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S U M M A R Y

For over twenty years now, Americans have understood that we are not going to get control of illegal immigration unless and until we find a way to regulate US employers and their use of immigrant labor. The public understands this and has continually called for workplace enforcement. Both independent commissions convened during this period to make recommendations on immigration policy – one led by Rev. Theodore Hesburgh, the other by former congresswoman Barbara Jordan – strongly echoed the demand. And employer sanctions were at the heart of the landmark immigration legislation, the Immigration Reform and Control Act, passed in 1986. But, despite this awareness and effort, we have yet to gain control of unauthorized immigrant employment.

The reason: although IRCA made it a crime to hire unauthorized immigrants, it failed to give employers the tools they need to determine who is authorized to work and who isn't – a reliable, automated employment verification system. What's needed: a process not unlike credit-card verification that allows employers to swipe a card at the point of hire and receive a response in real time from the Social Security Administration, informing them – no more and no less – whether an employee is authorized to work in the United States. The system needn't be Orwellian. It needn't lead to a national ID. And although, the past two decades make clear, the idea will surely meet with some resistance, a variety of circumstances – from technical advances to changes in public attitudes driven by the threat of terrorism – may put the control that has so long eluded us within our reach today. There is no way around it: as history shows, we cannot control immigration without workplace enforcement, and we cannot control what happens in the workplace without reliable verification.

An Idea Whose Time Has Finally Come? The Case for Employment Verification

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For over twenty years now, Americans have understood that we are not going to get control of illegal immigration unless and until we find a way to regulate US employers and their use of immigrant labor. This understanding began to dawn on policymakers as early as the mid-1970s, even as the first waves of the current illegal influx reached our shores. Former Senator Alan Simpson later recalled the moment when it penetrated for him: “Upon becoming chairman of the Senate Immigration Subcommittee, I was astounded to learn that it was illegal to be an illegal alien, but it was not illegal for a US employer to hire one.” And within a few years, an unusually united political establishment – Democrats, Republicans, the president, local legislatures, the blue-ribbon bipartisan commission chaired by university president Rev. Theodore Hesburgh, among others – was pushing hard to police business activity. Still, a generation later, we have yet to gain control of unauthorized employment – a spectacular failure to follow through on an obvious and uncontested insight about national policy.

It has not been for lack of trying. The issue of workplace enforcement has been before the public all through these

decades. Laws have been passed, money has been spent, American hiring practices have been severely altered. When it became clear that the first legislative tightening, the 1986 Immigration Control and Reform Act (IRCA), had not succeeded in delivering control, there was another blue-ribbon panel and eventually another landmark law. The regulatory bureaucracy proliferated; showy enforcement actions were tried, at least for a while. And today, according to one estimate, American businesses spend more than 13 million hours a year handling employment-related paperwork required by law. Still, our economy is ever more dependent on illegal labor, with some 8 million unauthorized workers employed in sectors as diverse as agriculture, food processing, hospitality, and construction.

The measure of our failure is all around us. Every worker hired at every US workplace – more than 50 million new hires a year, citizens and foreign-born alike – fills out a form intended to screen out unauthorized immigrants. Virtually all businesses, big and small, comply with this requirement: the drill is as routine as a newspaper want ad. But because of a legal loophole – a glaring and long-recognized loophole – employers are not obliged to verify that the information entered on the forms is correct. Those who wish to inquire about its accuracy face a wall of red tape and legal deterrents: they can, for example, be sued for posing too many questions of a new hire. Employees are asked to produce documents substantiating the information they submit, but employers have no reliable way to vet this paperwork – in an age of instant electronic communication, they eyeball it. And counterfeit versions of all the required credentials, from a US passport to a birth certificate, can be purchased for a few hundred dollars in any city in America.

Meanwhile, despite the changes of the past decades, we as a nation now make almost no effort to police immigrant hiring. Frustrated by the evident legal loopholes and the proliferation of false documents, the federal bureaucracy has little will to pursue worksite enforcement, and the resources devoted to it have dwindled steadily since legislation was passed. Already in the 1990s, the branch of the immigration service charged with interior controls was shifting its focus away from workers to criminal aliens. Then, in the wake of 9/11, routine employers became still less important as attention concentrated on “critical infrastructure,” such as airports and nuclear power plants – at the expense of farms, restaurants and construction sites. Today, the budget for worksite enforcement is less than 3 percent of the budget for patrolling the border. There are fewer than 200 agents on the job nationwide, and the main branch of government devoted to preventing the hire of unauthorized immigrants is a little known, five-person office with no appropriated budget that oversees the regulation of 3,625 employers – out of some 8.4 million in the United States. Though arguably the most important tool we have at our disposal to control illegal immigration, this program, known as the Basic Pilot, is voluntary – no business is required to participate. And when the officials manning it come across evidence of infractions, they do not pass that information along to investigators who could crack down on the offending employers for fear that taking action would drive businesses away.

As the nation gears up yet again to reform our immigration laws, it is critical that we understand this failure: not just how it happened – how it unfolded historically – but why. Conventional wisdom holds cynically that it was unavoidable: that greedy employers stran-

gled the legislative process and blocked implementation, that both political parties (each for its own reasons) have a stake in illegal immigration, even that controls of this kind – both the intensive regulation of business and the monitoring of identity it requires – are out of keeping with the American character. Maybe so. But if we cannot overcome these obstacles, we will never get control of immigration. And in fact, history shows, the reasons for our failure are more complicated than these clichés suggest. “We tried it, and it didn’t work,” the cynics say, urging that we give up on efforts to police the hiring of unauthorized immigrants. But in truth, for all the effort of the past decades, we have not really tried workplace enforcement. And a variety of circumstances – from technical advances to changes in public attitudes driven by the threat of terrorism – may put the control that has so long eluded us within our reach today.

The Lessons of the Past

The skeptics are partly right, of course: Americans have long been inclined to look the other way when it came to regulating the employment of unauthorized immigrants. As early as the late 19th century when we first passed legislation to limit who entered the country, these laws were laxly enforced precisely to provide employers – in those days, mostly farmers – the labor they needed to keep their businesses running. These laborers, it was lost on no one, who were here outside the law and could be deported at any time if they objected to wage levels or working conditions. This studied indifference was codified into law as recently as 1952, when Congress passed legislation making it illegal to “harbor” illegal aliens, but deemed explicitly that employing them did not constitute “harboring”: the infa-

mous “Texas Proviso.” Not until the late 1970s, when the current illegal flow began in earnest, did most Americans consider making it a crime to hire unauthorized workers.

The Hesburgh Commission

The Select Commission on Immigration and Refugee Policy, headed by Notre Dame University president Theodore Hesburgh, was convened in 1978 to

respond to restrictionist pressures being generated by the new influx. Composed of sixteen members – cabinet members, congressmen and prominent citizens

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– the panel minced no words in its diagnosis or its recommended remedy. “The thrust of the [commission’s findings],” a top staff aide noted, “is the need for enforcement.”

Members understood that the problem was not immigrants – net-net, they appeared to benefit the nation, if not economically, then in other ways – but rather the illegality associated with the growing flow. Accordingly, the panel suggested, the United States should “close the back door to undocumented and illegal migration [in order to open] the front door a little more to . . . legal migration.” Members suggested doing so with a multi-tiered system of enforcement measures: on the border, at large in the interior and, above all, in the workplace. Their chief recommendation – their legacy – was that the nation should make it a crime for employers to knowingly hire unauthorized immigrants.

Still, for all its insight, the Hesburgh commission was not as clear as it needed to be on two other critical aspects of immigration policy. Convened at a time of significant economic restructuring and before the United States

had had much experience with the large-scale labor migration we know today, the panel was uncertain about the economic benefits of the influx. Members were well aware that most unauthorized immigrants came to the United States to work, not to avail themselves of social services or welfare benefits. Still, the group was skeptical of businesses' claims that they needed foreign workers, and it declined to raise immigration quotas enough to reroute the growing illegal flow into legal channels. It also voted overwhelmingly against establishing an adequately sized guest worker program. And its final report maintained unambiguously – though it had no evidence to support this – that US employers could, and should, be weaned of their dependence on foreign workers.

It was an impulse that would be repeated again and again in the decades to come as Americans tried to get a grip on illegal immi-

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gration. Perceiving that the problem was illegality, the commission moved to eliminate it, but failed to see that the lawlessness was a side effect of a legitimate and growing need on the part of

American business: a need, driven by demographics and economic restructuring, for an additional supply of low-skilled labor. By making it a crime to hire unauthorized immigrants without creating adequate channels for employers to bring in legal workers, Congress effectively criminalized vital economic activity and business expansion. The result, once their recommendations became law, was predictable enough: an ever growing underground economy.

Second, and equally fateful in the long run, was the fact that even as the commission moved to make hiring unauthorized immigrants a crime, it hesitated to give business the tools it needed to determine which workers were legal and which weren't. Members understood that existing identity cards were easily counterfeited. They grasped that it would be difficult for employers to distinguish between citizens and aliens, as new controls would likely require. And at a time when telephone credit-card verification was already commonplace, they saw that employers would probably need some means to inquire about the cards they were presented by employees. But while the panel saw these problems looming, it was divided and uncertain about the solution. Unlike the recommendation to punish unlawful hires, which passed by an overwhelming 14 to 2, a second proposal for a "more reliable" mechanism (such as counterfeit-resistant Social Security cards) to identify those authorized to work in the United States hardly got through the commission, passing by only 8 to 7. At the time, no one noticed or made much of this ambivalence. But it too would reappear again and again in the years to come as the nation grappled with rapidly rising immigration numbers, and over time it would prove to be the principal reason we could not gain control.

The Immigration Reform and Control Act of 1986 (IRCA)

Within a year of the Select Commission's final report, Congress was moving to enact its recommendations into law. The two commission members who co-sponsored the legislation – Republican Senator Alan Simpson from Wyoming and Democrat Ron Mazzoli, congressman from Kentucky – were largely faithful to the panel's thinking and proposals. Simpson, in particular, proved an untiring

champion, spending the better part of the next decade explaining to anyone who would listen why workplace enforcement – which he envisioned as a form of business regulation – was fundamentally preferable to the raids, round-ups and other coercive kinds of immigration control that had been practiced in the past and were inevitable on the border. Without his efforts, it is clear in retrospect, Americans would never have accepted the idea of employer sanctions – a historic achievement. But Simpson also repeated and exacerbated the Hesburgh commission’s core mistakes: failing, most importantly, to recognize the reality of America’s changing labor needs, even as he hedged ambivalently on how business should determine which foreigners were authorized to work and which weren’t.

It took five years for the Simpson-Mazzoli bill to get through Congress. It was bitterly contested in both chambers, with fierce opposition from across the political spectrum, virtually all focused not on making hiring unauthorized immigrants a crime, but rather on how to implement the new prohibition: whether employers would be provided the tools they needed – a counterfeit-proof card or cards and the means to verify them. Business objected to the burden and expense – against its own interest, it would turn out, since a more reliable system would have been much easier to use. Civil libertarians opposed what they saw as the likely invasion of privacy. But it was newly empowered Hispanics who in the end proved decisive, convincing Congress that a secure process, demonized as a national ID system, would be discriminatory. Proponents countered, correctly, that a more reliable system – one that allowed employers to know rather than guess who was who – would help prevent rather than encourage discrimination. But together, the naysayers proved

indomitable. Each subsequent session of Congress watered the legislation down further. And by the time it passed in the autumn of 1986, the enforcement provisions of IRCA – which also included a measure to legalize the unauthorized migrants already in the country – were hardly worth the paper they were printed on. They contained no workable mechanism to implement their core proscription. Nor did the legislation provide any means for the workers we would increasingly need to keep the economy growing to enter the country in a lawful manner – thus all but guaranteeing a continued illegal flow even as the prohibition on hiring drove it further underground.

The years following the enactment of IRCA were predictable enough: the shortcomings of the bill came home to roost with a vengeance. The federal bureaucracy mounted a national campaign to educate businesses about what was required of them: the I-9 forms to be filled out by every new employee; the obligation to scrutinize, in each case, one or two of what were then twenty-nine possible identity documents; and the mandated procedures for keeping and filing the forms. Outside observers, including the Government Accounting Office (now the Government Accountability Office – GAO), would later report a range of responses on the part of employers, with some quickly adapting to the drill, but others, particularly smaller businesses, confused. Then in the late 1980s, when the grace period for education expired and the new requirements kicked in, came the inevitable explosion of false documentation. IRCA opened the way with its failure to create a secure card or provide employers with a means to verify the paperwork they were shown – and

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human nature filled the void, generating a vast underground industry devoted to the manufacture of false credentials. Social Security cards, drivers' licenses, even birth certificates: by the early 90s you could buy any of them for a few hundred dollars or less.

Different sectors of the business world reacted differently. The confused grew only more confused – and as result, more likely to discriminate against immigrant workers.

Overwhelmed by the requirement that they distinguish between immigrants and citizens, unable to make sense of the cards they were shown, and with no possibility of asking for help from the government, many did the easy thing – hired only Anglos. Still other businesses – an exploitative minority – used the I-9 procedure as a way to intimidate unauthorized employees, requiring them to go through the drill, and inevitably rejecting their paperwork, only when they dared to ask for higher wages or better working conditions. The result, as documented by the GAO in 1990, was widespread abuse of the system, with foreign-looking workers three times as likely as Anglos to experience discrimination in hiring. Meanwhile, the vast majority of employers settled into perfunctory compliance with the new law: asking to see the documents, filling out the forms, filing them conscientiously – and pretending not to know what many of them knew all too well about the workers they hired. Cynical and self-serving? Perhaps, but the law gave them little alternative. Though many, particularly in the service sector, were increasingly in need of immigrant workers, the system gave them no legal way to find or hire this labor, then let them get away with going through the motions of complying with the law.

And that, increasingly, is just what the government did. The effort to enforce employer sanctions, never exactly robust, peaked the first year sanctions kicked in, in 1989. Even then, there were only 1,600 agents assigned to the task nationwide. Their mission was ill-defined: they spent as much time and energy going after shoddy paperwork as substantive violations. Employers had advance warnings of raids and of the government's intent to fine them, with sanctions being levied only for a third violation. Doubtless, as is often charged, some companies used their political influence to avoid scrutiny. One former Immigration and Naturalization Service (INS) commissioner tells a story, off the record, of watching on television as Congress debated a border security bill and being particularly struck by one House member's apparent hostility toward immigration. Then, later in the day, the commissioner received a phone call from that same member, asking that the INS go easier on employers in his district. But business resistance alone was hardly responsible for the falloff in attention to workplace enforcement.

By 1994, when the press and public began to focus in earnest on the porous border, work-site crackdowns had already dropped from 40 percent of INS interior enforcement activity to 20 percent, and since then Congress has explicitly mandated a shift in emphasis away from the interior to the frontier. The subsequent shifts toward pursuing criminal aliens and protecting critical infrastructure tipped the balance further. Even the most determined agents have grown increasingly demoralized about tracking down business owners likely to claim, often with justification, that they were stymied by false documentation. Through the decades since IRCA passed, workplace enforcement has never accounted

for more than 10 percent of all immigration arrests. By 2004, it was the lowest of the immigration service's enforcement priorities. The combined activities of the 200 agents on the job amounted to less than 4 percent of the hours devoted to all immigration-related investigations. And over the course of the entire year, the service sent out exactly three notices to non-compliant employers.

The Jordan Commission

In the early 1990s, with another wave of restrictionism building, another commission was appointed to assess the immigration system, this one headed by former Texas congresswoman Barbara Jordan. Like the Hesburgh panel before it, the new US Commission on Immigration Reform concluded unequivocally that there could be no hope of controlling illegal immigration unless we could wrest control in the workplace. Though far from all that was needed – the Jordan group also made recommendations for improving border enforcement and other interior operations, including detention and removal – “reducing the employment magnet” was yet again found to be the *sine qua non*, or, as the new group put it, the “linchpin,” of a comprehensive strategy to restore the rule of law. The panel reviewed what had been achieved under IRCA and surprised no one when it gave that effort a failing grade: a decade later, not only had the unauthorized population grown by several million, but employers were confused and overburdened, workplace discrimination was on the rise and the country was awash in a sea of false documents.

What to do? Here too, the Jordan commission could only repeat the Hesburgh proposal: that we develop what the earlier panel had called a “more reliable” mechanism for employers

to use in determining who was authorized to work and who wasn't. Where the new panel broke new ground: it recommended a computerized registry based on Social

Security data that businesses could tap into to verify information provided by employees. Employers would not have to decide who was a citizen and who wasn't; they would not have to eyeball anything or make any decisions. They would simply ask the employee for his Social Security number and type it into the computer. Not only would this reduce fraud; it also promised to ease discrimination. By taking the burden of making determinations about workers out of the hands of employers and putting it back squarely where it belonged, on the shoulders of government, we could pare back the onus on business – including the impossible to satisfy legal responsibility – and improve workers' lives, even as we finally gained control of illegal immigration.

It could have been just the mid-course correction we needed: a thoughtful, targeted fix for the flawed legislation of the previous decade. There were only two problems, both naggingly familiar. The first: despite some praise from press and public, there was also the inevitable question – wouldn't creating a national registry put us on a slippery slope toward a national ID card? Like Theodore Hesburgh and Alan Simpson before her, Barbara Jordan responded defensively. “It was not proposed by the commission,” she insisted at a news conference. “It is not thought desirable by the commission.” But like her predecessors, she had no real answer: nothing she could prom-

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ise that could ease the public's fears. Personally, she seemed to think that the registry could work without cards: employees would learn their Social Security numbers by heart and repeat them to employers – and the computerized registry would do the rest, flagging the fraudulent numbers of unauthorized workers. The commission itself seemed less certain, and its report struck a cautious middle course, suggesting that we reduce the twenty-nine different kinds of cards that could be presented in filling out an I-9 to a smaller, more manageable number, thus limiting the opportunities for fraud and easing the burden on employers.

Problem Number Two was where to find the resources to create the new system. A computerized registry was sure to be extremely expensive. There were questions about the databases and the breeder documents on which identifications would be based. Nor was it clear – when the idea was first proposed in 1994 or, in 1997, when the commission issued its final report – that we had the technical savvy to make it work. The panel's answer: it recommended three pilot projects to test everything, including whether a secure card was necessary, the accuracy of the databases, the startup costs, and how to fight discrimination and protect civil liberties.

The decade since the Jordan commission issued its findings has brought more disappointment – there has been no progress on its principal recommendation – but also some rays of hope. In 1996, prodded in part by the panel's suggestions, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The new law did not create a national registry; it appropriated no significant new resources for work-

place enforcement; it added no new bite to the ineffective employer sanctions on the books; and it made scant progress in combating document fraud. The one step it did take – authorizing the three pilot projects recommended in the commission's report – was little more than a symbolic gesture. By the end of the decade, two of the experiments had petered out, in both cases because the ideas they were testing had proved unworkable. And the third, the Basic Pilot Program, remains just what its name implies: a small-scale experiment, largely unknown to the public and still far from the mandatory verification system we need.

The idea behind the Basic Pilot is sound: the idea at the heart of the Jordan findings – to test the Social Security numbers offered by workers against centralized databases at the Social Security Administration (SSA) and the immigration service, now in the Department of Homeland Security. The problem is that these databases are riddled with inaccuracies and unable to communicate in a timely way about even the most basic information, such as when an immigrant on a temporary visa falls out of status, leaving him unauthorized to work. The result: though verification is relatively fast and accurate for citizens, it is maddeningly slow and inaccurate for those born abroad. The pilot is backed up by no enforcement capability or sanctions of any kind. And now that its small, start-up appropriation has run out, it is virtually unfunded – hardly in a position to correct existing shortcomings, much less expand. Still, the program has proved extremely popular with the handful of employers who use it: finally, the tool they crave to verify the information submitted to them by employees, reducing their uncertainty and legal liability. Imperfect as it is and badly in

need of resources, the Basic Pilot shows that employment verification can work, pointing the way to the future – toward the national computerized registry called for in the Jordan commission report.

Nor is this the only progress made in the past decade. After years of diversion and delay, the Department of Homeland Security’s Student and Exchange Visitor Information System (SEVIS) is finally up and running. An automated, web-based program anchored in a national database, it uses required input from schools and colleges to help the government keep track of foreign students, and in many ways, it is a model for electronic employment verification. Also encouraging – evidence of our technical capacity to identify unauthorized workers – was the Social Security Administration’s experiment with “no-match” letters: alerts sent out in recent years to employers who submitted W-2 forms that did not jibe with SSA records. The letters were not followed up with investigations or sanctions, but the consternation they caused in the business community confirmed that for all its inaccuracies, the SSA database could indeed form the basis of an effective employment verification program.

Still another promising development: the enforcement action known as Operation Vanguard carried out in Nebraska meatpacking plants in 1998. By then, the challenge was somewhat different: not just document fraud but worse, a new crime called “identity fraud” – workers using stolen or borrowed but valid credentials to pose as another person. In an effort to combat it, INS agents subpoenaed meatpacking company records and compared them with information from Social Security files to identify individuals who appeared

fraudulent – Social Security numbers that didn’t match names, or were in use elsewhere in the country – then made worksite visits to interview suspect employees. Some 3,500 workers fled the plants rather than undergo questioning, and another thousand were detained. It was yet another vindication of the Jordan recommendations – another sign of just how effective it could be to vet workers’ paperwork and identities against the Social Security database. Then, with the operation still in full swing, employers, elected officials and others in the communities where the meatpacking plants were located rose up in protest against the action. It had been so successful that it threatened to shut down one of the leading industries in the state: more evidence, if any were needed, of another fundamental lesson of the past twenty years – that we must combine employment verification with immigration reform that provides employers with the workers they need to keep their businesses open and growing.

What We Know Now

Twenty-five years of good ideas, imperfect legislation and failed implementation later, what have we learned about controlling illegal immigration in the workplace? The lessons are clear:

- ***Worksite enforcement is still the linchpin of a comprehensive enforcement regime.*** Employment verification is and must be the capstone of a broader, many-layered effort to deter illegal entry into the United States. Until we eliminate the employment magnet – the abundant jobs available to unauthorized workers throughout the US economy – no effort to take control of the border or patrol the interior can hope to be successful. The Hesburgh panel,

the Jordan commission, the architects of IRCA: all concurred on this point, and they were right. Where they fell short was not in their goal, but rather in how they proposed to achieve it – and how that implementation played out on the ground in the American workplace.

- ***Workplace enforcement cannot hope to succeed unless we also create a legal way for the foreign workers we need to enter the country.*** Enforcement alone will not work, no matter how well conceived or effectively executed. Put another way, employer sanctions that criminalize economic growth and business expansion are doomed to failure: they will only drive that economic activity underground, eroding the rule of law in the workplace and the surrounding community. Far better to recognize the reality of our labor needs and create legal channels for immigrant workers to enter the country, and then regulate that legal migration with employment verification and other tools. This is the only way to bring business behavior fully into line with the immigration code. It is the only way to enlist employers to cooperate whole-heartedly in policing the system, and is it our only hope of staunching the tide of unauthorized workers.
- ***Employers cannot enforce the law without help from the government.*** Employers are the first line of defense – the eyes and ears of employment verification. But they cannot be expected to determine, on their own and without help from the government, whether or not an employee is who he says he is and authorized to work. The analogy here is credit card verification: no one expects a merchant to determine on his own whether a customer's Master Card is valid or he is up-to-date on his payments.

With immigrant employment verification, as with credit cards, both a secure card, or cards, and a computerized registry will be necessary. As the experience of the Basic Pilot shows, employers are hungry for this sort of assistance in verifying workers' identities – the fundamental tool they need to comply with the law and avoid hiring unauthorized immigrants.

- ***The technical tools are available, though in need of improvement.*** The Basic Pilot Program, Operation Vanguard, SEVIS, the Social Security no-match letters: though all fall far short of the full-scale computerized employee registry that the Jordan commission called for, they point encouragingly toward the possibility of creating such a registry in the not-too-distant future. What's needed: a clear mandate from Congress to get the system up and running – improving the accuracy of SSA and DHS databases, ensuring the interoperability of the two agencies' computer systems, minimizing delays in data entry, etc. – on a timetable laid out explicitly in legislation. If it turns out that the databases cannot be fully coordinated – that is what now makes the processing for foreigners so much slower and more error-prone than for citizens – then we need to move toward a single, unified registry, the sooner, the better. But arguably the most difficult challenge is not technical, it is political: what to use for a secure card, all the more important today in an age of widespread identity fraud. Does this inevitably mean a national ID? Not necessarily. It should be sufficient to require that employees show one of three or four alternative cards – say, a new, secure Social Security card *or* a driver's license (with a Social Security number embedded in it) *or* a bio-

metric temporary worker visa (also, ideally, with a Social Security number embedded) – thus avoiding the need for all workers to carry the same type of card. The one common requirement: unlike existing Social Security cards and drivers’ licenses, all should be biometric, tamper-proof and, ideally, machine-readable, allowing for verification with a simple swipe as is routinely done with credit cards.

- ***An innovation for our era: the swipe card.*** The Hesburgh and Jordan panels thought of almost everything, but not perhaps the one innovation that could make employment verification truly practical – simple, timely, and reliable. Why a swipe card? American society is increasingly familiar with swipe cards. They are fast and easy to use. A swipe system would eliminate cumbersome requirements to scrutinize IDs, fill out forms, enter data, save paperwork, cull files, and all the rest of the work that accompanies the use of I-9 forms. From the point of view of privacy protections, swipe cards hold significant advantages over a system that requires employees to constantly share and repeat a personal PIN number. They would also help eliminate the confusion that now occurs because of varied spellings of foreign names and even typos in manually entering names and Social Security numbers into a database. Swipe-card verification takes only a few seconds, the cost is minimal, and privacy protections are balanced with ease of use in a way with which all Americans are familiar and comfortable.
- ***It won’t happen without resources – significant additional resources.*** Improving the databases, connecting the computers, purchasing the card readers,

revamping and reissuing Social Security cards or drivers’ licenses or both: together, it will cost billions of dollars – no one yet knows how many. Employers can help with some of it: it might not be unreasonable, for example, to ask that they buy their own simple swipe machines or, as with the SEVIS program, contribute toward maintaining the computerized system. (Business will, after all, be saving considerably – both time and money – when the possibility of swiping a card renders the I-9 process unnecessary.) But most of the expense will fall to government. And there can be no cutting corners: not in the startup costs or to maintain the system once it is in place. For unless the program is workable – streamlined, reliable, user-friendly, and fast – many employers will not use it, preferring, for the sake of business efficiency, to risk operating on the wrong side of the law.

- ***Verification must eventually be mandatory for all employers.*** Anything less is a recipe for failure, as the Basic Pilot Program has made amply clear. An entirely voluntary system, the pilot is caught in a classic catch-22: it cannot ask too much of businesses – or even risk investigating evidence of likely wrongdoing – for fear that if employers don’t like the requirements, they will opt out of the program. Of course, no business can be required to participate in any verification system until it has been proven effective – reasonably error-free and workable in the real-life circumstances in which employers operate. But once we have created an efficient, streamlined program, appealing to employers and effective in identifying unauthorized workers, we must require it across the board – and back that requirement with stern enforcement.

- ***The new system must be accompanied by robust enforcement mechanisms:***

audits, agents, high-profile prosecutions and penalties that go beyond the cost of doing business. According to officials involved in the Basic Pilot, its computer system can be programmed to generate leads for investigations: employers whose records are too good to be true, or those whose questionable employees never bother to undergo a secondary phase of processing. But unlike with the pilot, we must pass those leads onto agents who can follow up on them. As mandated by IRCA but never fully implemented, the Department of Labor and the immigration service must work together on investigations: as is well known, employers who violate labor laws also tend to ignore the immigration code – and combined enforcement more than doubles our ability to bring them to justice. As for penalties, they must be significantly more severe than those levied in the past – perhaps fines calculated as a percentage of profits or a percentage of revenues. One possible model is the Equal Employment Opportunity Commission’s 1970s campaign against workplace discrimination: a few high-profile cases involving huge monetary penalties made national headlines and forever changed the way business was done. The good news: in contrast to the 1980s and 90s, when bad law bred demoralization in the immigration service, with better law will come an enhanced will to enforce it.

- ***The program must be phased-in gradually, but not so slowly as to invite skepticism or evasion.*** Both immigration reform bills introduced in the Senate this summer – McCain-Kennedy’s Secure America and Orderly Immigration Act and Cornyn-Kyl’s Comprehensive Enforcement and Immigration Reform Act – mandate

employment verification of the kind under discussion here: programs based loosely on the Basic Pilot Program, albeit with some modifications. (McCain-Kennedy moves the program to the Social Security Administration and substitutes a swipe card for the I-9 process. Cornyn-Kyl builds more explicitly on the pilot and mandates a massive overhaul of the Social Security database within a year of enactment.) But neither bill goes far enough either in imagining what’s needed or specifying how to get there – including how to expand a tiny experiment by a factor of several thousand. How to go from the 3,600 employers enrolled in the Basic Pilot to the 8.4 million in the US economy? One possibility is to start with one class of worker – new temporary workers, say, as the McCain-Kennedy bill proposes. Still another option, less likely perhaps to lead to discrimination: phase the system in sector by sector – the meatpacking industry first, for example, then hotels and restaurants, then agriculture. The technology too will have to be phased in. Certainly, it is unrealistic today to expect most employers to have access to biometric scanners, and while we should surely start issuing biometric cards now, in the medium term we will have to make do with photo identification, relying on the SSA to flag potential cases of identity fraud. In no instance should the program be expanded until it has been proven to be workable, as measured by quantitative error rates. But once that has been established, we should move as decisively as possible – for reasons of fairness as well as enforcement credibility.

- ***The system must be designed to protect privacy and guard against discrimination.*** A more reliable verification system should in itself help to reduce discrimina-

tion in hiring: employers will no longer need to determine who is a citizen and who isn't or guess whose paperwork is likely to be fraudulent and whose is valid. But the program must also include explicit protections for workers. As customers can have access to their own credit histories, so employees should be able to verify their own records in the employment registry – as a way to protect themselves against abusive employers and as the first step in an appeal if the database turns out to be wrong. Speedy and efficient processing will also be key in preventing discrimination: likely delays and extra paperwork are among the reasons some employers now shun immigrant workers. Finally, the program must have a well-funded capacity to investigate and punish discrimination in the workplace.

Familiar Obstacles – and the Difference Today

Today as in the mid-80s and again in the 90s, the idea of a vast, mandatory employment verification system is sure to meet with resistance in many quarters. The question is whether that resistance has eased as times have changed – and there is some reason to be moderately hopeful that it has.

Today as in the past, there will be four principal challenges: technological obstacles, appropriating the resources, getting business compliance, and concerns about the risk of a national ID card.

Technology. The passage of time has plainly helped with the technological challenges. When the Hesburgh panel first proposed an automated system, all members could imagine

was verification by telephone, and even the Basic Pilot, introduced in 1996, initially required employers to call in. That program later switched to a computer-based system, albeit a rudimentary one that involved expensive software and time-consuming training, only to move eventually to a streamlined web-based protocol – and with every technological advance, employer interest ratcheted upward. Not only SEVIS, but also the computerized US Visitor and Immigrant Status Indicator Technology (US-VISIT) entry-exit tracking system suggest what is technologically possible today. Together, these two programs have pioneered new biometric technology, triggered the linkage of several large national databases, and experimented with new models of information flow and new procedures for secondary vetting of suspect cases – much of which could be appropriated for an employment verification system. Meanwhile, the private sector is developing still more advanced, effective tools, and it should be brought in to help design and even perhaps run parts of a new program. We can greatly improve on the Basic Pilot, which still, it sometimes seems, operates in another century – plagued by chronically inaccurate manual data entry, false positives caused by delayed mail delivery, and the elementary missing links between SSA and DHS computer systems. Some discrepancies between the databases may be harder to fix, but even that cannot be insurmountable if we are willing to devote sufficient resources.

Resources. Just what will it cost to create a reliable program? One estimate by the GAO suggests that it could take as much as \$4 billion just to replace existing Social Security cards. But even if the total is several times that figure, would it not be worth it if it

allowed us to retake control of our immigration system, reestablishing the rule of law in our workplaces and communities? The security benefits alone would seem to justify the expense of what is after all a fairly low-tech protocol, long routine in the commercial sector. Not only that, but obvious improvements in the Basic Pilot could significantly reduce the cost of expanding it: improvements, for example, in the databases used for initial screening that could sharply cut the manpower necessary for secondary processing. In the end, today as in the past, it will be a matter of political will – but surely that is changing in an age of international terrorism.

Business compliance. For all the stereotypes, the truth is that the vast majority of employers would prefer a stable, reliable, legal labor force to the uncertainty that comes with depending on unauthorized immigrants. The problem in the past, as we have seen, was that the effort to implement employment verification was not accompanied by other reforms providing businesses with the legal workers they needed. Even so, most employers complied with what was required of them in filling out I-9 forms – a virtual revolution in national hiring practices. And today not only is it more than likely that enhanced enforcement will be part of a larger reform package, but many employers who depend on immigrant labor seem eager for a streamlined system that would eliminate the I-9 burden and reduce their legal liability. Of course, there will always be exploitive employers looking for a way to get around the rules. But once abiding by the law is the norm rather than the exception, as it is today in many industries, we should find it easier to control these bottom feeders with targeted investigations and more stringent sanctions.

A national ID. On this score too, surely 9/11 has changed American attitudes. We now show identity documents at every turn: to board trains and planes; to check into hotel rooms; to make purchases; move through office buildings; sometimes, if we live in apartments, even to enter our own homes. By comparison, an employment verification system would intrude very little, requiring just a one-time swipe, at the moment of hiring. A program that can accommodate several different types of cards, with employees free to choose which they wish to carry and show employers, ought to help ease concerns. And the system should make use of familiar, existing documents – drivers' licenses, Social Security cards, immigrant and temporary worker visas – not create a new credential more likely to fuel fear and resistance. The new national standards for drivers' licenses included in the REAL ID Act are arguably more than is needed to create a secure piece of identification – and that legislation passed with surprisingly little protest from the public. Of course, there will always be people who will be anxious about the slippery slope toward a national ID. But today, unlike in the past, their arguments no longer seem a trump card – hardly as strong, for most of the public, as the arguments for security and immigration control.

Conclusion

After more than twenty years of trying, is the moment finally ripe to enact and implement a workable employment verification system? We can only hope so. As history shows, there is no way around it: we cannot control immigration without workplace enforcement, and we cannot control what happens in the workplace without reliable verification.

The system need not be Orwellian. We don't need a new, national ID card. We don't need agents riding herd on every US business. And we may not, if we can coordinate SSA and DHS databases, need a new centralized computer registry. All we need is a process, not unlike credit card verification, that allows employers to swipe a familiar card at the point of hire and receive a response in real time from the Social Security Administration, informing them – no more and no less – whether an employee is authorized to work in the United States.

Eliminating the employment magnet was the principal recommendation of the Hesburgh panel in 1982. It was the principal recommen-

ation of the Jordan commission in 1994. And it is likely to be one of the principal recommendations put forward by the Independent Task Force on Immigration and America's Future. The only question: has the climate of opinion changed enough, and do we as a nation now have the political will to make it happen? Our national security and our future as a nation of immigrants could depend on it.

All we need is a process, not unlike credit card verification, that allows employers to swipe a familiar card at the point of hire and receive a response in real time from the Social Security Administration, informing them – no more and no less – whether an employee is authorized to work in the United States.

About the Author



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Tamar Jacoby is a Senior Fellow at the Manhattan Institute and writes extensively on immigration, citizenship, ethnicity and race. Her 1998 book, *Someone Else's House: America's Unfinished Struggle for Integration*, tells the story of race relations in three American cities. Her newest book, *Reinventing the Melting Pot: The New Immigrants and What It Means To Be American*, is a collection of essays by a diverse group of authors – academics, journalists and fiction-writers on both the right and the left. It argues that we as a nation need to find new ways to talk about and encourage assimilation. Ms. Jacoby has also published numerous articles and essays in a variety of periodicals.

Before joining the Manhattan Institute, from 1987 to 1989, she was a Senior Writer and Justice Editor for *Newsweek*. Between 1981 and 1987, she was the Deputy Editor of *The New York Times* op-ed page. Before that, Ms. Jacoby was Assistant to the Editor of *The New York Review of Books*. In 2004, she was confirmed by the US Senate to serve on the National Council on the Humanities, the advisory board of the National Endowment for the Humanities. She is a graduate of Yale University and has taught at Yale, Cooper Union and the New School University.

The Migration Policy Institute (MPI) is an independent, non-partisan, non-profit think tank dedicated to the study of the movement of people worldwide. The institute provides analysis, development, and evaluation of migration and refugee policies at the local, national, and international levels. It aims to meet the rising demand for pragmatic responses to the challenges and opportunities that migration presents in an ever more integrated world. MPI produces the Migration Information Source web site, at www.migrationinformation.org.

This report was commissioned as part of MPI's Independent Task Force on Immigration and America's Future. The task force is a bipartisan panel of prominent leaders from key sectors concerned with immigration, which aims to generate sound information and workable policy ideas.

The task force's work focuses on four major policy challenges:

- The growing unauthorized immigrant population
- Immigration enforcement and security requirements
- Labor markets and the legal immigration system
- Integrating immigrants into American society

The panel's series of reports and policy briefs will lead to a comprehensive set of recommendations in 2006.

Former Senator Spencer Abraham (R-MI) and former Congressman Lee Hamilton (D-IN) serve as co-chairs, and the task force's work is directed by MPI Senior Fellow Doris Meissner, the former Commissioner of the Immigration and Naturalization Service.

The approximately 25 task force members include high-ranking members of Congress who are involved in shaping legislation; leaders from key business, labor and immigrant groups; and public policy and immigration experts. MPI, a nonpartisan think tank dedicated to the analysis of the movement of people worldwide, is partnering with Manhattan Institute and the Woodrow Wilson International Center for Scholars for this project.

For more information on the Independent Task Force on Immigration and America's Future, please visit:

www.migrationpolicy.org