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## ATTRITION THROUGH ENFORCEMENT: A RATIONAL APPROACH TO ILLEGAL IMMIGRATION

*Kris W. Kobach*\*

For years, the public debate about illegal immigration in the United States has been gripped by a false dichotomy. We have been told that there are only two choices in addressing the fact that twelve to twenty million aliens are unlawfully present in the United States: either attempt to round them up and remove them all, or grant a massive amnesty and provide all (or virtually all) illegal aliens<sup>1</sup> legal status.

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1. I use the term “illegal alien” because it is a legally accurate term used repeatedly in the immigration laws of the United States. *See, e.g.*, 8 U.S.C. § 1356(r)(3)(ii) (2006) (“expenses associated with the detention of illegal aliens”); 8 U.S.C. § 1366(1) (2006) (“the number of illegal aliens incarcerated in Federal and State prisons”). Another phrase that is used throughout the immigration laws of the United States is “alien not lawfully present in the United States.” *See, e.g.*, 8 U.S.C. § 1229a(c)(2) (2006) (“the alien has the burden of establishing . . . (B) by clear and convincing evidence, that the alien is lawfully present in the United States”); 8 U.S.C. § 1357(g)(10) (2006) (“for any officer or employee of a State or political subdivision of a State . . . (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.”). This term, however, is a bit too cumbersome for a writing of this nature. A third term, “unauthorized alien,” is found in federal immigration laws, but is limited to the employment context. *See, e.g.*, 8 U.S.C. § 1324a(a) (2006) (“[m]aking employment of unauthorized aliens unlawful”); 8 U.S.C. § 1324b(a)(1) (2006) (“other than an unauthorized alien, as defined in section 1324a(h)(3) of this title”). In contrast, the ambiguous terms “undocumented immigrant” and “undocumented alien” do not appear anywhere in the immigration laws of the United States. *See, e.g.*, 8 U.S.C. § 1101(a)-(i) (2006). Accordingly, I will use the shorter of the two appropriate terms recognized by federal statute, namely “illegal alien.”

This is a truly curious assertion. In no other area of law do serious people suggest that the only options are either pursuing total enforcement in order to achieve zero violations, or granting amnesty and thereby accommodating lawbreaking. No one claims that the only options regarding driving under the influence are mandatory breathalyzer checks at every bar and restaurant prior to allowing patrons to drive home, versus the elimination of penalties for driving under the influence. No one claims that the only options in confronting theft are the imposition of a police state with an officer on every block versus amnesty for all thieves.

Perhaps the best analogy is that of speeding on a highway. If it is well known that virtually no one is ever ticketed for speeding on a particular section of highway, people will predictably speed with impunity. The longer that a regime of non-enforcement exists, the more brazen and pervasive the speeding becomes. In an effort to restore the rule of law, no one seriously suggests that the only two options are ticketing every speeder or abandoning the speed limit laws entirely. In fact, a third, intermediate option is far superior. Simply posting a highway patrol officer on that section of highway and ticketing a small percentage of speeders changes everything. Drivers recognize that the threat of enforcement is real, and they change their behavior accordingly. The ratcheting up of enforcement produces a dramatic decline in lawbreaking.

In fact, in every area of law, society relies on the deterrence of lawbreaking through the credible threat of enforcement. If lawbreaking reaches an unacceptably high level, then law enforcement officials increase enforcement resources and activities in order to change the behavior of the lawbreakers. The time has come to apply this obvious concept to immigration law on a nationwide scale. The twelve to twenty million illegal aliens in the United States need not be rounded up and forcibly removed through direct government action. Illegal aliens can be encouraged to depart the United States on their own, through a concerted strategy of attrition through enforcement. Illegal aliens are rational decision makers. If the risks of detention or involuntary removal go up, and the probability of being able to obtain unauthorized employment goes down, then at some point, the only rational decision is to return home.

This has never been the immigration strategy of the United States. Instead, the national immigration policy for the last decade has been one of triage—incarcerate alien smugglers and deport aliens involved in violent crimes, but do virtually nothing to enforce the law against garden-variety illegal aliens. The vast majority of illegal aliens fall into the third category. Consequently, most illegal aliens have never faced a serious threat of enforcement, and working illegally has always been easy.

There is no credible threat of enforcement against most illegal aliens because the U.S. Bureau of Immigration and Customs Enforcement (ICE) has only approximately 3,000 interior enforcement agents attempting to cover the

entire country.<sup>2</sup> Most police departments in large cities have more officers than ICE does. Due to ICE's inadequate manpower, illegal aliens know that the probability of actually encountering federal immigration enforcement officers is very low. In this environment, the rule of law has eroded persistently and pervasively.

However, it is possible to change the enforcement landscape. What if *every* illegal alien found it difficult to obtain employment in the United States and the risks of enforcement (including the possibility of detention during removal hearings) were to increase for all? Those new realities would dramatically alter behavior. Attrition through enforcement would occur. There is empirical evidence that attrition through enforcement works in immigration. Two case studies have made this clear: Arizona and the National Security Entry-Exit Registration System (NSEERS).

In 2007, Arizona became the first state in America to require all employers to verify the legal status of employees through the federal government's "E-Verify" system.<sup>3</sup> The new law also made the knowing employment of an unauthorized alien a violation of state law and subjected offending employers to the suspension of business licenses.<sup>4</sup> The internet-based E-Verify system places responsibility on the federal government to offer a conclusive determination as to whether an employee is authorized to work in the United States. Upon hiring an individual, the employer simply enters the employee's name, date of birth, and Social Security number or other work authorization number into the system. The employer receives an answer back from the federal government in seconds. Over 20,000 businesses across the country were already using E-Verify voluntarily before January 1, 2008. Thereafter, Arizona's 145,000 businesses were obliged to join their ranks. By the end of February 2008, the number of businesses using the system had already climbed to approximately 55,000.

When employers verify the employment authorization of every new employee with the federal government it becomes difficult, if not impossible, for unauthorized aliens to obtain jobs. Unauthorized aliens know that E-Verify makes it impossible for them to fabricate Social Security numbers and use counterfeit identity cards to deceive employers. And when the jobs dry up, unauthorized aliens self-deport.

Arizona's statute had immediate and profound effects. Newspapers in the state reported in January 2008 that illegal aliens were already *self-deporting* by

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2. *Past Present and Future: A Historic and Personal Reflection on American Immigration: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 4 (2007) (statement of Michael Cutler, Director of Research, Center for Immigration Studies).

3. E-Verify was formerly called the "Basic Pilot Program.;" ARIZ. REV. STAT. ANN. §23-214.

4. See ARIZ. REV. STAT. ANN. § 23-212(F)(1)(c)-(d) (2007).

the thousands.<sup>5</sup> Apartment complexes in Phoenix and Tucson confirmed that thousands of alien tenants had vacated their apartments.<sup>6</sup> The overburdened Arizona public school system saw its costs drop dramatically with the departure of illegal alien households; a \$48.6 million surplus suddenly appeared in FY 2008.<sup>7</sup> Although some illegal aliens undoubtedly moved to neighboring states, many returned across the border to Mexico. This was verified by the neighboring Mexican state of Sonora. In January 2008, Sonora sent a delegation of nine state legislators to Arizona to criticize the new law. Absurdly, they complained that Sonora could not handle the burden that the influx of returning Mexican citizens was imposing on Sonoran schools and housing.<sup>8</sup> Needless to say, it was difficult to persuade the Arizona legislators that the taxpayers of Arizona should continue to bear the burden instead.

Federal law enforcement officials noticed the outward migration as well. At the end of February 2008, U.S. Secretary of Homeland Security Michael Chertoff commented publicly on the subject:

Likewise, we're continuing to promote the use of E-Verify. The state of Arizona . . . in the last couple days had its new rule requiring E-Verify use sustained by the federal courts, and we are beginning to see that illegal workers are picking up and leaving, because they recognize this system is an impediment to their continued illegal activities and illegal employment in this country.<sup>9</sup>

Clearly, the Department of Homeland Security was pleased with what was happening in Arizona. It was impossible to deny that making E-Verify participation mandatory had resulted in unprecedented numbers of self-deportations.

The impact of doing what Arizona has done on a national scale would be tremendous. Currently, millions of unauthorized aliens fabricate social security

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5. See, e.g., Daniel González, *Apartments Going Empty as Hiring Law Hits Migrants*, ARIZONA REPUBLIC, Jan. 31, 2008, at A1; see also Press Release, Dep't of Homeland Security, Remarks by Homeland Security Secretary Michael Chertoff and Attorney General Mukasey at a Briefing on Immigration Enforcement and Border Security Efforts (Feb. 22, 2008) (on file with the *Tulsa Journal of Comparative & International Law*), available at [http://www.dhs.gov/xnews/releases/pr\\_1203722713615.shtm](http://www.dhs.gov/xnews/releases/pr_1203722713615.shtm).

6. González, *supra* note 5; see also Randal C. Archibold, *Arizona Seeing Signs of Flight by Immigrants*, N.Y. TIMES, Feb. 12, 2008, at A13.

7. JLBC Monthly Fiscal Highlights: December 2007, at 2, available at <http://www.azleg.gov/jlbc/mfh-dec-07.pdf>. See also Jacques Billeaud, *Employer-Sanctions Law Forces Illegal Immigrants to Move On*, SIERRA VISTA HERALD, March 3, 2008, available at <http://www.svherald.com/articles/2008/03/03/news/doc47cb9f7c14db5486886624.txt>.

8. Sheryl Kornman, *Sonoran Officials Slam Sanctions Law in Tucson Visit*, TUCSON CITIZEN, Jan. 16, 2008, at 4A.

9. Statement of U.S. Secretary of Homeland Security, Joint Press Conference of Secretary Michael Chertoff and Attorney General Michael Mukasey, Feb. 22, 2008, available at [http://www.dhs.gov/xnews/releases/pr\\_1203722713615.shtm](http://www.dhs.gov/xnews/releases/pr_1203722713615.shtm).

numbers and employment authorization numbers to obtain employment in the United States. Incredibly, each year more than half a million individuals work illegally in the United States under the Social Security number 000-00-0000.<sup>10</sup> Millions more are somewhat more creative when they fabricated their Social Security numbers. In 2002, some nine million Social Security records were filed with invalid or incomplete information.<sup>11</sup> Without any system in place to confirm that a name, date of birth, and Social Security number all match the federal government's records, such fraudulent behavior occurs unabated. However, E-Verify changes the game. When employers are compelled to verify every new employee's immigration status with the federal government, it becomes extremely difficult to violate the law.

Arizona offers compelling proof that attrition through enforcement works,<sup>12</sup> but this is not the only case study that we have. The effectiveness of attrition through enforcement was first demonstrated in 2002 and 2003, with the implementation of the NSEERS by the U.S. Department of Justice. In the wake of the September 11<sup>th</sup> attacks on the World Trade Center, the Department of Justice launched NSEERS to screen and register aliens from Al Qaeda-associated countries and aliens from anywhere in the world whose backgrounds or travel patterns suggested a higher risk of potential involvement in terrorism

In addition to screening and registering these arriving aliens at ports of entry, NSEERS also required the registration of aliens from Al Qaeda-associated countries who were already in the United States. In late 2002 and early 2003, the Justice Department ordered designated aliens from those countries to report to INS offices to provide fingerprints and register.<sup>13</sup> If they did not register, they

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10. Between 1985-2000, approximately nine million annual Social Security records were submitted with all zeros in the number field, or an average of 600,000 per year. U.S. GOV'T ACCOUNTABILITY OFFICE, SOCIAL SECURITY: BETTER COORDINATION AMONG FEDERAL AGENCIES COULD REDUCE UNIDENTIFIED EARNINGS REPORTS, GAO-05-154, 3 (Feb. 2005).

11. *Id.* at 1.

12. A reasonable argument can be made that Oklahoma's House Bill 1804, which was enacted in 2007, also demonstrated attrition through enforcement at the state level. Although H.B. 1804 did not require all businesses in the state to use the E-Verify system, it did combine a number of smaller enforcement-oriented measures in one omnibus bill, including the denial of public benefits to illegal aliens, the creation of state-level crimes with respect to the transportation and harboring of illegal aliens, the prohibition of sanctuary cities in Oklahoma, and other measures. See Oklahoma Taxpayer and Citizen Protection Act of 2007, H.B. 1804, 51st Leg., 1st Sess. (Okla. 2007) (codified in scattered sections). Some newspapers reported anecdotal evidence that the legislation had prompted illegal aliens to leave the state of Oklahoma. See, e.g., Emily Bazar, *Strict Immigration Law Rattles Okla. Businesses*, USA TODAY, Jan. 10, 2008, at 1A.

13. Anthony Kujawa, *Foreign Visitor Registration Program Called "Great Success,"* AMERICA.GOV, U.S. DEPT. OF STATE, May 1, 2003, <http://www.america.gov/st/washfile-english/2003/May/20030501162441relhcie0.4553644.html>.

faced stiff penalties. Of the countries concerned, Pakistan had the largest number of its nationals in the United States.

As the process moved forward, some 1,500 Pakistanis who had been unlawfully present in the United States were deported by the federal government. However, the more salient figure is the number of *self*-deportations that occurred. According to the government of Pakistan, approximately 15,000 illegal aliens from Pakistan left the United States on their own.<sup>14</sup> They did so because they realized that the threat of enforcement through the NSEERS program was real. Most returned directly to Pakistan. An estimated 3,000 attempted to enter Canada with the hope of benefiting from the Canadian government's permissive asylum rules.<sup>15</sup> Regardless, the central fact was undeniable; the credible threat of enforcement had resulted in mass self-deportation.

It was stunning proof that attrition through enforcement works. When the risks of being detained and/or prosecuted go up dramatically, illegal aliens make the rational decision to leave the United States on their own. The NSEERS program demonstrated this fact in 2002 and 2003, and Arizona's E-Verify law demonstrated it in 2008.

If a strategy of attrition through enforcement were implemented nationwide, it would gradually, but inexorably, reduce the number of illegal aliens in the United States. Self-deportation is already a reality. There is a great deal of turnover in the illegal alien population, even under the current, relatively lax enforcement regime. According to federal government figures from the year 2000, approximately 183,000 illegal aliens self-deport every year.<sup>16</sup> However, some 900,000 to 1,000,000 illegal aliens enter the country or overstay their visas annually.<sup>17</sup> If Congress were to take the necessary steps to make attrition through enforcement a reality, it would become extremely difficult for aliens to obtain unauthorized employment, and the probability of facing enforcement for the typical illegal alien would increase substantially. Consequently, many illegal aliens would make the rational decision to return home on their own volition.

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14. *Clear Law Enforcement for Criminal Alien Removal Act of 2003: Hearing on H.R. 2671 Before the Subcomm. on Immigration, Border Security, and Claims of the H. Judiciary Comm.*, 108th Cong. (2003) (statement of James R. Edwards, Adjunct Fellow, Center for Immigration Studies).

15. Karen Branch-Brioso, *U.S. Ends Program Setting Annual Immigrant Reviews: More Than 80,000 Were Expected for Interviews*, ST. LOUIS POST-DISPATCH, Dec. 2, 2003, at A2.

16. The number of self-deportations increased steadily from 1990 to 2000, so it is likely that the self-deportation figure is much higher now. See OFFICE OF POLICY & PLANNING, U.S. IMMIGRATION & NATURALIZATION SERV., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000, 10 *tbl.C* (2003), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/III\\_Report\\_1211.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/III_Report_1211.pdf).

17. *See id.*

Eventually those numbers could be reversed, as the annual number of self-deportations gradually surpassed the number of incoming illegal aliens. Over time, the illegal alien population would dwindle to a fraction of its current size.

What would a nationwide strategy of attrition through enforcement entail? Properly conceived, it would involve several steps: (1) mandating that all employers in the country use the E-Verify system to verify the work authorization of new employees, a step that the U.S. House of Representatives took in December 2005 with the passage of H.R. 4437<sup>18</sup> (but the Senate never acted on the bill); (2) increasing the removal rate of aliens who have not been convicted of serious felonies; (3) increasing the percentage of aliens who are detained during removal proceedings to reduce the number of absconders;<sup>19</sup> (4) increasing the number of Section 287(g) agreements between ICE and state law enforcement agencies;<sup>20</sup> (5) ending sanctuary cities by denying federal law enforcement funding to cities that violate 8 U.S.C. § 1373(a)-(b);<sup>21</sup> and (6)

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18. See H.R. Res. 4437, 109th Cong. (2005). The bill was also commonly known as the "Sensenbrenner Bill," referring to its sponsor, Wisconsin Representative James Sensenbrenner.

19. Increasing the number of detainees would require continuing the current expansion in the number of detention beds. "Absconders" are those aliens who fail to show up for their removal hearings or flee upon receipt of a removal order. According to a 2003 report by the Office of the Inspector General of the U.S. Department of Justice, the INS deported approximately thirteen percent of aliens who were not detained prior to their removal proceedings, but the INS deported approximately ninety-two percent of the aliens who were detained prior to their removal proceedings. OFFICE OF THE INSPECTOR GEN., U.S. DEPT. OF JUSTICE, THE IMMIGRATION AND NATURALIZATION SERVICE'S REMOVAL OF ALIENS ISSUED FINAL ORDERS, Rep. No. I-2003-004, ii (2003).

20. See Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 196-99 (2005).

21. §1373. Communication between government agencies and the Immigration and Naturalization Service

(a) In general

Notwithstanding any other provisions of Federal, State, or local law, a Federal State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

- (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.



increasing the number of ICE interior enforcement agents. The most important of these steps is the first—making E-Verify mandatory for all employers nationwide. Some combination of the other five steps would also be necessary in order for most illegal aliens to experience an increased probability of encountering meaningful law enforcement.

In addition to the fact that it works, attrition through enforcement possesses a significant advantage over other competing approaches: it is comparatively inexpensive to implement. It takes considerable government manpower and other resources to arrest an illegal alien, initiate removal proceedings, detain him if necessary, provide the hearings and appellate review to which he is entitled, and ultimately remove him.<sup>22</sup> It is also extremely expensive to implement an amnesty and pay for the government benefits enjoyed by the newly-legalized aliens. The amnesty considered by the U.S. Senate in 2007 would have cost the United States \$2.6 trillion over a ten-year period.<sup>23</sup>

In contrast, attrition through enforcement is relatively inexpensive. It costs the federal government very little when aliens *self*-deport. All that attrition through enforcement requires is a realistic probability that enforcement will occur. The mere probability of enforcement, in and of itself, changes behavior. Arizona is a case in point. Illegal aliens began pouring out of the state in the run-up to January 1, 2008, but no county attorney in Arizona had actually initiated any enforcement action. Indeed, during the course of litigation, the county attorneys announced that they would not begin enforcement until after March 1, 2008. No government official had to lift a finger for tens of thousands to self-deport. One study estimated the cost of implementing a nationwide attrition-through-enforcement strategy to be approximately \$400 million per year

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(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

8 U.S.C. § 1373(a)-(b) (2006).

22. In 2005, the Center for American Progress came up with a simplistic and widely-criticized estimate of what it would cost to apprehend and remove ten million illegal aliens from the United States, speculating that the figure would be approximately \$206 billion to \$230 billion over five years, or at least \$41 billion a year. See Darryl Fears, *\$41 Billion Cost Projected To Remove Illegal Entrants*, WASHINGTON POST, July 26, 2005, at A11. Critics assailed that figure as a gross overestimate. See Mac Johnson, *What Would It Cost to Deport Illegal Aliens?*, HUMAN EVENTS, Aug. 1, 2005, <http://www.humanevents.com/article.php?id=8387>. Regardless of how inflated that figure is, it is certainly true that the process of removing aliens one at a time through direct government action requires a substantial commitment of public resources.

23. Robert Rector, *Amnesty Will Cost U.S. Taxpayers at Least \$2.6 Trillion*, THE HERITAGE FOUNDATION, June 6, 2007, at 1, <http://www.heritage.org/Research/Immigration/wm1490.cfm>.

over a five-year period—or less than one percent of the budget of the Department of Homeland Security.<sup>24</sup>

The time has come to make attrition through enforcement the nationwide strategy of the federal government. Attrition through enforcement promises to transform the landscape of illegal immigration. It has already succeeded at the state level and, within the confines of the NSEERS program, at the national level. If implemented nationwide, it would do much to restore the rule of law in immigration and gradually reduce the number of illegal aliens in the United States. The alternative—continuing to focus on the false dichotomy of massive government round-ups versus amnesty—will only ensure policy paralysis in Washington.

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24. Jessica M. Vaughan, *Attrition Through Enforcement: A Cost-Effective Strategy to Shrink the Illegal Population*, CENTER FOR IMMIGRATION STUDIES BACKGROUNDER, Apr. 2006, at 1, available at <http://www.cis.org/articles/2006/back406.pdf> (discussing several components in the attrition-through-enforcement model: mandatory E-Verify, data sharing between the Social Security Administration and the Department of Homeland Security, increased ICE cooperation with state and local law enforcement, expansion of the US-VISIT program, increased removals, and the continuing proliferation of state and local laws discouraging illegal immigration; see also Rector, *supra* note 21, at 5.

