Down But Not Out: A Comparison of Previous Attempts at Immigration Reform and the Resulting Agency Implemented Changes

Laurence M. Krutchik*
DOWN BUT NOT OUT: A COMPARISON OF PREVIOUS ATTEMPTS AT IMMIGRATION REFORM AND THE RESULTING AGENCY IMPLEMENTED CHANGES

LAURENCE M. KRUTCHIK*

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I. INTRODUCTION

Recently, immigration reform has caught the attention of the United States. The media has been following the development of the recent immigration bill, Senate Bill 1348—formerly known as the Comprehensive Immigration Reform Act of 2007 (CIRA 2007)—presented by a bipartisan
group of senators. The 110th Congress of the United States believed that this Act and several amendments would have resulted in radical changes to immigration laws. Unfortunately, on June 28, 2007, CIRA 2007 was defeated, coming up “fourteen votes short of the necessary sixty” to proceed to consideration by the House of Representatives. This revolutionary bill would have closed the gaps in current immigration law through the creation of several programs, as well as rewriting certain parts of the United States Code. This is not the first time that Congress considered such a change in immigration law. Last year, the 109th Congress considered Senate Bill 2611 (CIRA 2006), which was essentially identical to CIRA 2007. The CIRA 2006 was passed by the House and Senate, but was never signed into law. Senator Harry Reid was the sponsor of both bills, and continues to promote immigration reform in this country. With the failure of these bills in Congress, the White House has presented changes they can make, through

* J.D. Candidate 2009, Nova Southeastern University, Shepard Broad Law Center; Managing Technical Editor 2008–09, NOVA LAW REVIEW. The author received his B.S. in Criminal Justice from Northeastern University in 2004. He wishes to thank his family and friends for their support and encouragement, especially his parents Paula and Allan Krutchik and his brother Evan. The author also wishes to thank Jonah M. Levine, Managing Technical Editor 2007–08, for his guidance and assistance in the preparation of this Note.


9. Id.
administrative principles, within the existing law. These changes do not require congressional approval, but still have a binding legal effect on the nation through amendments to existing rules and regulations.

This article will discuss the evolution of immigration reform in the past and the attempts for contemporary reform. It is important for legislation, successful or not, to be evaluated. Doing so allows for a better understanding of the process of trial and error Congress struggles through to reform laws in this country. Part II briefly discusses the immigration reforms implemented before the September 11, 2001 (9/11) terrorist attacks. Part III will briefly review the legislation that was passed after 9/11 and the effect the laws had on immigration in a now terrorist-threatened country. Part IV will review the Comprehensive Immigration Reform Act of 2007 and the proposed changes that it would make to the law mentioned in the previous sections, in addition to other relevant laws. Additionally, this note will discuss the Comprehensive Immigration Reform Act of 2007 in detail. There are five main aspects of the bill that will be broken down and discussed. They are: 1) securing America’s borders; 2) a temporary work program for immigrants; 3) holding employers accountable for the illegal hiring of illegal aliens; 4) the three-group categorization of aliens currently residing in the United States; and lastly, 5) the assimilation of immigrants into American society through the enactment of the DREAM Act. Part V will discuss the similarities and differences of the immigration initiatives put forth by President Bush. There are some aspects of the initiatives that mimic the comprehensive acts and others that do not.


11. See id.

Since these changes will drastically affect the status of immigration in this country, this article will also incorporate predictions as to the effects that the new law will have on the economy and the country as a whole.

II. PRE-SEPTEMBER 11, 2001 IMMIGRATION LEGISLATION

Current immigration law in the United States is detailed and complex. There have been a multitude of acts and amendments that govern immigration in the United States. Discussing every act and the changes they made would encompass volumes. For purposes of this article, the major changes in the law, a review of CIRA 2007, and the current initiatives will be examined. This article examines legislation enacted prior to and following the 9/11 terrorist attacks.

A. Immigration Reform and Control Act of 1986

The first of recent changes in immigration law occurred with the enactment of the Immigration Reform and Control Act of 1986 (IRCA). Although similar to almost all other immigration laws, this law did not immediately pass in Congress. In fact, the law was voted down in three prior congressional sessions. The IRCA made changes to the laws established by the Immigration and Nationality Act (INA). This and other similar acts are "referred to as an 'amnesty' or a legalization program because it provides LPR [(lawful permanent resident)] status to aliens who are otherwise residing illegally in the United States." The major changes resulting from IRCA include: 1) sanctions imposed on employers who knowingly hired or em-
ployed aliens not authorized to work; 19 2) enactment of a provision that would legalize the status of aliens residing in the United States since before January 1, 1982; 3) increased resources for immigration law enforcement; 20 and 4) an amnesty program for certain undocumented aliens and special provisions relating to foreign agricultural workers. 21 Additionally, IRCA established a new H-2A visa nonimmigrant status. 22 Although this new visa was added, immigrant and nonimmigrant visas were not overhauled. 23 As will be seen later in this article, there are laws enacted which made changes to the overall immigration system. Such changes include, but are not limited to, the elimination of the Immigration and Naturalization Service (INS) and the transfer of authority over immigration to the Attorney General of the United States. 24 Additionally, CIRA 2007 proposed more changes to the laws enacted under this and many of the other laws described in this article. 25


20. WEISSBRODT, supra note 15, at 22. CIRA 2007 also addresses the issue of immigrants residing in the United States. See LEGISLATIVE NOTICE, supra note 7, at 17.


22. 2 GORDON ET AL., supra note 17, 2-30. This visa program allows foreign workers to do farm work in the United States strictly through contracts. GUIDE TO THE H-2A VISA PROGRAM, supra note 21, at 1. Foreign workers contract with employers and return to their home countries when the contract is over. Id.

23. WEISSBRODT, supra note 15, at 23.


B. Immigration Marriage Fraud Amendments of 1986

With the enactment of the IRCA, problems developed with aliens committing marriage fraud in order to obtain benefits they otherwise would not be entitled to receive. The Immigration Marriage Fraud Amendments of 1986 (IMFA) were enacted specifically to counteract such fraud. The INS commissioner stated that “marriage fraud posed a significant threat to the integrity of the immigration system because marriage was the easiest . . . means of obtaining permanent residence status.” While these amendments were being debated, Representative Romano L. Mazzoli (D-KY) stated that: “Because spouses of U.S. citizens and permanent resident aliens are . . . given special consideration under our immigration laws, many aliens who would not otherwise be allowed to live in the United States find it expedient to enter into a fraudulent marriage.” The IMFA still allowed immigrants to marry in order to obtain citizenship, but attached certain conditions. The conditions revolve around the conditional permanent resident status granted to an alien upon marriage. The immigrant-resident petitioner must maintain a valid two year marriage. However, the INS may terminate the conditional status if it is determined that the marriage is a sham. Criminal penalties were increased for marriages that were determined to be shams.

29. Id. at 682.
31. 8 U.S.C. § 1186a(a)(1). See also Jones, supra note 26, at 682.
32. Jones, supra note 26, at 682. The INS has the power to waive these conditions and is known as a hardship waiver. Id. at 683.
33. Jones, supra note 26, at 682. The Attorney General, in the Attorney General’s discretion, may remove the conditional basis of the permanent resident status for an alien who fails to meet the requirements of paragraph (1) if the alien demonstrates that—(A) extreme hardship would result if such alien is removed, (B) the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) and the alien was not at fault in failing to meet the requirements of paragraph (1), or (C) the qualifying marriage was entered into in good faith by the alien spouse and during the marriage the alien spouse or child was battered by or was the subject of extreme cruelty perpetrated by his or her spouse or citizen or permanent resident parent and the alien was not at fault in failing to meet the requirements of paragraph (1).
34. Id. Sham marriage is defined as “[a] purported marriage in which all the formal requirements are met or seemingly met, but in which the parties go through the ceremony with
C. **Anti-Drug Abuse Act of 1988**

The next landmark legislation, the Anti-Drug Abuse Act of 1988, addressed immigration from a different angle.\(^{36}\) This legislation focused on the epidemic of narcotics drug trafficking.\(^{37}\) In addition to the drug related changes in the law, there were immigration issues that were also addressed.\(^{38}\) This Act specified the term aggravated felony to include murder, drug trafficking, and illicit trafficking of firearms.\(^{39}\) This Act relates to immigration because it precluded granting voluntary departure to an alien convicted of the newly defined "aggravated felony," which "[a]dded a new deportation ground for an alien convicted of an aggravated felony . . . , [e]nlarged the criminal penalties for aliens" charged with an aggravated felony attempting to reenter the United States unlawfully, and "[c]hanged [the] deportation proceedings relating to an alien convicted of an aggravated felony."\(^{40}\)

D. **Immigration Act of 1990**

In 1990, Congress passed the Immigration Act of 1990 which modified immigration law in the United States.\(^{41}\) This law has been said to be "ill conceived, deceptively designed, poorly timed, and subtly racist."\(^{42}\) Critics of this act state that it emphasizes the worst parts of the system and contains some hints of unethical principles.\(^{43}\) Critics have formed this view from the fact that the supporters of the act used the myth of labor shortages to justify the enactment of the legislation.\(^{44}\) Some of the major highlights of this legislation include, but are not limited to: an increase in the number of immigrants admitted into the United States,\(^{45}\) changes in laws applying to aliens

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35. 2 GORDON ET AL., supra note 17, 2–32.
37. See generally id.
38. See id. §§ 7341-50, 102 Stat. at 4469–73.
39. 2 GORDON ET AL., supra note 17, 2-34.
40. Id. at 2-34 to 2-35.
43. Id.
44. Id.
45. See LEGISLATIVE NOTICE, supra note 7, at 15. The breakdown of visas allocated by CIRA 2007 are as follows: 480,000 for family sponsored immigrants, 450,000 for employment based immigrants, and 55,000 for "diversity" visas. Id.; Representative Sheila Jackson
seeking temporary entry, switching naturalization power from the federal courts to the Attorney General, and making revisions to the grounds for exclusion and deportation from the United States.

E. Illegal Immigration Reform and Immigrant Responsibility Act of 1996

One of the last major changes in immigration law, prior to the 9/11 attacks, was the enactment of the Illegal Immigration Reform and Responsibility Act of 1996 (IIRIRA). This Act was intended to “strengthen and tighten the immigration laws.” The purpose of this Act was “to improve border control by . . . [enforcing] criminal penalties for high speed flight from immigration checkpoints. [It] also contain[ed] various provisions . . . to facilitate legal entry, and interior enforcement of . . . laws.”

Another aspect of the IIRIRA that has seen considerable attention, as addressed by the current proposal, is the issue of document integrity. The IIRIRA increased criminal penalties and imposed the first “civil penalties for fraud or misuse of visas, permits, and other documents.” Furthermore, this Act “defined the term ‘falsely make’” as it applies to the previously mentioned documents.

Lee, Why Immigration Reform Requires a Comprehensive Approach that Includes both Legislation Programs and Provisions to Secure the Border, 43 HARV. J. ON LEGIS. 267, 282 (2006).

46. 2 GORDON ET AL., supra note 17, 2-44 to 2-45. The next major aspect of this act is the change to the status of non-immigrants. Changes were made to the following areas: visa waiver pilot program, crewmembers (individuals employed for longshore work), treaty traders, temporary workers, and intra-company transferees. Id.

47. Id. at 2-46. Since 1795, Congress has granted federal “courts the power to award naturalization” to aliens. Id. Effective on October 1, 1991, the Attorney General was granted the “sole authority to naturalize persons as citizens of the United States.” Id. (quoting 8 U.S.C. § 1421 (2000)) (internal quotations omitted). Courts still maintained jurisdiction to adjudicate claims filed by aliens. 2 GORDON ET AL., supra note 17, 2-46.

48. See id. at 2-47 to 2-49. The Act addressed the following categories of exclusion: health-related provisions, criminal-related provisions, security and related grounds which includes activities that would adversely affect United States foreign policy, communists, and significant changes relating to misrepresentation which was expanded by the Marriage Fraud Act. Id.


51. Id.

52. Id. § 7.

53. Id.
III. POST-SEPTEMBER 11, 2001 IMMIGRATION LEGISLATION

The 9/11 attacks on the United States were a major wakeup call that the then current restrictions on the entry of immigrants, document security, and background checks were not strict enough. The terrorists that attacked the United States fell through the cracks of the complicated system of, not only immigration laws, but other laws aimed at protecting the United States from such attacks. Specifically, the attacks demonstrated the dangers associated with, not only illegal immigrants, but legal immigrants as well.

The report issued by the National Commission on Terrorist Attacks upon the United States (9/11 Commission) stated that “more than 9 million people are in the United States outside the legal immigration system.” However, not everyone feels that the legislation resulting from the terrorist attacks was the most appropriate. In an e-mail from immigration attorney and professor, Ira Kurzban, he stated that the 9/11 attacks opened the door to improper actions by the United States government. Mr. Kurzban believes that aliens are typically the first to feel the brunt of repression, and that the 9/11 attacks are no exception.

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55. See id. n.4.


58. Ira Kurzban is a practicing attorney who specializes in immigration law. Kurzban, Kurzban, Weinger & Tetzeli, P.A., Attorney Profiles: Ira J. Kurzban, Esq., http://www.kkwilaw.com/Bio/IraKurzban.asp (last visited Apr. 19, 2008). He is a partner at the firm of Kurzban, Kurzban, Weinger & Tetzeli, P.A. located in Miami, Florida. Id. He is also an adjunct professor of Immigration and Nationality Law at Nova Southeastern University, Shepard Broad Law Center, and the University of Miami School of Law. Id.

59. See E-mail from Laurence M. Krutchik, J.D. Candidate 2009, Nova Se. Univ., Shepard Broad Law Ctr., to Ira J. Kurzban, Esq., Adjunct Professor of Law, Nova Se. Univ., Shepard Broad Law Ctr. (July 10, 2007, 18:44:00 EST) (on file with author).

60. Id.
A. Homeland Security Act of 2002

One of the most drastic changes in the United States government, which also affected immigration laws, occurred with the passage of The Homeland Security Act of 2002 (HSA). This Act established the Department of Homeland Security (DHS). The DHS is a cabinet-level department and is managed by the Secretary of Homeland Security. This department was established to strengthen the security measures used to protect against terrorism occurring in the United States. Subtitles D, E, and F of Title IV of the Act made substantial changes to immigration laws in the United States. Some of the most drastic changes are found in section 402, which stipulates functions relating to border patrol. The Act transfers the following agencies and their function to the DHS: United States Customs Service, INS, Animal and Plant Health Inspection Service, United States Coast Guard, and Transportation Security Administration.

B. Intelligence Reform and Terrorism Prevention Act of 2004

The Homeland Security Act of 2002 was Congress’ initial response to the terrorist attacks on the country. However, the extent of the reaction and implementation of new laws would not stop there. The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) was signed into law, “by the President on December 17, 2004.” The Act is designed to attack document

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64. Id.


67. REORGANIZATION PLAN, supra note 61, at 4.

68. David S. Rubenstein, Restoring the Quid Pro Quo of Voluntary Departure, 44 HARV. J. ON LEGIS. 1, 5 (2007).

fraud which aids terrorists in entering the United States. Before the enactment of this legislation, there were no national standards set for drivers' licenses, social security cards, and birth certificates. Additionally, the 9/11 Commission addressed the issue of uniformity of documentation in its report by stating that, "[t]he federal government should set standards for the issuance of birth certificates and sources of identification, such as drivers' licenses." The law requires that every new license or identification card from every state contain certain features that could allow the cards to be accepted for any official purpose by a federal agency. As for the issuance of social security numbers and cards, restrictions were placed on the number of cards and the cards themselves to secure the numbers from fraudulent use. Lastly, this Act addresses the issuance of birth certificates for newborn children. The Act delegates authority to the Secretary of Health and Human Services to set minimum standards for the issuance of birth certificates.

C. REAL ID Act of 2005

Although many features were added to the various forms of identification by IRTPA, the legislation for eliminating fraudulent forms of identification continued with the REAL ID Act of 2005 (REAL ID Act). There still remained some proposals from the IRTPA, which would be set into place by the REAL ID Act.

[T]he major provisions of the REAL ID Act [did the following]:

70. See id. at 2.
71. Id. at 1.
72. 9/11 COMMISSION REPORT, supra note 57, at 390.
73. TATELMAN, supra note 69, at 2. The drivers' licenses or identification cards must include the following information: "1) full legal name; 2) date of birth; 3) gender; 4) driver's license or identification card number; 5) digital photograph; 6) address; and 7) signature." Id. The cards must also contain a "physical . . . feature[] designed to prevent tampering." Id.
74. Id. at 6. The Commissioner of Social Security may restrict the issuance of social security cards to three per year per individual and "10 for the life of the individual." Id. However, the Commissioner has discretion, if he or she feels that there is little chance of fraud. TATELMAN, supra note 69, at 6.
75. Id. at 8–9.
76. Id. at 8. The Act requires that the issuing agency or state use safety papers and/or other measures "designed to prevent tampering, counterfeiting, or otherwise duplicating the birth certificate for fraudulent purposes.”" Id.
1) modified the eligibility criteria for asylum and withholding of removal; 2) limited judicial review of certain immigration decisions; 3) provided additional waiver authority over laws that might impede the expeditious construction of barriers and roads along land borders, including a 14-mile wide fence near San Diego; 4) expanded the scope of terror-related activity making an alien inadmissible or deportable, as well as ineligible for certain forms of relief from removal; 5) required states to meet certain minimum security standards in order for the drivers' licenses and personal identification cards they issue to be accepted for federal purposes; 6) required the Secretary of Homeland Security to enter into the appropriate aviation security screening database the appropriate background information of any person convicted of using a false driver's license for the purpose of boarding an airplane; and 7) required the Department of Homeland Security to study and plan ways to improve U.S. security and improve inter-agency communications and information sharing, as well as establish a ground surveillance pilot program. 79

Another key area addressed by this Act is the issue of asylum in the United States. 80 "An alien who is physically present or arrives in the United States, regardless of the alien's immigration status, may apply for asylum." 81 The Attorney General of the United States has the authority to grant asylum to an alien under section 208(b) of the Immigration and Nationality Act (INA). 82 The REAL ID Act slightly changed who may grant asylum. 83 Specifically, the "authority to grant asylum" is now given to both "the Secretary

79. See generally id.
80. See id. at 2. Asylum is defined as "[p]rotection of [usually] political refugees from arrest by a foreign jurisdiction; a nation or embassy that affords such protection." BLACK'S LAW DICTIONARY 135 (8th ed. 2004).
81. GARCIA ET AL., supra note 78, at 3.
82. Id.; 8 U.S.C. § 1158(b)(1)(A) (2000). In order to be granted asylum, an alien must be classified as a refugee under the INA, which defines the term refugee to mean:

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

83. See GARCIA ET AL., supra note 78, at 5. "Subsection 101(a) of the REAL ID Act amends § 208(b)(1) of the INA . . . ." Id.
of Homeland Security and the Attorney General" of the United States.84 When an alien applies for amnesty under the new REAL ID Act, they have a higher burden of proof to "establish that at least one central reason for persecution [in their native country] was or will be race, religion, nationality, membership in a particular social group, or political opinion."85

IV. Comprehensive Immigration Reform Act of 2007 (Senate Bill 1348)

President Bush had been advocating the need for immigration reform since January 2004 with the announcement of "his principles of reform."86 The 109th Congress considered Senate Bill 261187 (CIRA 2006), which proposed immigration reform, although it was never signed into law.88 The more recent reform is CIRA 2007.89 The purpose of this bill was to amend the INA to provide for more effective border and employment enforcement, to prevent illegal immigration, and to reform and rationalize avenues for legal immigration, as well as for other purposes.90 This proposal was essentially identical to CIRA 2006, which passed through the Senate on May 25, 2006.91 Recently, President Bush outlined the five main areas for reform: 1) the need to secure the borders of the United States; 2) "a temporary worker program" for immigrants granted admission into the United States; 3) holding employers accountable for hiring immigrants whom the employers know are in the United States illegally; 4) a means to handle immigrants who currently reside in the United States; and 5) assimilation of immigrants into American society.92

85. GARCIA ET AL., supra note 78, at 5.
90. See id.
91. LEGISLATIVE NOTICE, supra note 7, at 1.
A. **Securing America’s Border**

1. Increase in Enforcement Personnel

“The U.S. Border Patrol, [a department] within the . . . [DHS’s] U.S. Customs and Border Protection (CBP), is responsible for patrolling 8,000 miles of the land and coastal borders of the United States . . .” 93 The purpose of the CBP is to prevent the entry of aliens and contraband into the United States. 94 “As of October 2006, [there were] 12,349 [border patrol] agents stationed” at various points throughout the United States. 95

CIRA 2007 called for an increase in enforcement personnel in several areas. 96 The Act proposed the addition of “200 new positions . . . to investigate alien smuggling” and 500 new port of entry inspectors between 2008 and 2012. 97 Also, within this same time frame, CIRA 2007 proposed the addition of 11,200 CBP. 98 This increase in Border Patrol agents does not come without a cost to the taxpayers. 99 The United States Government Accountability Office (GAO) estimates that it costs about $14,700 to train a new agent. 100 With the addition of 11,200 agents, the cost for training alone amounts to $164,640,000. 101

In addition to human beings patrolling America’s borders, the bill will authorize the use of unmanned technology. 102 Such technologies include, but are not limited to, cameras, unmanned aerial vehicles, and sensors. 103 The combination of the various technologies is referred to as “The President’s
Secure Border Initiative.”\textsuperscript{104} Appropriations for the technologies are authorized by CIRA 2007.\textsuperscript{105} Also associated with the increased number of personnel, the President proposed the abolishment of the policy of “Catch and Release.”\textsuperscript{106}

2. Border Fence Proposals

Currently, the United States has border fencing erected for a substantial amount of the borders.\textsuperscript{107} However, there needs to be a more secure system of fencing.\textsuperscript{108} The idea of building a fence to deter and keep illegal aliens out of the United States is not a new idea.\textsuperscript{109} There is a history to border fence construction that is essential to understanding the proposed upgrades and additions. The Border Patrol began erecting a fence in 1990 in the San Diego sector of the border.\textsuperscript{110} The power to order the construction of the fence rests in the Attorney General who has the broad power “to control and guard the [United States] border[s].”\textsuperscript{111} “In 1996, Congress passed the [IIRIRA], which . . . authorized the [INS] to construct a secondary layer of fencing to buttress the completed [San Diego] fence.”\textsuperscript{112} Appropriations were made by the REAL ID Act to complete the fourteen mile San Diego fence.\textsuperscript{113} “Congress [then] passed the Secure Fence Act of 2006,” which allowed the Secretary of the DHS to order the building of additional fencing totaling 850 miles.\textsuperscript{114}

Since there is already a system of fencing in place from previous legislation, the purpose of the fencing provision in CIRA 2007 is to repair and

\textsuperscript{105}. See LEGISLATIVE NOTICE, supra note 7, at 4.
\textsuperscript{106}. Press Release, Comprehensive Immigration Reform, supra note 104.
\textsuperscript{107}. See generally NUNÉZ-NETO & VIÑA, supra note 93.
\textsuperscript{108}. See id.
\textsuperscript{109}. Id. at 1.
\textsuperscript{110}. Id.
\textsuperscript{111}. Id.
\textsuperscript{112}. NUNÉZ-NETO & VIÑA, supra note 93, at 2.
\textsuperscript{114}. Id. at 6.
add to the current fencing in place. The proposed bill authorized monies necessary for the repair of damaged primary fencing “and to construct at least 200 miles of vehicle barriers and all-weather roads in areas” known to be breach points for illegal immigrants.

3. Technological Advances in Biometrics and Document Integrity

A substantial problem in the United States is document fraud. The problem became evident following the terrorist attacks of September 11, 2001. The proposed bill calls for a massive overhaul “of [C]hapter 75 of Title 18 of the U.S. Code.” This section of the United States Code addresses issues relating to “passport[] and visa fraud.”

Along with rewriting parts of the United States Code, the technological advances include the implementation of the “Integrated Automated Fingerprint Identification System (IAFIS)” which would be integrated with the “United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program.” This system:

applies to a certain group of foreign nationals—non-immigrants from countries whose residents are required to obtain nonimmigrant passports.

115. LEGISLATIVE NOTICE, supra note 7, at 4.
116. Id. at 5.
117. Id. at 5.
118. See 9/11 COMMISSION REPORT, supra note 57, at 390.
119. See LEGISLATIVE NOTICE, supra note 7, at 5. The rewriting of this section of the United States Code creates new crimes for:

[1] trafficking in passports and punishing those who unlawfully produce, issue, transfer, forge, or falsely make passports, as well as those who transact in passports they know to be forged or counterfeited, and those who prepare, submit, or mail applications for passports that they know include a false statement; [2] completing, signing, or submitting a passport application knowing that it contains a false statement or representation; [3] knowingly and without lawful authority producing or issuing a passport for or to any person not owing allegiance to the United States; [4] knowingly and without lawful authority transferring a passport to a person for use when such person is not the person for whom the passport was issued or designed; [5] knowingly using a passport to enter or attempt to enter the country, knowing that the passport is forged or counterfeited; [6] knowingly using a passport to defraud an agency of the United States or a State, knowing that the passport is forged or counterfeited; [7] knowingly executing a scheme to defraud any person in connection with any matter arising under the immigration laws or that the offender claims arises under the immigration laws; [8] knowingly using any immigration document issued or designed for use by another; [9] trafficking in immigration documents; [10] knowingly and without lawful authority, producing, obtaining, or possessing various papers, seals, symbols, or other materials used to make immigration documents; [11] entering into multiple marriages to evade immigration law; and [12] arranging, supporting, or facilitating such multiple marriages.

Id.

120. Id.
121. Id.
grant visas before entering the United States and residents of certain countries who are exempt from United States visa requirements when they apply for admission to the United States for up to 90 days for tourism or business purposes under the Visa Waiver Program. 122

There is some history to the implementation of the system. Originally, part of the Immigration and Naturalization Service Data Management Improvement Act (DMIA) of 2000 contained a requirement for the implementation of an integrated data system to monitor foreign nationals. 123 This Act replaced a provision that was part of the IIRIRA which "required an automated system to record and then match the departure of every foreign national from the United States to the individual's arrival record." 124 The IAFIS "will support the paperless submission of fingerprint records." 125 US-VISIT is an "automated biometric entry-exit system [integrated by the DHS] that records the arrival and departure of certain aliens . . . ; conducts certain immigrations violation, criminal, and terrorist checks on aliens; and compares biometric identifiers to those collected on previous encounters to verify identity." 126 The systems are located at the various air, sea, and land ports of entry (POEs) into the United States. 127 Under the US-VISIT system, prior to entry into the United States, "[v]isitors applying for a visa [must] have their information reviewed before [entering] the United States." 128 In order to


The Visa Waiver Program (VWP) enables nationals of certain countries to travel to the United States for tourism or business for stays of 90 days or less without obtaining a visa . . . . VWP eligible travelers may apply for a visa, if they prefer to do so. Not all countries participate in the VWP, and not all travelers from VWP countries are eligible to use the program. VWP travelers are screened prior to admission into the United States, and they are enrolled in the Department of Homeland Security's US-VISIT program.


123. US-VISIT PROGRAM, supra note 122, at 10.

124. Id.


126. PRIVACY IMPACT ASSESSMENT, supra note 19, at 2.

127. US-VISIT PROGRAM, supra note 122, at 1. "[T]he entry portion of [the] US-VISIT [system has been installed] at 154 of the nation's 170 land POEs." Id. at 5.

enter the United States, passports must comport with digital requirements; if a passport is expired or does not comply with the standards, then the visitor is "required to obtain a visa" in order to enter into the United States.129 When exiting the United States, the US-VISIT system "compares arrival and departure [information] . . . to know when [individuals] enter[] and exit[] the country."130 At this point in time, there are exit procedures in effect in certain cities.131 The program is continuing to study exit alternatives to determine the most effective means for the use of the system.132 Furthermore, the Act requires Congress to specify a timeline of implementation of the US-VISIT system at the various entry and exit points into the United States.133

4. Detention and Removal of Aliens

The detention and removal of illegal aliens is no easy task. The problem is that once a person enters the United States, that person is entitled to protections granted under the law.134 Specifically, the Due Process Clause applies to all persons present in the United States.135 The United States Supreme Court addressed the issue of illegal aliens who are held for an unreasonable time in the case of Zadvydas v. Davis.136 This case is important to this aspect of the Act, as the bill expands upon the Supreme Court’s ruling. The case came before the Supreme Court as two separate cases addressing the same situation.137 The first defendant, Kestutis Zadvydas, had an extensive criminal record and had a known "history of flight, from both criminal and deportation proceedings."138 His most recent conviction was for possession of cocaine with the intent to distribute which carried a sixteen year sentence.139 Zadvydas was released after two years, immediately placed in the custody of the INS, and was ordered deported from the United States thereafter.140 Unfortunately, attempts to deport him were unsuccessful and the de-

129. Id.
130. Id.
131. Id.
132. Id.
133. LEGISLATIVE NOTICE, supra note 7, at 5.
135. U.S. CONST. amend. V. "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." Id.
137. Id. at 684.
138. Id.
139. Id.
140. Id.
fendant was held beyond the removal period.\textsuperscript{141} As a result, “Zadvydas filed a petition for a writ of habeas corpus [pursuant] to 28 U.S.C. § 2241 challenging his continued detention.”\textsuperscript{142}

The second defendant, Kim Ho Ma, was an alien with a similar criminal history.\textsuperscript{143} Ma had been “involved in a gang-related shooting, convicted of manslaughter, and sentenced to 38 months imprisonment.”\textsuperscript{144} Ma was released into the INS’s custody and several attempts were made to deport him as well.\textsuperscript{145} He was held beyond the ninety day removal period, and also filed a writ of habeas corpus [pursuant] to 28 U.S.C. § 2241.\textsuperscript{146} The United States Supreme Court granted certiorari and noted what they call a “special statute” which grants the further detention of aliens if they pose “a risk to the community,” or will not comply with the removal proceedings.\textsuperscript{147} In this case, it was evident that the defendants posed a risk to society, and one of them had a history of evading criminal and deportation proceedings.\textsuperscript{148} On the basis of this “special statute,” the court found that there was no constitutional violation by the government in the extended detention of the defendants.\textsuperscript{149}

This case is crucial to the proposed Act as it seeks to provide greater authority to the federal government to detain aliens beyond the specified time periods.\textsuperscript{150} Currently, according to 8 C.F.R. § 241.14, “an alien may be detained even when there is no significant likelihood of removal in the near future.”\textsuperscript{151} The Act grants the Attorney General the power to determine who is “a risk to the community” and/or who would not comply with removal procedures.\textsuperscript{152} Additionally, the new bill would expedite the removal of

\begin{thebibliography}{9}
\bibitem{141} Zadvydas, 533 U.S. at 684.
\bibitem{142} Id. at 684-85.
\bibitem{143} Id. at 685.
\bibitem{144} Id. See also 8 U.S.C. § 1101(a)(43)(F) (2000) (this is the section concerning aggravated felonies, which was expanded by the Anti-Drug Abuse Act of 1988).
\bibitem{145} Zadvydas, 533 U.S. at 685-86.
\bibitem{146} Id.
\bibitem{147} Id. at 682. The special statute refers to 8 U.S.C. § 1231(a)(6) (2000). Id.
\bibitem{148} See id. at 684-86.
\bibitem{149} See Zadvydas, 533 U.S. at 699.
\bibitem{150} LEGISLATIVE NOTICE, supra note 7, at 8.
\bibitem{151} Rachel Canty, \textit{The New World of Immigration Custody Determinations After Zadvydas v. Davis}, 18 GEO. IMMIGR. L.J. 467, 484 (2004). The circumstances in this section “are very narrowly drawn and include aliens who are determined to 1) have a highly contagious disease posing a danger to the public, 2) pose foreign policy concerns, 3) pose national security and terrorism concerns, or 4) be individuals who are specially dangerous due to a mental condition or personality disorder.” Id. See also 8 C.F.R. § 241.14 (2006).
\bibitem{152} LEGISLATIVE NOTICE, supra note 7, at 8.
\end{thebibliography}
aliens apprehended within a certain amount of time and/or distance from the border.\footnote{153}

B. \textit{Temporary Work Program}

1. \textbf{Work Visas}

The proposed legislation would have established a new temporary work visa (H-2C).\footnote{154} The purpose of this visa is to allow aliens to work in the United States temporarily, where “American employer[s] find unemployed Americans capable of performing [the tasks they require].”\footnote{155} There are a variety of requirements that the alien must meet in order to receive the new visa.\footnote{156} Among other requirements, the alien must: 1) show a capability of performing labor for the intended occupation; 2) pass a medical examination; and 3) pass a background check.\footnote{157} The bill sets out a maximum of 200,000 visas to be distributed.\footnote{158} Additionally, the bill would have reinstated the practice of allowing the State Department to reissue work visas while an alien was still in the United States.\footnote{159}

2. \textbf{Green Cards}

The new work visa program relates directly to the issuance of new green cards to immigrants.\footnote{160} The issuance of green cards relates directly to immigrants who are currently residing in the United States. This aspect of the proposed Act will be discussed later in this paper. There are two categories of aliens admitted into the United States: 1) non-immigrants, who are persons seeking admission “for a limited period of time” and “for a limited purpose” and 2) immigrants, who are persons who wish “to become permanent residents of the [United States].”\footnote{161} “In order to qualify for an immigrant visa, a person must ordinarily demonstrate that [he or she] has the in-
tent to live indefinitely in the United States and qualifies for one of the family-sponsored, employment-related, or diversity visas.”

CIRA 2007 would have modified the number of green cards issued in the aforementioned three categories. The modifications would have resulted in an “increase[] [in] the number of employment-based green cards from 140,000 to 450,000 per year (for the next 10 years) . . . and [an] increase[] [of] family-based green card[s] . . . from 226,000 to 480,000 per year.” Increasing quotas was intended to alleviate the backlog of applications for green cards.

C. Employer Accountability

Even with the passage of the IRCA “more than 20 years” ago, there are still almost 500,000 undocumented workers entering the United States every year. “Because illegal aliens are willing to work for lower wages than an American and [a] legal immigrant who is doing the same job, employers are willing to hire an illegal alien over an American citizen[] [or a] legal immigrant.” The current system, established by IRCA, requires “[a]n employer [to] wait for a newly hired employee to [begin] work[ing] before . . . verify[ing] [their] work eligibility.” Then, “[w]ithin the first three days [of employment], the employee [presents] the employer” with documentation of his or her “identity and eligibility to work.” Unfortunately, such a system is subject to fraud because the “[e]mployers are not document [specialists, and i]f a document looks valid on its face,” it will be taken as such.

162. Id. at 110.
163. LEGISLATIVE NOTICE, supra note 7, at 15.
164. Id. at 15.
165. Id. Out of the “12 million applications for green cards . . . [only] 1 million green cards are processed each year.” Id.
168. Johnson Hearing, supra note 166, at 3.
169. Id.
170. Id.
1997, in an attempt to combat possible document fraud related to employment eligibility, the DHS implemented the Basic Pilot Program.\textsuperscript{171} This is a voluntary internet based system that allows employers to check an employee’s social security number against the government-run database.\textsuperscript{172} However, problems arose with the system, including lack of updates and “high error rate[s] in determining work authorization.”\textsuperscript{173}

To combat this problem, CIRA 2007 proposes several changes to verification by employers of potential employees.\textsuperscript{174} The new changes are collectively referred to as the Work Authorization Verification located in Title III of the proposed legislation.\textsuperscript{175} Title III was also placed into CIRA 2006 which was the previous year’s proposed immigration reform, but it was further developed in CIRA 2007.\textsuperscript{176} The major changes proposed are the following:

Employment of unauthorized aliens is unlawful; Employers who in good faith follow the provisions . . . have an affirmative defense; DHS can require an employer to certify [compliance with this section]; An employer must attest that he has reasonably verified (under the totality of the circumstances) the identity and eligibility for work of each new hire; DHS will develop an electronic employee verification system . . . [providing] . . . employer[s] [with] a “green light” or “red light” or “tentative non-confirmation” for every employee name and social security number . . . or alien number . . . submitted to the system; DHS will designate critical employers that must be using the system within 180 days of bill enactment (e.g., critical infrastructure employers), and all other employers must utilize the system [eighteen] months after funds are appropriated for the system; [and] an annual increase of 2,000 investigators (for five years) dedicated to worksite enforcement of the immigration laws, and specifically requires not less than 20 percent of the enforcement hours of Immigration and Customs Enforcement (DHS) be used for worksite enforcement.\textsuperscript{177}

\begin{itemize}
  \item \textsuperscript{171} BRUNO, supra note 19, at 4–6. In 1996, the IIRIRA would “direct[] the Attorney General to conduct three pilot programs: . . . the Basic Pilot program, the Machine-Readable Document Pilot program, and the Citizen Attestation Pilot.” \textit{Id.} at 4.
  \item \textsuperscript{172} Johnson Hearing, supra note 166, at 3.
  \item \textsuperscript{173} \textit{Id.} at 4. “A future employment eligibility verification system will need to take into account the failures and successes of the Basic Pilot Program to ensure that it is workable.” \textit{Id.}
  \item \textsuperscript{174} LEGISLATIVE NOTICE, supra note 7, at 12–13.
  \item \textsuperscript{175} \textit{Id.}
  \item \textsuperscript{176} \textit{Id.} at 12.
  \item \textsuperscript{177} \textit{Id.} at 12–13.
\end{itemize}
These proposed provisions are the most noteworthy, as they attempt to rectify the problems with the current employment verification system.

This aspect of the bill has not been favored by employers. Specifically, businesses are not pleased with the idea that civil penalties would be increased. Additionally, criminal liability would be imposed by the new bill should it be determined that an employer's subcontractors are caught hiring illegal workers.

D. Immigrants Currently Residing in the United States

Another controversial area of the proposed legislation is the admission of immigrants currently residing in the United States. CIRA 2007 would have established three separate groups relating to the general unauthorized alien population. The details relating to these groups can be “found in section 601 of [CIRA 2007].”

1. Group One: Unauthorized Aliens Residing in the United States for Five Years and Who Have Worked for Three Years

The first group of aliens consists of individuals who have resided in the United States for five years and who have worked for at least three of the five years. The aliens who qualify as part of this group may apply for a green card if they:

- were illegal on April 5, 2006; were physically present in the United States on or before April 5, 2001; did not depart the United States during that time, except for short trips; worked for 3 years during that time period (and paid or will pay state and federal taxes owed for that work); pass[ed] a security check; pay a $2,000 fee (80 percent of the funds would go to border security); work[ed] 6 years after bill enactment; and demonstrate that they meet the naturalization requirements for English language ability (but [this] can also be satisfied by “pursuing a course of study to achieve such an understanding of English”).

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179. Id.
180. Id.
181. LEGISLATIVE NOTICE, supra note 7, at 17-19.
182. Id. at 17.
183. Id. at 17-18.
184. Id. at 17.
In addition to these requirements, there are benefits that come with being part of Group One. The "[s]pouse and children of [an] . . . alien" in this group are permitted to "obtain a green card [and] . . . are not subject[ed] to the green card quota[s]" previously discussed. Also, the aliens that are classified in this group would be permitted to travel abroad, even while their green card is being finalized.

2. Group Two: Aliens Who Have Resided in the United States for Two to Five Years

The second group, known as "Group 2," consists of "aliens who have resided in the [United States] for [two to five] years." The requirements of this group are far more complicated than that of Group One. Aliens who were "present in the [United States] on January 7, 2004," would be presented with two options. First, they could leave the United States "and apply for an H-2C visa . . . with all of the normal requirements waived." Second, they could leave the United States and apply for a green card. Additionally, aliens must show that: "They were physically present in the [United States] on January 7, 2004; They were illegally present on that date; They had been employed from that date until present—except for 60-day breaks; and [t]hey have been continuously present—short trips abroad excepted—in the [United States] since then." Any alien who seeks to depart the United

185. Id. at 17–18.
186. LEGISLATIVE NOTICE, supra note 7, at 18.
187. Id.
188. Id.
189. See id. at 17–19.
190. Id.
191. LEGISLATIVE NOTICE, supra note 7, at 17–19. CIRA 2006, which was assimilated into CIRA 2007, created the H-2C or "guest-worker visa." Id. at 1. This program would allow people to enter the United States temporarily to work on the condition that they meet certain requirements and that they apply for permanent residency. Id. In order to receive the guest-worker visa, the individual must have been offered employment prior to entering the United States and must have paid a $500 fee. Id. at 1, 13. The visa would be valid for three years with the possibility for a one time, three year extension. Id. at 13. The guest workers and their dependents could apply for permanent residence after four years—or earlier if done by their employer—and they could remain in the United States pending the review of their application(s) for residency—even if the guest visa has expired. LEGISLATIVE NOTICE, supra note 7, at 1.
192. Id. at 18.
193. Id.
194. Id.
States must register with the DHS. All of these conditions apply to the children and spouse of the principal alien.

3. Group Three: Aliens Who Have Resided in the United States for Less than Two Years

The final group, "Group 3," is not directly stated, but is implied by the silence of the bill. This third group consists of "aliens who have resided in the United States [for] less than two years."

E. Assimilation of Immigrants Through the Development, Relief, and Education for Alien Minors Act

Another controversial aspect of the bill is its incorporation of "the Development, Relief, and Education for Alien Minors Act" (DREAM Act). This proposed legislation shows how to fully incorporate these individuals into the United States, and ultimately, into American society. Immigrants must be able to obtain a proper education to achieve complete assimilation into American society. Proponents of the DREAM Act state that:

Each year about 65,000 [United States]-raised students who would qualify for the DREAM Act ... graduate from high school. These include honor roll students, star athletes, talented artists, homecoming queens, and aspiring teachers, doctors, and [United States] soldiers. They are young people who have lived in the [United States] for most of their lives and desire only to call this country their home. Even though they were brought to the [United States] years ago as children, they face unique barriers to higher education, are unable to work legally in the [United States], and must live in constant fear of detection by immigration authorities.

195. Id.
196. LEGISLATIVE NOTICE, supra note 7, at 19.
197. Id.
198. Id.
200. See id.
201. See id.
Currently, unauthorized aliens are permitted to obtain an education through high school. The United States Supreme Court addressed the issue of allowing illegal alien children to obtain an elementary education in the class action case of *Plyler v. Doe*. This case allowed for immigrants to obtain an elementary education. The case came before the United States Supreme Court on constitutional grounds. The plaintiffs, consisting of a class of undocumented children of Mexican origin, alleged that the denial of an education violates the Equal Protection Clause. The court decided in favor of allowing immigrant children to obtain an education based on the fear of creating a permanent underclass of uneducated, illegal immigrants. The court noted that there is a lifelong effect of an elementary education and that children should not be punished for their parents immigrating to the United States.

However, obtaining a postsecondary education has proven difficult due to a provision of the IIRIRA which discourages states and localities from granting unauthorized aliens such an education. To counter this hurdle, CIRA 2007 incorporated the DREAM Act. It should be noted that this Act has never been passed into law, but there have been multiple attempts in the previous Congresses to enact such legislation. The first attempt to pass the Act was made in the 107th Congress by Senator Orrin Hatch (R-Utah). Another attempt to pass this legislation was made with the proposed CIRA 2007.
V. IMMIGRATION INITIATIVES: THE ADMINISTRATIVE CHANGE APPROACH

A. Introduction of Administrative Power to Amend Current Law

Although an overhaul of immigration law never came to fruition, President Bush is not letting this hinder his ability to bring about change. Almost immediately following the defeat of CIRA 2007, the White House announced changes which would be made by amending existing law.216 These reforms, however, do not require comprehensive congressional legislation.217 How is this possible? Doesn’t Congress need to approve all changes to the law? Not necessarily. There exists within the government the power of the administrative agencies to enact regulations that are permitted within the scope of the statutes that give them power.218 This aspect of governmental power has been addressed by Congress and the United States Supreme Court.219 In 1946, Congress enacted the Administrative Procedure Act that allows administrative agencies, established by the executive branch, to propose and establish regulations.220 Currently, President Bush and the White House are utilizing this Act and the holding in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*221 (NRDC), discussed below, to promulgate agency based reforms. It will be shown, however, that these changes to existing law are not as expansive as the changes that would have taken effect under CIRA 2007.

B. The Chevron Case

The United States Supreme Court elaborated on the concept of administrative power in *Chevron.*222 Surprisingly, this issue arose from the interpretation of an aspect of the Clean Air Act Amendments of 1977.223 The ques-


222. See *id.* at 840.

223. *Id.* at 839-40. See also Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685.
tions presented centered on the interpretation of the term "stationary source," as promulgated in the EPA's clean air regulation. The definition of this term was problematic because its statutory construction led to a loophole in the statute. More specifically, the rules applied to pollution emissions at energy production facilities which used "stationary sources" (cooling towers). The statute was argued to apply pollution restrictions to each of the individual emission units, otherwise known as cooling towers. However, due to the lack of a clear statutory construction, the EPA decided to allow for the cooling towers to be encased "within a single [hypothetical] 'bubble.'" In evaluating this problematic part of the Clean Air Act, the United States Supreme Court acknowledged that there was no explicit evidence of Congressional intent as applied to the meaning of the term "stationary source." Additionally, the Court noted that this issue was not addressed in the legislative history.

*Chevron* is relevant to the current immigration issue because it demonstrates the power, which an executive appointed agency maintains within our government, with respect to the agency's ability to interpret and implement laws. "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Without this power, the immigration initiatives promulgated by President Bush would not be possible. With respect to the current initiatives, the DHS has been granted the power to promulgate and interpret current law to support its objectives.

The ability to interpret law is stated best by the *Chevron* Court, which proposed that two questions arise when reviewing an agency's interpretation of a statute. The first is whether Congress has addressed the question and whether their intent is clear. If this is the case, then Congressional intent

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225. See id.
226. Id.
227. Id.
228. Id.
230. Id.
231. Id. at 843 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).
232. See id.
will trump the agency’s interpretation.\textsuperscript{235} If, however, Congressional intent is unclear, “the [second] question . . . is whether the agency’s [interpretation] is based on a permissible [and reasonable] construction.”\textsuperscript{236} Such construction of a statute will be upheld “unless [it is] arbitrary, capricious, or manifestly contrary to the statute.”\textsuperscript{237} This two-prong analysis is applicable to DHS rulemaking.

C. \textit{Border Security}

1. Strengthening Personnel and Infrastructure

One of the most problematic areas requiring attention is border security. The new initiatives have a deadline of December 31, 2008, and include the following measures: 1) “18,300 Border Patrol agents”—with an additional 1700 border patrol agents by 2009; 2) “370 miles of fencing;” 3) “300 miles of vehicle barriers;” 4) “105 camera and radar towers;” and 5) three additional Unmanned Aerial Vehicles (UAV) (a fourth UAV will be added by 2009).\textsuperscript{238}

These changes are not unlike those sought through CIRA 2007. The new initiative calls for 18,300 Border Patrol agents, whereas CIRA 2007 called for the addition of 11,200 agents.\textsuperscript{239} Even though CIRA 2007 did not pass, there is a noticeable increase in the proposed number of agents under the current initiative.\textsuperscript{240} The GAO indicated that there is a cost associated with the addition of new agents.\textsuperscript{241} With the enactment of the initiatives, the result will be an overall increase in cost.\textsuperscript{242} This is due to the difference in the number of agents.\textsuperscript{243}

\textsuperscript{235} \textit{Chevron U.S.A. Inc.}, 467 U.S. at 842–43.
\textsuperscript{236} \textit{Id.} at 843.
\textsuperscript{237} \textit{Id.} at 844.
\textsuperscript{239} \textit{Id.; Legislative Notice, supra} note 7, at 4.
\textsuperscript{240} Press Release, Improving Border Security, \textit{supra} note 10; \textit{Legislative Notice; supra} note 7, at 4.
\textsuperscript{241} \textit{Stana Hearing, supra} note 93, at 10.
\textsuperscript{243} \textit{See Stana Hearing, supra} note 93, at 9; Press Release, Improving Border Security, \textit{supra} note 10. The amount to the taxpayer resulting from the increased amount under the initiatives is $104,370,000; this amount was calculated by taking $14,700—the amount to train each agent as stipulated by the GAO—and multiplying it by $7100, which is the difference in the number of agents proposed in CIRA 2007 and the amount to be enacted by the immigration initiatives. \textit{See Stana Hearing, supra} note 93, at 9; \textit{Legislative Notice, supra} note 7, at 4; Press Release, Improving Border Security, \textit{supra} note 10.
Next, CIRA 2007 called for repairing the fences already in place, and for the addition of "200 miles of vehicle barriers and all-weather roads" at points of common breach. By the end of 2008, there should be "370 miles of fencing" and "300 miles of vehicle barriers." The difference here is that instead of merely repairing the current fencing, an additional "370 miles of fencing" and "300 miles of vehicle barriers" will be erected, an increase of 100 miles from CIRA 2007. Lastly, the new initiatives call for technological security measures through the use of "105 camera and radar towers," and the addition of three UAVs.

2. "Catch and Return" Policy

The policy initiatives will implement a strict "catch and return" policy. This policy was last seen in Senate Bill 1639 which was superseded by CIRA 2007. Originally, aliens who illegally crossed the border were only given "a note to appear... before an immigration judge." However, they will now be detained and held until they can be extradited back to their native country. The administration is integrating this aspect of the bill and CIRA 2007 into their new initiatives. The Due Process dilemma seen in Zadvydas v. Davis will most likely arise in the implementation of this policy as well. In implementing this policy, the administration will

244. LEGISLATIVE NOTICE, supra note 7, at 4.
246. Id.
247. Id.
248. See LEGISLATIVE NOTICE, supra note 7, at 4.
250. Id.
253. S. 1639, § 1(a)(4).
255. See generally Zadvydas v. Davis, 533 U.S. 678, 693 (2000); LEGISLATIVE NOTICE, supra note 7, at 8.
“[i]ncrease [f]unding [f]or [d]etention [b]eds,” as well as ask recalcitrant countries to assist the United States in extraditing illegal immigrants.\(^{256}\) Hopefully, with the cooperation of other countries in expediting the deportation of illegal immigrants, the Due Process problem can be averted.

3. Expansion of Exit Requirements

The next change was included in CIRA 2007. The DHS will implement the US-VISIT program “[b]y [t]he [e]nd [o]f 2008.”\(^{257}\) Recall that US-VISIT is an automated biometric system to be placed at various POEs throughout the United States.\(^{258}\) Even after this system has been implemented, the DHS will continue to research and further develop the effectiveness of “biometric exit requirements at land border crossings.”\(^{259}\) Note that this system is applicable to individuals that have overstayed their time allotted by their visas.\(^{260}\)

To accommodate guest workers who are granted visas, such as the seasonal visas, the United States will implement “[a] [n]ew [l]and-[b]order [e]xit [s]ystem.”\(^{261}\) This system will most likely mimic the US-VISIT system, but will apply to temporary workers.\(^{262}\) This system will enforce “mandate[s] to leave . . . [the country once the workers’] work authorization expires.”\(^{263}\)

D. Interior Enforcement

1. Training State and Local Officials to Address Illegal Immigration

The administration will expand on an eleven-year-old program established under section 287(g) of the IIRIRA.\(^{264}\) The IIRIRA added section 287(g) to the INA to allow for the “performance of immigration officer func-

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257. Id.
258. PRIVACY IMPACT ASSESSMENT, supra note 19, at 2.
260. Id.
261. Id.
262. See id.
263. Id.
More specifically, this section "authorizes the Secretary of the [DHS] to enter into agreements with state and local law enforcement agencies [and to allow them] to perform immigration law enforcement functions." The administration will continue to expand upon this program through training and other enforcement tools, including "search and seizure authority granted under Title 19."  

2. Regulatory Action to Close the "Voluntary Departure" Loophole

A major problem that the new initiatives will address is a loophole in the voluntary departure procedure. This loophole has been, and continues to be, exploited by illegal immigrants. Currently, under the INA, "[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense." This is the alternative to formal removal proceedings and the entry of a formal removal order against the illegal alien(s). "[A]n immigration judge may permit an alien to depart" voluntarily, so long as it is within 120 days.


266. Press Release, Delegation of Authority, supra note 264. The agreements are in the form of Memorandum of Agreements and as of September 14, 2007, these agreements have been entered into by the following 28 agencies: Alabama State Police, Arizona Department of Corrections, Arizona Department of Public Safety, Maricopa County (Arizona) Sheriff's Office, Los Angeles County (California) Sheriff's Office, Orange County (California) Sheriff's Office, Riverside County (California) Sheriff's Office, San Bernardino County (California) Sheriff's Office, Colorado Department of Public Safety, El Paso County (Colorado) Sheriff's Office, Collier County (Florida) Sheriff's Office, Florida Department of Law Enforcement, Georgia Department of Public Safety, Cobb County (Georgia) Sheriff's Office, Massachusetts Department of Corrections, Framingham (Massachusetts) Police Department, Barnstable County (Massachusetts) Sheriff's Office, Alamance County (North Carolina) Sheriff's Office, Cabarrus County (North Carolina) Sheriff's Office, Gaston County (North Carolina) Sheriff's Office, Mecklenburg County (North Carolina) Sheriff's Office, Hudson City (New Hampshire) Police Department, Tulsa County (Oklahoma) Sheriff's Office, Davidson County (Tennessee) Sheriff's Office, Herndon (Virginia) Police Department, Prince William-Manassas Adult Detention Center (Virginia), Rockingham County (Virginia) Sheriff's Office, and Shenandoah County (Virginia) Sheriff's Office. Id.


268. Id.

269. Id.


271. Id. at 67,674–75.

272. Id. at 67,675.
For aliens, voluntary departure is desirable because it allows them to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, to avoid stigma and various penalties associated with forced removal—and it facilitates the possibility of return to the United States.\textsuperscript{273}

Although the current rule seems fair and expedites the removal of illegal aliens, it allows immigrants to gain extra time in the United States.\textsuperscript{274} They do so “by filing a procedural motion to reopen the case.”\textsuperscript{275} Not only does the current rule allow for more time in the United States with the voluntary departure, but “the alien is not regarded as having been deported and thus obtains the benefits of departure without deportation.”\textsuperscript{276} The initiative has proposed amending parts 1240 and 1241 of Title 8 to the Code of Federal Regulations.\textsuperscript{277} The amendment to the regulations will still allow for illegal aliens to file the procedural motion to reopen and a motion for judicial review; however, doing so “will have the effect of . . . terminating the grant of voluntary departure.”\textsuperscript{278} This will close the loophole and prevent illegal aliens from overstaying their welcome in the United States.\textsuperscript{279} Additionally, civil penalties, in the amount of $3000, will be set for failure “to comply with a voluntary departure agreement.”\textsuperscript{280}

Currently, the United States Supreme Court is addressing this issue.\textsuperscript{281} Recently, the Court granted certiorari to answer the question: “[w]hether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure.”\textsuperscript{282} The Court heard oral arguments for this case on January 7, 2008.\textsuperscript{283} A decision on this matter may have an effect on the substance of the changes to be made to these sections of the Code of Federal Regulations.

\textsuperscript{273.} Id. (quoting Iouri v. Ashcroft, 487 F.3d 76, 82–83 (2d Cir. 2006)).
\textsuperscript{275.} Id.
\textsuperscript{276.} Iouri, 487 F.3d at 85.
\textsuperscript{277.} See Voluntary Departure, 72 Fed. Reg. at 67,674.
\textsuperscript{278.} Id.
\textsuperscript{280.} Id.
\textsuperscript{282.} Id. at 36–37.
E. Worksite Enforcement

1. Documentation for Employment Eligibility

In early 2008, the Administration will release a regulation that reduces the number of documents employers are required to accept when verifying the identity of their employees. 284 Currently, Form I-9 specifies an extensive list of documents that can be used to verify the employee’s status. 285 Unfortunately, this list leaves room for an applicant to present a prospective employer with forged documents. 286 This future regulation is an extension of the REAL ID Act of 2005. 287 The new regulation will reduce the number of acceptable documents, thereby reducing document fraud; thus, resulting in the reduction of unlawful employment of illegal aliens. 288

2. Increase in Civil Fines to Employers

To act in conjunction with the prevention of document fraud, the Administration will increase civil penalties for employers who knowingly hire illegal immigrants. 289 The White House has concluded that the problem, under the current law, is that the fines are lenient and have been considered by many employers to be “a cost of doing business.” 290 The Administration plans to increase the penalties by twenty-five percent, which is the maximum allowed under the current law. 291

3. Rulemaking for the Use of the E-Verify System

The E-Verify system is a free, internet-based system that is meant to assist employers in verifying employment eligibility. 292 The verification helps employers avoid current and future civil penalties for hiring illegal immi-

289. Id.
290. Id.
291. Id. See also 8 C.F.R. § 280.53 (2006).
Verification is made possible by the joint effort of the DHS and the Social Security Administration. However, the use of this system is not required under the current law.

The administration will implement this system in various ways. First, they will "require all federal contractors and vendors to use" the system for all employees. Considering that the United States currently conducts business with over 200,000 companies, there will be a substantial reduction in employment for illegal immigrants through the use of fraud. Second, although "some states currently mandate the use of" the system, the Administration will facilitate nationwide implementation of the system by providing outreach and technical assistance. Third, the Administration will increase data sources that will allow for cross checking of records. This will allow authorities to more easily catch repeat offenders. Lastly, the Administration will solicit state Departments of Motor Vehicles to share photos and records to "help prevent illegal immigrants from using fraudulent driver’s licenses to obtain employment."

F. Streamlining Existing Guest-Worker Programs

Under CIRA 2007, the H-2C temporary work visa was proposed. The new initiatives do not address this particular visa, but instead address issues related to seasonal workers.

1. The H-2A Agricultural Seasonal Worker Program

The H-2A visa was established by IRCA and "authorizes the lawful admission of temporary, nonimmigrant workers . . . to perform agricultural labor or services of a temporary or seasonal nature." The Bush Administration has recognized that the agriculture industry "requires a legal flow of

294. E-Verify, supra note 292.
296. Id.
297. Id.
298. Id.
299. Id.
301. Id.
foreign workers." Unfortunately, there has been a shortage of workers due to tightened security on the Southern border. Thus, President Bush has directed the Department of Labor (DOL) to institute regulatory changes that will allow more foreign workers into the United States legally "while protecting the rights of laborers."

2. Streamlining the H-2B Program for Non-Agricultural Seasonal Workers

The H-2B program is similar to the H-2A visa, except that it applies to non-agricultural workers. This program "permits employers to hire foreign workers to come temporarily to the U.S. and perform temporary nonagricultural services or labor on a one-time, seasonal, peakload or intermittent basis." This visa has found popularity in seasonal industries because employers in hospitality and landscaping experience difficulties in finding temporary workers. The "DOL's proposed rule will" make the process easier for employers by moving away from the "government-certified system to an employer [verification] system." The proposed system is similar to another system already in place that has had the effect of a reduction of "backlog[] in other areas."

3. Extension of the Visa Term for Professional Workers from Canada and Mexico

The United States is always looking to bring foreign professionals into the country. Professionals from other countries are permitted to enter and work in the United States through the nonimmigrant NAFTA Professional visa (TN visa). This "visa allows [professionals from] Canada and Mexico . . . to work in the United States" if they meet the following conditions: 1)
they are a citizen of Canada or Mexico; 2) their "profession is on the NAFTA list;" 3) there is a "position in the U.S. that requires a NAFTA professional;" 4) the "Mexican or Canadian applicant is to work in a prearranged full-time or part-time job for a U.S. employer;" and 5) "[t]he professional Mexican or Canadian citizen" meets requirements of the profession set out by the U.S. Department of State.

Unfortunately, the current law requires that "workers who enter the United States" under the TN visa renew it each year. The DHS will put forth a new regulation that will increase the duration of these visas to three years which is the same as many of the "other popular professional visas."

G. **Assimilation**

CIRA 2007 focused on education of alien minors through the DREAM Act. However, the new initiatives appear to focus generally on the assimilation of immigrants into the country.

1. **The Revised Naturalization Test from the Office of Citizenship**

One of the major steps to assimilate immigrants into American society is "[a] [r]evised [n]aturalization [t]est." The purpose of the redesign of the test is to "encourage civic learning and patriotism among prospective citizens." "A revised test, with an emphasis on the fundamental concepts of American democracy and the rights and responsibilities of citizenship, will help to encourage citizenship applicants to learn and identify with the basic values that we all share as Americans." Furthermore, the revised "test will ensure fairness, as there are variations throughout the country in the quality of testing."

The revised test will be different in the following ways. First, the English reading and writing sections will be "similar to the existing test," except

313. *Id.*
315. *Id.*
316. See BRUNO, *supra* note 199, at 1.
318. *Id.*
320. *Id.*
that the "USCIS will provide [all] applicants with study materials."\textsuperscript{322} Second, the civics portion of the test "will still consist of 100 questions and answers," but now the "USCIS will place these questions and answers, along with a study guide on the Internet and elsewhere in the public domain."\textsuperscript{323} The third and last part, which is the English speaking test, will not substantially change from the existing test.\textsuperscript{324} The new test is currently in the pilot testing phase, which began in February 2007.\textsuperscript{325} The new test will see nationwide implementation at some point in 2008.\textsuperscript{326}

2. Additional Training for People that Lead Immigrants Through the Naturalization Process

The United States currently allows for volunteers and adult educators to assist immigrant applicants through the naturalization process.\textsuperscript{327} To foster the assimilation of immigrants, the Office of Citizenship will provide additional training of these educators through a web based training program.\textsuperscript{328} The training program "covers U.S. government, civics education, and the naturalization process" and will also include training conferences to improve the instructors’ abilities.\textsuperscript{329}

3. Internet Portal to Assist in Immigrants to Learn English

A major aspect of immigrant assimilation is their ability to learn and speak the English language. The White House has stated that "[k]nowledge of English is the most important component of assimilation."\textsuperscript{330} In order to promote education in English, the Department of Education will launch a free, internet based site to assist in their education.\textsuperscript{331} The Administration has further asserted that "[a]n investment in tools to help new Americans learn English will be repaid many times over in the contributions these immigrants make to our political discourse, economy, and society."\textsuperscript{332}

\begin{footnotes}
\footnote{322. Naturalization Test Redesign, \textit{supra} note 319.}
\footnote{323. \textit{id.}}
\footnote{324. \textit{id.}}
\footnote{325. \textit{id.}}
\footnote{326. \textit{id.}}
\footnote{327. See Press Release, Improving Border Security, \textit{supra} note 10.}
\footnote{328. \textit{id.}}
\footnote{329. \textit{id.}}
\footnote{330. \textit{id.}}
\footnote{331. \textit{id.}}
\footnote{332. Press Release, Improving Border Security, \textit{supra} note 10.}
\end{footnotes}
VI. CONCLUSION

This article has touched on some of the major immigration provisions in the United States as a background to show the evolution of reform. Each act has established new laws either through amending existing laws or creating totally new provisions. Either way, there continue to be loopholes in immigration law. The CIRA 2007 has some positive aspects and some negative aspects. Unfortunately, such a drastic change in the immigration laws may have been premature and, therefore, rushed. The members of the House and Senate must try to work harder at a bipartisan relationship to establish realistic, fair, and workable alternatives to the existing immigration laws in the United States. In an e-mail from immigration attorney and professor, Ira Kurzban, regarding his opinion on this legislation, he indicated several areas where the proposed legislation fell short. He believes that “[t]he legislation was ill advised for many reasons” and that the important issue of amnesty was not addressed due to the fear of a “vocal right-wing minority.”

Another problem that was not addressed by this legislation was that it did not have provisions “to attract both high skilled and low skilled workers into the U.S.” Next, “[i]t was also a poor bill in terms of enforcement because it failed to meaningfully secure the borders of the U.S.” Mr. Kurzban proposes that Due Process issues with respect to fair treatment and judicial review were not properly addressed. With that in mind, this is not an issue that will die a natural death. As was seen previously with IRCA, it took several attempts at passage before it was finally passed into law. This issue will come up again in future Congressional sessions. It can only be hoped that there will be more thought and realistic mentality devoted to proposed changes to one of the largest, most complicated, and controversial areas of the law in the United States. In the meantime, President Bush is taking advantage of executive and agency power in order to bring about changes hoped for in CIRA 2007. Although these changes will have legal effect, Congress still needs to consider immigration reform to bring about the changes that did not arise from the initiatives. Finally, it will be interesting to see the approach the future president will take on immigration reform in the United States.

333. E-mail from Laurence M. Krutchik, J.D. Candidate 2009, Nova Se. Univ., Shepard Broad Law Ctr., to Ira J. Kurzban, Esq., Adjunct Professor of Law, Nova Se. Univ., Shepard Broad Law Ctr. (July 16, 2007, 17:16:00 EST) (on file with author).

334. Id.
335. Id.
336. Id.