TO THE
PRESIDENTIAL TRANSITION TEAM

IN RE:
SOCIAL SECURITY AND IMMIGRATION REFORM MEASURES

TSCL PETITION
IN SUPPORT OF SOCIAL SECURITY PROTECTION, AND IN OPPOSITION TO BUSH ADMINISTRATION'S UNITED STATES-MEXICO TOTALIZATION AGREEMENT

SUBMITTED BY

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TSCL RECOMMENDED POLICY
relating to
SOCIAL SECURITY TOTALIZATION AGREEMENT WITH MEXICO

The United States/Mexico Totalization Agreement, negotiated and signed by the Bush Administration, but never submitted to Congress, is in need of renegotiation and amendment. If put into effect as it currently stands, this unwise and unfair agreement would drain funds away from the Social Security trust funds set up to provide benefits to America's senior citizens, as well as to all present and future generations of the American people, who have contributed to the fund and who have reasonably relied upon the Social Security system to supplement their savings and investments in their retirement years.

Absent an amendment that expressly provides that illegal immigrants are ineligible for U.S. Social Security benefits, the U.S./Mexico Totalization Agreement should not be submitted to Congress for final review. And, if the agreement were to be submitted by President Bush in the closing days of the current administration, it should be rejected by both houses of Congress. We urge the President-Elect to decline to submit the treaty to Congress, and to support Congressional measures that would require any Social Security totalization agreement to be negotiated and approved only by the constitutional means prescribed by the treaty ratification process in Article II, Section 2 and the bicameral and presentment legislative process in Article I, Section 7, of the Constitution.

EXECUTIVE SUMMARY

Threats to Social Security. Social Security is in jeopardy. It is critical that our political leaders focus now on how to save the program and keep the promises made to those for whom the system was created to sustain. In part, the American people are at risk because of the Bush Administration's strategy to extend the benefits of America's Social Security program to illegal Mexican immigrants. A principal element of that strategy is the pending **United States/Mexico Totalization Agreement[1] that could cost the American taxpayers billions of dollars, and put the Social Security trust funds in even greater jeopardy than they are already.** This agreement was executed for the United States by President Bush's Commissioner of Social Security on June 29, 2004, but not yet submitted for the required congressional review.

Bush Immigration Reform. On January 7, 2004, President George W. Bush announced that, as part of his proposed "guest worker" program addressing the problem of illegal Mexican immigration in the United States, he favored "financial incentives" for temporary foreign "workers to return to their home countries after their period of work in the United States expires." To that end, the President pledged to "work with foreign governments on a plan to give temporary workers credit, when they enter their own nation's retirement system, for the time that they worked in America."[2]

Bush Mexican Totalization Agreement. Six months later, on **June 29, 2004**, the United States Social Security Administration announced that it had **negotiated a Social Security totalization agreement** with Mexico, assuring the American people that the agreement would:

(a) "save U.S. workers and their employers about $140 million in Mexican social security and health insurance taxes over the first 5 years of the agreement";

(b) "cost … the U.S. Social Security system [an] estimated average [of] about $105 million per year over the first 5 years"; and

(c) have "a negligible long-range effect on the [Social Security] Trust Funds."

Statutory Approval Process. Pursuant to 42 U.S.C. Section 433(e)(1), a totalization agreement will not become effective if either the Senate or the House of Representatives passes a resolution of disapproval, but each house will have only 60 legislative days (after submission of the agreement to Congress) within which to act before the agreement would become fully effective and legally binding on the United

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[1] *See* http://www.ssa.gov/international/Agreement_Texts/mexico.html.

[2] "President Bush Proposes New Temporary Worker Program," Remarks by the President on Immigration Policy, The East Room (January 7, 2004) http://www.whitehouse.gov/news/releases/2004/01/print/20040107-3.html

States. The Senior Citizens League ("TSCL") believes, moreover, that the current process by which totalization agreements are approved, which allows them to go into effect unless one house of Congress votes its disapproval, violates the Article II, Section 2 treaty ratification provision and the Article I, Section 7 bicameral and presentment provision of the U.S. Constitution.

GAO Study on Flawed Bush Cost Estimates. According to a **U.S. Government Accountability Office ("GAO") report** dated September 30, 2003, the Social Security Administration's Mexico totalization agreement projections were based upon **insufficient and "poor data**,"

(a) overstating the **system controls and data integrity processes** of the Mexican social security system and

(b) understating the **number of Mexican workers**, both legal and illegal, who would qualify for Social Security benefits under the agreement, thereby

(c) **underestimating** by "several orders of magnitude" both the short-range and long-range **costs** of the proposed U.S./Mexico Totalization Agreement on the United States Social Security program and its Trust Funds.

Notwithstanding these GAO findings, SSA indicated that the agreement it had negotiated with the Mexican Social Security officials was under executive department review with the expectation that President Bush would sign the agreement and submit it to Congress.

TSCL FOIA Requests. In the face of refusals by the SSA and the U.S. Department of State to respond adequately to **TSCL's Freedom of Information Act ("FOIA") requests** for records concerning the U.S./Mexico Totalization Agreement, TSCL filed **two lawsuits in federal court** to force those agencies to disclose the Agreement and other documents being hidden from the American people because they contain damaging information about a virtually **secret pact** that would transfer a great deal of wealth from the United States to Mexico, and one which potentially jeopardizes the Social Security trust funds.

TSCL obtains disclosure of documents. TSCL's litigation success in persuading those agencies to disclose the agreement, along with other relevant documentation, resulted in a flurry of non-government publicity about the Totalization Agreement in early 2007. However, the Administration has continued to treat the issue with **silence**, and virtually nothing further has been learned about the current status of the U.S./Mexico Totalization Agreement, whether there are any new financial estimates concerning its projected financial impact, and whether there is still a plan within the Administration to transmit it to Congress for review.

Benefits to Illegal Aliens. A **critical issue** with respect to the U.S./Mexico Totalization Agreement **is whether that Agreement would effectively provide U.S. Social Security benefits to illegal immigrants and their families**. The **Totalization Agreement** itself appears to be considered ambiguous on this issue and the Bush Administration refuses to

address it. **The American public is simply being kept in the dark**. Unless the Totalization Agreement explicitly and affirmatively prevents the provision of benefits to illegal immigrants, SSA's published financial projections as to the impact of the Agreement on the Social Security trust funds would be absurdly low. **In an effort to bring clarity to this question, a diplomatic protocol seeking Mexico's specific understanding that the totalization agreement would not extend social security benefits to illegal Mexican immigrants and their families was submitted to Mexican authorities for their signature. As of this date, this protocol presumably has never been signed.**

Congressional Ban for FY2008. A Congressional appropriations rider currently bars implementation during FY 2008 (ending September 30, 2008). Public Law 110-161 (signed by President Bush on December 26, 2007) provided as follows:

> None of the funds appropriated by the Act may be used by the Commissioner of Social Security or the Social Security Administration to pay the compensation of employees of the Social Security Administration to administer social security benefit payments, under any agreement between the United States and Mexico establishing **totalization arrangements** between the social security systems established by Title 2 of the Social Security Act and the social security system of **Mexico**, which would not otherwise be payable but for such agreement. [Section 526 (emphasis added).]

Senator Max Baucus bill. Several measures designed to stop such an agreement's taking effect have been introduced in the House of Representatives and the Senate. Chairman of the Senate Committee on Finance Max Baucus (D-MT) introduced S. 1666 on June 20, 2007 (a bill "To amend Title 2 of the Social Security Act to improve the process for Congressional consideration of international social security agreements"). This bill would change the process for approval of totalization agreements, requiring a joint resolution approving totalization agreements before they would go into effect.

President-Elect's Statutory Duty. In light of current financial market and mortgage crisis, and rising unemployment in a time of recession, the President-elect would not be able to discharge his statutory duty under 42 U.S.C. Section 433(e)(1) to report to Congress the economic impact of the proposed U.S./Mexico Totalization Agreement without making a thorough reassessment of the costs and benefits of the proposed agreement.

TSCL Recommendation. In light of the undue and unreasonable economic threat that the U.S./Mexico Totalization Agreement poses to the fiscal solvency of the United States Social Security program and its trust funds, **The Senior Citizens League** urges the President-Elect to oppose implementation of the pending Bush Administration U.S./Mexico Totalization

Agreement and to support the Baucus bill, if reintroduced in the 111th Congress, or any similar bill, to support repeal of the current Social Security totalization statute, and to recommend either discontinuing the totalization process altogether or restoring that process to the constitutional bicameral and presentment principles of Article I, Section 7 and the treaty ratification principle of Article II, Section 2 of the United States Constitution.

INTEREST OF THE PETITIONER

The Senior Citizens League (TSCL)[3], is a non-profit, nonpartisan, independent seniors' education and advocacy organization, exempt from federal taxation under section 501(c)(4) of the Internal Revenue Code. Its mission is one of education and social welfare — to educate and alert senior citizens about their rights and freedoms as United States citizens, to support and assist its members and supporters, and to protect and defend the benefits which senior citizens have earned and for which they have paid. To achieve these goals, TSCL advocates the views of seniors before the United States Congress and the Executive Branch, as well as before agencies and departments of the federal government. Unlike many other nonprofit organizations, TSCL accepts no government monies.

TSCL's members have a vested interest in the continued financial integrity of the United States Social Security program and its trust funds, and TSCL therefore is greatly concerned with all policies affecting the Social Security program, including the pending U.S./Mexico Totalization Agreement.

In 2003, based upon stories that the Administration was negotiating a totalization agreement with Mexico, TSCL embarked on a quest to obtain copies of the documentation that would be relevant to such an agreement, including cost projection studies and other data concerning the potential impact of any such agreement on the Social Security trust funds.

On August 4, 2003, TSCL submitted requests under the **Freedom of Information Act** ("FOIA"), 5 U.S.C. § 552, *et seq.*, to the **United States Department of State** and the **Social Security Administration** ("SSA"), seeking records relating to a proposed Social Security totalization agreement between the United States and Mexico. On December 5, 2003, the SSA responded by sending 20 documents consisting of 133 pages, but withheld 43 other documents that it claimed were exempt from mandatory disclosure under FOIA. The 20 documents the SSA did send were public documents, many of them available on the Internet.

The Government Accountability Office ("GAO") has reported "a lack of transparency

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[3] The formal name of The Senior Citizens League is TREA Senior Citizens League.

in SSA's processes,"[4] and TSCL has found this to be true. No meaningful response from the State Department (other than a time period inquiry) was received, and on March 8, 2004, another letter was sent to the Department. Only then did the State Department inform TSCL that pertinent documents relating to a U.S./Mexico Totalization Agreement do indeed exist, and that those documents are held by the United States Embassy in Mexico. The State Department submitted several requests to the Embassy, which were ignored until, finally, the Embassy denied having any responsive documents. To date, no substantive response — and no meaningful documents — have been received from either the State Department or the United States Embassy in Mexico.

TSCL filed a **second set of FOIA requests** to the SSA and the State Department on May 5, 2005. These requests — including a specific request for a copy of the U.S./Mexico Totalization Agreement — also were essentially ignored. Because of this non-response to its FOIA requests, TSCL filed complaints in the United States District Court for the District of Columbia against both the SSA and the State Department, seeking an injunction requiring production of the requested documents under FOIA as provided by law.[5]

On November 10, 2005, TSCL submitted to Congress a Petition for Redress of Grievances on this matter, distributing its petition to all 100 members of the United States Senate and 435 members of the House of Representatives, a majority vote of either house of which could stop this threat if the U.S./Mexico Totalization Agreement were submitted for congressional review.

TSCL's FOIA lawsuits ultimately resulted in a **settlement** whereby the government agencies disclosed a number of documents in December 2006, including a copy of the U.S./Mexico Totalization Agreement itself, Diplomatic Note No. 1539-2004, and an outgoing telegram to the Government of Mexico — State Department documents indicating concern with respect to whether the Totalization Agreement could be interpreted to provide Social Security benefits to illegal immigrants. No post-2003 economic studies or financial data were provided by either government agency with respect to the potential financial impact of the U.S./Mexico Totalization Agreement on the Social Security trust funds. On July 7, 2008, TSCL submitted new FOIA requests to both the SSA and the State Department to obtain any new records regarding the U.S./Mexico Totalization Agreement. To date, TSCL has not received any documents responsive to its 2008 FOIA requests, nor has it received a response from either government agency identifying any such documents.

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[4] GAO Report to Congressional Requesters (GAO-03-993), "Social Security: Proposed Totalization Agreement with Mexico Presents Unique Challenges," September 2003, p. 6.

[5] The two lawsuits were: TREA Senior Citizens League v. U.S. Department of State, Civil Action No. 06-1201 (CKK) (D.D.C. 2006), and TREA Senior Citizens League v. Social Security Administration, Civil Action No. 06-1202 (JDB) (D.D.C. 2006).

STATEMENT OF FACTS

A. Statutory Authority for Social Security Totalization Agreements

In 1977, the **Social Security Act** ("the Act") was amended to provide a procedure for the United States to enter into **"totalization" agreements** with foreign nations in order to establish "entitlement to and the amount of old-age, survivors, disability, or derivative benefits," based on a combination of an individual's periods of coverage under the social security systems of the United States and foreign nations. 42 U.S.C. § 433. *See* Attachment B.

Under the Act, the **Commissioner of Social Security** is charged with making rules and regulations implementing the procedures authorized by the Act (42 U.S.C. section 433). The current regulations, adopted in 1979, are set forth in 20 CFR §§ 404.1901, *et seq.*

The Act does not specify how totalization agreements are to be negotiated, and the regulations are vague on this subject.[6] Ms. Jo Anne Barnhart, the 14th Social Security Commissioner, explained the **Bush administration's internal procedure** during a Congressional hearing in September 2003:

> After a totalization agreement is negotiated, the first step is for **SSA's General Counsel** to review the draft agreement to ensure that it is fully consistent with American law. Second, the **State Department** reviews the draft agreement in terms of its consistency with overall American interests. If the draft is cleared by the State Department and the **White House**, the agreement is then **formally signed** by representatives of the two governments. The Secretary of State then transmits the signed agreement to the President…. [Hearing, Committee on the Judiciary, Subcommittee on Immigration, Border Security and Claims, September 11, 2003 (emphasis added).]

Under section 433(e)(1) of the Act, the President must transmit a totalization agreement to Congress "together with a report on the **estimated number of individuals** who will be

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[6] "An agreement shall be negotiated with the national government of the foreign country for the entire country. However, agreements may **only be negotiated with foreign countries that have a social security system of general application in effect**. The system shall be considered to be in effect if it is **collecting** social security taxes **or paying** social security benefits." *See* 20 CFR § 404.1903 (emphasis added).

affected by the agreement and the **effect of the agreement** on the estimated income and expenditures of the programs established by this Act." (Emphasis added.)

Under section 433(e)(2) of the Act, a totalization agreement, once properly submitted to Congress:

> **shall become effective** on any date, provided in the agreement, which occurs after the expiration of the period … during which at least one House of the Congress has been in session on each of **60 days**; **except** that such agreement shall not become effective if, during such period, **either House of the Congress** adopts a **resolution of disapproval** of the agreement. [Emphasis added.]

The first United States totalization agreement was signed with Italy in 1978;[7] since then, 22 totalization agreements have been signed and implemented by the United States,[8] with Congress declining to disapprove any of the agreements submitted to it. However, the vast majority of these agreements have been with European nations, and nearly all of the totalization agreements thus far have been with nations whose level of economic development is comparable to that of the United States. (*See* Appendix C.)

For reasons explained below, the totalization agreement here under scrutiny, the U.S./Mexico Totalization Agreement, is in a class by itself. Nevertheless, it is governed by the procedures set forth in the statute, 42 U.S.C. § 433, and the regulations, 20 CFR §§ 404.1901, *et seq*. It remains, therefore, to review the specific requirements of those laws to determine whether, thus far, the proposed U.S./Mexico Totalization Agreement meets the statutory purposes, policies, and procedures prescribed for such agreements.

B. Existing Social Security Totalization Agreements

Since 1978, the United States has signed and implemented totalization agreements with many western European countries — currently there are 22 such agreements, not counting the pending agreement with Mexico (*see* Appendix D). In 2004, SSA paid **$2.4 billion** to 430,000

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[7] Interestingly, the first two totalization agreements, with Italy (1973) and Germany (1976), were signed before the 1977 law was passed by Congress.

[8] U.S. International Social Security Agreements, Social Security Administration. http://www.ssa.gov/international/agreements_overview.html. *See* Appendix C for a list of the countries with totalization agreements.

foreign beneficiaries, while it paid **$206 million** to 102,000 foreign beneficiaries who were using "totalized" credits.[9]

Totalization agreements were designed to solve two problems inherent in the migration of workers across national borders. First, many workers and employers have been required to pay taxes to two countries: the country from which they migrated, and the country in which they work. Totalization agreements were envisioned to lift this economic burden on foreign employers and workers by eliminating dual taxation. Second, many workers were splitting their working lives between two or more countries. Though these people worked enough total years to qualify for benefits under either country's retirement program, they had not worked enough years under either system to qualify independently. In the absence of any totalization agreement, many workers were unable to receive any retirement benefits. Thus, totalization agreements were designed so that workers could receive benefits from any of the countries in which they had worked.

1. Totalization of Credits

Totalization agreements allow workers to earn generic "credits" for their work, good for receiving retirement benefits in either country. In the United States, one credit is earned "for each $890 of covered annual earnings," with a maximum of one credit per quarter, or four credits earned per year.[10] These credits, from the United States and other countries, can then be totaled together to receive benefits. Credits, even when used abroad, remain held by the issuing country, and can later be used to qualify for benefits there. Workers qualifying for full benefits in two different countries (without transferring any credits) will have each set of benefits reduced to prevent overcompensation. Depending on the number of foreign credits used, benefits are also "prorated," or proportionally reduced, by the appropriate country.

For foreign workers operating under these agreements, United States benefits are limited to Social Security alone, and do not apply to other related federal programs such as

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[9] GAO Report to Congressional Requesters (GAO-05-250), "Social Security Administration: A More Formal Approach Could Enhance SSA's Ability to Develop and Manage Totalization Agreements," February 2005. http://www.gao.gov/cgi-bin/getrpt?GAO-05-250. Hereinafter, GAO, 2005. See also, "International Agreements of the Social Security Administration," The Migration Policy Institute (January 29, 2004) http://www.migrationpolicy.org/pubs/MPI%20Fact%20Sheet-International%20Agreements%20of%20the%20SSA.FS.pdf.

[10] Special Issues for Younger Medicare Beneficiaries With Disabilities, MedicareEd.org, Issue Brief Volume 4, No. 2, 2003, p. 2. http://www.futureofaging.org/PublicationFiles/V4N2.pdf

Medicare and the Supplemental Security Income (SSI).[11] Many other countries use their Social Security tax programs to pay for supplementary programs (*i.e.,* illness, maternity, and unemployment). However, American citizens working and paying taxes abroad are required to pay a foreign country only that part of the tax that is directed to Social Security and, in so curbing their tax liability, are not eligible for the additional benefits.[12]

2. Dual Taxation

Ordinarily, citizens of one country, working abroad, would be required to pay Social Security taxes in both their native country and, additionally, in their country of employment. Totalization agreements solve this problem by allowing these workers and their employers to pay taxes only once. All workers may obtain a "**Certificate of Coverage**" to prove that they are covered by another country and avoid being taxed twice.

Those sent to work in a foreign country by an employer from their native country follow the "**Detached Worker Rule**," and continue to pay taxes to their native country for time less than five years, and to the foreign country in which they work if they are sent for a period exceeding five years. Workers hired at home by a foreign company follow the "**Territoriality Rule**," and continue to pay taxes at home. Likewise, workers hired abroad by a foreign company pay taxes to that country in which they work. Self-employed workers follow the **"Residency Rule**," always paying taxes to that country in which they reside — with no period of overlap. Finally, workers hired in a foreign country by an employer from their native country pay Social Security taxes to the foreign country alone.[13]

3. Costs and Benefits of Existing Totalization Agreements

According to figures supplied by GAO and the Center for Immigration Studies (CIS), previously-negotiated and implemented totalization agreements have resulted in a positive "net return" to the United States in the form of financial benefits to those American citizens who work abroad in a signatory country.[14] Under these totalization agreements, the government has incurred a debit of $200 million per annum in lost tax revenue — as a result of the elimination of dual taxation — and incurred a debit of $206 million per annum of additional payments to

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[11] "U.S. International Social Security Agreements," Social Security Administration. http://www.ssa.gov/international/agreements_overview.html.

[12] *Id.*

[13] There are exceptions to these general rules contained in some totalization agreements, such as the agreements with Belgium, France, Italy, and Germany.

[14] *See* Chart, Statement of Facts, Section C.3.

persons who would not, but for the totalization agreement, have been entitled to the Social Security benefit amounts under the terms of the agreement. In return, American citizens working in one of the first 21 signatory countries have reaped $800 million in tax savings — as a result of the elimination of dual taxation — and $180 million in Social Security payments from such signatory countries wherein, by utilizing their credits for work in the United States, they have qualified for Social Security benefits. Thus, for the government's having incurred a $406 million debit in the form of tax revenue losses and Social Security benefit payment increases, American citizens working abroad in one or more of the signatory countries have received a $980 million return in the form of tax savings and increased Social Security benefits.

C. Pending Social Security Totalization Agreement With Mexico

On January 7, 2004, President Bush publically announced that, as part of his proposed "guest worker" program addressing the problem of illegal Mexican immigration in the United States, he was pledged to support a plan to give temporary workers credit for the time that they worked in America when such workers enter their own nation's retirement system.[15] On June 29, 2004, the Commissioner of the Social Security Administration signed a twenty-second totalization agreement — the U.S./Mexico Totalization Agreement. Should the President approve it, it would be sent to Congress, along with a report on the estimated individuals who would be affected by the agreement and the effect of the agreement on estimated income and expenditures of the Social Security program.[16] Each house of Congress would then have 60 legislative days to register its objection to the agreement. If neither the Senate nor the House of Representatives registered an objection in the form of a resolution of disapproval, then the proposed U.S./Mexico Totalization Agreement would become effective.[17]

As previously explained, Congress authorized social security totalization agreements to achieve two goals: (1) the elimination of dual taxation on workers whose legal residence was in one country while their place of work was in another; and (2) the totalization of Social Security credits earned by persons who had worked in two or more countries but had earned insufficient credits to qualify for benefits in either country. One would expect, then, that the President's report to Congress would include information that would enable Congress to assess whether the proposed U.S./Mexico Totalization Agreement would meet those criteria.

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[15] "President Bush Proposes New Temporary Worker Program," Remarks by the President on Immigration Policy, The East Room (January 7, 2004) http://www.whitehouse.gov/news/releases/2004/01/print/20040107-3.html.

[16] *See* 42 U.S.C. § 433(e)(1).

[17] *See* 42 U.S.C. § 433(e)(2).

1. Dual Taxation

The U.S./Mexico Totalization Agreement contains a provision (Article 5) appearing to eliminate dual taxation so that no Mexican worker legally employed to work in the United States would be liable to pay an employment or comparable tax to both Mexico, his place of permanent residence, and also to the United States, his place of employment, and vice versa.[18]

While such a provision makes sense in previously-signed totalization agreements, in that both countries have workers lawfully in each other's countries, that does not appear to be the case with the United States and Mexico. This is so because relatively few of the many millions of Mexicans in the United States are lawfully working in the United States for Mexican employers. Most Mexican workers in the United States appear to be either illegal migrant workers that are hired illegally by domestic United States employers, or lawful migrant workers also hired by domestic United States employers. These workers simply do not pay Social Security taxes twice, while some illegal immigrants pay no taxes at all. With respect to those Mexicans who are illegally in the United States, such workers at best pay taxes only to the United States. In light of these facts, the only persons who would gain from any provision eliminating dual taxation would be American workers working in Mexico for an American or Mexican employer. SSA estimated relatively recently that only 3,000 Americans working in Mexico were paying Social Security taxes to both the United States and Mexico.[19]This may increase as trade between the two countries increases, but TSCL has found no reliable estimates projecting such an increase.

2. Dual Coverage

The U.S./Mexico Totalization Agreement contains provisions (Articles 5 and 6) appearing to ensure American and Mexican workers that periods of coverage for individual workers in each country may be combined for the purpose of establishing entitlement to and the amount of old-age, survivors, and disability insurance benefits.[20] As noted above, only a small number of American workers who are employed in Mexico would benefit from such provisions. Further, relatively few Mexican workers in the United States appear to have worked in Mexico either as an employee working for a Mexican company which does business in the United States, or at all. Thus, few, if any, Mexican workers would benefit from such

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[18] *See* 42 U.S.C. § 433(c)(1)(B). However, it is not clear from the U.S./Mexico Totalization Agreement that the lawfulness of residence is a factor in the determination of benefits.

[19] "United States and Mexico Sign Social Security Agreement," June, 2004. http://www.ssa.gov/pressoffice/pr/USandMexico-pr.htm.

[20] *See* 42 U.S.C. § 433(c)(1)(A) and (C).

provisions, simply because most Mexicans — whether they are working legally or illegally in the United States — never paid into the social security system of Mexico. **Since nearly all Mexican workers in the United States have paid no Mexican social security taxes,[21] and legal Mexican workers — who have worked legally in the United States for a total of 10 years — already qualify for Social Security payments upon retirement, a totalization agreement with Mexico would apparently benefit only those Mexican workers who work and have worked illegally in the United States, including countless illegal workers who have already returned to Mexico.**

3. Costs/Benefits to the U.S.

According to figures supplied by GAO, CIS, and SSA, it was estimated that the only costs incurred by the government under the proposed U.S./Mexico Totalization Agreement will be incurred in the form of increased benefits paid out to persons who would not otherwise have been entitled to Social Security benefits. SSA has estimated that amount to be $110 million per annum. GAO and CIS, however, have estimated that the actual amount could be much higher. Even if the SSA estimate of $110 million per annum were correct, and even if the United States lost no tax revenues by the elimination of dual taxation of Mexican workers in the United States, American workers employed in Mexico apparently would only gain $26.8 million per annum in tax savings — resulting from the ban on dual taxation — and $5.8 million per annum in Social Security benefits paid to them by Mexico. Thus, there would be only a 33 percent return to American workers employed in Mexico, as contrasted with the 240 percent return to such workers employed in the foreign countries subject to the first 21 previously negotiated totalization agreements.

United States Cost/Benefit for Totalization Agreements

	All Existing TA's		**U.S. - Mexico TA**	
Itemized Costs and Benefits	**+/-**	**Benefit/Loss**	**+/-**	**Benefit/Loss**
U.S. Social Security payments to totalized beneficiaries	-	$206m	-	$110m
Higher income for U.S. citizens resulting from dual tax elimination	+	$800m	+	$26.8m

[21] Dinerstein, Marti, "Social Security 'Totalization:' Examining a Lopsided Agreement With Mexico," Center for Immigration Studies, September 2004. http://www.cis.org/articles/2004/back904.html

U.S. Government lost taxes	-	$200m	-	$0m
Foreign Social Security payments to U.S. citizens	+	$180m	+	$5.8m
Totals	+	$574m /yr.	-	$77.4m
Return on $1 Investment		$2.41		$0.33

This dramatic difference in return is understandable for three reasons. First, Mexico's Social Security system is completely incongruent with that of the United States. To qualify for full retirement benefits in Mexico, **24 years** (1,250 weeks) of Social Security contributions are required.[22] In the United States, though, only **10 years** of employment contributions are required. Consequently, Mexican workers would be given a greater incentive to work in the United States (legally or illegally) because it would be easier to meet the lesser qualifications. Concurrently, American citizens are given a disincentive to work in Mexico, as they must work more than twice as long to meet benefits qualifications.

Second, there are inherent differences between the United States and Mexican retirement systems. Specifically, Mexican social security pays back to retirees **only what they put into the system**, along with interest.[23] In contrast, anyone who qualifies for benefits in the United States receives a guaranteed minimum level of coverage, regardless of taxes paid. The goal is to guarantee all retirees a basic standard of living, and thus those workers at the lower end of the income scale receive a disproportionately-high level of benefits. This gives poor Mexican workers with low earnings an **incentive to leave Mexico**, where their social security payments will be proportionally small. It encourages them to enter the United States (legally or illegally) in order to receive larger Social Security benefits for their relatively small contributions. At the same time, the Mexican social security offers no comparable incentive to American workers to work for any length of time in Mexico.

Third, the economies of Mexico and of the United States are not comparable, whereas the economies of 20 of the first 21 nations with which the United States has approved totalization agreements are comparable. For example, the United States has a per capita GDP of $40,100 and the 20 nations have per capita GDP's ranging from a low of $17,900 to a high

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[22] "Social Security Programs Throughout the World: The Americas, 2003 – Mexico" http://www.ssa.gov/policy/docs/progdesc/ssptw/2002-2003/americas/mexico.html.

[23] *Id*.

of $58,900, with an average of $29,645.[24] By contrast, Mexico's per capita GDP is $9,600, less than onethird the average. Of the first 21 nations which have approved totalization agreements with the United States, only Chile's $10,200 is comparable to Mexico's; Chileans, though, make up a very small percentage of immigrants to the United States, whereas Mexicans are the largest immigrant group to America, comprising approximately 33 percent of all immigrants over the past decade and 69 percent of the unauthorized entrants in the United States from 1990 to 2000.[25]

Because of its close geographic proximity to the United States, the differences in the economic conditions of Mexico and the United States contribute significantly to the steady flow of Mexican immigrants to America. With Mexico's chronically-higher unemployment rate and consistently-higher poverty rate, there is no question that any agreement increasing the amount of U.S. Social Security benefits, and expanding the number of persons eligible to receive such benefits, would, in turn, increase both legal and illegal immigration of Mexicans to the United States, thereby significantly increasing the costs that such an agreement will have on the nation's Social Security system.

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[24] *See* Appendix C.

[25] "Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000," Office of Policy and Planning, U.S. Immigration and Naturalization Service, January, 2003. http://uscis.gov/graphics/shared/statistics/publications/ Ill_Report_1211.pdf. *See* "Rise, Peak, and Decline: Trends in U.S. Immigration 1992-2004," Pew Hispanic Center Report, pp. iii, 6, Appendix A, Table 1b (Sept. 27, 2005) http://pew hispanic.org/files/reports/53.pdf and "Unauthorized Migrants: Numbers and Characteristics, Background Briefing Prepared for Task Force on Immigration and America's Future," Pew Hispanic Center Report, p. 4 (June 14, 2005). http://pewhispanic.org/files/reports/46.pdf.

"Estimates of Unauthorized Immigrants," United States Citizen and Immigration Services, "2002 Yearbook of Immigration Statistics (formerly, Statistical Yearbook of the Immigration and Naturalization Service) - Estimates chapter." http://uscis.gov/graphics/shared/ aboutus/statistics/Illegal2002.pdf.

ARGUMENT

I. THE PENDING U.S./MEXICO TOTALIZATION AGREEMENT POSES UNNECESSARY AND UNREASONABLE RISKS TO THE UNITED STATES SOCIAL SECURITY PROGRAM AND ITS TRUST FUNDS.

While the United States' 22 other totalization agreements may well serve their purpose, such an agreement with Mexico would be different from any other, and thus the U.S./Mexico Totalization Agreement needs special scrutiny. A social security agreement with Mexico appears not to be in the best interests of the United States, and particularly those retired Americans who depend on Social Security. The other 22 countries having totalization agreements with the United States do not tacitly consent to, and even encourage, illegal immigration of their citizens to the United States — while Mexico appears to do just that. Mexico, in fact, accounts for an estimated 69 percent of all illegal immigration to the United States.[26] It is this illegal immigration from Mexico to the United States that makes the U.S./Mexico Totalization Agreement different from all others, and for that reason alone, the proposed agreement should be disapproved.

A. The SSA Investigative, Planning, and Administrative Processes Pertaining to Totalization Agreements Are Inadequate.

Concerned about the costs to the Social Security Trust Funds posed by existing and pending totalization agreements, several members of Congress requested the GAO to conduct a study of: (1) the SSA's policies and procedures for assessing the accuracy of foreign countries' birth, death, and eligibility data when entering into a totalization agreement, and (2) the SSA's processes for verifying foreign beneficiaries' initial and continued eligibility for benefits once an agreement is in force. In response, GAO conducted the requested study and issued its report in February 2005, recommending several changes: (a) in the SSA's investigative and planning processes as pertain to the negotiation of future totalization agreements; and (b) in the SSA's administrative processes as they pertain to the payment of retirement benefits. (GAO-05-250, p. 16.)

1. Investigative and Planning Processes: Negotiation of Agreements

GAO found that, prior to entering into previously-negotiated totalization agreements, "SSA has conducted only limited reviews, focusing primarily on broad policy issues and systems compatibility, rather than the integrity and reliability of earnings data and evidentiary documents."[27] It further found that, while there have been recent improvements in their investigative practices, the "SSA's policies and procedures for assessing the accuracy and

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[27] GAO, 2005, p. 2.

reliability of important information from foreign countries — such as birth and death date — when entering into totalization agreements remains informal."[28] Consequently, the GAO expressed concern that these new initiatives do not "identify and assess the potential risks posed by inaccurate or unreliable foreign data." In response to GAO concerns, SSA has given its assurance that its "current informal approach … is practical given institutional knowledge possessed by experienced managers responsible for overseeing the initiation of the agreements."[29] The GAO, however, expressed dissatisfaction with this response, observing that "without a more formal mechanism in place, given the expected retirement of key management officials in coming years, SSA risks the loss of critical institutional knowledge, thus diminishing the agency's ability to effectively assess risks associated with future agreements."[30]

2. Administrative Processes Pertaining to Eligible Beneficiaries

GAO also found "potential vulnerabilities in SSA's policies and procedures for verifying individuals' eligibility for benefits once an agreement is in force."[31] The SSA "generally accepts documentation from foreign countries' social security agencies with no independent verification of this information when establishing an individual's initial eligibility."[32] In contrast, the SSA has "tools … that it routinely uses in the United States to independently verify domestic beneficiaries' eligibility for benefits."[33] With respect to foreign beneficiaries, however, "due to staff and budgetary limitations …," the **SSA currently has no way of confirming anything about a potential foreign beneficiary** other than his "identity and existence."[34]

Because SSA lacks such tools to verify foreign beneficiaries' initial eligibility, the government relies on two methods to verify such beneficiaries' "identity and continuing eligibility": "**periodic validation surveys**" and "**personal questionnaires**."[35]

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28 GAO, 2005, p. 3.

29 *Id.*

30 *Id.*

31 GAO, 2005, p. 12.

32 *Id.*

33 *Id.*

34 GAO, 2005. (Emphasis added.)

35 GAO, 2005. (Emphasis added.)

The **validation surveys**, however, are conducted in only "3 countries each year," even though such surveys, when conducted, have revealed significant overpayments of benefits.[36] Indeed, a 1998 SSA survey in Canada found approximately $132,000 in overpayments to beneficiaries that had either died or were otherwise ineligible.[37] SSA is hard-pressed to obtain accurate and timely information regarding such things as "birth, death, marriage, divorce, and earnings…."[38] Moreover, in at least one surveyed country, the SSA has documented "the ease of fraudulently obtaining official documents **such as birth certificates through bribes and other means…."**[39]

The **personal questionnaires**, while distributed at least once every two years to all foreign beneficiaries, still make it possible for an ineligible individual to receive benefits for up to two years without ever having to so much as answer a single question as to his eligibility. Additionally, the SSA "typically rel[ies] on [foreign] beneficiaries to accurately self-report [relevant] information with no independent verification to determine the reliability of the responses."[40] Thus, the SSA does not have any mechanism in place to ascertain whether a particular foreign beneficiary has died, or for some other reason, is ineligible to receive benefits.[41]

3. GAO Concerns

The GAO concluded that: (a) the lack of formal protocols governing the investigative and planning processes when entering into agreement negotiations continues to expose the United States Social Security trust funds "to improper payments resulting from inaccurate or incomplete foreign data" and (b) the "relatively limited scope of SSA's current verification procedures may not provide adequate assurance that the trust funds are protected from improper payments" once an agreement is in place.[42]

Thus, because the SSA has no adequate safeguards in place either to determine an individual's initial eligibility or to ensure his continued eligibility, it is not only possible, but

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36 GAO, 2005, p. 13.

37 GAO, 2005.

38 GAO, 2005.

39 GAO, 2005.

40 GAO, 2005, pp. 13-14.

41 GAO, 2005, p. 14.

42 GAO, 2005, p. 15.

also likely, that foreign beneficiaries have taken, are taking, and will continue to take undue advantage of the United States Social Security program.

B. The SSA Investigative and Planning Processes Undertaken in Relation to the Negotiations Leading to the U.S./Mexico Totalization Agreement Were Inadequate and Flawed.

1. SSA's Initial Mexican Visit

In its initial efforts to open negotiations with Mexico to establish a totalization agreement, SSA "followed the same procedures … that it used in all prior agreements."[43] According to the GAO:

> [SSA officials] toured social security facilities, observed how Mexico's automated social security systems functioned, and identified the type of data maintained on Mexican workers. SSA took no technical staff on this visit to assess system controls or data integrity processes. In effect, SSA only briefly observed the operations of the Mexican social security program. … SSA did not document its efforts or perform any additional analyses then, or at a later time, to assess the integrity of Mexico's social security data and the controls over that data. In particular, SSA officials provided no evidence that they examined key elements of Mexico's program, such as its controls over the posting of earnings and its processes for obtaining key birth and death information for Mexican citizens. Nor did SSA evaluate how access to Mexican data and records is controlled and monitored to prevent unauthorized use or whether internal or external audit functions exist to evaluate operations.[44]

GAO further observed that SSA failed to conduct any meaningful analyses of Mexico's control systems "despite documented concerns among Mexican government officials and others regarding the integrity of Mexico's records."[45] Additionally, GAO reported that "[b]ecause all totalization agreements represent a financial commitment with implications for Social Security tax revenues and benefit outlays, a reasonable level of due diligence and analysis is necessary

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[43] GAO Highlights of September 29, 2003 Report entitled "Proposed Totalization Agreement with Mexico Presents Unique Challenges (hereinafter "GAO, 2003").

[44] GAO, 2003, p. 8.

[45] *Id.,* pp. 8-9.

to help federal managers identify issues that could affect benefit payment accuracy or expose the nation's system to undue risk."[46]

2. SSA's Belated Mexican Visit

Notwithstanding these observations and warnings, SSA defended its investigative and planning processes as "sufficient to identify and assess risks."[47] Only belatedly did SSA adopt GAO's recommendation to conduct a more careful analysis, sending "SSA's systems specialists and program integrity experts [to] examine … Mexico's social security information system and earnings data."[48] While GAO did not have occasion to examine the findings of this subsequent visit, GAO did note that SSA had taken a step in the right direction, but that SSA needed to do more if it were to conduct the kind of investigative and planning process that is necessary to protect the financial integrity of the United States Social Security system and its trust funds.[49]

While SSA reluctantly modified its investigative and planning process to bring it more into conformity with GAO recommendations, it did so only after it had already begun negotiations with Mexican officials leading to a totalization agreement. Moreover, SSA made such modifications only after it had "defended" its normal cursory visit as "sufficient to identify and assess risks."[50] Thus, SSA's subsequent investigative effort is not as credible as it would have been had it been conducted in the beginning, before entering into serious negotiations.

3. SSA's Cost Estimates

The SSA has estimated that $134 million in dually-paid taxes will be saved by 3,000 American citizens and the companies that employ them in Mexico over the first five years of a U.S./Mexico Totalization Agreement. Additionally, $29 million is projected to be paid to

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46 *Id.*, p. 8.

47 *Id.*, p. 15.

48 GAO, 2005, pp. 9-10.

49 *See generally* GAO, 2005.

50 *See* GAO, 2003, p. 15.

Americans in the form of Mexican Social Security.[51] This amount brings total Mexican compensation to the U.S. to $163 million over the first five years, or **$32.6 million a year**.

Meanwhile, the SSA estimates that U.S. Social Security payments to Mexicans resulting from a totalization agreement could total as much as $550 million for the first five years of the program. It is highly unlikely that the United States would lose any measurable tax revenue, since there appear to be few Mexicans legally employed by Mexican employers in the United States. Even if the U.S. were to lose such tax revenues, it would only make the situation worse. And even without lost tax revenue, the total U.S. compensation to Mexico is $550 million over five years, or **$110 million a year**. This number is expected to reach **$650 million a year** (in 2002 dollars) by the year 2050.

This means that, **even under these ideal SSA estimates, the U.S. would suffer a net loss of $77.4 million per year**. What's more, **the Social Security trust fund will bear the entirety of that amount**. Yet Social Security Commissioner Barnhart claimed that a U.S./Mexico Totalization Agreement would be "beneficial" to the United States.

There is, moreover, a significant fallacy in these SSA estimates — a problem that GAO (along with other government agencies) has recognized. The problem is that the SSA's cost estimates assume that only 50,000 Mexican workers and beneficiaries, who have **legally** worked in the United States, will apply for and receive Social Security benefits. Clearly, however, this will not be the case.

It appears that, under the U.S./Mexico Totalization Agreement, all that any **illegal** Mexican (who wishes to qualify himself and his dependents for benefits) must do is return to Mexico. Once there, all **illegal** work done in the United States would appear to count towards benefits. The SSA knows this, but downplays the estimated cost a U.S./Mexico Totalization Agreement is expected to have on the Social Security trust funds.[52] Apparently, under the Agreement, a worker who has done illegal work in the United States (though not enough to be vested for U.S. benefits) and legal work in Mexico would be able to totalize the legal and illegal credits and, while living in Mexico, would be able to receive U.S. benefits where such benefits do not today exist.

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[51] "Testimony by Commissioner Jo Anne B. Barnhart, Hearing on International Social Security Amendments, Subcommittee on Immigration, Border Security, and Claims," September 11, 2003, http://www.ssa.gov/legislation/testimony_091103.html.

[52] *See* the State Department's telegram and the U.S. Embassy's Diplomatic Note.

4. GAO's Assessment of SSA's Cost Estimates

Although SSA modified its investigative effort into the Mexican social security system's integrity, it did not modify either its short-run or long-run cost estimates pertaining to the implementation of a U.S./Mexico Totalization Agreement, expressing disagreement with GAO's "analysis and conclusions regarding the estimates of the potential cost of a totalization agreement with Mexico."[53] According to the GAO report, the SSA estimates were based upon incomplete data on the impact of millions of unauthorized Mexican workers in the United States and upon an overreliance upon data associated with the existing totalization agreement between the United States and Canada.[54]

With respect to the data about unauthorized workers, GAO stated that such data is so "limited" that it makes "any estimate of the expected costs of a Mexican totalization agreement highly uncertain."[55] Moreover, GAO noted that the SSA projections did not even "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."[56] Yet, there was no doubt that any totalization agreement would increase the number of such unauthorized workers and family members entitled to payments from the United States Social Security program.[57]With respect to SSA's reliance on the Canadian experience, GAO pointed out that "there is a dramatic difference in the extent of unauthorized immigration from [Canada and Mexico]," such that "the Canadian experience is not a good predictor of experience under an agreement with Mexico."[58]

Not only did GAO's warning about short-run costs go unheeded by SSA, but SSA completely ignored GAO's admonition that would belie SSA's later announcement that a U.S./Mexico Totalization Agreement would have a "negligible effect" on the Social Security trust funds.[59] According to the GAO report, SSA estimates about the potential impact of previously negotiated totalization agreements have been significantly off the mark, the

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53 *See* GAO, 2003, p. 16.

54 *See* GAO, 2003, pp. 10-11.

55 GAO, 2003, p. 11.

56 *Id.*

57 *See* GAO, 2003, p. 9.

58 GAO, 2003, p. 12.

59 *Compare* GAO, 2003, pp. 11-12, *with* SSA June 2004 Press Release.

differences being "huge, involving several orders of magnitude."[60] Further, GAO noted that these "differences" occurred "even in agreements where uncertainty about the number of unauthorized workers is substantially less."[61] **Undaunted by undue risks of enormous costs, SSA nonetheless pressed forward with the U.S./Mexico Totalization Agreement, and signed it. It is important to note that the State Department finally weighed in on the issue of illegal immigrant presence and unauthorized work in the United States, recommending that the U.S. Embassy issue a Diplomatic Note to the government of Mexico, confirming that the U.S./Mexico Totalization Agreement "does not override certain statutory restrictions on benefit eligibility or payments applicable to Mexican nationals in the United States illegally or who work in the United States without authorization."**

TSCL, which received the Diplomatic Note only after filing FOIA lawsuits against the SSA and the State Department, has received no government record indicating that the government of Mexico even replied to the Diplomatic Note.[62] Moreover, it is not clear that, even if the government of Mexico agreed with that interpretation of the agreement, it would eliminate the problem of Mexican nationals receiving U.S. Social Security benefits on the basis of work performed by illegal immigrants in the United States.

C. The Risks Posed by a U.S./Mexico Totalization Agreement to the United States Social Security Benefit Program and Trust Funds Are Unduly High and Unreasonable.

1. Payments to Illegal Workers and Their Beneficiaries Will Increase.

Currently, those who illegally work and pay taxes in the United States may still earn Social Security credits, good for receiving benefits. However, federal law requires that, in order for an immigrant **worker** to qualify to receive public benefits, he must either be:

(a) "lawfully present in the United States" or
(b) "living in a country where SSA is authorized to pay them their benefits."[63]

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60 GAO, 2003, p. 12.

61 *Id.*

62 However, on July 7, 2008, TSCL submitted new FOIA requests to both SSA and the State Department, specifically asking, *inter alia*, for all records indicating a response or otherwise relating to the Diplomatic Note. To date, no records have been provided.

63 GAO, 2003, p. 7.

Because Mexico is such an "authorized" country, a Mexican worker who paid the U.S. Social Security taxes, qualified for such benefit, and lives in Mexico would be paid the social security benefit even if the worker had illegally been in the United States during his time of employment.[64]

On the other hand, current law prohibits benefit payments to the **dependents** and **survivors** of illegal workers for more than a period of six months — even if those beneficiaries reside in Mexico — unless they can prove that they lived "in the United States for 5 years in a close family relationship with the covered worker."[65] A U.S./Mexico Totalization Agreement would change these rules, thereby "increas[ing] the number of Mexican citizens who will be paid U.S. social security benefits in two ways."[66]

First, the U.S./Mexico Totalization "[A]greement will make it easier for Mexican workers to qualify for" U.S. Social Security benefits by permitting such workers, who otherwise would not qualify, "to combine their annual earnings under [Mexico's] social security program with their annual earnings under the U.S. Social Security program to meet" the minimum 10-year requirement instead of Mexico's 24-year requirement.[67]

Second, the U.S./Mexico Totalization Agreement probably will "override Social Security Act provisions that prohibit benefits payments to noncitizens' dependents and

survivors who reside outside the United States for more than six months, unless they can prove that they lived in the United States for 5 years in a close family relationship with the covered worker," by waiving the five-year rule.[68]

In testimony before Congress, SSA Commissioner Barnhart testified that "[t]otalization agreements do not have any effect on the prohibition against payment of benefits to illegal aliens in the United States."[69] While Commissioner Barnhart's statement appears to be

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64 *Id.*

65 GAO, 2003, p. 9.

66 *Id.*

67 *Id.*

68 *Id.*

69 Testimony by Commissioner Jo Anne B. Barnhart, Hearing on International Social Security Agreements, Subcommittee on Immigration, Border Security, and Claims, September 11, 2003. http://www.ssa.gov/legislation/testimony_091103.html

technically correct, it was made in such a way as to give rise to the implication that the U.S./Mexico Totalization Agreement need not be concerned about the number of unauthorized Mexican workers in the United States. But, as the GAO September 2003 Report points out, the number of illegal Mexican workers must be factored into any attempt to estimate the annual costs of such an agreement and the ultimate impact that such an agreement would have on the U.S. Social Security trust funds.[70]

2. The Estimated Costs of Increased Benefit Payments Are Highly Uncertain.

According to the September 2003 GAO Report, "[e]stimates of the number of unauthorized Mexican immigrants living in the United States vary."[71] In January 2000, the federal government's immigration and naturalization officials estimated the number to be "about 5 million."[72] In June 2005, the Pew Hispanic Center estimated that in 2004 there were approximately 5.9 million unauthorized migrants from Mexico.[73] Yet, these estimates were not directly taken into account in the SSA's estimated costs of the proposed U.S./Mexico Totalization Agreement.[74] Also, SSA estimates did not take into account the number of Mexicans who had in the past entered the United States illegally, paid the Social Security tax, qualified for benefits and are now living in Mexico.[75] There are, therefore, potentially hundreds of thousands of past illegal Mexican workers and family members, long since returned to Mexico, who could apply for U.S. Social Security benefit payments under the proposed U.S./Mexico Totalization Agreement. Additionally, the SSA estimate did not take into account the impact that such an agreement could have on the number of Mexican immigrants in the future, having assumed that "the behavior of Mexican citizens would not

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[70] Not only will these factors result in a huge and thus far unreported net outflow of retirement funds from the United States to Mexico, but will cause a "double-whammy" effect in that the lost funds, when spent, will boost the Mexican economy, and not that of the United States.

[71] GAO, 2003, p. 11.

[72] *Id.*

[73] Pew Hispanic Center Report on Unauthorized Migrants, p. 4 (June 2005).

[74] *See* 2003 GAO Report, p. 11. A key factor that this failure could drastically skew the SSA cost assessment is the fact that Mexicans make up 69 percent of the total unauthorized immigrants in the United States from 1990-2000 (*see* p.17). Conversely, none of the other individual countries having totalization agreements with the United States account for any but a small percentage of such immigrants. *See* Pew Center Hispanic Report on Unauthorized Migrants, p. 4 (June 2005).

[75] *See* GAO, 2003, p. 11.

change after a totalization agreement goes into effect."[76] Yet, there is no question that such an agreement would serve as an "additional incentive" for Mexicans to enter the United States illegally and to work.[77]

The GAO found that, for previously-negotiated totalization agreements, **SSA estimates** of the long-range impact of such agreements **were usually more than 25 percent too low**, "even in agreements where uncertainty about the number of unauthorized workers is substantially less" than Mexico.[78] When such estimates have been lower than realized, they have exceeded 25 percent by "several orders of magnitude."[79] Thus, it would not be unrealistic to assume that if **only 500,000** of the millions of past Mexican workers and beneficiaries initially apply for U.S. Social Security, **the SSA cost estimates could increase tenfold**. An agreement that Commissioner Barnhart claims will cost $550 million over five years could instead cost billions of dollars over five years. By the same logic, payments to Mexican Social Security beneficiaries could reach billions of dollars per year by the year 2050, instead of $650 million, as predicted by SSA.

This number can be expected to increase even further as Mexicans who today are illegally working in the United States reach retirement age. Since legal benefits for workers, dependents and survivors can be obtained by returning to Mexico, this would create a huge incentive for illegal workers and their families to return to Mexico and live off the American taxpayer for the remainder of their lives. A **conservative estimate** of the net loss to the Social Security trust funds resulting from **a U.S./Mexico Totalization Agreement, by itself, could increase the Social Security $3.7 trillion 75-year projected deficit by at least 10 percent**. If hundreds of thousands or millions of illegal Mexicans were to claim benefits, the deficit could increase 20 percent, 25 percent, 30 percent or more.

3. Cost-Control Mechanisms Are Problematic

Since Mexican documentation of birth, death, work records, and other important data appears to be much less reliable than such documentation from other countries, the use of **fraud** to obtain benefits would pose a serious problem for the SSA. After all, those Mexicans who have worked illegally in the United States have shown, by their behavior upon entry into the country, that they are **willing to flaunt U.S. law** to obtain employment in America and, in order to become qualified for Social Security benefits, to pay taxes, utilizing false papers to do

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76 *Id.* at pp. 11-12.

77 *Id.* at p. 12.

78 *Id.*

79 *Id.*

so. While many of these workers may not be able to take advantage of a U.S./Mexico Totalization Agreement because they are "unable to prove that they have the necessary coverage credits to be entitled to benefits,"[80] a good number likely would overcome such hurdles.

D. The Benefits to the United States Are Limited and Insufficient.

A United States totalization agreement with Mexico would benefit Mexican citizens more than all other United States totalization agreements, combined, benefit other foreign citizens, while such an agreement would benefit United States citizens many times less than any other totalization agreement. This is completely opposite the experience of United States totalization agreements that have, across the board, benefitted United States citizens more than the citizens of partner countries: "Under existing agreements, the annual foreign tax savings of United States workers and their employers total more than $800 million. In contrast, the annual United States tax savings of foreign workers in the United States and their employers total only about $200 million"[81]

Legal and illegal workers from Mexico already claim United States Social Security benefits for time worked. The U.S./Mexico Totalization Agreement apparently would only make it easier for undeserved benefits to be extracted from the trust fund money allocated for taxpaying American senior citizens. Additionally, the federal government would be required to pay benefits to all past legal Mexican workers and dependents who have returned to Mexico. More Mexican workers would be encouraged to migrate to the United States, both legally and illegally, only to pay minimal Social Security taxes. They would be encouraged to stay for a period no shorter than 10 years in order to qualify themselves and their dependents for full benefits.

The U.S./Mexico Totalization Agreement arguably would allow illegal Mexican workers **violating U.S. law** to retire to Mexico and receive retirement, dependents and survivors benefits there. Millions of Mexicans would be in a position to take advantage of such an agreement, with an **eventual cost to American taxpayers estimated to be in the hundreds of billions of dollars**.[82] What makes the U.S./Mexico Totalization Agreement even

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[80] *Id.* at p. 10.

[81] Testimony by Commissioner Jo Anne B. Barnhart, Hearing on International Social Security Agreements, Subcommittee on Immigration, Border Security, and Claims, September 11, 2003. http://www.ssa.gov/legislation/testimony_091103.html.

[82] Mowbray, Joel. 2003. "Social Security Heading South of the Border." TownHall.com. (January 11, 2003.) http://www.townhall.com/columnists/joelmowbray/jm20030111.shtml.

more unattractive is that Mexican Social Security requires Americans to work more than twice the number of years to qualify for benefits than does the U.S. program. What benefits the Mexican program does pay are relatively so small that they are nothing but an incentive to seek benefits elsewhere.

Current federal law states **this country's policy regarding foreign immigration**: "It continues to be the immigration policy of the United States that … **the availability of public benefits not constitute an incentive for immigration to the United States**" (emphasis added).[83] "Public benefit" is defined therein as "any retirement … benefit … for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States."[84] It is clear that **The Totalization Agreement between the United States and Mexico would significantly change federal policy.**

Totalization agreements historically have been implemented to benefit United States citizens, but the U.S./Mexico Totalization Agreement would do just the opposite. All other totalization agreements benefit American citizens, as most partner countries have better retirement programs than does the United States. The benefits from the totalization agreement with Mexico would be just the opposite. While helping perhaps only 3,000 Americans, the U.S./Mexico Totalization Agreement would threaten to undermine SSA trust funds that are in place to provide for millions of other senior citizens. These trust funds, it must be said, are already at a reported deficit of $3.7 trillion, and do not need the added strain of the claims of millions of illegal Mexican retirees.

E. The Risks and Benefits Should be Reassessed in Light of Current and Projected Economic Recession.

Finally, the costs and benefits of the proposed U.S./Mexico totalization agreement should be reassessed in light of the current financial market and mortgage crisis. Indeed, it appears that the President-elect could not discharge his statutory responsibility under 42 U.S.C. Section 433(e)(1) without an assessment of the impact of the current recession on "the estimated number of individuals who will be affected by the agreement and the effect of the agreement on the estimated income and expenditures" of the social security programs established by Congress. Already there is strong indication that unemployment rates are rising and likely to continue to rise,[85] necessitating a reevaluation of the projected employment tax

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[83] 8 U.S.C. § 1601.

[84] 8 U.S.C. § 1611.

[85] *See* J. Schmitt and D. Baker, "What We're In For: Projected Economic Impact of the Next Recession," Center for Economic and Policy Research (Jan. 2008).

revenues upon which the current proposed totalization agreement is based. Furthermore, there can be no doubt that the billion dollar bailout plans already in place, with more in the offing, will put a significant strain upon the social security trust fund.[86] Prudent economic planning would thus dictate that the government should not enter into an agreement that might very well place an added cost risk without a corresponding increase in benefits for America's seniors.

II. THE PROCESS BY WHICH THE PROPOSED U.S./MEXICO TOTALIZATION AGREEMENT WOULD BECOME EFFECTIVE VIOLATES THE U.S. CONSTITUTION.

A. Negotiation and Status of the U.S./Mexico Social Security Totalization Agreement

Pursuant to the authority granted by Congress in 42 U.S.C. Section 433(a) to "enter into agreements establishing totalization arrangements between the [American] social security system … and the social security system of any foreign country," President George W. Bush entered into negotiations to establish such an arrangement with Mexico. On June 29, 2004, acting pursuant to a State Department-approved Circular 175 authority for the signing of the United States/Mexico Social Security Totalization Agreement, Jo Anne Barnhart, then Commissioner of Social Security (hereinafter "the Commissioner"), signed the agreement.

The terms of the U.S./Mexico Totalization Agreement are set forth in a 15-page document, containing 21 separate articles, number 20 of which affirms the right of either party to terminate the Agreement by written notice. Appended to the Agreement is a 4-page Administrative Arrangement between the two countries'' social security departments containing eight numbered articles, each of which addresses the mechanisms by which the Agreement is to be implemented. In conformity with the purposes and provisions of 42 U.S.C. Section 433(b) and (c), the U.S./Mexico Totalization Agreement, if put into effect in accordance with Section 433(e), would, in essence:

> (a) eliminate dual social security taxation that would otherwise occur when a worker in the United States works in Mexico, and required to pay taxes in both, and vice versa; and
>
> (b) permit both U.S. and Mexican workers to combine work credits in both countries to qualify for social security benefits.

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[86] *See, e.g.,* "Bush Advisor Favors Drawing on Trust Fund in Event of Recession," International Herald Tribune (Aug. 27, 2001) http://www.iht.com/articles/2001/08/27tube_ed3_.php.

In addition to the formal U.S./Mexico Totalization Agreement, the United States prepared and submitted to Mexican authorities a **"Diplomatic Note"** stating, in essence, that the proposed Agreement "could not override present or future provisions of United States law that prohibit or limit social security benefit eligibility or payment in the case of foreign nationals who are in the United States illegally or who have worked in the United States without authorization." By this Note, the United States representative sought to "document the common understanding" of the two nations' governments "that the social security agreement of June 29, 2004, will not affect" any such current or future provision of United States law. To that end — and to the further end that the United States would "be in a position to provide documentation of [such] understanding to the United States Congress" — the Note was officially initialed by the Embassy for transmission to Mexican Secretariat, "request[ing] [a] reply … at its earliest convenience with an expression of concurrence in this understanding of the legal effect of the agreement."

Subsequent to this submission to the Mexican authorities, Congressman John Culberson, in his capacity as a member of the House of Representatives Appropriations Committee, submitted a series of written questions to Secretary of State Condoleeza Rice, seeking information concerning the "signed agreement" between the Commissioner and the Director General of the Mexican Social Security Institute. Among the questions posed was a query whether there was any **"language** [that would] make Mexican nationals whose presence in the U.S. is **undocumented or illegal eligible to participate** in the American Social Security System." (Emphasis added.) Significantly, Secretary Rice did not answer this question specifically, stating only that "we have emphasized … to the Government of Mexico" that the U.S./Mexico Totalization Agreement "would not override U.S. statutory restrictions on benefit eligibility or payments applicable to foreign nationals," including "the provision of U.S. law that prohibits payment of … benefits to non-U.S. citizens … who are not lawfully present in this country" or not "authorized to work in the United States."

In an apparent effort to obtain a more precise answer, Congressman Culberson then asked: "What is the exact language of the totalization agreement regarding Mexican nationals working in the U.S.? Does this language make Mexican nationals whose presence in the U.S. is undocumented or illegal eligible to participate in the American Social Security System?" To which Secretary Rice replied as before with a general statement that the agreement would not "affect" existing provisions making such persons ineligible for such benefits.

Additionally, the State Department issued a Status Report on the U.S./Mexico Totalization Agreement in which it stated that:

> The Social Security Administration is currently holding review of the … Agreement while it seeks to document Mexico's understanding that the Agreement does not override statutory restrictions on benefit eligibility or payments applicant to

> Mexican nationals in the United States illegally or working without authorization. **Mexico has yet to acknowledge this understanding.** [Emphasis added.]

On December 22, 2006, the SSA, responding to TSCL's FOIA litigation, produced a number of documents, including: (i) a copy of the U.S./Mexico Totalization Agreement; (ii) the attached Administrative Arrangement; (iii) the Diplomatic Note; (iv) the questions posed by Congressman Culberson and answers provided by Secretary Rice; and (v) a status report, indicating thereby that the SSA was still awaiting Mexico's confirmation that the proposed Agreement would not override the current or future limits on social security eligibility for those Mexican nationals who worked while illegally in the U.S. or while working without supportive documentation.

Before submitting the U.S./Mexico Totalization Agreement to Congress, the President is required to report on the estimated number of individuals who will be affected by the agreement and the effect of the agreement on the estimated income and expenditures" of the social security programs established by Congress. In the light of such requirements and as noted above (pp. 15-27, *supra*), the estimated number of Mexican workers and the estimated income and expenditures of the overall cost of the U.S./Mexico Totalization Agreement will depend significantly on whether the Agreement excludes those workers from Mexico illegally in the United States or without proper documentation. Further, in light of the controversy in America over whether such workers should receive any social security benefits based upon work performed in the United States while illegally in the country, or any other benefits, it appears that the U.S./Mexico Totalization Agreement, unlike the 22 totalization agreements previously agreed to and put into effect, will be a matter of great controversy. Not only will there be a debate over the substantive provisions of the Agreement, but there may very well be a debate over the constitutionality of the statutorily-prescribed process by which the U.S./Mexico Totalization Agreement, like all such agreements, is made effective.

42 U.S.C. Section 433(e) states that a totalization agreement "become[s] effective on any date provided in the agreement if —

> (a) The date occurs after the expiration of a period during which at least one House of Congress has been in session on each of the 60 days following the date on which the agreement is transmitted to Congress by the President; and
>
> (b) Neither House of Congress adopts a resolution of disapproval of the agreement within the 60-day period described in paragraph (a) of this section. [*See also* 20 CFR Section 404.1904.]

In sum, Congress has a sixty-day window in which to review the report and the proposed Agreement, prepare a disapproval resolution, hold hearings, and take a vote, and if both houses fail to do so, or if neither house passes a resolution of disapproval, the U.S./Mexico Totalization Agreement becomes effective "by default." *See* A. Christians, "National Report USA," in M. Lang, Double Taxation Conventions and Social Security Conventions, p. 695 (2006) (hereinafter "USA Report").

It appears that the U.S./Mexico Totalization Agreement, unlike those that have been previously signed and made effective,[87] is due for a battle royal in both the House and the Senate should President Bush, or his successor in office, decide to submit the Agreement to Congress. It also appears that the fight will not be limited to the substantive provisions of the Agreement, but will extend to the very Congressional process by which the Agreement would become effective — a process that could be challenged not only legislatively as a matter of policy, but legislatively and judicially as a matter of constitutionality.

B. The Process By Which a Totalization Agreement Becomes Effective Violates Article II, Section 2 and Article I, Section 7 of the United States Constitution.

The U.S./Mexico Totalization Agreement, like those previously entered into and made effective between the United States and 22 other countries, is considered by the President, and treated by 42 U.S.C. Section 433, **not as a treaty** within the meaning of that term in Article II, Section 2 of the United States Constitution, but as an "**executive agreement**." By denominating totalization agreements as "executive agreements," the constitutional approval process by which such treaties become the law of the land is bypassed. If a social security totalization agreement is, as a matter of constitutional law, not a treaty, then the President who negotiates and signs such an agreement need not secure ratification by a two-thirds vote of the Senate before such an agreement is effective. *See, e.g.,* United States v. Belmont, 301 U.S. 324 (1937). Indeed, according to the Supreme Court ruling in Belmont and in United States v. Pink, 315 U.S. 203 (1942), whenever a president enters into an executive agreement in the exercise of his "plenary" power over foreign affairs — such as recognition of a government of another country — the president need not obtain any approval from Congress whatsoever before such an "executive agreement" is effective as the law of the land. *See* Appendix A.

In the case of social security totalization agreements, however, the President cannot act unilaterally. He has no plenary power over either international trade or the general welfare. And he certainly has no power to tax. Rather, Article I, Section 8, Paragraph 3 confers upon Congress the power "to regulate Commerce with foreign nations,"[88] Article I, Section 8; and

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[87] *See* USA Report, p. 695.

[88] *See* United States v. Guy W. Capps, Inc., 204 F.2d 655, 658 (4th Cir. 1953), affirmed 348 U.S. 296 (1955).

paragraph 1 confers upon Congress the power "to lay and collect taxes … to provide for the General Welfare of the United States."[89] Each of these powers is implicated in the formation and implementation of any social security totalization agreement.[90] Because the President cannot constitutionally act unilaterally, it has become common practice since World War II for Congress and the President to combine Presidential executive authority and congressional regulatory, taxing, and appropriation power whereby the President negotiates the terms of an agreement between the United States and another nation (or nations) and submits the agreement to Congress for approval by an up-or-down majority vote in each house. By such a process, recent trade agreements, such as NAFTA, have been enacted into law.

Following enactment of NAFTA, the Made in the U.S.A. Foundation and United Steelworkers of America, Local 12L challenged the constitutionality of the process by which NAFTA became law. Made in the USA Foundation v. United States, 56 F. Supp.2d 1226 (N.D. Ala. 1999). Contending that NAFTA was, in constitutional parlance, a "treaty," plaintiffs argued that it could not become law by a majority vote of both houses of Congress, but only upon a two-thirds vote of the Senate, as provided in Article II, Section 2 of the Constitution. Acknowledging that the issue raised was one of first impression, the district court ruled against plaintiffs, concluding that the NAFTA agreement was not a "treaty," but an international trade agreement, and that the ratification process dictated by Article II, Section 2 did not apply. On appeal, the United States Court of Appeals for the 11th Circuit vacated the district court's opinion, reversing and remanding the case with instructions to dismiss the claim on the grounds that the process by which NAFTA became law was a "political question" for the President and Congress, not for the courts. Made in the USA Foundation v. United States, 242 F.3d 1300 (11th Cir., 2001).

Whether any particular agreement between the United States and another nation, such as the U.S./Mexico Totalization Agreement, is a "treaty" or not remains an open question, and in the first instance is a question to be resolved as a matter of constitutional law by the President and Congress. Members of Congress who disapprove of the proposed Agreement, therefore, may base their opposition to that agreement upon the ground that it is a "treaty" and that the Section 433(e) process by which it would become effective is unconstitutional, not only (i) because that process contravenes the treaty ratification provision, but also (ii) because it violates the legislative process by which a bill becomes as law.

There is ample support for both claims, as follows:

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[89] *See* Helvering v. Davis, 301 U.S. 619 (1937) (Social Security Act as an exercise of Congress under the General Welfare Clause).

[90] *See* U.S. International Social Security Agreements, http://www.ssa.gov/international/agreements_overview.html.

1. The Totalization Approval Process Violates Article II, Section 2 of the U.S. Constitution.

According to Joseph Story's nineteenth century Commentaries on the Constitution, "[t]he power 'to make treaties' is … general; embrac[ing] all sorts of treaties … for any … purpose[] which the policy or interests of independent sovereigns may dictate in their intercourse with each other." *Id.* at Section 1508. According to this comprehensive definition of a treaty, only those executive agreements between the United States and another nation that "comprise the daily grist of the diplomatic mill" would be exempt from the treaty ratification process. Because the proposed U.S./Mexico Totalization Agreement does not fit into such a category, it is a treaty that may become law only if ratified by a two-thirds vote of the Senate, as **Harvard Law Professor, Laurence Tribe** has so ably argued. *See* L. Tribe, "Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretations," 108 Harv. L. Rev. 1221 (1995).

Since World War II, however, both the President and Congress have departed from such strict adherence to the constitutional text and purpose of the treaty ratification process. Instead of adhering to the constitutionally-prescribed two-step process — submission of a presidentially-negotiated international agreement to the Senate for ratification by a supermajority of senators present (pursuant to Article II, Section 2) and, if ratified, initiation of implementing legislation in Congress for presentment to the President (pursuant to Article I, Section 7) — the President has submitted the agreement directly to both houses of Congress not only for ratification, but for implementation as domestic law without a vote of approval.

Some have argued that the Constitution confers upon Congress and the President complete discretion, the two processes being completely "interchangeable." *See* B. Ackerman and D. Golove, "Is NAFTA Constitutional," 108 Harv. L. Rev. 799 (1995). In defense of this view, proponents contend that, in an age of rapid globalization, the two-step process dictated by the constitutional text is overly cumbersome and outmoded. Even if "the choice of instrument for a particular agreement is … a matter of political judgment," the Congressional/executive agreement process has "generally been used in matters of international economic affairs, such as trade and finance," and "international income (as well as estate and gift taxation) exclusively in treaties." "USA Report," p. 693.

Because social security totalization agreements are concerned with the topic of general welfare and taxation, rather than commercial affairs, a political case could be made, that they, like other taxation matters, ought to be subject to the treaty ratification process. *Id.* Indeed, conflicts with other nations involving the taxation of social security benefits received by retired workers as income "is addressed in income tax treaties, … known as double tax conventions [which] are negotiated by … the Department of Treasury [and] become law only after being reviewed and agreed to in the Senate by a two-thirds majority." "USA Report," p. 695. Otherwise, Congress will have effectually delegated its taxing authority to the President in

violation of the long-standing American commitment to "**no taxation without representation**," as reflected in the Article I, Section 7 command that all revenue-raising bills originate in the House of Representatives.[91] That social security totalization agreements are likely to have such a revenue-raising effect is reflected in the statutory requirement that the President report to Congress the "effect" any proposed agreement would have on "**income** and expenditures" of the overall social security programs, thereby triggering the beginning of the 60-day period within which either house must determine whether to prevent the agreement from going into effect as law. *See* 42 U.S.C. Section 433(e)(1).

2. The Totalization Approval Process Violates Article I, Section 7 of the U.S. Constitution.

According to Professor Tribe, the treaty ratification process is the only constitutionally enumerated process by which international agreements may be consummated. Since the federal government is a government of enumerated powers, it would be incumbent upon those who support a different process, such as the one employed in the enactment of NAFTA, to point to a provision in the Constitution sanctioning a different process. Reinforcing this contention is Article I, Section 7, which spells out the process by which a bill becomes a law. According to this provision, all bills must "originate" in the House of Representatives or in the Senate, except in the case of bills raising revenue which must originate in the House only. Only after a bill has been passed in both houses of Congress and presented to the President is the President given any role in the legislative process, and even then, the President's role is limited to the exercise of his veto power.

The process by which a totalization agreement becomes law turns this inside out. Instead of the House or the Senate initiating legislative action on the U.S./Mexico Totalization Agreement, Section 433(e)(1) authorizes the President to "transmit[]" the agreement to the Congress. Instead of a House or Senate Committee preparing a Report, explaining and supporting a proposed totalization agreement, Section 433(e)(1) authorizes the President to "report on the estimated number of individuals who will be affected by the agreement and the effect of the agreement on the estimated income and expenditures" of the Social Security programs established by Congress. Finally, instead of Congress determining the content of the agreement, as it would a bill, "presenting" the bill to the President who is empowered only to veto the entire bill or sign it, Section 433(e)(2) authorizes the opposite, the President having the power to determine the contents of a totalization agreement, "presenting" the agreement to Congress for a one-house up-or-down veto. Such an inversion of the legislative process prescribed in Article I, Section 7 is unconstitutional. *See* I.N.S. v. Chadha, 462 U.S. 919 (1983).

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[91] *See generally* 2 The Founders' Constitution, pp. 374-87 (P. Kurland & R. Lerner, eds.: Univ. Chi. Press: 1987).

3. The Totalization Approval Process Also Violates Article I, Sections 1, 8 (Clause 1), 7 (Clause 2), and 9 (Clause 7) of the U.S. Constitution.

Unlike the typical Congressional/executive agreement, such as NAFTA, the U.S./Mexico Totalization Agreement would become law without a majority vote of both houses of Congress approving the agreement. Rather, such an agreement "automatically become[s] law 60 session days after being submitted by the President to Congress unless objection arises in the House or the Senate in the form of a resolution of disapproval." "USA Report," p. 695. Thus, the U.S./Mexico Agreement would become law "by default unless Congress acts to prevent [its] enactment." *Id.* By design and effect this "law by default" process constituted an unlawful delegation of legislative power, not only to the President, but to the government of Mexico. After all, the U.S./Mexico Totalization Agreement would "not enter in force and therefore become law until all enumerated conditions are satisfied, including ratification by" Mexico of the Diplomatic Note stating the mutual understanding that the consummation of the agreement would not confer American social security benefits for work done by undocumented Mexican workers in the United States, or work done by Mexicans while illegally in this country.

It is difficult to imagine a more egregious unconstitutional **delegation of legislative power** than is provided for in 42 U.S.C. section 433(e). Article I, Section 1 of the Constitution vests "all legislative powers herein granted" to Congress. Article I, Section 8, Clause 1 grants to Congress the "power to lay and collect taxes … to pay the debts and provide for … the general welfare of the United States." Article I, Section 9, Clause 7, states emphatically that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Finally, Article I, Section 7, Clause 2 provides that only those bills "which shall have passed the House of Representatives and the Senate, shall … become a Law." In short, the Constitution requires that Congress enact a bill affirmatively adopting the U.S./Mexico Totalization Agreement before it can become law.

Under the current process of legislation by default, the United States will become obliged to spend millions of dollars in the form of benefits paid to foreign workers and to suffer from reduced social security tax revenues from such workers. In light of such financial burdens, Congress should act now to change the process by which totalization agreements become law, requiring at least majority approval of both houses of Congress.

III. LEGISLATIVE REMEDIES

At this stage of development of a U.S./Mexico Totalization Agreement, it appears that President Bush still may be inclined to approve the agreement, which has already been negotiated and signed by the social security officials of both nations, despite the shortcomings summarized above. If so, and the agreement is submitted to Congress, those who seek relief

from the unreasonable and undue risks of such an agreement must look to Congress to protect the Social Security program and its trust funds.[92] However, the views of the President-Elect certainly would be important for Congress to consider as it engaged in the process of consideration of the agreement during its "veto period."[93] Furthermore, the President-Elect would take office during the pendency of the legislative review period, and it is submitted that the agreement could even be withdrawn from Congressional consideration during that period.

The following bills, relevant to Congressional consideration of the U.S./Mexico Totalization Agreement, are indicative of some of the sentiments already existing in the 110th Congress with respect to the dangers to Social Security contained in the U.S./Mexico Totalization Agreement, as well as other extensions of Social Security benefits to those who have entered United States borders illegally:

In the **House of Representatives**, the following measures were introduced and are pending in the Subcommittee on Social Security of the House Committee on Ways and Means:

- H. Res. 18 (introduced January 4, 2007) expresses disapproval of the Bush U.S./Mexico totalization agreement
- H. Res. 22 (introduced January 4, 2007) expresses disapproval of the Bush U.S./Mexico totalization agreement
- H.R. 279 (introduced January 5, 2007) ("Social Security Totalization Agreement Reform Act of 2007") would change the system to require the approval of both Houses of Congress of all totalization agreements.
- H.R. 709 (introduced January 29, 2007) ("Total Overhaul of Totalization Agreements Law of 2007") would bar Social Security earnings by persons illegally in the country.

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[92] The **Social Security Protection Act of 2004**, prohibits the extension of Social Security benefits to "unauthorized" workers, but that prohibition is limited to applications for such benefits based on a Social Security Number ("SSN") assigned **on or after** January 1, 2004. Thus, a "noncitizen who files an application for benefits based upon an SSN assigned **before** January 1, 2004, is not subject to the work authorization requirement." Moreover, the work authorization requirement of the Social Security Protection Act of 2004 does not appear to address the payment of Social Security benefits under a totalization agreement which is governed by an entirely different section of the law.

[93] As previously noted, the statutory scheme provides that a totalization agreement will become effective if neither House of Congress disapproves it during a 60-legislative-day period after the agreement is submitted to Congress by the President.

- H.R. 2954 (introduced July 10, 2007) ("Secure Borders FIRST Act of 2007") would bar Social Security earnings by persons illegally in the country.

- H.R. 5515 (introduced February 28, 2008) ("New Employee Verification Act of 2008") would require approval of both houses of Congress of all totalization agreements.

- H.R. 190 (introduced January 4, 2007) ("Social Security for Americans Only Act of 2007") would put an end to all totalization agreements, past, present and future.

In the **Senate**:

- S. 43 (introduced January 4, 2007) ("the Social Security Totalization Agreement Reform Act of 2007") would require approval of both Houses of Congress of all totalization agreements.

- S. 1666 (introduced June 20, 2007) ("To amend Title 2 of the Social Security Act to improve the process for Congressional consideration of international social security agreements"). Introduced by Chairman of the Senate Committee on Finance, **Senator Max Baucus (D-MT)**, this bill would change the way that totalization agreements become effective by requiring an affirmative "approval resolution" passed by both Houses of Congress. Such approval resolution would be required to be introduced when a totalization agreement has been presented to Congress and would be referred to the House Committee on Ways and Means and the Senate Committee on Finance. In introducing the bill, Sen. Baucus said that the "current process … is invalid because it involves the unconstitutional use of a legislative veto." 153 Cong. Rec. S8064 (daily ed. June 20, 2007) (statement of Sen. Baucus). S. 1666 was referred to the Senate Committee on Finance.

CONCLUSION

For the reasons herein stated, TSCL asks that if the Bush Administration submits the U.S./Mexico Totalization Agreement to Congress, the President-Elect oppose it and express support for congressional resolutions disapproving of that agreement. Further, TSCL asks that the President-Elect express support for Senator Baucus' bill (S. 1666), and that he urge that only such agreements entered into by constitutional processes be supported by Congress upon clear and convincing proof that any such agreement would not put the Social Security system and its trust funds at risk.

Respectfully submitted,

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Appendix A
United States Constitution

Article I, Section 7, Clause 2

Clause 2: Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Article I, Section 8, Clauses 1, 3, 18

Clause 1: The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

Clause 3: To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Clause 18: To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article I, Section 9, Clause 7

Clause 7: No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

Appendix B
Statutes of the United States

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 7. SOCIAL SECURITY ACT
TITLE II. FEDERAL OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE BENEFITS
42 USCS § 433 (2005)

§ 433. International agreements

(a) Purpose of agreement. The President is authorized (subject to the succeeding provisions of this section) to enter into agreements establishing totalization arrangements between the social security system established by this title and the social security system of any foreign country, for the purposes of establishing entitlement to and the amount of old-age, survivors, disability, or derivative benefits based on a combination of an individual's periods of coverage under the social security system established by this title and the social security system of such foreign country.

(b) Definitions. For the purposes of this section-

(1) the term "social security system" means, with respect to a foreign country, a social insurance or pension system which is of general application in the country and under which periodic benefits, or the actuarial equivalent thereof, are paid on account of old age, death, or disability; and

(2) the term "period of coverage" means a period of payment of contributions or a period of earnings based on wages for employment or on self-employment income, or any similar period recognized as equivalent thereto under this title or under the social security system of a country which is a party to an agreement entered into under this section.

(c) Crediting periods of coverage; conditions of payment of benefits.

(1) Any agreement establishing a totalization arrangement pursuant to this section shall provide-

(A) that in the case of an individual who has at least 6 quarters of coverage as defined in section 213 of this Act [42 USCS § 413] and periods of coverage under the social security system of a foreign country which is a party to such agreement, periods of coverage of such individual under such social security system of such foreign country may be combined with periods of coverage under this title and otherwise considered for the purposes of establishing entitlement to and the amount of old-age, survivors, and disability insurance benefits under this title;

(B) (i) that employment or self-employment, or any service which is recognized as equivalent to employment or self-employment under this title or the social security system of a foreign country which is a party to such agreement, shall, on or after the effective date of such agreement, result in a period of coverage under the system established under this title or under the system established under the laws of such foreign country, but not under both, and

(ii) the methods and conditions for determining under which system employment, self-employment, or other service shall result in a period of coverage; and

(C) that where an individual's periods of coverage are combined, the benefit amount payable under this title shall be based on the proportion of such individual's periods of coverage which was completed under this title.

(2) Any such agreement may provide that an individual who is entitled to cash benefits under this title shall, notwithstanding the provisions of section 202(t) [42 USCS § 402(t)], receive such benefits while he resides in a foreign country which is a party to such agreement.

(3) Section 226 [42 USCS § 426] shall not apply in the case of any individual to whom it would not be applicable but for this section or any agreement or regulation under this section.

(4) Any such agreement may contain other provisions which are not inconsistent with the other provisions of this title and which the President deems appropriate to carry out the purposes of this section.

(d) Regulations. The Commissioner of Social Security shall make rules and regulations and establish procedures which are reasonable and necessary to implement and administer any agreement which has been entered into in accordance with this section.

(e) Reports to Congress; effective date of agreements.

(1) Any agreement to establish a totalization arrangement entered into pursuant to this section shall be transmitted by the President to the Congress together with a report on the estimated number of individuals who will be affected by the agreement and the effect of the agreement on the estimated income and expenditures of the programs established by this Act.

(2) Such an agreement shall become effective on any date, provided in the agreement, which occurs after the expiration of the period (following the date on which the agreement is transmitted in accordance with paragraph (1)) during which at least one House of the Congress has been in session on each of 60 days; except that such agreement shall not become effective if, during such period, either House of the Congress adopts a resolution of disapproval of the agreement.

Appendix C
Per Capita GDP of 21 Initial Totalization Agreement Countries

Country	Per Capita GDP in U.S. $
Australia	$30,700
Austria	$31,300
Belgium	$30,600
Canada	$31,500
Chile	$10,700
Finland	$29,000
France	$28,700
Germany	$28,700
Greece	$21,300
Ireland	$31,900
Italy	$27,700
Luxembourg	$58,900
Netherlands	$29,500
Norway	$40,000
Portugal	$17,900
South Korea	$19,200
Spain	$23,300
Sweden	$28,400
Switzerland	$33,800
United Kingdom	$29,600
Japan	$29,400
United States	$40,100
Average	**$29,645**
Mexico	$9,600

Appendix D
United States Totalization Agreements

Country	Date of Signing	Effective Date	Citation
Agreements Prior to Passage of Law			
1 Italy	5/23/1973	11/1/1978	29 UST 4263; TIAS 9058
2 Germany	1/7/1976	12/1/1979	30 UST 6099; TIAS 9542
Agreements After Passage of Law			
3 Switzerland	7/18/1979	11/1/1980	32 UST 2165; TIAS 9830
4 Belgium	2/19/1982	7/1/1984	TIAS 11175
5 Norway	1/13/1983	7/1/1984	TIAS 10818
6 Canada	3/11/1981	8/1/1984	TIAS 10863
7 United Kingdom	2/13/1984	1/1/1985	TIAS 11086
8 Sweden	5/27/1985	1/1/1987	TIAS 11266
9 Spain	9/30/1986	4/1/1988	TIAS 12123
10 France	3/2/1987	7/1/1988	TIAS 12106
11 Portugal	3/30/1988	8/1/1989	TIAS 12121
12 Netherlands	12/8/1987	11/1/1990	H.R. Doc. 100-182
13 Austria	7/13/1990	11/1/1991	TIAS 12037
14 Finland	6/3/1991	10/1/1992	TIAS 12105
15 Ireland	4/14/1992	9/1/1993	TIAS 12117
16 Luxembourg	2/12/1992	11/1/1993	TIAS 12119
17 Greece	6/22/1993	9/1/1994	H.R. Doc. 103-198
18 South Korea	3/13/2000	4/1/2001	H.R. Doc. 106-243
19 Chile	2/16/2000	12/1/2001	H.R. Doc. 106-244
20 Australia	9/27/2001	10/1/2002	H.R. Doc. 107-186
21 Japan	2/19/2004	10/1/2005	H.R. Doc. 108-234
22 Denmark	6/13/2007	10/1/2008	H.R. Doc. 110-97
**********	**********	**********	**********
23 Czech Republic	9/7/2007	1/1/2009	H.R. Doc. 110-110
24 Mexico	6/29/2004	(Not Submitted to Congress)	

See http://www.socialsecurity.gov/international/status.html.