prisons. Over two-thirds of non-citizens under incarceration were in state and private facilities. U.S. Department of Justice, Bureau of Justice Statistics, *Census of State and Federal Correctional Facilities, 1995*, August 1997, p. v; and U.S. Department of Justice, Bureau of Justice Statistics, *Census of State and Federal Correctional Facilities, 2000*, Revised October 15, 2003, p. 8.

[35] Alison Siskin, *Immigration-Related Detention: Current Legislative Issues*, CRS Report for Congress (Washington, D.C. Congressional Research Service, April 28, 2004), p. 12; Alison Siskin, et al., *Immigration Enforcement within the United States*, CRS Report for Congress (Washington DC: Congressional Research Service, April 6, 2006), p. 23.

[36] Miller, "By Any Means Necessary," pp. 55-56; U.S. Department of Homeland Security, *Yearbook of Immigration Statistics 2004* (Washington D.C.: U.S. Department of Homeland Security, Office of Immigration Statistics, 2006), Table 43 (Aliens Removed by Criminal Status and Region and Country of Nationality, 1998-2004); Siskin, et al., "Immigration Enforcement within the United States," p.16. These figures do not include *voluntary* departures.

[37] David Firestone and Christopher Drew, "Al Qada Link Seen in Only a Handful of 1,200 Detainees, *The New York Times*, November 29, 2001; David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York and

London: Free Press, 2003), pp. 22-50; "DHS-ICE Sanctions, Registration," *Migration News*, 2003; and Miller, "By Any Means Necessary," pp. 59-60.

[38] U.S Department of Justice, "Anti-Terrorism Act of 2001: Section by Section Analysis." September 19, 2001; Cole, *Enemy Aliens*, pp. 61-76; and USA PATRIOT ACT Title IV (B) (411).

[39] U.S Department of Justice, "Anti-Terrorism Act of 2001," p. 8; House Judiciary Committee, "Majority Staff Description of the Latest Version of the Patriot Act," October 12, 2001, p. 4.

[40] The Attorney General was empowered to detain without arrest for up to seven days, after which the Attorney General must release the alien or certify, by "demonstrating reasonable ground to believe," that the alien meets the definition of terrorist activity or is engaged in "any other activity that endangers the national security of the United States." If the alien is so certified, he/she must be charged with a criminal offense or placed in removal proceedings. However, if "removal is unlikely in the foreseeable future" and the alien's release is deemed a threat to the "national security of the United States or the safety of the community or any person," the alien can be detained for a period up to six months and, following review of the certification, re-detained. U.S Department of Justice, "Anti-Terrorism Act of 2001," p.9; House Judiciary Committee, "Majority Staff Description," p. 4; USA PATRIOT ACT Title IV (B) (412).

[41]Ibid.

[42] For example see Mary Beth Sheridan, "Immigration Law as Anti-Terrorism Tool," *Washington Post*, June 13, 2005.

[43] Miller, "By Any Means Necessary," p. 47; Siskin, et al., "Immigration Enforcement."

[44]Of those apprehended, 27,497 were released "due to lack of detention bed space or for some other reason." U.S. Department of Homeland Security, Office of Inspector General, *Detention and Removal of Illegal Aliens: U.S. Immigration and Customs Enforcement* (Washington, D.C: DHS Office of Audits, April 2006), p. 7

[45] U.S. Department of Homeland Security, *Yearbook of Immigration Statistics 2004s*, Table 43; Siskin, et al., "Immigration Enforcement," pp. 15-16, 23.

[46] U.S. Department of Homeland Security, "Detention and Removal of Illegal Aliens," pp. 9-10.

[47] Rosemary Jenks, "The USA Patriot Act of 2001," Center for Immigration Studies, December 2001, available at http://www.cis.org/articles/2001/back1501.html; Miller, "By Any Means Necessary," p. 47.

[48] Miller, "By Any Means Necessary," p. 59.

[49] Christopher Mele and Teresa A. Miller, "Collateral Civil Penalties as Techniques of Social Policy," in *Civil Penalties, Social Consequences*, ed., Christopher Mele and Teresa A. Miller (New York and London: Routledge, 2005), p. 20.

[50] Miller, "By Any Means Necessary," pp. 48-49; U.S. Department of Homeland Security, "Department of Homeland Security Launches Operation 'Ice Storm'," DHS Press Release, November 10, 2003.

[51] Dan Eggan and Julie Tate, "U.S. Campaign Produces few Convictions on Terrorism Charges," *Washington Post,* June 12, 2005.

[52] James Sensenbrenner, "Real ID Legislation Introduced in the House." Press Release, January 2005.

[53] Michael John Garcia, Margaret Mikyung Lee, Todd Tatelman, *Immigration: Analysis of the Major Provisions of H.R. 418, the REAL ID Act of 2005*, CRS Report for Congress (Washington, D.C.: Congressional Research Service, February 2, 2005).

[54] Michael John Garcia, *Criminalizing Unlawful Presence: Selected Issues*, CRS Report for Congress (Washington, D.C.: Congressional Research Service, May 3, 2006), pp. 1-3; Federation for American Immigration Reform, "Comparison of H.R. 4437 and S. 2611," July 3, 2006, p.4.

[55]See, H.R. 4437, The Border Protection, Antiterrorism and Illegal Immigration Control Act, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h4437eh.txt.pdf; and S. 2454, Securing America's Borders Act, available at http://www.nilc.org/immlawpolicy/CIR/saba_frist_2006-3-16.pdf; and S. 2611, The Comprehensive Immigration Reform Act available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s2611es.txt.pdf

[56] H.R.4437; American Immigration Lawyers Association, "The Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005 (H.R. 4437), as Amended and Passed by the House on 12/16/05: Section-by-Section Analysis."

[57] Lamar Smith, Statements on "How Illegal Immigration Impacts Constituencies: Perspectives from members of Congress (Part I)," Hearing Before the Subcommittee on Immigration, Border Security and Claims of the Committee on the Judiciary House of Representatives, 109th Congress, 1st session, November 10, 2005 (Washington DC; US GPO 2006), p. 30.

[58] John N. Hostettler, Statements on "How Illegal Immigration Impacts Constituencies: Perspectives from members of Congress (Part I)," Hearing Before the Subcommittee on Immigration, Border Security and Claims of the Committee on the Judiciary House of Representatives, 109th Congress, 1st session, November 10, 2005 (Washington DC; US GPO 2006), p. 1.

[59] For example, see Gary Endelman, "After the Fall: Making Sense out of Sensenbrenner," *Immigration Daily*, January 4, 2006.

[60] For example see Numbers USA, "Immigration Profile of Rep. James Sensenbrenner." In contrast the migration patterns facing Florida representatives in the 1980s, Wisconsin migrant population is relatively low. Estimates of illegal migrants in the state in 2003 were 64,000 compared to the estimated national total of 11 million. See, Federation for American Immigration Reform, "Distribution of the Illegal Alien Population," June 2003.

[61] U.S, Congress, House of Representatives, "Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005, Report of the Committee on the Judiciary House of Representatives, to Accompany H.R. 4437, together with Additional and Dissenting Views," December 13, 2005, p. 44.

[62] Ibid., p.45. These arguments had been raised in earlier hearings over illegal immigration; no hearings were held on the bill itself.

[63] For example, see Freeman, "Client Politics or Populism," p. 95; Welch *Detained*, p. 177; Cook, "Banished for Minor Crimes," pp. 310-11.

[64] For example, see Cole, *Enemy Aliens*, pp. 30-31; U.S. Department of Justice, Office of 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, June 2003.

[65] For example, see "Sensenbrenner Statement on Border Security and Immigration Reform," News Advisory, March 27, 2006; and "Media Repeated GOP's False Claim that Democrats are to Blame for Plan to Make Illegal Immigrants Felons," Media Matters for America, April 17, 2006.

[66] Prioritization as an essential component of immigration control reform had long been recommended by critics of the Immigration and Naturalization Service. For example, see U.S. Commission on Immigration Reform, "U.S. Immigration Policy: Restoring Credibility: Executive Summary," 1994; Susan Martin, "Politics and Policy Responses to Illegal Migration in the US," ISIM Working Paper, 1998.

[67] For example, see National Immigration Forum, "Legislation: State and Local Police Enforcement of Immigration Laws."