

**THERE'S SOMETHING ABOUT MEXICO:  
EXPLORING THE CONTROVERSY, COSTS,  
AND BENEFITS OF A SOCIAL SECURITY  
TOTALIZATION AGREEMENT WITH OUR  
NEIGHBOR TO THE SOUTH**

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*The United States currently honors Social Security totalization agreements with over twenty countries. These agreements are in place to prevent the double taxation of workers who earn income in two countries. Mexico is the United States' second largest trading partner, but a totalization agreement with Mexico has yet to be adopted. Those opposed to enacting a totalization agreement with Mexico fear that allowing Mexican workers to receive Social Security benefits from the United States will put undue strain on the U.S. Social Security system. However, Mr. Tuladhar argues the benefits of such an agreement are plentiful and could be the answer to protecting Social Security in the United States for years to come.*

## **I. Introduction**

Under the Social Security Act, “the President is authorized to enter into international agreements establishing entitlement to old-age, survivors, disability, or derivative benefits based on a combination of an individual’s periods of coverage under the United States

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Social Security system and that of any foreign country.”<sup>1</sup> These international agreements are known as Social Security totalization agreements (SSTA),<sup>2</sup> or simply totalization agreements.<sup>3</sup> The United States has entered into twenty-one totalization agreements since the late 1970s.<sup>4</sup> These agreements eliminate the dual earnings taxation that may occur when a worker from one country works in another and help fill gaps in benefit protection for workers who have divided their careers between the United States and another country and may not qualify for Social Security benefits in either.<sup>5</sup> Congress amended the Social Security Act in 1977 to allow for totalization agreements<sup>6</sup> with the intent to “enhance trade with foreign nations.”<sup>7</sup> Thus it is not surprising that the United States currently has SSTAs with many of its largest trading partners, including the first and third largest, Canada and Japan.<sup>8</sup> In 2004, Jo Anne Barnhart, Commissioner of the Social Security Administration, signed a SSTA with Mexico, the United

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1. Allison Christians, *Social Security in United States Treaties and Executive Agreements*, 43 *INTERNATIONALEN STEUERRECHT* 685, 700 (2006) [hereinafter Christians, *Treaties and Executive Agreements*]; see also 42 U.S.C. § 433(a) (2000); ALISON SISKIN & GERALD MAYER, U.S. CONG. RESEARCH SERV., *MEXICAN WORKERS IN THE UNITED STATES: A COMPARISON WITH WORKERS FROM SOCIAL SECURITY TOTALIZATION COUNTRIES* 4 (2005).

2. See Allison Christians, *Taxing the Global Worker: Three Spheres of International Social Security Coordination*, 26 *V.A. TAX REV.* 81, 85 (2006) [hereinafter Christians, *Three Spheres*] (describing the difference between U.S. treaties, which must be signed by the President and ratified by two-thirds of the Senate, and executive agreements, which the President can sign without Senate approval).

3. Internal Revenue Service, *Totalization Agreements*, <http://www.irs.gov/businesses/small/international/article/0,,id=105254,00.html> (last visited Sept. 25, 2007); Social Security Administration Online, *United States/Mexico Totalization Agreement*, <http://www.ssa.gov/pressoffice/factsheets/USandMexico-alt.htm> (last visited Sept. 25, 2007) [hereinafter Mexico Totalization Agreement Factsheet].

4. See Social Security Administration Online, *U.S. International Social Security Agreements*, [http://www.ssa.gov/international/agreements\\_overview.html](http://www.ssa.gov/international/agreements_overview.html) (last visited Sept. 25, 2007) (the following is a list of countries with which the United States has existing totalization agreements and the effective date of each: Italy, Nov. 1, 1978; Germany, Dec. 1, 1979; Switzerland, Nov. 1, 1980; Belgium, July 1, 1984; Norway, July 1, 1984; Canada, Aug. 1, 1984; United Kingdom, Jan. 1, 1985; Sweden, Jan. 1, 1987; Spain, Apr. 1, 1988; France, July 1, 1988; Portugal, Aug. 1, 1989; Netherlands, Nov. 1, 1990; Austria, Nov. 1, 1991; Finland, Nov. 1, 1992; Ireland, Sept. 1, 1993; Luxembourg, Nov. 1, 1993; Greece, Sept. 1, 1994; South Korea, April 1, 2001; Chile, Dec. 1, 2001; Australia, Oct. 1, 2002; Japan, Oct. 1, 2005).

5. Mexico Totalization Agreement Factsheet, *supra* note 3.

6. Social Security Amendments of 1977, Pub. L. No. 95-216 (codified at 42 U.S.C. § 433 (2000)).

7. *Should There Be a Social Security Totalization Agreement with Mexico?: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 108th Cong. 8 (2003) [hereinafter *Hearings*] (statement of Jo Anne B. Barnhart, Comm’r, Social Security Administration).

8. *Id.* at 10.

States' second largest trading partner.<sup>9</sup> However, the SSTA with Mexico is still pending.

Although the United States has had SSTAs with several countries for almost three decades,<sup>10</sup> many entered into recently,<sup>11</sup> none have created the controversy or received the media attention and political opposition as the pending SSTA with Mexico.<sup>12</sup> Critics of the SSTA with Mexico argue that the large number of Mexican citizens working in the United States, many of whom are working illegally, makes such an agreement different and less favorable for the United States than similar agreements with other countries.<sup>13</sup>

This Note explores the controversies, costs, and potential benefits of a SSTA with Mexico. Part II provides the background necessary to understand the debate over the SSTA with Mexico, including an overview of the U.S. and Mexican Social Security systems, the mechanics of SSTAs, current U.S. immigration policy and statistics that impact the pending SSTA with Mexico, and the history and status of the pending agreement with Mexico. In Part III, Mexico is compared to the other totalization agreement countries to determine the unique impact an agreement with Mexico may have. Part III also examines

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9. SISKIN & MAYER, *supra* note 1, at i; Mexico Totalization Agreement Fact-sheet, *supra* note 3. A copy of the signed SSTA with Mexico can be found at [http://www.tscl.org/NewContent/Totalization\\_Agreement.pdf](http://www.tscl.org/NewContent/Totalization_Agreement.pdf).

10. Social Security Agreement, U.S.-Italy, May 23, 1973, 29 U.S.T. 4263 (the first SSTA was signed with Italy in 1973, and entered into force on Nov. 1, 1978).

11. Michael D. Tanner, *Going Totally Berserk over Totalization*, CATO INST., Jan. 11, 2007, [http://www.cato.org/pub\\_display.php?pub\\_id=6923](http://www.cato.org/pub_display.php?pub_id=6923); *see, e.g.*, Social Security Agreement, U.S.-Japan, Feb. 19, 2004, [http://www.ssa.gov/international/Agreement\\_Texts/japan.html](http://www.ssa.gov/international/Agreement_Texts/japan.html) (the agreement with Japan went into effect on Oct. 1, 2005); *Hearings, supra* note 7, at 11 (statement of Comm'r Jo Anne B. Barnhart) (noting that the cost of the Japan agreement is estimated to be very similar to the cost of an agreement with Mexico).

12. Tanner, *supra* note 11 (noting that the United States has entered into many totalization agreements in the past, and none have been met with as much controversy as the agreement with Mexico); *see also* J.D. HAYWORTH, *WHATEVER IT TAKES: ILLEGAL IMMIGRATION, BORDER SECURITY, AND THE WAR ON TERROR* 131-32 (2006) (describing former Congressman Hayworth's opposition to a totalization agreement with Mexico); Shannon Benton, Op-Ed, *Protect Social Security; Don't Let Illegals Raid the Trust Fund*, WASH. TIMES, Jan. 5, 2007, at A17 (same); Ron Paul, *Texas Straight Talk: Totalization Is a Bad Idea*, U.S. FED. NEWS, Jan. 8, 2007 (stating Rep. Ron Paul's, R-Texas (14th Dist.), opposition to a totalization agreement with Mexico); Phyllis Schlafly, Editorial, *Bush's Totalization Plan Threatens Social Security*, HUMANEVENTS.COM, Jan. 17, 2007, <http://www.humanevents.com/article.php?id=18945> (same); Jonathan Weisman, *U.S. Social Security May Reach to Mexico*, WASH. POST, Dec. 19, 2002, at A01 (criticizing a SSTA with Mexico).

13. *E.g.*, Geoff Davis, *Totalization Agreement with Mexico Is a Bad Deal for the United States*, U.S. FED. NEWS, Oct. 3, 2006; Paul, *supra* note 12.

the potential costs of entering into a SSTA with Mexico and the benefits to the United States, and its elderly population, of such an agreement. Finally, Part IV recommends how the United States should proceed with the pending totalization agreement with Mexico.

## II. Background

The pending SSTA with Mexico has been a source of great controversy and debate since the United States and Mexico first began negotiations in 2001.<sup>14</sup> One early report described the agreement as one that would “put tens of thousands of Mexicans onto the Social Security roster and send hundreds of millions of dollars in benefits south of the border.”<sup>15</sup> While this assessment may be true, the Mexicans who will become eligible for U.S. Social Security benefits are workers who have paid into the system.

Arguments both for and against a SSTA with Mexico are complicated because of the large number of unauthorized Mexican workers in the United States. The current benefit payment rules do not necessarily prohibit earning Social Security work credits for work performed without authorization.<sup>16</sup> Because of these uncertainties, there are many myths surrounding the potential affects of a SSTA.<sup>17</sup> Before

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14. See Weisman, *supra* note 12 (an early article critical of a SSTA with Mexico).

15. *Id.*

16. Compare Letter from Jo Anne B. Barnhart, Comm’r, Soc. Sec. Admin., to David Dreier, Congressman, House of Representatives (Aug. 30, 2004), [http://dreier.house.gov/pdf/Totalization\\_from.pdf](http://dreier.house.gov/pdf/Totalization_from.pdf) (explaining that “under the proposed agreement with Mexico and, indeed, under all United States (U.S.) totalization agreements . . . current law prohibits the payment of benefits to non-U.S. citizens in the U.S. who are not lawfully present. In addition . . . a person may not become eligible for U.S. Social Security benefits unless the worker on whose record benefits are based is a U.S. citizen or a non-U.S. citizen who was authorized to work in the U.S. when the worker was issued a Social Security number or any time thereafter.”), with DAWN NUSCHLER & ALISON SISKIN, U.S. CONG. RESEARCH SERV., SOCIAL SECURITY BENEFITS FOR NONCITIZENS: CURRENT POLICY AND LEGISLATION 3–5 (2006) (explaining how non-U.S. citizens *may* collect U.S. Social Security benefits).

17. *Hearings, supra* note 7, at 8 (statement of Comm’r Jo Anne B. Barnhart). Commissioner Barnhart lists the following five myths regarding a SSTA with Mexico and attempts to debunk them: (1) a totalization agreement with Mexico would change existing immigration policy; (2) one result of a totalization agreement with Mexico will be to begin to pay benefits to undocumented or illegal aliens; (3) a totalization agreement with Mexico will cost the United States \$345 billion; (4) all of the earnings in the suspense file came from undocumented or illegal aliens; and (5) totalization agreements enable noncitizens who work in the United States for a very short period of time to receive full American Social Security benefits. *Id.* at 9.

delving into the complexities of entering into an SSTA with Mexico, it is important to first understand the current systems of both countries and the mechanics of SSTAs.

## A. The U.S. and Mexican Social Security Systems

### 1. THE U.S. SYSTEM

“The Old Age, Survivors, and Disability Insurance Program (OASDI), more commonly known as the Social Security” program,<sup>18</sup> was launched in the late 1930s during the Great Depression.<sup>19</sup> The U.S. Social Security program provides a monthly cash benefit to retired and/or disabled workers and their dependents, and to the survivors of deceased workers.<sup>20</sup> To qualify for Social Security, workers must work in a Social Security covered job and earn forty credits for program-covered work.<sup>21</sup> This usually requires at least ten years of earnings subject to Social Security or self-employment taxes.<sup>22</sup> “The main Social Security benefit, called the primary insurance amount, is calculated according to a complicated process that looks at a worker’s entire work history.”<sup>23</sup> According to an agency report, at the end of 2005 it was estimated that 48 million people were receiving OASDI benefits, and an estimated \$521 billion in benefits were paid.<sup>24</sup> Approximately 96% of the U.S. workforce is required to pay Social Security payroll taxes.<sup>25</sup>

### 2. THE MEXICAN SYSTEM

In 1944, the Mexican government established the Mexican Social Security Institute “to manage old-age, disability, and life insurance

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18. 2 JOAN M. KRAUSKOPF ET AL., *ELDERLAW: ADVOCACY FOR THE AGING* § 15:1 (2d ed. 2006).

19. Olivia S. Mitchell et al., *An Overview of the Issues*, in *PROSPECTS FOR SOCIAL SECURITY REFORM* 3, 3 (Olivia S. Mitchell et al. eds., 1999).

20. NUSCHLER & SISKIN, *supra* note 16, at 1.

21. *Id.* at 1–3 (discussing covered work, payroll taxes, and noncovered work).

22. See Overview of Social Security Retirement Benefits, <http://www.fairmark.com/retirement/socsec/overview.htm> (last visited Sept. 25, 2007); Social Security Credits, <http://www.ssa.gov/retire2/credits.htm> (last visited Sept. 25, 2007).

23. Overview of Social Security Retirement Benefits, <http://www.fairmark.com/retirement/socsec/overview.htm> (last visited Sept. 25, 2007) (emphasis omitted); see also SISKIN & MAYER, *supra* note 1, at 2 (describing the benefits formula).

24. H.R. Doc. No. 109-103, at 2 (2006).

25. See NUSCHLER & SISKIN, *supra* note 16, at 1.

and other social insurance programs.”<sup>26</sup> Prior to this, “all private sector workers and their employers were required to contribute to the” program.<sup>27</sup> The payments were small and not based on individual contributions.<sup>28</sup> Workers did not have individual accounts based on their particular contributions but instead were eligible for benefits based on their status and characteristics if they were registered as beneficiaries.<sup>29</sup>

In 1992, the Mexican government instituted major reforms to the Social Security system after inadequate funding and mismanagement left it on the verge of collapse.<sup>30</sup> However, these reforms failed to fix the problem, and a new system was introduced in 1997.<sup>31</sup> The current system is based on individual retirement accounts in which contribution is mandatory for all workers.<sup>32</sup> The 1997 system raised the maximum taxable amount from ten times the minimum wage to twenty-five times the minimum wage.<sup>33</sup> The amount of time needed to qualify for Mexican Social Security benefits under the 1997 system is twenty-four years.<sup>34</sup>

## B. The Mechanics of a Social Security Totalization Agreement

Income security programs, such as Social Security in the United States, exist in most countries around the world.<sup>35</sup> All of the countries with which the United States has strong economic and commercial ties have these programs.<sup>36</sup> Because every country has its own unique system for funding and distributing program benefits, a person work-

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26. JAN WALLISER & SCOTT M. BECKER, CONG. BUDGET OFFICE, SOCIAL SECURITY PRIVATIZATION EXPERIENCES ABROAD 59 (1999), available at <http://www.cbo.gov/ftpdocs/10xx/doc1065/ssabroad.pdf>.

27. STEPHEN ZAMORA ET AL., MEXICAN LAW 630 (2004).

28. *Id.*

29. *Id.*

30. *Id.*

31. See WALLISER & BECKER, *supra* note 26, at 63; James Heskett, *Public Pension Reform: Does Mexico Have the Answer?*, HARV. BUS. SCH. WORKING KNOWLEDGE, Jan. 10, 2005, <http://hbswk.hbs.edu/item/4570.html>.

32. WALLISER & BECKER, *supra* note 26, at 63.

33. *Id.*

34. U.S. GEN. ACCOUNTING OFFICE, SOCIAL SECURITY: PROPOSED TOTALIZATION AGREEMENT WITH MEXICO PRESENTS UNIQUE CHALLENGES 8 n.2 (2003) (“The amount of time needed to qualify for Mexican social security benefits is about 9.6 years under the former pay-as-you-go plan that closed in July 1997 and 24 years under the defined contribution plan that replaced it.”).

35. See Christians, *Three Spheres*, *supra* note 2, at 82.

36. See *id.*

ing outside her country of origin may find herself covered by the systems of multiple countries for the same work.<sup>37</sup> When this happens, both countries generally require the employer and employee to pay Social Security taxes.<sup>38</sup> SSTAs are necessary when workers face the possibility of such double taxation.<sup>39</sup>

SSTAs are executive agreements, entered into by the President and approved by a majority of Congress like a statute. This is different than treaties, which require a Senate supermajority.<sup>40</sup> U.S. treaties and executive agreements are identical both in their goal of achieving international agreement with overlapping or conflicting domestic laws, as well as their legal status as binding the United States under general principles of international law.<sup>41</sup>

With a SSTA, “individuals are exempt from social security contribution requirements in one country to the extent their self-employment income or wages are subject to requirements under the social security system of another country.”<sup>42</sup> Under a SSTA, the authority to collect Social Security contributions is typically given to the country where the taxpayer is employed.<sup>43</sup> Thus, a resident of the United States who works abroad in Mexico will make Social Security contributions in Mexico, while a Mexican resident working in the United States will make Social Security contributions in the United States.<sup>44</sup> Because there are more Mexicans working in the United States than Americans working in Mexico, the U.S. system will likely collect more contributions as a result of a SSTA with Mexico. Contributions made by unauthorized workers will help the U.S. Social Security system because they do not qualify for Social Security benefits.

SSTAs are also necessary to “prevent the possibility that workers will lose their right to receive benefits if they divide their careers between two or more countries, and to prevent countries from imposing restrictions on benefits eligibility based solely on residence or pres-

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37. *Id.*

38. Social Security Administration Online, U.S. International Social Security Agreements, [http://www.ssa.gov/international/agreements\\_overview.html](http://www.ssa.gov/international/agreements_overview.html) (last visited Sept. 25, 2007).

39. Christians, *Three Spheres*, *supra* note 2, at 85.

40. Christians, *Treaties and Executive Agreements*, *supra* note 1, at 691. A treaty is formally defined as any agreement signed by the President that can be ratified only upon the advice and consent of two-thirds of the Senate. *Id.*

41. See Christians, *Three Spheres*, *supra* note 2, at 87.

42. *Id.* at 94; see 26 U.S.C. §§ 1401(e), 3101(c), 3111(c) (2000).

43. See Christians, *Three Spheres*, *supra* note 2, at 94.

44. *Id.* at 102.

ence in the other country at the time benefits would be paid.”<sup>45</sup> When a SSTA is in place, the United States allows credits earned from working in another country to count towards the forty-credit requirement to receive U.S. Social Security benefits and modifies the residency requirements for foreign workers and their beneficiaries to receive benefits.<sup>46</sup> Further, the Social Security Act allows a worker who has earned six credits in the United States to combine periods of coverage under the other country’s Social Security system “for the purposes of establishing entitlement to and the amount of [benefits].”<sup>47</sup> If foreign credits are needed to receive a U.S. benefit, the worker will only be eligible for a partial benefit related to the number of credits attained by working in the United States.<sup>48</sup> These provisions appear to be the main source of controversy over the pending SSTA with Mexico.<sup>49</sup>

### C. Immigration Statistics and Policy

#### 1. IMMIGRATION STATISTICS

A 2005 report estimated 160,000 Mexicans received legal permanent status in the United States, and an additional 4.77 million Mexican citizens were granted nonimmigrant admissions.<sup>50</sup> It is also important to consider the number of undocumented Mexican workers in

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45. *Id.* at 99–100.

46. *Id.* at 102–04.

47. 42 U.S.C. § 433(c)(1)(A) (2007). The congressional intent of this provision has been interpreted to mean benefits should be combined only when “an individual would not have enough quarters of coverage under one system to qualify for benefits[,]” but if an individual has enough credits to earn benefits in the United States, the credits in the other country will not be taken into account. Christians, *Three Spheres*, *supra* note 2, at 102–04.

48. See Christians, *Three Spheres*, *supra* note 2, at 102–04; see also Alan L. Gustman & Thomas L. Steinmeier, *Social Security Benefits of Immigrants and U.S. Born*, in ISSUES IN THE ECONOMICS OF IMMIGRATION 309–18 (George J. Borjas ed., 2000) (discussing the prorating of benefits in totalization agreements when credits are earned under multiple systems). “Under totalization, the first decade of work in the United States results in 10/35 of total benefits, each of the next two decades of work increases benefits by another 10/35 of the total PIA, and the last decade of covered work brings in an additional 5/35 of the PIA.” *Id.*; U.S. GEN. ACCOUNTING OFFICE, *supra* note 34, at 20. The report provides a summary of the monthly totalized social security benefit based on credits earned. *Id.* For low, average, high, and maximum earnings, the totalized benefit for 8, 20, and 36 credits are: \$39, \$99, \$178; \$65, \$163, \$294; \$85, \$212, \$382; and \$94, \$237, \$427 respectively. *Id.*

49. See Christians, *Three Spheres*, *supra* note 2, at 104–06.

50. OFFICE OF IMMIGRATION STATISTICS, DEP’T OF HOMELAND SEC., 2005 YEARBOOK OF IMMIGRATION STATISTICS 79 (2006), available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS\\_2005\\_Yearbook.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf).



the United States when considering the debate over a SSTA with Mexico, as a SSTA could increase the number of undocumented workers who may become eligible for U.S. Social Security benefits. In March 2006, it was estimated there are between 11.5 and 12 million unauthorized immigrants in the United States.<sup>51</sup> Since 2000, the number of unauthorized immigrants has increased at a rate of 500,000 per year, and between 2000 and 2005, the unauthorized immigrant population from Mexico increased by approximately 1.5 million.<sup>52</sup> Two-thirds of the unauthorized immigrant population have been in the United States for less than ten years, while 40% have been in the United States for less than five years.<sup>53</sup> As of 2005 almost 56% of the total unauthorized immigrant population in the United States was from Mexico.<sup>54</sup>

Although immigrants from Mexico play an important role in the U.S. labor market, there are very few employment-based visas for these workers to enter the United States legally, which in turn leads to the large number of undocumented Mexican workers in the United States.<sup>55</sup> There are many reasons why undocumented workers come

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51. JEFFREY S. PASSEL, PEW HISPANIC CTR., *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.* i (2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

52. *Id.*

53. *Id.*

54. *Id.*

55. See Rob Paral, *NO WAY IN: U.S. Immigration Policy Leaves Few Legal Options for Mexican Workers*, IMMIGR. POL'Y IN FOCUS, July 2005, at 4, available at <http://www.aifl.org/ipc/nowayinprint.pdf>.

There are five preference categories of visas for permanent immigration status and only one is set aside for workers in less-skilled jobs. Four of the five favor immigrants with higher levels of education or financial capital and are therefore not relevant to less-skilled workers. The remaining category, the employment-based "third preference," allots only 5,000 visas each year to workers in occupations that require less than two years of higher education, training, or experience. This visa category, which is designated for "other workers," is nearly the only employment-based avenue for permanent immigration available to workers in less-skilled jobs. A similar bottleneck exists for workers in less-skilled jobs who seek employment-based visas for temporary immigrant status. There are sixteen different types of temporary immigrant visas available for employment and training in the United States, and in 2002 some 656,000 persons were admitted under these categories. Of these sixteen visa categories, only two—H2A and H2B—are available to workers in industries that require little or no formal training. H2As are restricted to agricultural workers. H2Bs are not only capped at 66,000, but are limited to "seasonal" or otherwise "temporary" work that is defined so restrictively as to disqualify workers in many industries.

*Id.*

from Mexico to the United States, but the primary reason is employment.<sup>56</sup> The average wage in Mexico is about one-ninth of the wage in the United States, and the growth of the U.S. economy is creating a demand for essential workers.<sup>57</sup> Also, with the aging of the U.S. population and the increasing number of U.S. citizens seeking higher education, “the demand for young, essential workers will continue to increase at levels ‘which the domestic workforce cannot or will not fill.’”<sup>58</sup> Critics of current U.S. immigration policies claim such policies are out of sync with demand because there are very few avenues for these workers to enter the U.S. legally.<sup>59</sup> According to a 2005 report, unauthorized workers made up about 4.9% of the U.S. labor force.<sup>60</sup> While these workers are employed in a variety of occupations, they make up a large part of the workforce in certain categories,<sup>61</sup> including eldercare.<sup>62</sup>

## 2. HOW UNAUTHORIZED WORKERS GET SOCIAL SECURITY NUMBERS

There are three types of Social Security cards: regular cards, cards that are valid for work only with authorization from the Department of Homeland Security (DHS), and nonwork Social Security Numbers (SSN). There are several ways that a noncitizen may be eligible for a Social Security card.<sup>63</sup>

To be eligible for a regular Social Security card, without “not authorized to work” markings, the immigrant must be either (1) a noncitizen lawfully admitted to the United States for permanent residence (an immigrant), (2) a noncitizen with permission from the DHS to work permanently in the United States, or (3) a member of a group eligible to work in the United States on a temporary basis (for example, with a work visa or as an authorized worker in an approved exchange program).<sup>64</sup>

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56. Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 11 (2006).

57. *Id.*

58. *Id.* at 11–12.

59. See Paral, *supra* note 55, at 4.

60. PASSEL, *supra* note 51, at ii–iii.

61. See *id.*

62. See Barry Newman, *Who Will Care for U.S. Elderly If Border Closes?*, WALL ST. J., July 26, 2006, at B1.

63. See U.S. GEN. ACCOUNTING OFFICE, SOCIAL SECURITY: PROCEDURES FOR ISSUING NUMBERS AND BENEFITS TO THE FOREIGN-BORN 7–9 (2006).

64. *Id.*

The DHS-authorized work card is a much less common type of Social Security card that is issued to noncitizens who are eligible to work under limited circumstances.<sup>65</sup> This card is marked with “VALID FOR WORK ONLY WITH DHS AUTHORIZATION.”<sup>66</sup> Noncitizens must have DHS permission to temporarily work in the United States to be eligible.<sup>67</sup> The SSA issues these cards to eligible workers, such as spouses and children of exchange visitors, and foreign students.<sup>68</sup>

The third type of card is for people ineligible to work in the United States. The Social Security Administration (SSA) sends recipients a card showing their name, SSN, and the inscription “NOT VALID FOR EMPLOYMENT.”<sup>69</sup> To receive one of these cards, noncitizens who are legally in the United States and do not have DHS permission to work must be found eligible to receive a federally funded benefit or be subject to a state or local law that requires them to have an SSN to collect public benefits.<sup>70</sup> Examples of these benefits include Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Survivor benefits, Medicaid, and Food Stamps.<sup>71</sup>

In some cases, workers will use nonwork SSNs to gain employment even when they are ineligible to work in the United States.<sup>72</sup> If the worker later gains employment approved status, he or she would have no problem collecting Social Security benefits in the United States, even under the Social Security Protection Act of 2004.<sup>73</sup> In other cases, unauthorized workers will simply make up a SSN to seek employment, purchase a fake identification number, or even steal the identity of an American with a valid SSN.<sup>74</sup>

If a worker is able to prove that he or she earned credits under a particular SSN, he or she may be able to qualify for Social Security benefits, even if he or she worked without authorization.<sup>75</sup> However,

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *See id.* at 5.

73. *Id.* at 13.

74. *See generally id.* at 3 (addressing identity theft as a method of unauthorized workers to obtain employment).

75. *Id.* at 12.

to be eligible for benefits, the earned wages must have had Social Security payroll taxes withheld.<sup>76</sup> In other words, if a worker is not authorized to work in the United States, but an employer hires him or her and pays him or her cash with no Social Security taxes withheld, that employment will not establish benefits. Thus, although it is possible for an unauthorized worker to earn credits for work performed without authorization, very few are able to do this, and most will never collect any of the money they have contributed to Social Security.<sup>77</sup>

#### D. The History and Status of the SSTA with Mexico

Beginning in 2001, the SSA began informal discussions with Mexico regarding a potential SSTA.<sup>78</sup> From the very start, a SSTA with Mexico has been tied to the debate over immigration reform. Some reports suggest the Bush administration was pressured by the Mexican government to begin work on a SSTA after promised immigration reform was not implemented.<sup>79</sup> These reports describe the agreements as “one of those less-sexy things that Mexico has been pushing to deepen its relationship with the United States and improve the day-to-day lives of Mexicans.”<sup>80</sup> In 2002, SSA officials visited Mexico to determine if Mexico would be able to administer a SSTA.<sup>81</sup> Based on this visit and on follow-up discussions, the SSA concluded that Mexico was prepared to administer a totalization agreement and has the ability to provide the records necessary for the SSA to determine the eligibility of individuals.<sup>82</sup>

Representatives from the SSA and the Mexican Social Security Institute signed a totalization agreement in June of 2004.<sup>83</sup> The Government Accountability Office (GAO) found that the SSA “followed the same procedures for the proposed Mexican agreement that it used in all prior agreements.”<sup>84</sup> Although there is no model SSTA, “because negotiation of SSTAs is authorized by statute, there exists a

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76. *Id.* at 3.

77. See Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security with Billions*, N.Y. TIMES, Apr. 5, 2005, at A1.

78. *Hearings*, *supra* note 7, at 10 (statement of Comm’r Jo Anne B. Barnhart).

79. See Weisman, *supra* note 12.

80. *Id.*

81. *Hearings*, *supra* note 7, at 10 (statement of Comm’r Jo Anne B. Barnhart).

82. *Id.*

83. NUSCHLER & SISKIN, *supra* note 16, at 12.

84. U.S. GEN. ACCOUNTING OFFICE, *supra* note 34, at 6–7.

framework of domestic law governing these agreements[.]” forcing the SSTA with Mexico to fit within certain known parameters.<sup>85</sup> However, many conservative groups opposed to a SSTA with Mexico have tried to paint the process as secretive on the part of the Bush administration.<sup>86</sup> As part of that effort, the Retired Enlisted Association (TREA) Senior Citizens League filed a Freedom of Information Act request to receive a copy of the U.S./Mexico SSTA.<sup>87</sup>

After being signed by the SSA, the SSTA with Mexico was sent to the Secretary of State and the President for review.<sup>88</sup> Before it was signed by the SSA, the SSTA was reviewed by the SSA’s General Counsel to ensure that it was consistent with American law.<sup>89</sup> President Bush has not signed the SSTA with Mexico yet. If he does, it will then be sent to Congress where it will sit in review for sixty session days.<sup>90</sup> The SSTA agreement would then go into effect unless the House of Representatives or the Senate adopts a resolution of disapproval within the sixty-day review period.<sup>91</sup> Congress has never before voted to disapprove a SSTA,<sup>92</sup> but there have been several resolutions submitted by Congress opposing a SSTA with Mexico.<sup>93</sup>

### III. Analysis

The United States has entered into twenty-one SSTAs since 1978. None of the existing SSTAs were met with the controversy and opposition that marks the pending Mexican agreement.<sup>94</sup> Critics of a SSTA

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85. Christians, *Treaties and Executive Agreements*, *supra* note 1, at 707. The SSTA with Mexico does not have any nonstandard provisions or sections. See Mexico Totalization Agreement Factsheet, *supra* note 3.

86. *E.g.*, Schlafly, *supra* note 12 (calling the totalization agreement with Mexico “President George W. Bush’s secret plan for Social Security”).

87. TREA Senior Citizens League, *Social Security Agreement with Mexico Released After 3-1/2 Year Freedom of Information Act Battle*, Jan. 4, 2007, <http://www.tscl.org/NewContent/102800.asp>.

88. NUSCHLER & SISKIN, *supra* note 16, at 12.

89. *Hearings*, *supra* note 7, at 10 (statement of Comm’r Jo Anne B. Barnhart).

90. *Id.* at 14.

91. See NUSCHLER & SISKIN, *supra* note 16, at 11.

92. See *Hearings*, *supra* note 7, at 10 (statement of Comm’r Jo Anne B. Barnhart); NUSCHLER & SISKIN, *supra* note 16, at 11 (“It should be noted that the provision of Section 233(e)(2) that allows for the rejection of a totalization agreement upon adoption of a resolution of disapproval by either House of Congress is an unconstitutional legislative veto. This conclusion is compelled by the holding in *INS v. Chadha*.”).

93. See, *e.g.*, H.R. Res. 20, 109th Cong. (2005); H.R. Con. Res. 50, 109th Cong. (2005).

94. See Tanner, *supra* note 11.

with Mexico argue that such an agreement is different from all of the existing agreements because of the large number of Mexican immigrants in the United States, the demographic profile of Mexican immigrants, and because “Mexico’s retirement system is radically different than that of other participating countries.”<sup>95</sup> However, one commentator in favor of a Mexican SSTA suggests “[a]s the anger of anti-immigration zealots attests, the only reason why this is an issue is that it’s an agreement with Mexico.”<sup>96</sup> This Part compares and contrasts the proposed Mexican SSTA with existing agreements, explores the potential costs of a Mexican SSTA, and considers the benefits of such an agreement.

#### A. Comparing Mexico and Other Totalization Agreement Countries

In a recent Congressional Research Service (CRS) report, several socioeconomic factors of the Mexican population in the United States were compared with those of persons from countries with current SSTAs.<sup>97</sup> According to the report, the number of Mexican-born non-citizens and naturalized citizens living in the United States is about three times as high as the comparative population for all other SSTA countries combined.<sup>98</sup> The same report found that Mexicans in the United States tended to be younger, have less education, have a higher labor force participation rate, and make less money when compared to persons from other SSTA countries.<sup>99</sup> These factors are important because they suggest Mexican workers may receive a higher replacement rate, relative to the payroll taxes they pay, than workers with higher lifetime earnings, such as U.S. citizens and non-citizens from other SSTA countries.<sup>100</sup>

While the statistics provide a broad comparison of Mexican immigrants and immigrants from other SSTA countries, these statistics do not explain the difference between authorized and unauthorized immigrants, which is a chief concern when considering a SSTA with

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95. *Hearings*, *supra* note 7, at 11 (statement of Comm’r Jo Anne B. Barnhart); TREA Senior Citizens League, *supra* note 87.

96. Tanner, *supra* note 11.

97. NUSCHLER & SISKIN, *supra* note 16, at i.

98. *Id.* at 14.

99. *Id.* at 5–17.

100. *Id.* at i.

Mexico.<sup>101</sup> According to a 2005 study by the Pew Hispanic Center, there were about 11.1 million unauthorized immigrants living in the United States.<sup>102</sup> Of this population, it is estimated 6.2 million, or 56%, come from Mexico.<sup>103</sup> The rest of Latin America makes up an estimated 22% of the unauthorized immigrant population, Asia about 13%, Europe and Canada about 6%, and Africa about 3%.<sup>104</sup> Most of the existing totalization agreements are with Canada and countries in Europe.<sup>105</sup>

Opponents of a SSTA with Mexico have also expressed concern that “Mexico’s retirement system is radically different than that of other participating countries.”<sup>106</sup> It is true that early SSTAs were signed with countries that had Social Security systems very similar to the U.S. system, but more recent agreements have been entered into with countries with Social Security systems “considerably different than the U.S. system.”<sup>107</sup> For example, the United States has signed an agreement with Chile,<sup>108</sup> a country with a system similar to the Mexican system in many ways.<sup>109</sup> For proponents of a SSTA with Mexico, this suggests that any complexities of coordinating the U.S. and Mexican systems are manageable.<sup>110</sup>

Although some of the existing totalization agreements are not financially beneficial to the United States, the existing totalization agreements are overall “a net gain to the United States of hundreds of millions of dollars a year.”<sup>111</sup> While a SSTA with Mexico may cost the United States a significant amount in terms of new benefit payments, it may “only amount to a fraction of the net gains from our other . . .

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101. *Id.* at 6.

102. PASSEL, *supra* note 51, at 1.

103. *Id.* at 9.

104. *Id.* at 10.

105. *Hearings, supra* note 7, at 1 (statement of Rep. John Hosteller, Chairman, House Subcommittee on Immigration, Border Security, and Claims of the House Committee on the Judiciary); *see also supra* note 4 and accompanying examples.

106. TREA Senior Citizens League, *supra* note 87.

107. *Hearings, supra* note 7, at 37 (statement of Kenneth S. Apfel, LBJ School of Public Affairs, the University of Texas at Austin).

108. Social Security Agreement, U.S.-Chile, Dec. 1, 2001, [http://www.ssa.gov/international/Agreement\\_Texts/chile.html](http://www.ssa.gov/international/Agreement_Texts/chile.html).

109. *Hearings, supra* note 7, at 37 (statement of Kenneth S. Apfel, LBJ School of Public Affairs, the University of Texas at Austin).

110. *Id.*

111. *Id.*

agreements.”<sup>112</sup> Also, these costs may be less significant when considered in light of the potential benefits of a SSTA.

**1. ANTI-IMMIGRANT SENTIMENT AND ITS ROLE IN THE DEBATE OVER ENACTING A SSTA WITH MEXICO**

When examining the debate over a SSTA with Mexico, it is clear immigration is the driving force behind most disagreements. Many Mexican immigrants stand to gain under a SSTA, and it is believed that an agreement would encourage immigration from Mexico to the United States.<sup>113</sup> It is no surprise that groups that generally oppose immigration also oppose a totalization agreement.<sup>114</sup> One commentator stated that “[i]mmigration restrictionists are apoplectic over the news that the United States has entered into a ‘totalization’ agreement with Mexico.”<sup>115</sup>

There is a widespread belief in the United States that unauthorized immigrants cost the government more than they contribute to the economy.<sup>116</sup> Several recent surveys have found that a significant portion of Americans believe “immigration hurts the United States more than it helps,” immigrants “are a burden on our country because they take our jobs, housing and health care,” and “[t]he growing number of newcomers from other countries threatens traditional American customs and values.”<sup>117</sup> On the more extreme side, a recent report by the Anti-Defamation League has found the Ku Klux Klan has experienced a troubling resurgence by exploiting the immigration debate.<sup>118</sup> While

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112. *Id.*

113. MARTI DINERSTEIN, CTR. FOR IMMIGRATION STUDIES, SOCIAL SECURITY ‘TOTALIZATION’ EXAMINING A LOPSIDED AGREEMENT WITH MEXICO 1 (2004), <http://www.cis.org/articles/2004/back904.pdf>.

114. See Federation for Immigration Reform, *Social Security Funds for Illegal Aliens?*, [http://www.fairus.org/site/PageServer?pagename=iic\\_immigrationissuecenters3acf](http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters3acf) (last visited Sept. 25, 2007) (FAIR is an anti-immigration group that published this anti-totalization agreement article); Conservativeusa.org, *Stop Mexican Raid on Our Social Security System*, <http://www.conservativeusa.org/mexico-socsec.htm> (last visited Sept. 25, 2007) (Conservativeusa.org is also anti-immigration and anti-SSTA).

115. Ruben Navarrette Jr., *Social Security Is About Math, Not Mexicans*, CNN.COM, Jan 15, 2007, <http://www.cnn.com/2007/US/01/15/navarrette/>.

116. Lipman, *supra* note 56, at 1–2.

117. PEW HISPANIC CTR., THE STATE OF AMERICAN PUBLIC OPINION ON IMMIGRATION IN SPRING 2006: A REVIEW OF MAJOR SURVEYS 3 (2006), available at <http://pewhispanic.org/files/18.pdf>.

118. Press Release, Anti-Defamation League, *Ku Klux Klan Rebounds with New Focus on Immigration* (Feb. 6, 2007), available at [http://www.adl.org/PresRele/Extremism\\_72/4973\\_72.htm](http://www.adl.org/PresRele/Extremism_72/4973_72.htm).



the validity of these statements is debatable, particularly with respect to Social Security, anti-immigrant sentiments do seem to be infiltrating the debate over a SSTA with Mexico.<sup>119</sup> When reviewing the arguments and statements made by opponents, many use the anti-immigrant sentiment to bolster their argument.<sup>120</sup>

### B. The Potential Costs of a SSTA with Mexico

Many opponents to a SSTA with Mexico fear the potential costs to the United States.<sup>121</sup> One such cost is the possibility that Mexican workers and their dependents will become eligible for U.S. Social Security benefits based on work performed in the United States without authorization.<sup>122</sup> This is especially controversial because in certain circumstances such work does not violate Social Security payment rules.<sup>123</sup>

According to SSA estimates, a SSTA with Mexico would cost the U.S. Social Security system an average of \$105 million per year over the first five years<sup>124</sup> and would reach an estimated \$650 million by 2050.<sup>125</sup> The reasons for these increasing costs include the increased number of workers who will qualify for benefits by totalizing their work credits, the reduced Social Security tax contributions under the dual tax exemption, and the removal of some restrictions on benefit payments to noncitizens' family members living abroad.<sup>126</sup> SSA actuaries have predicted that a SSTA with Mexico would have "a negligible long-range effect on the [Social Security] Trust Funds."<sup>127</sup> Critics of a SSTA with Mexico argue that the SSA's cost estimates are deeply flawed<sup>128</sup> and that an agreement with Mexico is a "deal to give up to \$345 billion . . . in Social Security benefits to illegal aliens from Mexico."<sup>129</sup>

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119. Lipman, *supra* note 56 at 1 (citing multiple sources stating that immigrants contribute more than they take).

120. *Id.*

121. See Weisman, *supra* note 12.

122. NUSCHLER & SISKIN, *supra* note 16 (explaining how non-U.S. Citizens *may* collect U.S. Social Security Benefits).

123. *Id.* at 6–7.

124. Mexico Totalization Agreement Factsheet, *supra* note 3.

125. U.S. GEN. ACCOUNTING OFFICE, *supra* note 34, at 9.

126. *Id.* at 8; see Mexico Totalization Agreement Factsheet, *supra* note 3.

127. Mexico Totalization Agreement Factsheet, *supra* note 3.

128. See HAYWORTH, *supra* note 12, at 131–32.

129. Joel Mowbray, "Traitor", NAT'L REVIEW ONLINE, Jan. 30, 2003, <http://www.nationalreview.com/mowbray/mowbray013003.asp>.

The SSA cost estimates for a SSTA with Mexico assume there would initially be 50,000 newly eligible Mexican beneficiaries and that over time these numbers would increase to 300,000 eligible beneficiaries.<sup>130</sup> Normally, when estimating the cost of a SSTA with a partner country, the SSA looks at pertinent data from previous agreements with the partner country, work visas issued, foreign corporations operating in the United States, and U.S. Census data.<sup>131</sup> However, in estimating the cost of the SSTA with Mexico, the SSA concluded that U.S. Census data would not be appropriate for estimating the number of new beneficiaries because the number of unauthorized workers from Mexico is much greater than other SSTA countries.<sup>132</sup> Instead, the SSA “used the number of fully insured beneficiaries—U.S. citizens and others living in Mexico—currently receiving U.S. Social Security benefits as a proxy for the number of Mexican citizens who would initially receive totalized benefits.”<sup>133</sup> As a “rough check on the reasonableness of using current beneficiaries in Mexico for its cost estimates,” the SSA used the ratio of Canadians receiving totalized versus fully insured benefits in Canada.<sup>134</sup> When the ratio was applied to the number of fully insured beneficiaries in Mexico, the SSA found that approximately 37,000 new initial beneficiaries could be expected to qualify for totalized benefits provided “the Canadian experience proves predictive of the Mexican outcome.”<sup>135</sup>

The GAO has criticized the assumptions used by the SSA in its cost estimates for a SSTA with Mexico, calling the estimates “highly uncertain.”<sup>136</sup> According to the GAO, the lack of data on unauthorized Mexican workers is the reason for this uncertainty.<sup>137</sup> The GAO found the assumption of 50,000 individuals who might initially benefit from a SSTA with Mexico did “not directly consider the estimated millions of unauthorized Mexican immigrants in the United States and Mexico who are not fully insured and might receive totalized benefits.”<sup>138</sup> The GAO also considered the predicted increase to 300,000 recipients of totalized benefits to be very low given the esti-

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130. U.S. GEN. ACCOUNTING OFFICE, *supra* note 34, at 9.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 10.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 11.

mates of unauthorized workers.<sup>139</sup> The GAO considered the comparison to Canada unpersuasive for the same reason.<sup>140</sup> The GAO also points out that under a SSTA, “unauthorized workers would have an additional incentive to enter the United States to work,” a factor not considered in the SSA’s estimates.<sup>141</sup> Further, the GAO mentions that according to the SSA’s own sensitivity analysis, if the number of new beneficiaries is off by as little as 13,000 people, there may be a long-term impact on the U.S. Social Security program.<sup>142</sup> Despite these criticisms, the SSA stands by its estimates, stating the estimates are based on the best available data and not all unauthorized workers would become eligible for benefits if they are not paying into the system.<sup>143</sup>

**1. THE NUMBER OF UNAUTHORIZED MEXICAN WORKERS MATTERS IN ESTIMATING THE COST OF A SSTA WITH MEXICO**

Many immigrants work without authorization and pay Social Security taxes.<sup>144</sup> The Social Security Protection Act of 2004 requires all noncitizens who apply for Social Security benefits after 2003 “to have work authorization at the time a Social Security Number is assigned, or at some later time, to gain insured status under the Social Security program.”<sup>145</sup> The Act also requires noncitizens in the United States to be “lawfully present” to receive benefits.<sup>146</sup> Additionally, benefit payments are suspended if the noncitizen remains outside the United States for more than six consecutive months.<sup>147</sup>

While this would appear to preclude a noncitizen from receiving U.S. Social Security benefits in the United States if he or she is not legally present *and* to suspend benefits once he or she has left the country, this is not always the case.<sup>148</sup> Because Mexico is considered a “social insurance country,”<sup>149</sup> a Mexican citizen can receive U.S. Social Security benefits even when outside the United States.<sup>150</sup> While a

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139. *Id.* at 12.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 16–18.

144. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 63, at 3.

145. NUSCHLER & SISKIN, *supra* note 16, at 3–4.

146. *Id.* at 4 (noting that it can be based on unauthorized work).

147. *Id.* at 4–5.

148. *Id.* at 5.

149. *Id.* at 5, app. A.

150. *Id.* at 5.

SSTA would also allow a noncitizen to collect benefits while outside of the United States, this would not be necessary for Mexican citizens because of this exception. However, for dependents and survivors of noncitizens to receive benefits while outside the United States, they “must have lived in the United States for at least five years previously (lawfully or unlawfully) and the family relationship to the worker must have existed during that time.”<sup>151</sup> Mexico does not currently qualify for any of the several exceptions to the survivor residency requirements.<sup>152</sup> Because a SSTA is one of the exceptions, a SSTA with Mexico would allow for dependents or survivors to collect benefits without having been in the United States.<sup>153</sup>

### C. Benefits of a SSTA with Mexico

Although the implementation of a totalization agreement with Mexico is shrouded with controversy, there are numerous benefits that would result if the agreement is enacted.

#### 1. THE GENERAL BENEFITS OF A SSTA WITH MEXICO

Just as a SSTA with Mexico would make certain Mexican citizens eligible for U.S. benefits, an agreement would also make certain U.S. citizens eligible for Mexican benefits. Current estimates suggest that three thousand U.S. citizens are working in Mexico.<sup>154</sup> Without a SSTA, many of these workers and their employers are likely paying social security taxes to both the United States and Mexico.<sup>155</sup> The SSA estimates that U.S. workers and their employers would save approximately \$140 million in taxes paid to Mexico in the first five years of a SSTA.<sup>156</sup> The SSA further estimates that U.S. workers and their dependants would get additional benefits of about \$29 million dollars a year from the Mexican Social Security system because of a SSTA.<sup>157</sup> Proponents of a SSTA with Mexico argue that as a matter of fairness to workers and employers doing business in Mexico “we should elimi-

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151. *Id.*

152. *Id.* at 5, app. A.

153. *Id.* at 5.

154. *Hearings, supra* note 7, at 4 (statement of Comm’r Jo Anne B. Barnhart).

155. *Id.*

156. Mexico Totalization Agreement Factsheet, *supra* note 3.

157. *Hearings, supra* note 7, at 10–11 (statement of Comm’r Jo Anne B. Barnhart).

nate double taxation and establish a framework to blend benefit coverage.”<sup>158</sup>

Additionally, those who support a SSTA with Mexico argue that as the U.S. and Mexican economies become more interconnected through agreements such as NAFTA, more American workers will spend part of their careers working in Mexico, making an agreement even more necessary.<sup>159</sup> From an economic perspective, the systemic gains of increased trade with Mexico could be worth the additional costs associated with a SSTA. Also, if there were systemic economic gains, this would be consistent with the congressional intent of amending the Social Security Act to enhance trade with foreign nations.<sup>160</sup>

## 2. IMMIGRATION AND THE SOCIAL SECURITY SYSTEM

The average age of the American population is increasing<sup>161</sup> as a result of increased longevity and decreasing birth rate.<sup>162</sup> Because of this longer life expectancy, when the Baby-Boomer generation reaches retirement age the U.S. Social Security system will be out of balance,<sup>163</sup> benefit payments will exceed payroll taxes and interest accrued on the Social Security Trust Funds.<sup>164</sup> According to the Trustees of OASDI Trust Funds, the “[a]nnual cost will begin to exceed tax income in 2017 for the combined OASDI Trust Funds, which are projected to become exhausted and thus unable to pay scheduled benefits in full on a timely basis in 2040.”<sup>165</sup>

Some unauthorized workers pay into the U.S. Social Security system, and because of this, may be able to collect Social Security benefits.<sup>166</sup> While there is no official data on the amount of money unauthorized workers are paying into the U.S. Social Security system,

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158. *Id.* at 37 (statement of Kenneth S. Apfel).

159. *Id.*

160. *See id.* at 8 (statement of Comm’r Jo Anne B. Barnhart) (explaining that one intent of amending the Social Security Act to include totalization agreements was to enhance trade with foreign nations).

161. LOUISE AUERHAHN & BOB BROWNSTEIN, *WORKING P’SHPIS USA, THE ECONOMIC EFFECTS OF IMMIGRATION IN SANTA CLARA COUNTY AND CALIFORNIA* iv (2004).

162. Abigail Trafford, *Immigration Is an Aging Issue*, WASH. POST, Apr. 18, 2006, at F01.

163. *See id.*

164. H.R. Doc. No. 109-103, at 2 (2006).

165. *Id.*

166. *See generally* NUSCHLER & SISKIN, *supra* note 16, at 10 (discussing benefits received by alien workers under various totalization agreements).

the SSA maintains an earning suspense file (ESF) which tracks wages that can not be posted to an individual worker's account.<sup>167</sup> As of October 2005, the ESF had reached an estimated \$520 billion dollars.<sup>168</sup> The majority of the ESF is suspected to be wages of unauthorized workers.<sup>169</sup> The ESF represents about \$7 billion in withheld taxes annually, about 10% of the 2004 Social Security surplus.<sup>170</sup> In fact, the SSA factors this money into all of its financial projections for the Social Security system.<sup>171</sup>

Immigration helps the U.S. Social Security system because immigrants tend to be of working age and usually contribute more than they take from the system.<sup>172</sup> Unauthorized workers who pay into the Social Security system, but are not eligible to receive benefits, help even more.<sup>173</sup> According to the SSA's calculations, if 1.3 million immigrants entered the United States a year—400,000 more than current estimates—"the system's 75-year funding gap would narrow to 1.67 percent of total payroll, from 1.92 percent," a savings of half a trillion dollars.<sup>174</sup> Therefore, even if a SSTA with Mexico would increase the number of Mexicans who could receive benefits, even for unauthorized work, the long-term benefit they provide to the system may outweigh any cost.

### 3. BENEFITS TO THE ELDERLY OF A SSTA WITH MEXICO

If a SSTA with Mexico is approved, there are benefits that could improve the lives of older Americans in addition to direct Social Security benefits. Some of these benefits include maintaining the solvency of the U.S. Social Security system, attracting younger workers to fill the essential jobs the elderly can no longer perform, and ensuring a source of caretakers for the aging population of the United States.<sup>175</sup>

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167. *Id.* at 2.

168. *Id.*

169. Porter, *supra* note 77.

170. *Id.*

171. *Id.*

172. See AUERHAHN & BROWNSTEIN, *supra* note 161, at iii-iv; Porter, *supra* note 77 ("Immigration can help solve both these problems, because immigrants have no 'baby boom' generation, and most arrive in the US during their prime working years . . . [i]mmigrants can therefore provide the workforce to support Baby Boomers in retirement and make up for the reduction in the working-age population.").

173. See Porter, *supra* note 77.

174. *Id.*

175. See AUERHAHN & BROWNSTEIN, *supra* note 161, at iv.

Additionally, as discussed previously, the increased number of unauthorized workers may actually add more to the system than they take out.

In addition to affecting the age structure of society and improving the fiscal health of Social Security, if a SSTA increases the number of immigrants that enter the United States from Mexico, with or without authorization, the elderly would further benefit because many immigrants provide hands-on care for the elderly.<sup>176</sup> Immigration helps fill the essential jobs of caring for people in hospitals and nursing homes.<sup>177</sup> As the U.S. population continues to age, more and more elder care jobs will need to be filled.<sup>178</sup> According to the Department of Health and Human Services, the elder care workforce was 1.9 million in 2000, and the workforce must reach 2.7 million by 2010 and 5 million by 2050 to meet the increased needs of the aging population.<sup>179</sup>

In addition to a decreasing population of American workers who primarily fill these elder care positions, American-born women between twenty-five and fifty years-old, many American workers are fleeing these jobs because of “poor pay, few benefits and no security.”<sup>180</sup> The current number of visas available to less-skilled workers, such as those who care for the elderly, will not be sufficient to meet this demand for elder care in the near future.<sup>181</sup> If a SSTA with Mexico were to encourage workers from Mexico to come to the United States to assist in caring for the nation’s elderly, it would directly improve the number of available workers who care for the aging U.S. population.

#### IV. Recommendation

When the SSTA with Mexico reaches President Bush’s desk, he should sign it and transmit it to Congress. Upon receiving the SSTA Congress should not take any action to block it. First, if Congress tried to block the SSTA, this may be an unconstitutional legislative veto of the President’s authority.<sup>182</sup> Second, the benefits of entering into a SSTA with Mexico are greater than any difficulties.

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176. Trafford, *supra* note 162.

177. *See id.*

178. *See* Newman, *supra* note 62.

179. *Id.*

180. *Id.*

181. *Id.*

182. *See* INS v. Chadha, 462 U.S. 919, 928 (1983).

Entering into a SSTA with Mexico would help improve the United States' economic relationship with Mexico, its second largest trading partner. By implementing a totalization agreement with Mexico, U.S. companies will find it easier to do business in Mexico, and Americans will be able to work in Mexico without facing potential double taxation. In addition to the individual benefits a worker who spends time in Mexico will receive, there are greater societal benefits of a SSTA.

If a SSTA encourages additional Mexican immigrants to come to the United States and they are employed in Social Security covered jobs, the immigrants will be paying into the U.S. Social Security system. Because the U.S. population is aging and there are fewer younger workers paying into the system to support those receiving retirement benefits, having an influx of younger workers will help maintain the fiscal health of the system. Many critics of the SSTA are focused on the additional number of Mexican workers who would eventually become eligible for benefits.<sup>183</sup> However, if these workers can reduce the funding gap in the U.S. system, they may in fact save the system more than they will cost it. Also, because many of the Mexican workers encouraged to come to the United States would be low-skilled, low-wage workers, they will help fill gaps in the labor market that the U.S. workforce cannot fill. Many of these jobs are directly related to the caring for the elderly.

Even without a SSTA with Mexico, it is possible for unauthorized workers to collect Social Security benefits from the U.S. Social Security system, so critics of a SSTA need not worry. If an unauthorized worker is using a SSN issued before 2004, he or she could potentially receive benefits for work performed within the United States. A SSTA will lessen the number of U.S.-earned work credits needed to collect benefits. Under a SSTA, the unauthorized worker would still have to show they contributed to the Mexican system. Thus, entering into an agreement with Mexico may not open the flood gates critics fear. Also, it is important to remember that many of the Mexican workers are in their prime working years and will not collect benefits for a long time. While the SSTA does remove the residency requirement for beneficiaries of workers and the number of people receiving benefits may thus increase, the amount of additional benefits will be pro-

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183. Joel Mowbray, *Illegal but Paid? The Question of Social Security for Mexicans*, NAT'L REV., Jan. 27, 2003, at 22.



portional to the amount of credits earned in the United States. Additionally, it should be reiterated that only those unauthorized workers who have contributions withheld would ever become eligible to receive benefits.

Opponents of paying Social Security benefits to unauthorized workers argue that aliens who violate immigration laws should not be rewarded with Social Security benefits. The reality, however, is that by not giving these workers benefits the United States is exploiting some of the most low-wage and vulnerable members of the American workforce. One way to avoid the exploitation of Mexican workers is to adopt an immigration reform program that allows more workers into the United States legally. This eliminates the need to use fraudulent or invalid Social Security papers.

President Bush has said that “every human being has dignity and value no matter what their citizenship papers say.”<sup>184</sup> Granting benefits to those who have paid into a system is consistent with that message. There may well be initial growing pains from entering into a SSTA with Mexico because the program will likely cover more workers than all the existing SSTAs combined. However, the potential benefits could be just as large.

## V. Conclusion

Currently, the United States has SSTAs with Canada and Japan, our first and third largest trading partners. Having an agreement with Mexico, our second largest trading partner, is consistent with improving economic ties with our other NAFTA partner. Such an agreement would also likely improve economic relations between the United States and Mexico. Critics believe that the large number of unauthorized workers from Mexico that could potentially qualify for Social Security benefits makes a SSTA with Mexico too costly. However, when balanced with the possible benefits of entering into a SSTA, these additional benefit payments may be a small price to pay. Increasing the number of younger workers entering the U.S. workforce may help improve the financial security of the U.S. Social Security system. Also, the low-skilled, low-wage workers coming from

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184. President George W. Bush, Address to the Nation on Immigration Reform (May 15, 2006), available at <http://www.whitehouse.gov/news/releases/2006/05/20060515-8.html>.

Mexico will help fill the needs of the aging and elderly population in America. In addition to avoiding the double taxation of American workers working abroad in Mexico, a SSTA will also help sustain the Social Security system and help improve the lives of the elderly by ensuring the source of the necessary care is not eliminated.