

Testimony of

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"Immigration Enforcement at the Workplace:
Learning from the Mistakes of 1986"

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INTRODUCTION

Chairman Cornyn and Ranking Member Kennedy, thank you for the opportunity to return to your committee to discuss how to develop an effective system to enforce our immigration laws related to illegal employment of unauthorized workers and how such a program plays a critical part of a broader effort to secure our borders. I am currently a principal at the consulting firm Mehlman Vogel Castagnetti, Inc., an Adjunct Fellow at the Center for Strategic and International Studies, and a member of the Independent Task Force on Immigration Reform and America's Future which is chaired by former Senator Spencer Abraham and former Congressman Lee Hamilton and managed by the Migration Policy Institute.

As you know, following confirmation by the Senate in 2003, I served as Assistant Secretary for Border and Transportation Security Policy and Planning until my resignation from the Department of Homeland Security (DHS) in March of 2005. In this capacity, I was responsible for policy development within the Border and Transportation Security (BTS) Directorate, reporting to Under Secretary Asa Hutchinson and Secretary Tom Ridge. BTS coordinated policy development and operational activities in the fields of immigration and visas, transportation security, law enforcement, and cargo security which largely were carried out in the field by BTS agencies - U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), and the Transportation Security Administration. BTS' functions have been subsumed and enhanced under the new DHS structure, including the new DHS Policy Directorate headed by Assistant Secretary Baker which has spearheaded the attempt to gain control of our immigration systems.

You may remember that shortly after leaving DHS a year ago, I appeared before this Subcommittee to discuss immigration enforcement. It is a credit to Chairman Cornyn, Ranking Member Kennedy and many of your colleagues in the House and Senate who have devoted countless hours in the past year to developing bold legislative solutions to fix our troubled immigration laws. Before turning to the specifics of enforcement at the workplace, I would urge the Congress to seize the moment and pass a comprehensive approach to immigration reform this year. While I recognize the difficult politics inherent in this issue, each day that we struggle under the current legal regime only makes the task more difficult. The issues that you have attempted to resolve this Congress cannot be solved by time or appropriations for enforcement alone. Next year the number of illegal workers will be greater, the disconnect between our economic needs and our laws wider, the politics more inflamed, and the solutions even harder to implement. Now is the time to act and to act in a way that learns from our prior mistakes, not just respond to understandable public anger.

Late last year, the House passed a sweeping enforcement bill, H.R. 4437. Last month, the Senate passed S. 2611 which added to the enforcement provisions wide ranging sections to create a temporary worker program and provide legal status to millions of aliens who have been in country for several years who can pass a background check, maintain employment, pay any back taxes and a fine, and meet other criteria. The Senate bill is not perfect, but the general approach is the correct one. Trying to enact an "enforcement-only" or "enforcement-first" approach is doomed to fail. Only by addressing all of the elements of a sensible immigration plan in one piece of legislation can any of the elements be expected to succeed.

Earlier this year, an informal coalition of former high-ranking officials in DHS and its component agencies with immigration responsibilities signed an open letter to interested parties which argued that the best way to secure our borders was this comprehensive approach to border security. The Coalition for Immigration Security stated in part:

"But enforcement alone will not do the job of securing our borders. Enforcement at the border will only be successful in the long-term if it is coupled with a more sensible approach to the 10-12 million illegal aliens in the country today and the many more who will attempt to migrate into the United States for economic reasons. Accordingly, we support the creation of a robust employment verification system and a temporary worker program in the context of an overall reform of our border security and immigration laws.

With each year that passes, our country's shifting demographics mean we face a larger and larger shortage of workers, especially at the low-skilled end of the economy. Entire segments of the economy in a growing number of urban and rural areas depend on large illegal populations. Existing law allows only a small fraction of these workers even to attempt to enter the United States legally, even though our unemployment rate has fallen below 5 percent.

Thus, each week our labor market entices thousands of individuals, most from Mexico but many from numerous other countries, to sneak across our border, or to refuse to leave when a temporary visa expires. These numbers add up: DHS apprehends over 1 million migrants illegally entering the United States each year, but perhaps as many as 500,000 get through our defenses every year and add to our already staggering illegal immigrant population. As believers in the free market and the laws of supply and demand, we believe border enforcement will fail so long as we refuse to allow these willing workers a chance to work legally for a willing employer.

Most such migrants are gainfully employed here, pay taxes, and many have started families and developed roots in our society. And an attempt to locate and deport these 10 to 12 million people is sure to fail and would be extraordinarily divisive to our country.

But others seeking to cross our borders illegally do present a threat - including potential terrorists and criminals. The current flow of illegal immigrants and people overstaying their visas has made it extremely difficult for our border and interior enforcement agencies to be able to focus on the terrorists, organized criminals, and violent felons who use the cloak of anonymity that the current chaotic situation offers.

An appropriately designed temporary worker program should relieve this pressure on the border. We need to accept the reality that our strong economy will continue to draw impoverished job seekers, some of whom will inevitably find a way to enter the country to fill jobs that are available. A successful temporary worker program should bring these economic migrants through lawful channels. Instead of crossing the Rio Grande or trekking through the deserts, these economic migrants would be interviewed, undergo background checks, be given tamper-proof identity cards, and only then be allowed in our country. And the Border Patrol would be able to focus on the real threats coming across our border. This will only happen, however, if Congress passes a comprehensive reform of our border security and immigration laws.

Moreover, current law neither deters employers who are willing to flout the law by hiring illegal workers, nor rewards employers who are trying to obey the law. Bogus documents abound, and there is currently no comprehensive and mandatory mechanism for employers to check the legality of a worker's status. An effective temporary worker program would include a universal employment verification system based on the issuance of secure, biometrically-based employment eligibility documents and an "insta-check" system for employers to confirm eligibility. We recognize the cost of such programs but believe the cost of the current morass is much greater.

Lastly, individuals who have maintained employment in the United States for many years without evidence of ties to criminal or terrorist behavior should be granted the opportunity to make in essence a plea bargain with law enforcement. By paying a stiff fine and undergoing a robust security check, these individuals can make amends for their mistake without crippling our economy and social structures by being part of a mass deportation. Each day that we fail to bring these people out of the shadows is another day of amnesty by default."

A full copy of the coalition's letter is attached to this testimony.

In particular, there appears to be an overwhelming consensus now that our country urgently needs a robust program to allow temporary workers to enter the country to fill jobs that cannot be filled by American citizens. We have existing systems in place to conduct security reviews and issue biometrically-enhanced travel documents to current temporary workers that should suffice as an interim measure for the new temporary worker program while the new electronic employer verification system (EEVS) is deployed. Allowing this flow of workers to begin only a year and a half after funds have been allocated to the EEVS, as a provision of S.2611 would require, means we would be adding another 18 months worth of workers being attracted and employed illegally rather than channeling that flow through legal means.

As Congress has been in the legislative phase, I am pleased to see the aggressive approach DHS is taking to put in place a strategic plan to restore integrity to our immigration systems. As some of the political and funding impediments that hindered the efforts of immigration enforcement during my tenure have been overcome, Secretary Chertoff, Assistant Secretary Myers, Commissioner Basham, Chief Aguilar, Assistant Secretary Baker, and Assistant Secretary Beardsworth are to be commended for their Secure Border Initiative which is sweeping in scope and thoughtful in approach. Each of the major elements of SBI needs significant funding and long-term policy commitment to play a part in reversing decades of poorly-designed immigration policy, including:

SBI-net: DHS wisely has turned to the ingenuity of the private sector to develop the best mix of technological solutions to enforcement between the ports of entry, with a procurement award expected this fall. Now is the time to take the best current generation technology -- whether it be sensors, cameras, video recognition software, airborne surveillance, biometrics, identification and booking systems, vehicular deterrents, or similar products - and deploy the most effective series of assets that can support the operations of the Border Patrol in the wide variety of physical settings they operate.

Enhanced Detention and Removal: While not as sexy as interdiction assets mentioned above, the ability of ICE to process, hold, and return as many illegal aliens as possible has long been the weakest part of enforcement regime. Bedspace shortages and litigation challenges led to policies like "catch-and-release" and issuance of so-called "run" letters to individuals in deportation proceedings. DHS has made progress in a number of areas in this realm, including the overdue use of expedited removal along the border, the streamlining of deportation proceedings, negotiations with recalcitrant countries to accept deportees, and modest increases in bedspace. However, until there is a credible system that will hold the overwhelming majority of illegal aliens when they are identified by federal, state, or local law enforcement, it will be difficult to claim victory. The bedspace crisis will become especially acute as the other enforcement assets such as the Border Patrol, ICE Investigations, and states working under federal enforcement agreements, become much more effective in providing "customers" to ICE Detention and Removal.

Turning to employment enforcement issues, it is difficult to imagine a system that could be worse than the current one. While many people point the 1986 immigration law as the cause for this failure, that statute created only part of the current mix of law, enforcement policy, and employer behavior that is notorious now for the following factors:

- ? Prospective employees are allowed to "prove" their ability to work by producing a number of identification documents which are illegally obtained, easily forged, or used multiple times. In essence we have tried building an enforcement regime on quicksand;
- ? Prospective employers who would like to obey existing laws have been provided with no tools to ascertain anything but the worse frauds since the documents they review are unreliable and there has been no reliable system to confirm employment eligibility;
- ? Prospective employers who either are willing to break the law or make no effort to comply have essentially been given a green light due to a lack of enforcement resources and the fact that INS and then DHS announced that

enforcement activity was to be concentrated on employers in a handful of industries with national security connections;

? Despite the fact that the Social Security Administration has developed an elaborate system of employee identification to facilitate payment of retirement benefits and investigation of tax compliance, that system essentially has been of little use to immigration enforcement authorities;

? In an era when government requires employers and employees to submit information concerning nearly every aspect of their activities to various agencies; amazingly the only wide-scale program that allows the government to assist employers with eligibility determinations - the so-called Basic Pilot system - is voluntary.

As we sit here today, credit card companies have developed a system that allows secure payments at millions of locations around the world in a matter of seconds, not to mention any computer terminal. Banks have deployed a worldwide network of ATM machines that hand out cash in a matter of seconds. As mentioned above, the Social Security Administration and Internal Revenue Service obtain and analyze enough information about each of us to ensure that the government knows down the last dollar how much we owe in taxes and receive in retirement and other benefits. But there is no system to provide an answer to the following question: Is the person applying for a job an American citizen or a foreign guest eligible to work? This failure is question of will, not of ability.

The American people rightfully are concerned about the current state of affairs, but they are also willing to accept the reality that we cannot expect the EEVS to be fool-proof and universally-applied from day one. Employee verification is not missile defense - some measure of error is to be expected and tolerated so long as it does not deny U.S. citizens the opportunity to work. Thus, as Congress continues drafting legislation to create the EEVS, I make the following recommendations:

? Phased-in approach: The EEVS should be applied to employers in phases, starting with the most sensitive employers such as aviation, chemical or other critical infrastructure, as S.2611 requires;

? Employee rights: Especially during the initial phases of EEVS, enforcement activities should err on the side of employees claiming to be legitimate U.S. citizens before requiring termination. As the system improves and legacy workers transition into new documents and jobs, what we ask of employees and employers should be increased but as the system is turned on, we cannot expect perfection. Allowing some initial flexibility may also minimize the need to require DHS, and by extension taxpayers, to pay for damages in cases where people were inappropriately denied work authorization. Eventually over 50 million workers may be subject annually to the EVS and nothing will cause the worthy goal of EEVS to collapse faster than horror stories of American workers being denied employment because of faulty government databases;

? REAL ID implementation: Unless and until a new system of biometrically-enhanced identification documents is deployed, the EEVS likely will be heavily dependent on U.S. citizens obtaining and presenting REAL ID compliant driver's licenses. Thus DHS must keep the process of issuing implementing regulations for REAL ID on track and Congress must help states with the massive cost of REAL ID compliance;

? Biometrics: Basing EEVS on non-biometric identifiers such as Social Security Numbers and immigration control numbers may be the best short-term fix, but the next phase of EEVS must be biometrically-based to derive the enforcement and facilitation benefits that only biometric databases can deliver. In essence, we need a database of legitimate worker identification akin to the US-VISIT database of foreign travelers which has been extremely effective in finding criminals and imposters and clearing those with biographic information similar to wanted individuals. This type of system would be especially helpful in deterring potential discrimination against non-citizens eligible to work and those who "look" like illegal aliens;

? Private sector involvement: U.S. Citizenship and Immigration Services (CIS) has made commendable progress in speeding up the backlog of service applications and including additional security checks on applicants. However, the Herculean task of building EEVS and tying it to Social Security and enrolling tens of millions of prospective employees including millions of temporary workers is a job where we will need the best and brightest private sector solutions. Much like US-VISIT and SBI, the private sector should be challenged to propose and implement innovative solutions to each aspect of EEVS under the supervision of DHS and its component agencies;

? Fees: Asking U.S. employers to spend corporate funds to comply with government mandates is a reasonable request, as we have done in areas such as environmental, tax, and accounting compliance. Imposing a flat tax for the privilege of hiring a domestic worker to fund the government side of the EEVS is not reasonable or consistent with our history of encouraging a robust domestic economy. Building the EEVS is a core governmental responsibility which should come partially from fees on foreign workers seeking entry into the country and partially from general taxpayer revenues.

Building an effective EEVS is the lynchpin to the entire effort to secure our borders. It will require significant funding, oversight, cooperation with the private sector, and explanation to the public.

As I testified last year, we should be attempting to build an immigration system based on the principals of "deter and reward": Those who are seeking to enter our country to work must be faced with a reality that crossing our borders illegally or attempting to work without proper certifications will be detected and punished with long-term consequences for violations. In contrast, those that follow the rules on applying for work, passing a security check, and crossing the border legally should be rewarded with employment, retirement and travel privileges. By the end of this decade, we should be able to look back in amazement to an era when illegal employment was tolerated and our immigration enforcement efforts fodder for late night comedians.

I congratulate the Committee and Subcommittee for its thoughtful work on these most difficult issues. I thank you for the opportunity to appear before you today and look forward to your questions.