Testimony of

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

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Chairman Goodlatte, Ranking Member Conyers and Members of the Committee:

My name is Muzaffar Chishti. I am a lawyer and Director of the Migration Policy Institute's office at New York University School of Law. Thank you for the opportunity to testify before you on the topic of "America's Immigration System: Opportunities for Legal Immigration and the Enforcement of Laws Against Illegal Immigration."

Since enactment of the 1986 Immigration Reform and Control Act (IRCA), which ushered in the current era of immigration control policies, the United States has allocated unprecedented levels of funding, manpower and technology to immigration enforcement. Fueled by frustration over high levels of illegal immigration in the 1990s as well as post 9-11 national security concerns, the past two decades have seen strong and sustained bipartisan support for increased border security and new and enhanced interior immigration enforcement measures. The result has been the creation of a complex, cross-agency immigration enforcement "machinery" that is interconnected in an unprecedented fashion.

This testimony outlines several aspects of the current immigration enforcement regime, including current levels of manpower and funding, as well as outcomes on apprehensions, removals, criminal prosecutions of immigration-related crimes, detention and worksite enforcement. I will then turn to several of the main criticisms associated with IRCA, the United States' last major law combining a legalization program for unauthorized immigrants with increased border security and interior enforcement. I conclude with several recommendations for avoiding the pitfalls of IRCA, should Congress choose to once again take up the issue of comprehensive immigration reform.

I. Record High Levels of Immigration Enforcement

As the Migration Policy Institute (MPI) found in our recent report, *Immigration Enforcement in the United States: The Rise of a Formidable New Machinery*, by almost any available metric, the level of immigration enforcement in the United States now stands at a record high. In fiscal 2012, spending for the federal government's two main immigration enforcement agencies, U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE), as well as its primary immigration enforcement technology initiative, the US-VISIT program, reached $17.9 billion.[1] This amount is nearly 15 times greater than the adjusted budget of the former Immigration and Naturalization Service (INS) in 1986 — and 24 percent greater than the combined fiscal 2012 budgets of all other principal criminal federal law enforcement agencies: the Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), Secret Service, US Marshals Service and Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).[2]

The Border Patrol, which has received the lion's share of increased funding in recent years, stood at 21,370 agents as of February 2012 — double its size in 2004. In addition, 21,186 full-time employees were staffing the nation's ports of entry as of February 2012. As of that date, the combined staffing of ICE, CBP and US-VISIT had reached over 81,000 full-time employees.

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[1] Doris Meissner, Donald M. Kerwin, Muzaffar Chishti, and Claire Bergeron, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* (Washington, D.C.: Migration Policy Institute, 2013): 21, www.migrationpolicy.org/pubs/enforcementpillars.pdf.

[2] Ibid.

Major new resource infusions have led to notable immigration enforcement results. These include: deportations at record highs; Border Patrol apprehensions at 40-year lows; more non-citizens held in immigration detention over the course of a year than are serving sentences in federal Bureau of Prisons facilities; and criminal prosecutions for immigration-related crimes that now make up more than half of all criminal prosecutions initiated by the federal government.

Thus, from the standpoint of resource allocations, case volumes and enforcement actions, which represent the only publicly available measures of the system's performance, immigration enforcement can be seen to rank as the federal government's highest criminal law enforcement priority.

A. Drop in Apprehension Levels

Perhaps the most significant immigration enforcement trend of recent years has been the dramatic drop in the number of non-citizens apprehended by the Border Patrol. Between FY 2000 and FY 2012, total apprehensions fell by 78 percent, from a post-IRCA peak of more than 1.6 million in FY 2000 to 365,000 in FY 2012. The most precipitous drop occurred between 2008 and 2011, when apprehensions declined by 53 percent.[3]

As many have pointed out, the use of apprehensions for measuring border effectiveness is problematic, because apprehensions speak only to the number of arrests made of non-citizens crossing the border; they do not provide an estimate of the total size of the illegal flow. However, due in large part to the use of new and improved technologies along the border, the Border Patrol is now increasingly able to develop additional data that captures broader trends in border control effectiveness. Independent analyses of these data, like the apprehensions data, also point to a fundamental change in border control and effectiveness in recent years.

For example, a 2012 report from the Congressional Research Service (CRS), which analyzed data stored in US-VISIT's IDENT database, concluded that the number of unique individuals intercepted by the Border Patrol fell from 880,000 in FY 2000 to 269,000 in FY 2011.[4] CRS also noted a significant decline in the share of those individuals crossing the border who constituted "recidivist" crossers — meaning persons who had previously been caught crossing the border illegally, and who were attempting to cross again. According to the CRS analysis, the prevalence of recidivists as a share of total crossers fell from a peak of 28 percent in FY 2007 to 20 percent in FY 2011.[5]

More recently, the Government Accountability Office (GAO), in a December 2012 report, looked at Border Patrol measurements of "estimated illegal entries," which CBP calculated by using cameras, sensors and radars, as well as agent observation, to combine total apprehensions with an estimated number of "turn-backs" (individuals who cross back into Mexico before the Border Patrol can

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[3] Department of Homeland Security (DHS) Office of Immigration Statistics, *2011 Yearbook of Immigration Statistics* (Washington, D.C.: DHS Office of Immigration Statistics, 2012): 95, www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf.

[4] Marc R. Rosenblum, *Border Security: Immigration Enforcement Between Ports of Entry* (Washington, D.C.: Congressional Research Service, 2012): 25, http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1883&context=key_workplace.

[5] Ibid.

apprehend them) and "got-aways" (individuals who proceed into the interior of the United States after unlawfully crossing the border). GAO found that between FY 2006 and FY 2011, apprehensions at the border as well as estimated illegal entries declined significantly in all nine Border Patrol sectors along the U.S.-Mexico border. In the Tucson sector alone, the number of estimated illegal entries decreased by 69 percent during that timeframe, while the number of apprehensions fell by 68 percent.[6]

B. Rise in Formal Orders of Removal

Increased immigration enforcement has also led to a dramatic increase in the number of non-citizens deported from the country under formal orders of removal, thus barring them from legal re-entry for between five and 20 years. According to the DHS Office of Immigration Statistics (OIS), DHS effectuated a total of 391,953 removals (the formal term for deportations) in FY 2011, more than double the number carried out by the INS in FY 2002 (165,168).[7] Also in FY 2011, for the first time in 70 years, the total number of non-citizens formally removed by DHS pursuant to final orders of removal (391,953) exceeded the number of non-citizens who left the country pursuant to some form of voluntary return (323,542).[8]

Since 1990, more than 4.4 million non-citizens, primarily unauthorized immigrants, have been deported from the United States. During this time frame, 42 percent (1,940,154) of all deportations occurred between 2008 and 2012.[9]

DHS makes extensive use of its administrative authority to remove non-citizens. In FY 2011, more than 60 percent of the removals carried out by DHS occurred without a formal hearing before an immigration judge. Roughly one-third of these removals occurred through the expedited removal process, which allows DHS to issue removal orders immediately for certain individuals who are found near the border or who present fraudulent documents, unless they express a fear of return.[10] An additional 33 percent of removals constituted removal "reinstatements" — old removal orders that are reactivated when a deported non-citizen re-enters the country. Thus, the number of noncitizens removed pursuant to an administrative order exceeds the number ordered removed by immigration judges. In FY 2011, immigration judges issued 161,354 orders of removal, while DHS

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[6] Government Accountability Office (GAO), *Border Patrol: Key Elements of New Strategic Plan Not Yet in Place to Inform Border Security Status and Resource Needs* (Washington, D.C.: GAO, 2012):11-12, www.gao.gov/products/GAO-13-25.

[7] DHS Office of Immigration Statistics, *2011 Yearbook of Immigration Statistics*, 101.

[8] Ibid. The Office of Immigration Statistics defines a "removal" as the "compulsory and confirmed movement of an inadmissible or deportable alien out of the United States based on an order of removal." A "return" is defined as the "confirmed movement of an inadmissible or deportable alien out of the United States not based on an order of removal."

[9] MPI analysis of data from the DHS Office of Immigration Statistics, *2011 Yearbook of Immigration Statistics*, 101; and Immigration and Customs Enforcement (ICE), "Removal Statistics," www.ice.gov/removal-statistics/.

[10] John Simanksi and Lesley M. Sapp, *Immigration Enforcement Actions: 2011* (Washington, D.C.: DHS, Office of Immigration Statistics, 2012): 5, www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf.

removed 391,953 people.[11] This current trend is the opposite of what it was in 1996, when immigration judges issued 147,652 orders of removal, while the INS removed just 69,680 people.[12]

DHS has also in recent years prioritized the removal of individuals with criminal convictions: 48 percent of those ordered removed in FY 2011 had criminal convictions, compared with 27 percent in FY 2008, 33 percent in FY 2009 and 44 percent FY in 2010.

With increasing numbers of removals has come increasing numbers of non-citizen detentions. ICE reported detaining 429,247 people in FY 2011 — more than double the number detained by immigration authorities in FY 2001 (204,459), and more people than are serving sentences in federal Bureau of Prisons facilities.[13]

C. Increased Prosecutions for Immigration-Related Crimes

Increased deportations have been accompanied by a parallel trend in increased prosecutions for criminal immigration offenses. While offenses such as re-entry following an order of removal and illegal entry have long been criminal offenses, INS and its successor agencies in DHS historically referred only egregious immigration violators for criminal prosecution. Over the course of the past decade, however, the number of criminal prosecutions for immigration-related violations has grown at an unprecedented rate, helped in part by programs like Operation Streamline, introduced in 2005, which refer a high proportion of illegal border crossers in a given area for criminal prosecution.

Between FY 2000 and FY 2003, prosecutions for immigration-related criminal offenses accounted for between 17 and 21 percent of all federal criminal prosecutions initiated.[14] By FY 2008, and for every fiscal year that followed, immigration prosecutions have accounted for roughly 50 percent of all federal criminal prosecutions filed.[15] The vast majority have been for illegal entry, a criminal misdemeanor, and illegal re-entry following a prior order of removal, a felony. Prosecutions for illegal entry rose more than tenfold between FY 2000 and FY 2011 (from 3,900 to 39,305), while prosecutions for illegal re-entry following a prior order of removal more than quadrupled (from 7,900 to 36,040) during the same time period.[16]

Partly as a result of these increases, the total number of cases referred for criminal prosecution by CBP and ICE now exceeds referrals by all Department of Justice (DOJ) law enforcement agencies combined.[17] CBP alone now refers more cases than does the FBI.[18]

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[11] Meissner et. al, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, 126.
[12] Ibid.
[13] ICE, "Report on ERO Facts and Statistics," December 12, 2011, www.ice.gov/doclib/foia/reports/ero-facts-and-statistics.pdf; Meissner et. al, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, 132.
[14] Transactional Records Access Clearinghouse (TRAC), "Going Deeper" data tool, data on file with the Migration Policy Institute.
[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Ibid.

D. Shifting Worksite Enforcement Policies

The Obama administration has shifted the focus of worksite enforcement so as to primarily target employers who hire unauthorized immigrants, rather than the workers themselves.[19] While ICE has not publicly released data on the number of employers targeted under this new strategy, an analysis by CRS indicates that the number of final orders for civil monetary penalties issued to employers has increased in recent years (rising from zero orders in FY 2006 to 385 orders in FY 2011), as has the level of administrative fines imposed on employers (which rose from $0 in 2006 to $10,463,988 in FY 2011).[20] DHS has reported that since January 2009, ICE has audited more than 8,079 employers, debarred 726 companies and individuals and imposed more than $87.9 million in financial sanctions.[21]

The number of employers enrolling in E-Verify, the federal government's electronic system for checking employment eligibility of workers, has also increased, from 5,899 in 2005 to 353,822 in 2011.[22] In addition, 20 states now have laws requiring some or all employers to enroll in the E-Verify program.[23] This has broadened the opportunity to test the viability of expanding the E-Verify program, and for continuing to remedy the weaknesses in the system.

E. The Development of an Interconnected System

Although dramatic changes in Border Patrol apprehensions, levels of removals and criminal prosecutions are perhaps the most obvious signs of strengthened immigration enforcement, an equally important yet less visible change has been the development of new technology and databases that connect and link immigration enforcement agencies, programs and systems, and that also permit screening against criminal law enforcement and intelligence databases.

Database screening now accompanies virtually all key interactions between non-citizens and the federal government — whether in interviews at U.S. consulates overseas or as they fly to the United States, and once here, during the arrival at airports, the processing of immigration benefits, booking into local jails and more. Immigration databases capture biographical information (e.g. name, date of birth and country of origin) and provide information on past entries to the country, immigration status records, criminal history and possible terrorist connections. Increasingly, data systems also

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[19] See Memorandum from Marcy A. Forman, Director, ICE Office of Investigations, "Worksite Enforcement Strategy," (to Assistant Director, Deputy Assistant Directors and Special Agents in Charge, ICE, April 30, 2009), www.ice.gov/doclib/foia/dro_policy_memos/worksite_enforcement_strategy4_30_2009.pdf.

[20] Andorra Bruno, *Immigration-Related Worksite Enforcement Performance Measures* (Washington, D.C.: Congressional Research Service, 2012): 6, www.fas.org/sgp/crs/homesec/R40002.pdf.

[21] Statement of Homeland Security Secretary Janet Napolitano before the House Judiciary Committee, hearing on "Oversight of the Department of Homeland Security," July 17, 2012, www.dhs.gov/news/2012/07/17/written-testimony-dhs-secretary-janet-napolitano-house-committee-judiciary-hearing.

[22] U.S. Citizenship and Immigration Services (USCIS), "E-Verify History and Milestones," www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=84979589cdb76210VgnVCM100000b92ca60aRCRD&vgnextchannel=84979589cdb76210VgnVCM100000b92ca60aRCRD.

[23] National Conference of State Legislatures, "E-Verify," December 18, 2012, www.ncsl.org/issues-research/immig/everify-faq.aspx.

collect and screen against fingerprints and digital photographs for purposes of identity assurance. Such screening may soon include iris scans, voice matching and facial recognition.

Of particular importance for immigration enforcement purposes is the Automated Biometric Identification System (IDENT), administered by US-VISIT. IDENT contains more than 148 million individual fingerprint records, grows by 10 million new entries per year and reflects more than 2 billion individual entry events.[24] IDENT, which is the world's largest biometric law enforcement database, forms the backbone of the US-VISIT travel screening program, through which the biographic and biometric information of arriving non-citizen visitors is captured and screened against immigration and national security databases. Because IDENT is interoperable with the FBI's Integrated Automated Fingerprint Identification System (IAFIS), which stores criminal history information, officers checking IDENT may also learn whether an arriving non-citizen has a criminal history in the United States.

Another key development that has occurred as a result of IDENT/IAFIS interoperability is the rapid expansion of ICE's Secure Communities program. The program utilizes IDENT and IAFIS to screen the fingerprints of all individuals arrested by state and local law enforcement officers in enrolled jurisdictions for criminal and immigration history. Since the program's launch in seven jurisdictions in October 2008, ICE has rapidly expanded the reach of Secure Communities. As of August 2012, Secure Communities had been activated in more than 3,000 jurisdictions in all 50 states, representing 97 percent of all jurisdictions across the country.[25] The program is expected to be operational in all jurisdictions by March.

F. Remaining Weaknesses in the Current Immigration Enforcement Regime

While the bulwark of a modern, well-resourced, multi-layered immigration enforcement system is now fundamentally in place, there are several key areas where additional improvements are needed.

The first is the E-Verify program, DHS's electronic verification system for confirming the work authorization of new employees. Since 2007, U.S. Citizenship and Immigration Services (USCIS) has made a number of significant updates to the E-Verify system. These include requiring employers to re-check the information that they have entered for data-entry errors, automatic checks against USCIS' naturalization records database and against passport databases, the collection of driver's license information and new fields that record additional information collected from foreign passports. Recent reports also suggest that substantial progress has been made in reducing E-Verify error rates. According to the GAO, DHS reduced the percentage of cases receiving initial tentative non-confirmation notices from 8 percent during June 2004- March 2007 to 2.6 percent in FY 2009.[26] More recent USCIS statistics indicate that in FY 2011, 98.3 percent of the cases submitted through

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[24] Meissner et. al, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, 71.
[25] ICE, "Activated Jurisdictions," www.ice.gov/doclib/secure-communities/pdf/sc-activated2.pdf.
[26] Richard M. Stana, *Employment Verification: Federal Agencies Have Taken Steps to Improve E-Verify, But Significant Challenges Remain* (Washington, DC: Government Accountability Office, 2010): 16, www.gao.gov/new.items/d11146.pdf.

E-Verify were automatically confirmed as work authorized, and just 0.28 percent were erroneously initially flagged as not authorized to work.[27]

Nevertheless, other reports suggest that E-Verify, much like the I-9 verification system overall, often fails to identify unauthorized workers who present the identification documents of other, authorized workers. Westat, an independent consulting firm hired by DHS to evaluate E-Verify, estimated that between April – June 2008, 54 percent of the unauthorized workers who submitted biographic information through E-Verify were incorrectly confirmed as work authorized.[28] While USCIS has introduced a photo matching tool in hopes of combating fraud within the program, the tool's effectiveness is limited by the fact that it can only be used for certain types of documents. The tool's ultimate effectiveness also depends on the good-faith efforts of employers to certify that the photo on an identity document presented by a worker matches the stored digital version that appears in the E-Verify system.[29]

A second area of concern is DHS's limited ability to determine when lawfully admitted individuals have overstayed their authorized periods of admission. There have been two authoritative studies on visa overstays, one done by INS in 1997 and a second by the Pew Hispanic Center in 2006.[30] These studies indicated that up to 40-50 percent of the unauthorized population is comprised of individuals who entered the United States lawfully but overstayed their authorized periods of admission. Estimates of the visa overstay population have not been updated since the recession.

Moreover, despite congressional mandates dating to 1996 that require DHS to implement exit controls to verify that individuals entering the country with temporary visas leave before their authorized periods of admission expire, DHS has yet to launch a biometric exit verification system. Preliminary testing of exit verification programs in 2009 was labeled of limited value by GAO because the programs did not define standards for gauging the pilot programs' performance, and biometric screening was frequently suspended to avoid departure delays.[31]

Finally, the physical infrastructure needs at land ports of entry (POEs) have not kept pace with advances in documentation and screening developments. Many land POEs are now equipped with technology that permits 100 percent license plate reading and document scanning. However, when traffic delays exceed 60 minutes, inspectors may "flush" traffic through, pulling aside only obvious high-risk crossers.[32] One underlying reason for the lack of infrastructure development may be the fact that funding streams for land port infrastructure come not from the main DHS budget, which has received record high levels of funding, but rather from the budget for the General Services Administration (GSA), which has seen more modest resource increases.

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[27] USCIS, "E-Verify Statistics," www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=7c579589cdb76210VgnVCM100000b92ca60aRCRD&vgnextchannel=7c579589cdb76210VgnVCM100000b92ca60aRCRD

[28] Westat, *Findings of the E-Verify Program Evaluation* (Rockville, MD: Westat, 2009): 117, www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf.

[29] Marc R. Rosenblum, *E-Verify: Strengths, Weaknesses, and Proposals for Reform* (Washington, D.C.: Migration Policy Institute, 2011): 9, www.migrationpolicy.org/pubs/e-verify-insight.pdf.

[30] Pew Hispanic Center, *Modes of Entry for the Unauthorized Migrant Population* (Washington, D.C.: Pew Hispanic Center, 2006), http://pewhispanic.org/files/factsheets/19.pdf.

[31] GAO, *Homeland Security: US-VISIT Pilot Options Offer Limited Understanding of Air Exit Options* (Washington, D.C.: GAO, 2010): 4-5, www.gao.gov/products/GAO-10-860.

[32] Meissner et. al., *Immigration Enforcement in the United States: The Rise of a Formidable New Machinery*, 40.

II. Key Problems Associated with the Last Comprehensive Immigration Reform Effort — the Immigration Reform and Control Act

High levels of resources, manpower and technology devoted to border and interior enforcement have resulted in an historic transformation of the country's immigration enforcement system. Nevertheless, concerns persist that a legalization program may strain enforcement resources and lead to future increases in illegal immigration. Some of this concern stems from perceived weaknesses in the 1986 Immigration Reform and Control Act (IRCA), which combined a legalization program with increased border security and workplace enforcement.

For the remainder of my testimony, I would like to describe three of the key weaknesses associated with IRCA, as well as offer recommendations for avoiding similar problems in the current environment.

A. Failure to Deal with the Entire Unauthorized Population

The legalization component of IRCA was largely seen as a successful program. More than 2.7 million formerly unauthorized immigrants — three-quarters of the estimated total eligible population — became lawful permanent residents through the two legalization programs enacted under IRCA.[33]

IRCA did not, however, wipe the slate clean with regards to illegal immigration, as the law was intended to do. The number of unauthorized immigrants rose from an estimated 4 million in 1986, pre-IRCA, to an estimated 12 million in 2007, before the onset of the recession. Illegal crossings also increased, adding an estimated 500,000 individuals per year to the size of the resident unauthorized population through the 1990s until the mid-2000s.[34]

A key drawback of IRCA's legalization component was that the law disqualified those who had arrived in the United States after January 1, 1982. Thus, at the time of the law's implementation in 1987, anyone who had arrived in the United States during the past five years was automatically excluded from the legalization program and remained in unauthorized status. Additionally, IRCA did not provide an opportunity for immediate family members of the newly legalized population to obtain lawful status. The combination of these two factors left large numbers of people in mixed-status families, where one member of the family gained lawful immigration status, while another remained unauthorized. And when newly legalized IRCA beneficiaries filed petitions for their relatives in existing family preference categories, the result was enormous increases in the backlogs

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[33] The Immigration Reform and Control Act created two separate legalization programs for unauthorized immigrants: a general legalization program for unauthorized individuals who had been continuously present in the United States since January 1, 1982, and a second program, with more generous provisions, for individuals performing seasonal agricultural work. See Betsy Cooper and Kevin O'Neil, *Lessons from the Immigration Reform and Control Act of 1986* (Washington, DC: Migration Policy Institute, 2005), www.migrationpolicy.org/pubs/PolicyBrief_No3_Aug05.pdf.

[34] Jeffrey Passel, *Size and Characteristics of the Unauthorized Migrant Population in the U.S.* (Washington, D.C.: Pew Hispanic Center, 2006), www.pewhispanic.org/2006/03/07/size-and-characteristics-of-the-unauthorized-migrant-population-in-the-us/.

for family-sponsored immigrants, and wait times that spanned years, or even decades. All of these factors created the nucleus of a sizeable post-1986 unauthorized population.

For any new legalization program to be successful, it should be as inclusive as possible. The law should not disqualify large sections of the unauthorized population, as doing so both invites fraud and fails to address the full scope of the problem.

B. Failure to Address Future Flows

IRCA's major failure was its narrow focus. By addressing only issues of illegal immigration, it failed to anticipate or make provisions for future labor needs in the United States, especially in the low-skilled labor market. Without such provisions, hundreds of thousands of individuals who were drawn to the U.S. job market in the late 1980s and mid-1990s sought to enter the country illegally.

Demand for workers in low-skilled jobs did fall dramatically with the onset of the recession in 2008. However, as the economy recovers, pressures for low-skilled immigration can be expected to rise. New immigration reform measures should provide appropriate mechanisms for dealing with increased labor demand.

One notable lesson from the aftermath of IRCA is that IRCA, too, was originally crafted during years of economic downturn. By the time of the law's implementation, however, the economy had recovered, labor demands had increased and a lack of available legal channels for low-skilled workers spurred increased illegal immigration. Demographic and economic changes in Mexico, combined with much improved enforcement measures in the U.S. all point to a decreased tendency for illegal migration in the current era.

At present, both temporary and permanent work-related immigration channels for low-skilled workers are exceedingly limited. While the H-2A and H-2B temporary visa programs allow employers to sponsor foreign workers for temporary or seasonal work, there are almost no permanent visas — fewer than 5,000 — available for ongoing, non-temporary positions that require less than a bachelor's degree or two years of experience. In recent years, and even during the middle of the recession, employer demand for H-2B visa holders far exceeded the annual statutory cap of 66,000 visas. In addition, employers have voiced concerns over the arduous nature of the H-2A and H-2B sponsorship process, which may discourage widespread use of the program.

The rules governing any new visa channels for low-skilled immigrants must balance the need to make legal work-based immigration sufficiently attractive to employers with the need to maintain adequate wage and working conditions for low-skilled immigrants and the U.S. workers working alongside them. Lawmakers will be forced to confront a variety of issues related to this balance, including whether to create a new visa that allows for the admission of low-skilled workers in non-temporary positions, whether low-skilled visas should be portable from one employer to another and whether to allow all or some portion of individuals admitted on such a visa to adjust status to become lawful permanent residents.

A number of proposals for managing future flows have been advanced. The one to which I would like to draw the committee's attention calls for establishing a Standing Commission on Labor Markets and Immigration. Such a commission was proposed by the Independent Task Force on Immigration and America's Future, which was convened by the Migration Policy Institute, and has

been endorsed by other distinguished groups and individuals.[35] This nonpartisan commission - staffed by labor and immigration experts - would be responsible for making recommendations to Congress every year or two for adjusting immigration levels, based on analyses of labor market needs, unemployment patterns, and changing economic and demographic trends.

For those admitted to the U.S. in occupations that are not seasonal or temporary in nature, the Task Force further recommended creating a new kind of visa, known as a provisional worker visa.[36] The provisional worker visa would bridge the frequently artificial distinction between temporary and permanent immigration and build a system that is more closely aligned with how migration flows and labor markets work in practice. It would respond to the needs of employers and protect the interests both of U.S. and foreign workers. The number of provisional visa workers admitted every year would be based on the recommendations made by the Standing Commission to Congress.

Provisional workers in all occupations would be allowed to enter the country, sponsored by employers, for two renewable three-year periods. But workers would be free to change employers after an initial period. They would be allowed to be accompanied by their immediate family members. Workers would be guaranteed labor rights and protections on par with U.S. workers, including the right to bring legal actions against employers. Provisional workers could return to their countries of origin after working for a period of time and return to the U.S. at a later time for another temporary period, thus potentially promoting greater circular migration. Or, in cases where over time they met a set of conditions that include a track record of employment, future employment opportunities and the acquisition of language skills, they could become eligible to adjust to permanent residence.

Employers of provisional workers would participate in a well-regulated labor attestation process. Employers who consistently comply with labor and immigration laws could be pre-certified for sponsoring workers, a privilege they would lose if found non-compliant. Employers would contribute to a fund which could be used to meet a variety of immigration and workplace enhancement capacity building needs.

C. Failure to Provide Employers with a Reliable Means of Determining Employment Eligibility

One final failure of IRCA's design and implementation was the absence of a reliable mechanism for employers to verify the authenticity of identification documents presented by would-be employees. Without a way to verify these documents, employers found it easy to comply with the letter of the law, and unauthorized workers found it easy to procure false and fraudulent documents which indicated that they were work authorized.

The development of E-Verify, along with the earlier mentioned improvements in the system's technology, provides a promising new option for tackling part of this problem. The current version

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[35] Doris Meissner, Deborah W. Meyers, Demetrios G. Papademetriou and Michael Fix, *Immigration and America's Future: A New Chapter*, Report of the Independent Task Force on Immigration and America's Future (Washington, D.C.: Migration Policy Institute, 2006), www.migrationpolicy.org/itfiaf/finalreport.pdf.

[36] Demetrios G. Papademetriou, Doris Meissner, Marc R. Rosenblum and Madeleine Sumption, *Aligning Temporary Immigration Visas with Labor Market Needs: The Case for a New System of Provisional Visas* (Washington, D.C.: Migration Policy Institute, 2009), www.migrationpolicy.org/pubs/provisional_visas.pdf.

of E-Verify, however, requires significant improvements in its ability to verify the true identity of job applicants. A good place to start would be to test a variety of options involving biometric scanning, more secure documents, and pre-verified personal identification numbers (PIN numbers) assigned to and managed by individual workers.[37] These should be tested in the field alongside the current system to determine the best approach for improving E-Verify.

Any expansion of the program should also be accompanied by its close monitoring to ensure that it strengthens due process protections and compensates workers when system errors result in the wrongful termination of lawful workers. There should also be monitoring to ensure that the system does not result in discrimination against foreign-looking or foreign-sounding employees, which has been a source of concern in the implementation of the program in the past.

While the time to expand the electronic employment verification system has arrived, making it mandatory is a major undertaking and has to be done cautiously. Even though more than 350,000 employers are currently enrolled in E-Verify, the system covers only a small percentage of the nation's more than 7 million employers and more than 140 million workers.

Extending E-Verify will require a major commitment by employers, workers' representatives and the government. It requires a realistic timeline. It would be best to phase it in over several years. Universal enrollment in the program could depend, for example, on certification by the Homeland Security Secretary that mandatory participation will not cause undue burdens on employers or lead to violations of worker protections. DHS would be wise to empanel a group of employer and worker representatives and other stakeholders to help it monitor and advise on the progress of the E-Verify program during various stages of enrollment.

A mandatory electronic verification system will ultimately be successful only if it is part of larger immigration reform. The critical elements of that reform would have to include a broad legalization program for the current pool of unauthorized immigrants and the creation of a new, expanded, employment-based immigration stream for future flows. These two elements are critical to reducing the pool of unauthorized workers in the US labor market—a critical foundation for a successful workplace verification and enforcement effort.

III. Conclusion

The nation has built a formidable immigration enforcement machinery in recent years. The "enforcement-first" policy that has been advocated by many inside and outside of Congress as a condition for considering broader immigration reform has de facto become the nation's dominant immigration policy.

Important as this enforcement effort is, enforcement alone is not sufficient to answer the broad challenges that both legal and illegal immigration pose for our society, our economy and for America's future. Looking forward, answering those challenges depends not only on effective enforcement, but also on enforceable laws that address both inherent weaknesses in the immigration system and better align our immigration policy with the nation's economic and labor market needs and future growth and well-being.

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[37] Doris Meissner and Marc R. Rosenblum, *The Next Generation of E-Verify: Getting Employment Verification Right* (Washington, D.C.: Migration Policy Institute, 2009), www.migrationpolicy.org/pubs/verification_paper-071709.pdf.