America's Immigration System: Opportunities for Legal Immigration and Enforcement of Laws against Illegal Immigration

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Chairman Goodlatte, Ranking Member Conyers, I thank you for the opportunity to testify today on the enforcement of laws against illegal immigration.

There is no more important responsibility of our federal government than to secure our borders. It is critical that we provide the agencies that are tasked with this mission with the resources they need to keep us safe, to prevent the entry of terrorists and criminals, to manage the entry of legitimate trade and travel, and to keep illegal immigration in check.

Illegal immigration imposes enormous economic, fiscal and security burdens on American communities. In addition to displacing American and legal immigrants from jobs and depressing their wages, illegal immigration costs taxpayers about $10 billion a year at the federal level[i], and even more at the state and local level. For this reason, every dollar invested in border security and immigration enforcement has a public safety benefit and a fiscal benefit.

IMMIGRATION AGENCIES' FOOTPRINT IN FEDERAL LAW ENFORCEMENT

The federal government, appropriately, allocates a significant share of taxpayer dollars to the immigration agencies that carry out this important work. It is impossible to determine exactly how much the federal government has spent on immigration enforcement over the years, because the Department of Homeland Security and its predecessor, INS, have never tracked these activities. In 2012, the Department of Homeland Security (DHS) received about $20 million to fund Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and US-VISIT for the missions of immigration and customs enforcement and foreign visitor data collection and analysis. This represents about half of overall federal law enforcement expenditures (not counting most military and intelligence service law enforcement nor Coast Guard), which totaled about $39 billion in 2012.[ii]

That might sound like we are spending an enormous sum on immigration law enforcement. But the immigration agencies' work encompasses far more than immigration law enforcement. Customs enforcement represents a huge share of these agencies' budgets, especially at the ports of entry, along with intellectual property enforcement; transnational gang suppression; child pornography investigations; fighting human trafficking; returning stolen antiquities; doing cargo inspections; and interdicting drugs, weapons, bulk cash, and other contraband that is smuggled across our borders.

Immigration and customs enforcement overlaps with the mission of many other federal law enforcement agencies, and sometimes even surpasses them in productivity. For example, in 2012, CBP agents seized 4.2 million pounds of illegal drugs -- more than three times the amount seized by the Drug Enforcement Administration in the previous year. In the last eight years, under the auspices of Operation

Community Shield, ICE has arrested 27,600 gang members; no comparable statistics could be found for the FBI, but there is no doubt that ICE plays a leading role in addressing this serious public safety problem. In addition, both ICE and CBP routinely make significant seizures of illegal weapons and currency from criminal organizations trying to enter or already operating in the United States.[iii]

In addition, a major part of CBP's effort and resources are used to facilitate the entry of legitimate visitors and goods, for example, through routine inspections of people and goods and through trusted traveler programs.

While outlays for border security and immigration enforcement have reached historic highs, it is important to remember that the immigration enforcement mission was woefully underfunded for decades; meanwhile, the threat from international terrorism and transnational criminal organizations is also greater than ever before. Illegal immigration has risen steadily since the 1980s. While our research shows that new illegal entries have slackened somewhat since 2007, there are signs that the tide could be shifting again. According to numbers just released by CBP, in 2012 southwest border apprehensions, which the agency has used as an indicator of the number of illegal crossings, went up by nine percent.

Transactional data collected by a project at Syracuse University reportedly shows that CBP and ICE together refer more cases for prosecution than other federal law enforcement agencies, which some have interpreted to mean that these agencies have been hyperactive and overzealous in their work. But another reliable source, the U.S. Sentencing Commission, reports that immigration cases represent a much smaller share of the federal criminal justice docket. The Commission's 2011 annual report says that immigration offenders were 35% of all those sentenced in federal court that year, meaning there were twice as many sentenced offenders from non-immigration agency prosecutions than from CBP and ICE.[iv] However, this same report notes that 10% of murderers, 31% of drug traffickers, 34% of money launderers, 64% of kidnappers, and 28% of food and drug offenders sentenced that year were non-citizens, so it's easy to see why immigration enforcement should be such a high priority in federal law enforcement. Obviously these two sets of data are measuring different things – referrals for prosecution and sentenced offenders -- but they are equally valid measures of the immigration agencies' footprint in the federal criminal justice system.

Some observers also have raised concerns about the number of individuals in immigration detention (429,000 in 2011). However, immigration detention is of relatively short duration (average 29 days) compared to the federal prison system, where only two percent stay less than one year. There are far fewer immigration detainees than federal prisoners at any one time; the average daily immigration detainee population is about 33,000, compared to about 218,000 inmates in the Bureau of Prisons system.[v] Immigration offenders make up only 12 percent of the federal prison population, although 26.5 percent of federal prisoners are non-citizens. But the immigration detention system is not at all like the federal prison system in purpose or nature. Immigration detention is more comparable to the local jail system, which has an average daily population of about 750,000 inmates.

Obama administration officials have pointed to what they claim is a record number of removals and returns – 409,000 in 2012, out of more than 11 million illegal residents -- as evidence that the government is doing as much as it can, perhaps even more than enough, immigration enforcement. But as the president has said, these numbers are "actually a little deceptive:"

- The 2012 deportation numbers are not a record, using the current methodology of counting both removals and returns. According to the annual yearbook of immigration statistics, in 1996 removals and returns numbered more than 1.6 million, up from more than 1.3 million in 1995.

- The "dramatic" recent increases in deportations, removals and returns actually occurred between 2005 and 2009; since then, the numbers have flattened out noticeably.[vi]
- It has been established that recent deportation statistics are heavily padded with cases that were not previously counted as such.[vii]
- ICE arrests have been trending downward since 2008, after a sharp rise that year. It's hard to understand how deportations can be rising when apprehensions are falling.[viii]

THE MEAGER HISTORY OF ENFORCEMENT AT THE WORKPLACE

But the most conspicuous void in immigration law enforcement has been in the area of workplace enforcement. Enforcement of immigration laws at the workplace is essential to gaining control of illegal immigration and to addressing the most significant negative effects of immigration, namely the displacement of legal workers and the deterioration in wages for those U.S. workers who must compete with illegal workers.

Workplace enforcement is as important as securing the border itself, for several reasons. Illegal immigration occurs in many ways, including illicit border crossing, overstaying a legal visa, and using false documents. Any strategy that relies solely on securing the border is doomed to fail, because it will miss as many as half the illegal entrants. Secondly, border security is limited by the physical challenges of the terrain and by the government's financial resources. And, as long as there are employers willing and able to hire illegal workers, the workers will try to come.

An effective workplace strategy provides employers with the tools to enable them to comply voluntarily and also holds them accountable for their violations and their role in sending the message that illegal workers are welcome. Routine, frequent and thorough enforcement discourages illegal workers by creating an expectation that they could be subject to arrest and removal at any time. Such policies of strict enforcement of the laws against illegal employment have been shown to be effective, both in reducing the flow of new illegal immigrants and in reducing the size of the settled illegal immigrant population.

In 1986, Congress attempted to address the illegal immigration problem with a grand bargain: a large share of the resident illegal population would receive amnesty, and future illegal flows would be prevented by the implementation of employer sanctions, to be enforced by the Immigration and Naturalization Service (INS). For the first time, it became expressly illegal to knowingly hire, recruit, or refer for a fee someone who was not authorized to work in the United States. Employers were required to check documents presented by new hires to establish that they were authorized to work, and record the information on form now known as the I-9. The sanctions included fines and possible prison time for the act of illegal hiring and for not properly checking the status of new employees.

The federal government was quick to implement the amnesty program, but never followed through with the enforcement of employer sanctions. In fact, it seems that they were never intended to be allowed to work at all.

Many have blamed Congressional drafters for deliberately creating a clumsy system in which employers were required to ask new hires for documentation, but not expected or required to verify the information (and there was no easy way for them to do so anyway). The law allowed for more than a dozen different forms of identification to establish work authorization. As a result, many workers simply began providing false documents, and a booming trade in false identification for employment purposes was born.

But executive branch officials, under the influence of political appointees with ties to major business, agricultural, and industrial special interests, were equally complicit in creating a workplace enforcement system that was built to fail.

First, it was decided that a significant share of the INS enforcement resources would be directed toward an "employer sanctions education mandate." It was essentially an outreach program to inform the nation's employers of the new law and their new responsibilities. This outreach was to be performed primarily by the agency's corps of special agents – and had the effect of taking the sworn law enforcement officers who were trained and empowered to investigate violations off their beat.

Next, the agency leadership crafted the regulations in such a way as to ensure that very few employers would actually be subjected to sanctions that were painful enough to deter illegal hiring. The regulations included the following provisions:

- Employers were to be notified three days in advance of agents arriving to audit the personnel forms (I-9s), providing employers with a chance to create the appearance of compliance;
- Before sanctioning an employer, whether for knowingly hiring illegal workers or for improper paperwork, agents had to obtain advance clearance from both the operational supervisors and the general counsel's office in headquarters. These two offices put every single notice of intent to fine through a such a wringer of review that very few sanctions were ever approved;
- In the event that an employer fine was approved, the case was handed off to the agency lawyers in the field, who typically preferred to negotiate settlements with the employers that knocked down the fines to literally pennies on the dollar. Agents were not allowed to participate in the settlement negotiations to provide input on the seriousness of the illegal hiring practices, or make the case for tough sanctions.

The result was that employers failed to take the sanctions seriously and were able to absorb any meager penalties as a cost of doing business. Nevertheless, each year the INS completed thousands of employer investigations. According to the agency's statistical yearbooks, each year between 1992 and 1998, agents completed 5,000 to 7,000 employer investigations resulting in between 7,500 and 17,500 arrests. But even these efforts were a drop in the bucket relative to the scale of illegal hiring at the time.

These policies remained in place until the demise of the INS. Under the Clinton administration, the situation worsened. During the tenure of Commissioner Doris Meissner, the size of the corps of special agents in the Investigations division (comparable to today's Homeland Security Investigations division, without the customs, intellectual property, and counterfeit goods responsibilities) shrank to about 500 (compared to about 7,000 today). Worksite enforcement and employer sanctions ranked as no more than a footnote in the agency's priorities, and most agent productive hours were directed toward casework such as drugs, gangs, and alien smuggling.[ix]

Under the Bush administration, initially, INS priorities were focused on primarily on streamlining the processing of immigration benefits applications, until the events of 9/11, when the focus became national security, and the agency was dismantled and its enforcement functions assigned to CBP and ICE. Given the national security focus that pre-occupied the agency at that time, in the early years of ICE, worksite investigations were at first focused mainly on critical infrastructure work places such as airports.

In 2005, the GAO issued a report noting that competing priorities at ICE had brought worksite enforcement to a near stand-still.[x] The auditors found that between 1999 and 2004, the number of employers fined either for substantive or paperwork violations had declined from 417 to 3.

Following this report, ICE received an infusion of funding to hire additional compliance officers, agents, and managers to devote to this program. Activity gradually increased over the next several years. Field offices planned and carried out carefully-executed raids and made a record number of arrests of illegal workers at meatpacking plants, factories, and even smaller employers such as restaurants and retail establishments. The number of administrative and criminal arrests in worksite operations seems to have peaked in 2008, when there were more than 5,000 administrative arrests and more than 1,000 criminal arrests.[xi]

In early 2009, the Obama administration adopted new policies on worksite enforcement, placing the focus on conducting paperwork audits of more companies while deliberately avoiding contact with illegal workers. It is difficult to evaluate the productivity of this new approach, because ICE no longer publishes detailed worksite enforcement statistics, and the few statistics that are released are not comparable with earlier years. But judging from various limited records I have reviewed that were released through the FOIA process, there is a great deal of inconsistency among ICE investigative field offices in how they go about worksite enforcement. Some offices target employers that are suspected of egregiously hiring large numbers of workers; others tend to select employers where few suspected illegal workers are found in the paperwork, but they can still claim to have completed many audits. Some offices push hard to impose large fines, others prefer to issue mainly warnings, even in cases where large numbers of suspected illegal workers were found on the payroll.

In addition, I have found some inconsistencies in the way ICE apparently is classifying its investigations, which leads me to wonder if they might be manipulating case reporting statistics in order to give an inflated impression of the level of worksite enforcement. Listed under the "Worksite" section of the ICE Newsroom page, I found several press releases about investigations that were clearly criminal in nature, and could not reasonably be classified as "worksite enforcement." So-called "worksite" cases I found included prosecutions of the leaders of a prostitution ring in Florida and the owner of a motel in El Paso used as a drophouse for 5,000 smuggled aliens.

On the other hand, some of my sources report of another multi-state prostitution ring investigation (reportedly involving underage girls) that was initiated by the Border Patrol and later turned over to ICE was reportedly dropped because it would have led to discoveries of widespread illegal hiring practices at dairy farms in northern Vermont.

The one consistent theme of worksite investigations in recent years seems to be that arrests of workers are to be avoided at all costs. This raises legitimate questions as to the value of an audits-only approach.

Our research shows that there are advantages, disadvantages and trade-offs to raids and audits, and the most effective approach is probably a blend of both. Raids are very effective for the purposes of penalizing both workers and employers. Both employers and workers can be caught red-handed, making it easier both to apprehend and remove the workers and to prosecute the employers, in large part because the workers can testify against the employer. In addition, the negative publicity associated with a raid can be a deterrent to illegal hiring. On the other hand, some consider the raids to be excessively intimidating to both workers and employers, as ICE agents will use customary law enforcement procedures in order to maintain order and prevent escape or violence. The raids are costly to the U.S. government as, depending on the size of the operation, they may require hundreds of agents, months of preparation, and complex logistics.

Audits, on the other hand, are largely a paperwork exercise and enable ICE to examine the practices of a much larger number of employers than is possible through raids. Audits might be part of a full investigation that culminates in a raid, but it is also possible to perform an audit without the business

disruption of a raid. The auditors can, for the most part, easily determine which employees lack authorization using the standard verification tools. On the other hand, the audits may not detect employees working under the table. The audits offer no opportunity for ICE to apprehend the illegal workers. The employer is required to terminate an unauthorized worker discovered by the audit, but the worker is free to find employment elsewhere. In general, the audits result in lesser sanctions on employers who are found to be violating the law. Without the testimony of the workers, it can be very difficult for ICE to make a case or press charges on an employer for knowingly hiring illegal workers.

Conclusion. Enforcement of immigration laws at the workplace is not a substitute for border enforcement, but is ultimately a more effective approach. Since a significant number of illegal aliens enter legally on visas as well as illegally over the land borders, any strategy to control illegal immigration must operate beyond the border and disrupt the magnet of employment, which is what causes most illegal immigrants to settle here. Workplace enforcement accomplishes that by targeting and deterring the employers of illegal workers and by penalizing the workers who are apprehended at the workplace. Workplace enforcement is flexible, with a variety of layers including both voluntary compliance on the part of employers and sanctions against egregious or knowing violators. Finally workplace enforcement provides a direct benefit to U.S. workers by opening up job opportunities and improving wages and working conditions as a direct result of the enforcement action.

Respectfully submitted by,

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[i] Steven A. Camarota, *The High Cost of Cheap Labor: Illegal Immigration and the Federal Budget,* Center for Immigration Studies, August, 2004, http://www.cis.org/High-Cost-of-Cheap-Labor.

[ii] Figures are taken from official agency budget summaries from the last two years. Other federal law enforcement agency budgets tallied include: FBI, DEA, ATF, US Marshals, Secret Service, Bureau of Prisons, US Attorneys Offices, Transportation Security Administration, Diplomatic Security Service, IRS Criminal Investigation Division, Treasury Inspector General for Tax Administration, US Mint Police, Pentagon Force Protection, DoD OIG, Bureau of Indian Affairs Police, Bureau of Land Management Office of Enforcement and Security, National Park Service Police, Fish & Wildlife Office of Law Enforcement, Forest Service Law Enforcement and Investigations, USDA OIG, NOAA Fisheries Office of Law Enforcement, FDA Office of Criminal Investigations, Education OIG, Veterans Affairs Police, US Capitol Police.

[iii] All data is available on these agencies' web sites.

[iv] U.S. Sentencing Commission, 2011 Sourcebook of Federal Sentencing Statistics, http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2....

[v] The total federal prisoner population is comparable to an average daily population, because nearly all of the federal prisoners are serving long sentences of more than one year.

[vi] DHS Immigration Enforcement Actions, 201, http://www.dhs.gov/immigration-enforcement-actions-2011.

[vii] Rep. Lamar Smith, http://www.washingtontimes.com/news/2012/sep/26/obama-puts-illegals-ahea....

[viii] DHS Immigration Enforcement Actions, 2011.

[ix] Andorra Bruno, "Immigration-Related Worksite Enforcement: Performance Measures," Congressional Research Service, 7-5700, June 24, 2010.

[x] Government Accountability Office, "Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts," GAO-08-813, August, 2005.

[xi] Bruno.