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REVIEW & OUTLOOK

Messed Up Manhunt *October 18, 2007; Page A16*

A federal judge in San Francisco has put a crimp in the Bush Administration's plans to solve the country's illegal immigration problem on the backs of small business. The White House should rejoice at this defeat, and move on to Plan B.

After immigration reform flamed out earlier this year, the Department of Homeland Security decided that the proper response was to ramp up enforcement of current law that everyone agrees doesn't work. Some political whiz apparently imagined this would placate anti-immigration conservatives, as well as motivate the business community to lobby Congress harder for "comprehensive" reform. As the British like to say, "brilliant!"

So in August, DHS promulgated a rule requiring employers to fire workers whose names don't match their Social Security numbers. But the government's Social Security database, by its own reckoning, is riddled with mismatch errors unrelated to immigration status. The move succeeded mainly in causing dogs and cats to live together -- specifically, the Chamber of Commerce and AFL-CIO to join in a lawsuit.

Last week U.S. District Court Judge Charles Breyer agreed with the plaintiffs and overruled the new rule on grounds that it would cause "irreparable harm to innocent workers and employers." He said the Administration failed to analyze the economic impact on business, which is a violation of the Regulatory Flexibility Act. "There can be no doubt that the effects of the rule's implementation will be severe," said the judge. (Political aside: Aren't Republicans supposed to believe in "flexibility"?)

Because Judge Breyer didn't find the rule illegal per se, it's possible DHS could address the implementation concerns and win on appeal. But the better decision would be to use the defeat as an excuse to stop the enforcement overkill. Until the feds fix their own databases, it makes no sense to punish businesses for hiring workers they believe to be legal. Meanwhile, such enforcement will only make it harder for businesses already short of labor in many parts of the country to find and retain good employees.

As for the politics, major immigration reform is dead at least until 2009 and no amount of business pressure on Congress will revive it. What is possible and is also popular with business, however, are smaller reforms that would expand current visa programs.

Congress has been far too stingy with H-1B work visas for skilled foreign nationals, many of whom are educated in the U.S. only to be sent away after graduation to work for our overseas competitors. The H-1B visa cap has been set at 65,000 since 2004, when it took 10 months to exhaust it. This year the cap was reached on the first day applications were accepted. Lawmakers should eliminate the cap, or at least let market forces influence its size.

American agriculture also faces an acute labor shortage, which is driving many growers to Latin America. An AgJobs proposal on Capitol Hill would help keep food production in the U.S. by allowing illegal alien farm workers who pass a background check to remain here and eventually earn legal status. It also would streamline the process for admitting future agriculture workers.

Amid the housing recession, the last thing the U.S. economy needs is immigration enforcement that drives away labor and causes employers to stop expanding payrolls. If the Bush Administration wants an immigration success, it should work on expanding the supply of legal visas.

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