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# **MEASURE FOR MEASURE: THE UNEASY MARRIAGE OF TAX POLICY AND IMMIGRATION REFORM**

Jacqueline Lainez \*

## INTRODUCTION

The United States has deeply contradictory policies related to undocumented immigrant workers. America's disparate immigration and tax policies include immigration directives that designate deportation proceedings for any immigrant living in the U.S. without proper authorization. Simultaneously, the government's enforcement of its tax laws requires undocumented workers to apply for a tax identification number in order to file taxes because, as undocumented immigrants, they do not qualify for a valid Social Security Number. Additionally, undocumented workers do not qualify for Social Security benefits, but they are subject to mandatory Social Security and Medicare payroll tax withholdings on their W-2 wages.

This results in a schizophrenic existence for undocumented immigrants living in the United States.<sup>1</sup> Undocumented immigrants financially contribute to their communities by way of income, employment and sales taxes.<sup>2</sup> However, in their undocumented state, they possess no political power while the United States simultaneously enforces incongruent tax and immigration laws.<sup>3</sup> The result is a fractured and tenuous marriage of opposing ideals.<sup>4</sup> These ideals, manifest as tax and immigration policy, will be explored herein.

In 1986, 1996 and in recent years, Congress passed immigration reform measures with varying degrees of success. Notably, all prior immigration legislation has failed to effectively address the issue of continued illegal immigration into the United States. Ultimately, this task may prove impossible because ending illegal immigration requires continuous funding to fuel the manpower necessary to (1) process the systemic backlog of immigration petitions; (2) deport those in the U.S. without proper documentation who fail to qualify for temporary or permanent resident status; (3) monitor the workplace to ensure only legal residents are working; and (4) secure the borders. Therefore, comprehensive reform remains a prominent, perennial issue for

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politicians, their constituents and the undocumented immigrant population. This article will analyze latent tax policy considerations related to the continued challenges of comprehensive immigration reform. However, due to the expansive intersection between tax and immigration policy, the discussion will be limited to three central themes.

Section I will discuss the almost furtive formation of tax policy as a result of the 1986 Immigration Reform and Control Act (P.L. 99-603) (IRCA). While IRCA resulted in the legalization of many immigrants, many others were left in IRCA's wake. A majority of immigrants unable to adjust their status under IRCA resorted to Social Security number (SSN) misuse in order to work. Subsequently, in an attempt to comply with immigration laws requiring submission of proof that they would not become public charges once legalized, these workers filed tax returns with incorrect or missing SSNs. This administrative nightmare led the IRS to develop the Individual Taxpayer Identification Number (ITIN) program. Armed with ITINs, undocumented workers can legally report earnings they are not legally permitted to earn.

Section II discusses the potential economic impact of future immigration reform specifically related to the Earned Income tax Credit (EITC). As comprehensive immigration reform continues to be an unsettled issue, a major consideration of reform is its economic impact on tax transfer programs such as the EITC. While the EITC program has enjoyed relative success for over thirty years, its redistributive nature makes some legislators nervous. Currently, undocumented workers are not eligible for the EITC, but once legalized and in receipt of an unrestricted SSN, they immediately become eligible to claim the EITC for the current and two previous tax years.<sup>5</sup> Therefore, some legislators fear if this tax policy remains in place, immigration reform will lead to a marked increase in EITC claims and result in an economic drain at a time when the nation can least afford it.

Finally, Section III addresses the immigration and tax policy divide regarding Social Security payroll taxes. This article will specifically explore the ongoing supplemental effect undocumented workers have on the Social Security Trust Fund. Legislators are now beginning to notice the contributions undocumented workers are making to Social Security through mandatory W-2 payroll tax withholding. Based on recent legislative proposals, if future immigration reform is implemented, it will likely contain provisions permanently separating undocumented workers from prior payroll tax contributions currently in the Social Security Earning Suspense File (ESF) that "contains

approximately 264 million mismatched Forms W-2 related to \$586 billion in wages through the end of Calendar Year 2004.”<sup>6</sup>

#### I. FASHIONING TAX POLICY OUT OF IMMIGRATION REFORM

The uneasy coexistence of tax and immigration policy is best illustrated in the context of immigration reform. Historical attempts at sweeping immigration reform have enjoyed qualified success, but prior legislation has left behind a sizeable population unable to qualify for legalization. The majority of these individuals are difficult to detect in society, leaving the government with the onus of expending funds in order to do so. The inability to make the necessary expenditures remains a significant impediment, a fact evidenced in recent reform.

Comprehensive immigration reform in the modern era occurred in 1986, when President Reagan signed IRCA.<sup>7</sup> IRCA was the result of a bipartisan effort commenced in 1981. Once passed, IRCA provided amnesty to undocumented immigrants who could prove they had migrated to the U.S. prior to January 1, 1982. The primary architects of the bill, a Democrat from Kentucky and a Republican from Wyoming, together crafted a “three-legged stool” consisting of:

- (1) tightened border security and workplace enforcement,
- (2) the H-2A temporary agricultural worker program and
- (3) a path to legalization.<sup>8</sup>

More than 20 years after IRCA’s passage, Congress continues to struggle to implement effective immigration measures. Meanwhile, IRCA’s drafters recognize that the lack of substantive advancement of the nation’s avowed immigration policy boils down to economics:

All administrations since 1986 have allocated funding and personnel resources more generously to the task of securing the border than to enforcing IRCA in the workplace. Why? One answer is that there are never enough federal budget resources. Another is that administrations of both stripes are loathe (*sic*) to disrupt economic activities—i.e., labor supply in factories, farms and businesses. And we know that disruptions in the labor supply are the natural, unavoidable and even desirable consequence of strong border and workplace enforcement.<sup>9</sup>

Tax policy was not an explicit concern for IRCA, but there was an immediate tax policy ramification borne out of IRCA’s enactment: amplified SSN misuse. Post-IRCA, counterfeit social security cards

became the golden ticket for immigrants ineligible for legalization under IRCA, most of them recent arrivals unable to meet the baseline test for legalization based on length of stay in the United States. IRCA's legislative history indicates SSN misuse preceded the legislation.<sup>10</sup> However, increased SSN misuse resulted from the shroud of legitimacy IRCA conferred upon undocumented workers. IRCA facilitated employers' acceptance of proffered documentation at face value and fraudulent documents have been said to "provide employers with crucial protection in the eyes of the law: companies can plausibly deny that they knew they were hiring people without legal permission to work."<sup>11</sup>

IRCA specifically sought to prevent future immigrants from working illegally by requiring employers to comply with Form I-9 procedures, requiring that prospective employees possess proper work authorization, usually a Social Security card and work permit.<sup>12</sup> IRCA's fundamental flaw, however, was the failure to provide employers with efficient tools to confirm an immigrant's purported legal status.<sup>13</sup> IRCA's reliance on Form I-9 documentation was easy to circumvent because "for less than \$50, immigrants can buy a set of fake documents—usually a Social Security card and green card, indicating permanent residency—to get a job."<sup>14</sup>

President Reagan believed IRCA's employer sanctions program would "remove the incentive for illegal immigration by eliminating the job opportunities which draw illegal aliens here."<sup>15</sup> Yet despite IRCA's stated objective of border enforcement and workplace security, IRCA authors Simpson and Mazzoli concede, "After two decades, the system is still not in place. Unfortunately, what is in place is the use of several different identifiers, which were meant to be temporary, and a flourishing underground economy engaged in creating fraudulent documents for illegal immigrants."<sup>16</sup>

#### A. *IRCA's Direct Effect on Social Security and Medicare Taxes*

Notwithstanding its best efforts, IRCA was unable to effectively deter the hiring of undocumented workers. Instead, workers in possession of falsified Social Security cards worked as "legal employees." This putative legal status required employers to withhold Social Security and Medicare taxes from employee paychecks and in turn remit these taxes to the IRS with the Social Security Administration (SSA) as the ultimate gate and record-keeper.

Generally, employers must adhere to standard payroll tax processes for all employees.<sup>17</sup> Specifically, employers must withhold applicable federal and state income taxes, along with Social Security and

Medicare taxes. In addition, employers are required by law to contribute their own equal portion of Social Security and Medicare taxes.<sup>18</sup>

As part of this process, employers provide SSA with W-2s and file Forms 941, 943 or Form 1040, Schedule H with the IRS. Once SSA receives wage information, it conducts a reconciliation process and documents wage records by tracing the earnings to the SSN holder, duly updating the individual earnings record.<sup>19</sup> However, this process becomes disrupted when wage records are submitted for employees who do not exist in SSA records, either because the SSN used to work has not been issued by SSA, or because the wages are reported under valid SSNs that have been misappropriated.

A recent report from the Treasury Inspector General for Tax Administration (TIGTA) states, “According to the FTC, 56,125 (22 percent) of 258,427 of all reported identity theft complaints in Calendar Year 2007 resulted from either the filing of a fraudulent tax return or the misuse of someone’s identity to obtain employment.”<sup>20</sup> Under these circumstances, Social Security and Medicare taxes cannot be traced to the actual person earning the wages, so these payroll taxes are placed into the Social Security Administration’s Earnings Suspense File (ESF). SSA Deputy Commissioner Lockhart testified in 2004 that “SSA is committed to significantly reducing the suspense file’s rate of growth as well as to reducing its current size. This commitment reflects SSA’s concern that, when earnings are not posted to an individual’s earnings record, the individual will not receive proper credit.”<sup>21</sup>

But in this stated commitment, there is an inherent conflict between policy ideals and economic realities. Does the government really want to reduce the monies in the suspense file? What effect will future immigration have on the earnings suspense file? Has Congress already anticipated these issues and formulated a bipartisan game plan? These and other policy questions surrounding Social Security issues will be addressed in Section III.

On the whole, Simpson and Mazzoli admit, “Since illegal immigration continues nearly unabated today, legitimate questions can be raised about the effectiveness of IRCA.”<sup>22</sup> They believe continued illegal immigration today is not due to any inherent deficiencies in their bill, but instead to improper execution of their bill’s provisions; execution largely dependent on continuous funding “for agents to investigate

workplace violations, for prosecution of employers who broke the law, for more Border Patrol agents, and for installing the latest in high-tech monitoring and surveillance equipment.”<sup>23</sup>

*B. Tax Policy vis-à-vis Immigration Policy*

One of the most interesting, likely unintended tax consequences of IRCA was the development of IRS policy on the Individual Taxpayer Identification Number (ITIN). The ITIN program was intended for nonresident aliens who had a U.S. tax-filing obligation. <sup>24</sup> In order to correctly process tax returns, the IRS requires a TIN, usually an SSN or Employer Identification Number (EIN).<sup>25</sup> Beginning in 1996, nonresident aliens ineligible for a SSN or EIN were directed to Form W-7, *Application for ITIN*.<sup>26</sup> The ITIN program remedied the IRS’ quandary of how to effectively process the post-IRCA flood of tax returns filled with incorrect or missing Social Security Numbers. The vast majority of tax returns received without valid SSNs belonged to immigrant workers who did not qualify for legalization under IRCA.

While immigrants legalized under IRCA received their own SSN, those unable to adjust their status made due with counterfeit SSNs or worked “under the table.” The IRS settled on the ITIN program as a rather ingenious policy solution to address the issue of resident aliens without a valid SSN, but with a tax-filing obligation.<sup>27</sup> It should be noted “resident alien” for tax purposes is an entirely different concept than “lawful permanent resident” for immigration purposes. A lawful permanent resident (LPR) for immigration purposes indicates that an individual is eligible to reside legally in the United States and is assigned a valid SSN. As holders of their own SSN, LPRs are outside the scope of the ITIN. Resident alien status is wholly unconnected to a person’s immigration status and is a term of art created by the tax code, indicating the person is under U.S. taxing jurisdiction in the same manner as U.S. citizens.<sup>28</sup>

Alas, this is at the heart of the undocumented worker’s schizophrenic existence in the United States. These workers recognize they should not be in the country without proper documentation, yet the same government that issues this decree provides them with their own ITIN in order to remit taxes on their income.

Despite this inherent divergence in government policy, the issuance of ITINs “increased dramatically, climbing from 1.1 million in 2001 to 1.5 million in 2002—a one-year increase of about 36 percent.”<sup>29</sup> Former Commissioner Everson has publicly supported the ITIN program, stating:

ITINs permit an undocumented taxpayer to file personal income taxes in the U.S. without a valid Social Security Number. Our job is to make sure that everyone who earns income within our borders pays the proper amount of taxes, whether that income is legally obtained and whether the individual is working here legally. If someone is working without authorization in this country, he/she is not absolved of tax liability. Instead of an SSN to file a tax return, that person frequently uses an Individual Taxpayer Identification Number.<sup>30</sup>

The Treasury Inspector General testified that an analysis of tax returns filed in tax year 2001 concluded 530,000 tax returns filed with ITINs by unauthorized workers reported gross income of \$10.7 billion, resulting in \$184 million in taxes owed and \$522 million in refunds.

When evaluating the efficacy of the ITIN as a revenue collection tool, Commissioner Everson stated IRS estimates for tax filing periods between 1996 through 2003 indicated “the income tax liability for ITIN filers totaled almost \$50 billion.”<sup>31</sup>

### C. *IRCA’s Footprint*

More than two decades after IRCA’s passage, the undocumented immigrant population in America continues to grow, work and pay taxes. In the interim, immigration and tax laws continue to weave a complex web of policy contradictions that ultimately affect employers, undocumented workers, U.S. citizens and the fisc. IRCA and the IRS ITIN program illustrate that in the current fissured system, one measure often necessitates additional actions, usually as a stopgap. For the moment, IRCA and its progeny have provided just enough hope for undocumented workers and serves to encourage the filing of income taxes for immigration purposes. Undocumented immigrants know the U.S. government bans unauthorized employment. However, these workers also know that submitting tax returns to the government documents their (1) length of stay in the United States; (2) generation of sufficient income to sustain themselves and their families, making them unlikely public charges if legalized; and (3) good moral character as evidenced by their compliance with as many of the nation’s laws as possible, including its tax laws. <sup>32</sup>

Conversely, when undocumented immigrants are paid in cash due to lack of proper work authorization this results in the nonpayment of



Medicare, Social Security and federal and state income taxes. Consequently, a change in immigration policy permitting millions of undocumented workers in the country to work legally would have a significant impact on revenue.<sup>33</sup>

## II. IMMIGRATION REFORM AND THE EARNED INCOME TAX CREDIT

Code Sec. 32 governs the Earned Income Tax Credit (EITC). Largely credited to the Reagan administration,<sup>34</sup> it was initially developed under Nixon and first codified in 1975.<sup>35</sup> The EITC has redistributive effects as a negative income tax and as a public benefit administered through the tax code.<sup>36</sup> Politically popular and the result of bipartisan compromise, the EITC rewards the working poor by ensuring a yearly tax credit that, once claimed, will pull the individual or family above the poverty line.<sup>37</sup>

The EITC as a public benefit dictates that undocumented immigrant workers are ineligible to claim the credit.<sup>38</sup> This has emerged as one of the primary tax and revenue concerns related to potential immigration reform. Questions include whether reform should allow the EITC for undocumented aliens immediately after their adjustment of status or whether exceptions should be carved out in the name of the fisc.

### A. *EITC in the 110th Congress*

The 110th Congress revisited the perennial issue of comprehensive immigration reform. The main comprehensive reform bill under consideration, S. 1348, failed to go to a vote and cloture was attempted but ultimately unsuccessful. With the failure of S. 1348, comprehensive immigration reform was not realized during the 110th Congress. In its original form, the bill did not address tax considerations, but an amendment to the bill proposed by Senator Sessions was passed with the stated purpose:

To save American taxpayers up to \$24 billion in the 10 years after passage of this Act, by preventing the earned income tax credit, which is, according to the Congressional Research Service, the largest anti-poverty entitlement program of the Federal Government, from being claimed by Y39 temporary workers or illegal aliens given status by this Act until they adjust to legal permanent resident status.<sup>40</sup>

Senator McCain sponsored an amendment providing for the payment of back taxes by workers who adjust to permanent status. It was unanimously passed by the Senate and immediately folded into the text of the bill.<sup>41</sup> Similarly, pursuant to Senator Sessions' intervention, the text of S.1348 thereafter included a limitation related to the Earned Income Tax Credit.<sup>42</sup> The limitation harked back to a study performed by the Joint Committee on Taxation, discussed in detail below.

### *B. EITC in the 109th Congress*

Immigration reform debates throughout the 109<sup>th</sup> congressional sessions grew to a televised crescendo that ultimately resulted in passage of a bill. Unfortunately, the bill merely ordered the building of a wall between Mexico and the United States. This was a weak semblance of the comprehensive reform sought by those on both sides of the debate. The 109th Congress saw a total of 124 bills dealing with immigration reform.<sup>43</sup>

The most publicized immigration bill discussing the impacts of reform to the EITC was the "Comprehensive Immigration Reform Act of 2006", (S. 2611). On May 25, 2006, the Senate passed the bill with Senator Feingold stating the current immigration system was broken, but lauding the fact that the bill as passed by the Senate did not include any of the provisions that would have allowed the estimated 11 million to 12 million undocumented immigrants currently residing in the United States to gain legal status. Senator Feingold stated:

Mass deportation is not a realistic option. Neither is amnesty. This legislation would require those who are here illegally to come forward, pay hefty fines, pay taxes, learn English and civics, work, and wait in the back of the line—before earning the privilege of permanent resident status and ultimately a path to citizenship if they choose to pursue it. These core provisions remain in the bill, and that is critical.<sup>44</sup>

The bill, which included the controversial Ensign Social Security amendment, failed to come out of conference committee with a green light from the House.<sup>45</sup> The Ensign amendment had the following stated purpose: To ensure the integrity of the Earned Income Tax Credit program by reducing the potential for fraud and to ensure that aliens who receive an adjustment of status under this bill meet their obligation to pay back taxes without creating a burden on the American public.<sup>46</sup>

Whether the Ensign Amendment was political posturing for constituents remains to be seen, but the Amendment itself was sufficiently broad enough to bring into question exactly what the proposed protection of the EITC would actually entail.

Ultimately, the immigration bill that obtained full congressional approval was the “Secure Fence Act of 2006” (H.R. 6061). The bill was introduced in the House on September 13, 2006, and summarily passed by the House and Senate on September 14, 2006, with adequate assurances that the President would sign the bill.<sup>47</sup> The bill’s swift passage signified the 109th Congress felt behooved to pass what could only be classified as the specter of immigration reform in an effort to allay constituents.<sup>48</sup>

Passage of H.R. 6061 was intended to achieve operational control of the U.S.-Mexico border.<sup>49</sup> The bill contained no direct tax provisions and was unclear as to how soon the wall would be constructed. In fact, “shortly before Congress adjourned, the House and Senate gave the Bush administration leeway to distribute the money allocated for the fence to other projects, including roads, technology and other infrastructure items to support the Department of Homeland Security’s preferred option of building a “virtual fence.”<sup>50</sup> It has been reported “Republicans and Democrats alike acknowledged they were leaving the country’s immigration problems largely unresolved. The border security measures passed do not address the 11 million people living here illegally, the call for a guest worker program by businesses or the need for a verification program that would ensure that companies do not hire illegal workers.”<sup>51</sup>

### *C. Joint Committee on Taxation on the EITC*

Months before the Secure Fence Act was passed, the 109th Congress reviewed a hearing pamphlet prepared by the Joint Committee on Taxation (JCT) following the Senate’s approved version of the “Comprehensive Immigration Reform Act of 2006” (S. 2611). At the time, S. 2611 appeared promising, so the JCT report examined the bill’s treatment of tax credits, employer penalties and employment taxes.

The Ways and Means Committee was presented with the hearing pamphlet on July 26, 2006, where the Joint Committee specifically opined:

The legalization provisions of this bill have a number of tax consequences. The bill would increase the number of workers who are eligible to claim refundable tax credits. For example, the EIC requires that taxpayers and their otherwise qualifying children have a SSN that is valid for employment. As a result of the bill, it is expected that there will be an increase in the number of workers

and their children who will satisfy this requirement. It is expected that this will increase the amount of refundable tax credits claimed. Similarly, the guest worker provisions of the bill would increase the number of workers with withholdings for individual income and employment taxes and refundable tax credits.<sup>52</sup>

#### *D. Response to JCT Findings*

The Joint Committee points to both EITC costs and infers possible benefits from increased income and employment tax withholding. However, without supporting empirical data, the JCT report can only be accepted at face value. I suggest important follow up, including legislation requiring GAO and TIGTA studies to gauge true EITC costs, as well as tax and revenue benefits that could result from mass legalization.

Thus far, the legislative process has only incorporated sound bites from agency heads and broad studies identifying potential concerns. However, only detailed financial studies can determine whether increased claims of refundable tax credits, including the EITC, will result in an insupportable drain on the economy. An intensive study of the macroeconomic effects of prospective reform could assist in determining whether increased revenues could outweigh any corresponding outlays.

It has already been acknowledged that “[i]mmigrants play a vital role in the dynamic U.S. economy. ... A recent study estimated that U.S.-based workers from Latin America sent home \$45 billion in remittances in 2006, about 10 percent of their total earnings.”<sup>53</sup> This indicates that Latin American<sup>54</sup> workers alone earned approximately \$450 billion in the United States in 2006. On the same day the Joint Committee submitted their hearing pamphlet to Ways and Means, the Commissioner of the IRS physically testified before the Ways and Means Committee. Stressing tax considerations favoring immigration reform, he stated:

In TY 2004, we had 2.5 million ITINs filed with nearly \$5 billion in tax liability. That is why comprehensive reform is so necessary. It will allow these taxpayers as well as others who are not currently filing to become a more active part of our economic system. Failure to enact comprehensive reform could have negative consequences for tax administration if procedures are imposed on

employers and employees that have the effect of driving certain economic activities “underground.”<sup>55</sup>

Based on the testimony of then-Commissioner Everson, Treasury data and other published reports, it is arguable that undocumented workers in the United States contribute more to federal, state and local coffers than they cost. <sup>56</sup> Locally “most of the one million immigrants in the Washington region, regardless of legal status, pay taxes, according to a study conducted by the Urban Institute—with undocumented immigrants paying about half what the legal immigrants do.”<sup>57</sup>

While it is difficult to accurately quantify the costs of undocumented immigrants across the United States, a 2006 revenue analysis published by the Georgia Budget and Policy Institute (GBPI) estimated that the “average undocumented family in Georgia contributes between \$2,340 and \$2,470 in state and local sales, income and property taxes combined.”<sup>58</sup>

The GBPI study reported that state and local aggregate tax contributions from Georgia’s undocumented workers were in the range of \$215.6 to \$252.5 million.<sup>59</sup> The GBPI report noted immigrants pay more in federal taxes than they receive in benefits, but use more in state benefits than they contribute in taxes. Moreover:

The descendants of the first-generation immigrant correct that pattern and contribute more in taxes at both the federal and state level than they consume in services at both levels. Each generation successfully contributes a greater share due to increased wages, language skills and education.<sup>60</sup>

In the end, these studies, testimony and reports can all be pieced together to draw a host of conclusions. But these conclusions can be manipulated to conform to any particular bias. If Congress is serious about implementing future immigration reform, it must commission a comprehensive government-wide study incorporating Treasury, Social Security and Department of Homeland Security data. Anything short of exhaustive, applied research will ensure more of the same political partisanship responsible for our current splintered tax and immigration policy.

### III. IMMIGRATION REFORM AND THE SOCIAL SECURITY TRUST FUND

IRCA has been credited as a “great piece of legislation for Social Security’s finances.”<sup>61</sup> This is because despite whether undocumented workers file tax returns, as long as they work as W-2 employees, they directly pay taxes in the form of payroll or FICA (Social Security and

Medicare) taxes. Undocumented workers have no control over this process because employers are required by law to deduct these taxes directly from employee paychecks.<sup>62</sup>

Following IRCA, many immigrants unable to legally adjust their status worked with fraudulent documents. Whether employers know these documents are fraudulent doesn't matter, especially because the IRS officially provides that the exception from FICA taxes applied to temporary agricultural workers does not apply to undocumented immigrants working in the United States.<sup>63</sup> Therefore, under current law, it would be practically impossible to exempt undocumented immigrants working as W-2 employees from FICA taxes. To do so would require flagrant, extensive violations of employment and immigration laws. In fact, only undocumented aliens working for cash, like legal residents and U.S. citizens in the cash economy, are able to avoid payroll taxes, but they are still subject to virtually unavoidable sales taxes.

Thus, employers are responsible for deducting 7.65 percent of FICA taxes from employee paychecks. Unless the undocumented taxpayer has the opportunity to become a legal alien, or lawful permanent resident, complete with a government-issued SSN, these FICA taxes will never be properly credited to the employee's earnings record and will remain in a Social Security ESF. <sup>64</sup>

#### A. *Government Policy on the Earnings Suspense File*

The U.S. government is aware of the ESF and the contributions made by undocumented workers: "TIGTA estimated, for example, that 353,000 taxpayers could be identified as illegal aliens from IRS tax year 2000 data and that of these at least 265,000 had wage statements with invalid SSNs."<sup>65</sup> Additionally, according to "an analysis by the Government Accountability Office, about 17 percent of the businesses with inaccurate W-2's were restaurants, 10 percent were construction companies and seven percent were farm operations."<sup>66</sup>

Official statements indicate between 1937 and 2003, wage records numbering between 244 to 255 million accounting for \$421 billion to \$520 billion in earnings accumulated into the earnings suspense file.<sup>67</sup> James B. Lockhart III, Deputy Commissioner of Social Security, testified that, "historically, approximately 2 percent of all wage items for a given year Lockhart further confirmed that the suspense file's

growth over the years “points to the larger issue of the increase in illegal immigration and subsequent illegal employment.”<sup>69</sup>

According to Commissioner Lockhart, the government had taken active steps to reduce the size of the ESF:

We have removed more than 11 million W-2s from the suspense file and posted them to the correct earnings records. It is estimated that a total of 30 million items will be removed from the suspense file and credited to the records of individual workers through these new efforts. Despite all these efforts, over time the suspense file continues to grow. SSA’s Inspector General will testify later that this growth is due to “unauthorized work by non-citizens” and that stronger worksite enforcement is needed.<sup>70</sup>

Commissioner Lockhart’s testimony is brought into question when former President Bush had gone on the record about Social Security’s troubled finances, stating:

We’ve got more people who are going to be receiving benefits over time, with fewer payers into the system. And those who are receiving benefits will live longer and will receive more money. That says we’ve got a problem. It is a funding problem. In the year 2027, the federal government is somehow going to have to come up with \$200 billion more than the payroll tax to make sure we fulfill the promise. And the problem gets worse and worse. Starting in 2018, which isn’t all that far away, 13 years away from now, the system goes into the red. That means more money coming out of Social Security than going in. <sup>71</sup>

In light of the former President’s comments, it is no surprise that at least one recently proposed bill sought to exclude undocumented workers from claiming the payroll taxes they have contributed. H.R.2954 “Secure Borders FIRST (For Integrity, Reform, Safety, and Anti-Terrorism)” Act of 2007, designated for purposes of an individual’s quarters of coverage “such individual shall not be credited with any wages paid to such individual for services performed in the United States, or any self-employment income derived by such individual in the United States, if such services were performed, or such self-employment income was derived, while such individual (1) was not a citizen or national of the United States, (2) was not lawfully admitted for permanent residence in the United States, and (3) was not authorized to be employed in the United States.”<sup>72</sup>

*B. The Social Security Trust Funds*

A better understanding of the issues is facilitated by a breakdown of Social Security's accounting system:

“There are four separate trust funds. For Social Security, the Old-Age and Survivors Insurance (OASI) Trust Fund pays retirement and survivors benefits, and the Disability Insurance (DI) Trust Fund pays disability benefits. (The two trust funds are often considered on a combined basis designated OASDI.) For Medicare, the Hospital Insurance (HI) Trust Fund pays for inpatient hospital and related care. The Supplementary Medical Insurance (SMI) Trust Fund comprises two separate accounts: Part B, which pays for physician and outpatient services, and Part D, which covers the prescription drug benefit.”<sup>73</sup>

OASDI and HI are primarily funded through payroll taxes collected from employers, employees and the self-employed. In 2007, roughly 163 million workers had earnings subject to Social Security taxes and 168 million were subject to Medicare taxes. An immediate concern is growing demand for federal funds. Additionally, “in response to the ‘Medicare funding warning’ issued in the 2007 Medicare Trustees Report, President Bush submitted legislation in February 2008.

Because no further action has been taken as of the date of this report, another ‘Medicare funding warning’ is triggered.”<sup>74</sup> It is well known that former President Bush has publicly sounded the alarm about the state of Social Security, in the past declaring:

Some in our country think that Social Security is a trust fund—in other words, there's a pile of money being accumulated. That's just simply not true. The money—payroll taxes going into the Social Security are spent. They're spent on benefits and they're spent on government programs. There is no trust. We're on the ultimate pay-as-you-go system—what goes in comes out. And so, starting in 2018, what's going in—what's coming out is greater than what's going in. It says we've got a problem. And we'd better start dealing with it now. The longer we wait, the harder it is to fix the problem.<sup>75</sup>

The Social Security Administration explains that trust fund assets consist of Treasury securities so that payroll taxes are “in effect being lent to the federal government to be expended for whatever present purposes the government requires. In this indirect sense, one could say that the Social Security trust funds are being spent for non-Social Security purposes.”<sup>76</sup>



Former Federal Reserve Board Chairman, Alan Greenspan has testified on these ominous Social Security benefit issues and their connection to wage histories, stating:

Tax increases of sufficient dimension to deal with our looming fiscal problems arguably pose significant risks to economic growth and the revenue base. In the end, I suspect that, unless we attain unprecedented increases in productivity, we will have to make significant structural adjustments in the nation's major retirement and health programs. Our current, largely pay-as-you go social insurance system worked well given the demographics of the second half of the twentieth century. But as I have argued previously, the system is ill-suited to address the unprecedented shift of population from the workforce to retirement that will start in 2008.<sup>77</sup>

### *C. Increasing Productivity through Immigrant Labor*

Former Commissioner Greenspan's testimony stresses a concern that immigrant advocates have asserted for some time, that the American workforce is aging and retiring at greater rates than they can be replaced. The undocumented population is replacing some of these retirees. "Migrants to the United States have generally been drawn from the pool of relatively young workers. In 2005, for example, foreign-born persons who reported being in the United States for only one year (recent migrants) had a median age of 25, whereas the median age of native-born persons was 35."<sup>78</sup> Also in 2005, "foreign-born men had higher labor force participation rates than natives (81 percent compared to 72 percent)."<sup>79</sup>

The Social Security Earnings Suspense File is proof positive that undocumented immigrants are participating in the workforce. SSA notes that, "As of October, 2005, approximately 8.8 million W-2s (3.7 percent of the total) representing \$57.8 billion in wages remained in the suspense file for TY 2003."<sup>80</sup>

Therefore, not only are undocumented workers adding to productivity, they are bolstering government programs. If undocumented workers are denied the opportunity to adjust their status indefinitely, these monies in the ESF will be absorbed by the fisc. Conversely, if these workers are allowed to legalize their status, decisions must be made about whether they will be allowed to draw down the funds they contributed during their lifetime as employees.

Those who believe that legalization would therefore result in a tremendous drain on the federal budget should consider past governmental measures to

remedy shortfalls. In 1982, the assets of OASI were nearly depleted, but “no beneficiary was shortchanged because the Congress enacted temporary emergency legislation that permitted borrowing from other Federal trust funds and then later enacted legislation to strengthen OASI Trust Fund financing. The borrowed amounts were repaid with interest within 4 years.”<sup>81</sup>

Currently, the future of the Social Security Earning Suspense File is uncertain, but it is without question that undocumented immigrants’ Social Security earnings will be lost to them and any claim to Social Security benefits later in life will be barred without the opportunity to adjust their status. Without the possibility of immigration reform and legalization for millions of undocumented immigrants in the U.S., the Earnings Suspense File will presumably be allowed to grow ad infinitum while the misuse of SSNs borne out of necessity will continue.

#### CONCLUSION

During the 109th Congress, Commissioner Everson testified about the potential benefits of comprehensive immigration reform, stating:

As the Commissioner of the IRS, it is not my role to advocate public policy changes. However, as a former Deputy Commissioner at Immigration and Naturalization Service, I am sensitive to the need for a system of immigration that functions effectively and I am particularly sensitive to the interaction between the immigration system and the tax system. I recognize that comprehensive immigration reform can have positive impacts on tax administration. For example, the creation of a temporary worker program will likely result in additional taxpayers entering the system.<sup>82</sup>

Former Commissioner Everson’s testimony is particularly meaningful in light of his roles within the former Immigration and Naturalization Service (now Department of Homeland Security, “DHS”), and the IRS. He understood that the untenable divide between tax and immigration policy is something that must be addressed by legislation.

Moreover, the three major administrative agencies involved, the DHS, the SSA and the IRS, must embark on a concerted effort to address the vast inconsistencies where their respective policies collide. These agencies must collaborate with Congress to implement effective strategies to tackle their programmatic disparities.

If the DHS, SSA, IRS and Congress fail to do so in future sessions, the deep divide between tax and immigration policy will not mend itself. This will leave our nation of laws with a crumbling façade that will continue to deteriorate over time. Inaction through the passage of time will concurrently leave us with an increasingly aging workforce and a renewable population of undocumented immigrant workers, immigrants that are certain to experience a lifetime of unrelenting marginalization.

ENDNOTES:

1 WASHINGTON POST staff writers Pamela Constable and Marcela Sanchez penned an article discussing the local crackdown on immigrant day laborers, stating: Immigrants are finding fewer and fewer safe places to seek work. In Maryland, they are welcome at the network of job placement centers operated by the nonprofit agency CASA of Maryland, but in Virginia, the only such center, in Herndon, was besieged by controversy and shut its doors last month, leaving workers to fend for themselves. *Day Laborers Squeezed on Two Sides Legal Crackdown, Job Slump Coincide*, WASH. POST, Oct. 10, 2007, at A01.

2 One report concentrating on the Chicago area immigrant population stated, “Based on these estimates, undocumented immigrants in the Chicago metro area spend approximately \$2.89 billion annually from their earnings. These annual expenditures of \$2.89 billion generate an additional \$2.56 billion in local spending. Therefore, the direct, indirect, and induced spending of undocumented workers accounts for a total of \$5.45 billion spent annually in the metro area economy.” CTR. FOR URBAN ECON. DEV., UNIV. OF ILL. AT CHICAGO, CHICAGO’S UNDOCUMENTED IMMIGRANTS: AN ANALYSIS OF WAGES, WORKING CONDITIONS, AND ECONOMIC CONTRIBUTIONS (2002), [www.uic.edu/cuppa/uicued/Publications/RECENT/undoc\\_full.pdf](http://www.uic.edu/cuppa/uicued/Publications/RECENT/undoc_full.pdf).

3 The President’s Economic Report admitted: “Although immigrants continue to make positive contributions to our nation and our economy, our current immigration laws have proven difficult to enforce and are not fully serving the needs of the American economy.” ECONOMIC REPORT OF THE PRESIDENT 189 (2007).

4 Kathleen Miller wrote an article for THE EXAMINER discussing community tensions and the economic effect on local businesses as a result of local crackdowns: “I agree that this area needs cleaning up,’ Nora Portillo, who operates the cash register at El Pollo Dorado, said in Spanish. ‘But for us, it’s bad for business. Just the fact that police are

asking people what they are doing here scares some of our customers away. I hope we can still pay the rent.” Kathleen Miller, *Police Crack Down on Crowds, Day Laborers at Md. Strip Mall*, THE EXAMINER, Feb. 26, 2008.

5 For EITC purposes, only Social Security Cards bearing no employment restriction are accepted. IRS Publication 596 notes: “If your social security card (or your spouse’s, if filing a joint return) says ‘Not valid for employment’ and your SSN was issued so that you (or your spouse) could get a federally funded benefit, you cannot get the EIC. An example of a federally funded benefit is Medicaid. If you have a card with the legend ‘Not valid for employment’ and your immigration status has changed so that you are now a U.S. citizen or permanent resident, ask the SSA for a new social security card without the legend.” IRS Publication 596, at 5 (2007), available at [www.irs.gov/pub/irs-pdf/p596.pdf](http://www.irs.gov/pub/irs-pdf/p596.pdf).

6 TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, OUTREACH HAS IMPROVED, BUT MORE ACTION IS NEEDED TO EFFECTIVELY ADDRESS EMPLOYMENT-RELATED AND TAX FRAUD IDENTITY THEFT 6 (2008), [www.ustreas.gov/tigta/auditreports/2008reports/200840086fr.pdf](http://www.ustreas.gov/tigta/auditreports/2008reports/200840086fr.pdf) (Reference Number: 2008-40-086).

7 Immigration Reform and Control (Simpson-Mazzoli) Act (P.L. 99-603), 100 Stat. 3359 (1986) (signed by President Ronald Reagan on Nov. 6, 1986).

8 Romano L. Mazzoli and Alan K. Simpson, *Enacting Immigration Reform, Again*, WASH. POST, Sept. 15, 2006.

9 *Id.*

10 Senator Moynihan (D-NY) submitted an amendment “[t]o require the Comptroller General of the United States to investigate ways to reduce counterfeiting of social security account number cards.” S.AMDT.610 Amends: S.1200 (submitted, proposed agreed to in Senate by Voice Vote on Sept. 13, 1985).

11 Eduardo Porter, *The Search for Illegal Immigrants Stops at the Workplace*, N.Y. TIME S , Mar. 5, 2006, available at [www.nytimes.com/2006/03/05/business/yourmoney/05view.html?\\_r=1&oref=slogin](http://www.nytimes.com/2006/03/05/business/yourmoney/05view.html?_r=1&oref=slogin).

12 Immigration Reform and Control (Simpson-Mazzoli) Act (P.L. 99-603).

13 Porter, *supra* note 11.

14 *Id.*

15 President Ronald Reagan, Statement on Signing the Immigration Reform and Control Act of 1986 (Nov. 6, 1986), *www.reagan.utexas.edu/archives/speeches/1986/110686b.htm* (last visited Feb. 6, 2009).

16 Mazzoli & Simpson, *supra* note 8.

17 There are exceptions as certain temporary workers are granted relief from FICA taxes. *See* Rev. Rul. 77-140, 1970-1 CB 301. The IRS has taken the official position that the exception from FICA taxes that applies to temporary agricultural workers should not apply to undocumented immigrants working in the United States.

18 Since 1990, the FICA tax rate has been 7.65 percent. This is the combined rate for Social Security and Medicare. The Social Security portion (OASDI) is 6.20 percent on earnings up to the applicable taxable maximum amount (\$94,200 for 2006 and \$97,500 for 2007). The Medicare portion (HI) is 1.45 percent on all earnings. Employees and employers each contribute 7.65 percent. Self-employed workers contribute the full 15.30 percent. *See* Social Security & Medicare Tax Rates, available at [www.socialsecurity.gov/OACT/ProgData/taxRates.html](http://www.socialsecurity.gov/OACT/ProgData/taxRates.html) (last visited Feb. 6, 2009).

19 The Social Security administration advises employers: “SSA can post employee wages correctly only when employers and submitters report employee wages under the correct name and SSN. Recording names and SSNs correctly is the key to successful processing of annual wage reports. It saves the employer and the administration processing costs and allows SSA to properly credit your employees’ earnings record. Credits to your employees’ earnings record are important in determining their future eligibility and payment of SSA’s retirement, disability and survivor benefits.” SOCIAL SECURITY ADMINISTRATION, *The Importance of Correct SSNs, in* SOCIAL SECURITY NUMBER VERIFICATION SERVICE (SSNVS) HANDBOOK, available at [www.ssa.gov/employer/ssnvs\\_handbk.htm#regin](http://www.ssa.gov/employer/ssnvs_handbk.htm#regin) (last visited Feb. 6, 2009).

20 TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, *supra* note 6, at 2.

21 James B. Lockhart, Deputy Comm’r for Soc. Sec., Testimony Before the House Committee on Ways and Means Subcommittee on Social

Security Subcommittee on Oversight Hearing on Individual Taxpayer Identification Numbers (ITINs), Social Security Numbers (SSNs), Wage Reporting, and the Suspense File (Mar. 10, 2004).

22 Mazzoli & Simpson, *supra* note 8.

23 *Id.*

24 “The Internal Revenue Code does not have a special classification for individuals who are in the United States without authorization. Instead, the Code treats these individuals the same as other foreign nationals—they are subject to federal taxes and classified for tax purposes as either resident or nonresident aliens. Resident aliens are subject to Social Security and Medicare taxes on wages (FICA taxes) and on self-employment income (SECA taxes) in the same manner as U.S. citizens. I.R.C. §§ 1402(b) and 3121(b).” ERIKA LUNDER, CONG. RESEARCH SERV., CRS UPDATES REPORT ON TAXATION OF ALIENS WORKING IN U.S. ORDER CODE RS21732 (2007).

25 The IRS Web site notes that Taxpayer Identification Numbers consist of Social Security Number “SSN”; Employer Identification Number “EIN”; Individual Taxpayer Identification Number “ITIN”; Taxpayer Identification Number for Pending U.S. Adoptions “ATIN”; and Preparer Taxpayer Identification Number “PTIN.” It is further noted: “The temporary IRS Numbers previously assigned are no longer valid. A TIN must be furnished on returns, statements, and other tax related documents.” IRS, [www.irs.gov/businesses/small/international/article/0,,id=96696,00.html](http://www.irs.gov/businesses/small/international/article/0,,id=96696,00.html).

26 Social Security Commissioner Lockhart testified before Congress on the ITIN program, stating: “IRS began assigning ITINs effective July 1, 1996. Subject to a 1997 Memorandum of Understanding between SSA and IRS, IRS agreed that ITINs will be nine digits beginning with the number ‘9’ and initially will have either ‘7’ or ‘8’ in the 4th position.” Lockhart, *supra* note 21.

27 The Internal Revenue Code does not directly address ITINs. ITINs are instead fleshed out in the regulations, providing “(iii) General rule for assigning number. Under procedures issued by the Internal Revenue Service, an IRS individual taxpayer identification number will be assigned to an individual upon the basis of information reported on Form W-7 (or such other form as may be prescribed by the Internal Revenue Service) and any such accompanying documentation that may be required by the Internal Revenue Service. An applicant for an IRS individual taxpayer

identification number must submit such documentary evidence as the Internal Revenue Service may prescribe in order to establish alien status and identity. Examples of acceptable documentary evidence for this purpose may include items such as an original (or a certified copy of the original) passport, driver's license, birth certificate, identity card, or immigration documentation." Reg. §301.6109-1(d)(3) (2008).

28 Current tax policy allows for *resident alien* status based on an individual's presence in the United States. Pursuant to Code Sec. 7701(b)(3) and(A)(i), "The second major test of residence (entirely independent of immigration status) is physical presence in the United States. A foreign national present in the United States for 183 or more days during the calendar year is a U.S. resident for that year. The substantial presence test has two forms, 'strong' and 'weak' specifically actual physical presence and substantial presence by carryover of days. United States residence cannot, however, result entirely from days carried forward from earlier years. A minimum physical presence of at least 31 days in the United States is required before substantial presence is ever triggered. It follows that the greatest constant-level number of days that can be spent in the United States year in and year out without triggering United States residence is 121. Repeated annual stays of 121 days eventually become measured as 181 1/2 under this extended substantial presence test, still below 183." JOSEPH ISENBERGH, *INTERNATIONAL TAXATION* 20–22 (Foundation Press 2000).

29 Pamela J. Gardiner, Acting Inspector Gen. for Tax Admin., Testimony Before the U.S. House of Representatives Committee on Ways and Means Subcommittee on Oversight Subcommittee on Social Security (Mar. 10, 2004). Since the ITIN program began in 1996 the IRS has taken extra measures, particularly after 9/11, to ensure that ITINs are being used for their intended purpose, namely, filing tax returns. Early in the program ITINs could be solicited simply by submitting a properly executed Form W-7 with accompanying documentation, such as a passport, or other official photo identification serving as proof of national identity. After 9/11, tax returns were required to accompany the ITIN application. This requirement, and the fact that the list of acceptable supporting documentation was significantly reduced from 23 to 11, does not appear to have decreased the number of ITIN applications.

30 Mark W. Everson, Commissioner of the IRS, Testimony Before the House Committee on Ways and Means (July 26, 2006).

31 *Id.*

32 "New INA section 245A(d)(2) states that no alien would qualify for lawful temporary or permanent resident status provided in that section if 'likely to become [a] public charge [ ].' This disqualification could be

waived by the Attorney General under certain circumstances. A likelihood that an applicant would become a public charge would exist, for example, if the applicant had failed to demonstrate either a history of employment in the United States of a kind that would provide sufficient means without public cash assistance for the support of the alien and his likely dependents who are not United States citizens or the possession of independent means sufficient by itself for such support for an indefinite period. New INA section 245A(a)(3) requires that an applicant for legalization establish that he has been continuously physically present in the United States since the date of the enactment' but states that 'brief, casual, and innocent absences from the United States' will not be considered a break in the required continuous physical presence." President Reagan, *supra* note 15.

33 RANDY CAPPS ET AL., THE CMTY. FOUND. FOR THE NAT'L CAPITAL REGION, CIVIC CONTRIBUTIONS: TAXES PAID BY IMMIGRANTS IN THE WASHINGTON, DC, METROPOLITAN AREA (2006).

34 "The 1986 tax law indexed the EITC for inflation, protecting workers against erosion in the credit's real value. Indexing, combined with expansions in eligibility, led to phenomenal growth in the program's size." STEVE HOLT, THE BROOKINGS INST., THE EARNED INCOME TAX CREDIT AT 30: WHAT WE KNOW 2 (2006), *available at* [www.brookings.edu/~media/Files/rc/reports/2006/02childrenfamilies\\_holt/20060209\\_Holt.pdf](http://www.brookings.edu/~media/Files/rc/reports/2006/02childrenfamilies_holt/20060209_Holt.pdf) (last visited Feb. 9, 2009).

35 *Id.*

36 "Many economists and lawyers have understood that transfers are negative taxes ... just like income taxes, they involve cash flows between private parties and the government, albeit going in the opposite direction." Daniel N. Shaviro, *Welfare, Cash Grants, and Marginal Rates*, 59 SMU L. REV. 835, 835 (2006).

37 Prof. Shaviro asserts that a poverty trap results from "rapidly phasing out transfers, such as TANF, Food Stamps, Medicaid, and the earned income tax credit ('EITC') ... As you leave poverty, you may rapidly lose many thousands of dollars worth of benefits, on top of also paying various positive taxes on your earnings." *Id.*, at 836.

38 The EITC incorporates an "Identification number requirement: No credit shall be allowed under this section to an eligible individual who does not include on the return of tax for the taxable year—(i) such



individual's taxpayer identification number, and (ii) if the individual is married (within the meaning of section 7703), the taxpayer identification number of such individual's spouse." Code Sec. 32(c)(1)(f) (2008).

39 "Temporary Workers In The 'Y' Program Face Strict Restrictions On Bringing Immediate Family Members To The U.S. The new 'Y' temporary workers are eligible only for three, two-year terms in the U.S. and must spend at least a year outside the country between each term." Press Release, Office of the Press Sec'y, *Fact Sheet: Ending Chain Migration Bipartisan Immigration Bill Reforms System To Focus Family Migration On Nuclear Family And Parents* (June 1, 2007).

40 Library of Congress, S.AMDT.1234, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SP01234:/bss/d110query.html>.

41 Library of Congress, SA 1190 (2007). The text of the amendments is as follows: "(3) Payment of income taxes.— (A) In General.—Not later than the date on which status is adjusted under this section, the alien establishes the payment of any applicable Federal tax liability by establishing that— (i) no such tax liability exists; (ii) all outstanding liabilities have been paid; Or (iii) the alien has entered into an agreement for payment of all outstanding liabilities with the Internal Revenue Service. (B) Applicable Federal Tax Liability.—For purposes of clause (i), the term 'applicable Federal tax liability' means liability for Federal taxes, including penalties and interest, owed for any year during the period of employment required by subparagraph (D)(i) for which the statutory period for assessment of any deficiency for such taxes has not expired. (C) IRS Cooperation.—The Secretary of the Treasury shall establish rules and procedures under which the Commissioner of Internal Revenue shall provide documentation to an alien upon request to establish the payment of all taxes required by this subparagraph. (D) In General.—The alien may satisfy such requirement by establishing that— (i) no such tax liability exists; (ii) all outstanding liabilities have been met; or (iii) the alien has entered into an agreement for payment of all outstanding liabilities with the Internal Revenue Service and with the department of revenue of each State to which taxes are owed."

42 Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007): "(v) Limitation—Provided further that an alien required to pay taxes under this subparagraph ... shall not be allowed to collect any tax refund for any taxable year before 2006, or to file any claim for the Earned Income Tax Credit, or any other tax credit otherwise allowable under the tax code, prior to such taxable year."

43 Library of Congress, <http://thomas.loc.gov/cgi-bin/query>.

44 S. 2611 [Page: S5334], 109th Cong. (2006).

45 Dustin Stamper, 2006 TAX NOTES TODAY (May 26, 2006). “Ensign’s amendment would bar illegal aliens from receiving tax refunds when settling back taxes, which the bill would require as a condition of citizenship. Doubling the blow, Senate Finance Committee Chair Chuck Grassley, R-Iowa, added to the manager’s amendment provisions that would force aliens to pay all outstanding tax liabilities when seeking a status adjustment, instead of liabilities for only three of the past five years, as originally required by the bill.”

46 Ensign’s Amendment No. 4136 is available *via* TAX ANALYSTS, *see* Doc 2006-10168.

47 Jonathan Weisman, *With Senate Vote, Congress Passes Border Fence Bill Barrier Trumps Immigration Overhaul*, WASH. POST, Sept. 30, 2006, at A01.

48 Carl Hulse, *A Build-a-Protest Approach to Immigration*, N.Y. TIMES, May 31, 2006, [www.nytimes.com/2006/05/31/washington/31immig.html?pagewanted=print](http://www.nytimes.com/2006/05/31/washington/31immig.html?pagewanted=print). “Through the Send-a-Brick Project, our constituents have found a solid way to communicate their feelings about illegal immigration.”

49 H.R. 6061, 109th Cong., at §2 (2006).

50 John Pomfret, *Fence Meets Wall of Skepticism: Critics Doubt a 700-Mile Barrier Would Stem Migrant Tide*, WASH. POST Oct. 10, 2006, at A03.

51 Carl Hulse and Rachel L. Swarns, *Senate Passes Bill on Building Border Fence*, N.Y. TIMES, Sept. 30, 2006.

52 JOINT COMM. ON TAXATION, PRESENT LAW AND BACKGROUND RELATING TO TAX ISSUES ASSOCIATED WITH IMMIGRATION REFORM, SCHEDULED FOR A PUBLIC HEARING BEFORE THE HOUSE COMMITTEE ON WAYS AND MEANS ON JULY 26, 2006 (2006) (reference number JCX-32-06).

53 ECONOMIC REPORT OF THE PRESIDENT, *supra* note 3.

54 The vast majority of unauthorized migrants had come from Mexico (56 percent, or 6.2 million) and elsewhere in Latin America (22 percent, or 2.5 million). Nearly half (5.4 million) of the unauthorized migrants were adult

males, with a little less than half (2.4 million) of the adult males residing without a spouse or children. *Id.*, at 199.

55 Everson, *supra* note 30.

56 Francine J. Lipman, *Taxing Undocumented Immigrants: Separate, Unequal and Without Representation*, 9 HARV. LATINO L. REV. 1 (2006) and 59 TAX LAW. 813 (2006).

57 S. Mitra Kalita, *Washington, Reaching for Legitimacy in the Immigrant Economy Networks Help Illegal Workers Find Jobs, Housing*, WASH. POST, Sept. 10, 2006, at A01.

58 SARAH BETH COFFEY, GA. BUDGET & POLICY INST., UNDOCUMENTED IMMIGRANTS IN GEORGIA: TAX CONTRIBUTION AND FISCAL CONCERNS (2006), available at [www.gbpi.org/pubs/garevenue/20060119.pdf](http://www.gbpi.org/pubs/garevenue/20060119.pdf).

59 *Id.*

60 *Id.*, at 3 (citing ECONOMIC REPORT OF THE PRESIDENT 107 (2005), [www.gpoaccess.gov/eop/](http://www.gpoaccess.gov/eop/)).

61 Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security With Billions*, N.Y. TIMES, Apr. 5, 2005.

62 “Section 1401 of the Internal Revenue Code requires the IRS to impose the Self-Employment Contributions Act (SECA) tax on self-employment income. The SECA tax is equivalent to the Federal Insurance Contributions Act (FICA) tax paid by both employers and employees. Like FICA, SECA includes contributions for both the Social Security and Medicare programs. SSA is required to maintain an accurate record of earnings information received from IRS and administer benefit programs based on this information.” OFFICE OF THE INSPECTOR GENERAL, SOCIAL SECURITY ADMINISTRATION, *Self-Employment Income Earnings Suspense File*, in AUDIT REPORT (2006) (reference number A-03-05-25038).

63 Rev. Rul. 77-140, 1970-1 CB 301.

64 A Legal Alien also known as a Lawful Permanent Resident (LPR). All immigrants are eventually issued a “green card” (USCIS Form I-551), which is the evidence of the alien’s LPR status. LPRs who are awaiting the issuance of their green cards may bear an I-551 stamp in their foreign passports. Department of Homeland Security, [www.dhs.gov/index.shtm](http://www.dhs.gov/index.shtm).

65 *Id.*

66 Porter, *supra* note 61. The 2007 Economic Report of the President confirmed these findings, stating: “In 2005, foreign-born men had higher labor force participation rates than natives (81 percent compared to 72 percent) Construction laborers, maids and housekeepers, janitors, and cooks are at the top of the foreign-born occupation list.” ECONOMIC REPORT OF THE PRESIDENT, *supra* note 3, at 195.

67 Jim McCrery, Chairman and a Representative in Congress from the State of La., Opening Statement of the Committee on Ways and Means (Feb. 16, 2006); Patrick P. O’Carroll, Assistant Inspector Gen. for Investigations, Soc. Sec. Admin., Testimony Before the Subcommittee on Oversight of the House Committee on Ways and Means (Mar. 10, 2004).

68 James B. Lockhart, Deputy Comm’r of Soc. Sec., Testimony Before the House Committee on Ways and Means Subcommittee on Social Security Subcommittee on Oversight Hearing on Strengthening Employer Wage Reporting (Feb. 16, 2006), [www.socialsecurity.gov/legislation/testimony\\_021606.html](http://www.socialsecurity.gov/legislation/testimony_021606.html).

69 *Id.*

70 *Id.*

71 Press Release, Office of the Press Sec’y, President Participates in Class-Action Lawsuit Reform Conversation (Feb. 9, 2005), [available at www.whitehouse.gov/news/releases/2005/02/20050209-15.html](http://www.whitehouse.gov/news/releases/2005/02/20050209-15.html).<sup>72</sup> Secure Borders FIRST (For Integrity, Reform, Safety, and Anti-Terrorism) Act of 2007, H.R. 2954, 110th Cong. (2007), [available at http://thomas.loc.gov/](http://thomas.loc.gov/).

73 SOCIAL SECURITY AND MEDICARE BOARDS OF TRUSTEES, A SUMMARY OF THE 2008 ANNUAL REPORTS, [www.ssa.gov/OACT/TRSUM/trsummary.html](http://www.ssa.gov/OACT/TRSUM/trsummary.html).

74 *Id.*

75 Press Release, Office of the Press Sec’y, *supra* note 71.

76 LARRY DEWITT, SOC. SEC. ADMIN. HISTORIAN’S OFFICE, RESEARCH NOTE #20: THE SOCIAL SECURITY TRUST FUNDS AND THE FEDERAL BUDGET (2005), [www.ssa.gov/history/BudgetTreatment.html](http://www.ssa.gov/history/BudgetTreatment.html) (updated June 18, 2007).

77 Alan Greenspan, Chairman, Fed. Reserve Bd., Testimony on the Economic Outlook and Current Fiscal Issues Before the Committee on the Budget, U.S. House of Representatives (Mar. 2, 2005), [www.federalreserve.gov/boarddocs/testimony/2005/20050302/default.htm](http://www.federalreserve.gov/boarddocs/testimony/2005/20050302/default.htm). Chairman Greenspan further opined: “In my view, a retirement system with a significant personal accounts component would provide a more credible means of ensuring that the program actually adds to overall saving and, in turn, boosts the nation’s capital stock. The reason is that money allocated to the personal accounts would no longer be available to fund other government activities and—barring an offsetting reduction in private saving outside the new accounts—would, in effect, be reserved for future consumption needs.”

78 ECONOMIC REPORT OF THE PRESIDENT, *supra* note 3, at 194.

79 *Id.*, at 195.

80 Lockhart, *supra* note 68.

81 TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, *supra* note 6.

82 Everson, *supra* note 30.