

Confiscating Contributions

Proposals requiring legalized workers to forfeit Social Security credit for their prior work and tax contributions would impoverish future citizens, burden state and local governments, frustrate efforts to correct Social Security records, and undermine immigration reform.

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As Congress prepares to reform the nation's immigration laws, it will once again consider proposals under which immigrants would forfeit contributions they made to Social Security before obtaining legal status. If enacted, these proposals would set the stage for an enormous social problem in the future when these workers retire — many as U.S. citizens — and find themselves indigent because they lack access to the benefits their taxes were intended to fund.

■ Background

Contrary to common perceptions, the majority of undocumented noncitizen workers actually work “on the books” for employers who require that their employees have a Social Security number (SSN). Undocumented people generally cannot obtain a valid “authorized for employment” SSN. Therefore, many must use an invalid SSN if they are to work in the U.S. As a result, they and their employers pay billions of dollars in payroll taxes each year, boosting the Social Security and Medicare trust funds from which everyone benefits.¹ Like any other workers,

¹ Peter Goss, Social Security's Chief Actuary, has estimated that three quarters of undocumented immigrants pay payroll taxes. This generates \$6 to \$7 billion per year in Social Security tax revenue and \$1.5 billion in Medicare taxes. *See* Edu-

undocumented workers are both required and encouraged by the federal government to pay payroll and income taxes.² According to the U.S. Internal Revenue Service, undocumented noncitizens paid almost \$50 billion in federal taxes from 1996 to 2003.³ Recent reports from across the country indicate that during the 2007 tax season, record numbers of undocumented people filed tax returns.⁴

These contributions are a central theme in the debate surrounding comprehensive immigration reform. Rewarding work is a core principle on which earned legalization programs are founded. Yet

ardo Porter, “Illegal Immigrants Are Bolstering Social Security with Billions,” *NEW YORK TIMES*, April 5, 2005.

² As IRS Commissioner Mark Everson, a former immigration official, stated in testimony before Congress last year, “If someone is working without authorization in this country, he or she is not absolved of tax liability.” In a more recent speech to the National Press Club, Everson added, “We want your money whether you are here legally or not and whether you earned it legally or not.” Miriam Jordan, “Even Workers in U.S. Illegally Pay Tax Man,” *WALL STREET JOURNAL*, April 4, 2007.

³ Statement of The Honorable Mark W. Everson, Commissioner, Internal Revenue Service, Testimony before the House Committee on Ways and Means, July 26, 2006.

⁴ *See, e.g.*, Nina Bernstein, “Tax Returns Rise for Immigrants in U.S. Illegally,” *NEW YORK TIMES*, April 16, 2006.

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comprehensive immigration reform proposals have never proposed to afford immigrants the full value of their tax contributions. The proposals contemplate long waiting periods during which many public benefit programs would be unavailable to legalized workers. Until recently, though, Social Security benefits, a universal entitlement based on the actual earnings of those who have paid into the system, were considered in a different light. Before last year, comprehensive immigration reform proposals had not attempted to change current law and disqualify lawfully present and citizen workers of credit for work performed and contributions already made to the Social Security system.

Under current law, undocumented people are ineligible for Social Security benefits. As long as they are undocumented, they cannot secure credit for their own contributions. But if and when they adjust to lawful status, they have the opportunity to benefit from their actual earnings record. This feature of current law carries important advantages:

- It allows immigrants to use the account funded by their own earnings to fend off poverty when they retire or face disability, a benefit not only to them, but also to the communities in which they live.
- It allows any problems or confusion caused by improper past use of an SSN, including the use of a number and identity that may be held by another person, to be corrected. This benefits everyone, including the Social Security Administration (SSA), because when no one comes forward to explain a discrepancy, it takes far more time and costs much more money to restore integrity to records than it does when someone volunteers an explanation.
- It eliminates the substantial logistical challenge and cost to the SSA of attempting to verify, for each and every past quarter of work used to calculate Social Security benefits, whether the work was performed under a valid SSN issued to that worker.

Nevertheless, pressure is increasing on Congress to deny workers the benefit of their Social Security tax contributions once they legalize their status. Under the leading proposals, either

1. Earnings during periods in which the person was not employment-authorized would not be counted for purposes of calculating Social Security eligibility and payments, or
2. A similar result would be accomplished indirectly by making it impossible for legalizing immigrants to correct their Social Security earnings record without risking felony prosecution.

Regardless of which mechanism is chosen, the proposal would force large numbers of legalizing immigrants into indigence upon retirement and would leave millions of Social Security records uncorrected. These uncorrected records could result in substantial complications for all workers who have paid into the system.

■ Seizing Credits for Contributions Made Prior to Legalizing Status

As mentioned above, under current law, undocumented workers are ineligible for Social Security benefits even though they are required to pay the same taxes as all other workers. However, the contributions made by these people do accumulate in the Social Security trust fund. If and when they are granted lawful status, their quarters of coverage from payments made on work that they have actually performed are counted for purposes of determining their eligibility and the amount that they can claim upon retirement or disability.⁵

⁵ Noncitizens, their spouses, children, and survivors must be “lawfully present” to collect Social Security benefits in the U.S. Applicants for an SSN on or after Jan. 1, 2004, must also have been issued a valid SSN authorized for employment before they become “fully insured” for Social Security purposes. *See* the Social Security Protection Act of 2004 (Public Law 108-203).

Social Security Basics

Individuals generally become “fully insured” to receive Social Security benefits if and when they have worked 10 years (40 quarters). The amount of benefits is based on a person’s average earnings over 35 years. If a person is credited for less than 35 years of work, the missing years are averaged in as zeros, greatly reducing benefits.

Ensign Amendment

Defeated during the debate on the Senate’s 2006 comprehensive immigration reform bill,⁶ but again under consideration in 2007, this amendment would require the SSA, when calculating eligibility and benefit amount, to ignore all payments into the system and quarters of coverage for periods before which an immigrant was issued a work-authorized SSN. The proposed restriction would apply to any immigrant who applies for an SSN in the future, even after the person becomes a U.S. citizen, irrespective of how long the person has worked in the U.S. or how much Social Security tax he or she has paid into the system. It would affect workers who obtain legal status in the future through any pathway under immigration law, not only those who participate in a special legalization program under a new immigration reform bill.

White House Concept

Under a discussion draft of the recently leaked White House principles for immigration reform, “Workers who paid Social Security taxes while working illegally may not obtain benefits based on those contributions unless they were made under a real name with a valid Social Security Number. Fraudulent contributions are forfeited.”⁷

⁶ Senate Amendment 3985 to the Comprehensive Immigration Reform Act of 2006 (S. 2611). The restriction was defeated in the Senate on a 50-49 vote.

⁷ This language suggests an attempt to narrow the Ensign amendment slightly by focusing the restriction on individuals who worked and paid taxes under an SSN other than

Impact of the Restrictive Proposals

The Ensign amendment and related White House proposal would reduce or completely eliminate the Social Security benefits for which most legalizing immigrants would otherwise become eligible years — even decades — later when they retire or face disability. For many, this would mean that they will experience desperate poverty during the last years of their lives. This policy would also have a profound impact on the economies and social fabric of the communities where these immigrants live.

Many of the individuals who would be eligible to legalize under immigration reform proposals have been in the U.S. for decades, working and paying taxes.⁸

their own as opposed to individuals who worked under their own SSN. According to DHS estimates, approximately 40 percent of undocumented workers have “overstayed” some prior legal status in the U.S. See “DHS: ICE, CBP, USCIS,” *MIGRATION NEWS*, Vol. 13 No. 3, July 2006, http://migration.ucdavis.edu/mn/more.php?id=3200_0_2_0. However, only a small minority of these individuals can be expected to have held a prior legal status that would have entitled them to acquire their own SSN. An overwhelming proportion of immigrants who enter lawfully on a temporary basis are admitted under statuses, such as “visitor for pleasure,” that do not permit work authorization and that therefore do not entitle individuals to their own SSN. See 2005 *YEARBOOK OF IMMIGRATION STATISTICS* (Washington, DC: DHS Office of Immigration Statistics, 2006), Table 26. Therefore, an exception for this small segment of workers does little to mitigate the overall harm that the restriction would cause. Moreover, assuming the idea behind the White House concept is to penalize only those workers who worked under an invalid SSN, it fails on its own terms, since no exception is provided for the hundreds of thousands of self-employed undocumented people who work without an SSN and who pay income and payroll taxes each year through filing a tax return under a validly issued individual taxpayer identification number. See N. Bernstein, *supra* note 4.

⁸ Figures in the following two illustrations are estimates generated by the Center on Budget and Policy Priorities in 2006 and represent monetary values in 2006 dollars.

Consider a 55 year-old woman who has performed 25 years of work while undocumented, paying a total of \$75,000 into the system. She ultimately gains legal status under immigration reform and works an additional ten years, making her eligible for Social Security. However, when she retires as a U.S. citizen, her Social Security benefit would amount to a paltry \$300 per month, or 37 percent of poverty income — compared to the \$840 per month she would otherwise be entitled to on the basis of her actual work history and contributions.

These proposals would also threaten the security of surviving citizen spouses and children in the event of a wage earner's premature death.⁹

Consider a 45 year-old father of three U.S.-born citizens who has been employed for 20 years, paying a total of \$50,000 into the system. Shortly after obtaining legal status and a new SSN, he suffers unexpected death. His children would be denied \$15,000 in annual survivor's benefits that he earned through his contributions to Social Security. Instead, they would receive nothing because, despite 20 years of work, he lacked sufficient credited earnings to be considered fully insured. In addition, it should be noted that disability benefits similarly would be unavailable to this worker and his family in the event that the father became permanently disabled, even if he worked for years after legalizing.

⁹ The rules governing the minimum numbers of credited quarters needed to obtain “fully insured” status vary among Social Security's retirement, disability, and survivors programs. Although the general requirement is forty quarters, some allowance is provided to younger workers who suffer early disability or death. In the following example, a 45-year-old who becomes permanently disabled would need 22 quarters of work credits to be eligible for disability insurance. If the father performed five years of continuous work after legalizing, he would still be ineligible; by that time he was 50 years old and would have 20 credits, but at age 50 would need 28 work credits to qualify as insured.

■ Preventing Correction of Social Security Records

Absent a specific provision in the comprehensive immigration reform legislation, immigrants who legalize would not be able to correct their records without risk of felony criminal prosecution. For this reason, even if the Ensign amendment and similar proposals are defeated, many immigrants could be deterred from applying for credit for any contributions made prior to obtaining lawful status. Fear of criminal prosecution would mean that many would not make the corrections in their records necessary to transfer their prior earnings to their newly issued SSN. S 2611, last year's Senate-passed bill, contained a provision that aimed to address this problem. However, no similar provision is included in the STRIVE Act (HR 1645), the bipartisan House immigration reform bill introduced earlier this year by Reps. Jeff Flake (R-AZ) and Luis Gutierrez (D-IL).

Consequences of Using an Invalid Social Security Number

As discussed above, most undocumented workers do not have an SSN validly issued for employment and therefore cannot work on the books unless they provide an invalid number. This has become a necessary reality for the millions of undocumented people who are navigating the push and pull of the economy's demand for labor and an immigration system that provides virtually no pathways to lawful status for low-skilled immigrant workers. Using an invalid SSN to work subjects workers to potential felony prosecution under various laws prohibiting the misuse of SSNs or Social Security cards; however, these laws are aimed primarily at persons who use the violation to steal or conduct other criminal enterprises.¹⁰ These laws carry stiff penalties of up

¹⁰ See, e.g., 42 USC § 408(a)(6) (providing false information to SSA, a felony punishable by up to 5 years in prison); 42 USC § 408(a)(7) (use of a false SSN or card, a felony punishable by up to 5 years in prison); 18 USC § 1546 (document fraud, false attestation, a felony punishable by up to 5 years

to five years or more of imprisonment. In general, a conviction under any one of these laws would subject the person to deportation for committing a crime of moral turpitude and/or an aggravated felony.

Without a provision offering limited protection to people who correct their records, millions of workers who legalize under comprehensive immigration reform nevertheless could face felony prosecution — and deportation — for violations incident to their past immigration status long after they have taken the steps necessary to legalize.

Solution Provided When Immigrants Failed to Correct Their Records in the Immediate Wake of IRCA

Many immigrants who legalize under comprehensive immigration reform could face exposure and prosecution under these laws if they attempt to correct their Social Security records, absent a provision offering protection from prosecution. In fact, after Congress enacted the Immigration Reform and Control Act of 1986 (IRCA) (under which millions of undocumented people legalized their immigration status), many individuals who legalized failed to correct their records because they feared the potential criminal consequences.

To deal with this problem, Congress enacted a provision, 42 USC § 408(e), a few years later, exempting IRCA-legalized individuals from prosecution for having misused an SSN, before IRCA passed, *solely for otherwise lawful purposes* such as employment.¹¹ The protection of section 408(e) did

in prison, and in certain cases by up to 10 years); and 18 USC §§ 1028 and 1028A (among other things, use of a false SSN, a felony punishable by up to 5 years in prison, and in certain circumstances, carrying a mandatory minimum sentence of two years).

¹¹ “The Conferees intend that this exemption apply only to those individuals who use a false social security number to engage in otherwise lawful conduct. For example, an alien who used a false social security number in order to obtain employment which results in eligibility for social security

not apply to individuals who sold false Social Security cards or possessed or counterfeited a Social Security card with the intent to sell it, or who misused SSNs or cards to accomplish an illegal activity such as credit card fraud or any other types of theft.

Recognizing that some such provision is essential to acknowledging the reality of undocumented work and effectuating the goals of comprehensive reform, last year’s Senate-passed comprehensive immigration reform bill, S 2611, included a provision applying the same limited protection to those who would have legalized under its program. This provision does not appear in the STRIVE Act.

■ What’s Wrong with Preventing Legalized Workers from Gaining Credit for Their Social Security Contributions?

Wildly inaccurate allegations have appeared on talk radio, the Internet, and inflammatory 2006 campaign ads,¹² such as that last year’s Senate-passed bill would have allowed undocumented people to qualify for Social Security benefits, or would have taken benefits from other seniors and given them to the undocumented. Many who support the Ensign

benefits or the receipt of wage credits would be considered exempt from prosecution. However, an alien who used a false social security number for otherwise illegal activity such as bank fraud or drug trafficking would not be exempt from prosecution under this provision.” 101 H.Rpt. 964, 948 (1990).

¹² This issue became the subject of 29 Republican campaign attack ads, many of them erroneously accusing Democratic opponents across the country of wanting to “give Social Security benefits to illegal immigrants,” even though neither the underlying immigration reform bill (passed with bipartisan support) nor the failed Ensign amendment itself changed any rules governing undocumented immigrants’ eligibility for Social Security benefits. *See* “Republican Campaign Theme Debunked: Social Security for Illegal Immigrants” (FactCheck.org, Oct. 10, 2006), www.factcheck.org/social-security/republican_campaign_theme_debunked_social_security_for.html.

amendment or related proposals base their positions on this misinformation.

Others tend to argue that failure to seize these contributions would “reward millions of illegal immigrants for criminal behavior while our Social Security system is already in crisis.”¹³ But all of the comprehensive immigration reform proposals include significant punitive fines as well as tough and lengthy mechanisms for legalizing immigrants to “earn” legal status and eventually equal citizenship rights. And impoverishing millions of seniors who have paid into the system is an ineffective way to address the longstanding problems with Social Security as a whole.

Others, such as Senator Ensign, argue that disqualifying employment performed prior to legalizing status is necessary to combat identity theft. Identity theft is a serious problem, but the Ensign amendment would not lead to the prosecution of a single identity thief, nor would it in any other way protect us from those who would steal our identity to commit theft or other crimes. It makes no distinction between such malicious actions and merely using a false number to work. Under it, all who worked before legalizing, even those who *never* used a false SSN, would forfeit their contributions and face possible destitution in their old age. Ironically, rather than helping, the Ensign amendment would actually cause unnecessary problems for U.S. citizens whose numbers were inadvertently used by undocumented workers in the past, because it would discourage those workers from coming forward to correct their records and thereby clear up any problems the citizen might have as a result.

For many reasons, forfeiture of Social Security payments is a particularly problematic form of punishment:

¹³ Statement of Sen. Jim DeMint (R-SC), quoted in Charles Hurt, “Illegals Granted Social Security,” WASHINGTON TIMES, May 19, 2006

1. Delayed Punishment of Seniors and U.S. Citizens

Immigrants would not face the consequences of failure to count their previous contributions until their vulnerable retirement years, which for most would be decades in the future, *after many have become U.S. citizens, worked legally for years, and parented U.S. families*. What other form of punishment is applied so cruelly? Moreover, those most affected by the reduction or denial of Social Security generally will be U.S.-born children and grandchildren who will face the burden of supporting elderly family members solely because of the failure to count the earnings and quarters of work that their elders made to Social Security. Many U.S. citizen minor children and spouses also would face the loss of *survivor benefits* that would have been available to them if all contributions had been counted.

2. Shifting Costs to States and Nonprofits

Social Security is funded by contributions by workers to the *federal* trust fund. Over the next 75 years, lawfully present immigrants will provide a net benefit of approximately \$346 billion in present value to the federal Social Security trust fund.¹⁴ If immigrants’ access to this trust fund — which they have helped to endow — is reduced or denied, many who legalize would have no other source of income after retirement. As a result, as they age, many would have no recourse but to turn to welfare programs that are funded in whole or part by state and local governments, such as Medicaid and General Relief/Assistance.¹⁵ Private and religious charities

¹⁴ Stuart Anderson, “The Contribution of Legal Immigration to the Social Security System” (National Foundation for American Policy, March 2005), www.nfap.com/research/activities/studies/SocialSecurityStudy2005Revised.pdf, p.3.

¹⁵ Given restrictions on noncitizen eligibility for Supplemental Security Income, many seniors would also be ineligible for SSI despite their poverty, even though SSI is intended to assist indigent seniors who lack sufficient work credit to be eligible for Social Security. Other seniors, those who have become naturalized citizens, would be eligible for SSI, which generally provides a dramatically lower monthly benefit

and soup kitchens also would be forced to stretch their tight budgets to meet the increased demand. This is precisely what the federal Social Security system is intended to prevent.

The reduction of federal Social Security benefits would represent a huge cost shift to states, localities, and private and religious charities as these workers who have paid into the system and otherwise would have no need for such services reach the age of retirement, long after any “impact assistance” provided under comprehensive immigration reform has ceased to be granted. It would exacerbate the imbalance that exists that under current law, in which state and local governments receive fewer taxes from immigrants yet pay more expenses on their behalf than does the federal government.

3. Less Accurate Social Security Records

The Social Security Administration will be able to correct Social Security records more quickly and effectively, and at far less cost, if workers responsible for the inaccuracy have an incentive to come forward and present information within their possession, without fear of felony prosecution. Maintaining incorrect Social Security records is detrimental to the Social Security system as a whole and to other persons whose Social Security accounts may be affected by use of their SSN. Persons who currently share a number with legalizing immigrants would benefit the most from allowing the immigrant to come forward and correct his or her records.

amount than Social Security. This amounts to artificial cost shifting from SSA’s work-based entitlement program (Social Security retirement benefits) to its welfare program (SSI).

4. Fewer Social Security and Tax Contributions, More Immigrants Working under the Table for Cash

In addition to the millions of immigrants who work and pay taxes “on the books,” each year hundreds of thousands of undocumented immigrants who work “off the books” or as independent contractors take the extraordinary step of meeting their income, Social Security, and Medicare tax obligations to the federal government by using an Individual Taxpayer Identification Number (ITIN) for which they have voluntarily applied. A record number of undocumented immigrants filed tax returns using an ITIN during the 2007 tax season.¹⁶ These workers take this step because they want to document their contributions and invest in their future in the event they are able to adjust their status. They will be less likely to do so if they will never gain access to their contributions even if they attain legal status in the future. In addition, if Social Security contributions can never be recouped, individuals will have less incentive to work on the books rather than for cash. Seizing immigrant earnings is a shortsighted and desperate approach that does not address the real challenges facing the system.

FOR MORE INFORMATION

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¹⁶ See Nina Bernstein, *supra* note 4.