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Immigration Legislation in 2008: Politics, Policy and Patchwork Solutions

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It is well recognized that few areas of the law change as rapidly as immigration. Because the United States' immigration policies are products of our economic and political climate, the immigration laws frequently evolve to address our changing economic and national security needs and to serve as barometers of the times in which they are enacted.

What do the immigration laws of 2008 have to say about the times in which we live? They suggest that we are largely ambivalent in our feelings toward immigration, both legal and illegal. While 2008 saw the defeat of a number of deportation-only proposals and the enactment of numerous patchwork fixes of the immigration system, these advances were balanced by increased enforcement efforts, the defeat of a number of legislative efforts addressing weaknesses in the current immigration system and the continuing failure to secure a viable channel for the legalization of the 12 million individuals who live in this country illegally.

On one front, immigration advocates were very successful in combating deportation-only legislation proposed by restrictionist legislators. "Deportation-only" or "enforcement-only" bills rely on deportation and removal as the main strategies for addressing the large numbers of individuals residing in this country without any documentation or legal status. These bills largely ignore the fact that many of these individuals have family members who are legal immigrants or citizens of the United States and that there exist other viable means of remedying the undocumented problem, such as the creation of additional visas or waivers. As long-term solutions, deportation-only approaches are fundamentally problematic because they fail to take into account the sheer size of the undocumented population in the United States (12 million and counting), as well as the fact that more than 5 percent of all people employed in the country are not in legal status. An attempt to deport all these individuals would clearly be a losing proposition for practical, administrative and economic reasons.

Early this year, anti-immigration legislators in the House focused their energies on passing an enforcement-only bill entitled the "Secure America through Verification and Enforcement Act," or the

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SAVE Act. Despite its innocuous sounding name, the SAVE Act was a minefield of anti-immigration provisions that would have, among other things, increased the number of border patrol agents, expanded the number of beds for immigration detention, appropriated more money for border security and dramatically expanded the reach of the E-Verify program.

The E-Verify program is an online system administered by the U.S. Citizenship and Immigration Services, with the help of the Social Security administration, that allows an employer to check a worker's identity and employment eligibility information against records contained in the Social Security administration and Department of Homeland Security databases to determine whether the employee is legally authorized to work in the United States. Although the E-Verify system has been in operation as a voluntary program since 1997, a recently issued regulation makes E-Verify enrollment mandatory for federal contractors who are awarded contracts worth more than \$100,000 on or after Jan. 15, 2009.

The efficacy of the E-Verify program in successfully identifying unauthorized workers, though, has been questioned because of the large number of erroneous or outdated entries in the databases it relies upon that could potentially ensnare thousands of U.S. citizens and legal workers. E-Verify has also faced criticism as overburdening the Social Security administration. Despite the profound problems associated with the E-Verify program, the SAVE Act sought to make E-Verify mandatory for all employers within a four-year period.

In response, immigration advocates ran a blistering campaign against the proposed legislation, focusing on the fears of both big and small businesses that faced enrollment in the flawed E-Verify system. Immigrant groups also opposed the bill, which they viewed as strongly anti-immigrant because of its enforcement-only approach. Seeing the SAVE Act as an election-year wedge that would drive Hispanic voters further away from the Republican party, the Democratic leadership in the House provided stiff opposition to the bill and succeeded in holding it up in committee. As a result of these advocacy and political efforts, proponents of the SAVE Act were unable to muster sufficient enthusiasm for the bill's severe enforcement-oriented policies, and the act failed to receive the requisite number of signatures to force a vote on the House floor.

The defeat of the SAVE Act was an important achievement in thwarting deportation-only efforts. It should be noted, though, that attempts by immigration advocates to create new visas or add to existing visa numbers did not meet with the same amount of success as efforts directed at defeating enforcement-only legislation. For example, two bills seeking to increase the numbers of H-1B visas available to highly skilled workers did not make it out of the House of Representatives, leaving in place the flawed lottery-style system for awarding H-1Bs. The lottery system was instituted by the Immigration Service to deal with the high demand for H-1B visas, which greatly exceeds the annual numerical limitations on the visa, currently set at 65,000 for general applicants and 20,000 for foreign national graduates of U.S. master's degree programs. With the lottery system, a computer program is used to randomly select properly filed H-1B applications, which are only then vetted for eligibility and, if meeting the requirements for the visa, approved. The randomness inherent in the lottery system means that the applications of many of the best and brightest foreign workers are never even considered by the Immigration Service; that the H-1B applications of diverse industries are lumped together despite their varying employment needs; and that businesses cannot single out their preferred candidates.

In March 2008, Bill Gates presented impassioned testimony before the House Committee on Science and Technology arguing against the critically low caps on H-1B visas, which he believed hampered U.S. corporations like Microsoft from recruiting highly skilled workers and were forcing businesses to relocate abroad in order to obtain staff with the necessary skills. His testimony helped inspire the recent legislative efforts to raise the caps on H-1B visas, but the bills' lack of success demonstrates that even legal immigration by highly skilled workers is an unpopular political issue.

The pro-immigration legislation that was enacted into law in 2008 was largely passed through last-ditch efforts seeking to extend several existing pilot programs or implement narrowly targeted new programs. The following are a few of the key immigration-related laws that were enacted in 2008:

- The Military Personnel Citizenship Processing Act. This law requires the Immigration Service to process and issue a decision on the citizenship application of a current or former member of the armed forces or their surviving dependents within six months of receipt of the application.
- The SSI Extension for Elderly and Disabled Refugees Act. Prior to this enactment, qualified refugees, asylum seekers and victims of human trafficking were eligible for benefits under the Supplemental Security Income Program for seven years and were required to obtain citizenship during that seven-year period. To account for substantial processing delays by USCIS, the new law extends the period during which qualified immigrants remain eligible for SSI benefits, and during which they must obtain citizenship, by two years.
- The HIV Travel/Immigration Ban Repeal. This law removed the statutory bar to admission for tourists and immigrants with HIV. Prior to the repeal, HIV was the only disease that the current immigration laws specifically named as rendering travelers and immigrants inadmissible.
- Extensions for immigrant physician and religious worker visas. On Oct. 3, President Bush signed into law H.R. 5571, a five-year extension of the Conrad State 30 program. This program allows each state to sponsor up to 30 physicians who agree to work in medically underserved areas in order to avoid returning to their home countries for two years at the end of their training. Congress also succeeded in enacting a last minute extension of the non-minister religious worker program until March 6, 2009.
- The Continuing Resolution for fiscal year 2009 titled, Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009. The Continuing Resolution was a law drawn up by Congress to provide stop-gap funding for operations of the federal government until March 6, 2009. However, immigration advocates succeeded in incorporating a number of important measures into the Continuing Resolution, namely, limited extensions of the E-Verify and the EB-5 regional center pilot program until March 6, 2009. The EB-5 regional center program allows foreign nationals who make an investment of \$500,000 in a USCIS-approved regional investment center to obtain permanent residency in the United States. The program, which once stood on rocky ground, has now been restructured and has emerged as a well-respected program viewed as an important source of investment and job creation for the United States. For example, the locally based Philadelphia Industrial Development Corp. Regional

Center was responsible for a significant portion of the investments that enabled the Comcast Center to be built.

This overview of recent congressional efforts on immigration asks how the legislative landscape will differ in the aftermath of the recent elections, which placed a Democrat in the White House and added to the Democratic majority in both houses of Congress. More significantly, a new crop of pro-immigration legislators is about to enter the Capitol building; of the 21 House and Senate races in which immigration was strongly featured as a differentiation between the two candidates, the pro-immigration candidate won 19. Even in this new Congress, though, it is surmised that some things will remain the same. For instance, it will likely still be the case that efforts spearheading immigration reform will remain dependent on bipartisan support, because of the fact that the Democrats lack cohesiveness on the best path toward immigration reform while some of the strongest leaders on the topic have been found across the aisle.

As a political issue, immigration is unusual in that it draws support from two diverse lines of political thought, namely, pro-business and pro-immigrant groups. The recent downturn in the economy may have an important effect on immigration reform efforts by undermining arguments by pro-business elements that immigration strengthens the U.S. economy by filling the demand for low-skilled and highly skilled labor.

Some recent developments, though, are seen as bolstering immigration reform. Following Barack Obama's victory in the 2008 presidential campaign, one of the biggest stories to emerge was the significance of the Hispanic vote in the historic election. Hispanic voters were credited with winning Obama several swing states — Florida, Colorado, Nevada and New Mexico — and strengthening his lead in other key states, such as California. The rise of the Hispanic vote as a powerful political force suggests that, because of the large immigrant base in this group, both Democratic and Republican congressmen will be bending a more willing ear in the future to calls for pro-immigration efforts.

But it is questionable how far such congressional goodwill toward immigration will go. Comprehensive immigration reform has long been seen by many in both parties as a political quagmire because of the complex factors at work, and the Senate is still shell-shocked from its attempt to consider the matter in 2006 and 2007. The fact that the economy now lies in tatters does not make the political landscape any more favorable for immigration reform; forces that might once have supported the growth of immigrant labor may seek to keep immigration reform at bay in order to preserve U.S. jobs. Rather than becoming willingly embroiled in an ugly debate on immigration once again, some predict Democrats will delay pushing large-scale reforms of the immigration system to stay on the good side of organized labor.

For this reason, immigration advocates are not holding their breath while they wait for legislation addressing the immigration system. During its lame duck session, the current Congress will probably be too busy dealing with the economic stimulus to address immigration in any way. Obama has stated that he plans to consider comprehensive immigration reform during his first year in office, but has also explained that other issues, led by the economy, will be at the head of his list of priorities when he enters the White House. However, with the E-Verify, EB-5 regional center and religious worker programs all coming up for re-authorization in March 2009, Congress will be forced to lift its head out of the sand and turn its attention back to immigration by that date.

Immigration advocates hope to use this opportunity early in the year to bring before Congress legislation that would "recapture" family-based and employment-based visas that have gone unused in previous years because of visa processing or other bureaucratic delays. One certain thing is that immigration policy advocates will continue to apply pressure to Congress to address weaknesses in the current immigration system. While the success of future legislative efforts cannot be predicted, the role of immigration in the economy, and its importance among numerous groups in the country, mean that immigration should remain a pressing political issue next year.