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Immigration Enforcement: Beyond the Border and the Workplace

David A. Martin

SUMMARY

New immigration legislation must include changes to achieve effective and resolute enforcement of the immigration laws. Merely beefing up border policing (currently the most popular enforcement strategy) is insufficient. Over the last decade, the influx of unauthorized migrants has reached record levels even though border enforcement has greatly expanded, primarily because migrants know that getting past the border opens wide opportunities in the US job market, owing to the near absence of enforcement there. The most important reform is therefore well-crafted workplace screening.

Because border and workplace enforcement have been addressed elsewhere, this policy brief offers suggestions for other key enforcement improvements that Congress and the executive branch should implement. Primarily, reform should:

1. Assure that removal orders are enforced by:
   - expanding the use of fugitive operations teams;
   - wider application of civil and criminal penalties to absconders, including legislative changes to facilitate civil levies;
   - more strategic use of detention, including in connection with supervised release programs modeled on a Vera Institute pilot project;
   - shortening hearing times while preserving due process, including testing the efficiency effects of government-provided counsel through a limited pilot project.

2. Build better protections against fraud into the systems leading to a grant of benefits, rather than relying on after-the-fact prosecutions or revocations

3. Mainstream immigration enforcement, including through carefully structured engagement of state and local officers, while assuring that the central roles are played by federal officers expert in immigration law.

New immigration legislation, whatever exact shape it takes, must include changes to achieve effective and resolute enforcement of the immigration laws, if such reforms are to succeed and endure. Merely beefing up border policing is insufficient. Although effective border enforcement forms one essential component of an overall strategy, it has claimed disproportionate attention in recent legislative efforts—perhaps because border tightening entails few visible impositions on any vocal American constituency, whereas most other enforcement arenas involve difficult trade-offs and political costs.[1] Experience over the last decade shows, however, that border enforcement without comparable seriousness in the interior is hollow and ineffective. During that time the nation has doubled the size of the Border Patrol, added miles of better fencing, and deployed high-tech equipment. Yet the influx of unauthorized immigrants has reached record levels, primarily because migrants know that eventual success in getting past the border opens wide opportunities in the US job market, owing to the near absence of enforcement there.

Therefore, the most important element of improved interior enforcement must be well-crafted workplace screening, with enough resources to give employers genuine reason to comply carefully. Despite oft-heard counsels of despair or predictions of inevitable failure, effective worksite enforcement is not beyond the reach of policy science, using a carefully designed mix of public and private action. Many pending proposals and

studies show real promise, though they will have to be matched by a steady commitment of political will, including consistent funding and patience in the implementation.[2]

Because workplace enforcement and border control are addressed widely elsewhere, this paper focuses on other important enforcement steps that should be included in any well-designed new package of legislative and administrative action. Three main arenas for reforms are:

1. Enforce removal orders.

2. Build better protections against fraud into the systems leading to a grant of benefits, rather than relying on after-the-fact prosecutions or revocations to deter or remedy fraud.

3. Mainstream immigration enforcement, including through carefully structured engagement of state and local officers, but assure that the central roles are played by federal officers expert in immigration law.

I. Temptations to Avoid

To begin, it is worth noting that this list of reforms purposely omits several ideas that have been prominently championed in Congress as strict enforcement measures, such as increasing the mandatory detention of persons charged with immigration violations, expanding well beyond border areas the use of a summary procedure called expedited removal, greatly restricting the availability of "relief from removal,"[3] or reducing judicial review. Although targeted use of some of these measures can occasionally be useful, indiscriminate use is counterproductive.

Congress has already imposed some deleterious steps of this type on our immigration system, notably in the 1996 amendments to the Immigration and Nationality Act. For example, the 1996 law restricted forms of relief previously available to persons who had lived as lawful permanent residents in the United States for many years before committing a criminal act. (The old provisions did not guarantee forgiveness for long-term residents; they simply permitted an immigration judge to consider, in the exercise of discretion, whether to temper the strict letter of the deportation law based on other positive factors in the individual's case.) After the 1996 amendments, even in the most appealing case — involving a minor crime, clear rehabilitation, and decades of contributions to the community — the law inflexibly decrees deportation if the conviction is covered by an ever-growing list of offenses designated "aggravated felonies."[4] This amendment resulted in such harsh outcomes in several well-publicized cases that 28 members of Congress, including some who had supported the amendments initially, joined in a letter to the Attorney General and the Commissioner of the Immigration and Naturalization Service (INS), asking that they promulgate standards so that INS's "prosecutorial discretion" would be used to avoid charging in such cases.[5] Such a directive was eventually issued, but its guidance is vague, and the resulting system is far inferior to the earlier one that allowed immigration judges to consider these factors in a more structured setting based on a full record, and ultimately to restore lawful resident status completely if the case merited it (rather than simply refraining, for the moment, from enforcement).

Many of the 1996 hard-line enforcement changes thus produced gratuitous hardship (ultimately forsworn even by some of the congressional authors of the original measures) and ill-digested shifts in administrative responsibilities. They also generated final outcomes so disproportionate that they have often tempted appellate courts into distorting legal doctrines in order to reach a more sensible result — thereby complicating enforcement in cases that actually deserve the more severe treatment. Similarly, expanded mandates requiring deten-

tion of broad classes of individuals from the time of the initial deportation charge have impaired the flexibility the agencies need in order to make best use of resources to meet changing enforcement challenges.

Congress is now faced with a host of new enforcement proposals, many seemingly offered to enable their authors to climb aboard a popular get-tough bandwagon. Just appearing tough on first blush, however, is no guarantee of any real effectiveness in improving on-the-ground enforcement. Effectiveness should be measured by the amendment's likely effect on securing overall compliance with immigration control laws. Congress must develop the self-discipline to consider closely the actual impact on enforcement, in the context of real-world budgeting, training, and staffing realities, and not be stampeded any time a proposal comes wrapped in the beguiling mantle of tougher enforcement.

Similarly, the use of criminal sanctions needs to be carefully modulated. Some changes in current penalty schemes and the definitions of offenses could be useful, but others would be counterproductive. The enforcement bill passed by the House of Representatives in December 2005 reflects both extremes. On the one hand, increasing the maximum penalties for large-scale smugglers and better defining various fraud-related offenses can be useful. Prescribing comparable penalties for both visa overstayers and entrants without inspection also makes sense, because both kinds of violations contribute to the growth of the "illegal alien" population in this country. But the bill overreaches by making those offenses felonies, rather than misdemeanors (as is currently the treatment of entry without inspection, while overstay does not trigger criminal punishment). More ominously, it also expands penalties for those who might be found merely to assist illegal migrants, having some knowledge of their unlawful status — potentially reaching even those whose help is tangential or humanitarian in character.[6] Although overstretched US Attorneys' offices already rarely prosecute status offenses and are unlikely to pursue criminal prosecutions of persons simply trying to help a needy neighbor, those legal changes unnecessarily expand unguided prosecutorial discretion, may deter much-needed humanitarian efforts, and risk diluting the serious message that criminal provisions should impart. It is far more sensible to use the criminal sanction in a focused manner, in a way that carefully magnifies a relevant enforcement message. The next section contains a tailored proposal to this effect.

II. Enforce Removal Orders

The first area for improving interior enforcement (beyond workplace screening) derives from the need to assure actual enforcement of removal orders. The federal government obtains between 150,000 and 225,000 removal orders annually, but studies have shown that 85-90 percent of final removal orders are not honored if the individual subject to the order was not detained at the time of issuance.[7] That is, the person ordered removed does not report for deportation and is not later apprehended, nor is there any record of his or her having voluntarily departed the country.

A bit of clarification about the usual procedures for obtaining removal orders will help illuminate this issue. If the Department of Homeland Security (DHS) determines or suspects that a person is present in the country illegally, an officer may initiate removal proceedings against her by serving her with a charging document setting forth the removal grounds deemed applicable. The law authorizes arrest in such circumstances, but arrest is not required. Limited detention budgets constrain DHS in such decisions, because immigration proceedings normally will last at least for weeks and often for months or, with appeals, for years.[8] If she is

detained, a bond amount is usually set by DHS, and she can also ask an immigration judge (IJ) to lower the bond. Thus many who are detained at the start of immigration court proceedings manage to post bond and gain release.

Most removal cases are tried in rather formal court proceedings held before an immigration judge. Sometimes the case is resolved at an initial quick appearance before the IJ, called "master calendar," which operates something like an arraignment in a criminal case. There the individual is asked to plead to the removal charges. Resolution at this stage is particularly likely if the individual concedes deportability and does not ask for any relief from removal.[9] Most contested cases are fought over relief, because the immigration law violation is usually easily proven (for example, overstaying a temporary admission period or committing a crime that makes a noncitizen deportable). There can be many delays and multiple master calendar appearances, however, particularly when the person does not initially have a lawyer and the IJ grants continuances to allow a search for counsel willing to take the case either pro bono or for an affordable fee. A contested case will ultimately be set for a merits hearing of several hours' duration, during which the individual respondent and any witnesses take the stand and are questioned and cross-examined. The IJ typically delivers his judgment orally, in the individual's presence, on the record at the end of that hearing. Thereafter either side has 30 days to appeal to the Board of Immigration Appeals (BIA). Though oral argument before the BIA is quite rare, decisions are issued many months after the notice of appeal (because of the time required to transcribe and transmit the record, and for the parties to file their briefs). If the individual loses before the BIA, she can appeal further to the federal courts of appeals. Thus by the time the order becomes wholly final and enforceable, it may have been months or years since the person had any direct contact with DHS officials. Even with no appeal, 30 days are likely to have elapsed.

DHS estimates that roughly 450,000 persons now live in the United States even though they have received a final order of removal, and the number has been growing recently by about 40,000 per year.[10] These persons are often called, in immigration lingo, *absconders* or *fugitives* because of their disobedience to a formal individualized order, rather than simply to general provisions of the immigration laws.

Absconders form a special subset of all persons present in the United States without authorization, and their actions are more damaging to the overall system than is commonly appreciated. After all, the members of this group have had a full opportunity to present any defenses or claims for relief, such as asylum, plus a chance for administrative and judicial appeals, and have had those claims definitively rejected. A rough internal estimate of federal government costs in obtaining removal orders done in the mid-1990s placed the total expense at thousands of dollars per person (including costs for issuance and service of charging documents; the time spent by government attorneys, investigators, immigration courts and their personnel; and detention and transportation costs for the minority of respondents who are in detention during the procedure). Extensive and successful defiance of such orders, after all the expense and attention devoted to each case, sows deep cynicism about the entire process, among immigration officers and immigration judges as well as the general public. It also creates its own momentum within the target community. Each successful disregard of an order compounds a message that spontaneous compliance is a chump's game. Or to look at the matter from the other direction, officer morale, public and congressional support for the overall system, and eventual voluntary compliance with orders could be importantly enhanced if successful removal of absconders was more solidly assured.

Direct enforcement, including fugitive operations teams. The Immigration and Naturalization Service and its administrative successor, the Department of Homeland Security, have been working on this issue for at least the last two decades, though only limited concrete payoffs are yet visible. Laws and regulations have been rewritten to simplify some of the removal procedures and eliminate obstacles that have impaired the enforcement of final orders. For example, in 1986, the INS got rid of the former regulatory requirement of separate advance notice to nondetained deportees to report for deportation (officially dubbed the "bag and baggage letter" but informally known as the "run letter"). Statutory amendments in 1996 effectively overruled regulations that still delayed custody for deportation until at least 72 hours after service of the deportation order. A new "surrender regulation," expected to become final within the next few months, will impose a blanket requirement that the individual take the initiative to appear at DHS for removal within a stated time from when the removal order becomes final, and require that notice to this effect be given to the individual from the very beginning of the proceedings.[11] Officers can then proceed with enforcement against the noncompliant with a minimum of post-order paperwork. Further, after a multi-year effort to restructure officer positions and centralize responsibility for fugitives, DHS now clearly makes detection and apprehension of absconders a function of the detention and removal operations branch (DRO), rather than of the investigations branch, which had many other competing priorities. Under another highly important recent initiative, DHS has initiated and then expanded its deployment of "fugitive operations teams," units devoted full-time to the task of finding absconders and assuring their actual removal. Such teams secured the removal of 11,000 fugitives in FY 2004, up considerably from the previous year, and an estimated 15,000 for FY 2005. DHS is in the process of going from 17 to 44 teams this budget year, and has plans eventually to build that number to 100.[12]

The limitations of direct enforcement. The fugitive operations team initiative deserves consistent support. But it also reveals the magnitude of the challenge and the indispensable need for additional creative steps in order to deal effectively with the absconder problem. Although the teams may have reduced the *rate* of growth in the absconder population, that population still grew by 40,000 in FY 2004. In fact, locating and apprehending absconders one-by-one is highly expensive, labor-intensive work. Each team (which consists of six officers and one support staff position) is expected to produce only about 500 removals a year. Eighty teams would thus be required just to stop the growth of the absconder population, dozens more teams to begin making a significant dent in the total stock. As is apparent, the nation cannot rely solely on labor-intensive apprehension and forced removal; new approaches are needed in order to change the psychology or behavior of those who are ordered removed, so as to increase spontaneous compliance and to allow detention at strategically chosen moments when the individual could be more readily located.

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At the present time, even with the new prospect of expanded fugitive operations teams, absconding has to appear the rational strategy for nondetained individuals who have received a final order of removal. They face a choice of showing up promptly in accordance with the regulations and being removed, or else making a minimal

effort (for example, moving to another city or at least a different address) and thereby probably gaining a significant period of continuing work in the United States. Crucial to that calculus is this fact: If officers finally locate them, months or years later, they ordinarily suffer no sanction beyond what they would have faced if they complied initially — removal from the country.

No legal system can be healthy if its observance relies overwhelmingly on coercive and labor-intensive direct enforcement in each individual case, rather than benefiting primarily from voluntary (or at least acquiescent) compliance. Hence one central objective for enforcement must be to alter the calculus that makes absconding rational.

No legal system can be healthy if its observance relies overwhelmingly on coercive and labor-intensive direct enforcement in each individual case, rather than benefiting primarily from voluntary (or at least acquiescent) compliance. Hence one central objective for enforcement must be to alter the calculus that makes absconding rational. Persons ordered removed have to be made to reckon that additional sanctions await if they abscond rather than honor the final order in a timely fashion.

Civil penalties for absconders. The 1996 amendments to the Immigration and Nationality Act included provisions ostensibly designed to achieve this end. They provided for levying civil fines on persons who abscond — the principal penalty compounding at the rate of $500 per day for each day of noncompliance with a final order.[13] Effective use of such provisions could well change the calculus for many absconders, if they have amassed some savings or capital during their stay (a bank account, car, home, or even a small business) that could be attached to pay the fine.

But these provisions have never been enforced, in large measure because the legal provisions are not well designed. They simply declare the civil fine and set up no special mechanism for definitively settling the amount of the fine or arranging for levy, thus leaving those issues to time-consuming civil litigation involving the federal courts. (This contrasts with the special system using administrative law judges established by the statute to administer the fines associated with the INA's employer sanctions, antidiscrimination, and civil document fraud provisions.[14]) They also leave open important questions about the extent to which the individual can shelter assets under state homestead or debtor protection laws. Imposing the absconder fines therefore now would require complex cooperation between DHS and overburdened US Attorneys' offices. If Congress instead amended these provisions in order to streamline the calculation and imposition of these civil fines,[15] DHS, in cooperation with the Department of Justice (DOJ), might be able to make this additional sanction a part of its usable arsenal against absconders. Fines would have to be selectively applied, to be sure, to fit situations where there are reachable assets that make such enforcement worthwhile. But the point is not to win funds for the government. The point is to send a wider message that persons with final removal orders should comply promptly or else risk not only physical removal but also, down the road, the potential loss of whatever nest egg they may have saved during their US residence.

Criminal penalties for absconders. Some seasoned immigration officers remain skeptical of the use of civil sanctions, even under a streamlined statutory procedure. Only a subset of current absconders would be likely to feel threatened by such a step — those with saved assets in this country (as opposed to assets quickly sent to family in the home country), and collection would still impose administrative burdens. One alternative to civil sanctions would be the use of criminal sanctions for those who abscond. Current law already prescribes punishment of up to four years in prison for such a vio-

lation (ten years in some circumstances).[16] Unlike the civil sanctions, this law is not wholly dormant, but its use is still rare. Used more widely, it could send a clearer signal that absconding can be quite costly, even if the person has few reachable assets in the United States. Particularly for the average civil violator of the immigration laws — someone not otherwise acquainted with the criminal justice system — the prospect of significant prison time could serve as a major inducement for prompt compliance with a removal order.

To achieve that end, additional resources would have to be devoted to such prosecutions, and US attorneys would have to be persuaded or instructed to make them a serious priority. This would represent a decision that absconding *is* a more serious offense and deserves both resource allocations and imposition of sanctions that reflect that judgment. Again, the point is not to impose widespread punishments, but instead to do so visibly in enough cases to change the calculus that now solidly favors absconding.

Strategically, if the government committed to making wider use of either civil or criminal sanctions for absconders (once the basic resource, staffing, and training infrastructure was in place), it would probably be wise to begin with an announced amnesty period, meant to induce a burst of voluntary compliance. The announcement should promise that those absconders who, before a stated deadline date, surrender for removal in accordance with earlier final orders (or otherwise document a voluntary departure to the country of origin), would be assured that they would not face criminal prosecution or civil fines.

Part I of this paper warned against overuse of the criminal sanction. What is proposed here, in contrast to some of the measures discussed in that part, is a far more limited and focused deployment of criminal punishment. Two arguments support this careful extra step: (1) that absconding after a final order is in fact a more damaging offense than current prosecutorial policy reflects, and (2) that a genuine prospect of criminal punishment may be essential to secure, in the medium term, far wider spontaneous compliance with removal orders, which are already obtained at significant expense to the public treasury. The marker of success would be a situation in which a majority of those ordered deported comply with the order on their own initiative, ending the current practice that officers often describe complainingly as "having to catch them twice."

Supervised release plus targeted use of detention to improve compliance with removal orders. INS and DHS have (unsurprisingly) been quite successful in assuring removal when the person named in the order is detained. A different alternative for assuring enforcement of final removal orders therefore would be to make wider use of detention early in the process, when the individual is easier to locate. But there are important costs to consider. To detain a noncitizen from initial apprehension through the entire course of immigration court hearings plus review by the Board of Immigration Appeals and the federal courts is highly expensive. Detention costs run roughly $50-200 per bed per night, depending on location. Detention can also hamper the detainees' pursuit of any rights or defenses they may have. INS and DHS have therefore experimented with other models, beginning with a Vera Institute pilot program in the mid-1990s, and continuing through the Hartford Project and Operation Compliance in Denver in more recent years.[17] These programs involved extensive monitoring, supervision, and "appearance assistance" for persons while their removal proceedings were pending, carried out through storefront offices where these individuals regularly checked in while they were on release. The programs have had a good record in assuring that people showed up for immigration court proceedings and also often to remain in contact up through

the time of a BIA ruling. This record is understandable, because in addition to the encouragement deriving from the monitoring and assistance, the fact that the immigration judge's or BIA's order might contain good news — potentially a grant of relief leading to legal status — also induces appearance or continuing contact. But that latter inducement wears off once relief is denied, and these programs often lost touch with the individual at that point.

These worthy initiatives, saving the government detention costs during much of the procedure and also sparing the individual the hardships of incarceration, therefore need to be supplemented with additional steps to use detention more surgically at the point where the other inducements lose their force.

These worthy initiatives, saving the government detention costs during much of the procedure and also sparing the individual the hardships of incarceration, therefore need to be supplemented with additional steps to use detention more surgically at the point where the other inducements lose their force. This might mean detaining the person at the time when she learns of an adverse IJ ruling (usually delivered right in the courtroom at the close of proceedings). For circumstances where the individual is on release through the BIA appeal, perhaps service of the BIA's ruling by an immigration officer should become standard. The officer would be alerted to the contents of the order, and if it is adverse, immediate detention could be the result of the encounter, unless other factors guaranteed later appearance. Alternatively, the individual could be required to show up at a DHS office to receive service of the decision, and therefore would be readily subject to detention if the decision is unfavorable and the risk of absconding appears high. A modified version of this procedure has been used successfully at asylum offices — there to assure successful service of a charging document, rather than removal. In that setting, the applicant is required to return roughly two weeks after his interview, to pick up the results, which could be either a grant of asylum or a charging document initiating proceedings in immigration court.

Some experimentation has been done with use of detention at these strategic points, but at times immigration judges have resisted cooperation, not wishing to see persons seized in their courtrooms. Careful attention to public safety concerns must of course be applied, but IJs must also come to see that they too have a major stake in assuring that the orders they spend so much time adjudicating actually carry real-world consequences. High-level cooperation between DHS and DOJ, carefully monitored at the working level, will probably be necessary to make such an approach succeed.

Improve the timeliness of procedures while preserving safeguards. One other way to facilitate strategic use of detention resources in service of actual removals would be to shorten the time consumed by proceedings. No one argues overtly for protracted removal proceedings, but immigrant advocates rightly object if procedures are arbitrarily truncated to the prejudice of the individual. This has been one of the oft-voiced objections to Attorney General Ashcroft's 2002 BIA streamlining regulations. Those regulations did produce sharp reductions in an admittedly troubling BIA backlog, but the shortcuts taken have produced both a much higher rate of appeal to federal courts and a remarkable backlash from several courts of appeals.[18] The resulting deluge of litigation in the federal courts, with what appears to be a higher percentage of remands to the BIA, may undo much of the gain derived from backlog clearance. Restoring some of the safeguards that were slighted in 2002 (such as wider use of three-member panel consideration, instead of short single-member orders) might well be worthwhile.

Notwithstanding these cautions, improvements in timeliness are certainly possible. At the IJ stage, much additional delay is introduced

because of continuances granted in order to permit the respondent to arrange for counsel. Because, by statute, counsel now must be provided at no expense to the government, indigent respondents often spend considerable time seeking out an attorney or organization willing to take the case pro bono, and immigration judges generally allow additional time, through successive continuances, to permit the search to proceed. The search itself is often far more difficult for detained individuals. The entire process can add months to the period before the merits hearing in immigration court. In contrast, in a handful of settings where attorneys have been more reliably available for virtually every case, the system has been able to assure predictable and efficient scheduling of cases. Under those conditions the system can usually produce a definitive ruling no later than the individual's second appearance in immigration court, which could happen within a matter of weeks from the start of the case by means of arrest or service of a charging document.[19] In other words, assuring counsel for respondents in removal cases not only improves the individual's ability to assess his situation and present any plausible defenses or claims, but should also save on crucial system costs over time, including detention costs.

The current political climate does not hold much promise for Congress to approve an amendment providing appointed counsel in removal cases. But it might be possible to include in reform legislation a provision authorizing a modest pilot project in order to test concretely the efficiency effects when defense counsel is reliably available from the first master calendar hearing. Such legislation could provide, for example, for a three-year pilot project in a handful of districts, creating in those locations the immigration analogue of a public defender's office — government-provided legal staff to handle immigration defense work. The legislation should specify detailed data gathering and close monitoring to judge the effects of such a system on overall costs and effectiveness, including disposition times in both immigration court and the BIA, effects on use and expense of detention, and actual success in securing removal of persons ordered deported.

Specific recommendations:

1. Congress should fund further expansions in the use of fugitive operations teams by DHS.

2. DHS and DOJ should make wider use of civil and criminal penalties for absconders, in order to make it clear that failure to honor a removal order can readily result in sanctions beyond simply removal from the country. Some legislative amendments may be useful, particularly to enable administrative law judges in the Department of Justice to levy civil fines without the need to go to federal court. Actual imposition of penalties should be phased in gradually and with wide public notice, because the objective is to maximize the impact in inducing spontaneous compliance with removal orders, not to expand the hardship deriving from fines and imprisonment.

3. DHS should make more strategic use of detention to assure actual removal. Supervised release programs modeled on the Vera Institute pilot program, combined with targeted decisions to take persons into custody at the time they learn of adverse rulings by immigration judges or the BIA, seem particularly promising, and should be more widely deployed.

4. DHS and DOJ should work closely together to find ways to shorten processing times in all phases of removal cases, but with careful attention to preserving or restoring a full opportunity for individuals in removal proceedings to offer their defenses and pursue claims for relief.

5. As a specific focus for recommendation 4, Congress should adopt legislation authorizing a pilot project in a limited number of districts to provide government-appointed counsel in

removal cases, probably by means of a public-defender-style office. The purpose is to test the efficiency effects of such arrangements, when measured against the delays caused by the multiple continuances to obtain counsel that are now common.

III. Protections against Fraud

Any degree of success in improving border and worksite enforcement will inevitably produce pressures on other parts of the overall immigration system. One of the main unintended effects will probably be expanded attempts to obtain ostensibly legal immigration status by means of fraud. Marriage fraud, fraud in the labor certification system, and ill-founded claims to asylum probably offer the most tempting targets of opportunity. Steps should be taken immediately to fortify the system against these quite predictable pressures.

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Major prosecutions of fraud rings in recent years have exposed serious vulnerabilities to fraud in each of these three settings. For example, Operation Jakarta in 2004-2005 resulted in the indictment of a ring of operators who helped Indonesian nationals obtain status through fraudulent asylum applications and labor certifications, usually for fees of $2,000 or more per application.[20] The ring was broken and most of the main players sentenced to imprisonment, but the 1,000-plus grants of status that were cast into grave doubt by the prosecution could not be voided automatically as a result of the convictions. Labor-intensive individual reviews, followed by the reopening of cases, have been necessary. Much of the asylum fraud was fairly unsophisticated, using a handful of standard stories of persecution submitted in boilerplate applications. And yet the adjudication system has not been well-adapted to take notice of and respond to such suspicious patterns, nor to check closely in a way that would more readily detect, for example, a fraudulent address, before the benefit is granted.

Investigations of the sort that lead to major prosecutions of fraud rings reveal only a portion of the problem, but they demonstrate graphically the weaknesses of a system wherein the main responses to fraud consist of such post-hoc prosecutions. It would be far more effective to build safeguards against fraud more systematically into the benefit adjudication process itself, a setting where the individual typically bears the burden of proof, and at a time when the individual is not enjoying the benefits of the grant during the period of investigation.

Adding more barriers to fraud, of course, comes at a price. Not only must resources be provided to hire appropriate staff so that well-founded suspicions of fraud can be referred for timely investigation. Deeper inquiry into potential fraud also inevitably requires additional time in benefit interviews or immigration court hearings and will result in some slowing of per-case processing. Because badly delayed processing times have been such a focus of legitimate concern in recent years, new antifraud steps must be accompanied by additional resources to sustain a reasonable overall processing output even if more time is spent per average case.

The overall recommendation, therefore, is for DHS, the Department of Labor (DOL, which has major responsibility for labor certification), and DOJ (which oversees immigration courts and the BIA) to look systematically at each benefit-granting procedure to find well-targeted ways to flag potential fraud and to assure appropriate investigation when that occurs. They should also look closely to identify vulnerable portions of

their procedures that might make it easier for organizers to carry off systematic fraud. For example, in asylum office interviews, applicants whose English is inadequate must now supply their own interpreters at no expense to the government. This situation allows organizers of a wider fraud scheme to plant their own coconspirators, who know the false story better than the applicant, in the interview room as interpreters. In this role they can make sure that the answers recorded in English conform to the false story submitted on the application form, even if the applicant's native-language responses diverge. DHS should change the regulations to provide for government-supplied interpreters in the interviews — similar to the arrangements long mandated in immigration court. This change would bring added expense, which would probably have to be met by increases across the full range of USCIS application fees (because there is no fee for an asylum application). But the added sums would be well spent to address a glaring vulnerability in the application process.

To ask for systematic antifraud vigilance in benefit granting, to be sure, runs somewhat counter to the animating thought behind the split of immigration enforcement from service functions when DHS was created (assigning enforcement to the Bureau of Immigration and Customs Enforcement plus the Bureau of Customs and Border Protection, on the one hand, and service to the Bureau of Citizenship and Immigration Services on the other). But service functions — benefit-granting — inevitably carry enforcement exposure, and attention to enforcement objectives has to be incorporated into all adjudications. This recognition should not, of course, result in a situation where enforcement becomes the overriding or dominant theme in benefit programs — but it cannot be absent from the mix.

IV. Mainstream Immigration Enforcement, including through Careful Use of State and Local Law Enforcement

Immigration law evokes widely differing reactions. Some in the public consider it a highly abstruse field, suitable only for enforcement by federal specialists. Others regard such enforcement as vaguely illegitimate, inappropriate for a nation of immigrants, inherently inconsistent with basic rights, or ill-adapted for a capitalist society whose businesses would benefit from a free flow of labor. But still others see no reason why immigration laws should be treated differently from other parts of federal law; for them, any violation should be taken seriously. They tend to find the current pattern of widespread and notorious violation an affront to the rule of law, just as would be the case with equally prolific tax cheating or other federal regulatory violations. The latter sentiment has helped fuel populist initiatives like Proposition 187 in California in 1994 or Proposition 200 in Arizona in 2004, meant to deny state-level services to unauthorized migrants and induce stronger overall enforcement.

This same societal division manifests itself in the attitudes of those in charge of law enforcement agencies. Some localities have declared policies of explicit noncooperation with federal immigration law enforcement. Others, even if they would prefer close cooperation, have more quietly given up on significant notification to federal authorities when apparent immigration violations are detected, owing to a long history of disappointment in INS's or DHS's limited responses to pick up identified violators. On the other hand, several state and local law enforcement agencies, particularly since September 11, 2001, have pursued the right to make arrests or otherwise participate more extensively in immigration law enforcement.

Immigration reform should include among its objectives the overcoming or at least amelioration of this split in attitudes.[21] In the long run, immigration law must join the mainstream of legal cooperation. It must come to be regarded as legitimate and worthy of the same kind of law enforcement (and service) cooperation that prevails in other areas of public policy. Such a change need not mean a full deputization of state and local officers to make arrests for perceived immigration violations; a carefully worked-out division of labor is still important both for effectiveness and for protection of legitimate rights. But policies of explicit noncooperation should end, and focused assistance in enforcement should eventually become commonplace. Immigration reform that both opens up more realistic channels for migration and fosters resolute enforcement against those who do not fit those new criteria offers a real chance to move in that direction. Done properly, it can evoke wider public support for the legitimacy of enforcement, and by narrowing the enforcement task through legalizing (temporarily or permanently) a portion of the currently present illegal migrant population, it should improve the odds of federal enforcement responsiveness in the future.

In the short to medium term, however, cooperation should take only measured steps. Until the newly reformed system is fully functioning — until there can be a widely shared judgment about its successes, weaknesses, and legitimacy, as well as the bestowing of some sort of legal status on a significant percentage of the currently unauthorized population that winds up remaining in the United States — state and local involvement should take a highly focused form. Two separate constraints or concerns dictate this cautious approach. First, the primary job of state and local law enforcement will remain keeping the public peace and apprehending those who commit local offenses, including thefts and crimes of violence. Those agencies have a major stake in assuring that all portions of the community will readily report offenses and cooperate in pursuit and prosecution. A stance that seems to threaten arrest by local police whenever an officer suspects unauthorized immigration status will clearly hinder that cooperation. Such a stance could be acceptable if unauthorized migrants were only a tiny fraction of the local population (that end-state is the ultimate objective of reform), but for now, it is likely to be counterproductive. Second, experience has shown a real potential for abuses when state or local police have taken on immigration enforcement responsibilities without adequate preparation, training, or supervision by officers expert in federal immigration law, including the legal protections our system offers for foreigners present on the territory. For example, roundups carried out by local law enforcement in Chandler, Arizona, in 1997 resulted in the wholly inappropriate questioning and occasional detention of both US citizens and lawful permanent residents who were thought to look foreign or speak like non-natives.[22]

As a result, for now, state and local involvement in immigration enforcement needs to take a form that does not impair cooperation from immigrant communities in reporting ordinary crime and does not easily lend itself to overbroad sweeps and mistakes that stir lingering resentment. The most promising avenue is a form of cooperation that has already been employed in selected communities: targeted assistance to DHS in identifying, holding, and transporting removable noncitizens found among those already legitimately arrested for involvement in non-immigration offenses. Under such arrangements, local police are not authorized to make an initial arrest based on suspected violation of federal immigration laws; the arrest must be made by the local agency for an offense clearly within its jurisdiction. Instead, this form of cooperation takes advantage of something that is already a standard part of arrest booking: obtaining, from the detainees or from ID documents they carry, the

date and place of birth. The cases of those identified as foreign born, unless other evidence makes it clear that the person has naturalized or otherwise has legal status, are set aside for further processing by an expert federal immigration officer, to determine whether the person is illegally present in the country. That officer checks databases using the information obtained in the booking process, and normally goes on to interview the individual. Sustained local cooperation is required to make that interviewing process efficient — for example, to make sure that a reasonable number of such persons are readily available for interview when the immigration officer rides circuit to that facility. Even more efficiently, it has often been possible for INS or DHS to interview by means of video connections put in place by the local detention facility — especially useful in communities remote from the nearest DHS office or likely to encounter only a small number of such unauthorized migrants. Once unauthorized status is determined, the locality decides whether it wants to prosecute and punish the individual before handing him over to DHS for removal. If not — or once the local sentence has been served — there is room for further cooperation, such as having the local agency transport the individual to the DHS detention facility.

Some arrangements of this type have been made using the authorities in INA §287(g).[23] Enacted in 1996, that provision creates a specific structure for agreements between state and local enforcement agencies and DHS in functions relating to the "investigation, apprehension, or detention of aliens in the United States." The law specifies details such as immunities and liabilities, and, as a safeguard against misuse of immigration enforcement authority, it specifically requires adequate training in immigration law and its enforcement, plus ongoing federal supervision of the function. Although the state or the local government is required to bear the costs of acts taken under a §287(g) agreement, arrangements involving cost-sharing may be possible under other legal authority. Significantly, the recent immigration reform bills passed by the House and Senate would authorize broader federal funding.[24] Any new measures, however, should not be allowed to weaken the mandate for careful federal training and supervision contemplated in §287(g).[25]

Conclusion

Immigration reform needs to be comprehensive and balanced, including thoughtful measures designed to address likely consequences of any more effective enforcement regime. Creative thinking must extend beyond the various proposals for regularization of portions of the current illegal migration flow, and beyond the border and the workplace as primary sites for enforcement. Reform should include proactive measures against fraud, careful opportunities for focused cooperation between federal immigration officers and state and local law enforcement agencies, and a renewed commitment to assure that removal orders are honored.

ENDNOTES

1 See Peter Andreas, *Border Games: Policing the U.S.-Mexico Divide* (Ithaca, NY: Cornell University Press, 2000).

2 See, e.g., Marc Rosenblum, "Immigration Enforcement at the Worksite: Making It Work," Policy Brief, No. 6, MPI, November 2005; Kevin Jernegan, "Eligible to Work?: Experiments in Verifying Work Authorization," Insight, No. 8, MPI, November 2005; Tamar Jacoby, "An Idea Whose Time Has Finally Come?: The Case for Employment Verification," Policy Brief, No. 9, MPI, November 2005.

3 Relief from removal allows someone to stay, and usually to gain or retain lawful resident status, despite an admitted immigration violation. These provisions include political asylum as well as "cancellation of removal" for long-time residents whose deportation would cause hardship (formerly known as suspension of removal and section 212(c) relief). See T. Alexander Aleinikoff, David A. Martin, and Hiroshi Motomura, *Immigration and Citizenship: Process and Policy* 583-609 (West Publishing Company, 5th ed. 2003).

4 The original congressional decision in 1988 to add to the immigration laws a list of aggravated felonies — offenses so serious that more severe rules virtually mandating removal would apply — made some sense, but only because Congress kept the original list short and focused (murder, drug trafficking, firearms trafficking). The list has now grown to 21 paragraphs with numerous subparagraphs, see *id.*, p. 567-80, and the immigration bill passed by the House in December 2005 would expand its reach still further. The current list covers some offenses that are actually misdemeanors under state law, as well as others (such as shoplifting resulting in a wholly suspended sentence of one year) so minor that almost no one would spontaneously apply the label "aggravated."

5 See "Reps Urge INS to Issue Guidelines on Discretion in Removal Proceedings," 76 *Interpreter Releases* 1720 (1999); "INS General Counsel Discusses Legal Basis, Limits of INS's 'Prosecutorial Discretion,'" 77 id. 946 (2000); "Meissner Issues Prosecutorial Discretion Guidance on Her Last Day as INS Commissioner," 77 id. 1661 (2000).

6 Border Protection, Antiterrrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, §§202-203, 213, 109th Cong., 1st Sess. (as passed by the House Dec. 16, 2005).

7 Executive Office for Immigration Review, FY 2005 Statistical Yearbook at D2 (February 2006) (removal orders in FY 2003: 155,148; in FY 2004: 164,452; in FY 2005: 222,360); Department of Justice, Office of the Inspector General, The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders at i-ii (Report No. 1-2003-004, Feb. 2003) (1996 study found that only 11 percent of nondetained aliens were removed; 2001 study found only 13 percent removed; comparable figures for detained aliens were 94 and 92 percent, respectively).

8 Particular classes of cases can be resolved by DHS officers using special speedier procedures, known as expedited removal and administrative removal. In these cases the person is usually detained throughout. Summary procedures of this type are controversial, although they can be appropriate *if* other features of the case (such as apprehension right at the border or in a port of entry without documents) make it highly unlikely that any complex issues will arise. Recent suggestions to expand the application of these procedures to noncitizens inside the country usually overlook this important qualifier. Also, cases before immigration judges involving a detained respondent are placed on an expedited calendar, but the process still can require months before final resolution.

9 Regarding relief from removal, see footnote 3 above and accompanying text. If the only relief sought is voluntary departure — permission to leave on one's own within no longer than 120 days — the case can still be resolved at master calendar without holding a merits hearing. Voluntary departure is frequently granted (both at master calendar and after a merits hearing), in the form of an order from the IJ that becomes a fully enforceable removal order if the person does not actually leave within the stated time limit. But in that situation, if the person fails to leave, a significant period — as long as four months — elapses between last direct contact with officials and the ripening of a final and enforceable removal order.

10 Department of Homeland Security, Fact Sheet: Secure Border Initiative (Press Release, Nov. 2, 2005), available at http://www.dhs.gov/dhspublic/display?content=4922.

11 63 Fed. Reg. 47205 (1998) (initial proposed rule); 67 id. 31157 (2002) (modified proposed rule). See "INS Issues Proposed Rule Requiring Aliens Ordered Removed to Surrender," 79 *Interpreter Releases* 702 (2002).

12 Fact Sheet, Nov. 2, 2005 (above); Immigration and Customs Enforcement, ICE Detention and Removal Sets Record for FY 2004 (Press Release, Nov. 16, 2004), available at http://www.ice.gov/graphics/news/newsreleases/articles/drofy04.htm.

13 Immigration and Nationality Act (INA) §274D, 8 U.S.C. §1324d. In addition, INA §240B(d), 8 U.S.C. §1229c(d), imposes a civil penalty of between $1,000 and $5,000 for those who agree to voluntary departure in lieu of deportation, but then fail to depart within the allowed time period.

14 INA §§274A(e), 274B(e)-(j), 274C(d), 8 U.S.C. §1324a(e), 1324b(e)-(j), 1324c(d).

15 The Border Protection, Antiterrorism, and Illegal Immigration Control Act, as passed by the House, includes amendments meant to simplify the procedures for imposition and collection of the fine imposed on those who do not honor a voluntary departure agreement. H.R. 4437, §208(c).

16 INA §243(a), 8 U.S.C. §1253(a).

17 See Christopher Stone, "Supervised Release as an Alternative to Detention in Removal Proceedings: Some Promising Results of a Demonstration Project," 14 *Geo. Immigr. L.J.* 673 (2000) (describing the Vera Institute project).

18 The final streamlining regulations were published at 67 Fed. Reg. 54878-905 (2002). For an overview of some of the impact, including a steep jump in the percentage of cases appealed to the federal courts (from 10 percent to 25 percent of BIA rulings) and concomitant court criticism of the BIA and immigration judges, see, e.g., John R. B. Palmer, Stephen W. Yale-Loehr, and Elizabeth Cronin, "Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review," 20 *Geo. Immigr. L.J.* 1 (2005); Adam Liptak, "Courts Criticize Judges' Handling of Asylum Cases," *N.Y. Times*, Dec. 26, 2005.

19 Texas has had such a provision appointing state-paid counsel for Texas prison inmates involved in civil cases (divorce, property matters, and immigration). The early Institutional Hearing Program in Texas therefore could build its immigration court docketing plan around an assurance that counsel would be present at the person's initial appearance before an immigration judge (master calendar), allowing for a definitive plea to the charging document at that point and fairly firm scheduling of a merits hearing at the second appearance (whenever the master calendar colloquy indicated that there would be a contested issue for which such a hearing would be necessary).

20 See Jerry Markon, "26 Charged in Va. In Document Fraud," *Wash. Post,* Nov. 23, 2004, p. A4.

21 Not discussed here is the very real desirability of a simplification of the current Immigration and Nationality Act, which could itself help in reducing the isolation of immigration law. In its 54 years of existence, that act has been extensively amended, often in a patchwork and illogical fashion. Starting over to craft a more economical and straightforward codification would pay considerable dividends, for those who enforce as well as those who are subject to the law.

22 See, e.g., Michael A. Fletcher, "Police in Arizona Accused of Civil Rights Violations," *Wash. Post,* Aug. 20, 1997.

23 8 U.S.C. §1357(g).

24 H.R. 4437, §§220-222; Comprehensive Immigration Reform Act of 2006, S. 2611, §§229, 232, 109th Cong., 2d. Sess. (as passed by the Senate, May 25, 2006).

25 Section 221(e)(3) and (f) of H.R. 4437 would appear to undercut the salutary emphasis on training that appeared in the original INA §287(g).

About the Author

David A. Martin

David A. Martin is the Warner-Booker Distinguished Professor of International Law at the University of Virginia, teaching immigration, constitutional law, and international law, and a Nonresident Fellow of the Migration Policy Institute in Washington. He is a graduate of DePauw University and the Yale Law School, where he was elected editor-in-chief of the *Yale Law Journal.* Following clerkships with Judge J. Skelly Wright and Justice Lewis F. Powell, Jr., and a period of private practice in Washington, D.C., he served from 1978 to 1980 as special assistant in the human rights bureau of the US Department of State. There he participated in drafting the Refugee Act of 1980. Since joining the Virginia faculty in 1980, he has published numerous works on immigration, refugees, international human rights, and constitutional law. These include a leading casebook on US immigration and citizenship law, now in its fifth edition, and a co-edited volume called *Immigration Stories* (Foundation Press, 2005), which recounts the human drama, litigation strategies, and political context surrounding well-known immigration cases from the Chinese Exclusion era to the present day. He served as a consultant to the Department of Justice in 1993 on a project that led to major changes in US procedures for political asylum, and in 2004 completed a lengthy report commissioned by the Department of State on reforms for the US refugee resettlement program. From August 1995 to January 1998, he took leave to serve as General Counsel of the Immigration and Naturalization Service.

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MIGRATION POLICY INSTITUTE
mpi
1400 16th Street NW
Suite 300
Washington, DC 20036

202 266 1940
202 266 1900 (fax)

www.migrationpolicy.org
www.migrationinformation.org