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IS THE IRS *THE* SOLUTION TO ILLEGAL IMMIGRATION?

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I. INTRODUCTION

Illegal immigration has become one of the most controversial and divisive topics of our day. Proposals for comprehensive immigration reform include amnesty, guest worker programs, open borders, and sanctuary cities. Those who favor a strict illegal immigration policy advocate closed borders and some form of reduction in the numbers of illegal immigrants. Both options have significant costs for which no one has proposed a workable solution.

Using the Internal Revenue Service (IRS) has been overlooked. The IRS has an existing force of agents who conduct investigations, collect taxes, and prosecute crimes. With extensive databases of information and great access to businesses and individuals through their audit functions, the IRS has the capability to enforce the ban on hiring illegal immigrants. The IRS provides an enforcement body that is already in place, paid for, and has the expertise to do the job.

Most proposals to solve the problems of illegal immigration have focused on the immigrants themselves.¹ One of the big draws of immigrating to the United States is the availability of better jobs,

1. Robert Pear & Jim Rutenbert, *Senators in Bipartisan Deal on Immigration Bill*, N.Y. TIMES, May 17, 2007, available at http://www.nytimes.com/2007/05/18/washington/18immig.html?_r=1&oref=slogin.

but for there to be jobs for illegal immigrants, there must be employers willing to hire the illegal immigrants. If the penalties for hiring illegal immigrants were severe enough, the number of willing employers would drop, and the incentive to illegally enter the United States would be diminished. For example, if provisions similar to Internal Revenue Code section 280E that deny any deductions to drug dealers were applied against companies that hire illegal immigrants, there would be a greater incentive to comply with the existing immigration laws because companies would be required to pay taxes on gross income as opposed to net income. In turn, these provisions could produce additional revenue that would be available for border enforcement. Such provisions could be very harsh to employers *and* to a potentially great number of newly unemployed illegal aliens. To mitigate the harsh result of this provision, employers could be given a choice over a phase-in period between providing a severance package to illegal immigrants who have been caught or the employer could be required to pay tax on gross income.

There are many advantages to this alternative approach. First, it puts the cost of returning the illegal immigrants to their country on those who profited by bringing them to the United States instead of placing the burden on the American public. Second, it allows illegal immigrants, many of whom came to the United States because of the availability of jobs, to return to their countries with dignity. Instead of being jailed, tried, convicted, and deported for illegally entering the United States, illegal immigrants would instead be paid to return to their homelands. Moreover, because there would be no conviction for illegal entrance, they could apply for *legal* admission to the United States. Third, a severance package would help avert a humanitarian crisis because the illegal immigrants would be given a financial sum sufficient to re-establish themselves in their home country. Finally, the newly passed whistleblower rules could aid in enforcement by providing an additional incentive to informants by rewarding people for providing information to the IRS. Many people are aware of those breaking the law, and making the new whistleblower rules more public could result in additional civilians aiding in enforcing the laws.

II. ILLEGAL IMMIGRATION

With an estimated ten to twenty million illegal immigrants

currently in the country² and thousands more arriving daily, illegal immigration has become one of the most controversial topics of our day, and the magnitude of the problem is increasing. The United States has had an immigration policy for decades. The country's current immigration policy provides for a systematic program of admitting immigrants into the country when the immigrants have a job, a sponsor, a place to live, and allows them to begin and complete a program to help them integrate into American life. This process has been criticized as being too slow, although the fundamentals behind the policy have generally been viewed as sound. Despite the problems with implementation of the policy, the United States still admits between one to two million legal immigrants annually.³ The current policy, while roundly criticized because of the amount of illegal immigration, has never been given a chance to fully develop because the policy has never been enforced.

The crux of the problem appears to be *illegal* immigration rather than legal immigration. Illegal immigrants in the United States now account for about one in every twenty workers.⁴ Some

2.

We estimate that of the 35.2 million immigrants in the March 2005 CPS, between 9.6 and 9.8 million are illegal. This estimate is not significantly different from those of other researchers who have examined this question. It must also be remembered that these figures are only for those in the CPS, not those missed by the survey. Our estimates indicate that illegal aliens comprise 3.3 percent of the nation's total population and 28 percent of the total immigrant population. Estimates prepared by other researchers often adjust for undercount in Census Bureau data. While there is debate about the number missed, most research indicates that roughly 10 percent of the illegal population is not counted in the CPS. Thus, if one wants to know the "true" size of the illegal population, then 10 percent—or about one million illegals—should be added to our estimate of the number captured in the CPS for a total of nearly 11 million in March 2005.

Steven A. Camarota, *Immigrants at Mid-Decade: A Snapshot of America's Foreign-Born Population in 2005*, CENTER FOR IMMIGRATION STUDIES, Dec. 2005, <http://www.cis.org/articles/2005/back1405.pdf> [hereinafter Camarota, *Immigrants at Mid-Decade*]; Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics*, PEW HISPANIC CENTER, June 14, 2005, <http://pewhispanic.org/files/reports/46.pdf>; Jeffrey S. Passel, Randolph Capps & Michael E. Fix, *Undocumented Immigrants: Facts and Figures*, URBAN INSTITUTE, Jan. 12, 2004, http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf.

3. Cammarota, *Immigrants at Mid-Decade*, *supra* note 2.

4. Steven Ohlemacher, *Number of Illegal Immigrants Hits 12 Million*, ASSOCIATED PRESS NEWSWIRE, Mar. 7, 2006, http://www.breitbart.com/article.php?id=D8G6U2KO8&show_article=1.

claim that the objection to illegal immigration is due to prejudice and hate, but those opposed to illegal immigration have a whole litany of complaints that include the violation of our laws, lost jobs, increased costs, and increased crime rates.⁵ In addition, while enforcement of the immigration laws does not seem to be popular among big businesses, voters continue to support immigration laws,⁶ and the public outcry for the government to secure the country's borders has increased.⁷ While the need for increased border control has become a focus in political debates, the reality of the issue has yet to be faced—securing a 2700 mile border plus coastlines and ports will be expensive and will require a comprehensive new plan of its own. A proposed border control plan might include building a fence, increasing border security, increasing port security, increasing the detention and prison capacities, increasing the law enforcement and judicial capacities, including judges and lawyers, and changing the laws to impose criminal penalties for violators. There seems to be no middle ground between the two sides, and either alternative is costly. The United States has had an immigration policy for decades, but proper enforcement of the policy has been lacking. Is there a solution, and if so, who should pay for it?

III. HISTORY OF THE IMMIGRATION LAW

There have been a number of Immigration Acts in the United States:

- A. The Naturalization Act of 1790 established the basic rules for immigrants to receive naturalized citizenship.⁸

5. Elizabeth Llorente et al., *Seeking a Path to Citizenship: Rallies Make Case for Immigration Reform*, THE RECORD (New Jersey), May 2, 2007, 2007 WLNR 8296254; Patrick McGee, *Texas City Divided Over Illegal Immigration*, CHARLESTON GAZETTE, Jan. 27, 2007, 2007 WLNR 1736663; Ruben Navarrette, *Hate in the Immigration Debate*, UNION-TRIBUNE (San Diego), July 29, 2007, available at <http://www.signonsandiego.com/news/op-ed/navarrette/20070729-9999-lz1e29-navarre.html>.

6. Mark Krikorian, *Downsizing Illegal Immigration: A Strategy of Attrition Through Enforcement*, CENTER FOR IMMIGRATION STUDIES, May 2005, at 5, <http://www.cis.org/articles/2005/back605.pdf>.

7. *Just 26% Favor Senate Immigration Plan*, RASMUSSEN REPORTS, May 23, 2007, http://www.rasmussenreports.com/public_content/politics/just_26_favor_senate_immigration_plan; *Poll: Americans for more border cops, not a fence*, CNN, Oct. 26, 2006, <http://www.cnn.com/2006/POLITICS/10/24/immigration.poll/index.html>.

8. Ch. 3, 1 Stat. 103 (repealed 1795). This was superseded by the

- B. The Immigration Act of 1917 barred all illiterate immigrants over sixteen years of age and those of diminished mental capacity and also established the "Asiatic Barred Zone."⁹
- C. The Emergency Quota Act of 1921 created quotas on immigration based on maintaining the ratio of each nationality under the 1910 census.¹⁰
- D. The Immigration Act of 1924 reinforced the maintenance of the existing ratio of each nationality, capped the number of immigrants at 150,000, and allocated the share of the 150,000 immigrants to each country according to the same ratio currently existing in the United States.¹¹
- E. The Immigration and Nationality Act (INA) of 1952 created the current framework for immigration and citizenship in the United States.¹² This act, which is codified under Title 8 of the United States Code, increased the power of the government to deport illegal immigrants, especially those suspected of being Communists.¹³
- F. The Immigration and Nationality Act amendments of 1965¹⁴ abolished the national origin quotas. The emphasis was changed to allow those with relatives in the United States to immigrate, and for the first time in

Naturalization Act of 1795, ch. 20, 1 Stat. 414.

9. Pub. L. No. 301, 39 Stat. 874.

10. Emergency Quota Act of 1921, 42 Stat. 5.

11. Immigration Act of 1924, Pub. L. No. 139, 43 Stat. 153.

The passage of the Immigration Act of 1924 resulted from a mixture of passion and emotion; a mixture of fears and hates, tempered by idealism and by vision, which lie behind the complex motivations of Congressional action. We were afraid of foreigners; we distrusted them; we didn't like them. Under this act only some one hundred and fifty odd thousands would be permitted to enter the United States. If you were of Anglo-Saxon origin, you could have over two-thirds of the quota numbers allotted to your people. If you were Japanese, you could not come in at all. That, of course, had been true of the Chinese since 1880. If you were southern or eastern European, you could dribble in and remain on sufferance.

EMANUEL CELLER, YOU NEVER LEAVE BROOKLYN: THE AUTOBIOGRAPHY OF EMANUEL CELLER (John Day Co.) (1953).

12. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

13. *Id.*

14. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911.

history, Mexican immigration was restricted. Eventually, the INA established a preference system that selected which ethnic groups were desirable immigrants and placed great importance on labor qualifications. An annual limitation of 170,000 visas was established for immigrants from countries in the Eastern Hemisphere.¹⁵ No more than 20,000 people per country were allowed into the United States.¹⁶

By 1968, the annual limitation from the Western Hemisphere was set at 120,000 immigrants, with visas available on a first-come, first-serve basis.¹⁷ The number of family reunification visas, however, was unlimited and quickly led to “chain” immigration. This contravened the intention of family reunification visas, which were designed to end the separation of U.S. citizens from their families. In reality, the visas became a vehicle for allowing large extended families to enter the United States. The family reunification visas became a topic of many debates throughout Congress as well as the American public. During a debate on the Senate floor, Senator Kennedy discussed the effects of the INA and said, “our cities will not be flooded with a million immigrants annually” and promised that the ethnic mix in the United States would not be upset.¹⁸ Prior to the INA, the United States was overwhelmingly composed of those of white European descent, with blacks being the only minority group of significant size.¹⁹ Since the implementation of the INA, the relative proportion of the white population has steadily declined, with Hispanics being the largest minority in the United States, and the number of illegal immigrants coming to the country has increased to over one million annually.²⁰

G. The Immigration Reform and Control Act of 1986

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* In 1965, 89 percent of the United States’ population was comprised of those of white European descent. *Id.*

19. *Id.* Blacks comprised of 10 percent of the population in the United States in 1968. *Id.*

20. Randy Capps, *The Center for Children, Families, and the Law Interdisciplinary Conference: “Welcome to America: Immigration, Families, and the Law”*; *U.S. Immigrant Workers and Families: Demographics, Labor Market Participation, and Children’s Education*, 14 VA. J. SOC. POL’Y & L. 170, 188 (2007); Robert Bernstein, *U.S. Census Bureau News*, May 1, 2008, <http://www.census.gov/Press-Release/www/releases/archives/population/011910.html>.

(IRCA) provided for an illegal immigrant amnesty and a ban on the employment of illegal immigrants, actually making it a crime to hire an illegal immigrant.²¹ More than 2.7 million illegal immigrants were granted amnesty.²² IRCA also established financial penalties for employers employing illegal immigrants. This law and its accompanying amnesty were designed to fix the illegal immigration problem once and for all.

- H. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996²³ made changes to the law granting asylum, immigration detention, criminal-based immigration, and forms of immigration relief.
- I. The REAL ID Act of 2005 created more restrictions on political asylum, severely curtailed habeas corpus relief for immigrants, increased immigration enforcement mechanisms, altered judicial review, and imposed federal restrictions on the issuance of state driver's licenses to immigrants.²⁴

While the U.S. Code provides for the arrest and deportation of illegal immigrants found in the country,²⁵ the law has not been well enforced. Every year, illegal immigrants cross the border through trails and tunnels, are smuggled in trucks or cars, or simply run across the border.²⁶ With no practical penalties or enforcement of the existing immigration laws, there is no disincentive to illegal immigration.

IV. LACK OF ENFORCEMENT

A. History

It is necessary to evaluate the steps taken to enforce U.S. laws against illegal immigration, as enforcement of the nation's

21. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

22. Krikorian, *supra* note 6, at 3.

23. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

24. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231.

25. 8 U.S.C. § 1227 (2006).

26. Michael Riley, *Moving Targets: Part 4*, March 7, 2007, http://www.denverpost.com/fortressamerica/ci_5370888.

immigration policies has changed dramatically over the past half-century.²⁷ For the first several years after the passage of the IRCA in 1986, illegal immigration from Mexico dropped significantly. Some scholars indicate that the prospective illegal immigrants waited to see if the United States was serious about enforcing its policies as immigration from Mexico began to increase after it became apparent that the United States was “not serious about enforcement and that the system could be easily evaded through the use of inexpensive phony documents.”²⁸

Then, in 1996, Congress engaged in another failed attempt to enforce U.S. immigration policies by passing a law designed to punish long term illegal residents by barring illegal immigrants from future reentry for three to ten years.²⁹ In actuality, Congress’s law had little or no effect on illegal immigration as the law only applied to people who actually left the country and then tried to return, “but it was denounced at the time . . . as ‘radical’ and ‘draconian. . . .’ [I]n its first four years, the bar prevented fewer than 12,000 people from re-entering the United States.”³⁰ One-third of the illegal population entered the United States legally (on short term or other visas) and then just never left.³¹

In 1998, the United States, once again, made another failed attempt at enforcing the country’s illegal immigration policies by having the INS audit the personnel records at all the meat packing plants in Nebraska in what was known as “Operation Vanguard,” an attempt to identify illegal workers.³²

Of the more than 24,000 records that were checked, approximately 4,700 contained discrepancies. The INS asked the meatpackers to schedule those employees for interviews during May and June of 1999. More than 1,000

27. “Fifty years ago, immigration policy may have driven immigration numbers, but today the numbers drive policy. The non-stop increase of legal and illegal aliens is reshaping the language and the law to dissolve any distinction between legal and illegal immigration and, ultimately, the very idea of national borders.” Heather Mac Donald, *Crime & the Illegal Alien: The Fallout from Crippled Immigration Enforcement*, CENTER OF IMMIGRATION STUDIES, June 2004, <http://www.cis.org/articles/2004/back704.html>.

28. Krikorian, *supra* note 6, at 4.

29. Jessica Vaughan, *Bar None: An Evaluation of the 3/10-Year Bar*, CENTER OF IMMIGRATION STUDIES, 2003, <http://www.cis.org/articles/2003/back1003.html>.

30. *Id.*

31. Krikorian, *supra* note 6, at 4.

32. Gary Bokelmann, *Illegal Aliens Routinely Go Unchecked*, NEWSMAX, Nov. 9, 2001, <http://archive.newsmax.com/archives/articles/2001/11/8/184317.shtml>.

persons appeared, and all but 34 of these were able to straighten out their records, providing missing documentation or correcting simple errors.

But more than 3,000 simply failed to show up for interviews and disappeared, presumably because they were in the country illegally and thus not authorized to work. Follow-up inspections every 90 days were intended to keep workers from returning to their old jobs. Eventually, the program was supposed to expand to other industries, resulting in fewer and fewer places for illegal aliens to work.³³

Critics, including legislators, the governor of the state, local industry, and the U.S. Department of Agriculture labeled “Operation Vanguard” as a failed attempt at enforcing the country’s illegal immigration policies.³⁴ “Operation Vanguard” has never been repeated.

Then, in the aftermath of the 9/11 terrorist attacks, immigration authorities undertook a “Special Registration” program for people from Islamic countries.

The affected nation with the largest illegal-alien population was Pakistan, with an estimated 26,000 illegals here in 2000. Once it became clear that the government was getting more serious about enforcing the immigration law—at least with regard to Middle Easterners—Pakistani illegals started leaving on their own in large numbers. The Pakistani embassy estimated that more than 15,000 of its illegal aliens left the United States³⁵

In 2002, the Social Security Administration (SSA) sent out almost a million “no-match” letters to employers who filed W-2s with information that was inconsistent with SSA’s records.³⁶ The purpose of the letters was to clear up misspellings, name changes,³⁷

33. *Id.*

34. *Id.* The Nebraska task force said that the program failed “in part because of the unwillingness of the Social Security Administration to divulge Social Security numbers.” Siskind Susser Bland’s Immigration Bulletin, *Nebraska Taskforce Releases Recommendations for Operation Vanguard*, VISALAW.COM, <http://www.visalaw.com/00oct3/13oct300.html> (last visited Sept. 19, 2008).

35. Krikorian, *supra* note 6, at 4 (citing Michael Powell, *An Exodus Grows in Brooklyn: 9/11 Still Rippling Through Pakistani Neighborhood*, WASH. POST, May 29, 2003, at A1).

36. Mary Beth Sheridan, *Records Checks Displace Workers: Social Security Letters Cost Immigrants Jobs*, WASH. POST, Aug. 6, 2002, at A1.

37. *Id.*

and other mistakes that had caused a large amount of money paid into the system to go uncredited. Many of the problems were caused by illegal immigrants using illegal identification, “and thousands of illegal immigrants quit or were fired when they were found out. The effort was so successful at denying work to illegal immigrants that business and immigrant-rights groups organized to stop it and won a 90 percent reduction in the number of letters to be sent out.”³⁸

In 2007, the Social Security Administration announced its intention to send out “no-match” letters again. This time critics went to court to get a restraining order. The problem with this approach is that “no-match” letters not only identify illegal immigrants, they also identify problems with those here legally. Without the “no-match” letters, workers may have their contributions not credited to their accounts. Other clerical errors may also go uncorrected.³⁹

1. *Attempt to Close the Border*

In 2006, President Bush outlined a multi-step, multi-faceted immigration policy that attempted to close the United States’ immigration border. The first step was to build a fence spanning almost 854 of the 1933 miles of the border.⁴⁰ Although Congress passed the funding bill, only eighty-six miles of the fence have been built.⁴¹ The cost of building and maintaining the fence is enormous, but more troubling is the belief that it will not stop anyone. There are tunnels constantly being found along the border, some of which have been in operation for years without detection.⁴²

The second prong of President Bush’s plan to close the border began when Bush deployed 6000 National Guardsmen with orders not to shoot or detain anyone but simply to support the Border

38. Kirkorian, *supra* note 9, at 4.

39. Ermina Karim, *Employers Brace for Immigration Rules*, SAN LUIS OBISPO TRIB., Sept. 30, 2007, <http://www.alipac.us/article2603.html>.

40. Eleanor Stables, *Border Fence Construction Not Moving Fast Enough for Rep. Hunter*, CQ HOMELAND SECURITY, June 9, 2007, *available at* http://public.cq.com/docs/hs/hs_news110-000002547103.html.

41. *Id.*

42. Anna Cearley, *Tunnel Entry Point Disputed*, SAN DIEGO UNION-TRIB., May 16, 2006, *available at* http://www.uniontrib.com/uniontrib/20060516/news_1m16tunnel.html.

Patrol by having additional bodies in the way.⁴³ A mile is 5280 feet. Assuming a National Guardsman could span approximately six feet if he held his hands out (fewer as his arms began to fall from fatigue), it would take 880 guardsmen holding hands to span just one mile. Bush's plan to close the border, however, turned out to be unsuccessful, as the National Guardsmen retreated when drug smugglers and illegal immigrants, backed by armed legal and illegal Mexican nationals, approached and crossed the border.⁴⁴

Bush's proposal also provided for a guest worker plan and amnesty for those already in the country.⁴⁵ Then, in June 2007, the Senate defeated the legislation to implement the "Comprehensive Immigration Reform."⁴⁶ A piecemeal approach was attempted in October 2007, and was again defeated.⁴⁷

2. *Attempts to Prosecute Border Patrol Agents*

In the midst of the problem with illegal immigration, some U.S. attorneys have devoted time instead to prosecuting border patrol agents. In one situation, border patrol agents shot a drug smuggler in the buttocks while he was smuggling narcotics into the United States. During the trial, the drug smuggler—who was given immunity—was caught smuggling another shipment across the border. The two border patrolmen were convicted and sentenced to eleven and twelve years in prison, respectively.⁴⁸ In another

43. See Posting of Think Progress to Think Progress, <http://thinkprogress.org/2007/05/25/border-patriol-to-iraq/> (May 25, 2007, 14:54 EST).

44. See Richard C. Buchanan, *Border Fiasco: Guardsmen Overrun at Border*, NEWSVINE.COM, Jan. 5, 2007, http://opinion.newsvine.com/_news/2007/01/05/507541-border-fiasco-guardsmen-overrun-at-border.

45. Craig Nelsen, *Bush Amnesty Plan Raises Immigration Concerns*, FOXNEWS.COM, Jan. 8, 2004, <http://www.foxnews.com/story/0,2933,107692,00.html>.

46. Aaron M. Terrazas, *Immigration Reform Eludes Senate, Again*, MIGRATION INFORMATION SOURCE, July 16, 2007, <http://www.migrationinformation.org/USfocus/display.cfm?id=611>.

47. Nicole Gaouette, *GOP Senators Try to Unite on Immigration Overhaul*, L.A. TIMES, Oct. 26, 2005, available at <http://articles.latimes.com/2005/oct/26/nation/na-immig26>.

48. Elizabeth White, *Border Patrol Agents' Sentences Upheld*, UNION-TRIB. (San Diego), July 29, 2008, available at http://www.signonsandiego.com/uniontrib/20080729/news_1n29agents.html; see, e.g., Press Release, U.S. Congressman John Culberson, Congressman Culberson Statement on Agents Ramos and Compean, Feb. 7, 2007, <http://www.culberson.house.gov/news.aspx?A=281>.

incident, as a smuggler tried to run over a border patrolman, the border patrolman shot out the tires of the smuggler and was found guilty of violating the smuggler's rights.⁴⁹ While the border patrolmen are in prison, the enforcement of immigration policies continues to be an issue in the United States as immigrants continue to illegally enter the country every day. Prosecution of border patrolmen has made the Border Patrol uneasy about doing their job.

3. *Individual States Make Attempts to Control Illegal Immigration*

The lack of effort on the part of the federal government to take steps to enforce the immigration laws has led states to pass legislation on their own, ultimately enabling the states to enforce the immigration laws and protect their citizenry from increased crime and the debilitating effects of illegal immigration on their social services.⁵⁰ One of the most noted cases involves the city of Hazelton, Pennsylvania.⁵¹ The Hazelton ordinance prohibited the employment and harboring of undocumented aliens, and required apartment dwellers to obtain an occupancy permit. To receive such a permit, they must prove they are citizens or lawful residents. After a challenge by the American Civil Liberties Union and a coalition of public interest groups, a federal district court declared the ordinance unconstitutional.⁵²

However, the issue is far from dead. Late in 2008, the Ninth Circuit upheld a facial challenge against an Arizona statute. "The Arizona law, called the Legal Arizona Workers Act, targets employers who hire illegal aliens, and its principal sanction is the revocation of state licenses to do business in Arizona. It has yet to be enforced against any employer."⁵³

49. John MacCormack, *An Immigration Ruckus in Rocksprings: City Cries "Free Gilmer!"*, SAN ANTONIO EXPRESS-NEWS, Dec. 16, 2006, <http://www.mohairy.com/FreeGilmer/Express-News.html>.

50. The governor of New York, Elliott Spitzer, even attempted to give driver's licenses to illegal aliens. This led to revolt by the county recorders and an effort by state legislators to try to pass measures to stop these efforts. Press Release, N.Y. State Executive Chamber, Dep't of Motor Vehicles Changes License Policy to Include More New Yorkers and Implements New Regime of Anti-fraud Measures to Strengthen the Sec. of the System (Sept. 21, 2007), <http://www.ny.gov/governor/press/0921071.html>. Governor Spitzer eventually abandoned his idea after receiving such a passionate response from the public. *Id.*

51. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (D. Pa. 2007).

52. *Id.* at 554.

53. *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976, 979 (9th Cir.

States proposed more than 1400 pieces of legislation related to immigration between the beginning of 2007 and early July, according to the National Conference of State Legislatures (NCSL). In addition, a NCSL report declared, “In the continued absence of a comprehensive federal reform of the United States’ challenged immigration system, states have displayed an unprecedented level of activity—and have developed a variety of their own approaches and different solutions.”⁵⁴

According to the *New York Times*, “[e]very state debated immigration issues, and 41 states adopted immigration laws. A large number of new laws cracked down on employers who hire illegal immigrants.”⁵⁵

4. *Attempts by Immigration and Customs Enforcement Agents*

Immigration and Customs Enforcement agents have recently invaded meat packing operations in several states.⁵⁶ As a result, illegal immigrants and potential identity thieves have been arrested, and wages in the meat-packing industry have dropped from an average hourly wage of \$17.41 in 1976 to \$11.47 in 2006.⁵⁷ When the union was interviewed, however, it was revealed that the new source of illegal immigrants posed a new source of union dues; therefore, they actually *supported* the illegal immigrants.⁵⁸ A lawsuit by employees against their union is still pending.⁵⁹

2008).

54. Walter F. Roche Jr., *Number of State-Level Immigration Laws is Growing—Some Experts Say Washington Inaction Has Led to the Rise of the Localized Legislation*, L.A. TIMES, Aug. 6, 2007, at A-15, available at <http://articles.latimes.com/2007/aug/06/nation/na-immig6>.

55. Julia Preston, *Surge in Immigration Laws Around U.S.*, N.Y. TIMES, Aug. 6, 2007, at A12, available at http://www.nytimes.com/2007/08/06/washington/06immig.html?_r=1.

56. Nicole Gauoette, *Six Meat Plants are Raided in Massive I.D. Theft Case; Swift and Co. Workers are Accused of Immigration Violations and Using Stolen Social Security Numbers*, L.A. TIMES, Dec. 13, 2006, at A18.

57. *Meatpacking in the U.S.: Still a “Jungle” Out There?*, PBS, <http://www.pbs.org/now/shows/250/meat-packing.html> (last visited, Sept. 19, 2008).

58. See generally Julia Preston, *After Iowa Raid, Immigrants Fuel Labor Inquiries*, N.Y. TIMES, July 27, 2008, <http://www.nytimes.com/2008/07/27/us/27immig.html#>.

59. *Id.*

B. Practicalities—The Alternative to Amnesty

The failure to control illegal immigration adequately has caused another problem—a large number of illegal immigrants already living in the country continue to wait in limbo. While the idea of granting amnesty is disfavored by many Americans, the alternative to amnesty is seldom discussed. First, to gather an estimated ten to twenty million people would be a daunting task. Second, finding space to process so many people would be extremely challenging. Large football stadiums or convention halls range from a seating capacity of 20,000 to 60,000. Twenty million people would fill 1000 of the 20,000 seat stadiums. In short, twenty stadiums per state would need to be filled. Furthermore, sending twenty million people back to Mexico or various other countries of origin would create a humanitarian crisis and a potential public relations nightmare. America is complaining about the strain caused by a gradual influx of all of these illegal immigrants, and America is a wealthy country. Because the cost of returning these immigrants would be so daunting, the process would have to be done gradually, over a significant period of time, and presumably, with financial aid from America.

Finally, illegal immigrants who must hide in society are prey to the unscrupulous. They are extorted, forced into slave labor conditions, live in fear, and are abused.⁶⁰ Those preying on illegal immigrants know that they have no recourse because of their illegal status. Not granting amnesty is part of what contributes to the increase in crime and human suffering. Gang members and criminals, however, are among the illegal immigrants coming to the United States. Granting amnesty to these illegal immigrants only creates further problems.

V. FINANCES OF IMMIGRATION

A. Education

Immigration, both legal and illegal, has accounted for the national increase in public school enrollment over the last two

60. *The Abuse of Illegal Immigrants*, N.Y. TIMES, July 22, 1997, <http://query.nytimes.com/gst/fullpage.html?res=9C02E1D9123BF931A15754C0A961958260>.

decades.⁶¹ Indeed, “[i]n 2005, there were 10.3 million school age children from immigrant families in the United States.”⁶² Moreover, immigrants generally have lower incomes than natives,⁶³ so their tax contributions are unlikely to entirely offset the costs they impose on schools. This is especially true because of the higher costs associated with teaching children whose first language is not English.⁶⁴

B. Poverty

The poverty rate for immigrants and their children under eighteen who are born in the United States is 18.4 percent, which is 57 percent higher than the 11.7 percent for natives and their children.⁶⁵ Immigrants and their minor children currently account for about one in four persons living in poverty.⁶⁶ Current data indicates that there is an enormous variation in poverty rates among immigrants from different countries.⁶⁷

C. Uninsured for Health Care

In addition to the high poverty rates among illegal immigrants, about 34 percent of illegal immigrants and their minor children are uninsured.⁶⁸ The U.S.-born children of illegal immigrants,

61. See Note, *Federal Funding for Newcomer Schools: A Bipartisan Immigrant Education Initiative*, 120 HARV. L. REV. 799, 800 (2007) (“[A]mong children, immigrants constitute the fastest growing group”); *U.S. Population and Immigration: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 107th Cong. 24–28 (2001) (statement of Steven A. Camarota, Director of Research, Center for Immigration Studies), <http://judiciary.house.gov/legacy/74238.pdf>.

62. Camarota, *Immigrants at Mid-Decade*, *supra* note 2, at 2.

63. *Facts About Immigrants*, NATIONAL IMMIGRATION LAW CENTER, July 2004, at 1, <http://caimmigrant.org/repository/wp-content/uploads/2006/08/ImmigrFactsNILC0704.pdf>; See *Hardships Among Children of Immigrants: Findings from the 1999 National Survey of America’s Families*, THE URBAN INSTITUTE, NEW FEDERALISM: NATIONAL SURVEY OF AMERICAN FAMILIES, SERIES B., NO. B-29 (FEB. 2001), http://www.urban.org/UploadedPDF/anf_b29.pdf.

64. *Plyler v. Doe*, 457 U.S. 202, 252 (1982) (Burger, C.J., dissenting) (“[T]here can be no doubt that very large added costs will fall on the state or its local school districts as a result of the inclusion of illegal aliens in the tuition-free public schools.”).

65. Camarota, *Immigrants at Mid-Decade*, *supra* note 2 at 20.

66. *Id.* at 14.

67. *Id.* For example, the poverty rate for Mexicans is 26.4 percent—more than five times that of persons from Canada or the Philippines. *Id.*

68. *Id.* at 16.

however, can enroll in Medicaid, and almost 47 percent of immigrants and their children either have no insurance or have insurance provided to them through Medicaid.⁶⁹ The widespread reliance upon Medicaid ultimately creates a huge burden on health care costs.⁷⁰

D. Welfare

The use of welfare varies by country of origin.⁷¹ While immigrants from refugee-sending countries, such as Russia and Vietnam, tend to fully utilize the United States' welfare system, Mexican and Dominican households use welfare at an even higher rate, and virtually none of the Mexican or Dominican immigrants are refugees.⁷² Illegal immigrants account for a large share of the overall low-income population, and a large share of illegal-immigrant households use the food assistance programs and Medicaid.⁷³ In general, illegal immigrants cannot use the welfare system themselves; however, their children born in the United States can be enrolled in Medicaid and receive food assistance.⁷⁴ In addition, many illegal immigrants have low incomes, and as a result, their children can enroll in means-tested programs.⁷⁵ Giving amnesty to illegal immigrants will increase the availability of welfare programs to those who otherwise do not qualify.

69. *Id.*

70. Paul Fronstin, *The Impact of Immigration on Health Insurance Coverage in the United States*, EBRI NOTES, VOL. 26, NO. 6 (Employee Benefit Research Institute, Wash., D.C.) June 2005, at 6, http://www.ebri.org/pdf/notespdf/EBRI_Notes_06-2005.pdf.

More than 11 million immigrants in the United States were uninsured in 2003, accounting for 26.1 percent of the 44.7 million uninsured individuals in the country. Immigrants accounted for about one-third of the increase in the uninsured between 1994 and 1998, but between 1998 and 2003 they accounted for 86 percent of the growth in the uninsured, presumably because PRWORA [Personal Responsibility and Work Opportunity Reconciliation Act of 1996] restricted their benefits under public assistance programs for five years after they entered the United States. To the degree that immigration continues to increase, it is likely that the uninsured will also continue to increase as a proportion of the population.

Id. at 1.

71. Camarota, *Immigrants at Mid-Decade*, *supra* note 2, at 18.

72. *Id.*

73. *Id.* at 1, 18.

74. *Id.* at 16.

75. *Id.* at 17.

E. Taxes, Payroll Taxes, Earned Income Tax Credits

Tax benefits for illegal immigrant workers presents another significant issue. With an annual cost of over \$30 billion, the Earned Income Tax Credit (EITC) is the nation's largest means-tested cash assistance program for workers with low incomes.⁷⁶ Native-headed households make up 15.8 percent of those households that qualify for the credit, compared to 30 percent of immigrant households.⁷⁷ Making illegal immigrants legal will increase the number of qualifying immigrant households.

It is assumed the collection of back taxes, with penalties and interest, would generate billions of dollars for the IRS.⁷⁸ Whether illegal immigrants would be subject to the income tax, however, is an unanswered question.⁷⁹

F. Lost Jobs

There are millions of native-born Americans employed in occupations that have high concentrations of immigrants.⁸⁰ It is simply not correct to say that immigrants only do jobs natives do not want. If that were true, then there should be occupations comprised almost entirely of immigrants. The occupational categories of farming/fishing/forestry, construction, building, cleaning/maintenance, and food processing currently employ 15.3 million adult native-born Americans,⁸¹ yet these occupations are all areas in which illegal immigrants hold jobs that Americans do not purportedly want. Further, while employers often argue that there are no Americans available to fill such jobs, there are 1.8 million unemployed natives in these job areas, and native unemployment

76. *Id.*

77. *Id.*

78. See Michael Kranish, *Bush Removes Provision Requiring Back Taxes from Illegal Immigrants*, BOSTON GLOBE, May 19, 2007, http://www.boston.com/news/nation/washington/articles/2007/05/19/bush_removes_provision_requiring_back_taxes_from_illegal_immigrants/.

79. Compare Shikha Dalmia, *Illegal Immigrants are Paying a Lot More Taxes Than You Think*, REASON FOUNDATION, May 1, 2006, http://www.reason.org/commentaries/dalmia_20060501.shtml (last visited Sept. 19, 2008), with Steven A. Camarota, *The High Cost of Cheap Labor: Illegal Immigration and the Federal Budget*, CENTER FOR IMMIGRATION STUDIES, Aug. 2004, at 24–25, <http://www.cis.org/articles/2004/fiscal.pdf> [hereinafter Camarota, *The High Cost of Cheap Labor*].

80. Camarota, *Immigrants at Mid-Decade*, *supra* note 2, at 13.

81. *Id.* at 12.

averages 10.8 percent in these occupations.⁸²

VI. NET EFFECT OF LEGALIZING ILLEGAL IMMIGRANTS

Based on the foregoing, offering amnesty as a solution or partial solution to the issue of illegal immigrants who are already in the United States would have far-reaching financial effects. The estimated net fiscal costs to the federal government of amnesty for the illegal immigrants in the country would increase from \$2736 to \$6022 per household per year.⁸³ Based on Census Bureau data, when all taxes are paid (direct and indirect) and all costs are considered, illegal immigrant households created a net fiscal deficit at the federal level of more than \$10 billion in 2002.⁸⁴ It is estimated that, “if there [were] an amnesty [program] for illegal [immigrants], the net fiscal deficit would grow to nearly \$29 billion.”⁸⁵

On May 23, 2007, the Congressional Budget Office released its preliminary estimate of the cost of Senate Amendment 1150, the substitute for S. 1348, the Comprehensive Immigration Reform Act of 2007.⁸⁶ The new estimate put the cost at \$17 billion.⁸⁷ The estimate, however, contains the following caveats:

CBO and JCT estimate that enacting S. Amdt. 1150 would increase federal direct spending by \$13 billion to \$17 billion over the 2008-2012 period and by \$32 billion to \$38 billion over the 2008-2017 period. Over the 10-year period, about 4[%] of those totals for direct spending would be for Social Security benefits, which are classified as off-budget. The single largest component of the expected direct spending is for outlays from refundable tax credits, estimated by JCT.⁸⁸

and

CBO and JCT estimate that enacting the substitute amendment would result in a net increase in federal revenues of \$15 billion to \$19 billion over the 2008-2012

82. *Id.* at 13.

83. Camarota, *The High Cost of Cheap Labor*, *supra* note 79 at 32.

84. *Id.* at 5.

85. *Id.*

86. Letter from Peter R. Orszag, Director, Congressional Budget Office, to Senator Kent Conrad, Chairman, Senate Budget Committee (May 23, 2007), available at <http://cbo.gov/ftpdocs/81xx/doc8141/05-23-Immigration.pdf>.

87. *Id.* at 1.

88. *Id.*

period and a net increase of \$70 billion to \$75 billion over the 2008-2017 period. Increased revenue from Social Security payroll taxes, which are classified as off-budget account for most of the changes in revenues over the 10-year period. . . .⁸⁹

This means that the largest component of the \$13 to \$17 billion increase in spending is refundable tax credits and most of the revenues are payroll taxes. Without the payroll tax increase, the CBO would predict a large price tag to this or another similar bill.

VII. THE TAX LAW: A SOLUTION TO THE IMMIGRATION PROBLEM

One of the big issues related to illegal immigration is the fiscal cost of immigration. With the estimated cost of \$6000 per illegal immigrant household,⁹⁰ determining who should pay these costs is an issue of serious contention throughout the nation.

Employers are tempted to hire illegal or undocumented workers because they can pay them less than they would have to pay U.S. citizens or legal immigrants. For example, in an industry which pays only wages and no benefits, \$20,000 of net pay costs an employer \$26,762. That includes \$2958 of income taxes to the employee, \$1541.32 of Social Security Tax each for the employee and employer, and \$360.47 of Medicare tax each for the employer and employee. There may also be state employment costs and worker's compensation costs added to those figures.

Judged solely from the employee's perspective, that is \$12.43 an hour of advertised wages, and \$10.00 per hour of net wages. From the employer's perspective, it turns out to be \$13.38 an hour before taxes. Assuming a corporate employer in the 34 percent tax bracket, the after-tax cost to the employer is \$8.83 an hour. If the same employer were employing illegal immigrants, however, the cost would be \$10.00 per hour before taxes and \$6.60 after taxes (income and payroll). This represents a 25 percent savings to the employer, which has led to an increase in U.S. employers that are willing to hire illegal immigrants. The availability of jobs has attracted many illegal immigrants to this country for work. Thus, it is the U.S. employers that have profited, and presumably, it is the employers who should pay for the solution.

89. *Id.*

90. Camarota, *The High Cost of Cheap Labor*, *supra* note 79, at 9.

A. *Taxation of Illegal Immigrant Wages*

1. *Basic Principles*

One resource has been overlooked in the efforts to find a solution for the overwhelming problem of illegal immigration. The hiring of an illegal immigrant is an illegal activity, and operating an illegal activity is subject to tax just like the operation of legal activities. The ordinary and necessary expenses of operating a business apply to both legal and illegal businesses.⁹¹ Thus, illegal activities are still subject to tax, and illegal businesses are allowed to deduct all of the ordinary and necessary business expenses under Internal Revenue Code (IRC) section 162 that legal businesses can deduct.

However, the courts developed the principle that a payment in violation of public policy is not a necessary expense and is not deductible.⁹² This was generally used to disallow a deduction for any payment that the IRS felt violated public policy. However, Congress decided to limit the use of this power to include only fines, penalties, bribes, kickbacks, and violations of the United States' antitrust laws.⁹³

In foreign countries, disallowing a deduction is limited to those deductions that violate the U.S. Foreign Corrupt Practices Act of 1977.⁹⁴ In the past, these limitations have not been used to disallow deductions for the wages paid to illegal immigrants. If the wage payments were held to be in contravention of public policy, these limitations could apply.

§162(c)(2) Other Illegal Payments -No deduction shall be allowed under subsection (a) for any payment (other than a payment described in paragraph (1)) made, directly or indirectly, to any person, if the payment constitutes an illegal bribe, illegal kickback, **or other illegal payment** under any law of the United States, or under any law of a State (but only if such State law is generally enforced),

91. *Comm'r v. Sullivan*, 356 U.S. 27, 29 (1958) (holding payments made to employees as wages and to the landlord as rent are "ordinary and necessary expenses," and allowing those payments to be deducted unless the deduction is made to "avoid the consequence of violations of a law.").

92. *See Tank Truck Rentals, Inc. v. Comm'r*, 356 U.S. 30 (1958) (holding a payment that violates public policy is not deductible).

93. I.R.C. § 162(c), (f), (g) (2000).

94. *Id.* § 162(c).

which subjects the payor to a criminal penalty or the loss of license or privilege to engage in a trade or business [emphasis added].

Under section 162(c), a payment to any person is not deductible if it is an illegal payment under the laws of the United States or the laws of any state, including the District of Columbia.⁹⁵ In general, the payment itself must be illegal to be disallowed as a deduction. For example, wages and rents paid in connection with an illegal business are deductible.⁹⁶ If the wage itself is illegal, however, the deduction would not be allowed. According to the Code, the law must subject the payor to a criminal penalty or the loss of a license or privilege to engage in business. In addition, a state law must be “generally enforced” in order for the illegal payment to be nondeductible.⁹⁷ Fortunately, there is no corollary provision for required enforcement of federal laws. In *Wood v. United States*,⁹⁸ a taxpayer was required to pay income taxes on income received from contraband activities, even though all the proceeds from the illegal drug transaction were forfeited by the taxpayer to the government.⁹⁹ Although the forfeited money was properly classified as a loss, the loss was nondeductible due to the sharply-defined national policy against the possession and sale of illegal drugs.¹⁰⁰

The INA currently provides for both civil and criminal penalties.¹⁰¹ The criminal penalties only apply to employers. Presumably, IRC section 162 could be used to disallow the deduction for wages paid to illegal immigrants, but whether IRC section 162 would disallow the total wage deduction for all employees is subject to debate. For example, if only the wages paid to illegal immigrants were not allowed, it would place a greater burden on the IRS with less benefit, and there would be little possibility of any strong disincentive for employers to hire illegal immigrants. An employer is better off paying a smaller wage to an illegal immigrant even if he cannot deduct it. Alternatively, it would make the job of the IRS easier and would be a stronger disincentive to employers to hire illegal immigrants if the IRC

95. *Id.*; Treas. Reg. § 1.162-18(b) (1975).

96. *Sullivan*, 356 U.S. at 27.

97. Treas. Reg. § 1.162-18(b)(3) (1975).

98. *Wood v. United States*, 863 F.2d 417 (5th Cir. 1989).

99. *Id.*

100. *Id.* at 421–22.

101. *See generally* 8 U.S.C. § 1324a(f)(e) (2000).

disallowed *all* deductions for wages once any of the wages were tainted. At the very least, once an illegal worker is found, the burden of proof should shift to the employer to prove the portion of the wages that are legal.

2. *Denial of Wage Deductions or Denial of All Deductions*

The IRS Statistics of Income for the year 2004 show that for the 5,557,965 corporate tax returns filed, wages accounted for only 9.5 percent of the over twenty-two trillion dollars reported as receipts.¹⁰² The statistics also show, however, that of the total receipts of \$22.7 trillion, the total deductions amounted to \$21.6 trillion. Thus, disallowing *all* wages is only a small disincentive for businesses.

B. *Amending The Code Could Be A More Effective Fix*

1. *History*

The tax code has been used in other areas to deter crimes that frustrate national policy. There is an exception to deductibility for amounts incurred in the operation of illegal drug trafficking.¹⁰³ Drug dealers are not allowed a deduction for ordinary and necessary business expenses.¹⁰⁴ They may, however, reduce the cost of sales by the cost of goods sold.¹⁰⁵ Gross income is defined as “total sales, less the cost of goods sold.”¹⁰⁶ Thus, while section 280E prohibits any *deductions* for drug dealers, it does not modify the normal definition of gross income.¹⁰⁷ The strong public policy against drug dealing supports the provision denying *all* ordinary and necessary business expenses to drug dealers, and this, in turn, suggests a unique solution to the problem of illegal immigration.

2. *New Code Section 280I*

New Code Section 280I could be enacted in a manner similar

102. SOI Tax Stats - Table 5 - Returns of Active Corporations, INTERNAL REVENUE SERVICE, <http://www.irs.gov/taxstats/article/0,,id=170691,00.html> (last visited Sept. 19, 2008).

103. I.R.C. § 280E.

104. *Id.*

105. Treas. Reg. § 1.61-3(a) (2008).

106. *Id.*

107. *See id.*

to section 280E to provide that any business hiring illegal immigrants would be denied all tax deductions including all wages. The effect of such a change could not only put a stop to illegal immigration, and possibly even reverse the flow, but could have it paid for by the big businesses that created or at least exacerbated the problem.

The IRC provides that the income from illegal activities can be reduced by deductions for ordinary and necessary business expenses.¹⁰⁸ No deductions, however, are allowed for illegal drug activities,¹⁰⁹ but the income is reduced by the cost of goods sold.¹¹⁰ If the IRC were modified to deny *all* deductions of employers who hired illegal or undocumented immigrants, the finances of the situation would change dramatically. Consequently, businesses would lose *all* their deductions (not just wages) if caught hiring illegal immigrants. Further, the cost of enforcement would become an opportunity cost.

The IRS collects information for a significant number of people and businesses, and because law enforcement agencies generally know the companies who hire illegal immigrants, the IRS could simply move in on those companies that are in violation. It would be a huge source of revenue for the government if finding illegal immigrants on the payroll precluded all deductions. Moreover, if businesses knew that the possibility existed to have all tax deductions disallowed, their incentive to hire illegal immigrants would be diminished. In addition, the IRS is already in place with investigative and prosecutorial powers. With a change in the IRC, the IRS could collect from the businesses hiring illegal immigrants, and could prosecute those who break the law.

Giving the IRS the authority to enforce tax provisions aimed at curtailing the hiring of illegal immigrants could result in additional tax revenues and criminal penalties. The new IRC section 280I could read as follows:

**EXPENDITURES IN CONNECTION WITH THE
HIRING OF ILLEGAL IMMIGRANTS**

No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists

108. Treas. Reg. § 1.61-3(a) (2008).

109. I.R.C. § 162(c)(2) (2008).

110. Treas. Reg. § 1.61-3(a) (2008).

of hiring or employing illegal immigrants in any capacity. In addition, if illegal immigrant wages constitute part of cost of goods sold, all wages which are a part of cost of goods sold shall also be disallowed.

VIII. EFFECTS OF A CHANGE IN THE TAX CODE

The United States' "voluntary" tax compliance situation is a strong advantage to having a change in the tax code. With just a 0.5 to 2 percent audit rate, the great majority of us comply with the tax provisions. One would expect that the threat of a disallowance of all deductions would be a sufficient disincentive to impose voluntary non-hiring of illegal immigrants by many companies. Therefore, some compliance would be expected just from passing the law. While some believe that tax expenditures represent deviations from the 'normal income tax' and simply create spending for the benefit of favored groups, it is worthwhile to ask if the tax code is "an efficient and equitable means by which to accomplish the stated goal, even if that particular goal is one that is well-accepted."¹¹¹ It is important to note that we need to slow the flow of illegal immigration and encourage those who are here illegally to return to their native country. Still, we need to accomplish our goals in a systematic and orderly way without creating a crisis. Using the IRS can help decrease the flow of illegal immigration into the United States.

A. *Using the Internal Revenue Service*

The IRS can help decrease the flow of illegal immigration into the United States and encourage those who are here illegally to return to their native country. The IRS can help accomplish this goal in a systematic and orderly method without creating a crisis. The advantage of using the IRS is that the IRS can control, at least

111. Maureen B. Cavanaugh, *On the Road to Incoherence: Congress, Economics, and Taxes*, 49 UCLA L. REV. 685, 711 (2002).

In principle, the very introduction of the tax expenditure process should be designed to encourage fiscal and legislative restraint for Congress by attaching a cost to every tax preference. However, the opposite result occurs because these incentives attain budget priority subject to reduced scrutiny simply by virtue of their placement in the tax code.

Id. at 715. Precisely because they are not subject to the same scrutiny as direct programs by reason of their administration through the tax code, such preferences raise significant policy issues.

to some extent, the intensity with which companies are audited, and therefore, can control the number of illegal immigrants being deported. What the IRS cannot completely control is the impact of compliance. For example, if the IRS were to audit a very large multinational firm, and disallow all the deductions because the firm hired illegal immigrants, this could cause a colossal impact on jobs for illegal immigrants in other companies and other industries, and the effect would remain unknown.

The IRS also insures compliance of individuals by arresting an occasional “high profile” individual—or even a low profile individual if the community is small enough. The effect pushes non-compliers back into compliance, and confirms the viability of the system. There are more than ten million illegal immigrants employed in the United States,¹¹² making it likely that a significant number of companies are not in compliance with the law. Presumably, a small enforcement rate could have significant impact that could send a clear message to those thinking of crossing the border illegally to find work in the United States. In addition, it would have a large but incalculable impact on those illegal immigrants who are now working in the United States. While the United States should strive to create a voluntary emigration, it needs to be accomplished in an orderly manner, without creating a humanitarian crisis.

B. Severance Pay In Lieu of Disallowance of Deduction

To help create a voluntary emigration while alleviating a humanitarian crisis, the new tax provision could be coupled with a severance pay option that would provide a phase-in of the tax provision for any company providing a severance pay option to its illegal employees. If those employees are fired, the employer would provide an amount sufficient to allow them to return to their country with some money to reestablish a new life. In addition, the company would also pay to safely return the employee to his or her home country. Thus, the burden would still be on the company, but the burden would be less than a disallowance of all deductions. For companies unwilling to provide the severance package, the IRS could simply enforce the existing immigration laws. The phase-in could be done over a period of three, five, or seven years, allowing a gradual outflow of illegal immigrants. In addition, the severance

112. Camarota, *Immigrants at Mid-Decade*, supra note 2, at 2.

pay and costs could be deductible.

Having the companies who hire illegal immigrants actually pay to return the immigrants to their own countries accomplishes several goals. First, a humanitarian crisis will be diverted. Second, money will be saved from avoiding the costly deportation and detention proceedings. Third, this theory would serve as a check on the power of the IRS to audit and assess taxes on gross income because the company could choose whether to pay the tax or return the illegal workers to their home country. Presumably, the lack of new jobs, the outflow of existing illegal immigrants, the collection of additional taxes to secure the border, and the enforcement of our immigration laws should start a positive trend toward workable immigration, and the firing of illegal immigrants would provide new jobs for the unemployed in those occupations.

C. *Efficiency*

Unfortunately, tax compliance is always an area of concern. Through a balance of civic duty (everyone should contribute), fear of prosecution, and conservative economic analysis (the cost of non-compliance is high), taxpayers compute their tax obligation, file a return, and pay the tax. Imposing a penalty through denial of deductions could serve to undermine the system. Imposing a tax on employers of illegal immigrants could cause problems with corporate tax compliance.¹¹³

Alternatively, one commentator has suggested, “[c]learly, norms in the tax area pull both in the direction of compliance and against it, suggesting that norms do not operate very strongly, overall[.]”¹¹⁴ The corporate tax compliance scheme is already rife with mistrust and cheating.¹¹⁵ Thus, additional potential penalties will probably have little impact on compliance.

D. *Advantages of Utilizing the Code*

There are four advantages of imposing a loss of *all* deductions for those businesses that employ illegal immigrants.

113. Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 339–40 (2001).

114. Joseph M. Dodge & Jay A. Soled, *Debunking the Basis Myth Under the Income Tax*, 81 IND. L.J. 539, 577 (2006).

115. DAVID CAY JOHNSTON, *PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH—AND CHEAT EVERYBODY ELSE* (Portfolio 2003).

1. *Ease*

As opposed to other schemes to combat illegal immigration, this solution is the easiest, at least in terms of initial implementation. With a stroke of the pen, the penalty would be in place and there would be an immediate notification of the potential penalty to the public, the preparers, and special interest groups. The press coverage alone would be extensive, and the resulting clamor in business circles should lead many businesses to curtail the practice of employing illegal immigrants. This, in turn, should have two effects. First, the number of jobs available to illegal immigrants, coupled with the negative stigma attached to hiring such individuals, should reduce the numbers of illegal immigrants in these businesses. Second, those jobs formerly held by illegal immigrants would quickly become available to citizens and legal immigrant workers.¹¹⁶

These results should have no direct enforcement costs, as the more risk-adverse businesses would “voluntarily” curtail their illegal activities without government intervention. However, there could be indirect costs associated with a larger number of unemployed illegal immigrants primarily due to increased social services and welfare expenditures. Some of those costs would be offset by a voluntary emigration due to loss of jobs.

2. *Enforcement*

In comparison with other suggestions, using the tax code to combat illegal immigration actually increases the likelihood of enforcement. When considered in connection with the changes to section 7623, the number of government auditors should not rise, while the number of private individuals hoping for a whistleblower’s reward may increase.

Conducting a tax audit of a business suspected of hiring illegal immigrants may, depending on the number of employees, be labor intensive. Sorting through the hiring records and W-8 forms of thousands would be time consuming. If the IRS were required to verify every illegal employee to reduce the deduction, it could reduce enforcement. If the code were written to disallow all

116. After the Swift meat packer’s raid, the illegal immigrants who were rounded up were replaced within the week by legal workers. Randall Parker, *Illegal Alien Meat Packing Plant Raids Raise Wages*, PARAPUNDIT, Dec. 23, 2006, <http://www.parapundit.com/archives/003974.html>.

deductions if any illegal immigrants were found, however, the amount of work would be substantially reduced, and the process would end upon finding one illegal immigrant worker. Last, businesses would then be required to report gross income without deductions, and the audit would be over.

If all deductions are disallowed when any illegal immigrants are found, the burden of proof shifts to businesses. Thus, the business, not the IRS, has the burden of proving it did not hire any illegal immigrants. Since the magnitude of the penalty is so great due to disallowance of all deductions when one illegal immigrant is found, this makes a good argument for coupling the provision with an option to provide a severance package to the illegal immigrant. This severance package would require the employer to return the illegal immigrant to his or her native country with some money to start a new life. The result would be beneficial for the illegal immigrants and would be less detrimental to the business provided the numbers of illegal immigrants was small in comparison with its total deductions.

3. *Fear*

Arguably, those businesses currently hiring illegal immigrants are not concerned with the prospect of prosecution. This may be due to several factors, including the lack of significant prosecutions in the past, the low likelihood of detection, or the supposed sympathy a jury trial may bring. But it is another story altogether for a business to deal with the IRS. Fear of an audit which could result in the disallowance of all deductions or criminal prosecution raises the stakes for businesses which choose to employ illegal immigrants.

4. *Whistleblowing*

Section 7623 of the Internal Revenue Code and its regulations allow the IRS to pay a reward from amounts collected “to anyone who provides information that leads to the detection and punishment of anyone violating the internal revenue laws.”¹¹⁷ Section 7623(b) was recently added for large cases in which the collected amount is greater than \$2 million. The reward in those

117. I.R.S. Publication 733 (Rev. Oct. 2004), <http://www.irs.gov/pub/irs-pdf/p733.pdf>.

cases will be between 15 percent and 30 percent.¹¹⁸ The new legislation provides that payments to qualified whistleblowers are mandatory, and it permits whistleblowers to appeal the IRS award determinations to the Tax Court. If they are successful, whistleblowers will be permitted to take an above-the-line deduction for attorney's fees and costs they paid to recover their award. In addition, the statute places a ten percent cap on awards to whistleblowers in cases where there have been prior public disclosures of their allegations.

In 2003, the IRS paid out \$4 million to informants who helped the IRS pursue 190 cases, and recouped more than \$61 million in taxes owed.¹¹⁹ The IRS statistics show that the agency has paid an average of 2.74 percent of recovered taxes for rewards to informants since 1967.¹²⁰ The agency already conducts audits of and maintains information about the employers providing jobs to illegal immigrants, and the availability of whistleblower awards makes detection of those businesses more likely.

IX. CONCLUSION

At this time, it is generally accepted that the issue of illegal immigration is an extremely divisive topic in the United States. While the proposals for dealing with the topic vary widely, one thing is certain—the fix is going to be costly.

Using the IRS and amending the IRC has not been one of the proposals to remedy the problem. Amending the IRC, however, provides an interesting opportunity; it may provide a solution and the funds to implement it by simply enforcing our existing immigration laws and increasing the economic cost of breaking those laws. By changing the IRC to deny ordinary and necessary business deductions to companies who hire illegal immigrants, voluntary compliance with the immigration laws may increase due to the financial cost of non-compliance. The companies that refuse to comply could be audited and their deductions denied, resulting in a huge influx of tax dollars.

Because denying deductions could be catastrophic for

118. Paul D. Scott, *Whistleblowers Wanted*, JOURNAL OF ACCOUNTANCY, May 2007, <http://www.aicpa.org/pubs/jofa/may2007/taxpractice.htm>.

119. Jeff Schnepfer, *IRS Pays Informants To Squeal On Tax Cheats*, MSN.COM <http://moneycentral.msn.com/content/Taxes/Avoidanaudit/P42263.asp> (last visited Sept. 19, 2008).

120. *Id.*

companies, during a phase-in period companies would be given the option of providing a severance package for the illegal aliens who were being fired or paying taxes without deductions. The severance package would pay for the aliens to return to their native country. This would help to avert a humanitarian crisis caused by mass deportation, and would be less of a burden on the companies.

Since it is generally believed that most illegal immigrants come to this country for a new life and a higher paying job, the employers who have provided those jobs should bear the cost of returning the illegal immigrant to their native countries. Thus, instead of America bearing the cost of deportation, the employer should bear the cost, and presumably, the process to deport the illegal immigrant will be less time consuming.

There are already numerous sources of information to find the companies who are breaking the law. Law enforcement and civic leaders in several locations around the country already provide places for illegal workers to gather to be picked up for work by the companies that hire them. Social Security mismatch records provide clues. The whistleblower provisions of section 7623, including the 2006 amendments, make it financially rewarding for individuals to turn in employers who employ illegal aliens.

If the United States is serious about controlling illegal immigration, the demand for illegal workers must be decreased. The government needs to raise funds for closing the border, deporting illegal workers, and maintaining an effective enforcement infrastructure. It is advantageous for the government to use the IRS because the IRS already has an experienced workforce, thus the government would not need to employ additional people. Further, using the IRS could result in greater revenue with which to fund immigration reform. In short, because a major incentive to illegal immigration is the availability of jobs, using the IRS may be *the* solution.