Touching the Third Rail: An Analysis of Social Security and the Recently Revealed U.S.-Mexico Social Security Totalization Agreement

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We can never insure one hundred percent of the population against one hundred percent of the hazards and vicissitudes of life, but we have tried to frame a law which will give some measure of protection to the average citizen and to his family against the loss of a job and against poverty-ridden old age.1

I. Background

The Social Security Act enabled states to more adequately provide for "aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws; to establish a Social Security Board; to raise revenue; and for other purposes."2 The preceding statements illustrate some long-standing goals of Social Security, but much has changed since 1935, when Social Security first came into existence.

With the globalization of the world’s economy, workers have been sent to different countries to fulfill the requirements of their positions.3

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3. See generally Michel Camdessus, Managing Director, International Monetary
The ebb and flow of workers in the globalized economy has created a unique problem for companies and workers who are required to pay Social Security taxes in both their host country, as well as their country of citizenship: double taxation.4 Double taxation of employers and employees hinders commerce and hurts the pockets of such transnational employers and employees.5 To help alleviate the problem of double taxation of transnational employees, the United States has entered into agreements with other countries to credit any taxes paid into the foreign country's benefit system towards the credits needed by the employee in their country of origin to qualify for Social Security benefits or its equivalent.6

The crediting of tax paid to a foreign country to help the transnational employee qualify for benefits at home is called "totalization."7 Totalization also occurs when the credits earned in the home social security system are applied to qualify for the foreign country's social security benefits after the worker has returned home.8

The United States' totalization agreements currently in force have resulted in substantial savings for transnational companies and their employees by eliminating double taxation of wages paid.9 Many groups, however, question whether a totalization agreement with Mexico will be mutually beneficial or just beneficial to the interests of Mexico, Mexican companies, and Mexican workers working in the United States.10

The United States and Mexico signed a totalization agreement on June 29, 2004, but the agreement has yet to take effect.11 Speculation abounds that this agreement will bankrupt the U.S. Social Security system, leave seniors without Social Security benefits, and entice illegal immigrants from Mexico with promises of credits for taxes paid or

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5. See id. at 112. Stating that without an agreement employees' tax in some countries could be as high as 65% to 70% of the employee's income.

6. See id. at 113.

7. See id. at 115.


9. Powell, supra note 4, at 114.


Social Security benefits here in the United States. While totalization with Mexico may be the right ethical choice for the United States, the question remains whether such an agreement would be fiscally responsible as well.

First, this paper will provide an overview of Social Security in the United States including its future solvency and reform proposals. Next, totalization agreements will be analyzed with special consideration for U.S. agreements with Canada, Chile, and Japan. Then, it will explore the agreement the United States has signed with Mexico addressing the advantages and disadvantages of a totalization agreement with Mexico. Finally, this paper will conclude that, despite the disadvantages, a totalization agreement with Mexico may be mutually beneficial to both countries and their workers. Further, a well-drafted agreement should allow legal, Mexican migrants and immigrants to earn credits towards benefits while still applying safeguards to protect against potential abuses, which could easily occur if not adequately addressed.

II. What Is Social Security? A Brief Overview

Social Security is a government program whose intricacies most people know very little about. The federal government has amended the original Social Security Act hundreds of times since its enactment. The Social Security Act of 1935 established a pension plan for older persons and financed those pension benefits through an employer-employee payroll tax.

Since 1935, the program has grown to include: “survivors’ and dependents’ benefits; . . . disability, hospital, and medical insurance; expanded coverage to new groups of workers; lower minimum age for retirement benefits; increased payroll taxes; increased benefits; and automatic adjustment of benefits to reflect inflation.” Currently, Social

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13. These three countries' totalization agreements are important for the issue of the U.S.-Mexico agreement because these countries have totalization agreements with the United States and there situations closely approximate Mexico's. Canada is chosen for further analysis because of its geographical proximity to the United States, Chile because its social security system most closely resembles Mexico's and Japan because it is the latest totalization agreement that the United States has entered into.
16. Id.
17. Id.
Security's primary programs are retirement, survivor, and disability benefits.

Eligibility for Social Security benefits requires a worker to earn forty quarters of credit to become fully "entitled" in the program. In 2007, one Social Security work credit was given when a worker earned $1000 in qualified earnings; four work credits may be earned once the worker earns a total of $4,000 in a calendar year. A worker can only obtain up to four credits in one calendar year. The worker's average earnings from his or her years of employment are then used to determine the amount of the benefit he or she receives upon retirement. Eligibility, however, does not require that the forty credits be earned consecutively.

To fund Social Security, payroll taxes are collected from both employees and employers. These taxes are referred to as the Federal Insurance Contributions Act ("FICA") taxes. FICA taxes consist of both Social Security and Medicare taxes.

In 2006, employers and workers together paid a total of 15.3% of an employee's income toward payroll taxes or FICA taxes. The Social Security portion of the FICA tax is paid on the first $94,200 of the employee's income. After this taxable maximum is reached, the Social Security tax of 12.4%, of which the employer pays one-half or 6.2%, is eliminated.

Citizenship is currently not an eligibility requirement for Social Security benefits. However, the worker's country of citizenship will determine what benefits will be paid if they return to their home nation because the Social Security Administration ("SSA") restricts payments

19. Id.
20. Id.
22. Id.
23. Id.
24. Id.
25. Id.
28. Id.
30. Id.
31. Id. There is no taxable earnings limit on the Medicare tax portion of the FICA tax, which is 2.9% of the employee's income. The remaining tax for the Medicare portion is 1.45% for both the employee and employer or 2.9% for the self-employed.
of benefits to certain countries. For example, an Italian citizen comes to the United States and legally works for ten years, earning the required forty credits to qualify for Social Security benefits. When the worker returns to Italy he or she is entitled to receive full benefits from the U.S. Social Security program. Moreover, that worker’s family would qualify for spouse and survivor benefits.

A. Problems with Social Security

Controversy has surrounded the Social Security Act since its inception in 1935. Citizens and policymakers have disagreed about how the program should be implemented and what benefits should be received. Historically, opponents of the payroll tax have argued that industry will be overburdened, the purchasing power of workers will be limited, and private pension plans will not be fully funded. Proponents of the Social Security tax have argued that, by requiring workers to contribute and receive retirement benefits, the system would be applicable to all covered workers equally.

The current Social Security issue at the forefront of public discussion is a question of its continued solvency. The Social Security payroll tax has been increased more than twenty times since 1935. In 1935, the Social Security payroll tax was 2%; currently, it is 12.4%. Despite this escalation, the threat to Social Security’s continued solvency has not been resolved as the payroll tax percentage will have to be further increased to meet the needs of this century. Younger workers are concerned about what, if any, benefits will be available to them at

33. See id. (providing a full listing of restrictions and additional requirements for receiving benefits outside of the United States).
34. Id.
37. Id.
38. Id.
39. Id.
40. Id.
43. Id.
44. Id. The increase in benefit recipients outpaces the number of workers contributing to the system.
retirement,\textsuperscript{45} while older workers and retirees are concerned about reductions in promised benefits.\textsuperscript{46}

Social Security is a pay-as-you-go system. Present payroll taxes are used to satisfy current, previously promised benefits.\textsuperscript{47} In 2008, the Baby-Boomer generation will start to retire in force.\textsuperscript{48} Their mass exodus from the work force will shift the financial standing of the system.\textsuperscript{49} In 2017, it is projected that more money will go out in benefits than will be collected in taxes.\textsuperscript{50} The shortfall will be made up from the Social Security Trust Fund.\textsuperscript{51} The Trust Fund was established in 1939\textsuperscript{52} to help ensure that money would be available if benefit payments ever surpassed Social Security payroll taxes.\textsuperscript{53}

Many prospective beneficiaries incorrectly think the money that they pay into the Social Security system is earmarked for their later consumption.\textsuperscript{54} The myth persists, in public minds, that special individual accounts containing either cash or other investments exist for each taxpayer.\textsuperscript{55} This is not the case.\textsuperscript{56}

In addition, references to the Social Security Trust Fund seem to perpetuate the idea of the individual account.\textsuperscript{57} No individual accounts exist, nor does the Trust Fund contain cash or other saleable assets.\textsuperscript{58} In fact, the Trust Fund is nothing more than IOUs from the federal

\begin{footnotes}
\item[48] Id.
\item[49] See generally Mariacristina De Nardi et al., Projected U.S. Demographics and Social Security, 2 Rev. Econ. Dynamics 575 (1999), \url{http://marshallinside.usc.edu/simrohoroglu/teaching/605/spring2002/seo22.pdf}.
\item[50] Future of Social Security, \textit{supra} note 47.
\item[51] John, \textit{supra} note 14.
\item[52] Soc. Sec. Admin., Debunking Some Internet Myths, \url{http://www.ssa.gov/history/InternetMyths.html} (last visited June 1, 2007) ("President Roosevelt promised that the money the participants paid would be put into the independent "Trust Fund," rather than into the General operating fund, and therefore, would only be used to fund the Social Security Retirement program, and no other Government program. The idea here is basically correct. However, this statement is usually joined to a second statement to the effect that this principle was violated by subsequent Administrations." \textit{Id.} at Myth 4.).
\item[54] John, \textit{supra} note 14.
\item[55] Future of Social Security, \textit{supra} note 47.
\item[56] Id.
\item[57] John, \textit{supra} note 14.
\item[58] Id.
\end{footnotes}
government to workers promising to pay their future retirement benefits. The surpluses paid into the system to date have been used to fund other government programs or to reduce the national debt; the funds are not earmarked for prospective beneficiaries' later consumption.

The Social Security Trust Fund is very different from private trusts. In the private sector, trust funds often invest in real assets such as stocks, bonds, real estate, or other financial instruments. On the other hand, the Social Security Trust Fund is only allowed to invest in special-issue U.S. Treasury bonds. These special-issue bonds are unique because only the SSA may redeem them. Therefore, the SSA may not sell the bonds to the public to raise revenue for benefit payments.

The Department of the Treasury's issuance of bonds to the SSA is akin to lending money to one's self. The Social Security surplus is used to purchase these Treasury bonds. The surplus money then goes into the federal budget to finance everything from aircraft carriers to agency budgets and all other federally-subsidized programs. When it comes time for the bonds to mature, the government pays them from the federal budget.

According to the Office of Management and Budget ("OMB"), the only way Congress will be able to repay the special-issue Social Security bonds is to increase other taxes, authorize the treasury to borrow more funds from the public, reduce spending on other programs and use the savings to redeem the bonds, or reduce Social Security benefits. Because none of these options are attractive, it appears that Congress, through its inaction, would rather leave the issue of insolvency to later generations to resolve.

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59. Id.
60. Id.
62. Id.
63. Id.
64. John, supra note 14.
65. Id.
66. Id.
67. CRC Report for Congress, supra note 61.
68. Id.
69. Id.
70. Id.
71. Id.
Unfortunately, however, this problem gets more costly every year.\textsuperscript{74} Some estimate the cost of Congress delaying Social Security reform at $600 billion for each year.\textsuperscript{75} Many reform plans have been proposed, but none of the plans have been acted upon.\textsuperscript{76}

B. Reforming Social Security

The 1994 Advisory Council specifically addressed the program's long-term financing and found "serious problem[s] in the long run."\textsuperscript{77} In response, the Advisory Council of 1994 offered three reform options for consideration: a Maintenance of Benefits plan, an Individual Accounts plan, and a Personal Security Accounts plan.\textsuperscript{78}

The first option suggested is the Maintenance of Benefits plan.\textsuperscript{79} The proposal seeks to increase income taxes on Social Security benefits, redirect funds from the Medicare trust to the Social Security trust, cover all state and local employees under the program, slightly decrease benefits or increase payroll taxes, and move some of the Trust Fund to private equities indexed to the broader markets.\textsuperscript{80}

The main advantage of the Maintenance of Benefits plan is that the money in the Trust Fund may have a higher rate of return, which would make it possible to maintain current projected benefit levels for all workers if the return is sufficiently high.\textsuperscript{81}

The second option is the Individual Accounts plan.\textsuperscript{82} This option creates individual accounts alongside Social Security.\textsuperscript{83} Some key provisions of this plan are an increase in payroll taxes to fund personal accounts with defined investment options, an accelerated increase of the retirement age to sixty-seven by 2011, a slower growth of benefits for middle-income and high-income wage earners, lower dependant spouse benefits, and an increase of taxpayers by adding new hires in state and

\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} See generally id.
\textsuperscript{77} Advisory Council Report, FINDINGS, RECOMMENDATIONS AND STATEMENTS, http://www.ssa.gov/history/reports/adcouncil/report/findings.htm (last visited June 1, 2007) (an advisory council is commissioned by the SSA to review the Social Security Trust Fund, the scope of coverage, the benefits given, and all other aspects of the SSA's management) [hereinafter Advisory Council Report].
\textsuperscript{78} Id.
\textsuperscript{80} Advisory Council Report, supra note 77.
\textsuperscript{81} De Nardi et al., supra note 49.
\textsuperscript{82} Statement on Social Security, supra note 79.
\textsuperscript{83} Id.
local government to the Social Security program. The main benefit of the Individual Accounts plan is that the income generated from the individual accounts (which will be from annuities) coupled with reduced Social Security benefits will equal the benefits currently scheduled.

The third option suggested by the 1994 Advisory Council is labeled the Personal Security Accounts plan. This plan would create larger, fully-funded individual accounts to replace a portion of the current Social Security benefits. The key element of this plan is workers directing five percent of their current payroll taxes to a personal security account, which would be managed privately and invested in various financial products. This option establishes a two-tiered benefits plan where the first strata is a flat retirement payment for full career workers, while a second layer of benefits comes from the fully-funded, individually-owned Personal Security Accounts.

Under this plan, there would be a modification of Social Security to a flat rate with an acceleration in retirement age similar to the Individual Accounts plan, a gradual increase in the eligibility for early retirement benefits from sixty-two to sixty-five, a reduction in benefits for disabled workers and for spouses who have never worked outside of the home, and an increase in benefits for many elderly surviving spouses.

The advantages of the Personal Security Accounts plan include the potential for an overall higher benefit payment than currently projected, along with the ability to own the assets that accumulate in the Personal Security Account. Another benefit of this plan is that the account may be devised to a worker's beneficiary of choice upon death if it has not been previously exhausted.

III. What Are Totalization Agreements?

Totalization agreements are international social security agreements that coordinate one country's social security program with a comparable program from another country. These agreements have two main

84. Advisory Council Report, supra note 77.
85. Id.
86. Id.
87. Id.
88. Id.
89. Advisory Council Report, supra note 77.
90. Id.
91. De Nardi et al., supra note 49.
92. Id.
93. Id.
purposes: first, to eliminate double social security taxation on workers' income; second, to help workers fill foreign or domestic employment gaps in order to qualify for social security benefits.  

The United States currently has twenty-one totalization agreements in place. The most recent agreement the United States entered into is with Japan. There have been four new agreements since 2000.

A. Purposes of Totalization Agreements

1. Double Taxation

The first of the two main purposes of totalization agreements is to eliminate double taxation. Double taxation elimination is applicable to workers of one nationality who work in another country for part of their careers. This concept is illustrated by the following scenario regarding an American company sending employees to Canada. Without a totalization agreement, American workers in Canada would be required to pay the FICA tax on their earnings while working in Canada, in addition to Canada's applicable social security tax. The lack of totalization results in double taxation of the workers' wages. Totalization occurs because the American worker sent to Canada, under a totalization agreement, would pay either the social security tax of Canada or the United States, but not both concurrently.

A totalization agreement is beneficial to both the employer and their employee because many companies provide a tax equalization arrangement to expatriated employees. The current arrangement normally guarantees that the employee will not see a change in his or her after-tax income. For example, if a worker earns a salary of $50,000,

2006 [hereinafter Fact Sheet].

95. Id.

96. Payments, supra note 32 (listing countries with a Social Security agreement with the United States, which include: Austria, Belgium, Canada, Chile, Finland, France, Germany, Greece, Ireland, Israel, Italy, Japan, Korea (South), Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and United Kingdom).


98. Id. (listing countries with new agreements since 2000 as Australia, Chile, Japan, and South Korea).

99. Fact Sheet, supra note 94.

100. International Agreements, supra note 8.

101. Id.

102. Id. (length of employment in the foreign country determines whether that country will receive the Social Security tax).

103. Id.

104. Id.
the employer, under a tax equalization arrangement, could ultimately pay $50,000 in salary and then another $33,000 in Social Security and foreign benefit tax. The effective tax rate would be 66% of the employee's salary. In the above scenario, a totalization agreement would lower the amount the employer will pay in taxes and the savings could be passed on to the employee.

2. Avoiding Gaps

The second purpose of totalization is to allow workers to avoid gaps when trying to qualify for benefits. Without a totalization agreement, when an American worker is sent to a foreign country to work, the worker may not accumulate the required forty work credits needed to become vested in the Social Security program. In addition, the worker may not work in the foreign country long enough to qualify for that country's social security program, some of which require twenty-four years to become vested. Thus, international assignments could be potentially harmful to workers who spend a significant portion of their careers in another country. When these transnational workers retire, they may not have accumulated the required credits to qualify for full benefits from any of the countries where they have contributed to social security programs. Therefore, under a totalization agreement, work performed in another country would count towards work credits in the United States, and vice versa.

It is estimated that U.S. employers and employees currently save $800 million dollars annually in foreign tax through the existence of totalization agreements, while the annual savings of foreign employees and their employers from U.S. tax is only $200 million. Without totalization agreements, U.S. employers and employees working in foreign countries often pay up to 40% of their payroll in social security tax. Totalization agreements help reduce the tax burden on employers

105. See International Agreements, supra note 8.
106. Id.
107. Id.
108. Fact Sheet, supra note 94.
109. International Agreements, supra note 8; see also Dinerstein, supra note 10 at 2.
110. International Agreements, supra note 8.
111. Id.
113. Id.
114. Id.
and employees abroad.\textsuperscript{115} 

The totalization agreements currently in force are very similar to each other, and by looking at a select few it may be easier to understand how the U.S.-Mexico agreement will be implemented.\textsuperscript{116} The geographical location of the country, type of social security system in place, or the signing date of the agreement do not seem to affect the major terms of the agreements.\textsuperscript{117} The agreements with Canada, Chile, and Japan can be used to illustrate how the agreements work and how no major changes have occurred in the agreements’ terms over time or with different social security systems.\textsuperscript{118}

B. Agreement Currently in Force with Canada

The United States and Canada signed a totalization agreement on March 11, 1981.\textsuperscript{119} For the United States, this agreement covers the Social Security tax including the Medicare portion of FICA.\textsuperscript{120} However, the agreement does not apply to benefits provided by Medicare or the Supplemental Security Income (“SSI”) program.\textsuperscript{121} For Canada, this agreement applies to the Old-Age Security (“OAS”) program and the Canada Pension Plan (“CPP”).\textsuperscript{122} If an employee is working for an American employer and is sent to Canada to work for less than five years, that employee pays the FICA tax to the United States’ Social Security system.\textsuperscript{123} However, if an employee is sent to Canada for more than five years, then that employee would pay taxes to Canada’s social

\textsuperscript{115} International Agreements, supra note 8.
\textsuperscript{116} See generally id. (providing an overview of totalization agreements currently in effect). The only major difference in the current agreements is that the first agreement made with Italy does not include a maximum time allowed in the host country before taxes are to be paid into the host countries system; therefore, an Italian company may send an employee to the United States for any length of time and never contribute to the United States’ system for the entire time.
\textsuperscript{117} Id.; see also Soc. Sec. Admin., Totalization Agreement with Italy, available at http://www.ssa.gov/international/Agreement_Pamphlets/italy.html (last visited June 1, 2007) (totalization agreement with Italy is slightly different and does not include a time after which tax payments will be made to the host country).
\textsuperscript{118} International Agreements, supra note 8.
\textsuperscript{120} Id.
\textsuperscript{121} Id. SSI is primarily designed to help aged, blind, and disabled people, who have little or no income and provides cash to meet basic needs for food, clothing, and shelter. See generally Soc. Sec. Admin., Supplemental Security Income, available at http://www.ssa.gov/notices/supplemental-security-income/ (last visited June 1, 2007) (providing an overview of Supplemental Security Income).
\textsuperscript{122} Agreement Between U.S. and Canada, supra note 119.
\textsuperscript{123} Soc. Sec. Admin., Totalization Agreement with Canada, http://www.socialsecurity.gov/international/Agreement_Pamphlets/canada.html (last visited June 1, 2007) [hereinafter Totalization Agreement with Canada].
security system. Moreover, if the American was hired in Canada by an American employer, the American employee would pay the taxes into the Canadian system. If a Canadian is employed in the United States by a non-Canadian employer then the worker would pay FICA tax into the U.S. system. Finally, self-employed persons would generally pay social security taxes in their country of residence.

Benefits are available to a worker who has spent a portion of his or her career in either Canada or the United States. To qualify for benefits in the United States, an employee is required to work a minimum of 6-40 work credits, which equals 1.5 to 10 years. The number of credits earned from work in the United States will affect the amount received in benefits. To receive OAS, a person needs only to have resided in Canada for ten years. To receive benefits outside of Canada, a person must have resided in Canada for at least twenty years. If a worker does not have enough years of residency to qualify for OAS, Canada counts every quarter credit earned in the United States as three months towards the required time needed. No Canadian work credits are required for this benefit. To receive benefits from the Canada Pension Plan (CPP) only one work credit is required so long as the worker has reached the age of sixty-five.

Disability benefits are vested in an American worker after the worker has earned at least six quarters of credit or 1.5 years of work. A Canadian worker is vested for disability benefits so long as he or she has worked four of the last six years and is under the age of sixty-five. To receive these benefits from either the United States or Canada, a worker may use the credits earned from either one of the countries and apply them to the other country's benefit program.

124. Id.
125. Id.
126. Id.
127. Id.
128. Totalization Agreement with Canada, supra note 123.
129. Id.
130. Agreement Between U.S. and Canada, supra note 119.
131. Id.
132. Id.
133. Id.
134. Totalization Agreement with Canada, supra note 123.
135. Id. (Canadian work credit equals one year and the worker could qualify for reduced benefits at 60).
136. Id.
137. Id.
C. Agreement Currently in Force with Chile

The agreement currently in force with Chile was signed February 16, 2000. The totalization agreement with Chile is similar to the agreement in place with Canada. The main difference between the Canadian and Chilean systems is that the Chilean Social Security program has been privatized. The new Chilean pension plan capitalizes workers' contributions, and is managed by private companies. Chile's privatized pension plan allows for a minimum pension benefit regardless of what has actually been contributed, so long as the worker has contributed into the system for at least twenty years. This totalization agreement helps Chileans who may have spent part of their careers in the United States to qualify for the minimum benefits by using their credits earned while working in the United States towards the twenty year requirement.

D. Agreement Currently in Force with Japan

The agreement currently in force with Japan was signed on February 19, 2004. This totalization agreement is also similar to the agreement in place with Canada. Japan requires a full twenty-five years of coverage to become fully vested in the National Pension ("NP") and the Employees' Pension Insurance ("EPI"). While the NP universally covers all residents of Japan, the EPI is an earnings-related program. Full benefits are available for the NP at age sixty-five while full benefits for the EPI are available at age sixty.

The United States' current totalization agreement with Japan allows for workers from both countries to enjoy not having to pay double-
benefit taxes on wages earned while in the other country, as well as use the work credits earned in one country to apply for retirement benefits in their home country.

IV. Lack of Totalization Agreement with Mexico

Currently there is no totalization agreement between the United States and Mexico in force. However, Jo Anne Barnhart, then Commissioner of Social Security, signed a totalization agreement with Dr. Santiago Levy Algazi, Director General of the Mexican Social Security Institute on June 29, 2004, but the agreement has yet to take effect and has only recently been made public.

A. Agreement Currently Signed with Mexico

Similar to the agreement with Canada, if an employee is working for an American employer and is sent to Mexico to work for less than five years, that employee pays the FICA tax to the United States' Social Security system. However, if an employee is sent to Mexico for more than five years, that employee would pay taxes to Mexico's social security system. Furthermore, if the American was hired in Mexico by an American employer, the American employee would pay the taxes into the Mexican system. If a Mexican is employed in the United States by a non-Mexican employer, the worker would pay FICA tax into the U.S. system. Self-employed persons would generally pay social security taxes in their country of residence.

In addition to the coverage provisions listed above, the totalization agreement with Mexico also provides for portability of Social Security benefits from the United States to Mexico and vice versa. The agreement appears to eliminate any restrictions previously in place.

150. Agreement Between U.S. and Japan, supra note 145.
151. Id.
152. U.S. and Mexico Sign Agreement, supra note 11.
155. Id.
156. Id.
157. Id.
158. Id.
159. Agreement Between U.S. and Mexico, supra note 154.
regarding the portability of such benefits.\textsuperscript{160} An American worker would be guaranteed equal treatment under the laws of Mexico as a Mexican.\textsuperscript{161} Similarly, a Mexican citizen would be guaranteed equal treatment as any American citizen would under applicable Social Security laws and regulations.\textsuperscript{162} This equality extends not only to the worker but also to his or her dependants.\textsuperscript{163} However, the agreement makes no mention of credits earned while maintaining illegal immigrant status.\textsuperscript{164}

B. \textit{Concerns Over Totalization Agreement with Mexico}

Most totalization agreements have been signed with little or no notice from the public.\textsuperscript{165} However, the proposed U.S.-Mexico agreement has made some concerned citizens' groups furious.\textsuperscript{166} Senior citizens and border-protection groups have expressed opposition to this agreement.\textsuperscript{167} A resolution was even introduced in Congress expressing disapproval with the signed totalization agreement with Mexico.\textsuperscript{168} Concerns have been expressed before the House of Representatives' Subcommittee on Immigration, Border Security, and Claims of the Judiciary Committee\textsuperscript{169} that under the proposed agreement with Mexico, illegal immigrants would qualify for Social Security Disability Insurance ("SSDI") after only being in the United States for eighteen months,\textsuperscript{170} and that the system would be ripe for abuse from Mexican nationals aided by unscrupulous physicians who could diagnose and treat illegitimate injuries.\textsuperscript{171}

In addition, senior citizen groups such as "The Seniors Coalition,"\textsuperscript{172} are concerned that the Trust Fund will not be able to provide for Mexican nationals who may benefit from the Social Security

\begin{footnotesize}
\begin{enumerate}
\item[160.] Id. (agreement, which has been made public, is not a complete document, there appears to be several sentences or even paragraphs missing).
\item[161.] Id.
\item[162.] Id.
\item[163.] Id.
\item[164.] Agreement Between U.S. and Mexico, supra note 154.
\item[167.] See id.; see also Dobbs, supra note 12.
\item[168.] H.R. Res. 50, 109th Cong. (2005).
\item[169.] Judiciary Committee, supra note 112 (Joel Mowbray is an investigative reporter).
\item[170.] Id.
\item[171.] Id.
\end{enumerate}
\end{footnotesize}
system under this agreement. The Retired Enlisted Association ("TREA") Senior Citizens League has recently sent a petition to Congress trying to initiate another attempt to adopt a resolution aimed at blocking a U.S.-Mexico agreement.

Another concern raised by critics is that a totalization agreement with Mexico will promote a policy that encourages Mexican citizens to immigrate, legally or illegally, to the United States in order to qualify for SSDI and other benefits. Many critics fear that if an agreement is allowed to take effect, Mexicans will become eligible for Social Security benefits regardless of their legal status in the United States. This eligibility could cause an increase in the incidents of fraud against the Social Security system if Mexicans systematically claim disabilities which may or may not actually exist.

Another complaint from critics is that once a Mexican national is vested in the U.S. Social Security system, benefits will be paid to the worker and his spouse for the remainder of their lives, and because the current U.S. Social Security system is progressive, benefits are incrementally better for low-wage earners. The critics fear that this payout will add too great a burden on the Trust Fund.

The fears swirling around the U.S.-Mexico agreement are only exacerbated by a recent General Accounting Office ("GAO") report that states the "cost of such an agreement is highly uncertain." The GAO report lists several areas of concern in trying to determine the true cost of an agreement. These areas of concern include: the SSA’s process for developing the agreement was neither thorough nor well-documented, the research of the Mexican Social Security system was too informal to validate the integrity and compatibility of the Mexican system with the U.S. system, and poor data was relied upon by the SSA. This poor data was used to project the short-term and long-term costs of the

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173. Id.
178. Id; see also Schlafly, supra note 176; Weisman, supra note 165.
180. Id.
181. Id.
182. Id.
183. Id.
totalization agreement with Mexico.\textsuperscript{184} Mexico’s social security program is not as financially beneficial to low wage earners as the United States’ program.\textsuperscript{185} The Mexican program takes 1,250 weeks of contributions, or a full twenty-four years, to become vested in the program, and even then the worker only receives what he or she actually contributed plus interest.\textsuperscript{186} By comparison, the United States fully vests workers after only forty credits, which could be earned in as little as ten years.\textsuperscript{187}

Mexican social security is divided into two separate systems: one for the private sector and another for the public sector.\textsuperscript{188} The Mexican program for the public sector is in dire straits because the promised benefit is 100\% of the last twelve months of salary upon retirement and the retirement age in Mexico is fifty-six with a current life expectancy of seventy-eight.\textsuperscript{189} Currently, the ratio of workers per retirees in the public sector is five-to-one, but this is expected to change to two-to-one by 2020.\textsuperscript{190}

Mexico’s private sector’s social security program has been converted from a “defined-benefit” plan to a “defined-contribution” plan that provides the Mexican government some short-term relief from bankruptcy.\textsuperscript{191} A large majority of Mexican workers may opt out and not contribute anything to their retirement, which is one of the problems with the Mexican “defined-contribution” plan.\textsuperscript{192}

1. Fiscal Impact of a Totalization Agreement with Mexico

The impact of a totalization agreement with Mexico is unclear.\textsuperscript{193} According to the Office of the Chief Actuary (“OCACT”), the estimated cost of the first year of a totalization agreement with Mexico will be $78 million (in constant 2002 dollars) and will grow to $650 million by 2050.\textsuperscript{194} The SSA’s cost estimate assumes that the initial number of newly-qualified Mexican beneficiaries would be 50,000, or the number

\begin{itemize}
  \item \textsuperscript{184} GAO, supra note 179.
  \item \textsuperscript{185} Dinerstein, supra note 10 at 3.
  \item \textsuperscript{186} Id.
  \item \textsuperscript{188} Dinerstein, supra note 10.
  \item \textsuperscript{189} Id. at 5.
  \item \textsuperscript{190} Id.
  \item \textsuperscript{191} Id.
  \item \textsuperscript{192} Id. But cf. José Piñera, Empowering Workers: The Privatization of Social Security in Chile, CATO J., Winter 1995-96, http://www.cato.org/pubs/journal/cj15n2-3-1.html. The Mexican private sector plan and the Chilean social security plan are similar as both are “defined-contribution” plans. However, the Chilean plan is fiscally solvent.
  \item \textsuperscript{193} GAO, supra note 179.
  \item \textsuperscript{194} Id.
\end{itemize}
of current beneficiaries now living in Mexico, and the number will grow six fold over time. \(^{195}\) This number seems to be rather small in comparison to the 7.8 million Mexican immigrants estimated to be in the United States as of 2001. \(^{196}\) A GAO review of other totalization agreements shows that the actual number of beneficiaries was frequently underestimated and far exceeded the original actuarial projections. \(^{197}\) The possible underestimation of the number of Mexican beneficiaries is problematic because only a 25% increase in the estimated beneficiaries, or an additional 13,000 beneficiaries, would have a measurable impact on the long-range actuarial balance of the Trust Fund. \(^{198}\)

The fiscal impact of the actuarial data being underestimated in the case of Mexico could be severe. \(^{199}\) The U.S. Census Bureau projects that Mexico accounts for around 30% of all immigrants in the United States or 7,800,000. \(^{200}\) This projection makes Mexico the single largest country of origin for any immigrant group found in the United States, nearly six times greater than the next highest country. \(^{201}\) Meanwhile, Canadian immigrants total about 678,000. \(^{202}\)

When considering that the SSA estimates only an increase of 50,000 newly-qualified beneficiaries under a Mexican agreement, it is hard to understand why the SSA did not address the other 7,750,000 Mexican immigrants currently in the United States. \(^{203}\) The SSA projects that the amount of eligible beneficiaries will increase only six fold by 2050, which would only amount to 300,000. Again, the SSA does not address the other 7,500,000 Mexican immigrants in the United States. \(^{204}\)

The OCACT based its initial estimate of 50,000 on the premise that the number of Mexican immigrants who had worked in the United States

195. Id.
197. GAO, supra note 179 at 13.
198. Id. at 9.
199. Id. at 9-10.
202. Id. The top ten countries of birth for foreign-born people in the U.S. as of 2000, from highest to lowest, are Mexico, China, Philippines, India, Cuba, Vietnam, El Salvador, Korea, Dominican Republic and Canada. See also Immigrant Rights, supra note 200.
203. GAO, supra note 179.
204. Id. at 9 (300,000 was determined by multiplying the projected 50,000 initially qualified beneficiaries by 6).
for enough time to be vested with Social Security benefits equaled the number of immigrants who worked in the United States between two and nine years before returning to Mexico. In other words, initial new beneficiaries would be equivalent to the 50,000 recipients currently receiving benefits in Mexico.

According to the GAO, the OCAct did not determine whether the 50,000 persons currently receiving benefits would serve as a good measure for the Mexican immigrant population, nor did it appear that the OCAct adjusted its projections for the huge increase of Mexican immigrants into the United States from 1990 to 2000, or the increase since 2000.

2. Immigration Impact of an Agreement with Mexico

The full impact on Mexican immigration resulting from a totalization agreement is also unclear. Some critics argue that a totalization agreement will be one more reason for undocumented Mexican immigrants to illegally enter the United States. Meanwhile, other pro-immigration groups counter this argument by stating that an agreement would ensure fair treatment for all Mexican workers who have contributed into the U.S. Social Security system and deserve to receive retirement benefits just as anyone else who contributes. Only time will tell whether there will be any impact on legal or illegal immigration as a result of this totalization agreement.

Mexico and the United States have divergent interests when it comes to immigration and migration. Mexico desires to send its citizens north to relieve them from its lack of employment opportunities. Meanwhile, the cost to the United States outweighs the

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205. Id.
206. Id.
207. Id.
208. Census, supra note 201. The total Mexican immigration population in 1990 was 4.3 million compared to the 7.8 million in 2000, it is estimated that 485,000 new immigrants have come from Mexico each year since 2000. See Jeffery Passel, Unauthorized Migrants: Numbers and Characteristics (2005), available at http://www.ime.gob.mx/investigaciones/pew/2005/migracion/Unauthorized_Migrants.pdf.
211. See e.g., See Beyond the Border, PBS (2002), available at http://www.pbs.org/itvs/beyondtheborder/story.html (documentary shows immigrants who come to the United States for a chance to better support themselves and their families).
212. Camarota, supra note 196.
213. Id.
benefit derived from an influx of primarily unskilled labor.\textsuperscript{214} Mexican immigration has dramatically risen over the last thirty years and is projected to continually rise.\textsuperscript{215} A totalization agreement would solidify the rights of Mexican workers to receive Social Security benefits for themselves and for their dependents.\textsuperscript{216}

The U.S.-Mexico totalization agreement follows the pattern of other totalization agreements and overrides the Social Security Act.\textsuperscript{217} The agreement allows for benefits to be paid to Mexicans who reside in Mexico.\textsuperscript{218} This override allows a Mexican citizen to migrate to the United States, work here for a few years, and earn Social Security credits. Presumably thereafter, the worker may return to Mexico to work the remainder of his or her career and apply the credits earned in Mexico to the U.S. Social Security system.\textsuperscript{219} This application of credits would allow the worker to receive benefits for himself and his non-citizen spouse\textsuperscript{220} who may have never been in the United States.\textsuperscript{221}

A totalization agreement will financially benefit Mexican workers more than American workers.\textsuperscript{222} But, if the employment situation is so dire in Mexico that its citizenry desires to migrate north without a totalization agreement, it seems questionable that a totalization agreement will be the deciding factor in a Mexican national's decision to migrate.\textsuperscript{223} Canada, which has had a totalization agreement with the United States since 1984, has not seen a dramatic increase of immigrants to the United States as a result of the totalization agreement.\textsuperscript{224} Some anti-immigration groups see the signing and implementation of a totalization agreement as a tempting prize for Mexican nationals causing an increase in illegal Mexican immigration.\textsuperscript{225} Only after the enactment of the agreement will it be clear whether totalization does in fact increase the flow of Mexican nationals.

\begin{itemize}
\item \textsuperscript{214} Id.
\item \textsuperscript{215} Id. (Mexican Immigrant population in 1970 was 800,000 and in 2000 it was nearly 8,000,000).
\item \textsuperscript{216} GAO, supra note 179.
\item \textsuperscript{217} Agreement Between U.S. and Mexico, supra note 154.
\item \textsuperscript{218} Id.
\item \textsuperscript{219} GAO, supra note 179.
\item \textsuperscript{220} Agreement Between U.S. and Mexico, supra note 154.
\item \textsuperscript{221} Schlafly, supra note 176.
\item \textsuperscript{222} Dinerstein, supra note 10, at 1.
\item \textsuperscript{223} Maruja Lander, Crossing to the 'promised land': Myriad of complex reasons draw Latinos to America, PRESS AND SUN-BULL., Sept. 14, 2006, available at http://www.pressconnects.com/apps/pbcs.dll/article?AID=/20060914/NEWS01/609130377&template=themearrr&theme=HISPANIC.
\item \textsuperscript{224} GAO, supra note 179.
\item \textsuperscript{225} Dinerstein, supra note 10.
\end{itemize}
C. Reasons to Support a U.S.-Mexico Agreement

An agreement with Mexico may have a negative impact on the United States, including the disproportionate amount of money expended by the Social Security system versus the money saved by U.S. citizens working in Mexico. However, an agreement may still be the right step for the United States. Legal Mexican migrants or immigrants should be allowed to receive benefits for FICA taxes previously paid, regardless of where they wish to reside in retirement because it would be inequitable to act otherwise.

While the cost of a U.S.-Mexican agreement could be $78 million in the first year growing to $650 million by 2050, there may be ways to offset this cost, such as implementing some of the reform options previously mentioned. An example of using a reform idea to help fund the Mexican totalization agreement would be to transfer a portion of the Trust Fund from Treasury Notes to equities where the surplus would have the chance of a higher return. Treasury Notes issued in May 2007 were recently auctioned and are currently paying 4.5%. If one billion dollars is used to buy Treasury Notes today, the interest generated would equal $450 million over ten years. However, if the same one billion dollars was invested in an indexed fund for ten years, the total interest earned would equal $1,593,742,460.10. The amount of
interest that could be earned from an S&P 500 Index fund is staggering compared to Treasury Notes. This type of Social Security reform could be helpful in offsetting the cost of an agreement with Mexico. There are certainly risks when investing in the stock market because past performance is no guarantee of future earnings.\textsuperscript{236} Notwithstanding the risks, investing in a balanced portfolio can help mitigate such insecurity.

By allowing a U.S.-Mexican agreement to be implemented, the United States may still gain other benefits not previously addressed. The agreement would allow Mexican retirees to return to Mexico without losing their benefits, which would help alleviate the strain of geriatric care in the United States.\textsuperscript{237} The agreement could also help remove barriers for American retirees to retire to Mexico, which would shift the burden of health care, an aging population, and other end-of-life issues to Mexico. The Social Security totalization agreements with Mexico and Canada, along with NAFTA, are other steps toward creating a North American Union,\textsuperscript{238} which may become beneficial to the United States as the global economy becomes more competitive. Finally, by increasing the tax base into the Social Security system, the future solvency of the Trust Fund may be secured. An increase of legal immigrants paying into the Social Security system would help to improve the worker-to-retiree ratio.\textsuperscript{239} The improved ratio would help fund the pay-as-you-go system.\textsuperscript{240} This increase in the tax base may help to push back the date of the Social Security Trust Fund insolvency.\textsuperscript{241}

V. Conclusion

Many of the concerns regarding a totalization agreement with Mexico are genuine and valid.\textsuperscript{242} The agreement may not be immediately fiscally beneficial to the United States or the majority of American employers or employees. Notwithstanding these concerns, young Americans now embrace a social belief that one should not get a

\begin{thebibliography}{9}
  \item \textsuperscript{236} See generally GAO, supra note 179; \textit{but cf.} Statement on Social Security, \textit{supra} note 79 (stating concerns about investing in the equities market, which include volatility, investment risk and uncertainty).
  \item \textsuperscript{237} See generally Christine Tassone Kovner et al., \textit{Who Cares For Older Adults? Workforce Implications of an Aging Society}, \textit{21 HEALTH AFF.} 78 (2002).
  \item \textsuperscript{240} \textit{Id.}
  \item \textsuperscript{241} See generally Advisory Council Report, \textit{supra} note 77.
  \item \textsuperscript{242} See generally Schlafly, \textit{supra} note 176.
\end{thebibliography}
reward without working and earning it. This belief is what requires us to accept a totalization agreement with Mexico. Mexican immigrants and migrants who have worked legally in the United States and paid FICA taxes should benefit from those taxes paid.

As long as Mexican migrants and immigrants have a legal right to live and work in the United States, it would be inequitable not to extend Social Security benefits to all those who have contributed through their FICA taxes. Illegal migrants and immigrants, however, should not benefit from using false Social Security numbers, even though they may also have paid FICA taxes. Thus, a well-drafted agreement would allow Mexican nationals to receive only credit for work done in the United States legally. Because the totalization agreement makes no mention of credits earned while maintaining illegal immigrant status, Congress should consider carefully drafting legislation to specifically address this issue. Specific legislation may help to alleviate some of the concerns about potential abuses of the Social Security system. The pending enactment of the U.S.-Mexico totalization agreement may be an opportune time for Congress to address Social Security reform along with the need to insure that benefits go to those who have legally earned the right to them. The government should determine whether allowing additional migrant and immigrant workers will bolster the Social Security coffers. Hopefully, the U.S.-Mexican totalization agreement will have positive, long-term benefits for both countries, which could far outweigh any expressed concerns.

244. See generally John, supra note 13.
245. Id.
246. Judiciary Committee, supra note 112.
247. Id.
248. Agreement Between U.S. and Mexico, supra note 154.
249. Id.
250. Id.