Rethinking Immigration Proposals:
Security and Enforcement Gaps

The Honorable Stewart Baker

I'd like to begin this talk on immigration reform the way I sometimes begin meetings on the same topic at the Department of Homeland Security—by quoting the pop band Bowling for Soup. They sang about a woman named Debbie:

> Her two kids in high school,
> They tell her that she's uncool,
> Cuz she's still preoccupied,
> With nineteen, nineteen, nineteen eighty-five.

These days, DHS is a lot like Debbie. We too are preoccupied with the mid-'80s. Though if we were writing the song, we'd say we've got our attention firmly fixed—on nineteen, nineteen, nineteen eighty-six.

That was the year Congress enacted a major new immigration bill. By almost all accounts that law was a serious failure. So the question we're preoccupied with is: "What went wrong in 1986 and how can we make sure it doesn't go wrong again?"

Failure of 1986 Immigration Law

When most people think of the failures of 1986, they think of the millions of illegal immigrants who have come into the country since then, convinced that we won't ever enforce our immigration laws. That is a failure, and it has to be fixed.

But before we talk about the failure to enforce immigration laws, we need to remember that there are worse failures than that. There are people who want to slip into this country to do worse things than simply work. And the 1986 law let some of them in, too.

Talking Points

- Worksite enforcement is one of the toughest problems in immigration. The 1986 law made it difficult for employers to identify if a prospective employee was in the U.S. legally. Low penalties made it cheap for employers to violate the law.

- Whatever immigration bill Congress enacts must close the loopholes in the 1986 law.

- Tools like the Electronic Employment Verification System will enable employers to confirm the legitimacy of employees' identity documents. Unscrupulous employers that have built a new business model that depends on hiring illegal immigrants and exploiting them must face more stringent civil and criminal penalties.

- As gaps in enforcement are closed, the expected cost to businesses of employing illegal immigrants will rise and the demand for undocumented workers will be driven down.

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According to public sources, Mahmud Abouhalima was a New York City cabbie who went on to participate in the 1993 World Trade Center bombing. He became a legal resident thanks to some of the worst aspects of the 1986 law: its built-in potential for fraud and its willingness to elevate concern for the rights of illegal immigrants over the needs of law enforcement.

Abouhalima took advantage of a special program for agricultural workers that required little more than a false affidavit from a farmer. He and hundreds of others claimed to have worked on the farm, and in the end he was granted legal status.

But when the government began investigating his potential link to the terrorist activity, they couldn't use any of the information he turned over. The 1986 law forbade the government from using the information in Abouhalima's immigration file for any purpose other than adjudicating his application for legal status.

In fact, even today, Mahmud Abouhalima's file has a red sheet in it, with the notation that the information below the sheet is protected from disclosure for purposes other than adjudicating his application. That's why I had to use Wikipedia to write this speech. The Abouhalima story is actually even worse than you think. I'd love to tell you more, but my lawyers won't let me.

Thanks to this piece of red paper, investigators are kept in the dark about vital information. They won't know an alien's date and place of birth. They won't know any of his aliases. They won't know an alien's previous addresses. And they won't know about any Social Security numbers he previously used.

That's the kind of mistake we cannot afford to repeat. Because if we don't put security first, if we don't design our programs to prevent fraud, we will see another generation of Abouhalimas taking advantage of our mistake.

Tough Problem

Now I'd like to apply those lessons to one of the toughest problems in immigration: worksite enforcement. This is a tough problem because, as the President has said, most employers will follow the law if they can.

We have to give those employers the tools they need to comply. But we also have to give the Department tools to find and penalize the employers who think it's more profitable to flout the law. And we need to make sure we put security and preventing fraud at the top of our enforcement priorities.

That didn't happen in 1986. In that year, Congress made several mistakes that still haunt us. First, it gave employers no good way to determine whether a prospective employee was in the country legally or even whether the name and Social Security number he provided were valid.

Second, the 1986 law imposed only the most mechanical of obligations on employers, so it was easy for illegal immigrants to get around the law by showing a fake ID.

And finally, the penalties that the 1986 law put in place were far too low. They made it cheap for employers to violate the law and prohibitively expensive for DHS to enforce the law. Those are the three big problems that we need to address if we want to avoid another 1986.

Real Progress in Enforcement

Of course, it's not all bad news. DHS has started to make real progress—and achieve real results—in our worksite enforcement efforts. Let me give you a few numbers. Already this year, Immigration and Customs Enforcement has arrested 445 people on a variety of criminal charges in worksite investigations.

And we have apprehended another 2,700 of their illegal workers on administrative charges. That's a big improvement on the old record of the Immigration and Naturalization Service. There were a mere 24 arrests in worksite enforcement cases in FY 1999 and 25 in FY 2002. In addition, companies that break the law are paying record fines and penalties.

Last year, ICE received a $15 million payment in a single worksite case. This one payment was greater than the total of all administrative fines issued by the INS in the prior eight years.

Many businesses didn't think we were serious about workplace enforcement. But now that arrests and fines are up, and people are facing jail time, employers are starting to think twice about hiring illegal workers. Of course, we still have a ways to go

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to achieve the President's vision for comprehensive immigration reform.

Electronic Employment Verification System

But we can't do it alone. There are several things Congress can do this year to help fix the worst shortcomings of the 1986 law.

Let me start with the first failing of 1986: the lack of tools for employers to spot document fraud. We want to provide those tools, and the most promising is the Electronic Employment Verification System, or EEVS.

EEVS will enable employers to confirm that the documents they are given—say, Social Security cards—were in fact issued to persons with matching names and birthdates. But just providing such a database isn't enough.

We need to build the right incentives around the system, to make sure that it really works. An effective EEVS initiative needs at least the following elements:

- DHS should be able to direct employers in critical national-security fields to begin verifying all employees immediately. The same should go for businesses suspected of violating immigration law. Other employers could be added on a rolling basis, with full implementation within six years.

- We will strive to attain 100 percent accuracy with the EEVS. But some have proposed making the government liable for errors. This would put the federal government on the hook for massive amounts of back pay. And it would hurt enforcement badly. We have never before held any regulatory agency to a standard that says, in essence, "You had better be perfect, because you will pay damages every time you're not."

- Another thing we should not do is require the EEVS to automatically confirm, after a certain amount of time has passed, that a person is eligible to work. Illegal aliens should not be told they're authorized to work because of inadvertent delays—or, even worse, litigation—surrounding the EEVS.

Combating New Forms of Fraud

The second lesson from 1986 requires a bit more history. The 1986 act didn't ignore worksite enforcement. For the first time in our nation's history, it made hiring illegal immigrants unlawful. And it required businesses to verify workers' legal status by requesting documents that prove their identity and eligibility to work.

A good idea as far as it went. The problem is that Congress assumed it only needed one good idea. It left immigration authorities and employers with very little ability to adapt when illegal workers began to acquire fraudulent documents and serve them up to their employers.

The law required companies to verify that the documents "reasonably appeared" to be genuine on their face. However, other parts of the law told them they might be liable for discrimination if they asked questions about the document or the worker.

This put many employers in quite a predicament; they simply took documents at face value. Soon, there was a robust market for fake IDs, and it was nearly as easy to hire illegal immigrants as before the reforms. Even employers who *complied* with the law could not always avoid hiring illegal workers.

Last month, an agribusiness representative told the *Pittsburgh Tribune-Review*, "Many of our members have legally hired illegal workers." That's the problem in a nutshell. Employers are following the rules to the letter and still unwittingly hiring illegal workers.

And a few unscrupulous employers even have built a new business model that depends on hiring illegal immigrants and exploiting them. This undermines not only the immigration system, but the rule of law.

The lesson from this failure is that DHS—and employers—need the flexibility to adapt to new forms of fraud. The new measures that the Administration supports will make it far more difficult for illegal workers to get hired. But it is a near certainty that illegal workers will respond with new forms of fraud, some of which we have already seen. They will start stealing legitimate identities, for example, rather than just buying fake IDs.

DHS needs authority to respond to these new forms of fraud. And employers must partner with us to close the loopholes that allow the perpetrators of fraud to exploit the system.

Let me give you a few examples of what that means:

- Employers should be liable not just if they know they've hired an illegal worker, but if they "have reason to know" that they did so. This would prevent employers from hiding behind a quick glance at a document that could have easily been determined to be fraudulent by a closer look. And it would allow DHS to tell employers about new frauds so that employers could avoid those as well.

- Employers should not be able to hide behind contracting arrangements to avoid their responsibility to check documents. We have seen major cases in the last few years where businesses have claimed they had no responsibility for the fact that their contractors were using illegal labor, even though they were the ones reaping the benefit. Employers cannot outsource illegality by turning a blind eye to their contractors' misdeeds. We will continue to hold companies to the same "knowing or reason to know" standard for their contract employees as for their direct hires.

- DHS should have the authority to define—by regulation and with clarity—what constitutes good faith compliance with the law and to determine what "best practices" employers should use before they can defend themselves by pleading "good faith." That way, enforcers can look beyond the mere mechanical acts of compliance before granting that employer a "free pass" for an inadvertent hire.

- We should be able to require employers to take all reasonable steps to verify the employment eligibility of their workers, and give them the training and the tools to take those steps, including electronic verification. What's more, they should not look at the documents in a vacuum. We should continue to insist that businesses take into account other circumstances surrounding the hire. Have they hired someone in the last few months who shared the same Social Security number? Have they received a no-match letter under that Social Security number before? An employer should not be able to ignore these other warning signs and hide behind the document to avoid culpability.

- We should have the ability to go after employers who make it their business model to hire illegal immigrants. If a business is found to have hired more than a certain number of undocumented workers in a year, there should be a rebuttable presumption that it acted knowingly or in reckless disregard of the law.

- Employers should have to keep track of what they did to document a worker's status or resolve any doubts about it. For example, that's what they should do when Social Security tells them that the names and numbers don't match. Companies should retain these documents until the statutes of limitations have run out for document fraud and other related crimes.

- We've already begun to implement many of the things that we think should be in the law. We can't make them mandatory, as we'd prefer. But we can encourage law-abiding companies to adopt them as best practices. So, under the new IMAGE program—which stands for ICE Mutual Agreement Between Government and Employers—businesses will volunteer to participate in a pilot of the EEVS, adopt training programs to help spot fraudulent documents, and agree to undergo audits.

Meaningful Penalties Needed

Third, and finally, we cannot afford another law that makes violations cheap and enforcement expensive. We sorely need more stringent civil and criminal penalties for those who flout our immigration laws.

Needless to say, illegal immigrants who are arrested during enforcement actions are subject to removal. But it is not enough simply to deal with workers who violate the law; others will simply take their place. To be successful, we must address the draw. We must confront the businesses that break the law by employing them.

Only by subjecting companies to meaningful penalties will we be able to reduce the demand for illegal labor. If we are to improve on the 1986 bill, Congress should take a number of steps to bolster worksite enforcement:

- Fines for breaking the law should be significantly increased above their current paltry levels. We should have a tiered system so repeat offenders pay multiples of the base fines. And fines should be substantially higher for larger employers.

- To ensure that fines are actually collected, DHS should be able to assess a lien on the employer's property. These liens could be similar to those available under the Internal Revenue Code.

- Attorneys who win cases should not have more to gain than employers who hire illegal aliens have to lose. Businesses that succeed in litigation should not be allowed to recover more in attorney's fees than the maximum fines they are expected to pay. And if fees are offered to businesses that succeed on appeal, then the government should be able to recover fees on the same basis.

- Law enforcement is only as effective as the information on which it is based. This is why DHS needs more access to Social Security Administration data. This will help address identity and document fraud—for example, when aliens share Social Security numbers or use false names. This will help us target companies that are serial violators of immigration law. In a study last year, the GAO revealed that dozens of businesses reported the same Social Security number for more than a hundred employees. One particularly brazen company used the same Social Security number for some 2,500 employees in a single tax year. DHS agents cannot combat this rampant fraud unless they have more access to the Social Security Administration's "no match" data.

The recommendations I've presented today have a single goal in mind: developing a meaningful and practicable system of workplace enforcement. They will not, by themselves, solve the problem of illegal immigration.

The only way to solve this problem is comprehensive immigration reform, which also must include increased border enforcement, a temporary worker program to provide a legal way for willing aliens to perform needed jobs in the American economy, and a plan to address the 11–12 million undocumented workers already present in the country.

Driving Down Demand

But these recommendations will begin to close the many gaps left by the 1986 reform efforts. By raising the expected cost to businesses of employing illegal immigrants, these measures will help drive down the demand for undocumented workers. That drop in demand in turn will lead to a drop in supply.

With fewer and fewer American jobs available to illegal aliens, more and more will decide against entering this country unlawfully and will stay at home.

We at DHS have already seen that deterrence works. Aliens won't risk entering the United States illegally if their hoped-for benefits aren't there. Recently, we have ended "catch and release" for most removable illegal aliens caught along the Southwest border. Now, the aliens will be locked up and returned home.

Not surprisingly, we have seen a sizeable drop in the number of aliens crossing the border illegally. (Notice that I said "most," not "all" aliens. Because of a court order, we are barred from removing El Salvadorans on an expedited basis. Congress needs to close this loophole and authorize us to end "catch and release" across the board.)

Whatever immigration bill Congress chooses to enact must address these issues. Unless we adopt the policies we've discussed today, I fear that we may be setting ourselves to repeat the failures of 1986—failures that left America vulnerable to illegal immigration on a massive scale. We cannot allow this to happen again. The prosperity of this nation—to say nothing of her safety and security—depends on our success.

—*The Honorable Stewart Baker is Assistant Secretary for Policy at the U.S. Department of Homeland Security.*