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Administrative Law: Immigration, Amnesty, and the Rule of Law, 2007 National Lawyers Convention of the Federalist Society

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*Kris W. Kobach**

I. INTRODUCTION

Recent years have seen an unprecedented number of state laws proposed and enacted on the subject of illegal immigration.¹ In addition, municipalities across the country have enacted ordinances designed to discourage illegal immigration and the employment of unauthorized aliens.² Some observers have suggested that these efforts are simply the result of energized political activists, frustrated with inaction in Congress, turning their attention to state and local legislation.³ According to this view, such state and local laws are merely spillover consequences of the larger debate regarding controversial immigration bills in Congress.

These explanations do not accurately reflect what has been happening in the effort to confront illegal immigration at the state and local level. To be sure, frustration with congressional inaction sometimes fuels enthusiasm for state and local action. But that explanation does not fully account for what has been occurring in state

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1. In 2007, at least 1562 immigration bills were submitted, up from 570 in 2006. Of the bills submitted, 240 were enacted into law, up from 84 in 2006. NATIONAL CONFERENCE OF STATE LEGISLATURES, IMMIGRANT POLICY PROJECT: 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION I (2008), <http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf>.

2. See Hazelton, Pa., Ordinance 2006-18 (2006); Valley Park, Mo., Ordinance 1722 (2007).

3. See, e.g., Damien Cave, *States Take New Tack on Illegal Immigration*, N.Y. TIMES, June 9, 2008, at A1 (reporting that “inaction” on the part of the federal government has caused state legislatures to give “local authorities wider berth” on immigration matters); Julia Preston, *Judge Voids Ordinance on Illegal Immigrants*, N.Y. TIMES, July 27, 2007, at A14 (describing the decision by a Hazelton, Pennsylvania judge to strike down a local immigration ordinance and the reactions thereto).

legislatures and city halls nationwide. Independent forces motivate state and local governments to confront illegal immigration within their respective jurisdictions. While illegal immigration is a national issue, the consequences are felt first and foremost at the state and local level.

II. THE FISCAL BURDEN

Without question, the most significant force driving action at the state and local level is a fiscal one. In city after city, and state after state, governments have acted for one overriding reason: they can't afford not to. Illegal immigration is expensive.⁴ And the taxpayer bears an extraordinary burden in any city or state that includes a large population of illegal aliens.⁵ The net cost of illegal immigration at all levels of government (minus any tax revenues derived from illegal aliens) is massive. In 2007, Robert Rector of The Heritage Foundation published the most comprehensive and rigorous study to date on the net fiscal cost of illegal immigration.⁶ His study concluded that low-skilled aliens (defined as those households "headed by immigrants without a high

4. ROBERT RECTOR, THE HERITAGE FOUND., THE FISCAL COST OF LOW-SKILL IMMIGRANTS TO STATE AND LOCAL TAXPAYERS: TESTIMONY BEFORE THE SUBCOMMITTEE ON IMMIGRATION COMMITTEE OF THE HOUSE COMMITTEE ON THE JUDICIARY 15-16 (2007), <http://www.heritage.org/research/immigration/tst052107a.cfm> [hereinafter RECTOR TESTIMONY].

5. I use the term "illegal alien" because it is a legally accurate term used repeatedly in the immigration laws of the United States. See, e.g., 8 U.S.C. § 1356(r)(3)(ii) (2000) ("expenses associated with the detention of illegal aliens"); *id.* § 1366(1) (2000) ("the number of illegal aliens incarcerated in Federal and State prisons"). Another phrase that is used throughout the immigration laws of the United States is "alien not lawfully present in the United States." See, e.g., *id.* § 1229a(c)(2) (2000) ("the alien has the burden of establishing . . . by clear and convincing evidence, that the alien is lawfully present in the United States"); *id.* § 1357(g)(10) (2000) ("for any officer or employee of a State or political subdivision of a State . . . otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States"). This term, however, is a bit too cumbersome for a writing of this nature. A third term, "unauthorized alien," is found in federal immigration laws, but is limited to the employment context. See, e.g., *id.* § 1324a(a) (2000) ("to hire, or to recruit, or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien"); *id.* § 1324b(a)(1) (2000) ("other than an unauthorized alien, as defined in section 1324a(h)(3) of this title"). In contrast, the ambiguous terms "undocumented immigrant" and "undocumented alien" do not appear anywhere in the immigration laws of the United States. See *id.* § 1101, *et seq.* (2000). Accordingly, I will use the shorter of the two appropriate terms recognized by federal statute, namely "illegal alien."

6. See ROBERT RECTOR, CHRISTINE KIM & SHANEA WATKINS, THE HERITAGE FOUND., HERITAGE SPECIAL REPORT: THE FISCAL COST OF LOW-SKILL HOUSEHOLDS TO THE U.S. TAXPAYER (2007), <http://www.heritage.org/research/welfare/sr12.cfm> [hereinafter RECTOR REPORT]. In 2005, another study estimated, with considerably less detailed analysis, that the net cost of illegal immigration was approximately \$65 billion a year. ROBERT JUSTICH & BETTY NG, BEAR STEARNS ASSET MGMT., INC., THE UNDERGROUND LABOR FORCE IS RISING TO THE SURFACE 2 (2005), www.bearstearns.com/bscportal/pdfs/underground.pdf.

school diploma” and comprised predominantly of households headed by illegal aliens) impose a net fiscal cost of \$89.1 billion a year.⁷ Those figures reflect all sorts of government services, from primary and secondary education to medical care to costs of criminal incarceration, to the use of general public goods by low-skilled alien households.⁸

State and local governments bear the majority of that burden. According to 2002 federal government figures, the net cost of illegal immigration at the federal level was \$10.4 billion a year.⁹ Not surprisingly, because most of the \$89.1 billion falls on the shoulders of state and local governments, there has been an extraordinary amount of activity at the state and local level to discourage illegal immigration into the communities’ respective jurisdictions.¹⁰

Arizona is a case in point. In 2007, Arizona became the first state in the union to enact a law requiring all employers to use the “E-Verify” system to verify the employment authorization of all newly-hired employees.¹¹ That law was later sustained by the United States Court of Appeals for the Ninth Circuit against a legal challenge brought by a coalition of interest groups in the state.¹² This was the fourth in a line of Arizona statutes and popular initiatives designed to reduce illegal immigration. The first was Proposition 200, which was passed in 2004 with over fifty-five percent of the vote.¹³ Proposition 200 denied public benefits to illegal aliens.¹⁴ The second was Arizona’s law against human smuggling, enacted in 2005.¹⁵ The third was Arizona’s Proposition 300,

7. See RECTOR TESTIMONY, *supra* note 4, at 10. Rector’s testimony is based on the full report. See RECTOR REPORT, *supra* note 6, at 1.

8. RECTOR REPORT, *supra* note 6, at 1, 4, 6.

9. STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, THE HIGH COST OF CHEAP LABOR: ILLEGAL IMMIGRATION AND THE FEDERAL BUDGET 5 (2004), <http://www.cis.org/articles/2004/fiscal.pdf>.

10. See, e.g., ARIZ. REV. STAT. ANN. §§ 23-212 to -214 (2007); GA. CODE ANN. § 50-36-1 (2007); see also *supra* notes 2-3 and accompanying text.

11. See ARIZ. REV. STAT. ANN. §§ 23-212 to -214; Ariz. Contractors Ass’n, Inc. v. Candelaria, 534 F. Supp. 2d 1036, 1060 (D. Ariz. 2008). In 2008, Mississippi became the second state in the country to mandate that all private businesses use the E-Verify system. See Mississippi Employment Protection Act, S.B. 2988 (Mar. 17, 2008).

12. See generally *Chicanos Por La Causa, Inc. v. Napolitano*, No. 07-17272, 2008 WL 4225536 (9th Cir. Sept. 17, 2008). The author served as counsel on the legal team defending the Arizona statute.

13. See Ariz. Sec’y of State, 2004 General Election, <http://www.azsos.gov/election/2004/General/Canvass2004General.pdf> (last visited June 28, 2008).

14. David Kelly, *Illegal Immigrant Measure Upheld: Judge Says Arizona Can Enforce a Proposition Barring Some Services to the Undocumented*, L.A. TIMES, Dec. 23, 2004, at A13.

15. That law was challenged in state court on preemption grounds and was sustained. *Arizona v. Salazar*, No. CR2006-005932-003 DT, slip. op. at 6-9 (Super. Ct. of Ariz., June 9, 2006). The

which denied in-state tuition rates and other post-secondary education benefits to illegal aliens; Proposition 300 passed with a stunning 71.4 percent of the vote.¹⁶

This series of measures reflected the growing realization among voters and legislators that Arizona taxpayers were under siege as a result of illegal immigration. The total cost of providing services to Arizona's estimated 475,000 illegal aliens is approximately \$1.3 billion a year.¹⁷ The biggest ticket item is providing free public primary and secondary education to children in illegal alien-headed households; doing so cost Arizona taxpayers approximately \$748.3 million in 2005.¹⁸ When Arizona's 2007 statute requiring employers to use the E-Verify system prompted thousands of illegal aliens to self-deport, the Arizona school system immediately began to experience some relief, with a \$48.6 million surplus suddenly appearing in Fiscal Year ("FY") 2008.¹⁹ Another large source of taxpayer expense lies in the cost of incarcerating illegal alien criminals in Arizona's state prison system, which is approximately \$80 million a year.²⁰

Arizona's fiscal burden may not come as a great surprise, given its location on the border. However, as has been often said, every state is a border state now.²¹ Numerous other states have experienced a recent influx of illegal immigration. For example, Georgia saw its illegal alien population nearly double from 228,000 in 2000 to an estimated 440,000 in 2007, and Georgia taxpayers soon experienced the fiscal burdens that

author served as counsel assisting Maricopa County, Arizona, in its defense of the law against the preemption challenge.

16. Ariz. Sec'y of State, 2006 General Election (Unofficial Results), <http://www.azsos.gov/results/2006/general/BM300.htm>.

17. FED'N FOR AM. IMMIGRATION REFORM, ARIZONA: ILLEGAL ALIENS (2007), available at http://www.fairus.org/site/PageServer?pagename=research_research82b2.

18. JACK MARTIN, FED'N FOR AM. IMMIGRATION REFORM, BREAKING THE PIGGY BANK: HOW ILLEGAL IMMIGRATION IS SENDING SCHOOLS INTO THE RED (2007), available at <http://www.azleg.gov/jlbc/mfh-dec-07.pdf>.

19. J. LEGIS. BUDGET COMM., MONTHLY FISCAL HIGHLIGHTS 2 (2007), available at <http://www.azleg.gov/jlbc/mfh-dec-07.pdf>. See also Jacques Billeaud, *Employer-Sanctions Law Forces Illegal Immigrants to Move On*, ASSOCIATED PRESS, SIERRA VISTA HERALD, Mar. 3, 2008, available at <http://www.svherald.com/articles/2008/03/03/news/doc47cb9f7c14db5486886624.txt> (reporting that many illegal immigrants left Arizona after laws were passed to reduce spending on educating and providing health care for illegal immigrants).

20. The \$80 million estimate is based upon 2004 figures. FED'N FOR AM. IMMIGRATION REFORM, *supra* note 17.

21. See, e.g., Kathy Kiely, *Immigration Issue Takes Flight*, USA TODAY, July 20, 2006, at 4A; Andy Sher, *Ex-Rivals Pledge to Back Corker*, CHATTANOOGA TIMES FREE PRESS, Aug. 6, 2006, at 10A.

came with this influx.²² The total cost is approximately \$1.2 billion a year, of which the cost of providing free public education is approximately \$952 million a year.²³ Predictably, in 2006 the Georgia Legislature responded to these fiscal burdens by enacting the Georgia Security and Immigration Compliance Act to discourage further illegal immigration into the state.²⁴ The fiscal cost of illegal immigration prompted other states in the interior of the country to enact omnibus immigration bills in the years that followed—most notably, Oklahoma in 2007 and Missouri in 2008.²⁵

A similar increase in fiscal burdens often drives cities to act. This was demonstrated clearly in Hazleton, Pennsylvania, which enacted its Illegal Immigration Relief Act in 2006.²⁶ Hazleton's population exploded from approximately 22,000 in the 2000 census to 30,000-33,000 in 2005.²⁷ However, the earned income tax receipts on which the city relied for its revenues remained flat. This reflected the fact that much of the population increase was due to illegal immigration, and the new arrivals were either working off the books or earning so little that they were paying little or nothing in taxes.²⁸ Meanwhile, expenditures for routine city services that reflect the size of the population, such as trash removal, increased by nearly fifty-percent.²⁹ Expenditures by the local school district for its English as a Second Language program rose from \$500 in 2000 to over \$1.1 million in 2006.³⁰ The fiscal pressures pushing the City to reduce the burdens of illegal immigration were undeniable.

Such city ordinances and state statutes designed to discourage illegal immigration have been sustained repeatedly in the courts of the United States against federal preemption challenges. In 1976, in the

22. See FED'N FOR AM. IMMIGRATION REFORM, EXTENDED IMMIGRATION DATA FOR GEORGIA (2008), available at http://www.fairus.org/site/PageServer?pagename=research_research3920.

23. *Id.*

24. GA. CODE ANN. § 50-36-1 (2007).

25. Mo. Conf. Comm. Subst. for H.B. 1549, 1771, 1395 and 2366 (2008), codified at MO. REV. STAT. § 285.530; Okla. H.B. 1804 (2007), codified at OKLA. STAT. ANN. tit. 56, § 71 (West 2008).

26. That ordinance is the subject of litigation currently pending before the Third Circuit of the U.S. Court of Appeals (Case No. 07-3531). The author is lead attorney representing the City of Hazleton in the appeal from the decision of the Middle District of Pennsylvania. See *Lozano v. Hazleton*, 496 F. Supp. 2d 477, 484, 554 (M.D. Penn. 2007).

27. *Lozano*, 496 F. Supp. 2d at 484.

28. Joint Appendix at A1647, A1399-1400, A2290-91, *Lozano v. Hazleton*, No. 07-3531 (3d Cir. filed Apr. 8, 2008) (on file with author).

29. *Id.*

30. *Id.*

landmark case of *DeCanas v. Bica*, the Supreme Court of the United States sustained a California law that imposed sanctions on the employers of illegal aliens.³¹ Then, in 1986, Congress expressly carved out a window for states and cities to act by suspending the business licenses of those businesses that employ unauthorized aliens.³² In addition, Congress enacted other legislation in the 1990s that demonstrated its objective of promoting state and local assistance in discouraging illegal immigration.³³ As a result, recent state and local laws discouraging illegal immigration have been sustained in federal courts. Arizona's 2007 employment law was sustained by the District of Arizona and thereafter by the Ninth Circuit.³⁴ Moreover, the Eastern District of Missouri sustained a Valley Park, Missouri, ordinance that provided for the suspension of the business licenses of employers of unauthorized aliens.³⁵ These statutes and ordinances allow cities and states to take measured steps to reinforce compliance with federal immigration law in their jurisdictions.

Not only have such efforts succeeded against preemption challenges in court, they have also been successful in reducing illegal immigration within the jurisdictions involved.³⁶ Illegal aliens quickly become aware of which cities and states have taken steps to reinforce the rule of law in immigration. In February 2008, United States Secretary of Homeland Security Michael Chertoff noted the impact of such laws in deterring illegal immigration: "The state of Arizona . . . in the last

31. *DeCanas v. Bica*, 424 U.S. 351, 354 (1975).

32. 8 U.S.C. § 1324a(h)(2) (2000).

33. See Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 203-08 (2005).

34. See generally *Ariz. Contractors Ass'n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. 2008), *aff'd sub nom. Chicanos Por La Causa, Inc. v. Napolitano*, No. 07-17272, 2008 WL 4225536 (9th Cir. Sept. 17, 2008);

35. *Gray v. Valley Park*, No. 4:07CV00881(ERW), 2008 WL 294294, at *9-10, *30-31 (E.D. Mo., Jan. 31, 2008). The plaintiffs who lost before the District Court appealed the decision on jurisdictional grounds to the Eighth Circuit of the United States Court of Appeals. *Gray v. Valley Park*, No. 08-1681 (8th Cir. filed Aug. 15, 2008). That appeal is pending at the time of this writing. The author is serving as lead counsel defending the City of Valley Park, Missouri. The only federal court to reach a different holding in a final order is the United States District Court for the Middle District of Pennsylvania. See *Lozano v. Hazleton*, 496 F. Supp. 2d 477, 484, 554 (M.D. Penn. 2007). The Middle District of Pennsylvania set aside the binding Supreme Court precedent of *DeCanas*. *Id.* at 524.

36. This success has been most notable in Arizona, where the 2007 law requiring E-Verify participation and prohibiting the knowing employment of unauthorized aliens prompted the self-deportation of thousands of illegal aliens when the law became effective on January 1, 2008. Randal C. Archibold, *Arizona Seeing Signs of Flight by Immigrants*, N.Y. TIMES, Feb. 12, 2008, at A13; Daniel González, *Apartments Going Empty as Hiring Law Hits Migrants*, ARIZONA REPUBLIC, Jan. 31, 2008, at A1.

couple of days had its new rule requiring E-Verify use sustained by the federal courts, and we are beginning to see that illegal workers are picking up and leaving . . . I think we've really been making some substantial progress with the help of state and local governments."³⁷ The combination of state and local action with stepped-up federal enforcement activity produced dramatic results in 2007-08. For the first time in many years, the illegal alien population in the United States actually *decreased* by an estimated 1.3 million between August 2007 and May 2008—a decrease that began *prior* to the general decline in employment in the United States and therefore could not be attributed primarily to a slowing economy.³⁸

III. AMNESTY IS NOT THE ANSWER

Despite the fact that such enforcement efforts have proven effective in inducing illegal aliens to self-deport, proponents of a massive amnesty for illegal aliens assert that amnesty is nevertheless necessary to “solve” the illegal immigration problem in one easy step.³⁹ This facile assertion completely ignores the fiscal costs of illegal immigration. Although allowing millions of illegal aliens to adjust to a legal status does “reduce” the population of illegal aliens (by redefining them as lawfully present), it achieves little else. Giving illegal aliens a path to a legal status does virtually nothing to reduce the fiscal burden imposed by illegal immigration.

Indeed, amnesty exacerbates the fiscal costs of illegal immigration. Making illegal aliens legal does not make them fiscally positive. On the contrary, it makes them eligible for *more* government benefits, especially at the federal level—where the newly-legalized aliens become eligible for a wide range of entitlements. One of the biggest is Social Security benefits. For example, the amnesty proposal that was debated and rejected in the United States Senate in 2007⁴⁰ would have cost

37. Sec’y of Homeland Sec. Michael B. Chertoff & U.S. Attorney Gen. Michael B. Mukasey, Remarks at a Briefing on Immigration Enforcement and Border Security Efforts (Feb. 22, 2008), available at http://www.dhs.gov/xnews/releases/pr_1203722713615.shtm.

38. STEVEN A. CAMAROTA & KAREN JENSENIUS, CTR. FOR IMMIGRATION STUDIES, *HOMEWARD BOUND: RECENT IMMIGRATION ENFORCEMENT AND THE DECLINE IN THE ILLEGAL ALIEN POPULATION* (July 2008), <http://www.cis.org/articles/2008/back808.pdf>.

39. I define amnesty in immigration law the way most people understand it: providing a legal status to large categories of illegal aliens (regardless of whether or not “fines” or other fees are imposed upon recipients of the amnesty).

40. Comprehensive Immigration Reform Act, S.A. 1150, 110th Cong. § 601(f)(2) (proposed amendment to S. 1348).

approximately \$2.6 trillion,⁴¹ resulting in the largest expansion of the welfare state in thirty years.⁴² It would also have hastened the bankruptcy of the Social Security system.⁴³ Meanwhile, amnesty would have done nothing to reduce the fiscal burdens borne by American cities and states. In short, amnesty is expensive at every level of government.

Another consequence of “solving” the illegal immigration problem through amnesty is rampant fraud by amnesty applicants. We know this from experience. In 1986, as part of the Immigration Reform and Control Act (“IRCA”), the first and largest amnesty was granted to approximately 2.7 million “seasonal agricultural workers.”⁴⁴ Amnesty immediately led to a surge in illegal immigration as hundreds of thousands of new illegal aliens entered in order to fraudulently claim that they were eligible for amnesty.⁴⁵ The Immigration and Naturalization Service (“INS”) detected 398,000 cases of possible fraud—some from illegal aliens who arrived after IRCA was passed, others from illegal aliens already in the United States who submitted fraudulent applications claiming that they were eligible for amnesty.⁴⁶ There were undoubtedly many more cases that the INS never detected.

In addition to causing a spike in unlawful alien entries by aliens seeking to fraudulently claim amnesty, the 1986 amnesty also encouraged millions of illegal aliens to enter the United States in succeeding years, in the hope that they would benefit from the next amnesty.⁴⁷ Of course, in 1986, the amnesty was advertised as the one and only amnesty that the United States would ever grant.⁴⁸ The incoming illegal aliens did not believe it. The 1990s witnessed the greatest wave of illegal immigration ever.⁴⁹ In retrospect, the illegal

41. ROBERT RECTOR, THE HERITAGE FOUND., AMNESTY WILL COST U.S. TAXPAYERS AT LEAST \$2.6 TRILLION 1 (2007), <http://www.heritage.org/Research/Immigration/wm1490.cfm> (“Overall, the net cost to taxpayers of retirement benefits for amnesty recipients is likely to be at least \$2.6 trillion.”) [hereinafter RECTOR RESEARCH].

42. ROBERT E. RECTOR AND CHRISTINE KIM, THE FISCAL COST OF LOW-SKILL IMMIGRANTS TO THE U.S. TAXPAYER 22 (2007), <http://www.heritage.org/research/Immigration/sr14.cfm>.

43. RECTOR RESEARCH, *supra* note 41, at 6.

44. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 § 301 (1986).

45. Roberto Suro, *False Migrant Claims: Fraud on a Huge Scale*, N.Y. TIMES, Nov. 12, 1989, at A1; RECTOR RESEARCH, *supra* note 41, at 6.

46. Suro, *supra* note 45, at A1.

47. Robert Pear, *'86 Law Looms Over Immigration Fight*, N.Y. TIMES, June 12, 2007, at A1; RECTOR RESEARCH, *supra* note 41, at 9.

48. John Cornyn, *Immigration Reform: Back to the Future*, May 1, 2006, <http://yalelawjournal.org/images/pdfs/44.pdf>.

49. See STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, EIGHT MILLION ILLEGAL ALIENS IN 2000: CENSUS BUREAU FINDING RAISES CONCERN OVER BORDER CONTROL IN LIGHT OF TERRORIST THREAT (2001), <http://www.cis.org/articles/2001/censusrelease1001.html>.

aliens were right—plenty of Senators in 2007 felt no compulsion to observe the pledge that Congress made in 1986. There is no reason to believe that the results would be different the next time around.

Another problem with fraud in amnesty applications is the fact that individual terrorists have successfully obtained amnesty in the past, and more terrorists will almost certainly do so if another major amnesty is offered in the future. For example, Mahmud “The Red” Abouhalima, a leader of the 1993 World Trade Center bombing, was legalized as a seasonal agricultural worker as part of the 1986 amnesty.⁵⁰ He had actually been working as a cab driver.⁵¹ His newly-acquired legal status allowed him to travel abroad, including several trips to Pakistan where he received terrorist training.⁵² His brother, Mohammed, who was also involved in the 1993 attack, received amnesty as well.⁵³

The proposed amnesty of 2007 would have been particularly vulnerable to terrorist manipulation. The process outlined in the amnesty legislation would have given United States Citizenship and Immigration Services (“USCIS”) only one business day to do a quick background check before issuing a provisional Z visa.⁵⁴ Supporters of the bill apparently imagined that the United States government possessed a massive database of all the world’s terrorists and criminals, in searchable digital format. But the reality is that the United States still relies on many paper records. Plus, much of the information that is necessary to properly screen amnesty applicants is in the hands of foreign governments. Obtaining such information in twenty-four hours is difficult, if not impossible. Moreover, the 2007 amnesty bill also did not require any photo identification sufficient to verify an applicant’s asserted identity—which meant that an alien terrorist would have been free to invent an entirely clean, fictional name and obtain amnesty (and a federal ID) under that name. An applicant could have stated that his name was “Rumpelstiltskin” and produced a few easily-falsified

50. 9/11 AND TERRORIST TRAVEL: A STAFF REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 194 (2004); MARK KRICKORIAN, CTR. FOR IMMIGRATION STUDIES, SECURING THE HOMELAND THROUGH IMMIGRATION LAW ENFORCEMENT, TESTIMONY PREPARED FOR THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS (2003), <http://www.cis.org/articles/2003/mskstestimony410.html>.

51. *Id.*

52. *Id.*

53. 9/11 AND TERRORIST TRAVEL, *supra* note 50, at 190.

54. KRIS W. KOBACH, THE HERITAGE FOUND., THE SENATE IMMIGRATION BILL: A NATIONAL SECURITY NIGHTMARE 2 (2007), <http://www.heritage.org/Research/Immigration/wm1513.cfm>.

documents attributable to such a name. In all likelihood, USCIS would have had no basis on which to deny the application.⁵⁵

The proposed amnesty of 2007 would have also resulted in a complete breakdown of the USCIS bureaucracy. That is a reality of which many Senators were apparently unaware in June 2007. Assume that twelve million illegal aliens would have applied for the amnesty. The bill required illegal aliens to file their initial applications within one year.⁵⁶ There are 250 days in the calendar year on which the federal government is open for business.⁵⁷ That means that there would have been an average of 48,000 applications for the probationary Z visas every day, with significant fluctuations from that average likely to occur. There are approximately 3000 status adjudicators employed by USCIS. This number cannot be increased quickly, due to the difficulty of hiring new adjudicators, and the delay of training them. The Senate bill of 2007 would have only added a paltry one hundred status adjudicators a year for five years—“subject to the availability of appropriations.”⁵⁸ 48,000 applications spread among 3000 status adjudicators meant an average of sixteen amnesty applications per adjudicator, per day. Of course, on some days, the number of applications could have been double that amount. And with each application, the adjudicator would have had only one day to discover if the alien is a criminal or a national security threat.

It is a bleak picture. Unfortunately, it gets worse. Those numbers assumed that the adjudicators were not already busy. In FY 2005, USCIS received 6.3 million applications for immigration benefits—on top of a backlog of several million unresolved applications.⁵⁹ USCIS was already stretched to the breaking point. According to a 2006 Government Accountability Office (“GAO”) study, because adjudicators had to go through so many applications for benefits (permanent residency applications, asylum applications, etc.) every day, they spent too little time scrutinizing them.⁶⁰ As a result, the GAO concluded, failure to detect fraud was already “an ongoing and serious problem” at the agency.⁶¹ The backbreaking workload created a “high-pressure’

55. *Id.* at 3.

56. Comprehensive Immigration Reform Act, S.A. 1150, 110th Cong. § 601(f)(2) (proposed amendment to S. 1348).

57. Kris W. Kobach, *R.X. for Breakdown*, N.Y. POST, May 27, 2007, at A1.

58. *Id.*

59. *Id.*

60. *Id.*

61. U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION BENEFITS: ADDITIONAL CONTROLS AND A SANCTIONS STRATEGY COULD ENHANCE DHS'S ABILITY TO CONTROL BENEFIT FRAUD 4 (2006).

production environment.”⁶² It is widely known that an unofficial “six-minute rule” applies in some offices—spend no more than six minutes looking at any single application.⁶³ It is a bureaucratic sweatshop.

As a result, USCIS does not regularly engage in commonsense verification with outside agencies—for example, calling a state’s Department of Motor Vehicles to see if two people claiming to be married actually live at the same address. Such detailed scrutiny is too time-consuming.⁶⁴ And many adjudicators are actually discouraged from requesting more information from aliens who submit suspicious applications. So what would the 2007 Senate amnesty bill have done? Triple the incoming workload by adding approximately twelve million amnesty applications in a single year. Not only that, the twelve million Z visa holders would have had to come back in four years to renew their amnesty status. The six-minute rule would have become a *de facto* two-minute rule. Millions of fraudulent applications likely would have been accepted.⁶⁵ It was “a recipe for bureaucratic collapse.”⁶⁶

However, even if granting amnesty to twelve million illegal aliens could be accomplished with ease, it would not alleviate the burden that so many cities and states are bearing. Illegal immigration is expensive—very expensive—for the cities and states in which the illegal aliens live. An amnesty, like so many “solutions” that gain currency in the halls of Congress, is no solution at all.

62. *Id.* at 6.

63. Kobach, *supra* note 57, at A1.

64. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 61, at 25.

65. Kobach, *supra* note 57, at A1.

66. *Id.* If the 2007 bill had been enacted, it is likely that USCIS would have responded to the impossible bureaucratic task of implementing the amnesty by hiring contractors to review the amnesty applications. Doing so would have increased the total number of personnel available, but it would have created its own complications. The independent contractors likely would have lacked experience in detecting fraudulent applications, and the federal government would have been hard pressed to conduct security investigations on the independent contractors in time to implement the initial stages of the amnesty.
