WE SHOULD TRUST, BUT NOT E-VERIFY: AN ANALYSIS OF H.R. 2164

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EXECUTIVE SUMMARY

H.R. 2164, the Legal Workforce Act, would make the American workplace less free, ensnare U.S. workers in government agency errors, expand the size and role of government and is likely to be ineffective in reducing the illegal immigration population in the United States. An analysis of the bill's provisions shows it appears only in a bill where the subject is immigration would lawmakers be so willing to dramatically change and expand the role of government based on questionable promises and scant evidence that the legislation would achieve its stated objectives. While the 2010 elections were said to be a call for less government and more individual liberty, making E-Verify mandatory would mean a more intrusive federal government and less individual freedom.

H.R. 2164 represents a significant expansion of federal government power over U.S. employers and workers. In essence, the bill would require all new hires in America to gain approval from federal authorities to work for a new employer. If H.R. 2164 becomes law, employers will face possible criminal prosecution if they fail to use a federal database to check all new hires. Government data indicate more than 160,000 people a year, about 1 million over 6 years, will be forced to go to a federal government office or otherwise correct errors to work in America, although some estimates are higher.

This analysis shows the following key problems with H.R. 2164 and its provisions to make E-Verify mandatory:

- E-Verify may be "free" to use but it's costly to administer for companies, requiring a host of procedures and trained personnel for when new hires or employees experience problems with government databases. Filing an individual or corporate income tax return is free but it entails considerable compliance costs. Bloomberg estimates mandatory E-Verify would cost U.S. employers $2.7 billion a year to comply with the system, disproportionately affecting small businesses.

- Since most crop workers are working in the United States without legal status, an E-Verify system that seeks to remove such migrants from the labor force could leave many growers with insufficient labor to harvest crops, threatening many additional U.S.-based jobs in food production.

- Elected officeholders voting for H.R. 2164 would expose business owners to the genuine risk of losing their livelihoods because of a failure to follow government-mandated procedures. The significant increases in fines and requirements in H.R. 2164 could put small companies out of business, whether or not they have hired illegal immigrants, according to immigration attorneys.

- The record to date of E-Verify is one of ineffectiveness, with about half of illegal immigrants submitted to E-Verify shown incorrectly to be authorized to work by the system. This ineffectiveness will likely lead to calls for a national ID card or other biometric system to plug the perceived holes in E-Verify.

- H.R. 2164 will lead to an increase in government workers. Examining a bill in 2008 to make E-Verify mandatory, the Congressional Budget Office (CBO) estimated mandating E-Verify nationwide would increase federal spending by approximately $6 billion from 2009 to 2013 and by about $12 billion from 2009 to 2018. The CBO estimated the 2008 bill would lead to a decline of $17 billion in tax revenue over 10 years, caused primarily by pushing a number of illegal immigrants into the underground economy.

- Concerns about federalism are shunned aside in the bill, as the bill dictates the use of E-Verify for all new and existing employees in all states and even in local governments within 6 months of the bill's enactment.

- S. 1196, sponsored by Senator Charles Grassley (R-IA) would be harmful in ways similar to H.R. 2164 but it includes additional provisions that would carry a more negative impact, including a provision related to E-Verify and contracts in a business context.

- Government data show many employers pre-screen applicants through E-Verify and do not offer them jobs, without providing individuals an opportunity to correct possible errors in government databases, a problem that will be worsened if E-Verify is made mandatory nationwide.

- H.R. 2164 would represent a massive expansion of E-Verify from approximately 250,000 employers today to over 5 million nationwide, including to many large states that do not now mandate E-Verify for all private employers, including California, Texas, New York, Florida and Illinois.

Despite the new burdens on both employers and potential employees, there is little evidence H.R. 2164 will produce a significant reduction in America's illegal immigration population. Previous "enforcement only" measures in 1986, 1996, and in recent years have been followed by increases, not decreases, in illegal immigration. If Congressional supporters sincerely believe making use of E-Verify mandatory for all employers will be effective, then Congress should sunset H.R. 2164's provisions within 3 years of enactment if E-Verify has not shown to reduce by half the illegal immigrant population in the United States. That would show supporters of E-Verify are not simply hoisting another mandate on employers and workers but are instead demonstrating the courage of their convictions.

WHAT IS E-VERIFY?

E-Verify is an electronic employment verification system that employers can use to determine if a new hire (or current employee) is eligible to work in the United States. While a significant minority of employers uses the system either voluntarily or as a government requirement (federal contractors, employers in certain states), new legislation in Congress, H.R. 2164, the Legal Workforce Act, would require all employers to use the system within two years or face possible criminal prosecution. The largest employers must use the system for all new hires within 6 months, while agricultural employers have 3 years to comply.

Currently, E-Verify is only used after an employer enters into a Memorandum of Understanding (MOU) with U.S. Citizenship and Immigration Services and the Social Security Administration (SSA). "By signing the MOU, the employer agrees, among other things, to use the system only for new hires – or, in the case of federal contractors, to use the system both for new hires and for existing employees assigned to a federal contract – post a notification that the employer is an E-Verify participant, and verify the employment eligibility of new hires within 3 business days after the employee begins work," explains the Government Accountability Office (GAO). "The MOU also requires employers to comply with antidiscrimination requirements and prohibits employers from prescreening job applicants through E-Verify prior to hiring them, selectively choosing to verify or not verify new hires based on their citizenship status or national origin, or taking any adverse action against employees who choose to contest a TNC [tentative nonconfirmation]."[1]

An employer needs access to the Internet and, for citizens, to transmit an employee's name and Social Security number. "If there is a match, the system is to instantly notify the employer that the employee is eligible to work. If there is no match, the system is designed to instantly request that the employer check for possible input errors and, if the employer makes no changes, the system is to automatically check USCIS's naturalization databases to verify the employee's citizenship status." If there is still no match, an employer must inform the employee in writing "by providing a system-generated notice of the finding and the employee's right to contest it." If the employee decides to contest the finding, "the employer must electronically refer the TNC [tentative nonconfirmation] case in E-Verify to either SSA or DHS and provide the employee with an additional system-generated referral letter, indicating the specific agency – SSA or DHS – the employee should contact . . . the employee has 8 federal working days to initiate contact with the agency. Employees who do not initiate contact

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[1] *Employment Verification: Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain*, Report to the Subcommittee on Social Security, Committee on Ways and Means, House of Representatives, Government Accountability Office, GAO-11-146, December 2010, pp. 7-8.

with SSA or DHS to resolve their TNC [tentative nonconfirmation] within 8 federal business days are to receive a final nonconfirmation (FNC)."[2]

The process is similar for a noncitizen. "For noncitizens, information from the employee's Form I-9 is first checked against SSA's Numident database and, if there is a match, E-Verify is to route the information to DHS databases to determine if DHS granted employment authorization to the employee . . . For noncitizens who show a Permanent Resident ("green") card or employment authorization document as proof of identity and employment eligibility, the system is to transmit a digitally stored photograph of the employee to the employer. It is the employer's responsibility to determine whether the photograph provided by the employee matches the electronic photograph provided by E-Verify."[3]

WHAT DOES H.R. 2164 MANDATE?

Under Section 2 of H.R. 2164, employers will be required to use E-Verify for new hires within the following timeframes:

- 10,000 or more employees, within 6 month of the bill's date of enactment.
- 500 to 9,999 employees, within 12 months.
- 20 to 499 employees, within 18 months.
- 1 to 19 employees, within 24 months.
- Person or entity "recruiting or referring" an individual for employment, within 12 months.
- Agricultural employers, within 36 months for agricultural workers.[4]

The same timeframes apply for the "reverification" of individuals whose work authorization will expire within 30 days. The bill also requires using E-Verify on "an employee who requires a Federal security clearance working in a Federal, State or local government building, a military base, a nuclear energy site, a weapons site, or an airport or other facility that requires workers to carry a Transportation Worker Identification Credential (TWIC)."[5]

Most interestingly, any concerns about federalism are shunned aside in the bill, as the bill dictates the use of E-Verify for all new and existing employees in all states and even in local governments within 6 months of the bill's enactment. All individuals working on both state and federal contracts must be screened through E-Verify as well.[6]

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[2] Ibid., pp. 8-9.
[3] Ibid., p. 11.
[4] Section 2 of H.R. 2164.
[5] Ibid.
[6] Ibid. "Not later than the date that is 6 months after the date of the enactment of the Legal Workforce Act, an employer shall make an inquiry, as provided in subsection (d), using the verification system to seek verification of the identity and employment eligibility of any individual described in clause (ii) . . . `(I) An employee of any unit of a Federal, State, or local government. . . . `(III) An employee assigned to perform work in the United States under a Federal or State contract . . ."

COMPLIANCE WILL BE BURDENSOME FOR EMPLOYERS

While supporters claim E-Verify is popular and easy for employers, such sentiments do not conform to the reality of the workplace. A human resources specialist with a financial institution has noted, "There may not be a cost to 'use' E-Verify, but there is a cost to administer it." She said it can be particularly "onerous" on a business when a tentative nonconfirmation arises and personnel have limited acquired knowledge of how to deal with it. "E-Verify has caused a lot of pain and suffering for our hiring managers," she said.[7]

Daniel Siciliano, a faculty director at Stanford Law School and practicing immigration attorney, is more blunt. "E-Verify is free – like a puppy. The transactional costs are quite high for employers. There are many policies and procedures that need to be in place and to be followed." He laughs at the idea E-Verify is "popular" with employers given so many participants are required to use the system. "Maybe 1/10th of the current total would use E-Verify if not compelled to," he said. "Nobody in their right mind would otherwise use E-Verify."[8]

It is strange that supporters of E-Verify emphasize the system is "free" to use as an argument, while ignoring the transactional costs it entails in staff time and lost productivity for workers. Filing a personal or corporate income tax is also "free," but individual Americans and businesses spend numerous hours to file tax returns and comply with the tax code.

An analysis by Bloomberg estimated mandatory E-Verify would cost U.S. employers $2.7 billion a year to comply with the system, with small businesses paying most of those costs: "If mandated for all employers, E-Verify would have cost $2.7 billion in fiscal 2010, according to data compiled by Bloomberg. Small businesses, which account for 99.7 percent of employers, would have paid $2.6 billion of that, according to the data. Employers spent about $43 million in the fiscal year ending Sept. 30, 2008, to interact with the site, according to data compiled by Bloomberg based on a survey commissioned by the government. The survey results were released in December 2009, and Bloomberg has adjusted the figures for inflation and increased usage. If E-Verify costs remained constant, and usage of the system is adjusted for growth, the employers spent an estimated $95 million in fiscal 2010 on E-Verify."[9]

One source of the compliance costs for businesses comes from errors in government databases. Simply put, not everyone who is legally authorized to work in America gets a quick green light from E-Verify. "Employees are limited in their ability to identify the source of and how to correct information in DHS (Department of Homeland

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[7] The human resources specialist asked her name and affiliation not be used.
[8] Interview with F. Daniel Siciliano.
[9] Jason Arvelo, "'Free' E-Verify May Cost Small Business $2.6 Billion: Insight," Bloomberg Government, January 27, 2011.

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Security) databases that may have led to an erroneous TNC [tentative nonconfirmation]," reports the Government Accountability Office. "To identify and access the source of the incorrect data, employees must use methods such as Privacy Act requests, which, in fiscal year 2009, took on average 104 days."[10] One business organization estimated that it normally took more than 90 days for individuals to obtain corrections at a Social Security Administration field office, with it often taking multiple trips and waits of four hours or more on a trip.[11]

There could be a lot of trips to Social Security Administration offices if E-Verify becomes mandatory. Discussing erroneous nonconfirmations, the Government Accountability Office notes, "Using USCIS's and SSA's estimate that about 60 million queries would be generated annually under E-Verify if the program were made mandatory for new hires nationwide, about 164,000 citizens and noncitizens would receive a name-related TNC [tenatative nonconfirmation] each year. However, this number would greatly increase if E-Verify were mandatory for all employees nationwide and not just new hires."[12] The National Immigration Law Center, extrapolating from government data, estimates that "between 480,000 and 1.3 million U.S. citizen and legal workers will be flagged as having errors in their records that need to be fixed before they can begin work."[13]

The accuracy of E-Verify has become a source of contention in the policy debate. One issue is that even a small error percentage can generate problems for a relatively large number of people given the size of the U.S. workforce and the number of people who start or change jobs each year, which is estimated at 60 million by U.S. Citizenship and Immigration Services.[14] "USCIS data indicate that about 97.4 percent of almost 8.2 million newly hired employees were immediately confirmed as work authorized by E-Verify during fiscal year 2009 . . . about 2.6 percent or over 211,000 of newly hired employees received either a SSA or USCIS TNC [tentative nonconfirmation], including about 0.3 percent who were determined to be work eligible after they contested a TNC and resolved errors or inaccuracies in their records," according to the Government Accountability Office. "The approximately 2.3 percent who received an FNC [final nonconfirmation] consisted of both unauthorized employees and authorized employees who chose not to contest their TNCs, among others. However, USCIS was unable to determine how many of these employees (1) were authorized employees who did not take action resolve a TNC because they were not informed by their employers of their right to contest the TNC [tentative nonconfirmation], (2) independently decided not to contest the TNC, or (3) were not eligible to work."[15]

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[10] GAO-11-146, December 2010, summary.
[11] American Council on International Personnel, "Comments on Proposed Rules at 73 Fed. Reg. 33374 (June 12, 2008)," August 11, 2008, as cited in "Statement of Tyler Moran, Policy Director, National Immigration Law Center," before the House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, Hearing on the Legal Workforce Act, June 15, 2011, p. 6.
[12] GAO-11-146, December 2010, p. 19.
[13] "Statement of Tyler Moran, June 15, 2011, p. 5.
[14] GAO-11-146, December 2010, p. 19.
[15] Ibid., p. 16.

FINES IN BILL COULD PUT COMPANIES "OUT OF BUSINESS"

While most attention in H.R. 2164 has focused on the legislation's E-Verify mandates, H.R. 2164 contains extraordinary increases in penalties that could put employers out of business – whether or not they employ illegal immigrants. Elected officeholders voting for this bill would expose business owners to the genuine risk of losing their livelihoods and companies years in the making because of a failure to follow government-mandated procedures.

In general, Section 8 of H.R. 2164 multiplies by between two and ten existing fines related to immigration violations in Section 274A of the Immigration and Nationality Act. For example, the fine for each "unauthorized alien" goes from $2,500 to $5,000 for, in essence, a first offense. If an employer is subject to more than one cease and desist order for hiring, recruiting or referral violations, the fines would go from not less than $3,000 to not less than $10,000 and "not more than" $25,000 (from the current $10,000).[16]

Section 8 of H.R. 2164 sends violations, previously considered paperwork violations, through the roof. Civil monetary penalties climb from "an amount not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred," to "not less than $1,000" and "not more than $25,000."[17]

Immigration attorney Greg Siskind points out that it's not uncommon for an employer to get fined tens of thousands of dollars for essentially paperwork violations, such as not documenting well or consistently I-9 verification forms. "Most attorneys can't imagine their clients staying in business if they had to pay fines ten times that amount."[18] The prospect of enormous penalties can compel individuals and businesses to agree to lesser penalties regardless of fault or guilt. Massive paperwork fines can be assessed by the federal government even if every worker at an establishment turns out to be working there legally, say attorneys.

In Section 5 of H.R. 2164, the legislation provides a good faith defense for employers that use E-Verify. However, for example, as Greg Siskind points out, "The good faith defense is not available to employers who fail to verify existing employees when they become subjected to the E-Verify system."[19] In fact, it appears there are a variety of ways in which an employer, particularly a small business owner, can be tripped up by the legislation and potentially be forced to close his or her doors or at least lay off employees to survive.

Section 8 of H.R. 2164 states, "`Failure by a person or entity to utilize the employment eligibility verification system as required by law, or providing information to the system that the person or entity knows or reasonably

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[16] Section 8 of H.R. 2164 and Section 274A of the Immigration and Nationality Act.
[17] Ibid.
[18] Interview with Greg Siskind.
[19] Greg Siskind, "Summary of the Legal Workforce Act," June 2011. See Section 8 of H.R. 2164.

believes to be false, shall be treated as a violation of subsection (a)(1)(A)." Subsection (a)(1)(A) reads "It is unlawful for a person or other entity (A) 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 . . ."[20]

This means that an employer failing to use E-Verify in the situations required by H.R. 2164 is considered under the law as having hired an illegal immigrant even if the employer has no illegal immigrants or even foreign-born individuals working in the business. It would be easy to see how a family-run business, for example, would run afoul of this provision.

Circumstances come to mind where businesses could be placed at great risk. For example, a business does not need to use E-Verify in the case of an independent contractor. However, imagine the following scenario: The Department of Labor accuses, successfully, an employer of misclassifying individuals as independent contractors, rather than employees. In such a scenario, an employer might be faced with violations of the immigration code for not having used E-Verify for employees, even though the employer did not do so because at the time it considered the individuals to be independent contractors. The fines could be substantial in such cases.

It is surprising that conservative members of Congress, who criticize Department of Labor investigators for being overzealous at times, cannot foresee how businesses could find themselves in great peril in how they classify workers due to the provisions of H.R. 2164. Aggressive federal investigators will note the high fines established by H.R. 2164 when pursuing such cases.

Another scenario could involve confusion as to whether or not existing employees need to be verified. Some employers must do so under H.R. 2164 under certain circumstances yet may not be aware of this provision of the law. We should remember that companies are in business to turn a profit and sell products and services, not to read government regulations and immigration statutes. Yet few attorneys would recommend ignorance of the law as a good defense.

BAD LAWS BEGAT MORE BAD LAWS

The primary reason some national business groups have announced support for H.R. 2164 is that it contains a provision to preempt state laws and the potentially differing standards or rules on E-Verify in those states. This became important after the U.S. Supreme Court ruled Arizona's mandatory E-Verify law was constitutional, citing, in part, the state's authority over business licensing. Section 6 of H.R. 2164 contains the following:

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[20] Section 8 or H.R. 2164; Section 274A of the Immigration and Nationality Act.

Section 274A(h)(2) of the Immigration and Nationality Act (8 U.S.C. 1324a(h)(2)) is amended to read as follows:

`(2) PREEMPTION- The provisions of this section preempt any State or local law, ordinance, policy, or rule, including any criminal or civil fine or penalty structure, insofar as they may now or hereafter relate to the hiring, continued employment, or status verification for employment eligibility purposes, of unauthorized aliens. A State, locality, municipality, or political subdivision may exercise its authority over business licensing and similar laws as a penalty for failure to use the verification system described in subsection (d) to verify employment eligibility when and as required under subsection (b).'.[21]

While it is understandable businesses that operate in several states would want one standard, it does not necessarily follow that means Congress must expand mandatory E-Verify beyond the current roster of states. While as of June 2011 at least 17 states required the use of E-Verify in some form, only some of those states have mandated that all private businesses, regardless of size, must check all new hires through E-Verify.[22]

None of the largest states – California, Texas, New York, Florida, or Illinois – have required all private employers to use E-Verify. Passage of H.R. 2164 would do so. Today approximately 250,000 employers are enrolled in E-Verify. However, there are an estimated 5.5 million employers that employ at least one individual. That means H.R. 2164 would put in place an enormous expansion of the system in a brief time period.[23] It should be possible to craft a narrow legislative provision that preempts state law without mandating all employers in America use E-Verify.

AGRICULTURE THROWN UNDER THE BUS

One of the most open secrets in immigration is that the vast majority of field workers in America are working here illegally. One-half to two-thirds of crop workers admitted they were not working legally in the United States in interviews for a Department of Labor survey, which means the actual proportion of illegal immigrants in the agricultural labor force is likely much higher.[24] Cognizant of this fact, H.R. 2164 attempts to appease employers in the agricultural sector by delaying mandatory E-Verify for three years for agricultural workers.[25] Agricultural employers have viewed the delayed implementation as a poor tradeoff for the certainty of future serious difficulties in hiring workers.

"Farmers are concerned that mandatory E-Verify legislation without an effective program to assure a stable, legal labor force could severely handicap a business that is important to California's economic recovery," according to California Farm Bureau Federation President Paul Wenger. "California's high-value agriculture is labor intensive

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[21] Section 6 of H.R. 2164.
[22] National Conference of State Legislatures.
[23] Statement of Tyler Moran, June 15, 2011, p. 10.
[24] *The National Agricultural Workers Survey*, Employment and Training Administration, U.S. Department of Labor, 2005, chapter 5.
[25] Section 2 of H.R. 2164.

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and each job in the field supports two to three jobs in related businesses. If farmers are unable to hire those fieldworkers, the impact would be felt in towns and cities across California."[26]

Growers are not convinced the bill's provision that allows a seasonal worker returning to the same employer to avoid E-Verify will be effective. "If we can't convince Congress that agriculture needs a viable worker program in response to a mandatory, universal E-Verify requirement, we are headed for a train wreck," Little said. "There will simply be no way to plant, cultivate and harvest the high-value commodities we grow in California without it."[27] (The current H-2A temporary visa category for agricultural workers is considered bureaucratic and unable to meet the needs of employers, according to growers, and is reflected in the relatively low use of the category.)

The problem is not just California. In Georgia, which has already seen a state crackdown on illegal immigration, farmers are complaining about an absence of workers and lost crops. According to Bryan Tolar, president of the Georgia Agribusiness Council, farms in Georgia have lost $300 million and may lose up to $1 billion without sufficient workers.[28]

The only response from state has been Governor Nathan Deal's program to send former convicts to farms to replace experienced immigrant farm laborers. Given Georgia's history, this has evoked ridicule and scorn in some quarters. Atlanta's former mayor Shirley Franklin has written, "The suggestion of sending probationers into the fields to solve our self-inflicted economic wound is nothing more than retrogressing to an earlier shameful time in our state's history of victimizing hundreds of mostly black men and condemning them to near slavery, while the rest of us watch silently."[29]

The irony of H.R. 2164 mandating E-Verify but with no improved way to hire legal workers and legalize the existing agricultural labor force is that legal visas have already proven to be quite effective in reducing illegal immigration. After enforcement actions by the Immigration and Naturalization Service (INS) were combined with an increase in the use of the Bracero program for Mexican farm workers, illegal entry, as measured by INS apprehensions at the border, fell by an astonishing 95 percent between 1953 and 1959. This demonstrated how access to legal means of entry could affect the decision-making of migrant workers.[30]

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[26] Christine Souza, "Bill in Congress Would Require Use of E-Verify System," California Farm Bureau, June 22, 2011.
[27] Ibid.
[28] Reid J. Epstein, "Ga. Immigrant Crackdown Backfires," *Politico*, June 22, 2011.
[29] Ibid.
[30] See Stuart Anderson, *Immigration* (Denver, Co: Greenwood, 2010), pp. 93-97.

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SCANT EVIDENCE BILL WILL LEAD TO A SUBSTANTIAL DECREASE IN ILLEGAL IMMIGRATION AS PROMISED

Robert Frost once wrote, "The woods are lovely, dark and deep. But I have promises to keep. And miles to go before I sleep."[31] Promises are lovely things but sometimes, despite intentions, they cannot be kept. In 1996, the chief sponsor of a 300-plus-page bill designed to crack down on illegal immigrants promised members on the House floor, "This bill will reduce illegal immigration."[32] It did not. The illegal immigrant population in the United States increased from 5 million in 1996 to approximately 11 million today.[33] Coincidentally, that same member of Congress, House Judiciary Committee Chair Lamar Smith (R-TX), is the author of H.R. 2164 and has predicted (or promised) making E-Verify mandatory would open up millions of jobs for Americans by preventing illegal immigrants from working.[34]

There is no need to pick on one member of Congress, who undoubtedly was as sure in 1996 as he is today, along with his allies, that passing enforcement measures alone will reduce illegal immigration. The problem is that time and again reality and unintended consequences have intruded, whether in 1986, 1996, or with the numerous enforcement-only measures pursued since then. Over the years, enhanced border enforcement – increasing the authorized level of Border Patrol Agents from 5,000 to 20,000 in 15 years – has made it more difficult to enter the United States. However, that has encouraged individuals to stay in America after making it across the border, rather than risk traveling back and forth, turning previously "circular" migration into permanent settlement in many cases.[35]

One would think if Congress planned to make it mandatory to use E-Verify in all workplaces, then we would have solid evidence E-Verify would dramatically reduce the illegal immigration population in the United States. Instead, The record to date of E-Verify is one of ineffectiveness, with about half of illegal immigrants submitted to E-Verify shown incorrectly to be authorized to work by the system. In a December 2009 report for the Department of Homeland Security, the consulting group Westat found the following: "Due primarily to identity fraud, the inaccuracy rate for unauthorized workers is approximately 54 percent. Approximately 3.3 percent of all E-Verify findings are for unauthorized workers incorrectly found employment authorized and 2.9 percent of all findings are for unauthorized workers correctly not found employment authorized. Thus, almost half of all unauthorized workers are correctly not found to be employment authorized (2.9/6.2) and just over half are found to be

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[31] Robert Frost, "Stopping by Woods on a Snowy Evening."

[32] *Congressional Record*, March 21, 1996.

[33] Illegal immigration population numbers obtained from Immigration and Naturalization Service and Department of Homeland Security.

[34] Opening statement of Rep. Lamar Smith before the House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, Hearing on the Legal Workforce Act, June 15, 2011.

[35] Anderson, *Immigration*, p. 101.

employment authorized (3.3/6.2). Consequently, the *inaccuracy rate for unauthorized workers* is estimated to be approximately 54 percent with a plausible range of 37 percent to 64 percent."[36]

It is revealing that the authors of the Westat report did not find the results surprising or alarming. They found the results expected based on the known shortcomings in E-Verify. The Westat report concluded, "This finding is not surprising, given that since the inception of E-Verify it has been clear that many unauthorized workers obtain employment by committing identity fraud that cannot be detected by E-Verify."[37]

The Westat analysis deals only with illegal immigrants whose names are sent through E-Verify and are able to thwart the system. The analysis does not deal with the more obvious ways around E-Verify, such as simply not submitting names in the first place to E-Verify or obtaining services from individuals who are not your employees. One issue is whether the premise of E-Verify is based on a coherent narrative on how employers conduct themselves. On the one hand, critics of immigration have contended that employers purposely skirt the law in order to hire illegal immigrants for "cheaper labor." This implies employers knowingly hire illegal immigrants. On the other hand, the premise of E-Verify is that employers all want to comply with the law. This raises a question: If there are employers that intend to hire illegal immigrants, won't they be able to get around the E-Verify mandate simply by not submitting the names of possible illegal immigrants to the federal computer database?

An analysis from the Congressional Budget Office assumes that if E-Verify is effective, it would mostly be effective not in driving illegal immigrants from the country but in pushing such workers "off the books" and into more informal jobs. That would put more of the U.S. economy into the "black market."[38] Will this be the next unintended consequence of an enforcement-only immigration policy?

The primary solution to illegal immigration, one that has been tried only sporadically in our nation's history, is to provide more legal visas for individuals to work in lower-skilled jobs. This can be done in a number of ways, whether through new temporary visas, work permits as part of a bilateral agreement with Mexico and other countries, and/or as part of a package of legalization that includes workers currently inside the country.[39] It is ironic that many members of Congress who favor market-oriented solutions – and less government – on other issues, eschew that approach in favor of failed "big" government solutions on immigration.

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[36] Westat, *Findings of the E-Verify Program Evaluation,* Report Submitted to the U.S. Department of Homeland Security, December 2009, pp. xxx-xxi.
[37] Ibid.
[38] CBO Estimate of the Budgetary Effects of H.R. 4088, the Secure America Through Verification and Enforcement Act of 2007, as introduced on November 6, 2007, and letter to the Honorable John Conyers Jr. from Peter R. Orszag, Director, Congressional Budget Office, April 4, 2008.
[39] Anderson, *Immigration*, chapter 4.

INCREASED SPENDING, LOSS OF TAX REVENUE AND MANY NEW GOVERNMENT WORKERS

If a member of Congress is genuinely interested in cutting the debt and reducing the size of government, then supporting mandatory E-Verify is a poor policy choice.

Examining a bill in 2008 to make E-Verify mandatory, the Congressional Budget Office (CBO) estimated mandating E-Verify nationwide would increase federal spending by approximately $6 billion from 2009 to 2013 and by about $12 billion from 2009 to 2018. This includes an estimate of over $3 billion in costs associated with the employment verification system from 2009 to 2018 and about $9 billion during the same period for SSN (Social Security Number) verification.[40]

Making E-Verify mandatory would necessitate at least hundreds of new government employees among U.S. Citizenship and Immigration Services, the Social Security Administration, and Immigration and Customs Enforcement.

Given that E-Verify is unlikely to reduce illegal immigration in a manner that will please critics of immigration, its lack of success is likely itself to lead to additional costs, including a legislative response in the form of a robust biometric system, as noted earlier. "Costs for a biometric national ID system could easily top $100 billion," noted the Cato Institute's Jim Harper.[41]

The Congressional Budget Office analysis of the Secure America Through Verification and Enforcement Act of 2007 found it would result in a loss of over $17 billion in tax revenue, caused mainly by pushing illegal immigrants into the underground economy. "CBO and the Joint Committee on Taxation (JCT) estimate that enacting the legislation would: Decrease federal revenues by $17.3 billion over the 2009-2018 period." The analysis explained: "The decrease largely reflects the judgment that mandatory verification of employment eligibility through the E-Verify system would result in an increase in the number of undocumented workers being paid outside the tax system. In particular, JCT anticipates that some employers currently withholding income and employment taxes from the wages of undocumented workers and reporting these amounts to the Internal Revenue Service through the use of an Individual Tax Identification Number (ITIN) or other employee identification number would no longer withhold or report such taxes."[42]

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[40] CBO Estimate of the Budgetary Effects of H.R. 4088, the Secure America Through Verification and Enforcement Act of 2007.
[41] "Jim Harper, Cato's Director of Information Policy Studies, Answers Some Key Questions About a National ID Card," *Immigration Reform Bulletin*, the Cato Institute, April 2010.
[42] CBO Estimate of the Budgetary Effects of H.R. 4088, the Secure America Through Verification and Enforcement Act of 2007.

BILL LAYS GROUNDWORK FOR NATIONAL ID

H.R. 2164 anticipates E-Verify will be ineffective in preventing illegal immigrants from obtaining work in the United States. Section 11 of the bill establishes a "Biometric Employment Eligibility Verification pilot program." The bill states: "Not later than 18 months after the date of the enactment of the Legal Workforce Act, the Secretary of Homeland Security, after consultation with the Commissioner of Social Security and the Director of the National Institute of Standards and Technology, shall establish by regulation a Biometric Employment Eligibility Verification pilot program (the `Biometric Pilot'). The purpose of the Biometric Pilot shall be to provide for identity authentication and employment eligibility verification with respect to enrolled new employees which shall be available to subject employers who elect to participate in the Biometric Pilot."[43]

In an op-ed in the *Washington Post* op-ed, Senators Charles Schumer (D-NY) and Lindsey Graham (R-SC) made it clear they would plug any holes in E-Verify with a National ID card: "We would require all U.S. citizens and legal immigrants who want jobs to obtain a high-tech, fraud-proof Social Security card. Each card's unique biometric identifier would be stored only on the card; no government database would house everyone's information. The cards would not contain any private information, medical information or tracking devices. The card would be a high-tech version of the Social Security card that citizens already have."[44]

Under the Schumer-Graham proposal, not only would Americans need the cards, but employers would be required to use them when hiring: "Prospective employers would be responsible for swiping the cards through a machine to confirm a person's identity and immigration status. Employers who refused to swipe the card or who otherwise knowingly hired unauthorized workers would face stiff fines and, for repeat offenses, prison sentences," write Schumer and Graham.[45]

Jim Harper of the Cato Institute has explained the problems with such a system: "To get their National ID, American citizens would have to locate identity documents buried deep in old files, ordering new birth certificates and such when these documents have been lost. Americans would spend hours in line waiting to be fingerprinted or digitally scanned into the system. And Americans would have to make multiple trips to enrollment centers when their papers were found to be out of order, taking time away from work, family, and leisure to get their national IDs. The Department of Homeland Security estimated that implementation of the REAL ID Act would cost over $17 billion dollars. That was a modest proposal compared to the biometric systems now being proposed."[46]

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[43] Section 11 of H.R. 2164.
[44] Charles Schumer and Lindsey Graham, "The Right Way to Mend Immigration," *The Washington Post*, March 10, 2010.
[45] Ibid.
[46] *Immigration Reform Bulletin*, April 2010.

INDIVIDUALS MAY NOT KNOW WHY THEY DIDN'T RECEIVE A JOB

One of the worst things that could happen to individuals legally authorized to work in America is if an employer (or employers) "pre-screens" them and decides not to offer them a job because the government database reports an individual is not confirmed as a legal worker. Given the perceived problem of training an individual and discovering later the worker cannot stay on the job, it is understandable employers might wish to "pre-screen" in this manner. The problem is that the tentative nonconfirmation an employer receives may indicate an error in the database, not that a potential new hire is an illegal immigrant. The employer has no way of knowing which is the case and may find it's much easier just to turn to another applicant.

To guard against this situation, current protocols for E-Verify prohibit employers from pre-screening applicants. Employers are only supposed to submit an individual's information to E-Verify after he or she is hired. However, previous reports indicate employers do not scrupulously adhere to this rule, whether out of ignorance or finding the rule makes no sense or is not enforced.

There is enough data on E-Verify to conclude that employers pre-screen many prospective hires, and even current employees, and do not routinely give such individuals an opportunity to correct their records in government databases. Westat discovered in its analysis of E-Verify that many employers pre-screen job applicants and about one third of those applicants are not offered jobs. And, according to Westat, nearly half of the applicants went two months or more before landing another job.[47]

"U.S. Citizenship and Immigration Services is generally not in the position to determine whether employers engage in activities prohibited by E-Verify, such as limiting the pay of or terminating employees who receive TNCs [tentative nonconfirmations], using E-Verify to pre-screen job applicants, or screening employees who are not new hires," concluded the Government Accountability Office. "USCIS may be able to detect some of these noncompliant behaviors in visits to worksites. However, workers who are wrongly terminated or suffer other adverse employment consequences because employers fail to follow the MOU receive no protection or remedies under federal law."[48]

H.R. 2164 permits employers to screen individuals prior to the start of work and after an offer of employment. Section 2 of H.R. 2164 states, "In no case shall an employer rescind the offer of employment to an individual because of a failure of the individual to have identity and work eligibility confirmed under this subsection until a nonconfirmation becomes final."[49] However, that sentence is only relevant if an employer does not "pre-screen"

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[47] Westat as cited in Statement of Tyler Moran, June 15, 2011, p. 5.
[48] GAO-11-146, p. 30.
[49] Section 2 of H.R. 2164.

the employee and decide it might be time-consuming or unwise to offer a job to someone who received an initial nonconfirmation.

SENATE BILL ACTUALLY MORE HARMFUL

S. 1196, sponsored by Senator Charles Grassley (R-IA) would be harmful in ways similar to H.R. 2164 but it includes additional provisions that would carry a more negative impact. First, the Senate bill requires a shorter, even less realistic timeframe, to make it mandatory that all employers in America, regardless of size, use E-Verify within one year of the Senate bill's date of enactment. Second, in section 3, the Senate bill states, "Any employer who uses a contract, subcontract, or exchange to obtain the labor of an individual in the United States shall certify in such contract, subcontract, or exchange that the employer uses E-Verify. If such certification is not included in a contract, subcontract, or exchange, the employer shall be deemed to have violated paragraph (1)."[50] Depending on how federal agencies interpret this provision, it appears this would complicate many (potentially millions of) transactions in America, including many normal business or even informal relationships, since a contract can be oral, as opposed to written.[51] Third, section 6 of the Senate bill requires every employer in America to use E-Verify on all "existing employees" within 3 years of the date of enactment.[52]

CONCLUSION: WHY NOT A SUNSET PROVISION IF MANDATORY E-VERIFY PROVES INEFFECTIVE?

Supporters of mandatory E-Verify in H.R. 2164 have promised the measure will have an enormous impact on reducing illegal immigration in the United States. This appears unlikely, as time and again predictions that new enforcement measures would reduce illegal immigration have failed to come true. Given the significant new burdens placed on employers and individuals alike by making E-Verify mandatory nationwide, it would be good public policy to sunset the bill's provisions if after three years of enactment the United States sees no dramatic improvement in reducing the country's illegal immigration population. That would show supporters of E-Verify are not simply hoisting another mandate on employers and workers but are instead demonstrating the courage of their convictions.

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[50] Section 3 of S. 1196.
[51] Interview with Greg Siskind.
[52] Section 6 of S. 1196.

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