

PERSPECTIVES:***OVERHAULING IMMIGRATION LAW:
A BRIEF HISTORY AND BASIC PRINCIPLES OF REFORM***
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For more than a decade, efforts to systematically overhaul the United States immigration system have been overshadowed by other events—from foreign wars and national security concerns to the financial crisis that threatened to bring down the world economy. In addition to this ever-changing list of national crises, years of partisan political fighting and the resurgence of a volatile restrictionist movement that thrives on angry rhetoric have made opportunities for advancing genuine reform few and far between. As a result, many in both parties opted for a political strategy that emphasized immigration enforcement over immigration reform, holding to the argument that efficiently deporting non-citizens would reduce illegal immigration and pave the way for more sensible outcomes in the future. Instead, the unprecedented spending on immigration enforcement, the extraordinary rise in deportations, the passage of state anti-immigrant laws, and the almost daily anecdotes of separated families and discrimination finally took their toll. Voters signaled in the 2012 federal elections that they were tired of enforcement-only immigration policies and the senseless pain they caused. Now more than ever, the opportunity to craft immigration laws that reflect American values and needs is a distinct possibility. The White House, Members of Congress, and countless organizations have issued new ideas and principles for making the system work. These proposals vary and will likely change even more as proposals translate into legislation, but there are a number of common themes that exist. This paper lays out an overview of the underlying legal system, the most basic principles of reform, the reasons behind them, and how they are likely to be reflected in coming legislation.

The Immigration and Nationality Act in a Nutshell

Although Americans routinely acknowledge that the United States is a nation of immigrants, the system of laws that govern who can immigrate, who can visit, who can stay, and under what conditions is largely unknown to most people. The Immigration and Nationality Act (INA) of 1952 is a complex and often confusing collection of laws that does everything from setting forth qualifications for naturalization to regulating foreign students to managing temporary workers to authorizing humanitarian protections such as asylum and refugee admissions. The INA also contains quotas or limits on the number of legal immigrants who may come to the country each year, numbers which were last adjusted in 1990. In addition, the INA has authorized “relief” from deportation over the years. Providing relief through various laws allowed an individual to make the case that he or she should be permitted to enter or remain in the United States, despite being in violation of immigration laws, based on family unity, contributions to the community, or other humanitarian concerns. Similarly, the INA has been amended numerous times both to

expand access to the United States (based on characteristics of immigrants such as country of origin, occupation, and humanitarian factors) and to restrict access (based on criminal convictions, occupations, or political affiliations). Critics of these amendments routinely argue that we are either too generous or too restrictive in whom we allow to enter and remain in the United States, setting the stage for political arguments that have little to do with immigration itself and far more to do with issues of race, economics, culture, and identity.

What kinds of events prompt changes in immigration law?

Immigration reform is often fueled by other aspects of social change when the American public realizes that immigration law lags behind other social reforms. For instance, against the backdrop of the civil rights movement, the 1965 amendments to the INA eliminated biases in the law that favored European immigrants over all others. Following the refugee crises brought on by the Vietnam War, Congress enacted refugee and asylum provisions in 1980 that brought the United States into compliance with international standards of refugee protection. In 1986, driven by increased unauthorized immigration and few means to control it, Congress created a trade-off—legalization of approximately three million unauthorized immigrants in exchange for requiring all workers to establish their eligibility for employment in the United States.

By 1996, when unauthorized immigration was still not in check, many in Congress blamed the more generous provisions of the INA for the problem. As a result, lawmakers, led by then-House Judiciary Immigration Subcommittee Chairman Lamar Smith (R-TX), enacted a harsh new immigration removal scheme that eliminated or restricted many forms of relief, required mandatory detention and removal for many immigration violations, and authorized extensive or permanent bars on admission following a deportation. In subsequent years, the severity of these measures and the hardships experienced by many unauthorized immigrants who had fled civil wars and violence in Central America, Haiti, and the former Soviet Union led Congress to pass some small legalization programs, but nothing on the scale of the 1986 law.

On September 10, 2001, President George W. Bush and Mexican President Vicente Fox were making plans for a new temporary worker program and other immigration reforms, brought about by a booming economy, efforts to build a stronger partnership with Mexico, and a rise in unauthorized immigration. Of course, that initiative and many others fell by the wayside on September 11, to be replaced with enhanced national security and anti-terrorism laws, many of which attempted to regulate possible threats to the country through restrictions on immigration.¹

Nonetheless, bipartisan efforts to achieve a comprehensive immigration reform package began again in earnest by 2004, led by Senators Edward M. Kennedy (D-MA) and John McCain (R-AZ) and Cong. Luis Gutierrez (D-IL) and Jeff Flake (R-NM). At the same time, continued immigration restriction sentiments in Congress, particularly in the House, led to passage of a House bill in 2006 that would have made simply being in the country unlawfully a crime. The Senate responded by passing a bipartisan comprehensive immigration reform bill, but the two immigration bills were never taken up by the other chamber. In 2007, a second bipartisan effort came to the Senate floor twice, but could not obtain enough votes to overcome procedural hurdles.

Why is comprehensive immigration reform back in the news?

There is little doubt that the results of the November election, particularly the impact of Latino, Asian, and New American voters, jump-started the conversation on immigration reform, but the political momentum has increased each year since 2007. In fact, some might argue that the legislative push in 2013 can be traced back to the extremely punitive 1996 law. After almost 20 years, the supposed reforms of 1996 have led to years of troubled enforcement policies, further undermined a system that could not respond quickly to changes in the economy, and often ignored the important contributions made by immigrants to this country.

The persistent legacy of the 1996 law, which enhanced immigration penalties but eliminated many forms of relief, has been a series of ever-expanding efforts to deter illegal immigration through higher penalties and fewer options. The law also expanded mandatory detention and expanded immigration enforcement—including mass worksite raids and greater federal/state/local law-enforcement cooperation through programs like Secure Communities—which has ratcheted up the numbers of non-violent, non-criminal immigrants arrested for immigration violations. Despite the fact that many of the unauthorized have lived in the country for a decade or more and have U.S.-citizen and lawful permanent resident (LPR) family members, deportation has been almost inevitable because there is little relief available under the INA. The damage that millions of deportations have inflicted on U.S. families and communities is well-documented.²

The long-standing inadequacy of existing channels for legal immigration has also served as a motivation for change. That inadequacy, coupled with more than a decade of strong economic growth prior to the 2008 recession, created a jobs magnet in the United States, while also decreasing the likelihood that unauthorized immigrants would return to their home countries. Since the recession, unauthorized immigration has slowed to a trickle given the contraction of the U.S. labor market and improving economic conditions in Mexico.³ Yet 11 million unauthorized immigrants still call the United States home.⁴

Emerging from the recession, however, was also a growing consensus that the contributions of immigrants in speeding an economic recovery were critical.⁵ This was reflected in the growing number of arguments in favor of expanding both temporary and permanent access to high-skilled labor, as well as major reports on the role of immigrants as entrepreneurs and innovators. Many business leaders became more sensitive to the issue following state-led efforts to restrict immigration, and numerous reports assessing the value of immigrant contributions to the economy have poured out over the last few years.⁶

This mindset helped to foster greater openness to the idea that immigrant contributions far exceed the perceived problems of immigration. Demographic changes have further helped to solidify that point of view. Similarly, the activism of young unauthorized immigrants around the DREAM Act further expanded a general understanding of the shortcomings of the current immigration system, while at the same time lifting up the enormous contributions that these young people hoped to make to their country.⁷

Further, notwithstanding the decline in unauthorized immigration in recent years, the economic, demographic, and political strength of immigrants and their children is growing.⁸ Meanwhile, evidence mounts that anti-immigrant measures such as Arizona's SB 1070 result in

discrimination, racial profiling, and hate crimes against people of color. All of these factors have contributed to the growing awareness that an immigration crisis exists in the United States. Political polling following the 2012 elections further clarified that many voters, particularly those of Latino and Asian descent, think that a politician's negative views on immigration reflected a bias against them, regardless of their place of birth.⁹ Thus, the current efforts to reform immigration laws are the culmination of years of effort, but also of the political realities of America in 2013.

Is it necessary to try to fix all the immigration laws at once?

For years there has been debate over whether immigration reform should be “comprehensive,” “piecemeal,” or “incremental.” As a practical matter, immigration law should be something that is updated and revised constantly to reflect current economic and political conditions, to reflect changes in social issues, and to respond to foreign policy and humanitarian concerns. Congressional gridlock, and the particular paralysis that has stalled immigration reform, has meant that issues which should have been addressed periodically, such as adjustments to overall legal immigration admission numbers, don't happen in a timely way. That makes it even more difficult to address more dramatic challenges, such as the plight of 11 million unauthorized immigrants. Even as the President and Congress contemplate systematic overhaul of the immigration system, Members of Congress are introducing individual, more targeted bills. Both are necessary and can play a role in improving the system. The key, however, is coordinating the various proposals so that the overall effect is a more cohesive set of laws that acknowledge the biggest issues of immigration reform today: the need for an improved legal immigration system that is generous enough to discourage unauthorized immigration and provide a solution for the 11 million unauthorized immigrants, allowing them to transition from an underground existence to lawful permanent residence and, ultimately, U.S. citizenship. For a variety of reasons, these two components are critical and should be considered simultaneously, regardless of how many individual bills are initially introduced to put the issues on the table.

What other reforms are likely to be under consideration?

There is a humanitarian and political imperative to resolve the legal status of the roughly 11 million unauthorized immigrants in the United States, and this has been a central component of virtually every immigration overhaul proposal offered since 2004. Other critical components to a systemic approach include creating a fair, but realistic system to regulate future immigration needs, securing our borders through efficient application of smart enforcement strategies and technologies, ensuring that our immigration system welcomes new immigrants, and ensuring that all immigration laws respect the principles of due process on which this country is based.¹⁰

What are the basics of reform?

- 1. Creating a pathway to citizenship for unauthorized immigrants that is fair but feasible.**

Today, the vast majority of Americans support some form of legalization for unauthorized immigrants. While the details of that process may vary, polls show that the public wants a system put in place that permits legal status and ultimately citizenship, if the immigrant establishes commitment to the United States. Routinely, that commitment

is demonstrated through some form of initial registration, a willingness to learn English, and full payment of any outstanding taxes. Many of the fiercest debates—behind the scenes, in committee, and on the House and Senate floor—will likely turn on other requirements or conditions placed on individuals. For instance, the amount of fees and fines may determine who can actually apply for the program and who will be unable to afford it.

The scope of the program—whether you can apply for legalization based on presence on the date of enactment, at the time the bill was initially introduced, or sometime further back—will expand or narrow the number of people who can participate. While persons with major criminal convictions will clearly be excluded from the process, Congress will have to decide whether all criminal convictions—including misdemeanors or crimes committed long ago—will also bar someone from eligibility. For example, will convictions for immigration violations, such as entry after deportation, be held against an applicant?

Congress will also have to decide how many years an applicant must wait to transition from some form of provisional legal status to becoming an LPR. The amount of time could depend on whether or not LPR status is contingent on first clearing out the backlog of applicants in legal immigration visa categories, whether someone qualifies under special categories like DREAM Act or AgJobs, or whether someone is applying independently or as the derivative of a spouse's or parent's application. Each of these questions has implications for thousands, if not millions, of people, and that will make the final legalization package a series of compromises with clear winners and losers.

2. Ensuring that immigration policy supports families and American values.

While the economics of unauthorized immigration is frequently the focus of the immigration debate, the breakdown of the family immigration system is equally destabilizing and also spurs a significant amount of unauthorized immigration. Current backlogs in family-based immigration lead to delays of up to 20 years for the legal migration of family members.¹¹ Moreover, recent attempts to undermine family-based immigration have ignored the significant role family support plays in the success of immigrants, and thus of the American dream. The long delays and outdated procedures have generated several policy proposals that could form the basis for reforming family-based immigration.¹² Among the issues likely to be debated include increasing the overall number of visas available in order to reduce current backlogs, whether those increases will be temporary or permanent, and whether increases in family-based immigration can be made while simultaneously increasing employment-based immigration.

Critics of the current family-based visa categories may argue that only nuclear-family members should have access to family-based immigration. They say siblings of U.S. citizens should compete for visas under a merit or employment-based system. Such arguments are often justified by claiming that family immigration leads to “chain migration” or a constant flow of more and more immigrants as each new immigrant brings in additional family members, but the actual number of people who immigrate based on any relationship to a U.S. citizen is quite low.¹³ There have also been proposals that would tie elimination of family backlogs to the ability of unauthorized immigrants to

become LPRs, on the theory that it is unfair to make family-based immigrants wait longer for their visas than unauthorized immigrants would. Proposals like these, however, often fail to explain that the family-based backlogs are of Congress's own making and can be fixed by raising current limits.

Other issues likely to arise, in either an initial package or as a bill moves through Congress, include expanding the eligibility of same-sex partners to petition for spouses and children, allowing the spouses and children of LPRs to be treated as immediate relatives (eliminating waits of several years for LPR families to reunite), and providing broader discretion to grant waivers for persons with an immigration violation to remain in the country based on family or other humanitarian needs.

Another proposal that may be brought into the discussion is the introduction of a point-based immigration system. In a point system, immigrants are admitted based upon a list of characteristics that a country finds valuable, such as education, occupation, work experience, language ability, or age. While the 2007 Senate immigration bill contained a point system, it was a hurriedly produced experiment that was driven by political compromise rather than evidence that a point system would work. In order to be consistent with both American tradition and the country's varied economic needs, any effort to experiment with a point system would have to be a supplement to—and not a substitute for—the existing systems of family-based, work-based, and humanitarian immigration.

3. Ensuring that immigration enforcement enhances national security and community safety without undermining due-process protections.

Most experts and analysts, including those in law enforcement, think legalization is one of the key elements to ensuring our country's safety because it would allow the federal government to focus on genuine threats posed by those seeking to do the country harm, rather than individuals who lack status but have committed no other crimes.¹⁴ Recent reports have also emphasized that many of the markers and targets proposed for enforcement, especially border enforcement, have been met in recent years.¹⁵ Other studies have suggested that a decade of increased spending for immigration enforcement has produced diminishing returns with respect to ending unauthorized immigration, and that the economy, rather than enforcement measures, is a better predictor of unauthorized immigration.¹⁶ Despite these developments, enforcement measures will continue to appear in overhaul bills. These could include additional proposals to strengthen the border and ports of entry, as well as some increased penalties for existing immigration violations. Immigration reform advocates may also push for limits on immigration detention and reduced use of state and local law-enforcement officers to enforce immigration laws.

Shifts in public support away from immigration enforcement may limit additional immigration control measures. However, one area that appears likely to be expanded is the mandatory electronic employment-verification system, E-Verify.¹⁷ While E-Verify continues to have many critics, the debate over its further implementation is likely to turn far more on the level of employer and employee protections embedded in the system, the amount of time it will take to fully implement a mandatory program, what type of

exemptions may exist for individual employers, and how businesses protect themselves from liability for hiring unauthorized workers.

4. Ensuring that the legal immigration system is sufficiently robust to meet the needs of the American economy, does not put native-born workers at a disadvantage, and does not encourage new waves of illegal immigration when job demand is high.

One of the major criticisms of the Immigration Reform and Control Act (IRCA), which legalized nearly three million unauthorized immigrants in the late 1980s, was the failure to include provisions for dealing with future workforce needs.¹⁸ The authors assumed employer sanctions would deter future unauthorized immigration, but they did not account for an increased need for immigrant workers. Because overall immigration numbers were not adjusted to meet demand (and have remained essentially stagnant since 1990), the growing economy, widely available jobs, and inefficient enforcement fueled continued unauthorized immigration. Consequently, regulating the flow of immigration so that it reflects constantly shifting employment needs is critical to a systematic overhaul of the immigration system. It may also be one of the most difficult pieces of the puzzle to negotiate. Some issues, such as increasing the number of visas available in science, technology, engineering, and mathematics (STEM) fields, or encouraging foreign entrepreneurs to invest in the United States, have widespread support among Republicans and Democrats.

Other components of “future immigration flow,” particularly regulating the temporary workforce, are more controversial because they raise difficult questions about the dynamic between the native-born workforce and immigrants. The concerns range from unfair competitive advantages to defining labor shortages to ensuring adequate worker protections. Some argue for the necessity of a short-term and dependable supply of foreign labor, while others argue that businesses should be able to find and recruit needed workers wherever they may be. And other critics maintain that relying primarily on temporary workers, whether professional or day laborers, to meet job demand depresses wages and discourages American workers from obtaining the skills and training they need to succeed. Congress likely will piece together a series of bills that address different aspects of these issues, and may attempt to solve the problem of anticipating future need through various market-driven schemes. That could be through some form of an independent commission tasked with regulating immigration numbers, through lifting some caps on employment categories, by creating new visa categories, or some combination of these ideas. Congress may also choose to put some temporary increases in places with enhanced labor protections and defer the larger fight to another day. Regardless of whatever compromise is reached on this topic, the future-flow issue promises to be one of the most carefully watched and controversial aspects of reform.

5. Long-term commitment to citizenship

Although it frequently receives less attention, continued support of integration and naturalization for immigrants remains a goal of systematic immigration reform. A truly successful legalization program, for instance, should include support for teaching English as a second language and civics education in order to ensure that new immigrants are fully prepared to participate in American life. The high cost of becoming a citizen is a

frequent critique of the U.S. immigration system, yet Congress has routinely cut support for the Office of Citizenship in the last few years. Viewing citizenship as an investment in the future should be a given in any major reform package, but it remains to be seen whether Congress will be willing to invest funds in citizenship education during a period of fiscal austerity.

Conclusion—But There’s More

This is only a brief analysis of what we are likely to see in the coming months. A host of issues will likely be raised at some point in the debate: the restoration of many due-process protections for immigrants in court, reform of the immigration court system itself, access to counsel for minors and persons with disabilities, expansion of the protections for battered spouses and children under the Violence Against Women Act (VAWA), eliminating barriers to asylum such as the one-year filing deadline. Some of these issues may proceed under other pieces of legislation, such as VAWA reauthorization. Some of them may be debated but left for another day. The breadth and scope of these issues—both those that we know must be considered and those that we know should be considered—underscore why the time for a genuine debate over immigration reform is not only much anticipated, but long overdue.

Endnotes

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