

Executive Summary Backgrounder

No. 2241
February 13, 2009



Published by The Heritage Foundation

Next Steps for Immigration Reform and Workplace Enforcement

Diem Nguyen, Matt A. Mayer, and James Jay Carafano, Ph.D.

Legislative efforts in immigration reform have died off since the debate on the Comprehensive Immigration Reform Act of 2007 (S. 1348), but for the past several years, the Bush Administration did considerable work in advancing immigration reform outside the legislative process. One such effort was to enhance internal enforcement of immigration laws. The new emphasis on enforcement has resulted in a noticeable increase in the detention and deportation of illegal immigrants. However, enforcement still faces several obstacles before all immigration laws are successfully enforced. For improved enforcement to be an effective component of immigration reform, the necessary resources must be available to support a compassionate and responsible policy.

The Right Strategy for Reform. Immigration and workplace enforcement are only one component that affects migration to the United States. Establishing a robust and responsible immigration system and repairing America's broken borders will require serious effort across the entire immigration and border security system. Reform needs to be incremental and designed to deincentivize illegal immigration, while strengthening the capacity of employers to hire the employees they need to help the economy grow and prosper without jeopardizing the nation's security, sovereignty, and social fabric. Effective change does not require Congress to pass a massive, comprehensive bill. It could simply consist of sustained incremental efforts, including:

- *Safeguarding the southern border* to make illegal entry into the United States less attractive than the legal avenues.
- *Promoting economic development and good governance in Latin America* to provide potential illegal immigrants with opportunities at home.
- *Enhancing the legal worker programs* to provide legal avenues that meet the needs of employers and immigrants and are a better option than illegal immigration.
- *Reforming U.S. Citizenship and Immigration Services* to handle legal immigration better.
- *Enforcing immigration and workplace laws* to reduce the economic incentives for illegal immigration and restore the rule of law.

State and Local Initiative. The effort to reduce illegal immigration has not come solely from the federal government, nor should it. State and local interest in addressing illegal immigration is evident from the large number of jurisdictions applying for 287(g) partnerships and ICE ACCESS cooperation.

This paper, in its entirety, can be found at:
www.heritage.org/Research/Immigration/bg2241.cfm

Produced by the Douglas and Sarah Allison
Center for Foreign Policy Studies
of the

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Institute for International Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002-4999
(202) 546-4400 • heritage.org

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Lost in the debate is the ability of states and localities to enact employment, housing, identification, and other non-law enforcement measures to discourage illegal immigration in their jurisdictions. A handful of states and localities have even passed laws to apply pressure on illegal immigrants and the businesses that employ them in their respective areas. Yet many jurisdictions are hesitant to act because such actions provoke a legal onslaught from pro-illegal immigrant groups, such as business groups that want cheap labor and race-based groups that want more members.

Moving Forward on Internal Enforcement.

Federal, state, and local governments have made tremendous progress in enforcing immigration laws. The Obama Administration should not allow the situation to revert to the previous era of lax enforcement. It should continue to improve internal enforcement to ensure efficacy and compassion. Specifically, the Administration should:

- **Improve detention and removal.** The government needs to continue to enforce immigration law and to completely end the practice of “catch and release.” The U.S. Immigration and Customs Enforcement (ICE) needs to find innovative ways to move illegal immigrants expeditiously through detention centers. Using initiatives like Operation Scheduled Departure and expedited removal could greatly increase the Office of Detention and Removal’s ability to process illegal immigrants.
- **Foster greater cooperation with state and local governments.** ICE cooperation with state and local governments is the only feasible way to successfully enforce immigration laws. ICE ACCESS

is an extremely popular program and should receive the funding to meet the incoming partnership requests from local jurisdictions. Greater cooperation also entails state and local law enforcement communicating more with ICE to allow seamless cooperation in detaining and removing illegal immigrants.

- **Achieve comprehensive worker verification.** This will require more than adopting E-Verify. Implementing Real ID and sharing Social Security no-match data will reduce the ability of illegal immigrants to commit identity theft and employers’ ability to reuse Social Security numbers fraudulently.

Conclusion. Successful reform of U.S. immigration laws will require accountability by federal, state, and local governments. Without enforcement, the illegal immigrant population will continue to grow, and ICE and Border Patrol agents will find it increasingly difficult to focus on real threats.

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Background

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Legislative efforts in immigration reform have died off since the debate on the Comprehensive Immigration Reform Act of 2007 (S. 1348), but for the past several years, the Bush Administration did considerable work in advancing immigration reform outside the legislative process. One such effort was to enhance internal enforcement of immigration laws. The new emphasis on enforcement has resulted in a noticeable increase in the detention and deportation of illegal immigrants. However, enforcement still faces several obstacles before all immigration laws are successfully executed. For improved enforcement to be an effective component of immigration reform, the necessary resources must be available to support a compassionate and responsible policy.

Where We Are

History argues strongly for making immigration enforcement in the workplace an essential component of reform. In 1986, President Ronald Reagan signed the Immigration Reform and Control Act (IRCA) of 1986. The bill was essentially a comprehensive immigration bill. It included amnesty for the illegal population of approximately 2.7 million people, sanctions against employers that hired illegal workers, and a temporary worker program similar to the H-2A visa for seasonal agricultural workers.¹

IRCA, like the proposed 2007 comprehensive immigration bill, attempted to reform immigration to thwart illegal immigration. The policy strategy failed for two reasons: Amnesty encourages future immi-

Talking Points

- Immigration reform will require a sustained, incremental effort to secure the border, improvements in the legal worker programs, support for economic development in Latin America, and, especially, continued efforts by the Obama Administration to enforce U.S. immigration law.
- Internal enforcement is the only mechanism that can discourage illegal immigration and persuade future migrants and employers to use the available legal avenues. Immigration reform will not be feasible without methodical enforcement that brings legitimacy back to U.S. immigration law.
- Internal enforcement needs to be reformed to ensure that it is conducted efficiently and in a compassionate manner.
- Immigration reform is best accomplished in accordance with the principles of federalism. Allowing state and local communities to actively participate in specific immigration enforcement activities is the logical option.

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grants to enter the U.S. illegally, and work on immigration reform stopped after the bill was passed, with the federal government doing nothing to implement employer verification and immigration enforcement.

Until four years ago, it was an open secret that once inside the United States, illegal immigrants could live their lives with little fear of arrest or deportation. This was the mentality of the illegal immigrant population when the Bush Administration pledged to begin enforcing the law. As the number of worksite raids and deportations rose, a wide array of complaints and criticisms began appearing.

The massive increase in immigration arrests has led to an overwhelming number of cases in the federal judicial system. Critics note that the increased number of immigration cases has overloaded the federal court system, leading to reduced prosecutions of other types of crime, including organized crime and white-collar crime.² However, the U.S. Department of Justice should not be choosing to prosecute one crime over another, but should be prosecuting all cases presented. Further, arguments about immigration cases overwhelming the courts are misdirected. Because so few immigration cases were prosecuted before the renewed emphasis on immigration enforcement, enforcement would inevitably increase the number of immigration cases significantly. As part of this increased enforcement, Congress needs to provide the Justice Department and the courts with additional resources to enforce immigration law.

Similar concerns have also been voiced regarding state and local law enforcement priorities, arguing that local law enforcement's new focus on immigration enforcement takes away from the policing of other, potentially more serious crimes. This may be the case, but state and local governments have full

authority to decide their enforcement priorities. The U.S. federal system of government allows local governments to decide to what degree they will enforce immigration laws.

However, the most prevalent criticism is that enforcement is not an aspect of immigration reform, but a tool of anti-immigrant groups to limit overall immigration. A report by the National Network for Immigrant and Refugee Rights claimed that the U.S. government was perpetrating human rights violations against immigrants and refugees in its enforcement of federal immigration laws.³

The bulk of the media coverage of raids and enforcement paints arrested illegal immigrants as the victims of undeserved and excessive abuse. Reporting on the aftermath of raids describes families that have been separated, illegal immigrants hiding in their homes for fear of being caught, and mothers who are forced to wear ankle tracking bracelets while caring for their children. These critics accused the Bush Administration of being anti-immigrant and xenophobic and called for a complete end of immigration enforcement. Enforcement critics believe that immigration reform can be achieved by simply improving temporary worker programs.

Often these groups do not differentiate between illegal immigrants and legal immigrants. They believe that illegal immigrants are entitled to the same rights as those who are in the U.S. legally. They portray enforcement actions taken against illegal immigrants as acts against the entire immigrant population, legal and illegal. Finally, they make the spurious assertion that, by being tough on illegal immigration, the U.S. government is no longer open to immigration in general.

This argument is disingenuous, especially since legal immigration continues unabated into the

1. Edwin Meese III and Matthew Spalding, "Where We Stand: Essential Requirements for Immigration Reform," Heritage Foundation *Background* No. 2034, May 10, 2007, at <http://www.heritage.org/Research/Immigration/bg2034.cfm>.
2. Solomon Moore, "Push on Immigration Crimes Is Said to Shift Focus," *The New York Times*, January 11, 2009, at <http://www.nytimes.com/2009/01/12/us/12prosecute.html> (February 4, 2009).
3. Human Rights Immigrant Community Action Network, "Over-Raided, Under Siege: U.S. Immigration Laws and Enforcement Destroy the Rights of Immigrants," National Organization for Immigrant and Refugee Rights, January 2008, at http://www.nnirr.org/resources/docs/UnderSiege_web2.pdf (February 4, 2009).

United States. The U.S. continues to admit more immigrants than most countries in the world. In truth, the new enforcement efforts under the Bush Administration were part of a bigger immigration reform strategy. In addition to the new emphasis on policing illegal immigrants, the Department of Homeland Security (DHS) and Department of Labor also worked to streamline the H-2A and H-2B visas, simplifying the application process for temporary workers.

Contrary to the critics' claims, enforcement is essential to immigration reform. Enforcement and deportation are the only way to make the costs (and risks) of illegal immigration outweigh the benefits. No potential temporary worker program could, on its own, act as a sufficient incentive for legal migration. Temporary worker programs place greater restrictions on the visa holders, such as time limits on how long a temporary worker can work in the United States. In addition, temporary worker programs require employers to follow labor and wage laws for visa holders, which make visa holders significantly more expensive and time consuming to employ than illegal workers.

Furthermore, the increase in illegal immigrants is not solely due to undocumented people crossing the border. A significant portion of illegal immigrants in the United States are individuals who entered the country with valid visas but failed to leave before their visas had expired. Overstays account for at least 31 percent of the illegal immigrants in the U.S.⁴ Interior enforcement is the only method capable of dealing with these illegal immigrants.

Over the past year, studies have found that the number of illegal immigrants has declined from an

estimated 12 million illegal aliens in the summer of 2007 to between 11.2 and 11.4 million illegal immigrants as of July 2008.⁵ This drop of almost 1 million illegal immigrants is the first significant decrease in the past seven years.

The reason for the decline is not certain, but the increased enforcement has undoubtedly played a role. The Pew Hispanic Center noted that the heightened enforcement incited worry among illegal immigrants and could have induced many to leave the country on their own.⁶ Most importantly, the study notes that, for the first time in decades, the number of incoming illegal immigrants is less than the number of immigrants entering the country as legal permanent residents.

Understandably, the detention and deportation of illegal immigrants have negative emotional consequences on those directly and indirectly involved. Short of ending enforcement entirely, the U.S. government needs to acknowledge these hardships and make an effort to minimize them. The American image is important, and enforcement should not give potential legal migrants the impression that they would not be welcome.

The Obama Administration will need to find ways to enforce immigration laws and bring accountability back to the system in the most compassionate and humane way. Improving the treatment of detainees is necessary. For example, experts suggest language training for U.S. Immigration and Customs Enforcement (ICE) agents to enable them to better communicate with the detainees. In addition, quickly processing sole caregivers would minimize the time that children spend without a parent.⁷

4. Ruth Ellen Wasem, "Nonimmigrant Overstays: Brief Synthesis of the Issue," Congressional Research Service Report for Congress, May 22, 2006, at <http://www.ilw.com/immigdaily/news/2006,0530-crs.pdf> (September 14, 2008).
5. Jeffrey S. Passel and D'Vera Cohn, "Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow," Pew Hispanic Center *Background*, October 2, 2008, p. 1, at <http://pewhispanic.org/files/reports/94.pdf> (February 4, 2009), and Steven A. Camarota and Karen Jensenius, "Homeward Bound," Center for Immigration Studies, July 2008, at <http://www.cis.org/articles/2008/back808.pdf> (February 4, 2009).
6. Passel and Cohn, "Trends in Unauthorized Immigration," p. ii.
7. Randy Capps, Rosa Maria Castañeda, Ajay Chaudry, and Robert Santos, *Paying the Price: The Impact of Immigration Raids on America's Children*, Urban Institute, 2007, at http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf (February 4, 2009).

The Right Strategy for Reform

Immigration and workplace enforcement are only one component that affects migration to the United States. Establishing a robust and responsible immigration system and repairing America's broken borders will require serious effort across the entire immigration and border security system. Reform needs to be incremental and designed to deincentivize illegal immigration, while strengthening the capacity of employers to hire the employees they need to help the economy grow and prosper without jeopardizing the nation's security, sovereignty, and social fabric. Effective change does not require Congress to pass a massive, comprehensive bill. It could simply consist of sustained incremental efforts, including:

- **Safeguarding the southern border.** The U.S. porous border makes illegal entry into the United States an easier and more attractive option than the legal avenues. Conscious efforts should be made to give the U.S. government greater awareness along the border. The physical and technological fence is only part of the solution. More border agents are needed, more technology needs to be deployed, and federal authorities need to cooperate and collaborate more with state and local law enforcement.
- **Promoting economic development and good governance in Latin America.** The lack of job opportunities in Latin America encourages those desperate for work to enter the U.S. illegally. Meanwhile, employers readily offer work to those who are here illegally. This "push-pull" effect can only be addressed by engaging both sides. Aiding Latin American countries in their efforts for economic development will greatly reduce the pressure for their citizens to come to the United States illegally. In Mexico, it is vital that the U.S. help the Mexican government combat the drug cartels that are trying to destabilize it.
- **Enhancing the legal worker programs.** The United States has always been a destination for immigrants and requires a robust and efficient visa system. Faulty visa programs have encour-

aged many employers and immigrants to resort to illegal immigration. The United States needs to provide legal avenues that meet the needs of employers and immigrants and are a better option than illegal immigration. This need is greater now that Europe is creating aggressive visa programs to attract the world's best and brightest.

- **Reforming U.S. Citizenship and Immigration Services.** Reforming U.S. immigration policy is one aspect of reform. However, until the agency tasked with processing incoming immigrants is reformed, little improvement will be made. As of now, the U.S. Citizenship and Immigration Services (USCIS) could not handle a surge of legal immigrants, in part because it has a faulty budget model based on application fees. For USCIS to be responsive to immigration reform, its revenue structure should be changed to give the USCIS more flexibility. This can be accomplished by investing in workplace enforcement and by establishing a national trust fund to pay for programs for which the USCIS cannot charge fees (for example, amnesty applications and naturalization of military personnel).⁸
- **Enforcing immigration and workplace laws.** For many years, the government turned a blind eye to illegal immigration, only reinforcing the incentives for foreigners to enter the country illegally. The executive branch is responsible for implementing laws passed by Congress, but immigration reform is only possible if the government defends its laws. State and local governments should continue to put in place mechanisms to ensure that employers are not hiring illegal immigrants and to crack down on those living in the country illegally.

The Change in Federal Effort

After many years of neglect, the Bush Administration began judiciously enforcing the existing immigration laws to lay the groundwork for the proposed comprehensive immigration reform legislation in 2007, which would include a broad

8. See James Jay Carafano, "Naturalization, Citizenship, and Presidential Elections: Lessons for 2008," Heritage Foundation *Backgrounder* No. 2147, June 23, 2008, at <http://www.heritage.org/Research/HomelandDefense/bg2147.cfm>.

amnesty provision. The effort was wider than just worksite arrests. It included creating several initiatives to work with state and local governments and created new programs and software for worksite enforcement.

DHS will never be able to arrest every illegal immigrant in the country. Yet if the government held businesses accountable for their violations of immigration law by removing employees determined to be here illegally and by punishing scofflaw employers, those living here illegally would begin to leave on their own as jobs became too hard to find to justify staying. More importantly, future immigrants would use the legal avenues available because the difficulty of finding a job would not justify the cost of crossing illegally.

Worksite Enforcement

When the Bush Administration began enforcing immigration laws, the frequency of worksite arrests jumped from 845 in fiscal year (FY) 2004 to 6,287 in FY 2008.⁹

Worksite raids have been extremely controversial, greatly tainting overall perceptions of immigration enforcement, even though they affect only a minuscule percentage of aliens arrested. In FY 2007, only 4,940 of the 1,210,772 total illegal immigrants detained in 2007 were arrested through worksite enforcement. The media has covered ICE raids with much consternation, primarily due to the humanitarian concerns about families being separated by deportation. The worksite raids can cause the detainees' children, most of them U.S.-born citizens, to suffer when their parents are detained and deported.

The worksite raids also disrupt local communities because of the large number of people arrested. ICE has been conscious of this and has attempted to find ways to target egregious abusers of illegal work-

ers while being compassionate toward the families hit by deportation. ICE has started several initiatives to allow families to stay together during the deportation process, including opening the T. Don Hutto Residential Detention Center, which is a 512-bed facility that allows the family to stay together during the detention and removal process.¹⁰ In addition, ICE allows the release of sole caregivers from detention facilities.¹¹

However, because ICE prefers to keep families together, some parents do not report to ICE officers that they have children for fear of the children also being deported. A study found that half of detainees have children, making this a serious concern for ICE. To ensure a proper degree of care and compassion, ICE should:

- **Coordinate with the local community before and after raids**, including working with schools, social services, and churches to ensure that no children are being left behind.
- **Quickly release sole caregivers** to minimize the time that children of single parents are left in the care of others.

Working with State and Local Law Enforcement

Workplace raids do not have a directly significant effect on the total number of illegal immigrants present in the United States. ICE is a small agency, and it is responsible for enforcing immigration law as well as U.S. customs law. Because of its relatively small size, partnerships with state and local governments are essential for effective internal enforcement.

Beginning in 2002, ICE began partnering with local law enforcement agencies under a cross-designation program authorized by Section 287(g) of the Immigration and Nationality Act. This program allows local law enforcement officers to enforce

9. *Ibid.*, and press release, "Worksite Enforcement," U.S. Immigration and Customs Enforcement, November 25, 2008, at <http://www.ice.gov/pi/news/factsheets/worksite.htm> (February 4, 2009).

10. Press release, "The ICE T. Don Hutto Family Residential Facility: Maintaining Family Unity, Enforcing Immigration Laws," U.S. Immigration and Customs Enforcement, April 2007, at <http://www.ice.gov/pi/news/factsheets/huttofactsheet.htm> (February 4, 2009).

11. Emily Bazar, "Workplace Raids Ensnare Kids in Net, Too," *USA Today*, October 31, 2007, at http://www.usatoday.com/nation/2007-10-31-immigration-kids_N.htm (February 4, 2009).

immigration laws. In a 287(g) partnership, a memorandum of agreement (MOA) between ICE and the local law enforcement agency outlines the authority given to the local officers. ICE agents closely monitor activities under the 287(g) program, and localities are required to report any immigration-related enforcement work to ICE supervisors. Participating law enforcement officers are also required to attend a four-week training course and must meet basic requirements, including U.S. citizenship and a minimum of two years of work experience.

In the past several years, the cross-designation program has been extremely popular with state and local law enforcement agencies. ICE has 67 active MOAs and has received many additional requests for 287(g) partnerships. Yet ICE has found that the 287(g) partnerships are not ideal for many local jurisdictions. To meet their needs, ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ICE ACCESS) was created to provide a menu of different programs that allow the federal government to partner with and support local law enforcement officers in enforcing customs and immigration laws.

The ICE ACCESS menu includes:

- **Asset forfeiture/equitable sharing**, in which money seized by ICE agents from criminal activities—such as money laundering, drug trafficking, and bulk cash smuggling—can be disbursed to the state and local law enforcement agencies that aided in the investigation and prosecution.
- **Border Enforcement Security Task Force (BEST)**, which works with other law enforcement agencies to identify, disrupt, and dismantle criminal organizations at the border. Eight of the 10 task forces are deployed on the southern border. In FY 2007, BEST made 516 criminal arrests and 1,037 administrative arrests and seized thousands of pounds of drugs, including 1,326 pounds of cocaine.
- **Criminal Alien Program (CAP)**. CAP uses a risk-based approach to identify criminal aliens in

federal, state, and local prisons and to remove them from the country before they complete their sentences. In FY 2008, CAP was responsible for identifying 221,000 criminal aliens in jail.

- **Customs cross-designation**. This gives federal, state, and local law enforcement officers the ability to enforce U.S. customs laws. This is helpful for missions such as narcotics smuggling and human trafficking. There are about 800 participating officers.
- **Document and Benefit Fraud Task Forces**, which target and seize illicit profits from fraud committed with the intention of undermining U.S. immigration laws.
- **Fugitive Operations Teams (FOTs)**, which find and remove fugitive aliens, who have committed a crime and have failed to appear at their immigration hearing or leave the country after receiving final orders. In 2007, FOTs made more than 30,000 fugitive alien arrests.
- **Intellectual Property Rights Center**, which coordinates the government's efforts to enforce intellectual property rights.
- **Law Enforcement Support Center**, which is a 24/7 center that assists federal, state, and local law enforcement by providing information from eight DHS databases, including an alien's immigration status and identify information.
- **Operation Community Shield**. Under this initiative, ICE partners with federal, state, and local law enforcement to investigate and stop street gangs.
- **Operation Firewall**. This operation targets bulk cash smuggling, which is generally an illegal attempt to move \$10,000 or more into or out of the United States. ICE works with state and local law enforcement officers to stop smuggling internally, with U.S. Customs and Border Protection to stop smugglers at ports of entry, and with Mexican law enforcement to stop "the smuggling of U.S. currency through Mexico to Central and South America."¹²

12. Press release, "Operation Firewall: Combating Bulk Cash Smuggling," U.S. Immigration and Customs Enforcement, February 6, 2008, at <http://www.ice.gov/pi/news/factsheets/opfirewall.htm> (February 4, 2009).

- **Operation Predator.** This initiative identifies child predators and removes them from the United States. ICE also works with foreign countries to stop international sex predators and sex traffickers. Since 2003, this program has led to more than 11,000 arrests.
- **Rapid Removal of Eligible Parolees Accepted for Transfer (Rapid REPAT),** which allows the release of nonviolent criminal aliens before they finish their sentences if they are deported from the United States and agree not to return.
- **Secure Communities** supplements the CAP program by beginning an initiative to remove all criminal aliens in prison, broadening the targeted methods used by CAP. Secure Communities will use technology to share information with different law enforcement agencies and with federal, state, and local prisons.

Cooperation with local law enforcement has drawn accusations that local police departments are overzealously enforcing immigration laws, targeting anybody who “looks and sounds” foreign. These claims are not a fair representation of the enforcement effort. The MOAs between ICE and local agencies specifically prohibit local officers from arresting people solely on the suspicion of being an illegal immigrant. For an arrest to be made, a person must first be stopped and held for breaking another state law. A traffic stop, such as for speeding, does not warrant a criminal arrest and cannot result in an arrest for an immigration violation.

On the state and local levels, ICE ACCESS has been extremely popular. It allows localities to take action on illegal immigration if they wish to do so. ICE has received more requests for partnerships than it can answer. Congress would be wise to appropriate additional resources to allow the ICE ACCESS program to grow.

Detention and Removal

The government used to “catch and release” illegal immigrants. When an illegal alien was caught, rather than being detained and deported, the person was released back into society with a scheduled court date before an immigration judge. No enforcement activity ensured that these illegal immigrants appeared in court, and not surprisingly, many did not appear for their hearings.

This practice of catch and release reaffirmed the notion that illegal immigrants would not be deported, because even those unfortunate enough to be arrested were simply released later. Over the years, the number of absconders—those who received final removal orders and failed to leave—increased steadily from 331,734 ordered to leave in 2001 to 536,644 in 2005.¹³

Detention and removal is conducted by the Office of Detention and Removal (DRO) in ICE. Arrested illegal immigrants are removed under several different processes. In 2006, DHS announced the end of catch and release at the southern border and implemented the “catch and return” policy, in which those arrested while attempting to cross the border illegally are detained until they are returned to their points of origin. These detainees are returned home under expedited removal, which allows ICE to remove an illegal immigrant without administrative or judicial review.¹⁴ Under expedited removal, an alien is detained for an average of 19 days, significantly shorter than the traditional 90 days.¹⁵ El Salvadorans are exempt from expedited removal because of a court ruling 20 years ago during the El Salvador civil war.¹⁶

Those arrested internally go through the traditional detention process or voluntary departure. Aliens who are arrested are sent to a detention cen-

13. Alison Siskon, Andorra Bruno, Blas Nunez-Neto, Lisa M. Seghetti, and Ruth Ellen Wasem, “Immigration Enforcement Within the United States,” Congressional Research Service *Report for Congress*, April 6, 2006, p. 14, at <http://www.fas.org/sgp/crs/misc/RL33351.pdf> (February 6, 2009).

14. *Ibid.*, p. 10.

15. U.S. Immigration and Customs Enforcement, “Fiscal Year 2006 Annual Report: Protecting National Security and Upholding Public Safety,” p. 11, at <http://www.ice.gov/doclib/about/ICE-06AR.pdf> (February 4, 2009).

16. Michael Chertoff, “Department of Homeland Security: Charting a Path Forward,” Heritage Foundation *Lecture No. 933*, April 3, 2006, at <http://www.heritage.org/Research/HomelandSecurity/hl933.cfm>.

ter. If they are from Canada or Mexico, they have the option of leaving voluntarily and forgoing the formal deportation process. A large majority of deported aliens elect for voluntarily return. In 2007, there were 891,390 returns compared to the 319,382 removals.¹⁷ An alien who opts out of voluntary departure or is not from Canada or Mexico goes through the formal deportation process. The alien attends a court hearing before an immigration judge, who either issues a final deportation order or allows the alien to stay in the United States.

Since the end of catch and release, detained illegal immigrants stay at a detention center for the entire process, which can amount to 90 days.¹⁸ While at the detention center, a detainee receives an initial health check within the first 12 hours at the facility, followed by a health appraisal within the first 14 days. Those requiring medical attention receive treatment. The person is then removed from the United States. Criminal aliens who are arrested first go to jail and then are sent to a detention center for removal.

With the increase in worksite arrests, the growth of ICE ACCESS agreements with local jurisdictions and implementation of the detention and removal policy, the number of arrested aliens has multiplied. The process is far from perfect. ICE currently has eight detention centers with 32,000 beds, which can handle only a fraction of the 1 million illegal immigrants detained each year.¹⁹ In an effort to address the lack of capacity, ICE plans to add an additional 1,000 beds in 2009 and has used bed space at state, local, and private jails.

The increase in detention facilities has raised concerns about oversight of detention standards in both procedures and the health of detainees. ICE

has since instituted the Detention Facilities Inspection Group to ensure that detention facilities are following standards. Detention centers now receive annual inspections, and ICE plans to publish semi-annual reports on their detention facilities and compliance. The National Detention Standards were also reviewed and updated.²⁰

Finding enough bed space for all the detained illegal aliens is only half of the problem. ICE does not have enough agents and resources to oversee all deportations. A DRO officer must file paperwork and oversee all arrested and detained illegal immigrants, even those arrested by local law enforcement agents. Local sheriffs' offices have complained that ICE can no longer pick up arrested aliens and that ICE is asking law enforcement officers to release them.

One can only hope that a released illegal immigrant does not later commit a terrorist act, such as two of the attackers on September 11, 2001, did after their brush with local law enforcement. Regrettably, tragic stories of citizens killed by illegal immigrants who were driving while intoxicated and who had previously been arrested and released are common.

ICE has not even been able to remove every identified illegal alien, including criminal aliens. A report on the Harris County Jail in Houston, Texas, found that ICE had not filed paperwork to remove 75 percent of the 3,500 criminal aliens in jail. This is troublesome considering that some estimates suggest that up to 450,000 inmates in the U.S. are illegal aliens and ICE screens only 10 percent of jails for illegal immigrants.²¹ Criminal aliens should not be released from prison back into American society.

17. U.S. Immigration and Customs Enforcement, "Fiscal Year 2007 Annual Report: Protecting National Security and Upholding Public Safety," at http://www.ice.gov/doclib/about/ice07ar_final.pdf (February 4, 2009).

18. U.S. Immigration and Customs Enforcement, "Fiscal Year 2006 Annual Report."

19. Tom Barry, "The Immigrant Bed Bureaucracy," Center for Immigration Policy, Americas Program, June 12, 2008, at <http://americas.irc-online.org/am/5293> (February 6, 2009).

20. Julie L. Myers, "Problems with Immigration Detainee Medical Care," testimony before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, Committee on the Judiciary, U.S. House of Representatives, June 4, 2008, at <http://www.aila.org/content/fileviewer.aspx?docid=25596&linkid=178600> (February 4, 2009).

21. Susan Carroll, "A System's Fatal Flaws," *The Houston Chronicle*, November 16, 2008, at <http://www.chron.com/disp/story.mpl/special/immigration/6115223.html> (February 12, 2009).

The federal government clearly lacks sufficient capacity to remove all caught illegal immigrants. ICE needs more agents and money to oversee and manage the process. More broadly, the federal government needs to employ smarter strategies to remove all detained aliens in a reasonable and compassionate manner. ICE should specifically consider:

- **Innovative ways to remove aliens.** The Scheduled Departure Program is a good example of initiatives that lessen the pressure on DRO officers and ICE and allow those illegally living in the United States to leave in a respectful and orderly fashion. As a pilot program in August 2008, it allowed fugitive aliens to depart voluntarily without being taken into custody.²² Persons electing to leave voluntarily were not detained and were allowed time to arrange their personal and family affairs before leaving the country. The Obama Administration should consider reinstating Scheduled Departure and create new programs that encourage voluntary departure.
- **Greater use of the expedited removal.** Under the Immigration and Nationality Act, all non-criminal inadmissible aliens are eligible for expedited removal, yet it is used only for those caught near the border or those from Mexico or Canada. Applying expedited removal to a greater percentage of detainees, including most administrative arrests would lessen the burden and allow ICE agents to focus on removing criminal aliens.

The DRO cannot tackle this task alone. State and local law enforcement plays an important role in improving deportation capabilities.

- **Closer coordination with state and local law enforcement.** If state and local law enforcement forewarned ICE about planned arrests, DRO officers could plan and prepare for additional detainees. With more notification, ICE can better

identify localities of interest and allocate resources to deport illegal immigrants detained by local and state law enforcement.

Employer Verification

Of the more than 11 million illegal immigrants, an estimated 5 million came to the U.S. to work. Thus, effective immigration enforcement must include mechanisms for employer verification.²³ This theme has emerged in several past immigration bills. In 1986, the IRCA bill made it illegal to knowingly hire illegal workers. In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act created the Employment Eligibility Verification System (EEVS), a program for employers to check worker eligibility. EEVS was initially implemented in five states as a pilot program, but later expanded to all 50 states on a voluntary basis.²⁴ Not surprisingly, no serious effort was made to verify the legality of workers or to sanction employers that hired illegal immigrants.

An illegal immigrant can find work in the U.S. by using three methods:

1. **Under a fictitious Social Security number.** An illegal immigrant can work “on the books” under a fictitious Social Security number. The employer uses the fabricated information to file a W-2 for the employee and fill out an I-9 form. The employer may or may not be aware that the number or information is fictitious.
2. **Under a stolen identity.** Illegal immigrants can also work “on the books” by providing stolen identity information to the employer.
3. **“Off the books.”** Off-the-books employment, in which the employer does not file a W-2 or I-9 form, accounts for approximately 50 percent of working illegal immigrants.²⁵

22. Press release, “New ICE Program Gives Non-Criminal Fugitive Aliens Opportunity to Avoid Arrest and Detention,” U.S. Immigration and Customs Enforcement, July 31, 2008, at <http://www.ice.gov/pi/nr/0807/080731washington.htm> (February 4, 2009).

23. James Jay Carafano, “Nurturing a Nation of Immigrants,” Heritage Foundation *Commentary*, August 30, 2007, at <http://www.heritage.org/Press/Commentary/ed083007b.cfm>.

24. Robert Rector, “Reducing Illegal Immigration Through Employment Verification, Enforcement, and Protection,” Heritage Foundation *Background* No. 2192, October 7, 2008, p. 4, at <http://www.heritage.org/Research/Immigration/bg2192.cfm>.

Efforts by the Bush Administration to improve internal enforcement included implementing new measures for employer verification, including the ICE Mutual Agreement Between Government and Employees (IMAGE).

IMAGE is a voluntary program for companies that wish to verify that their employees can legally work in the United States. For a company to be IMAGE-certified, it must receive training from ICE on hiring procedures, detecting fraudulent documents, and using E-Verify.²⁶ In addition, companies must also undergo an I-9 audit and check the legitimacy of existing employees' Social Security numbers. The program currently has 27 full members.²⁷

The Bush Administration also launched a campaign to encourage the use of E-Verify (formerly the Basic Pilot/Employment Eligibility Verification Program). E-Verify allows employers to confirm that their newly hired employees are eligible to work in the United States by verifying their information on a Web-based system run by DHS and the Social Security Administration (SSA). Employers enter information, such as the employee's name, date of birth, and Social Security number into the E-Verify program. The information is then cross-checked with SSA databases to ensure that the Social Security number is valid. If the person is not a U.S. citizen, the information is checked against the USCIS database to verify the person's eligibility to work in the U.S. In June 2008, all federal contractors were required to use E-Verify. More than 87,000 employers are using E-Verify.²⁸

Regrettably, E-Verify and IMAGE cannot attain comprehensive employment verification. The IMAGE program is much too small, and greater participation is not feasible because ICE could not manage significant growth in IMAGE mem-

bership because of the training and certification requirements.

E-Verify is being used across the country, and Arizona and other states have passed legislation requiring all employers to use E-Verify. The wide use of the program is a step in the right direction for employer verification. Regrettably, E-Verify cannot catch identity fraud. Thus, additional methods of verifying legal employment are needed.

These should include:

- **Sharing Social Security no-match data.** The federal government mails out no-match letters when information provided by employers does not match data in the SSA database. A majority of SSA no-match letters are in response to illegal immigrants.²⁹ SSA should be authorized and directed to share the no-match data with DHS. This would allow DHS to target its enforcement efforts on large-scale abusers. The data also contain information showing that multiple people are using some Social Security numbers—an indication of people using identity theft to work.
- **Rolling out Real ID.** Congress has passed two bills that set Real ID standards for driver's licenses in all U.S. jurisdictions. The Real ID legislation does not create a federal identification card, but it does set minimum security standards for driver's licenses. All states have either agreed to comply with these standards or have applied for an extension of the deadline. Secure identification cards will make fraudulent documents more difficult to obtain and will also simplify employers' efforts to check documents when verifying employer eligibility. Real ID is a sensible protection against identify fraud.

25. *Ibid.*

26. U.S. Immigration and Customs Enforcement, "IMAGE," modified January 26, 2009, at <http://www.ice.gov/partners/opaimage/index.htm> (February 4, 2009).

27. U.S. Immigration and Customs Enforcement, "Members," modified November 14, 2008, at <http://www.ice.gov/partners/opaimage/members.htm> (February 4, 2009).

28. U.S. Immigration and Customs Enforcement, "E-Verify," modified January 29, 2009, at http://www.dhs.gov/xprevprot/programs/gc_1185221678150.shtm (February 4, 2009).

29. Charles Stimson and Andrew M. Grossman, "No-Match Immigration Enforcement: Time for Action," Heritage Foundation Legal Memorandum No. 25, May 16, 2008, at <http://www.heritage.org/Research/Immigration/lm25.cfm>.

State and Local Initiative

The effort to reduce illegal immigration has not come solely from the federal government, nor should it. State and local interest in addressing illegal immigration is evident from the large number of jurisdictions applying for 287(g) partnerships and ICE ACCESS cooperation. However, in many cases, local law enforcement is hesitant to become involved in arresting illegal immigrants because such individuals often cooperate with local law enforcement to shut down gang and drug activity. Such decisions should be made locally.

Lost in the debate is the ability of states and localities to enact employment, housing, identification, and other non-law enforcement measures to discourage illegal immigration in their jurisdictions. A handful of states and localities have even passed laws to apply pressure on illegal immigrants and the businesses that employ them in their respective areas. Yet many jurisdictions are hesitant to act because such actions provoke a legal onslaught from pro-illegal immigrant groups, such as business groups that want cheap labor and race-based groups that want more members. In tough fiscal times, most states and localities lack additional funds to cover costly legal expenses.

The most notable case involved the Legal Arizona Workers Act (LAWA), which the state legislature passed in 2007. The law requires all employers in Arizona to use E-Verify and made hiring illegal immigrants unlawful. The constitutionality of LAWA was challenged first in federal district court in Arizona, where it was upheld. The case was then appealed to the liberal U.S. Ninth Circuit Court of Appeals, which also found LAWA constitutional, much to the surprise of most observers. This decision provides other states with a solid legal basis from which to pass stronger enforcement laws and should minimize costly legal challenges. Other jurisdictions have passed similar laws including Valley Park, Missouri (upheld in federal district court), Hazelton, Pennsylvania (on appeal to the Fourth Circuit), and Oklahoma (delayed due to an injunction).

States and local government can do more. For example, they could:

- Require all businesses to use the E-Verify system for employment, financial, and housing transactions;
- Suspend business licenses for businesses that employ unauthorized aliens;
- Require business filings and business tax returns to include an attestation from the employer that it did not employ unauthorized aliens in the past 12 months and make filing a false attestation a felony;
- Require state income tax returns to include an attestation from the filers that they did not employ unauthorized aliens in the past 12 months and make it a felony to file a false attestation;
- Make it a felony for unauthorized aliens to work, punishable by imprisonment and a fine; to falsely claim legal presence in the United States; or to smuggle aliens;
- Make it a crime to rent, lease, or sublease living space for use by unauthorized aliens;
- Prohibit sanctuary cities and day-labor sites;
- Mandate the use of the Systemic Alien Verification for Entitlements system to verify eligibility for all state and local government benefits;
- Deny unauthorized aliens enrollment in and financial aid (including in-state tuition) for state-licensed higher education institutions;
- Restrict unauthorized aliens' access to nonessential public benefits and services;
- Prohibit tax deductions for business expenses related to unauthorized aliens;
- Institute a withholding tax on all electronic funds wire transfers to foreign parties, negotiable bank drafts, and international money orders without a valid Social Security number;
- Ban the use of foreign identification documents to establish identity or to obtain state identification cards unless accompanied by a U.S. document that demonstrates legal presence in the United States; and
- Restrict the use of taxpayer identification numbers for purposes not authorized by the Internal Revenue Service, including identification, unless

accompanied by a U.S. document that demonstrates legal presence in the United States.³⁰

The federal effort in internal enforcement can easily vary with different Administrations and budgets. Local governments will continue to bear most of the burden of illegal immigrants and should have the right to determine the best mechanisms to deal with it in their jurisdictions.

Moving Forward on Internal Enforcement

Federal, state, and local governments have made tremendous progress in enforcing immigration laws. The Obama Administration should not allow the situation to revert to the previous era of lax enforcement. It should continue to improve internal enforcement to ensure efficacy and compassion. Specifically, the Administration should:

- **Improve detention and removal.** The government needs to continue to enforce immigration law and to completely end the practice of “catch and release.” ICE needs to find innovative ways to move illegal immigrants expeditiously through detention centers. Using initiatives like Operation Scheduled Departure and expedited removal could greatly increase the DRO’s ability to process illegal immigrants.
- **Foster greater cooperation with state and local governments.** ICE cooperation with state and local governments is the only feasible way to successfully enforce immigration laws. ICE ACCESS is an extremely popular program and should receive the funding to meet the incoming partnership requests from local jurisdictions.

Greater cooperation also entails state and local law enforcement communicating more with ICE to allow seamless cooperation in detaining and removing illegal immigrants.

- **Achieve comprehensive worker verification.** This will require more than adopting E-Verify. Implementing Real ID and sharing Social Security no-match data will reduce the ability of illegal immigrants to commit identity theft and employers’ ability to reuse Social Security numbers fraudulently.

Conclusion

Successful reform of U.S. immigration laws will require accountability by federal, state, and local governments. Without enforcement, the illegal immigrant population will continue to grow, and ICE and Border Patrol agents will find it increasingly difficult to focus on real threats.

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30. *Ibid.*, pp. 1–7.