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U.S. policy squeezes immigrants, not immigration

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Residing on the Texas border for more than 20 years provides a front-row seat to the human fallout of various political efforts to address illegal immigration. President Barack Obama recently said during a press conference: "If the American people don't feel like you can secure the borders...then it's hard to strike a deal that would get people out of the shadows and on a pathway to citizenship." Suzanne Gamboa, "Analysis: Border security move has political angle," Associated Press, May 7, 2009.

Obama backed up this statement with a plan to request $27 billion for border and transportation security. Homeland Security Secretary Janet Napolitano followed this pronouncement with testimony outlining that the administration means to continue many practices commenced during the Bush administration in an attempt to construct a legal system defense against illegal immigration. Oversight of the Department of Homeland Security, Hearings of the Senate Committee on the Judiciary (Statement of Janet Napolitano, secretary of the U.S. Department of Homeland Security, May 6, 2009).

The approach places more pressure on what could be described as a squeeze chute (cattle term) of enforcement actions to combat illegal immigration using the judicial system. This has involved increased criminal and administrative actions against U.S. employers knowingly using undocumented workers. This methodology may seem a logical way to reduce the lure of jobs for the undocumented and the ability of employers using undocumented workers to create an uneven playing field between legally compliant employers and those exploiting the system. This approach, however, has resulted in the use of many unconventional methods that raise concerns regarding our judicial system's ability to maintain due process.

For example, U.S. Department of Justice and Department of Homeland Security (DHS) actions such as operations Streamline, Streamline II, No Pass and Lockdown sharply limit prosecutorial discretion in cases of illegal entry. Under these programs, law enforcement is directed to use criminal options when available regarding illegal entries.

ENFORCEMENT OPTIONS

Operation Streamline and similar programs require the use of the federal courts, public defenders, prosecutors, translators, detention centers and other resources. Major congressional efforts were expended in the past to avoid just this result. Specifically, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), P.L. No. 104-208, Division C, established the existing enforcement mechanism of expedited removal by amending § 235(b)(1)(A)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1225(b)(1)(A)(i). Expedited removal was implemented in April 1997 at the ports of entry and expanded for use by the Border Patrol on Aug. 11, 2004, in cases of illegal entry when the foreign national is apprehended within 100 air miles of the U.S. international land border and after being present in the United States continuously for fewer than 14 days preceding his or her interdiction.

Expedited removal allows a DHS officer to summarily exclude a foreign national arriving without proper documentation, one who commits fraud or a material misrepresentation and who has not been present in the United States continuously for two years immediately preceding the determination of inadmissibility at the port of entry. This action may be used unless the foreign national expresses an intent to apply for asylum or has a fear of persecution or torture. Expedited removal requires no hearing before an immigration judge and the foreign national has no right to counsel. If expedited removal is to continue, many legal observers believe that its targets deserve access to counsel and at least a modified administrative review. See, e.g., Alison Siskin and Ruth E. Wasem, Immigration Policy on Expedited Removal of Aliens, Congressional Research Service, Jan. 30, 2008.

Following the failure of comprehensive immigration reform in June 2007, then-DHS Secretary Michael Chertoff devoted increased resources to border enforcement, including a focus on prosecutions of even first-time offenders of 8 U.S.C. 1325 for illegal entry to the United States, a misdemeanor, and illegal re-entry under 8 U.S.C. 1326. The theory appeared to be that expedited removal was not a strong enough deterrent to illegal entry.

The misdemeanor charge is punishable by up to six months' imprisonment and, unlike a felony charge, it does not require an indictment by a grand jury and there is no right to trial before a district judge. Magistrate judges preside.

Federal prosecutors and law enforcement officials enjoy limited discretion here. U.S. immigration law is known for its complexity, yet public defenders often have little opportunity to interview the accused to determine whether relief is possible via asylum, derivative citizenship or automatic citizenship, among other options. See National Association of Criminal Defense Lawyers, Adopted NACDL Policy on Operation Streamline, May 4, 2008.)

In January 2009, charges under 8 U.S.C. 1325 led all other magistrate judge filings (50.7%). In U.S. district courts, re-entry of a deported alien (8 U.S.C. 1326) was the most frequent lead charge. Among the top 10 lead charges, violations of 18 U.S.C. 1546 involving the fraud and misuse of visas, permits and other documents showed the greatest increase in prosecutions in district courts — up by 78.7%. Compared to five years ago, the judicial district court with the largest growth in prosecutions was the Western District of Texas, with 51.4%. See Transactional Records Access Clearinghouse Report.

In the past, many of those attempting to enter the United States without inspection were subject to expedited removal or voluntary return at the border, which did not involve the same consequences as an expedited removal order (five years of inadmissibility to the United States). Following such programs as Operation Streamline II in late 2005, the two magistrate judges in Del Rio, Texas, experienced a 350% jump in their misdemeanor immigration caseload. "Federal Courts Hit Hard by Increased Law Enforcement on Border, The Third Branch Newsletter," July 2008. These misdemeanor cases often are prosecuted by Border Patrol attorneys serving as special assistant U.S. attorneys. These attorneys typically ask the courts to impose a jail term on each apprehended foreign national and initiate civil immigration proceedings.

In an alternative but rare approach, in 2008 the U.S. District Court for the Northern District of Iowa used judicial removal proceedings under INA § 238(c), 8 U.S.C. 1228(c), against the undocumented workers rounded up in the raid of Agriprocessors Inc.'s kosher meat-processing operations in Postville, Iowa. The workers charged were presented with a plea agreement containing an arbitrary seven-day deadline that provided limited time or counsel to consider their legal options. Appointed counsel found themselves representing as many as 17 defendants at once, with little assessment time. This type of group representation continues to an even greater degree along the Southwest border.

One of the results of the Postville raids was the May 4 U.S. Supreme Court decision in *Flores-Figueroa v. U.S.* , No. 08-108. The Supreme Court held that the federal criminal statute concerning the crime of aggravated identity theft, which imposes a mandatory, consecutive two-year prison term on those convicted, requires that the government show that the defendant knew that the means of identification that he or she unlawfully transferred, possessed or used did in fact belong to "another person." Only time will tell how this decision will shape enforcement actions by the government,

On the other side of enforcement chute, employers are attempting to grapple with continually changing requirements to establish the identity and work authorization of new hires. Some states, such as Arizona, require the use of the E-Verify program created by DHS in conjunction with the Social Security Administration. Many other employers are enticed into enrolling in the program by the possible protection against penalty that they perceive will be provided by E-Verify. E-Verify, however, is clearly used as an enforcement tool against those employers enrolled in the system. Priorities Enforcing Immigration Law: Hearings Before the Subcommittee on Homeland Security of the House Committee on Appropriations (statement of Michael Aytes, Acting Deputy Director, U.S. Citizenship and Immigration Services, April 2, 2009.)

In addition, E-Verify's utility against fraud is limited, since those adopting the identity of another often go undetected. While the E-Verify program continues to add photo enhancements to its fraud-detection capacity, the system arguably remains vulnerable to fraud and discriminatory use in pre-employment screening. U.S. Government Accountability Office, Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Verification System, GAO-08-895T, (June 10, 2008).

Meanwhile, some of the nation's enforcement-based laws have resulted in an increase in the number of the undocumented. As of April 1, 1997, a person unlawfully present in the United States for more than 180 consecutive days but less than one year, who departs the United States, is barred from returning to the country for three years unless granted a waiver. If the person accrues one year or more of unlawful presence and departs the United States, he or she is not able to return without a waiver for 10 years. "Unlawful presence" is a term of art

interpreted by numerous DHS and legacy Immigration and Naturalization Service memoranda. See, e.g., Paul Virtue, INS Memo on Grounds of Advises on Grounds of Inadmissibility, Unlawful Presence, Additional Guidance for Implementing Section 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act, AILA Infonet Doc. No. 97061790 (June 17, 1997).

The typical scenario is that someone who enters the United States without inspection accrues unlawful presence upon such entry. The practical effect is that many will refuse to leave the United States knowing that they will incur such barriers to re-admission. In addition, this statute causes, for example, families comprising U.S. citizens or legal permanent resident spouses and foreign national spouses to be separated for 10 years with no relief for issuance of an immigrant visa due to such unlawful-presence accrual and illegal re-entry under INA § 212(a)(9)(C). This provision has been interpreted to apply to minors based on their parents' or guardians' actions. See AILA Practice Alert dated August 18, 2008, regarding the application of unlawful presence bars to minors under INA 212 (a)(9)(C). AILA Infonet doc. 08081672.

The lesson that may be learned from the past 10 years of enforcement-related actions under the banner of border security is that enforcement for enforcement's sake alone does not and cannot achieve a lasting cure to the problems of illegal immigration or legal immigration to this country.

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