“America’s Immigration System: Opportunities for Legal Immigration and Enforcement of Laws Against Illegal Immigration”

Statement of Julie Myers Wood

Former Assistant Secretary, Immigration and Customs Enforcement (ICE)

Before the House Judiciary Committee

February 5, 2012

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Chairman Goodlatte, Ranking Member Conyers, Members of the Committee. I appreciate the opportunity to testify before you today about enforcement of laws against illegal immigration.

My name is Julie Myers Wood, and I am President of Guidepost Solutions, an investigative and compliance firm. In that position, I work with companies on their internal compliance programs, create web-based solutions to assist businesses with export and immigration compliance challenges, and consult with companies that work with the government. I also serve as an Advisory Committee member of the American Bar Association's Commission on Immigration and as a Member of the Constitution Project's Committee on Immigration. I am testifying today solely in my personal capacity and not as a representative of any group or organization.

Like many Americans, I believe that the current immigration system has failed and, in my view, reform is essential. In looking to reform this system, we must make it easier for those who wish to come to our country legally to become productive members of society, and make removal more certain for those who choose to come here illegally.

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As the former head of Immigration and Customs Enforcement ("ICE"), the principal agency charged to enforce existing immigration laws, I have an insider's perspective of the challenges that face us. Since the 1986 amnesty, inconsistent enforcement, coupled with an inefficient and restrictive pathway for legal access to the country, have left us with a broken immigration system. Many people concluded that it is far simpler to come here illegally, get a job, and hope that the law will change to let them stay, rather than to wait in unreasonably long lines to come here legally (and, of course, for some, there was no option to come legally). Many employers grew frustrated with the nearly decade-long wait for some petitions for workers with essential skills and just took their chances that enforcement would not target their business.

When considering legislative reform, we must consider how to avoid the mistakes of previous efforts. We must ensure that the next generation does not end up in the same position as ours, managing a broken system that is held together with band-aids. This is not a new problem. When I first arrived at ICE in 2006, it was apparent that there were many areas where enforcement had lagged for a number of years – that the promise of enforcement post-Immigration Reform and Control Act (IRCA) was not realized in a number of areas.

Managing Illegal Border Crossings. By way of example, from 2002 to 2005, the Border Patrol's apprehension numbers were growing substantially. In 2005, the Border Patrol apprehended more than 1,100,000 individuals.[1] But these record apprehensions weren't resulting in increased security or deportations. The Border Patrol

[1] "Apprehensions By the Border Patrol," available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois-apprehensions-fs-2005-2010.pdf.

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followed a practice known as "catch and release," where they would provide arrested illegal immigrants with a Notice of Appearance ("NTA"), but not turn them over to ICE or provide any sort of way to ensure their appearance at court proceedings. Not surprisingly, many illegal immigrants just took the papers and never showed up in immigration court. Although they were often ordered removed in absentia, for all intents and purposes many just established themselves in the United States and ignored the court order. The Border Patrol's practice of simply serving NTAs served to encourage, not deter individuals from illegally entering the United States, and discouraged others from waiting in line.

To address this problem, former Secretary Chertoff created the Department of Homeland Security's ("DHS's") Border Security Initiative, which re-engineered the deportation process, and created a more direct method of transferring aliens from Border Patrol to ICE custody. DHS expanded expedited removal, and ICE began to charge some immigrants criminally for entering the country illegally. This led to the end of "catch and release," and longer term, helped result in a reduction in the illegal immigrants coming into the United States. These enforcement actions resulted in a reduction in the number of apprehensions, down to 460,000 in 2010 (which was the lowest level of apprehension since 1972).[2] The apprehension numbers continued to decrease until 2012, when the numbers started to increase again.

Looking forward, any new legislation that promises either legalization or temporary worker status is likely to serve as a new draw for increased illegal migration into the United States. It is important that such legislation provides a consistent

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[2] Id.

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framework and institutionalizes reforms to discourage illegal border crossing, such as expedited removal for border crossers.

Identifying and Removing Criminal Aliens. Back in 2006, ICE did not have a good handle on the population of criminal aliens in jails and correctional institutions, despite its obligation to monitor the criminal alien population and reduce releases into society. Although ICE had various programs in many state, federal and local correctional institutions, the programs were not uniform and ICE was not represented at many facilities. The success, failure, or even mere existence of the criminal alien programs depended almost entirely on the relationships between the relevant ICE officials and the federal, state or local correctional personnel.

Given this gap in coverage, ICE created the Secure Communities program to more comprehensively manage the criminal alien population. Congress played a critical role in urging the agency to improve its efforts in this regard, through the 2008 and 2009 DHS Appropriations Act. Secure Communities was designed to remove the randomness, create uniformity and to ensure that all individuals who were arrested by local or state law enforcement would not simply fade back into society without a review by ICE.

Over the past several years, ICE has made significant strides in implementing Secure Communities, and will have expanded it nationwide by the end of 2013. Through August 2012, ICE has removed more than 166,000 individuals identified through Secure Communities.

Any new reform legislation must ensure that Secure Communities continues and is fully funded. It is also important that legislation help ensure that ICE does not

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knowingly permit criminal aliens to simply return to the streets with no follow up or monitoring of any kind. Although it makes sense for the agency to do a classification based on offenses criminal aliens were convicted of, the agency must be careful to avoid treating certain offenses as always "unimportant" or certain activities to always pose no risk. This picking and choosing of criminal convictions risks creating a "conviction of the day" mentality where the government is only focused on the previous threat.

Stopping Illegal Employment. When I started at ICE in 2006, there was virtually no workplace enforcement. Although it was common knowledge that jobs drove many individuals to enter the United States illegally, the agency had not focused on how to prevent this behavior. Fines, if any, were assessed under an outdated structure, were subject to substantial legal wrangling and ended up being nothing more than a slap on the wrist. The focus of the old INS was simply not on criminal violations. For example, in 2002, the INS's last full year, it brought only 25 criminal cases in worksite investigations and only collected $72,585 through the administrative fine process.

In an attempt to focus renewed effort on this area, in 2006, ICE developed a focus on employers, focusing on criminal cases, revising the civil fine structure, and also requesting funding for auditors to begin civil audits. For several years, we conducted criminal investigations where we obtained civil forfeitures in excess of $30 million each year and prison terms for some egregious employers. While these investigations were complex and time intensive, this approach resulted in renewed awareness and cooperation from some high-risk industries. However, many companies in lower-risk industries did not think it necessary to focus on I-9 and immigration compliance with this targeted approach. This approach also included apprehensions and removals of the unauthorized

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workers, who in many cases were using the names and social security numbers of authorized workers and U.S. citizens. The arrest and deportation of unauthorized workers consumed considerable ICE resources in worksite enforcement cases.

The current Administration has focused primarily on civil immigration audits, adopting an IRS-type approach. Under this approach, more companies have been subject to audits, and the general awareness of immigration compliance has increased significantly. This approach is also imperfect, however. The average cost of the penalty was still miniscule - under $11,000 per company in fiscal year 2012. Total civil fines for last fiscal year were only $10 million. On occasion, the focus on civil audits resulted in perverse consequences – some employers with no illegal workers were fined, while others that had a high percentage of civil workers didn't even receive a warning notice. Under this new approach, the government essentially ignored the illegal workers, allowing them to stay and work in the United States. While some employers take the civil fine system seriously, others have begun to write the cost of immigration compliance off as another rounding error.

To address the problem of unauthorized workers more successfully, new legislation must not just rely on what has been done in the past. Legislation should shift the burden from employers to the government, and provide employers with clear guidance on who is work authorized and who is not.

E-Verify should be made mandatory for all employers, but that alone cannot solve illegal employment. Although E-Verify has improved significantly in the past several years, gaps in the current program have still shifted much of the de facto enforcement

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responsibility to employers. This has created far too many amateur document detectives, and keeps employers guessing as to whether the steps they are taking are enough to ensure compliance or leave them crossing the "discrimination" line with unintended consequences. As a result, conscientious employers are slapped with a "silent tax" to pay for immigration compliance services, diverting money that would be better spent hiring new employees.[3]

Ignoring Immigration Court Orders. As part of the incomplete enforcement post-IRCA, the number of absconder or fugitive aliens – aliens who were ordered removed but failed to do so – had been steadily going up until 2006. The orders of Immigration Judges were routinely ignored, and immigrants built and created substantial equities long after being ordered to return to their home country. To address this, after 9/11, the INS and then ICE created fugitive operation teams to identify and arrest those individuals. The teams made some significant progress, first stabilizing and then reducing the fugitive numbers by 2008. In the current Administration, the focus has shifted from arresting fugitives to identifying whether they have equities that would warrant cancellation of removal or other relief. Although this makes sense in many cases given the long history of lax enforcement, it is compounding the problem and continuing to encourage immigrants to abscond.

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[3] Giving employers more concrete tools is particularly important given the failure to fully implement Real ID. Driver's licenses in many states remain unsecure and a biometric component to establish identity is more important than ever. Whatever tool is ultimately given to employers—it must be mandatory, and the implementation strategy must be realistic to ensure successful adoption by all.

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Going forward, any new legislation must ensure that once immigrants receive a final order of removal, procedures are in place, which ensures that these individuals actually return home. For example, compare two individuals – one from Japan and one from Argentina – who entered the United States on non-immigrant visas for vacation and overstayed those visas. ICE arrests both individuals. The Japanese individual has already waived his right to review before an immigration judge as part of the visa waiver program (as would have individuals from the 26 other visa waiver countries). The Argentinean's visa issuing process did not contain a waiver of the right to review, and he can tie up the immigration courts for years fighting removal. This makes no sense. Congress should normalize the system so that all aliens who come into the United States on these types of non-immigrant visas agree to waive any deportation proceedings as part of the visa-issuing process.

National Security Enforcement. After 9/11 exposed significant security vulnerabilities in the visa and immigration system post-IRCA, ICE moved to a national security strategy that included an emphasis on "routine" enforcement. As part of a layered enforcement strategy, the goal was to ensure that illegal immigrants could not be sure that they were escaping authorities at any time.

The current Administration has explicitly moved away from this layered approach to focus almost exclusively on "convicted criminals." The Administration has issued guidance that provides that illegal immigrants who have committed crimes only relating to their entry and illegal stay in the United States may be excused from deportation and obtain work authorization in certain cases. The difficulty, of course, is that individuals

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who may want to cause harm to the United States may not be previously convicted criminals. This Administration's deferred prosecution guidance could cover individuals like several of the 9/11 hijackers, who "merely" lied to obtain state identification documents or on their visa applications. The idea that routine immigration or documentation violations should be ignored, or considered insignificant poses a potentially serious threat to our system. It sends a message to those that seek to cause harm: if they can come in the United States illegally, but not immediately commit any additional crimes, they are likely to be left alone. Left alone to plan, take steps, cause harm. This explicit movement away from the New York policing model of addressing small and large violations – where even the turnstile jumpers were held accountable – should be closely watched as it may have broad implications for the ability of law enforcement to effectively prevent serious abuses in the immigration system.

Any new legislation should consider whether ICE should engage in layered enforcement, at least in part. It should also ensure that ICE continues to continuously reassess intelligence and threat streams to determine whether any particular category of visa holders or method of illegal entry is of highest risk, and initiate targeted investigative initiatives to address those. It would be unwise to ignore the connections to national security and vulnerabilities posed by misuse of our immigration system.

Additional Areas for Consideration. Beyond the items highlighted above, it is critical that any new immigration legislation also consider broad enforcement issues to avoid long-term problems.

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First, any reform effort must clearly support and fund our enforcement agencies to ensure full compliance of our immigration laws going forward. For the last several decades, immigration agencies have been woefully understaffed, given their significant mission. ICE has only 7,000 agents, for example, far less than several city police departments, but the agency has a nationwide mission to combat immigration and customs violations. To compound the staffing challenges, if new legislation provides additional opportunities for adjustment, there will be significant attempts to fraudulently adjust. Congress must consider the necessary enforcement footprint that will be required following reform to avoid the failures of the past.

Next, new legislation should also create or provide enhanced incentives to increase the efficiency of the removal process. For example, the agency should increase use of the program that places individuals in immigration proceedings while they are serving time in federal or state correctional institutions (known as the Institutional Removal Program). By strategically funding courtrooms, judges, and immigration lawyers (including virtual courtrooms) in federal, state and local institutions with a high population of illegal aliens, the government could reduce excess time that criminal aliens spend in immigration custody after release from criminal custody.

During legislative reform, the partial expansion of expedited removal should be considered. Expedited removal may be utilized for aliens who lack proper documentation or have committed fraud or willful misrepresentation of facts to gain admission into the United States, unless the aliens indicate either an intention to apply for

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asylum or a fear of persecution.[4] Under expedited removal processes, administrative and judicial review are restricted to cases in which the alien claims to be a citizen, or was previously legally admitted under certain circumstances.

By statute, expedited removal may be utilized for individuals that have been in the country for up to two years.[5] However, the executive branch has not utilized the full statutory authority provided for expedited removal, but instead applied certain arbitrary limitations, including the most recent requirement that the alien be apprehended no more than 100 miles from the border and has spent less than 14 days in the country. There is no reason that the government could not take steps to administratively expand the current use of expedited removal, by, for example, focusing on certain known smuggling routes beyond 100 miles or slightly extending the current time period for eligibility (30 days vs. 14 days, for example). Another alternative would be to apply extended time and range limits for the use of expedited removal for immigrants who are convicted of a crime by state or local law enforcement.

Any extension of expedited removal would have to be managed closely to ensure that the existing credible fear process for asylum seekers continues to be strictly followed and appropriate training is provided for DHS officers. In addition, individuals processed under expedited removal procedures are subject to mandatory detention, so administrative expansion under current authorities would have to be carefully coordinated to avoid problems with ICE detention space.

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[4] 8 U.S.C. § 1225.
[5] Id.

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New legislation could also expand qualifications and use of the voluntary departure program. A voluntary departure is a mechanism by which eligible immigrants agree to leave the country and avoid many of the bars associated with stipulated removal or formal removal orders.[6] In the 2010 EOIR Statistical Yearbook, DOJ reported that 17% of all removals in the immigration court system are now voluntary departures, up from 10% only five years prior to that.[7] With support from Congress, ICE could administratively create mechanisms to more uniformly notify individuals of the option of voluntary removal immediately, so that appropriate candidates might consider this option at the very outset of proceedings (rather than waiting till a master calendar hearing, or afterwards).

Finally, any new legislation should include a serious look at ways to improve the immigration court system. Having a strong judicial framework ensures the integrity of enforcement efforts. One way to increase immigration court efficiency is to reduce the number of cases that must come before immigration courts for full hearings, without reducing overall removal numbers. This can be done by formally endorsing forms of appropriate prosecutorial discretion, as well as by encouraging voluntary and mandatory mechanisms to remove appropriate cases from full immigration hearings while effectuating removal.

The enforcement agencies should continue to exercise appropriate prosecutorial discretion to ensure that resources are not wasted on inappropriate or ill-considered cases. As set forth in the current ICE memos on prosecutorial discretion, it is reasonable for the

[6] 8 U.S.C. §1229c.
[7] See Executive Office for Immigration Review, U.S. Department of Justice, FY 2010 Statistical Yearbook, at Q1.

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immigration enforcement agencies to consider whether there is a pending petition that could have a likelihood of success when determining whether initiating removal proceedings is appropriate. The active involvement of ICE attorneys early in the process can assist in ensuring the agencies make an appropriate determination, and avoid wasting court or detention resources on cases where adjustment is likely, the government is unlikely to prevail, or extenuating circumstances support discretion.

At the same time, it is important that the discretion be carefully tailored so that the agency is not creating incentives for individuals to come here illegally and break the law. A fact-based analysis must ensure that the prosecutorial discretion doesn't grant a wholesale exemption on whole categories of individuals without the approval of Congress, or make an executive branch decision to simply defer action on broad sections of immigration violators.

In addition, in any new legislation, Congress should consider taking steps to assist indigent and vulnerable aliens to retain counsel at government expense. This is particularly important for unaccompanied minors and immigrants with competency issues. Although ICE attorneys and immigration judges regularly identify legitimate claims by aliens who are not represented by attorneys, the system should not rely on the ability of opposing counsel or overworked judges to locate valid claims.

As a former enforcement chief and veteran of the last immigration reform debate, I am very encouraged by the interest this Committee has in ensuring effective immigration enforcement. Only by acknowledging and learning from the incomplete

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enforcement efforts of previous legislation will we be able to avoid a repeat of past problems and ensure a solid immigration system.

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