

PANEL: UNITED STATES BORDER CONTROL AND THE SECURE FENCE ACT OF 2006

SARA IBRAHIM,^{*} LEE BARGERHUFF,^{**} MARK KRIKORIAN,^{***} & RACHEL CANTY^{****}

AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW
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* National Policy Impact Coordinator for Project Voice, the human rights initiative of the American Friends Service Committee; J.D., American University Washington College of Law; B.A., George Washington University, Elliott School of International Affairs.

** Division Chief for the Northern and Coastal Areas, U.S. Customs and Border Protection, U.S. Department of Homeland Security. The views herein represent the author's and do not necessarily represent those of the Department of Homeland Security.

*** Executive Director of the Center for Immigration Studies, Washington, D.C.; M.A., Tufts University, Fletcher School of Law and Diplomacy; B.A., Georgetown University.

**** Attorney Advisor to the Operations Coordination Director, Department of Homeland Security. J.D., University of Florida, Frederic G. Levin College of Law; LL.M., University of Miami School of Law. The views herein represent the author's and do not necessarily represent those of the Department of Homeland Security.

I. REMARKS OF SARA IBRAHIM

The American Friends Service Committee (AFSC) is a ninety-year-old¹ faith-based organization grounded in Quaker beliefs respecting the dignity and worth of every person.² The AFSC works for peace, justice, and reconciliation throughout the world³ and received the Nobel Peace Prize in 1947.⁴ The AFSC's Project Voice immigrants' rights initiative presses for immigration legislation that does not diminish the civil and human rights of immigrants, refugees, or asylees. In 1977, the AFSC initiated the U.S.-Mexico Border Program to address economic imbalances between the U.S. and Mexico and to document systemic human rights abuses.⁵ Over the years, the program evolved into a human rights monitoring project, documenting human and civil rights abuses by law enforcement agencies. The program also provides human rights workshops for migrant communities to promote human rights and empower the community. Today the program is based at the AFSC San Diego office.

The U.S.-Mexico border region is woven together by family, economic, and cultural ties that have grown over many generations. Movement back and forth across the border has been a part of life for as long as the border has existed. The recent border build-up severed the heart of the region, separating merchants from their customers, grandparents from their grandchildren, and communities from their cultural roots. With the goal of educating others, AFSC, the American Civil Liberties Union, and WITNESS co-produced *Rights on the Line: Vigilantes at the Border*, a documentary filmed by human rights activists and residents of border communities.⁶ The film tells the story of border tensions from the point of view of those most affected and reveals the underlying motivations of vigilantes through interviews and disturbing footage of their night-time patrols.

1. American Friends Service Committee, AFSC History, <http://www.afsc.org/about/history.htm> (last visited June 12, 2007).

2. American Friends Service Committee, Mission and Values, <http://www.afsc.org/about/mission.htm> (last visited June 12, 2007).

3. *Id.*

4. American Friends Service Committee, History of Organization, http://nobelprize.org/nobel_prizes/peace/laureates/1947/friends-committee-history.html (last visited May 29, 2007).

5. News Release, American Friends Service Committee, *Home of the Free or Land of the Raids?*, <http://www.afsc.org/news/2006/HOME OF THE FREE OR LAND OF THE RAIDS.htm> (last visited May 29, 2007).

6. RIGHTS ON THE LINE: VIGILANTES AT THE BORDER (AFSC 2006), <http://www.afsc.org/immigrants-rights/rightsontheline/default.htm>.

Migrant and refugee communities across the nation deserve to be treated with dignity and respect. Any proposed legislation that addresses comprehensive immigration reform must contain provisions that guarantee the protection of all civil and human rights. Reform means a change for the better, yet too many reform proposals include measures that worsen the livelihoods of communities and undermine current human rights protections.

The rationale for more vigorous border security has transformed every few years from narcotics trafficking to illegal immigration to counterterrorism. The “solution”—increased Border Patrol and detention—always remains the same, despite the fact that the solution is unsuccessful. The AFSC believes that constructing physical barriers and detaining immigrants will not resolve the root causes of this immigration influx. The AFSC further believes that such enforcement-only policies are not practical steps in the effort to repair the United States’ broken system of immigration. “Building physical barriers and a fence will not deter immigrants or diminish their desperate situation,” states Pedro Rios, the director of the AFSC’s San Diego office.⁷ The AFSC joins the voices of border communities in their rightful demand for justice and dignity. The Secure Fence Act⁸ impedes the status adjustment of immigrants, ignores human rights and destroys families in the process. Current border enforcement policies, laws and practices, without provision for safe and legal entry, have resulted in the detention and criminalization of tens of thousands of people at a significant daily cost to taxpayers.

The U.S. Customs and Border Protection’s Border Patrol struggles with issues of accountability for violations of constitutional rights, a lack of transparent complaint processes, and insufficient protection of border communities. This struggle has become more apparent with the increase in the number of border apprehensions of immigrants. In 1994, U.S. government agents apprehended over 4,000 immigrants in the one-month period after the institution of Operation Gatekeeper.⁹

In 2005, the AFSC’s San Diego office produced a report, *San Diego: A Case Study on the Impact of Enforcement on Border Communities*, discussing the effects of enforcement for migrant communities in San

7. News Release, Janis D. Shields & Esther Nieves, American Friends Service Committee, Fencing in Immigration Reform: Repairs to Broken System Derailed (Oct. 5, 2006), <http://www.afsc.org/news/2006/fencing-in-immigration-reform.htm>.

8. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638.

9. U.S. DEP’T OF JUSTICE, BACKGROUND TO THE OFFICE OF THE INSPECTOR GENERAL INVESTIGATION 5, 7 (Oct. 1994), <http://www.usdoj.gov/oig/special/9807/gkp01.htm>.

Diego.¹⁰ This report is the product of multiple sources: first-hand accounts, news reports, victims' complaints, personal interviews and telephone conversations with victims and the U.S. Department of Homeland Security (DHS) representatives, and official immigration enforcement documents. The report's recommendations included the following:

- "DHS agents who conduct immigration and customs investigations and those involved in detention and removal operations must be held accountable for actions that lead to civil and human rights abuses."¹¹
- "DHS policies and initiatives that promote or encourage civil and human rights abuses should be reviewed and rescinded. Therefore, it is necessary to establish an independent body with full review and subpoena powers to monitor and hold immigration enforcement agents accountable for egregious actions, and to review questionable policies and initiatives and rescind when necessary if those policies are found to promote and encourage civil and human rights violations."¹²
- "We need clear policy on what drives operations based on 'national security concerns' and assurances that [such a policy] does not become a pretext for fomenting a state of siege and confusion for migrant communities."¹³
- "Border Patrol must clarify policy on protocol for deporting people and it must ensure that detainees are afforded all due process rights, and that no coercion or physical and verbal abuse occur at any point of contact between migrants and federal agents."¹⁴
- "Border Patrol must ensure that new detention methods are humane and provide migrants access to food and water, and to appropriate restroom facilities. The tents, which are a questionable detention facility, should not house migrants for prolonged periods especially given the extreme weather conditions. Border Patrol should find ways to remedy the concerns surrounding these types of detention facilities."¹⁵

In conclusion, the AFSC believes that all communities need to feel secure. To accomplish this goal, immigration policies must uphold the principles of human rights and community safety, both on the border and within the interior of the United States, while also ensuring that immigrant workers have opportunities, both for economic parity and also participation

10. AMERICAN FRIENDS SERVICE COMMITTEE, SAN DIEGO: A CASE STUDY ON THE IMPACT OF ENFORCEMENT ON BORDER COMMUNITIES (2005), available at <http://www.afsc.org/immigrants-rights/documents/border-enforcement.pdf>.

11. *Id.* at 4.

12. *Id.*

13. *Id.* at 6.

14. *Id.*

15. *Id.* at 7.

as equal members of the nation's social, political, and cultural landscape. Immigrant workers, families, and communities deserve legalization with rights, full labor protections, and the opportunity to reunite with their loved ones.

Bold and visionary leadership is needed to convert these legislative proposals into reality. With such leadership, the AFSC firmly believes that both immigrants and non-immigrants welcome the opportunity to live, work, and thrive in—as well as contribute to—a nation that is just and inclusive in its policies and laws. The AFSC believes that this is the spirit and substance of fair and comprehensive immigration reform.

II. REMARKS OF LEE BARGERHUFF

I want to thank American University Washington College of Law for this opportunity. I am here on behalf of Chief David Aguilar, the highest official in the United States Customs and Border Protection (formerly, the United States Border Patrol) here in Washington, D.C., who was not able to be here today.

I have seen, felt, smelled, sweated, and bled immigration enforcement. I have been involved in the area for over twenty-nine years, and it is new and exciting for me to be able to discuss these issues in an academic environment. I cannot fully begin to communicate to you the true nature of immigration enforcement; no video or demonstration could effectively communicate its essence.

You, as the taxpayers of this great country, have decided to put men and women like myself out on the front lines of this nation, and I would like to add that you have purchased and supported some wonderful and talented Americans to complete this mission. It is very difficult work. Our work is based on policy that we do not decide. We are civil servants. The American people have decided that this border protection policy is appropriate, and men and women step forward to complete this task for their country.

The history of border protection really begins in 1924.¹⁶ During the time of prohibition there was a need—again, as dictated by the people and government in this country—to maintain a presence on our borders in order to fulfill what has remained the same mission: to protect this country, our labor force, and our citizenry from a multitude of threats. These threats have manifested themselves in different ways over time, such as the threat of illegal drug importation or the post-9/11 threat of terrorism.

I am from Indiana, so I had no prior knowledge of the United States Border Patrol before joining. The first Border Patrol agent I ever saw was myself when I donned the uniform and looked in the mirror. Being from the Midwest, I had never seen a United States border. However, during my senior year of college, when I decided to complete the examinations in order to become a federal law enforcement officer, I noticed an opening for the United States Border Patrol. The posting described the job as going to “wild places” and having the opportunity to “learn a new language.” I am old enough that cowboys like Will Rogers were my heroes, so I decided to apply.

16. See U.S. Border Patrol – Protecting Our Sovereign Borders, http://www.cbp.gov/xp/cgov/toolbox/about/history/bp_historcut.xml (last visited Aug. 11, 2007).

The reality of my career presented itself immediately. I began my career in Texas, and it was very eye-opening to come into contact with the people who attempt to cross our border. The Rio Grande River formed the border in my area, and sometimes temperatures would drop below freezing. On any given day, even during freezing conditions, you could find dozens of people, stripped to their underwear or completely naked, getting into the water and battling the current to come to this nation. That spectacle spoke volumes to me regarding the type of people we would interact with on the border.

The United States Border Patrol apprehends between 1.1 and 1.3 million illegal aliens a year, with over 95% of those on the southern border.¹⁷ However, only a small number of these people are criminals, and most are simply people who strive for a better life. There is no doubt that we would be attempting to accomplish the same goals if we were in their shoes.

It is a common misconception that Border Patrol agents simply play a game of catch, process, and release with illegal aliens, only to repeat the process over again. However, the reality is much more serious. When I worked in the San Antonio office, handling mainly employment cases, we would investigate employers in an attempt to apprehend aliens. I recall one instance when we visited a lumberyard in Austin, Texas. When Border Patrol agents make these appearances, the situation usually becomes animated and people begin to flee the scene. When we arrived at this particular lumberyard, we found that two individuals had climbed to the top of a stack of lumber in an attempt to cross over the fence to escape. One of them crossed the fence and fell to the ground, breaking his leg. We accompanied the young man to the hospital to ensure he received medical attention. Once he was declared fit to travel, we began the trip back down south. During the car ride, I asked him—and I did not ask the question to be flippant or demeaning, but simply wanted to learn—“Are you going to try this again next time?” The man clenched his jaw in a determined but not threatening way, and answered that he would continue this until his death. I knew, then, that this cycle is not a game to those involved. You learn this lesson incredibly quickly when you work in this area.

September 11th changed not only all of our lives, but my profession as well. As Mr. Asa Hutchinson already mentioned, our office was formerly part of the Immigration and Naturalization Service. However, with the March 2003 creation of the Department of Homeland Security, we merged

17. See Amy Wu, *Border Apprehension: 2005*, FACT SHEET (Office of Immigration Statistics, U.S. Dep't of Homeland Sec.) Nov. 2006, http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_apprehensions_fs_2004.pdf.

into a new agency.¹⁸ This change in configuration did not change our mission. We must still handle all threats to our border security and must maintain what Mr. Hutchinson referred to as “operational control” of the border.¹⁹

Over the last year, I have taken part in a program entitled the Secure Border Initiative.²⁰ The Secure Border Initiative has defined our goals for the past year and will continue to guide our goals. We are currently working to achieve a system of operational control over every mile of border. We are increasing our monitoring efforts in an attempt to ascertain and identify the presence of entities at the border. We are attempting to refine our sensor equipment in order to identify if the entity is human or animal, and if the human is in the region for a permissible reason. Only then will we know the type of law enforcement response, if any, we should institute.

This approach brings with it the understanding that no single means of protection will best serve a given area. To give an example, we are currently monitoring almost 6,000 miles of border, but the border changes depending on the type of environment in which the border appears. In an urban environment, the placement of a physical barrier is appropriate because the agency has a very short amount of time to call out a response to a potential breach. While the fence will not stop humans from moving across the border, it will buy our agency enough time to execute the appropriate response. In a rural environment, the time frame changes drastically. Our agency may have between minutes and hours to formulate a response. Therefore, fencing in rural areas makes less practical sense. It is in these areas where tactical infrastructure, air assets, and video surveillance integrate to form a layer of protection.

“Operational control” requires more Border Patrol agents to enact this goal. When I joined the Border Patrol in 1978, there were 2,100 Border Patrol agents for the whole country. Now, our total number of agents is just over 12,000. Further, the President has expressed a commitment to raising that number to between 18,000 and 19,000 by the end of his administration.²¹

18. See DEP’T OF HOMELAND SEC. REORGANIZATION PLAN (Nov. 25, 2002), http://www.dhs.gov/xlibrary/assets/reorganization_plan.pdf.

19. See Asa Hutchinson, *Keynote Address*, 59 ADMIN. L. REV. 533, 541 (2007).

20. See Press Release, U.S. Dep’t of Homeland Security, Fact Sheet: Secure Border Initiative (Nov. 2, 2005), http://www.dhs.gov/xnews/releases/press_release_0794.shtm (detailing the ways the Secure Border Initiative will help accomplish the goal of “operational control” of the northern and southern borders within five years).

21. See Press Release, President George W. Bush, Fact Sheet: The Secure Fence Act of 2006 (Oct. 26, 2006), <http://www.whitehouse.gov/news/releases/2006/10/20061026-1.html> (noting that the Bush Administration has overseen the increase of the Border Patrol force by approximately 30% with plans to double the number of agents by the end of 2008).

It is important to see the current border crisis through the eyes of the enforcement community. Although pundits and politicians politicize and discuss immigration and border control in abstract terms with purported clear-cut answers, when viewing things from the enforcement aspect, the answer does not appear so simple. While my office does not deal with public sentiment and legislation, as the men and women on the front lines, we can offer a unique perspective. Through this lens, one is able to see another facet of border enforcement and the multitude of roles we play.

I would also like to touch on what Mr. Hutchinson said about our philosophy as a country.²² While Border Patrol agents are part of the enforcement branch and do enforce the law, we see our mission as including humanitarian assistance to those we watch for and apprehend. I liken our job to that of a football player who, by playing within the rules of the game, may knock down his opponent, but who will also help the opponent to his feet. While we take great expense, effort, and determination to apprehend those seeking to enter our country illegally, we also put forth great expense, determination, and passion to deliver them from danger. We have units in the field called BORSTAR.²³ These are EMT-style units whose sole purpose is to find people who are in distress and provide them medical assistance, including beginning intravenous medication and providing airlift transportation to medical facilities. It is this philosophy which I believe to be the noblest aspect of our profession, and it helps dispel the myth that border enforcement officials are callous or xenophobic.

We are on the front lines, and we understand the situation and its problems. We have seen it. This makes for a very difficult mission—to protect the border while, at the same time, experiencing the human aspect up-close on a daily basis.

I learned the reality of my role as an enforcement official after a conference on the Organized Crime Drug Enforcement Task Force, which was one of the leading initiatives in the war on drugs. During the conference, then-Attorney General Janet Reno explained to us that though we might all be law enforcement officials, and the conception is that it is our job to stop the problem—whether it be drugs or illegal immigration—we cannot fix the problem. These were sobering words from our leader. However, I found that she was absolutely correct. I have learned that we must begin to view these issues in other institutions: our homes, churches,

22. See Hutchinson, *supra* note 19, at 535.

23. BORSTAR is the acronym for Border Patrol Search, Trauma, and Rescue Teams. See U.S. CUSTOMS & BORDER PROT., BORSTAR (June 9, 2003), http://www.cbp.gov/xp/cgov/border_security/border_patrol/borstar/borstar.xml.

schools, and institutions of higher learning. We, the law enforcement community, are cognizant of this truth and attempt to promote it professionally within our ranks.

In closing, I would like to say a few more words about the Secure Border Initiative. I know that Ms. Canty is very well-versed in that area, and I do not want to steal any of her thunder, but I was involved with that program for the longest fourteen months of my life. However, like Mr. Hutchinson mentioned, I would not trade my experiences for anything. The people working for the Secure Border Initiative are knowledgeable and well-trained, and they strive to put these ideals into practice. Nevertheless, the success of border security will depend on the will of the nation to see this idea through. In my experience, immigration issues have ebbed and flowed throughout the years. The public gets animated at different times when hot-button issues arise. With the will of the people of this nation, however, this program can and will be a success, and we will continue to strive for completion of our mission while always keeping in mind the ideals which we, as a nation, hold so dear.

III. REMARKS OF MARK KRIKORIAN

I am here today to discuss immigration control and, more specifically, border control. However, I would like to point out that focusing on the border is only looking at one piece of the immigration problem. Border control is an important part of immigration control, but it is just one part of the bigger picture.

The fencing that last year's legislation authorized is an important tool in controlling the borders.²⁴ The fencing along the border near San Diego, as some of you may know, consists of two different levels of border fencing. These two different levels of fencing are the old fencing and more modern fencing. The old fencing, which was made from leftover landing mats, did little to prevent illegal border crossings. However, the more modern mesh fencing has proven to be remarkably effective in controlling illegal border crossings. But just like lights, motion sensors, and helicopters, fencing is just another tool that the Border Patrol uses to manage the border.

Congress takes the view that the fence is one of, if not *the* most, important aspect of border control enforcement. The Secure Fence Act of 2006²⁵ (the Act) illustrates this point. The Act further illustrates Congress's distrust of the administration's ability to enforce the Act's regulations. Ideally, with the passage of such an Act, Congress should say to the administration, "You tell us where you want a fence and where you do not want a fence, and we'll take your word for it because we trust you, and you are the experts." However, the truth is that Congress does not trust this administration. That is why Congress describes the construction of the fence in such detail within the text of the legislation.

A good analogy is a donor giving money to a non-profit group. If the donor trusts the non-profit group to effectively manage the money given to them, the donor will just write the non-profit a check and say, "You decide how to use it best." When a donor does not trust the non-profit group, the donor will say, "Use ten percent of it for this and eight percent of it to do that." It is not Congress's micromanaging that is the problem with regard to the Act. The problem is that Congress felt it necessary to micromanage because this administration is absolutely untrustworthy with regard to immigration enforcement.

For example, recently, Representative Bennie Thompson stated that the new Democratic-controlled 110th Congress would closely reexamine the Act and may decide to abandon it altogether.²⁶ Such an action would cut

24. See Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006).

25. *Id.*

26. See Shaun Waterman, *Democratic Congress May Scrap Border Fence*, UNITED PRESS INTERNATIONAL, Nov. 10, 2006, http://www.upi.com/Security_Terrorism/Analysis

off additional funding for construction of the fence. If Congress refuses to fund a fence that has already been authorized, or if it actually changes the law and eliminates the fence—something the President would certainly sign because he loathes the idea of a fence (or any enforcement on the border for that matter)—it would only serve to reinforce the perception among the public regarding the lack of commitment to enforce the law.

I think the basic issue is that if Congress cuts off funding for the bill, it would reinforce the sense that the new Democratic majority in Congress has no commitment to border enforcement. Therefore, in a sense, the Democrats find themselves in a tight spot. If they refuse to fund the fence—with all of the caveats about whether the fence is actually a good idea in the micromanaged way that it is laid out—such inaction would be the ripest fruit for a political Republican challenger in 2008.

With that said, the micromanagement of the construction of the fence under the Act is not the biggest issue concerning modern border enforcement. A bigger issue is that not all illegal immigrants are border-jumpers. The estimates vary, but approximately one-third of the total illegal population are overstayers: those people who entered legally, but then never left the United States upon the end of their permitted visit.²⁷ So fencing—even if it were a “silver bullet” that magically prevented all crossings—would not address that issue because those people never illegally crossed the border between ports of entry.

Overall, a focus on border control, as has been the debate in the Legislature during the last year, is simply an extension of a longstanding political trend. The fact is that the other elements of immigration enforcement, such as work site enforcement and better identification are politically more controversial. Business simply does not like work site enforcement and would rather the government not engage in such practices. These businesses have made their feelings known directly to Congress and administrative officials. As a result, the United States has ended up with the “lowest common denominator” of immigration enforcement for the past decade. During this time, much of immigration enforcement has focused on border issues alone.

2006/11/10/dem_congress_may_scrap_border_fence/5259/ (reporting that provisions for the border fence within the Act may be replaced or integrated with “a set of monitors, cameras and other integrated surveillance systems” commonly referred to as the “Secure Boarder Initiative”).

27. See generally Editorial, *Enforcement Sense*, NAT'L REV. ONLINE, Dec. 17, 2005, <http://www.nationalreview.com/editorial/editors200512120713.asp>; see also U.S. GEN. ACCOUNTING OFFICE, GAO-04-82, OVERSTAY TRACKING: A KEY COMPONENT OF HOMELAND SECURITY AND A LAYERED DEFENSE, REPORT TO THE CHAIRMAN, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES (2004), <http://www.gao.gov/new.items/d0482.pdf> (describing available data on the extent of overstaying).

We have seen roughly a doubling of the Border Patrol over the past ten years.²⁸ The administration has a target of essentially tripling the number of Border Patrol over a period of fifteen years or so. The target number is to have 18,000 or 19,000 by the end of the Bush administration.²⁹ This goal is perhaps too lofty, but Border Patrol numbers will certainly increase. There is a lot of turnover in the Border Patrol, and it takes a lot of money and time to continually train Border Patrol agents. Nonetheless, even if the Administration achieves its goal, it would result in an optimistic average of two agents per mile per shift. But, even that would be an incredibly inadequate number of agents. Regardless, the Administration has decided to focus only on this one aspect of enforcement.

As the number of Border Patrol agents has increased, the level of work site enforcement was minimal until just about a year ago. In 2004, only three employers in the entire nation were fined for knowingly employing of illegal immigrants.³⁰ The current Administration simply continued the Clinton Administration's decision not to enforce the prohibition against employing illegal immigrants. As some of you may have noticed through reading the newspapers, the policy has recently changed. But this recent step-up of work site enforcement is only a political ploy. Moving the focus beyond the border is useful, but it is unfortunately not happening for the right reasons.

The Administration is pursuing what I call the "spoonful of enforcement helps the amnesty go down" strategy. The administration, after years and years in power, has now just woken up and thought, "Why didn't we start enforcing immigration law a long time ago? Now we are going to do it." The Administration is enforcing immigration law in order to "dupe"

28. See Press Release, The White House, President George W. Bush, Fact Sheet: The Secure Fence Act of 2006 (Oct. 26, 2006), <http://www.whitehouse.gov/news/releases/2006/10/print/20061026-1.html> (explaining that since President Bush took office, the White House has increased the number of Border Patrol agents from about 9,000 to over 12,000, and that by the end of 2008, the number will have doubled).

29. See Dannielle Blumenthal, *President Bush to Accelerate Border Patrol Strategy with National Guard*, CUSTOMS & BORDER PROTECTION TODAY, May 2006, http://www.cbp.gov/xp/CustomsToday/2006/may/president_bush.xml. The [U.S. Customs and Border Protection] agency has received funding to double the Border Patrol agent force to 18,000 by 2008.

30. See Editorial, *Enforcement First*, NAT'L REV. ONLINE, Mar. 27, 2006, <http://www.nationalreview.com/editorial/editors200603270825.asp> (citing government statistics on immigration enforcement in urging the Senate to make enforcement a centerpiece of immigration reform efforts); see also Steven Camarota, Editorial, *Use Enforcement to Ease Situation*, ARIZ. REPUBLIC, Oct. 23, 2005, <http://www.azcentral.com/arizonarepublic/viewpoints/articles/1023camarota23.html> (last visited May 17, 2007) (noting that in 2004 only three employers were fined for hiring illegal workers and arguing for increased enforcement as a solution to America's "illegal-immigration problem").

members of Congress into thinking that since it is now credible on enforcement it will, therefore, enforce future immigration rules in a way that they simply refused to do in the past.

Disregarding its motivation, the enforcement that we are seeing now is in fact real. It is showing real results, and this illuminates the future path we need to take with regard to enforcement. In my view, the whole premise of the immigration debate in Congress and in the public over the past couple years is flawed. It is presented as a kind of Hobson's choice: either we deport all illegal immigrants, or, if we cannot do that, we legalize them. We can call that legalization amnesty, regularization, normalization, or phased-in access to a path to citizenship. There is an office in the White House thinking up appropriate euphemisms. But no matter what it is called, it all ends up being the same thing—the illegal immigrants get to stay.

Those, however, are not the only two choices we have. The one choice, deportation of all illegal immigrants, is not a choice at all because we do not have the capacity to do so even if we wanted. Last year, we deported fewer than 40,000 illegal aliens.³¹ In fact, most of these 40,000 did not become illegal aliens until they committed a crime. In other words, those deported were criminal aliens, not ordinary illegal immigrants. At present, the United States basically deports almost no ordinary illegal immigrants. If we tripled, quadrupled, or quintupled the number of ordinary illegal immigrants that we deported—and we probably should and certainly can do that—it is still not going to deal with the bulk of the problem.

The other half of the Hobson's choice—legalizing illegal immigrants—will not work. First, it stimulates additional illegal immigration because the illegal aliens know perfectly well that we will not enforce the law in the future. Second, the supporters of legalization make many promises about screening people—checking backgrounds, forcing people to pay back taxes, ensuring jobs—but these promises are surreal. The U.S. Citizenship and Immigration Services is the organization which would run a legalization program. It does not even have the administrative capacity to properly complete its present job. Therefore, dumping 12 million additional cases into their inbox is not going to improve the quality of their adjudications.

In 1986, the last time we had an amnesty, about 3 million people applied, 90% were approved, and we saw fraud on a level that the U.S. government has never seen in its history.³² The stories of fraudulent agricultural

31. See generally *supra* note 27.

32. See David S. North, *Lessons Learned From the Legalization Programs of the 1980s*, CTR. FOR IMMIGRATION STUDIES, BACKGROUNDER, JAN. 2005, <http://www.cis.org/articles/2005/back105.pdf> (detailing the flaws, including widespread fraud, large numbers of

workers were so numerous and flamboyant, it was almost comical. The problem was that the capacity and the political support to turn these people down for amnesty or to properly screen them did not exist. I guarantee you this will happen again if we have another amnesty. A grant of amnesty will undoubtedly fail.

The solution then is not the false choice between legalization or forcible deportation of the illegal population, but rather something in between—what I call attrition through enforcement. We enforce the immigration laws, which we have not bothered to do in the past, consistently across the board. Because of the natural churn that is continuously ongoing within the population of illegal aliens, the illegal population will naturally shrink over time. Enforcement will reduce the inflow and increase the outflow of those choosing to go home because they have given up and cannot find work. This is not some fantasy. We have actually seen this work. In fact, it is working now with the enforcement initiatives that the administration has begrudgingly undertaken. And that, it seems to me, is the way to move, at least for the next five, six, seven, or eight years: shrink the problem, reassert control, and restore the sense among the public that the government actually is interested in enforcing the immigration laws. That is what it really boils down to.

While I think there are legal changes that might benefit that process, the real change that needs to be made is not something that Congress can take a vote on and the President can sign. The real change that must occur is a change in perception that the political elite does in fact have the will to enforce the law. The real change will occur when the political elite begin to tell businessmen, or racial and ethnic pressure groups, when they call to complain about enforcement, “I feel your pain but that is too bad. We need to enforce the law. That is what we are going to do. And look, it is showing results.” We are now seeing the results from recent enforcement. Therefore, we must not short circuit the process through some of the measures Congress is debating, which include legalizing illegal immigrants and gutting enforcement efforts.

legalizations and seldom enforced sanctions, in the implementation of the Immigration Reform and Control Act of 1986).

IV. REMARKS OF RACHEL CANTY

I would like to begin by discussing my background with the Secure Border Initiative. I began as an attorney for the Coast Guard, working mainly on law enforcement issues, specifically migrant interdiction. This was the time of the great wave of Haitian immigrants, and their apprehension and humane treatment was of great interest to me. To me, the U.S. Coast Guard and U.S. Customs and Border Protection (formerly, U.S. Border Patrol) are very similar organizations—one is on land and one is on water. Both want to enforce the law, but both also want to treat people humanely. Mr. Asa Hutchinson communicated that ideal beautifully.³³ His former director of operations, Randy Beardsworth, was very, very enforcement-minded, yet the only picture on his wall was of this Haitian girl who was about six years old. On Christmas Day, he interdicted her and her family at sea. They were drowning—their boat had capsized—and he picked them up out of the water, gave them food, gave them shelter, and even had presents for them. There were tears of joy on this girl's face. That was the only picture he had on his wall. So when you think about people that work in immigration enforcement, please remember that these are people who really care about immigrants.

As I mentioned, I started with the Coast Guard doing migration interdiction on the water. At that time, I said, "Never again will I do migration interdiction or immigration." But then I received a call from somebody inviting me to the Office of Detention and Removal (DRO), in the former Immigration and Naturalization Service (INS), now Immigration and Customs Enforcement (ICE). I asked, "Why am I doing this?" But, through this opportunity, I was able to see immigration from an entirely different perspective. I was able to see the detention of people. I was able to see the removal of people. I was at DRO as they were developing detention standards. We worked very closely with the American Bar Association and human rights groups to come up with standards for those people in detention. People in detention receive all kinds of rights. If you are not familiar with detention standards, and you are interested, the standards are on the web.³⁴ They are very comprehensive. So, I was able to understand the processes of detention and removal.

Then I left DRO to work for Border and Transportation Security (BTS). I worked for Asa Hutchinson and others, and did things such as expedited removal and coordination between different components as the Department

33. See Hutchinson, *supra* note 19, at 535.

34. See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DETENTION OPERATIONS MANUAL, <http://www.ice.gov/partners/dro/opsmanual/index.htm> (last visited June 23, 2007) (detailing the standards for detainees).

of Homeland Security (DHS) took shape. Out of that work evolved the Secure Border Initiative (SBI). SBI was basically individuals taking a step back and saying, “You know what, we have Border Patrol and interdicting, and we have detention and removal, but we really do not have a connection between the two.” SBI started as a resource project. Border Patrol numbers were increasing. No one was giving any money to detention. People were being interdicted and then turned loose because those responsible for their detention did not have the capacity for them.

One of the first things SBI did was bring people from all over together into a huge room. No one wanted to be there. There was no air conditioning. We made them map out the entire process from interdiction to removal. We had charts, and we had logs. We had all kinds of things. Out of that meeting came the program to end the practice of catch-and-release: the process of releasing people after they are interdicted because of the lack of room to detain them.

It was not one specific thing that began the end of catch-and-release. It was the addition of more detention beds—though adding only about 6,000 beds is not many in the grand scheme. It was working more closely with foreign countries. Because you need a travel document, such as a passport, to remove someone, coordinating with other countries makes removal faster. It was expanding expedited removal. It was giving more tools to the different DHS components to make everything more streamlined so that people did not have to spend more time in detention. When people were detained, they were given a piece of paper and told, “Show up for your immigration hearing in three months.” As you can imagine, the vast majority do not show up, and therefore, add to the illegal population.

With the change in policy, these people were no longer released, but instead were kept in detention and went before an immigration judge. If they had a valid asylum claim or another reason to stay, they were afforded the opportunity to assert this to an immigration judge. If they did not have a valid reason to stay, they were removed and sent home.

An important aspect of the SBI was not just that it aligned those within DHS, but that it aligned those within the United States government as well. An interesting point about coordination is that the immigration judges do not work for DHS; rather, they work for the Department of Justice (DOJ). We have an entire system that involves different components. The Department of State grants visas, but DHS identifies and takes enforcement actions against visa over-stays. DHS may do interdictions. They may do employer enforcement. But DOJ then adjudicates as to who gets to stay. And if they say, “Yes, you get to stay,” then the immigrant goes back to DHS for Citizenship and Immigration Services (CIS) issues. In sum, the

process is a complicated mess. If all of those involved in the process are not on the same page, and if they are not talking and coordinating, then the result is an even larger mess.

That mess is what the SBI was created to address. The initiative was designed to assemble everyone together in the same room and say, “Okay, what is going on? How can we talk to each other? How can we make sure that our budget requests are in alignment? How can we make sure that our operations are in alignment?” And the biggest success we have had so far is in the area of catch-and-release.

Another major thing that SBI is known for is *SBI*net, which behaves like a fence—but not in physical form. *SBI*net is technology on the border used to interdict faster. If you were to ask a Border Patrol agent, “Do you need 700 miles of fence?” he or she will say “no.” He or she will say that you have to look at the terrain. A fence does different things. Sometimes you want to buy time. In a rural area, you do not want a fence. You do not want to catch them at the border. You want to catch them maybe 200 miles inside, where you can choose the time and place. In contrast, in a crowded urban environment like San Diego, you want to catch them at the border because five minutes later they are in downtown San Diego. You need something to stop them. So bills or ideas that say, “We know the answer: it is 700 miles of fence,” are nonsense from a practical perspective.

What *SBI*net is trying to do is evaluate the border, section by section. What kind of sensors do we need? What kind of agents do we need? What kind of infrastructure do we need? If we build a partial fence of sensors, then for every sensor, how many agents do we need to respond to those sensors? What kind of roads do we need to respond to those sensors? What kind of detention capacity do we need? What kind of immigration judges do we need? We are trying to take a systematic approach to the entire immigration problem.

Taking such an approach means looking beyond the border. It is not just a border problem. It is an interior problem.³⁵ We cannot stop people from coming—people want to come to the United States. We have to accept that as a fact. No matter what we do, no matter what laws we pass, people are going to want to come to the United States, unless we become a society that says, “You execute intruders when protecting the border.” That, however, is a society that we do not want to become.

In order to stop individuals from entering the United States illegally, we need a legal avenue to entry, such as the Temporary Worker Program. We also need worker enforcement. We need the employers to have a reason to want to comply with the law. Employers need the tools to comply with the

35. See *supra* p. 576 and notes 20-21 (discussing the Secure Border Initiative).

law, and they need to have the ability to comply with the law. My idea of a perfect situation would involve one employer suing another employer for unfair competition for using illegal immigrants when the first employer could not. In such a case, DHS would not have to spend resources, and people would realize that we are all in this together; we really need to work on this together.

It is somewhat of a combination: if you want to stop them at the border, then you want to make it more difficult at the border. But you have to recognize that people are going to come in anyway. Therefore, SBI was very involved with worksite enforcement. As you can tell, it is not about fines anymore. It is about working to make sure that employers are hiring legal people. We are also very much pushing for a legal way into the United States, taking a very comprehensive look and realizing that you cannot do one without the other. We understand the current political environment. No one believes us. No one trusts us anymore. Frankly, I would not trust us either. We have done a poor job at immigration enforcement. We need to prove that we are effective at immigration enforcement in order to then set up a three-legged system that considers the interior, the border, and a temporary worker program.