

Making sense of immigration

Keeping state and federal roles in balance

By Claire Guthrie Gastañaga

Everyone agrees that our current immigration system is broken and that we need a comprehensive solution. To fix the broken system:

- The federal government must secure our borders.
- Congress must remove incentives built into the current system that permit immigrant workers to be exploited in ways that harm them and law-abiding businesses and U.S. workers.

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- Congress must ease the process by which needed workers come to the United States legally to work and return to their families.
- Congress must deal humanely and sensibly with those persons who entered the United States without authority. They are an essential part of our economy and our neighbors.
- The federal government must reimburse states and localities for the costs incurred because of Congress' failure to act, including reimbursement for the costs of apprehending and jailing criminal aliens, offering ESL programs in schools, and providing emergency medical care.

Neither Virginia nor any of its localities can accomplish any of these things. Immigration is a distinctly federal issue, and the Congress has preempted state action. Persons who have entered this country without authority have done so under a failed federal immigration system. Rather than encouraging our state and local elected officials to pass mean-spirited legislation, the avowed purpose of which is to make Virginia "inhospitable," Virginians must demand that Congress and the president fix the broken system and restore integrity to the "rule of law."

- continued on page 30

With the Virginia illegal immigrant population numbering around a quarter-million or more, the national immigration debate is alive right here in the commonwealth,

spreading to a wide range of policy issues, such as government spending, education, law enforcement, and employment.

of U.S. citizens and legally present foreigners than the interests of those here illegally. The debate over what to do about illegal immigration too often obscures this point. It is not that illegal aliens do not have any rights or that they do not merit humanitarian concern, but their interests should give way if they conflict with those of Virginia's legal residents.

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Why immigration is an issue for Virginia lawmakers

By Jack Martin

Virginia policymakers have a greater responsibility to protect the interests

Up until the last decade or so, large-scale illegal immigration was a phenomenon limited to a handful of states. Today, it has become a nationwide phenomenon, and states like Virginia have experienced large increases in their illegal populations.^{1,14} The Federation for American Immigration Reform (FAIR) recently released a report on the fiscal costs of illegal immigration, estimating annual outlays in Virginia of \$1.9 billion based on an estimated 295,000 illegal immigrants.² The issue is not just fiscal costs, but also societal impacts and social justice issues that are discussed below.

Unlike the federal government, states lack the authority to remove illegal aliens from their jurisdictions, which does not mean that state and local governments are powerless to protect the interests of legal workers and taxpayers. In fact, they enjoy broad authority to enact and enforce policies that discourage illegal aliens from taking up residence.

Congress has unambiguously empowered local officials to work in tandem with the federal government in enforcing U.S. immigration law. That collaboration is demonstrated in the 287(g) program that deputizes local law enforcement personnel to act as immigration enforcement officers;³ the Secure Communities program in which

- continued on page 33

Existing state laws

Virginia leads the nation in taking action to address the impacts of illegal immigration. The Virginia General Assembly has put in place almost 40 laws, some of which date back to the 1950s.¹ Among other things, the commonwealth

- requires everyone seeking a driver's license or state ID to prove lawful presence;²
- requires everyone seeking welfare, Medicaid, admission to a mental health facility, or unemployment compensation to prove lawful presence;³
- requires sheriffs and the department of corrections to report criminal aliens to U.S. Immigration and Customs Enforcement (ICE) at the time they are admitted to Virginia jails and prisons (after arrest and again after conviction);⁴
- presumes those not lawfully present who are arrested should not get bail;⁵
- has enhanced penalties for residential overcrowding;⁶
- has strict domicile requirements that prevent aliens from qualifying for in-state tuition at public colleges and universities;⁷
- prohibits all aliens, except lawful permanent residents, from owning and transporting firearms;⁸
- allows police officers to arrest without a warrant anyone committing a crime who is an alien previously deported after a felony conviction;⁹ and
- makes English Virginia's official language.¹⁰

The length and scope of this list of existing statutes demonstrates Virginia's leadership in addressing any effects of illegal immigration. Anyone who proposes to further expand the reach of this list should be required to spell out in detail why any further changes are needed and what specific problems they are designed to address, including in the following four oft-cited areas:

1. Cost of government services

Federal and state laws already deny access to social services or payment of nonemergency medical expenses to any person who is here without authority. Even aliens

here lawfully cannot qualify for federal aid programs until five years after they become citizens or lawful permanent residents. To the extent that there is any demonstrable cost of accommodating new Virginians who need services, the real problem is devolution. Taxes (e.g., sales and income taxes and social security taxes) paid by new Virginians (lawfully present and not) largely flow upstream to the state and federal governments, while the costs of needed services (e.g., emergency medical care, elementary education) remain the responsibility of local governments.

2. Education

Some school divisions in Virginia serve significant percentages of children for whom English is not their first language, and some of these children are in the country without authority. Some school costs are paid by state sales taxes, which everyone pays regardless of status, and all school divisions receive substantial federal dollars, which mean they must afford equal opportunity to ESL students regardless of immigration status.¹¹

Admittedly, these funds are not enough to pay the full cost of instruction, but the answer is not to pass laws seeking to restrict access to elementary and secondary schools by undocumented immigrant children. Such restrictions were ruled unconstitutional nearly three decades ago.¹² The solution is to demand that the federal government assume responsibility for any increased costs of instruction associated with the education of children without documentation.

With respect to higher education, Virginia law makes it impossible for any alien to establish domicile in order to qualify for in-state tuition.¹³ All students admitted as out-of-state students pay the full cost of instruction.

One positive change that has been proposed and has passed the Virginia Senate¹⁴ would allow only undocumented students who are taxpaying Virginia residents, or whose parents are Virginia taxpayers, to qualify for in-state tuition if they meet certain exacting requirements.¹⁵ Keeping undocumented students in school has positive benefits for the community and our economy and has the strong support of college officials across the country.¹⁶

3. Employment

Regarding employment, there are sufficient laws already on the books:

- Federal law requires every employer to obtain documentation, using the federal I-9 form, that each new employee has the right to work in the United States.¹⁷ There are substantial federal penalties for noncompliance.
- Virginia law makes it a crime for employers to hire unauthorized workers (although the attorney general has opined that the state law is unconstitutional).¹⁸
- The Virginia State Corporation Commission can revoke a company's right to do business in Virginia if the company is found to have violated federal immigration laws.¹⁹
- Every state or local contractor is required to commit in every contract not to hire anyone without the legal right to work.²⁰
- State agencies must use the federal E-Verify system to check whether an employment applicant has the right to work (although the system continues to have a high error rate, particularly for foreign-born Virginians).²¹

Virginia is highly rated as a pro-business state because the legislature and the executive branch have refrained from enacting laws and regulations that do not meet a cost/benefit test.²² Advocates for additional punitive regulations have yet to make the case that the benefits of such laws would outweigh the costs to our economy.

What more could we do? Virginia law makes it a crime to earn money exploiting aliens,²³ but Virginia could strengthen wage laws and give the Department of Labor and Industry additional resources. Currently, it is too easy for employers to exploit immigrant workers by not paying them, without fear of sanction. Enhanced enforcement of wage laws would remove this incentive to hire illegal workers and would even the playing field for employers who play by the rules.

4. Law Enforcement

Virginia has led the nation in taking steps to address

public safety issues related to criminal conduct by people from other countries here either with or without authority. In addition to passing the many laws listed above, Virginia was one of the first states to participate in the ICE Secure Communities program, despite concerns about the accuracy of the database and the targets of the program.²⁴ Secure Communities ensures that the fingerprints of arrestees (whose immigration status must be checked under Virginia law, regardless) are run against a national immigration database in addition to standard criminal databases.²⁵

Some localities and correctional facilities have also entered into 287(g) agreements²⁶ with ICE that allow certain local police and jail officers to enforce immigration laws as if they were ICE officers. Recently, questions have been raised about the efficacy of these agreements.²⁷ Testimony has been offered suggesting that the agreements cause civil and human rights violations.²⁸

Local police chiefs and sheriffs have questioned involving state or local police in the routine enforcement of civil immigration laws, arguing that such broad enforcement authority will undermine their ability to protect communities from criminals by discouraging members of immigrant communities from coming forward when they are victims or witnesses of crime. This practice will make us all less safe, they say.²⁹

The federal government is not currently prepared to take into custody and deport every criminal alien at the completion of his or her sentence, although the Department of Homeland Security recently announced that it will detain those convicted of drunken driving. We must demand that Congress authorize additional funds to permit ICE to do its job.

Any additional action, including the recent decision by the governor to seek and sign a state-level 287(g) agreement with ICE,³⁰ would be redundant and reckless and would further erode trust between law enforcement and Virginia's immigrant communities at a time when that trust is urgently needed. There's no evidence such action will keep Virginians safer.

Conclusion

Most of the 40 laws now on the books were said to be needed to keep Virginians safe, reduce costs, or improve the ability and authority of law enforcement to combat gang activity, drug trafficking, and terrorism. None of these programs has yet been proven to be effective. Some have, however, been shown to adversely affect working people and their families who have committed no crimes. No further legislative action should be taken unless and until the laws now in place have been shown to be inadequate to address any discernable adverse impacts of unauthorized immigration on Virginians. To do otherwise is simply to continue making political points at the expense of human rights and dignity. **VIA**

Endnotes

¹ For a list of these laws, see “Current Virginia laws applicable to aliens,” <http://changeservant.blogspot.com/2010/09/current-virginia-laws-applicable-to.html>.

² Code of Virginia, Section 46.2-328.1.

³ Code of Virginia, Sections 37.2-827, 63.2-503.1, 32.1-325.03, and 60.2-617.

⁴ Code of Virginia, Sections 19.2-83.2 and 53.1-218.

⁵ Code of Virginia, Section 19.2-83.2.

⁶ Code of Virginia, Sections 15.2-2286, 15.2-2286.4, and 15.2-286.15.

⁷ Code of Virginia, Section 23-7.4.

⁸ Code of Virginia, Sections 18.2-308.2:1, 18.2-308.2:2, and 18.2-308.2:3.

⁹ Code of Virginia, Section 19.2-81.6.

¹⁰ Code of Virginia, Section 1-511.

¹¹ *Lau v. Nichols*, 414 U.S. 563 (1974).

¹² *Plyler v. Doe*, 457 U.S. 202 (1982).

¹³ Code of Virginia, Section 23-7.4.

¹⁴ See, e.g., Senate Bill 1037 (2009) sponsored by Virginia Sen. Emmet Hanger, <http://leg1.state.va.us/cgi-bin/legp504.exe?091+sum+SB1037>.

¹⁵ The requirements would include that the student: (i) has resided in Virginia while attending high school; (ii) has graduated from a public or private high school in Virginia or has received a General Education Development (GED) certificate in Virginia; (iii) has resided in the commonwealth for at least three years on the date of high school graduation; (iv) has registered at an institution of higher education; (v) has provided an affidavit stating that he has filed an application to become a permanent resident of the United States and is actively pursuing such permanent residency or will do so as soon as he is eligible; and (vi) has submitted evidence that he or, in the case of a dependent student, at least one parent, guardian, or person standing in loco parentis, filed, unless exempted by state law, Virginia income tax returns

for at least three years prior to the date of enrollment.

¹⁶ “Debating In-State Tuition for Undocumented Alien Students,” American Association of State Colleges and Universities, http://www.aascu.org/policy/special_report/access_for_all.htm.

¹⁷ For more information, see <http://www.uscis.gov>.

¹⁸ Code of Virginia, Section 40.1-111; 2010 Opinions of the Attorney General, 09-071 (Feb. 2, 2010), <http://www.vaag.com/OPINIONS/2010opns/09-071-Rust.pdf>.

¹⁹ Code of Virginia, Section 13.1-7531iv.

²⁰ Code of Virginia, Section 2.2-4311.1.

²¹ Code of Virginia, Section 40.1-11.1.

²² See, e.g., “Top 10 Pro-Business States,” Pollina Corporate Real Estate Inc., <http://www.pollina.com/publications/probiz~1.htm>.

²³ Code of Virginia, Section 18.2-59.

²⁴ See, e.g., “More questions than answers about the Secure Communities program,” National Immigration Law Center, March 2009, <http://www.nilc.org/immlawpolicy/LocalLaw/secure-communities-2009-03-23.pdf>. See also “Secure Communities in Arlington - FAQs,” <http://www.arlingtonva.us/departments/Communications/page77460.aspx>.

²⁵ For more information, see “Secure Communities: A Fact Sheet,” Immigration Policy Center, Oct. 1, 2010, <http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet>, and http://www.ice.gov/secure_communities/.

²⁶ For more information on 287(g) agreements and a list of the Virginia localities and jails with agreements, see http://www.ice.gov/pi/news/factsheets/section287_g.htm.

²⁷ See “The performance of 287(g) agreements,” Department of Homeland Security, Office of the Inspector General, March 2009, http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-63_Mar10.pdf. See also “DHS report confirms serious civil rights problems with local immigration enforcement program: ACLU calls for immediate termination of ICE 287(g) program,” April 2, 2010, <http://www.aclu.org/immigrants-rights/dhs-report-confirms-serious-civil-rights-problems-local-immigration-enforcement-pr>.

²⁸ “Hearing on the Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws,” April 2, 2009, http://judiciary.house.gov/hearings/hear_090402.html.

²⁹ “Statement on the Arlington County Board’s Secure Communities resolution,” Arlington County Police Department, press release, Sept. 28, 2010, <http://www.arlingtonva.us/departments/CountyManager/Documents/file78365.pdf>.

³⁰ “Governor McDonnell formally requests immigration enforcement partnership with federal government: Letter seeking 287(g) agreement sent to Secretary of Homeland Security Janet Napolitano,” press release, Office of the Governor, Aug. 12, 2010, <http://www.governor.virginia.gov/News/viewRelease.cfm?id=310>.



- **Martin**, continued from page 29

local law enforcement agencies send identity records on arrestees to the Department of Homeland Security,⁴ and in other cooperative programs, such as the State Criminal Alien Assistance Program, which identifies incarcerated deportable aliens in state and local detention facilities.⁵ There are also federal court decisions upholding local enforcement powers.⁶

FAIR is actively engaged in efforts to resolve continuing legal jurisdiction issues through the work of the Immigration Reform Law Institute (IRLI), which works with state and local policymakers to adopt measures to protect citizens from the harmful effects of illegal immigration.⁷ In 2008, FAIR published a guide regarding enforcement and jurisdictional issues for policymakers.⁸

The impact of illegal immigration

The impact of illegal immigration on communities includes fiscal costs, job competition, rising income inequality, strains on the public education system, unlicensed drivers, and increased crime. There are also major issues

of national security and long-term resource shortages, but these clearly must be addressed at the national level.

1. Cost of government services

The annual outlays in Virginia noted above of \$1.9 billion are partially offset by direct and indirect tax receipts of an estimated \$116 million (6.1 percent of the annual outlay). This calculation, however, is not a true offset because tax revenue would not be lost—and should increase—if illegal workers were replaced with legal workers. Because much of the fiscal outlays cannot be avoided, (e.g., medical and educational expenditures), the response of policymakers must be to work to reduce the size of this population. Granting amnesty to the illegal alien population, as proposed by President Barack Obama and others, would increase the fiscal burden as it would provide entitlement to benefits currently unavailable, such as social welfare programs.

2. Education

Illegal aliens, who in large majority come from Spanish-speaking countries,⁹ are often non-English-speakers at home; and their children, whether born before or after arrival, often enter schools with poor English skills. These lower skill levels place an enormous burden on the public school system (K-12) to expend resources in special classes for these Limited English Proficiency (LEP) students. FAIR estimates LEP costs in Virginia at \$401.7 million per year.¹⁰ These students siphon off funding for teaching other students, and the burden of LEP students tends to be disruptive of the overall learning environment.

While a U.S. Supreme Court decision¹¹ compels state and local governments to provide free K-12 education to illegal aliens, states have the ability to discourage the settlement of illegal aliens in the community. While defenders of illegal aliens argue that schools cannot collect immigration-status information on their students, that stance is not factual, and some school systems do so. This data collection serves to provide policymakers with a more data-based understanding of the size and costs of the problem and aids policy decisions.

Defenders of illegal aliens urge the state university system to admit illegal alien students at in-state rates. Their argument is that these foreigners are here to stay and should be educated the same as U.S. citizens. To accept the permanence of illegal aliens is to concede defeat in the effort to combat the harmful effects of illegal immigration.

3. Employment

The defenders of illegal aliens insist that illegal workers only take jobs that Americans won't perform. The assessment is obviously false because there is no job in America that Americans don't also do, and there are large numbers of unemployed Americans with skills similar to illegal alien workers. What is true is that where there is a large share of illegal workers (as in agriculture), wages and working conditions have become so depressed because of the presence of illegal workers that Americans are discouraged from taking those jobs if they have a better alternative. This erosion of wages and working conditions is already spreading to jobs in construction and services that were once solid, middle-class trades. Action is necessary to preserve these job opportunities for Americans. The General Assembly's adoption of HB 737, which requires agencies of the commonwealth and localities to enroll in the E-Verify program,¹² is a positive step, but more must be done. The unfounded view of some politicians and academics that Americans are unwilling to do labor-intensive jobs implies support for a perpetually exploited foreign-born workforce.

Linked to employment concerns is increasing income inequality. Studies, including one by FAIR, document that immigration—illegal immigration especially—has contributed to rising U.S. income inequality.¹³ Both low- and high-income families are growing in number and share, while the middle class is shrinking. This development should concern anyone who believes that a large middle class is important to the stability of our society.

4. Law enforcement

Studies of immigrant crime incidence generally com-

bine legal and illegal immigrants and find a lower incidence for them than for nonimmigrants. The FAIR study that focused on only illegal and deportable aliens found a 50 percent higher rate of incarceration than for the rest of the adult population.¹⁴ What appears to be a contradiction is clarified when it is noted that the legal immigrant population has a much lower crime incidence than the general population because these residents are screened to eliminate anyone with a criminal record.

Prince William County, Va., police data reveals that illegal aliens constituted disproportionate shares of arrests for public drunkenness (20 percent), DUI (13 percent), and fraud (13 percent), when the illegal alien population is estimated at only 7 or 8 percent.¹⁵ The county is able to collect such data because it has police deputized as immigration officers. The 287(g) agreements—implemented in Manassas, Herndon, Loudoun County, Manassas Park, Prince William County, and Shenandoah County, thus far—grant this authority. The argument that these agreements impact civil rights is a smokescreen. There is no civil right to be in the United States illegally.

Because driver's licenses are our de facto national identification system, we want to keep them out of the hands of persons who are in the country illegally. Otherwise, they can use licenses to get jobs—or even to board airplanes as the Sept. 11 terrorists did with licenses they acquired through the loopholes commonly used by illegal aliens. At least seven of the 19 terrorists had Virginia licenses,¹⁶ and Virginia moved swiftly in the aftermath of the Sept. 11 attacks to deny driver's licenses to illegal aliens.

Unfortunately, denying licenses to illegal aliens does not stop them from driving, often without insurance. However, such behavior can be greatly discouraged by state and local governments. Policies that impound the vehicles of unlicensed drivers and the possibility of referral to federal immigration authorities would greatly diminish the number of illegal aliens driving without licenses and insurance. While an amnesty program might decrease the number of unlicensed and uninsured drivers, it would not

guarantee full compliance with insurance requirements. Because of the low incomes and lack of assets to protect among this population—which, studies of the beneficiaries of the 1986 amnesty show, are likely to persist despite legalization¹⁷—make insurance a luxury.

Conclusion

Combating illegal immigration is an important and legitimate interest for states. In waging that battle, state and local policymakers are combating crime, contributing to national security, working to reduce the fiscal burden on taxpayers, and defending America's adherence to the rule of law.

The immigration-related agenda that Virginia's policymakers face has been imposed both by advocates for illegal aliens and by the failure of the federal government to deter illegal immigration at the border and in the interior of the country. It is an agenda that all too often has been driven by narrow interests that benefit economically or politically from illegal immigration.

Virginia policymakers have already taken some steps to discourage illegal settlement in the commonwealth, such as denying driver's licenses, 287(g) agreements, and the E-Verify program. These actions do not represent the full range of measures that can be taken to deter future illegal immigration and encourage illegal aliens to leave, but they are major steps in that direction.

The battle to deter illegal immigration will not be won until measures are adopted by Congress and fully implemented by the federal government that effectively deny job opportunities to illegal aliens and progressively send home—either voluntarily or involuntarily—those already here illegally. Until that time, state and local policymakers must continue to exercise their authority to discourage illegal immigration, while applying pressure on Washington to fulfill its obligation to protect the interests of the American people. **VIA**

Endnotes

¹ The Immigration and Naturalization Service estimated in its "2000 Yearbook of Immigration Statistics" that the illegal alien population in Virginia was 55,000 in October 1996. That figure was up from its estimate of an illegal alien population of 42,000 in 1992.

² Jack Martin and Eric Ruark, "The fiscal burden of illegal immigration on United States taxpayers," FAIR, 2010, http://www.fairus.org/site/DocServer/USCostStudy_2010.pdf?docID=4921.

³ A 287(g) program refers to the Immigration and Nationality Act section that provides for the training and deputizing of state and local police by the federal government. See http://www.ice.gov/partners/287g/Section287_g.htm.

⁴ See http://www.ice.gov/pi/news/factsheets/secure_communities.htm.

⁵ See <http://www.ojp.usdoj.gov/BJA/grant/scaap.html>.

⁶ U.S. v. Ontoniel Vasquez-Alvarez (10th Cir. May 11, 1999), cert. denied Oct. 4, 1999.

⁷ IRLI was involved in drafting and defending the challenge to Arizona's Legal Arizona Workers Act, which was ruled constitutional in *Arizona Contractors Association et al v. Candelaria et al*. No. CV07-2496-PHX (District of Arizona).

⁸ "Guide to State and Local Action to Deterring Illegal Immigration," FAIR, 2008, http://www.fairus.org/site/DocServer/StateLocalGuide_2008.pdf?docID=1961.

⁹ The Pew Hispanic Center estimates that more than 80 percent of illegal immigrants are from Mexico, Central or South America, or the Caribbean: <http://pewhispanic.org/files/reports/126.pdf>.

¹⁰ Martin and Ruark, "The fiscal burden of illegal immigration."

¹¹ Plyler v. Doe, 1982.

¹² See http://www.dhs.gov/files/programs/gc_1185221678150.shtm.

¹³ Jack Martin, "Immigration and rising income inequality," FAIR, 2007, <http://www.fairus.org/site/DocServer/Ineqstudy.pdf?docID=1401>.

¹⁴ Jack Martin, "Illegal aliens and crime incidence: Illegal aliens represent a disproportionately high share of the prison population," FAIR, 2007, <http://www.fairus.org/site/DocServer/crimestudy.pdf?docID=2321>.

¹⁵ Dave Gibson, "Prince William police: Illegal immigrants make up 13 percent of DUI arrests," Aug. 8, 2010, <http://www.examiner.com/immigration-reform-in-national/illegal-aliens-account-for-13-percent-of-dui-arrests-prince-william-county-va>.

¹⁶ See FAIR issue brief "Identity and immigration status of 9/11 terrorists," http://www.fairus.org/site/News2?page=NewsArticle&id=16910&security=1601&news_iv_ctrl=1011.

¹⁷ U.S. Department of Labor, Bureau of International Labor Affairs, "Effects of the Immigration Reform and Control Act: Characteristics and labor market behavior of the legalized population five years following legalization," May 1996.