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US IMMIGRATION REFORM: FROM G.W. BUSH TO B.H. OBAMA

■ William F. McDonald

The author describes attempts to introduce laws in the United States which would control illegal immigration. He focuses on reforms that the Bush administration tried to introduce, and failed, and on the criteria that successful reforms under the Obama administration would have to meet. He demonstrates the complexity of the political situation and, in so doing, shows why it is that effective reform is unlikely.

INTRODUCTION

One of the first problems of dealing with immigration reform is coming to grips with the language. In Washington, sharp debates often ensue over the meaning of words. President George W. Bush insisted that his legislation was not an ‘amnesty’.¹ Opponents like Pat Buchanan insisted it was an amnesty, ‘pure and simple’. But, of course, there was nothing pure or simple about that debate.

President Bush’s bill called for comprehensive reform that would have coupled together tougher border enforcement measures and tougher crackdowns on employers of illegal immigrants with a pathway to citizenship for 12 million illegal immigrants, plus a new guest-worker system and dramatic changes to the system of legal migration.

This article addresses four questions:

1. Why did the Bush reform fail?
2. Will the US be able to get an effective comprehensive reform with an amnesty in the future?
3. What are the elements needed for an effective immigration reform?
4. What are the prospects for an effective reform under Obama?

THE ARGUMENT

Why the Bush reform failed

The comprehensive immigration reform bill of 2007 was sunk because several forces converged into a perfect storm. It is unlikely

that precisely the same set of forces will occur in the future. Yet, one of them—a new and a potent one—will probably have to be reckoned with again, namely, effective opposition from activists who claimed to speak for the general public, those Liliputian Americans whose wishes regarding immigration policy have been repeatedly ignored. These conservative activists carried the day although their views did not reflect general public opinion found in the polls.

Why did this not happen to the Immigration Reform and Control Act (IRCA) in 1986? Demographics, culture, technology and a certain kind of president! In 1986, Americans believed the border was out of control and they wanted immigration restricted.² But two barriers prevented them from squelching IRCA: (1) The general public was much more insulated from the realities associated with immigration in 1986 than was the case in 2007; and (2) Congress was more insulated from the general public and advocates claiming to represent the public. Those barriers no longer exist.

The social consequences of immigration in the 1970s and 1980s were a lived reality only for those people living in certain areas of the country, the big six immigration states.³ Since the 1990s, immigrant communities have sprouted up everywhere. With them have come rapid changes that many people have said they find threatening and alarming.

Simple things like walking into your local Wal-Mart and suddenly realising that you are the only Caucasian in a sea of Latinos;⁴ or, being the target of some whistles and catcalls from those foreign men who hang around together drinking, laughing and talking in a language you don't understand; or, having forty people living in the two-bedroom house next door, barbecuing goats, letting chickens run free and playing that damn music all night.⁵ And, worst of all, they may be in the country illegally.

Compared to 1986, today's frustration with the federal government's failure to control immigration is felt directly. It has boiled over into a massive backlash. Grandmothers are manning the protest lines. State and local governments have moved aggressively to fill the void. By April of 2007 over one thousand immigration bills—in all 50 state capitols—had been introduced, up from a total of 570 for all of last year.⁶ By then eighteen states had already enacted 57 of these bills.⁷ However, for the entire year 576 immigration-related bills out of 1,059 bills introduced were enacted. Of these all expanded immigrant rights rather than contracted them.⁸

It is noteworthy that many of these efforts have occurred in small towns and suburbs far from the border, places like Hazleton, Pennsylvania—where the Hispanic population jumped from five per cent to 30 per cent in six years.⁹ In 2006 its City Council passed the Illegal Immigration Relief Act which imposes a \$1,000 a day fine on landlords who rent to an illegal immigrant and revokes for five years the business license of any employer who hires one.¹⁰

In 2007 after the Senate killed immigration reform, Prince William County, Virginia approved several anti-illegal-immigrant measures including denying them public services and directing the police to check the immigration status of anyone in custody whom they suspect to be unauthorised.¹¹

The impatience of the American public with the federal government's failure to control illegal immigration continues to boil over. The Arizona legislature has enacted the toughest immigration law in generations. It makes the failure to carry documents proving legal immigration status a crime and it gives local police broad authority to detain anyone suspected of being in the country illegally.¹² There are efforts afoot to copy the law in 20 other states;¹³ and the majority of Americans favor it.¹⁴ The Obama administration has succeeded in getting a temporary injunction to prevent the implementation of the Arizona law.¹⁵ The State of Arizona has appealed the ruling. The case is expected to go eventually to the US Supreme Court.

The backlash should be no surprise. Since 1996 the percentage of Hispanic students in Prince William County's school system, for example, had jumped from 6.6 to 24.2 per cent.¹⁶ Perhaps more telling is the dramatic rise in chicken violations—that is, the number of violations of the county's zoning regulations banning farm animals from residential neighborhoods. They soared from a mere three in 2004 to 32 in 2006, a whopping 1,000 percent increase!¹⁷ That's a lot of chicken feed!

Scholars such as Peter Schuck and Daniel Tichenor note that for many years there has been an enormous disconnect between the preferences of most ordinary citizens and immigration policy outcomes from Congress.¹⁸ Surveys indicate that the general public has almost always favored either more restrictive immigration policies or at least no further expansion of immigration.¹⁹ Yet, virtually all immigration policy reforms for decades have been consistently expansionist.²⁰

Surveys also have shown that there is a enormous gap between elites and the general public regarding their immigration policy preferences.²¹ Elites are expansionist. The general public is restrictionist. Columnist David Brooks argues that this difference

reflects a newly emerging culture war, one between the more educated and the less educated.²² Quoting with approval sociologist Manuel Castells' generalisation that 'Elites are cosmopolitan, people are local', Brooks says that '[p]eople with university educations favor intermingling. People with neighborhood values favor assimilation'.²³

Even today, the people's voices have yet to be heard undistorted by advocates. The expansionist immigration policies have been driven by special interests both on the right and on the left. The right favors guestworker programs and fewer burdens on business. The left favors family reunification, non-discrimination, greater welfare benefits and a path to legalisation.²⁴ But both sides favor expansionist policies. Even labor unions have become pro-immigration.²⁵

Against this army of expansionist interests, organised opposition has been puny. The old nativist and xenophobic organisations are gone. A few low immigration organisations have carried on a rear guard action. But they have not been a political counterforce to the dominant expansionists.

The new counterforce that came roaring onto the scene this year is the voice of some (if not all) of the people. It was aroused by a new cultural phenomenon, the conservative talk shows, and with the help of the new technology of faxes, blogs and emails.²⁶ It breached the barrier that had once insulated Congress. Today we live in a Lou Dobbesian²⁷ state of nature in which individuals can easily bombard Congress with electronic messages that are nasty, brutish and short.

This new force in immigration politics is not likely to fade away. But whether it will be able to trump the powerful expansionist forces in the future probably depends upon the last factor in our perfect storm, namely a president who was so politically weak because of his disastrous foreign policy that he could not rally his party and who

was so deluded with his political capital as to think that he could get controversial legislation enacted without the backing of some politically-balanced commission of experts who could provide needed political cover.

Readers acquainted with American immigration politics may recall that, in 1986, IRCA contained two controversial provisions: employer sanctions—which the right opposed—and an amnesty—which the general public did not oppose. Congress had cleverly hidden this wolf in sheep's clothing. They called it 'legalization' and sold it as a crackdown with tighter security at the border and tough penalties for employers of illegal workers.²⁸ In the late 1970s when these provisions were first being considered, a broad-based panel of political leaders and experts was created by Congress precisely for the purpose of averting a political backlash against immigration.²⁹ This strategy succeeded because there were no conservative stealth bombers to blow it apart.

This panel, the Select Commission on Immigration and Refugee Policy (SCIRP), was described by its sponsors as a panel that would 'offer broad expertise and prudent policy recommendations ...'³⁰ SCIRP supported employer sanctions and an amnesty. More broadly, it helped frame the reform discourse out of which IRCA finally emerged. But it was not easy. The IRCA legislation was killed so many times yet still kept coming back from the dead, that it was nicknamed the 'creature from the black lagoon'. Right to the end concessions were being made by all sides.³¹

Reform with amnesty possible?

The IRCA experience together with what happened to immigration reform in 2007 suggests that, if a broad-gauged amnesty is ever to be had, it will require a strong and popular president backed by the recommendations of a substantial bipartisan panel of people drawn from across the spectrum

of immigration policy preferences. It will not be easy but it probably can be done. Ronald Reagan had no problem calling for an ‘amnesty’. He said so himself in a televised debate with Democratic presidential nominee Walter Mondale in 1984. ‘I believe in the idea of amnesty for those who have put down roots and lived here, even though sometime back they may have entered illegally’, he said.³²

The encouraging news is that the general public actually is ambivalent about immigration in general and about an amnesty. Americans’ opinions about immigration are paradoxical. They want immigration decreased. They want to get tougher on illegal entry and on the employing of unauthorised workers. But they are willing to grant an amnesty.³³

Surveys conducted in 2006 and as late as 3 June 2007 found majorities of people were willing to allow illegal immigrants a path to citizenship. In March 2007, 83 per cent of Californian registered voters favored legalisation.³⁴ In late May 2007, a national survey found that two thirds of the respondents favored the paths to legalisation provided in the Senate’s bill.³⁵ The third survey (among New Yorkers in March 2006) actually used, the ‘A’ word, ‘amnesty’. Nonetheless, 70 per cent of the respondents favored the option.³⁶ Despite this agreeable public opinion the 2007 legislation failed because anti-immigrant forces such as talk radio and email campaigns spoke louder.

Elements needed for a reform that succeeds

Our next question is about whether or not an immigration reform bill that provides for the usual package of immigration control goodies—tougher employer sanctions, stronger border controls, guest-workers and an amnesty—will work. Will it do the following:

- deter employers from hiring unauthorised immigrants

- deter people from immigrating illegally
- provide employers with cheap labor
- eliminate the existence of a huge illegal population living in the country, and
- do all this cheaply, efficiently and without discrimination?

Doubters, like Senator Jeff Sessions, predict that such a reform bill would not work. What can we learn from experience?

In 1982, immigration scholar, Phil Martin, was probably correct when he said that no one could give an unequivocal answer to the question of whether the immigration reform strategy that ultimately became IRCA would stop illegal immigration. Nevertheless, he did not hesitate to say that most immigration specialists at the time believed it would!³⁷

With all due respect, it is hard to imagine how anyone then or now could believe that IRCA or a son-of-IRCA type legislation could work. At least a few immigration specialists at the time predicted failure.³⁸

Once our culture has changed to the point where it was no longer politically acceptable to control illegal immigration by mass deportation campaigns blithely named with ethnic slurs like the 1954 ‘Operation Wetback’, employer sanctions became one of the two last great hopes for controlling illegal immigration, the other being border control.

The dream was (and continues to be) that by deterring employers from hiring unauthorised workers the illegal job market would dry up. As Commerce Secretary Gutierrez put it when rolling out the Bush plan, ‘[O]ver time, it [would] become unlikely that people will risk their lives crossing the border’ knowing that unless they are legal they ‘will not find a job’.³⁹

The effectiveness of employer sanctions depends upon four things:

- the system has to be easily administered.

- there has to be a tamper-proof method for identifying who is eligible and who is not (such as a biometric national identity card).
- the sanctions have to be enforced.
- employers must have access to an alternative supply of cheap labor.

The first three of these conditions never happened and so, not surprisingly, IRCA was a bust. The outcome was predictable. For one thing, there was a Government Accounting Office report in 1982 that found that employer sanctions had been ineffective in all 19 nations that had tried them.⁴⁰ In addition, in the United States, eleven states including California had already tried the employer sanctions' magic bullet. All had failed. All for the same reason, namely, the failure to enforce the statutes.⁴¹

When it came to employer sanctions, the SCIRP commissioners had been almost unanimously (14 to two) in favor of them; but, when it came to the provision of a secure employee identification system, they had split down the middle (eight to seven with one absent).⁴² Congress also could not agree over a secure employee identification system. The problem was trying to balance the concerns of those opposed to anything resembling a national identity card system (something unthinkable in American politics) and those worried that existing forms of identification were too insecure to support employer sanctions—a conflict that is still being waged today.⁴³

Without a secure employee identification system, IRCA was doomed.⁴⁴ Twenty-eight different kinds of identification from birth certificates to driver's license were allowed to be used.⁴⁵ The law spawned an enormous fraudulent document industry.⁴⁶ An estimated 73 per cent of the applications under IRCA were fraudulent.⁴⁷

Solving the secure identification problem has yet to be done. The Bush administration proposed a high-tech biometric system but so far it does not appear workable; and, its

political viability is untested.⁴⁸ But even if such a system succeeded technologically, there is the question about the will to actually enforce these sanctions.

The enforcement record does not inspire confidence. It is a disheartening record of a few big-busts;⁴⁹ political interference resulting in the Immigration and Naturalization Service (INS) calling off raids that would hurt businesses;⁵⁰ discrimination and retaliation against workers; and major variations in the level of enforcement going from steep declines to the point of no longer having any reasonable expectation of a deterrent effect⁵¹ to rekindled campaigns to crackdown on employers.⁵²

If employer sanctions were ever effectively enforced, business interests would demand a compensatory guestworker program; liberals would demand that guestworkers be given a path to legalisation; the general public would be outraged once again, and the illegal immigration conundrum would continue to go unsolved.

We need to recognise that the illegal immigration control policy arena deals with multiple contradictions in our political economy and our culture that can no longer be reconciled by liberal democratic states. As Kitty Calavita has correctly argued, immigration control legislation attempts to respond to contradictory economic, ideological, political and cultural demands.⁵³

How about the border control component? Can the US control the US–Mexico border? At what cost? How big is that border? Not as big as Australia's 16,000 mile coastline but longer than the distance from Paris to Moscow.

Politically, getting the border under control is crucial. It has tremendous symbolic value. Evidence that the border has been controlled may be required as a trigger for any future deals involving amnesties—as it was in the Bush negotiations.

At great expense, the federal government has demonstrated that it can achieve

limited kinds of border control in selected geographic areas. It can divert the flow of illegal immigration from one area to another and even to treacherous areas. But it has not demonstrated that it can stem the flow of illegal immigrants.

Compared to pre-IRCA levels, overall immigration enforcement spending has skyrocketed, growing from \$1 billion to \$4.9 billion between fiscal years 1985 and 2002. The lion's share of those funds have been spent on border control. Over 93 per cent of the apprehensions of immigrants for immigration violations are made by the Border Patrol.⁵⁴

The government has upgraded the quality of its border barrier from chain link fencing to surplus military airport landing matts to shiny new fences that supposedly cannot be scaled. National guard engineers are helping to put up 370 miles of these fences. That leaves 1,630 miles unfenced and ungarded. For a mere \$8 billion dollars the Department of Homeland Security (DHS) plans to erect high tech electronic towers with cameras that can spot a flea on a dog's back ten miles away at midnight.

For all this effort, illegal immigrants keep streaming across the border.⁵⁵ Before IRCA, unauthorised immigrants were arriving in the country at the rate of 180,000 per year. Since the year 2000, they began arriving at the rate of 850,000 per year.⁵⁶ The conclusion seems inescapable. The federal government has not been able to control the border as a whole.

I am not advocating this but to make a point about the uncontrollable nature of the border I would say that if the federal government really wanted to stop the flow, it would have to treat its border the way East Germany treated the Berlin Wall. At least there would be fewer deaths. Since the build-up on the border beginning in 1993, there have been more than 2,600 border crossing-related deaths. This is ten times more than the Berlin Wall claimed during

its 28-year existence.⁵⁷

Finally, the US needs to address the big lie about the instrumental (rather than the symbolic) significance of border control. For all the attention that has been focused on border control, one might assume that the vast majority of illegal immigrants in the country entered by crossing the border. That would be wrong. One estimate is that as much as 40 per cent of the unauthorised population entered the country legally and overstayed their visas.⁵⁸

With all this leakage, the Congressional Budget Office's (CBO) estimate about the likely impact of the Senate's 2007 immigration reform bill should not come as any surprise. The CBO estimated that the bill's provisions would only reduce the new annual flow of unauthorised immigrants by 25 per cent.⁵⁹ That means that instead of the estimated 850,000 unauthorised immigrants arriving each year only 637,500 per year would be arriving.⁶⁰

IMMIGRATION REFORM UNDER OBAMA?

So what does all this mean? Where do we go from here?

It appears that contemporary liberal democratic states can no longer control their borders (as well as they once did) and that amnesties will be necessary—possibly at the rate of about one per generation as suggested by the multiple amnesties already granted in France, Italy and elsewhere.⁶¹ We should not delude ourselves into thinking that employer sanctions and border walls are the answer, that businesses can do without cheap labor, and that restricting immigration is not an important goal that the public dearly wants.

The immigration reform bill that failed under Bush deserved to die. It was not comprehensive enough. It did nothing to make immigration law more humane or more in line with the basic principles of fairness established in other fields of law

such as criminal law. For instance it did not propose to rescind the law providing for the deporting of aliens for minor crimes committed in their youth and paid for years ago by time served in prison. This staggers one's sense of justice. Spending billions to put up a wall without allocating a proportionate amount for search and rescue operations to protect the victims from the reality that we are an attractive nuisance is unjust. Immigration law reads like something out of the dark ages.⁶² When are we going to see it reformed to meet the basic standards of justice about which Americans once prided themselves?

Despite these pessimistic realities, the United States continues to try to do something effective about immigration reform. In the summer of 2009 Democratic Senator, Charles Schumer, Chairman of the Judiciary Subcommittee on Immigration, Refugees and Border Security, reported that: 'All of the fundamental building blocks are in place to pass comprehensive immigration reform this session and, even possibly, later this year'. He outlined key principles that would be part a reform bill, including strong enforcement of illegal immigration, an employer-based verification system and a direct path to citizenship. He said:

The following seven principles ... comprise what I believe to be the framework for a bill that can receive overwhelming Congressional support:

1. Illegal immigration is wrong, and a primary goal of comprehensive immigration reform must be to dramatically curtail future illegal immigration.
2. Operational control of our borders--through significant additional increases in infrastructure, technology, and border personnel--must be achieved within a year of enactment of legislation.
3. A biometric-based employer verification system-with tough enforcement and auditing-is necessary to significantly diminish the job magnet that attracts illegal aliens to

the United States and to provide certainty and simplicity for employers.

4. All illegal aliens present in the United States on the date of enactment of our bill must quickly register their presence with the United States Government—and submit to a rigorous process of converting to legal status and earning a path to citizenship—or face imminent deportation.

5. Family reunification is a cornerstone value of our immigration system. By dramatically reducing illegal immigration, we can create more room for both family immigration and employment-based immigration.

6. We must encourage the world's best and brightest individuals to come to the United States and create the new technologies and businesses that will employ countless American workers, but must discourage businesses from using our immigration laws as a means to obtain temporary and less-expensive foreign labor to replace capable American workers; and finally

7. We must create a system that converts the current flow of unskilled illegal immigrants into the United States into a more manageable and controlled flow of legal immigrants who can be absorbed by our economy.⁶³

It is not hard to see why Senator Schumer's proposal will never succeed. He solves one problem by creating another. Employer sanctions have failed in the past for want of a secure employee identification system. A biometric social security card would solve this problem but such a policy will never fly in the United States. Schumer's proposal has already been demonised in the blogosphere as a national identity card. The idea of such a system is completely anathema to American politics. It has been resisted time and again. It has even less chance of success than similar proposals in the United Kingdom and Australia, proposals which managed to be enacted but were quickly scrapped.⁶⁴

Candidate Obama made an appeal to

Latino voters promising immigration reform.⁶⁵ As president he is moving slowly. Immigration is a vexing issue that does not divide neatly along party and ideological lines. Obama recently indicated that he will 'begin' to initiate comprehensive immigration reform but success will depend upon getting bipartisan support.⁶⁶ And, Democratic leaders have agreed to try to steer a reform bill through Congress by the end of this year (2010).

The controversial Arizona law giving police broad power to detain people they suspect are in the country illegally has made the situation more complex. The law is significantly popular throughout the country.⁶⁷ However, it represents a challenge to the Constitutional authority of the federal government to regulate immigration. The Obama administration has obtained an injunction against the implementation of its most controversial provisions. Some commentators expect that this controversy will derail immigration reform possibly until after the next presidential election.⁶⁸ It seems clear that Democrats will lose control of Congress at the mid-term elections this (2010) fall; and, the Republican strategy is likely to continue to be obstructionist.

Public opinion pollsters, however, believe that the conventional wisdom is wrong. Recent polling shows once again that Americans hold what seem to be contradictory views about immigration. While most Americans support Arizona's anti-immigrant law, they also support proposed federal comprehensive immigration reform legislation with a path to eventual citizenship for undocumented immigrants.⁶⁹ Even the people of Arizona hold these contradictory views. Fifty-five per cent support their state's controversial so-called anti-immigrant law; yet, at the same time, sixty-two per cent support allowing working illegal immigrants with no criminal records to remain in the country.⁷⁰

CONCLUSION

Comprehensive immigration reform in the United States is a matter that everyone agrees needs to happen but few agree on how to do it. President Obama has repeated his commitment to trying to get it done but he has also said it could not happen without bipartisan support, something that seems to have disappeared from Congress. The Democrats' proposed reform package contains two components that would be an extremely hard sell to Americans: an amnesty for illegal immigrants and a biometric national identity card to prevent illegal employment. It also contains a promise to effectively control the border.

You can fool all of the people some of the time but not all the time. President Reagan managed to get an amnesty enacted in 1986 with the promise that employers would no longer hire illegal immigrants and thus illegal immigration would end. But more than two decades later with illegal immigrants showing up all over the country and the economy in crisis, the public is highly sceptical about the government's commitment to and capacity for controlling immigration. Paradoxically, the polls show that the majority of people are still willing to support an amnesty. Arguably these poll results are influenced by an unrealistic impression about the degree of immigration control that would accompany the amnesty legislation.

In any event, it is fair to predict that the anti-immigrant, talk-radio commentators will have an easy time vilifying the Democratic comprehensive reform proposal or similar ones. Beside the amnesty issue there is the politically explosive biometric national-identity card issue—which has yet to be lobbed into the debate. In addition, there is plenty of scepticism-mongering to be done regarding the government's ability to control the border.

It is possible that something called 'comprehensive immigration reform' might

be passed during the Obama administration. But, as we noted at the outset, the meaning of words is always problematic in Washington. The reform would have to contain some kind of amnesty and some feint at preventing illegal employment and controlling the borders. The amnesty will be easy to put into effect—although it is likely to be accompanied by much fraud. Achieving successful immigration control at the border or the place of employment, however, is unlikely to happen. The border

is too big and, a reliable, easily-administered and politically acceptable system for determining legal employability is too unreachable. The ‘comprehensive reform’ will be another triumph of words over actions in the litany of efforts that the United States has waged unsuccessfully against illegal immigration.

Acknowledgment

I am grateful to the anonymous reviewer for the excellent suggestions.

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