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US Immigration Reform: Plenty of Ideas; Little Action

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Introduction

The US has a “fundamentally broken immigration system,” in the words of President Obama. This sentiment is mirrored in a 2009 German Marshall Fund survey of US public opinion on immigration that found that 73% of the 1,000 people surveyed said that the US government has done a “poor” or “very poor” job in managing immigration, while only 24% rated immigration management as “good” or “very good.”² This policy failure is manifest in an illegal immigrant population that has increased from an estimated 4.2 million in 1992 to 7 million in 2000 to a high of 11.8 million in 2007 to 10.8 million in 2009,³ a third to two-fifths of which entered legally but overstayed their visas. As demand for migrant labor increased with a growing US economy between the end of the recession of 1990-1991 to the recession of 2008-2009, the US Congress was unable to pass legislation for an immigration system that allowed enough legal immigration to meet economic demands and ensured that employers only hired those migrants with work authorization. Instead, migrants entered, stayed and worked illegally, employers who hired them faced little risk of punishment and American consumers enjoyed the cheap food, home building, restaurant meals, eldercare and childcare services that these illegal migrant workers provided.

In this paper, I examine some of the main proposals for reforming America’s broken immigration system through a lens of political feasibility. First, I review many of the good ideas for immigration reform put forward by a variety of bipartisan and blue ribbon commissions over the past five years. Second, I examine contemporary realities of the coalition politics of immigration and the tension between a comprehensive approach to immigration reform vs. a piecemeal approach, with particular attention to breaking out border security legislation from larger packages of comprehensive reform legislation. Third, I consider the US federal government’s administrative capacity to implement comprehensive immigration reform legislation with special attention to the implementation of an expanded temporary migrant worker program. Fourth, I consider the political will to implement immigration reform legislation by evaluating the implementation of a component of comprehensive immigration reform that all immigration reform proposals have depicted as crucial to success but has proved exceptionally difficult to implement: the enforcement of sanctions on those who employ foreign nationals who are not authorized to work in the US. I conclude with a few reflections on how the failure to fully implement past immigration reform policies combined with the political framing of future immigration reforms in terms of the prerequisite of gaining “operational control of the border” are serious political obstacles to proponents of immigration reform as well as sum up my thinking on the prospects for enacting comprehensive or piecemeal immigration reform legislation in the near future.

Proposals for Reform

² German Marshall Fund, *Transatlantic Trends: Immigration*, Topline Data 2010, p. 43.

³ Data for 1997-2000 from “Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000” Office of Policy and Planning, U.S. Immigration and Naturalization Service, Table C, P. 10. http://www.dhs.gov/xlibrary/assets/statistics/publications/III_Report_1211.pdf; Data for 2005- 2009, Estimates of the Unauthorized Immigrant Population Residing in the United States” DHS Office of Immigration Statistics, various years <http://www.dhs.gov/files/statistics/publications>

Successive rounds of immigration reform commissions and legislative initiatives stretch back for over a century to the U.S. Immigration Commission (a.k.a. Dillingham Commission), which was established in 1907 and issued its series of reports in 1910-1911,⁴ with more recent successful legislative efforts depending on strange bedfellow coalitions of free-market Republicans responding to business interests and liberal Democrats influenced by ethnic and civil rights constituencies.⁵ The latest round of immigration reform was initiated by former President Bush shortly after he came into office in January of 2001 and shaped by intensive bilateral discussions with the administration of Mexican President Vicente Fox to address the increasing numbers of Mexican illegal migrants in the US. After five summit meetings in nine months, Bush and Fox came to an understanding that if the US would enact immigration reforms to increase the numbers of legal guestworkers from Mexico and legalize most of the undocumented Mexican nationals in the US, Mexico would cooperate with the US on border enforcement. Presidents Bush and Fox announced the agreement on such a framework for migration policy reforms on September 7th but terrorist attacks on the US four days later left the framework agreement stillborn. After a two and a half year lull, President Bush reignited immigration reform in the US with a January 7, 2004 speech in which he proposed “a new temporary worker program to match willing foreign workers with willing U.S. employers when no Americans can be found to fill the jobs.”⁶ Bush offered in an invitation to Congress to craft legislation for “fair and secure immigration reform” guided by a set of “principles for immigration reform” in which the proposed temporary labor migration program would also be used as a vehicle to regularize undocumented migrants in the US: “The program would be open to new foreign workers, and to the undocumented men and women currently employed in the U.S. This new program would allow workers who currently hold jobs to come out of hiding and participate legally in America's economy while not encouraging further illegal behavior.”⁷ Essentially, these principles for immigration reform paired legalization via guestworker with enhanced border controls and stricter immigration law enforcement.

After President Bush's proposal for legalization via guestworker program was deemed unworkable by Sen. Edward Kennedy (D-MA), ranking minority member of the Senate Judiciary Subcommittee on Immigration, Refugees, and Border Security, many alternative proposals were put forward by members of Congress from both sides of the aisle. Eventually, proponents of comprehensive immigration reform coalesced into a coalition led by Kennedy and John McCain (R-AZ) in the Senate and James Kolbe (R-AZ), Jeff Flake (R-AZ) and Luis Gutierrez (D-IL) in the House and then introduced The Secure America and Orderly Immigration Act in May 2005. This comprehensive immigration reform legislation paired increased border security with regularization of illegal migrants and provisions for increasing future legal flows, most notably a more flexible system for increasing temporary migrant labor. Senators Jon Coryn and Jon Kyl introduced the competing Comprehensive Enforcement and Immigration Reform Act of 2005, which included provisions for regularization of illegal migrants that were less expansive than the Kennedy-McCain bill. Senators Chuck Hagel and Mel Martinez then mediated a compromise which led to Senate passage of the Comprehensive Immigration Reform Act of 2006 at the end

⁴ Katherine Benton-Cohen, “The Rude Birth of Immigration Reform,” *Wilson Quarterly*, Vol. 34 Issue 3 (Summer 2010), pp. 16-22.

⁵ Daniel J Tichenor, *Dividing Lines: The Politics of Immigration Control in America* (Princeton, NJ: Princeton University Press, 2002).

⁶ See “Fact Sheet: Fair and Secure Immigration Reform,” White House January 7, 2004 <http://georgewbush-whitehouse.archives.gov/news/releases/2004/01/20040107-1.html>

⁷ “Fact Sheet: Fair and Secure Immigration Reform,” op. cit.

of May. Meanwhile in the House of Representatives, Republican supporters of comprehensive immigration reform like Kolbe and Flake were in a precarious minority in their party as most House Republicans were more inclined to support the Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005, introduced by Peter King (R-NY), which mandated the development of a national strategy for improving border security through increased funding for Border Patrol as well as physical fencing and border security technologies but did not include legalization or expand temporary migrant worker programs. As the support for compromise legislation in the Senate grew during the Spring and pressure grew in the House to consider and vote on similar comprehensive immigration reform legislation rather than hewing to the enforcement-only approach, the Republican House leadership decided to postpone voting on immigration reform until after the relevant House committees could hold hearings along the border throughout the Summer of 2006. This proved to be the death knell for immigration reform in the 109th Congress. After many members of Congress faced intense public opposition to any “amnesty” for illegal migrants, support for passing comprehensive immigration reform slowly withered away while heading into the fall election season.

The failure of the Kennedy and McCain-led coalition in 2006 and then again in 2007 to push immigration reform through Congress left a policy vacuum that states and localities have rushed in to fill. In 2006, the number of immigration related bills considered by state legislatures doubled to 570 bills (with 84 laws enacted) and those numbers were nearly tripled in 2007 with 1,562 bills introduced and 240 laws enacted. Between the beginning of 2006 and the middle of 2010, state legislatures enacted 1179 immigration-related laws.⁸ State immigration laws, such as the Arizona law requiring police to check the immigration status of those detained, raise constitutional issues about whether immigration policy is solely a prerogative of the federal government, generate court cases pitting the federal government against states and, thereby, increase the immigration policy imbroglio while undermining citizen confidence in government more generally. As the states and localities continue to pass more immigration laws while the US Congress does not, it becomes clear that reform of the immigration system at the national level is necessary to head off a patchwork of 50 different state immigration policies that will magnify immigration policy dysfunctionality of the country as a whole.

There are plenty of good ideas for policy reforms that can be found in past failed legislation as well as reports issued by bipartisan blue ribbon commissions, such as those organized by the Migration Policy Institute MPI⁹ and the Council on Foreign Relations¹⁰ as well as an immigration policy expert report produced the Brookings Institution and Duke University.¹¹ The Migration Policy Institute (MPI) sponsored commission perhaps most closely resembled previous federal government-sponsored commissions such as the Select Commission on Immigration and Refugee Policy¹² and the U.S. Commission on Immigration Reform¹³

⁸ NCSL 2010. National Council of State Legislatures, Immigration Policy Project, previous reports webpage summary http://www.ncsl.org/default.aspx?tabid=19897#Previous_Reports

⁹ Immigration and America’s Future, Report of the Independent Task Force on Immigration and America’s Future, September 2006.

¹⁰ U.S. Immigration Policy, Independent Task Force Report No 63, (New York: Council on Foreign Relations, 2009)

¹¹ Breaking the Immigration Stalemate: From Deep Disagreements to Constructive Proposals, A Report from the Brookings-Duke Immigration Policy Roundtable, 2009.

¹² Select Commission on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest (Washington, DC: Government Printing Office, 1981).

¹³ U.S. Commission on Immigration Reform, Becoming American: U.S. Immigration and Immigrant Policy. (Washington, DC: Government Printing Office, 1997).

because it was co-chaired by a former Republican Senator and former Democratic Congressman with the former director of the Immigration and Naturalization Service serving as Director and it included two sitting Senators and two Representatives among the Commission members. The Council on Foreign Relations (CFR) – sponsored commission was co-chaired by a former Republican governor and former Democratic White House chief of staff; was largely composed of a mix of former federal executive branch officials, academics and immigration policy analysts; and placed immigration reform in the larger context of international relations and US competitiveness within the global economy. The Brookings-Duke policy roundtable was composed of academics and policy analysts who held a wide range of divergent, even conflicting perspectives who opted not to conduct any new research but rather build on the work of past commissions, including those sponsored by MPI and CFR, though a deliberative process aimed reaching compromise, if not consensus, on a set of specific policy recommendations.

The three commission reports all advocate comprehensive immigration reform that is comprised of strengthened immigration law enforcement to reduce illegal immigration, optimizing channels for future flows of legal immigration and earned legalization for illegal immigrants already in the US. The report recommendations coincide on a number of key issues: All recommend: 1) redesigning the immigration system in conjunction with the establishment of commissions, which would either make recommendations to simplify immigration laws or make recommendations on an ongoing basis for changing levels of immigration; 2) strengthening employer verification and workplace enforcement and 3) establishing an earned path to permanent legal status for unauthorized immigrants in the US (see Table 1).

Table 1
Immigration reform report recommendations compared

	MPI	CFR	BI-Duke
Immigration policy and administration			
Re-design immigration system	X	X	X
Standing commission recommendations for immigration levels	X		X
Independent commission to simplify immigration laws		X	
White house co-coordinator for immigration policy	X		
Inter-agency cabinet committee for immigration policy	X		
Strengthen executive branch capacity to implement immigration mandates	X		
Blanket labor certification for shortage occupations and streamline for others	X		
Allow temporary workers to change employers after initial period	X		X
End hard caps on employment based visas for more flexible system		X	
Eliminate strict nationality quotas		X	
Give new opportunities for foreign students to remain in US after graduation		X	
Reduce application backlogs by investing in personnel and technology		X	X
DHS office for Refugee Protection; increase priority of refugee issues in DHS		X	
Eliminate Diversity Visa Program			X
Limit citizens' family-sponsored visas to spouses, minor children and parents			X
Limit legal permanent residents' family visas to spouses and minor children			X
Increase total annual number of skilled immigrant from 150K to 330K			X
Replace temporary employment visas with 5-year provisional visas with LPR option			X
Immigration law enforcement			
Strengthen employer verification and workplace enforcement	X	X	X
Upgrade electronic employment verification system	X		

Mandatory employment verification system		X	X
New Workplace Enforcement Advisory Board to build support for enforcement	X		
Biometric identification system/card to combat fraud	X	X	
Increase penalties for employers who hire unauthorized migrants		X	
Use state and local police to augment immigration enforcement capabilities		X	
Expand alternatives to detention (ankle bracelets, monitoring parolees)		X	
Greater discretion over penalties (e.g. 10 year bar) for returning deportees		X	
Border security			
Accelerate/expand “smart border” technology implementation	X	X	
Full implementation of Secure Border Initiative		X	
Improve security of visa issuance process and travel documents	X		
Balance security with facilitation of legitimate travel	X		
Lift travel restrictions those that do not significantly reduce security risk to US		X	
Immigrant integration			
Establish Office of Immigrant Integration / Office for New Americans	X		X
Develop national immigrant integration policy		X	
Help state and local institutions provide English language training and civics	X	X	X
Earned path to permanent legal status for unauthorized immigrants in US	X	X	X
Earned legalization for attending college or military service (DREAM Act)		X	

The reports varied in the ways that the immigration system might be redesigned. With respect to immigration policy and administration, the MPI report focuses less on specific programs and numerical limits and more on establishing new offices, building administrative capacity and using a standing commission to shape immigration flows while the Brookings-Duke report echoes the US Commission on Immigration Reform recommendations to shift legal immigration toward needed skills by limiting family-based immigration visas to the nuclear family and increase the number green cards given to skilled immigrants. The CFR report recommends simplification of the immigration system; repeatedly emphasizes that lack of governmental capacity to effectively implement existing immigration policies, let alone a host of new programs and reforms and calls for sufficiently increased funding for the USCIS to implement any immigration reform legislation that might be enacted.

All three reports are very emphatic about the need to strengthen workplace enforcement and they all place it at the top of their lists of immigration law enforcement recommendations. All advocate either the implementation of a mandatory employment verification system or the upgrading of the existing verification system. The MPI and CFR reports advocate a biometric identification system/card (e.g. secure Social Security card); the Brookings-Duke report acknowledges the need for more secure identification but remains open to a variety of options and does not specifically advocate using biometrics.

The components of earned legalization are rather consistent across the reports, however, the framing of legalization vary. The MPI report places earned legalization within a broader framework of immigrant integration whereas the Brookings-Duke report advocates that legalization should be closely linked to workplace enforcement. The CFR report advocates adopting the DREAM Act as a model (and, therefore, interim step) for future more broadly-based legalization.

Political Realities of Immigration Reform

The ideas in these commission reports have resonated in legislative proposals but immigration is a very volatile political issue that offers legislative champions of reform much more in the way of potential opposition attack ads than votes -- immigration has remained a proverbial “third rail” of American politics. Since the failure of comprehensive immigration reform legislation in 2006/07, Congress has remained deadlocked on the issue. A complete package of comprehensive immigration reform legislation was necessary to pull together and maintain the bipartisan strange bedfellow coalition needed to pass changes in immigration policy that each of the members of the coalition wanted. Largely responding to business constituencies, the more libertarian, free-market-oriented Republicans advocated for an expanded and more flexible temporary guestworker program. At the same time, liberal Democrats responded to ethnic interest groups by advocating earned legalization for the undocumented that would give them a pathway to citizenship. More socially conservative Republicans as well as security hawks among the Democrats advocated for tougher border controls, while the more libertarian Republicans and liberal Democrats accepted the need for tougher border controls within the context of comprehensive reform. In this way, each component of comprehensive reform legislation has been held hostage to passage of all others

For example, the 2008 Democratic Platform that candidate Barak Obama ran on stated “We need comprehensive immigration reform, not just piecemeal efforts. We must work together to pass immigration reform in a way that unites this country, not in a way that divides us by playing on our worst instincts and fears. We are committed to pursuing tough, practical, and humane immigration reform in the first year of the next administration.”¹⁴ After candidate Obama led the Democratic Party to majorities in both the House and Senate, President Obama, laid out his principles for immigration reform, which are similar to the components of comprehensive immigration as articulated in previous legislation and in the various commission recommendations:

Strengthen Border Control: President Obama will protect the integrity of our borders by investing in additional personnel, infrastructure, and technology on the border and at our ports of entry.

Improve Our Immigration System: President Obama will fix the dysfunctional immigration bureaucracy and enable legal immigration so that families can stay together.

Remove Incentives to Enter Illegally: President Obama will remove incentives to enter the country illegally by preventing employers from hiring undocumented workers and enforcing the law.

Bring People Out of the Shadows: President Obama supports a system that allows undocumented immigrants who are in good standing to pay a fine, learn English, and go to the back of the line for the opportunity to become citizens.

Work with Mexico: President Obama will promote economic development in Mexico to decrease the economic desperation that leads to illegal immigration.¹⁵

¹⁴ The 2008 Democratic National Platform: Renewing America’s Promise
http://www.democrats.org/about/party_platform

¹⁵ See “Issues: Immigration” at: <http://www.whitehouse.gov/issues/immigration>

Supporters of comprehensive immigration reform expected that the Obama Administration and the Democratic leadership in Congress would follow through on candidate Obama's pledge to pass comprehensive immigration reform legislation in the first year of his administration. It soon became clear, however, that the Administration's other legislative priorities of health care, financial regulatory reform, education and employment took precedent.

Nevertheless, Rep. Gutierrez and colleagues in the new Democratic majority wrote the Comprehensive Immigration Reform for America's Security and Prosperity Act that was introduced in December of 2009 by the dean of the Congressional Hispanic Caucus, Rep. Solomon Ortiz (D-TX). It immediately became clear that passage of the bill would rely entirely on Democratic votes given that Republicans would not support the bill, including co-sponsors of past immigration reform legislation, like Rep. Flake who said "(T) his is a flawed bill. It repeats the mistakes of the '86 reform – massive legalization without a temporary worker program to accommodate future labor demands. In order for immigration reform to be effective, it needs to be comprehensive. Any bill without a temporary worker program is simply not comprehensive."¹⁶ Speaker Nancy Pelosi then indicated that she would not put the legislation to a vote before the Senate voted on immigration reform legislation. Pelosi did not want to force recently elected Democratic representatives in swing districts to vote on immigration reform legislation that might come back to hurt them in re-election campaigns, especially if there was little indication that comprehensive immigration reform legislation would pass in the Senate.

On the other side of the Capitol building, Senator Chuck Schumer (D-NY), Chairman of Senate Judiciary Subcommittee on Immigration, Refugees and Border Security, laid out a set of seven principles in June 2009 that would be the basis for legislation he intended to introduce in the Fall of 2009:

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

¹⁶ "Congressman Flake Disappointed By Gutierrez Immigration Bill," Washington, D.C., Dec 15, 2009 <http://flake.house.gov/News/DocumentSingle.aspx?DocumentID=162489>

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.¹⁷

With respect to legislative coalition building, it is actually more accurate to say that each component of comprehensive reform legislation, except for border security, has been held hostage to passage of all others. Even as Congress failed to pass comprehensive immigration reform legislation, it did manage to pass the Secure Fence Act by a margin of 283 to 138 in the House and 80 to 19 in the Senate and did so five weeks before the November 2006 elections. The Secure Fence Act mandated the construction of 670 miles of border fencing and barriers in order “To establish operational control over the international land and maritime borders of the United States.” Although most House Democrats voted against the bill, 25 out of 43 Senate Democrats voted for the bill including future presidential candidates Hillary Rodham Clinton (D-NY), Barack Obama (D-IL) and Joseph Biden (D-DE) as well as Senate leaders on immigration policies such as Sen. Schumer and Dianne Feinstein (D-CA). Passage of the Secure Fence Act marked the ascendance of the argument that the border must be first secured before the rest of comprehensive immigration reform could be enacted, it undermined the argument that illegal migration could only be addressed within a complete package of immigration reform and it inspired more proposals for piecemeal legislation instead of a comprehensive approach to immigration reform.

Moreover, the Secure Fence Act set a goal of “operational control” of US borders that, when posited as a prerequisite for other aspects of comprehensive immigration reform, became an argument for not moving comprehensive reform legislation forward. The problem was clearly articulated by Senator Schumer in a May 2009 hearing:

The border experts in this hearing will show that the border is far more secure than it has ever been and, with our help, will be even more secure. It's important for the American people to know that all of these measures to secure our border were enacted with the approval of the vast majority of Congress and supported by the three of us here in a bipartisan way. Those of us who support immigration reform have shown our commitment to tough and serious border enforcement....But for years now, the opponents of immigration reform have continually promised that they'll engage in conversation about immigration reform once Congress showed it was serious about securing the border. Our witnesses will confirm today that showing has clearly been made.... (F)rom the western edge of the Rio Grande to the Pacific Ocean, almost the whole border fence has been built....So it's time to end the divisive and unhelpful rhetoric which claims that nothing has been done to secure the border. It's time to reengage in the long-promised yet long-delayed conversation about how to best reform our immigration - broken immigration system, including going -- doing even more than we have done.¹⁸

In the Spring of 2009, Sen. Schumer put forward the argument that due to all the improvements in border security, operational control of the border was possible in the near future. He therefore suggested that while the US had not yet achieved this goal, comprehensive immigration reform

¹⁷ Charles Schumer, “Schumer Announces Principles for Comprehensive Immigration Reform Bill in Works in Senate,” Press Release, June 24, 2009.

¹⁸ Chuck Schumer, Statement, Securing the Borders and America's Points of Entry, What Remains to Be Done” Senate Judiciary Committee Subcommittee on Immigration, Border Security and Citizenship, May 20, 2009.

legislation should “significant additional increases in infrastructure, technology, and border personnel” in order that operational control of US borders “be achieved within a year of enactment of legislation.”

In the aforementioned and subsequent hearings, Sen. Schumer and other proponents of comprehensive immigration reform have been at great pains to see the glass of border security at least three quarters full while those less inclined toward moving immigration reform forward would point out that not only was the glass still half empty but that unless many more Border Patrol agents were hired or double rather than single fencing was built or UAVs were deployed the US government could never hope to gain operational control of the border. One problem is that the Congress defined “operational control” in the Secure Fence Act as “the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.” By including “all” in this definition, Congress set a goal that is impossible for a non-totalitarian state to even come close to achieving. The DHS’s border control professionals added the modifier “effective” to “operational control” and articulated a more realistic strategic goal.¹⁹ When asked by a member of Congress for a definition of “securing the border,” US Border Patrol Chief Michael Fisher said that the “ultimate objective is to be able to reduce the likelihood that dangerous people and dangerous capabilities enter the between ports of entry. What you didn’t hear...is sealing the border.”²⁰ As Congress set a goal that seems reasonable to the layperson but is practically unattainable, it enabled an unattainable threshold to become a convenient excuse for members of Congress afraid of stepping on that politically dangerous third rail of immigration.

Schumer did not introduce immigration reform legislation later in 2009 as had been done in the House but rather focused on finding allies for a bipartisan coalition. He eventually forged a partnership with Lindsay Graham (R-SC) to outline immigration reform legislation that might receive bipartisan support and they met with President Obama to discuss the initiative in March 2010. Soon thereafter, however, Graham walked away from negotiations with Schumer after Senate Majority Leader Harry Reid (D-NV) made clear in April 2010 that he would push immigration legislation before an energy bill in a move widely interpreted as a way to bolster his faltering re-election prospects by appealing to Latino voters. Electoral considerations also knocked out another champion of immigration reform when, in response to a serious primary challenge from a Tea Party candidate, Senator John McCain renounced his support for earned legalization (and thereby comprehensive immigration reform) to save his Senate seat in the 2010 election.

Despite President Obama’s failure to lead Democratic majorities in the House and Senate to pass comprehensive immigration reform legislation, once again, Congress managed to pass border security legislation just before the 2010 fall election season. The Southwest Border Security Bill signed by President Obama on August 13, 2010 provides \$600 million “to enhance technology at the border, share information and support with state, local and tribal law enforcement, and increase (federal) presence and law enforcement activities at the border.” The prospect of further piecemeal reform was raised when the DREAM Act, legislation first introduced by Sen. Orin Hatch (R-UT) in 2001 that offered regularization of status to illegal

¹⁹ Testimony of Ronald Colburn, Deputy Chief, US Border Patrol, at “Border Insecurity Take Three: Open and Unmonitored,” Hearing Before the Committee on Finance, United States Senate, September 27, 2007.

²⁰ Testimony of Michael Fischer before the House Homeland Security Committee, Subcommittee on Management, Investigations and Oversight and the Subcommittee on Border Maritime and Global Counterterrorism, June 17, 2010.

migrants who came to the US as minors allowing them to join the military and access in-state tuition at public university, was attached to a Senate defense authorization bill in September 2010 but then was quashed just as quickly when the move failed to receive sufficient support in committee to move to a vote in the Senate. Resuscitated in the lame duck Congress with passage by a narrow vote in the House, the DREAM Act did not receive the requisite 60 votes necessary to end debate and proceed to a vote.

The Obama administration's advocacy for comprehensive immigration reform receded further with the President Obama's 2011 State of Union address. While the president said more about immigration in this speech than in either of his previous two State of the Union speeches, it came within the context of his framework for increasing US economic competitiveness and under the competitiveness agenda item of improving education (rather than comprehensive immigration reform) and it came in the form of support for two relatively minor components of immigration reform, the DREAM Act and a proposal advocated by high-tech companies to enable foreign students who graduate from US universities to easily adjust their status to permanent residents.²¹ Interestingly, the two immigration policy initiatives that President Obama advocated were recommended in the CFR task force report and President Obama adopted the CFR approach of framing immigration reform in terms of increasing US competitiveness in the global economy.

After President Obama's State of the Union address, John McCain signaled his intention to get back into the immigration reform arena by having a Feb. 2, 2011 meeting with President Obama to discuss immigration and the situation in the Middle East. Moreover, the potential for a more realistic mutual understanding of operational control of US borders emerged in an exchange between Sen. McCain and DHS Secretary Napolitano at a Feb 17, 2011 hearing. McCain stated "I think it would be very helpful to all of us if you could lay out what is necessary, what assets need to be devoted and what statistics could show us that the border is being secured, and at that time I think we could move forward with comprehensive immigration reform."²² Moreover, Lindsey Graham appears to be returning to his partnership with Sen. Schumer as the pair reportedly has been making calls to key immigration reform constituencies.²³ At the same time that key Senators in past efforts to introduce comprehensive immigration are gingerly moving toward coalition building, Sen. Orin Hatch has announced that he intends to introduce his own legislation, the "Strengthening Our Commitment to Legal Immigration and America's Security Act." Referring to 2010 Southwest Border Security Act, Sen. Hatch opined, "Some argue that the bill is sufficient to secure our border, but I disagree.

²¹ "Today, there are hundreds of thousands of students excelling in our schools who are not American citizens. Some are the children of undocumented workers, who had nothing to do with the actions of their parents. They grew up as Americans and pledge allegiance to our flag, and yet they live every day with the threat of deportation. Others come here from abroad to study in our colleges and universities. But as soon as they obtain advanced degrees, we send them back home to compete against us. It makes no sense. Now, I strongly believe that we should take on, once and for all, the issue of illegal immigration. And I am prepared to work with Republicans and Democrats to protect our borders, enforce our laws and address the millions of undocumented workers who are now living in the shadows. (Applause.) I know that debate will be difficult. I know it will take time. But tonight, let's agree to make that effort. And let's stop expelling talented, responsible young people who could be staffing our research labs or starting a new business, who could be further enriching this nation." See: "Remarks by the President in State of Union Address" <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>

²² "The Homeland Security Department's Budget Submission for Fiscal Year 2012," Senate Committee on Homeland Security and Government Affairs, February 17, 2011.

²³ Carrie Budoff Brown, "Senators look for immigration deal," Politico, Feb. 7, 2011.

There is much work to be done before the border is properly sealed.”²⁴ Sen. Hatch’s proposal includes a long list of immigration law enforcement and border security measures such as strengthening the 287(g) program through which DHS cooperates with local law enforcement, increased restrictions on the parole of aliens and deferring of action, require a mandatory exit procedure for all foreign visitors to the US, require the reduction of fraud in the Diversity Visa Program or eliminate the program itself. Hatch clearly emphasized “my legislation is not meant to be comprehensive in nature.” Poignantly, the list of provisions described by Sen. Hatch did not include the DREAM Act, which Sen. Hatch first introduced ten years ago and promised to vote against during the lame duck session because he felt “that it is brought up at this time for pure political purposes, and I resent that.”²⁵ While recent moves by key players give a sliver of hope to proponents of comprehensive immigration reform that a bipartisan coalition may put forward legislation in the current session of Congress, other members of Congress plan to introduce piecemeal immigration enforcement legislation aimed at “sealing the border.” Sound familiar?

Lack of Governmental Capacity to Implement Reforms

Even if the US were to enact comprehensive immigration reform along the lines of what had been proposed in 2006/07, implementing such a new law effectively and efficiently is quite another matter. The US has well-established legal and administrative frameworks to implement immigration policies, however, not only is the US government plagued by a set of conflicting and dysfunctional policies sorely in need of reform, the administrative capacities to execute such prescribed changes are often found wanting. To its great credit, the CFR task force report explained how much of the comprehensive immigration reform legislation drafted by the US Congress in 2006 and 2007 could not be implemented, even if passed, due to insufficient administrative capacities and budgetary resources.²⁶ Following up on the 2006 MPI-sponsored commission report that advocated increasing federal government immigration-related administrative capabilities, MPI issued a subsequent February 2009 report by Doris Meissner and Donald Kerwin, *DHS and Immigration: Taking Stock and Correcting Course*, which identified policy and operational changes within US Customs and Border Protection (CBP), US Immigration and Customs Enforcement (ICE) US Citizenship and Immigration Services (USCIS) necessary to improve these agencies’ effectiveness in implementing existing law. The report went on to make 36 recommendations for improvements that the executive branch could make without any new legislation and it offered suggestions for policy coordination on immigration across all of these DHS agencies.²⁷

The lack of administrative capabilities for implementing immigration reform is particularly evident in the USCIS, which, unlike any other federal agency, has depended on user fees for up to 99% of its budget (in some years). Fortunately for the USCIS, Congress did

²⁴ Orin Hatch, “Strengthening our commitment to legal immigration,” The Hill, Feb. 11, 2011.

<http://thehill.com/blogs/congress-blog/politics/143575-strengthening-our-commitment-to-legal-immigration->

²⁵ Quoted in Matt Canham, “House passes DREAM Act, but Senate may sink it,” The Salt Lake Tribune, Dec. 8, 2010.

²⁶ U.S. Immigration Policy, Independent Task Force Report No 63, (New York: Council on Foreign Relations, 2009), pp. 7, 59-64.

²⁷ Doris Meissner and Donald Kerwin, *DHS and Immigration: Taking Stock and Correcting Course* (Washington, DC: Migration Policy Institute, 2009).

appropriate funds for digitization of millions of paper Alien files or “A-Files” and for modernization of its Central Index System, a database system that contains information on the status of 57 million applicants for “immigration benefits,” including lawful permanent residents, naturalized citizens, US border crossers, aliens who illegally entered the US and were apprehended, aliens who have been issued employment authorization documents and individuals who petitioned for benefits on behalf of family members. Nevertheless, the administrative requirements of legislation that would regularize the status of up to 10.8 million illegal migrants estimated to be currently in the US and to put into place a temporary migrant worker program are tremendous.

For example, implementation of a temporary guestworker program would require enhancing USCIS administrative capability to process applications, issue visas and work authorization documents. It would be necessary to expand and enhance information systems to enable USCIS (and/or the Department of Labor) to verify any due diligence required of the employer to advertise the job and allow US citizens and permanent resident aliens an opportunity to fill the position before making it available to temporary migrant workers from abroad, integrate new documentation and databases into the electronic employment eligibility verification system, E-verify, manage issuance of any documents needed for international travel for the temporary work visa holder and manage any additional volume in changes of immigration status (e.g. if a guestworker marries a US citizen).

There is an additional administrative capability that is necessary in order to insure that Phil Martin’s saying that “there is nothing more permanent than temporary foreign workers” does not become a description of those who enter the US under a new temporary migrant worker program: the DHS would have to know if temporary foreign workers (or any other visitors to the US) actually left after their authorized stay is over. For that, Congress passed a series of laws beginning in 1996 that required the establishment of an entry-exit system. These laws eventually included requirements for collection of biometric data and mandated that this biometric entry-exit system be put in place by 2005. The resulting US-VISIT program, however, only collects biometric data from approximately 20% of people entering the US ports of entry and official border crossing points; there is no biometric exit data collection and there are no exit controls at all at land borders over which the vast majority of departures from the US take place.²⁸ While an automated entry-exit system can be a very powerful tool to identify visa-overstayers, as Australian experience amply demonstrates,²⁹ the US-VISIT database is plagued by lost I-94 arrival/departure forms, incomplete or inaccurate I-94 data entry and exit by land border -- missing exit data that renders the database unreliable in determining whether or not a specific individual has left the country.³⁰

Moreover, if a visa overstayer is identified, it is unlikely that that individual would remain at the address originally given upon arrival, and even if he or she did, there are a limited number of Immigration and Customs Enforcement (ICE) officers available to find, apprehend, and deport millions of visa overstayers in the US. US-VISIT has been generating an increasing

²⁸ Rey Koslowski, *Real Challenges for Virtual Borders: The Implementation of US-VISIT* (Washington, DC: Migration Policy Institute, 2005) and Rey Koslowski, Prepared Testimony for “US-VISIT: Challenges and Strategies for Securing the U.S. Border,” Hearing before the Subcommittee on Terrorism, Technology and Homeland Security of the Committee on the Judiciary, United States Senate, January 31, 2007. Available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:34148.pdf

²⁹ See Koslowski, “Prepared Testimony for US-VISIT: Challenges and Strategies...” op. cit.

³⁰ For details, see Koslowski, *Real Challenges for Virtual Borders*, op. cit.

number of leads on visa overstays to ICE, however, the number of arrests is dwarfed by the total population of illegal aliens in the US who overstayed their visas (see Table 2)

Table 2					
In-Country Visa Overstay Identification by US-VISIT, Enforcement and Estimated Population³¹					
	FY2006	FY2007	FY2008	FY2009	Total:
Priority in-Country Leads Referred to ICE	4,155	12,372	13,343	16,379	46,249
ICE Arrests Based on Referrals	139	338	715	568	1,760
Est. number of visa overstayers	4,640,000	4,720,000	4,640,000	4,320,000	

Although it is clear that an automated entry-exit system cannot also automatically enforce visa time limitations, such a system constrains the options open to visa overstayers that may, in turn, modify their behavior. Most importantly, individuals may be able to overstay their visas once (not be found and remain in the US), but it would be very difficult for them to leave the US, apply for another visa, and overstay again. Without a credible entry-exit system, it has been possible for visa overstayers to not only stay in the US, but also to travel back and forth. If nothing else, a credible entry-exit system could reduce the total number of visa overstayers in the US simply by stopping those who have overstayed from returning again. As it stands, US-VISIT has generated an increasing number of look-outs for visa overstayers that consular and CBP officers have used to deny visa applications and entry (see Table 3), however, given the tens of millions of foreign travelers entering the US every year it is not clear that several thousand denials for overstaying is a sufficient deterrent to those who entered legally and are considering to stay in the US beyond their authorized stay.

Table 3					
Out-of-Country Visa Overstay Identification by US-VISIT, Enforcement and Travel Flows³²					
	FY2006	FY2007	FY2008	FY2009	Total:
Out-of-Country Lookouts Created	457	7,357	13,276	16,691	37,781
Port/Visa Refusals Based on Lookouts	5	451	1,441	2,502	4,399
Non-Immigrant Admissions	33,667,328	37,149,651	39,381,928	36,231,554	

US-VISIT has stopped 4,399 immigration law violators from entering the US and it has provided leads to ICE for the arrest of 1,790 visa overstayers already in the country, however, when one places these figures in the larger context of travel flows and the total illegal alien population, US-VISIT's contribution to DHS capability to enforce authorized length of stay has

³¹ Sources: Statement for the Record of Rand Beers, Under Secretary, DHS National Protection and Programs Directorate, for "Visa Overstays: Can They Be Eliminated?" Hearing of US House of Representatives Committee on Homeland Security, Washington, D.C., March 25, 2010.

Overstay Population Estimate based on estimates in Table 1 above, using a 40% proportion of visa overstays of the total estimated unauthorized population.

³² Sources: Statement for the Record of Rand Beers, Under Secretary, DHS National Protection and Programs Directorate, for "Visa Overstays: Can They Be Eliminated?" Hearing of US House of Representatives Committee on Homeland Security, Washington, D.C., March 25, 2010; Non-Immigrant Admissions 2009," Annual Flow Report, DHS Office of Immigration Statistics, April 2010; Non-Immigrant Admissions 2008," Annual Flow Report, DHS Office of Immigration Statistics, April 2009.

been marginal and does not bode well for enforcing the terms of stay of a new temporary guestworker program. US-VISIT would have to develop a robust exit data collection capability, which has proven very difficult to implement, largely due to the political intercession of powerful economic interests and reluctance of successive administrations and Congresses to expend the political capital that would be necessary to fully implement US-VISIT.³³

Lack of Political Will to Implement Reforms: The Case of Worksite Enforcement

Worksite enforcement entails investigating and arresting employers who violate the Immigration and Nationality Act (INA), as modified by Immigration Reform and Control Act in 1986 with section 274A, which makes it unlawful for any employer in the US to knowingly hire, recruit or refer for a fee, or continue to employ unauthorized aliens. It also entails arresting illegal migrants who are employed at worksites. The challenges of implementing worksite enforcement are great. There are an estimated 7.8 million unauthorized migrant workers in the US (see table 5 below) and there are an estimated 6 million employers in the US³⁴ – that is a ratio of 1.3 unauthorized migrant workers to each employer in the US.

The MPI, CFR and Brookings-Duke commission reports are very emphatic about the need to strengthen workplace enforcement and they all place it at the top of their lists of immigration law enforcement recommendations. All advocate either the implementation of a mandatory employment verification system or the upgrading of the existing verification system. As one of five principles for immigration reform, “President Obama will remove incentives to enter the country illegally by preventing employers from hiring undocumented workers and enforcing the law.” Sen. Schumer more specifically argues, “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.” The Republican Party position on worksite enforcement, as articulated in the 2008 Party Platform, appears to concur with President Obama and Sen. Schumer: “Our commitment to the rule of law means smarter enforcement at the workplace, against illegal workers and lawbreaking employers alike, along with those who practice identity theft and traffic in fraudulent documents. As long as jobs are available in the United States, economic incentives to enter illegally will persist. But we must empower employers so they can know with confidence that those they hire are permitted to work. That means that the EVerify system, which is an internet-based system that verifies the employment authorization and identity of employees must be reauthorized. A phased-in requirement that employers use the E-Verify system must be enacted.”³⁵

Despite the strong co-relation between the unauthorized migrant population and employer demand for illegal migrant labor, which the leadership of both parties have acknowledged to be a major, if not the foremost, driver of illegal migration, Congress and successive administrations have chosen not to increase budgetary resources devoted to worksite enforcement at anywhere

³³ See Koslowski, *Real Challenges for Virtual Borders*, op cit.; Rey Koslowski, *The Evolution of US Border Controls as a Mechanism to Prevent Illegal Immigration* (Washington, DC: Migration Policy Institute, February 2011).

³⁴ See “Number of Firms, Number of Establishments, Employment, and Annual Payroll by Enterprise Employment Size for the United States and States, Totals: 2008, US Census Statistics of U.S. Businesses (SUSB), at: <http://www.census.gov/econ/susb/>

³⁵ 2008 Republican Platform, p. 3 at: <http://www.gop.com/2008Platform>

near the rate of increase in funding for border security. Immigration and Customs Enforcement (ICE) is responsible for worksite enforcement and the task primarily falls to ICE Special Agents from the ICE Office of Investigations, which has a staff of over 9,000 and a FY2010 budget of \$1.6 billion.³⁶ Worksite enforcement also involves divisions such as Intelligence, Legal Proceedings and Detention and Removal. There is no line item in the ICE budget for worksite enforcement but the DHS has identified “budgetary enhancements” in the past five years of the “Budget-in-Brief.” These budgetary increases for worksite enforcement pale in comparison to the year-to-year budgetary increases for border control between ports of entry, which has funded thousands of additional Border Patrol Agents (See Table 4)

Table 4					
Increases in DHS budget from previous year (in millions of dollars)					
	FY2006	FY2007	FY2008	FY2009	FY2010
ICE worksite enforcement ³⁷	10	30	15	34	6
Border security & control between POEs ³⁸	444	161	726	469	116

Congressional Republicans and Democrats, who could not manage to pass comprehensive immigration reform but could repeatedly pass stand-alone legislation that paid for more Border Patrol Agents, fencing and border security technology, opted not to direct much additional funding to worksite enforcement. The relatively low budgetary priority of worksite enforcement is reflected in recent arrest, prosecution and penalty statistics. For example, in FY2009, ICE issued 45 final orders to employers for \$798,179 in fines (see table 5 below) but these enforcement actions touched a minuscule percentage of the employers of an estimated 7.8 million unauthorized migrant workers.

All six million employers in the US are required to examine documents to verify employees’ identity and work eligibility as well as complete and retain verification forms, known as I-9 forms. Normally, an employee fills out an I-9 form and gives an identity document (often a driver’s license) and documentation of eligibility to work (usually a social security card) to the employer to inspect and verify the I-9 data submitted. Although it is not required by law, many employers simply make photocopies of documents presented and store them with the I-9 to demonstrate due diligence. ICE normally begins investigations by requesting to inspect the I-9 forms that employers have on file. Employers failing to meet I-9 filing requirements may be subject to a fine of \$110 to \$1,100 for each instance. Those convicted of hiring, recruiting, referring, or employing violations may be subject to a civil penalty of \$375 to \$3,200 for each unauthorized alien for a first offence with fines for second and third offence at rates that go up to a \$16,000 per unauthorized alien. Employers who are convicted of a pattern of knowingly hiring unauthorized aliens may also be subject to criminal penalties including imprisonment of up to six months.

During the seven years spanning the beginning of FY2003 through the end of FY 2009, ICE issued final orders against 127 employers for civil monetary penalties for violations of the I-

³⁶ See “U.S. Immigration and Customs Enforcement: Salaries and Expenses” in DHS Congressional Budget Justification FY 2011 at: http://www.dhs.gov/xlibrary/assets/dhs_congressional_budget_justification_fy2011.pdf

³⁷ ICE Budget Fact Sheets, various years at: <http://www.ice.gov/pi/news/factsheets/index.htm>

³⁸ Year-on-year increases calculated from yearly budgets in Table 6 from DHS “Budget-in-Brief,” various years at: <http://www.dhs.gov/xabout/budget>

9 requirements and for unlawful employment (also known as *civil or administrative fines*) and collected \$1.4 million in fines (see Table 5). Despite the increased funding allocated to worksite enforcement in the second term of the Bush Administration, the number of employers fined remained in the single digits and only reached 45 in the first year of the Obama administration. The number of unauthorized migrant workers peaked at 8.4 million in 2007, yet out of the country's 6 million employers; DHS only convicted and fined two employers for a total of \$26,560.

Table 5
Employment of unauthorized migrants and worksite enforcement³⁹

	2003	2004	2005	2006	2007	2008	2009
Unauthorized migrants in workforce	6.5M	6.8M	7.4M	7.8M	8.4M	8.2M	7.8M
Number of US employers	5.8M	5.9M	6.0M	6.0M	6.0M		
Final orders issued to employers	52	10	10	0	2	8	45
Fines collected from employers	\$267,480	\$87,946	\$27,547	0	\$26,560	\$196,523	\$798,179
Average fine per final order	\$5,144	\$8,795	\$2,755	0	\$13,280	\$24,565	\$17,737
Arrests on administrative charges	445	685	1,116	3,667	4,077	5,184	1,644
Arrests on criminal charges	72	165	176	716	863	1,103	443

At the same time in 2007, DHS was declaring successes in worksite enforcement: “ICE Sets New Records for Worksite Enforcement and Compliance Enforcement: More than 4,300 arrests were made in ICE worksite enforcement cases, more than seven times the arrests in 2002, the last full year of operations for U.S. Immigration and Naturalization Service.”⁴⁰ This is because DHS chose to emphasize another metric of worksite enforcement: the number of administrative and criminal arrests that take place in the context of worksite enforcement operations (see Table 5). Administrative arrests are for civil violations of immigration law, such as being in the US illegally and only noncitizens can be subject to administrative arrest. Both citizens and noncitizens are subject to criminal arrests, which, in addition to the criminal violations of the law against illegal hiring, include identity theft, alien harboring, money laundering, etc. The number of administrative arrests increased dramatically in the second term of the Bush Administration as ICE placed an increasing priority on worksite enforcement efforts in the form of enforcement actions at worksites with large numbers of unauthorized migrant workers. For example, in April 2006 ICE agents arrested 1,187 illegal alien employees of Houston-based IFCO Systems North America at more than 40 locations nationwide and 1,297

³⁹ Sources: Unauthorized migrants in US workforce from Jeffrey S. Passel and D’Vera Cohn, “U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade,” Pew Hispanic Center, September 1, 2010, figure 10, p. 8; number of US Employers data from US Census, Statistics of U.S. Businesses at: <http://www.census.gov/econ/susb/index.html> ; With respect to the number of final orders issued, amount of administrative fines collected, number of arrests on administrative changes and number of arrests on criminal charges, the data for fiscal years 2003-2007 is from Andorro Bruno, Immigration-Related Worksite Enforcement: Performance Measures, CRS Report for Congress, Congressional Research Service, December 2, 2008, pp. 6-7; data for FY2008 and FY2009 final orders and administrative fees collected is from “ICE Assistant Secretary John Morton announces 1,000 new workplace audits to hold employers accountable for their hiring practices,” ICE News Release, Nov. 9, 2009; FY2008 data for arrests on administrative and criminal charges is from ICE Fiscal Year 2008 Annual Report, pp. 16-17; and FY2009 data on administrative and criminal charges is from DHS Budget in Brief, p. 62.

⁴⁰ DHS Budget-in-Brief Fiscal Year 2008, p. 2

illegal aliens were arrested at Swift meat processing facilities in six states during December 2006.⁴¹ These large-scale worksite raids also increased the number of criminal arrests because DHS chose to charge apprehended unauthorized migrant workers with identity theft if they used fraudulent documents that enabled them work under the assumed identity of a person who would be authorized to work legally in the US. DHS enforcement statistics do not delineate how many of the criminal arrests were of employers as opposed to the employed. Given that seven managers were criminally charged in the IFCO Systems case and one human resource manager was criminally charged in the Swift case, one could surmise that the percentage of employers among the criminal arrests was very, very small.

In February 2009, DHS Secretary Janet Napolitano suspended large-scale ICE operations at worksites to re-evaluate worksite enforcement policy and in April 2009 she instituted new guidance for ICE to shift its emphasis from arresting illegal aliens to arresting and fining those who employ them. Noting that “Last year, the Department made more than 6,000 arrests related to workplace enforcement; only 135 of these arrests were of employers” Napolitano explained that “ICE will focus its resources within the worksite enforcement program on the criminal prosecution of employers who knowingly hire illegal workers in order to target the root cause of illegal immigration.”⁴² The shift in strategy is reflected in worksite enforcement statistics: ICE fined over five times as many employers and collected over four times the amount of fines in FY2009 than in FY2008 while the number of illegal aliens arrested at worksites for civil violations of immigration law in FY2009 dropped to a third of what they were in the previous year. It appears that the Obama administration intends to at least try to enforce sanctions on employers of illegal migrants. Nevertheless, it remains to be seen whether ICE will be able to maintain this rate of increase in FY2010 and quintuple the number of employers fined as well as increase the numbers of employers arrested and prosecuted on criminal charges.

Increasing the prosecution and conviction rates of employers who *knowingly* hire illegal aliens is very difficult because the existing process of verification of an employee’s employment eligibility in its current form is highly susceptible to fraud. Those unauthorized to work in the US can simply provide employers false information and fraudulent documents that enable the employer to fulfill the I-9 filing requirement. With the widespread availability of high-quality fraudulent documents, employers are in no position to determine whether documents submitted are genuine, making it very difficult to prove that an employer knowingly hired an unauthorized migrant worker. Moreover, if the employer does not accept the identity documents of someone the employer suspects might be an illegal migrant because, for example, that person speaks with a foreign accent, but the person is in fact authorized to work in the US, that employer runs the risk of being subject to charges of employment discrimination. To address this problem, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) authorized the Basic Pilot Program, a voluntary pilot program for an electronic employment eligibility verification system that would allow employers to transmit the data provided by employees on the I-9 form to the Social Security Administration (SSA) and DHS for verification of work authorization as well as a means for transmitting an immediate response back to the employer.

⁴¹ “Worksite Enforcement,” ICE Office of Investigations, August 25, 2008 at: http://www.ice.gov/pi/news/factsheets/worksite_cases.htm

⁴² Testimony of Secretary Napolitano on “Oversight of the Department of Homeland Security,” before the Senate Committee on the Judiciary on May 6, 2009.

“Basic Pilot” started as a low-cost, low-overhead system with no more than five full time DHS staff in DC in FY 2004. It was run as a sub-program under the Systematic Alien Verification for Entitlements (SAVE) program, which received appropriations of \$30 million over three years (1997-99) to cover initial implementation costs of Basic Pilot after which the costs of the program were covered by USCIS filing fees. The Basic Pilot Program Extension and Expansion Act of 2003 extended the program to November 2008 and required the its expansion to all 50 states. In 2004, Basic Pilot became accessible via the World Wide Web and available to employers across the entire county, 3,478 of whom opted to participate in the program by the end of year.⁴³

Comprehensive immigration reform legislation passed in 2006 and 2007 called for development and implementation of a mandatory electronic employment eligibility verification system and tamper-proof identification cards for legal foreign workers. Although plans for requiring electronic verification of all employers died with comprehensive reform, DHS increased the program’s momentum in August 2007 by renaming the Basic Pilot Program “E-Verify” and giving it sufficient funding to allow the program to grow beyond the small-scale pilot project stage (see Table 6). Moreover, an executive order that directed federal agencies to require that federal contractors use E-Verify went into effect in September 2009 and funding was almost doubled from FY2008 levels in order to enable the program to handle the anticipated increased employer participation (see Table 6). Over a dozen states have also passed legislation with similar requirements for their contractors and Arizona passed legislation requiring all employers in the state to use E-Verify for all new hires. These requirements have dramatically increased E-Verify uptake among employers over the past two years and by June 2010, there were more than 208,000 participating employers at more than 762,000.⁴⁴

Table 6 E-Verify enrollment and budget					
	FY2007	FY2008	FY2009	FY2010	FY2011 (Request)
Employers enrolled in E-Verify⁴⁵	24,480	87,758	142,178	208,000 ⁴⁶	
Year-on-year increase in employer enrollment		+63,278	+54,420	+65,822	
E-Verify budget⁴⁷	\$21.1M	\$60.0M	\$115.2M	\$137.0M	\$103.4M
E-Verify expenditures per employer enrolled	\$862.93	\$683.70	\$810.25	\$658.65	

As it stands, E-Verify does not address the primary problem of the paper-based employment eligibility verification process that it is supposed to replace, namely its reliance on identity documents and social security cards that are easily falsified. Of course, more secure tamperproof social security cards and drivers’ licenses may be helpful to employers but most employers will still lack the expertise to detect document fraud. Only after extensive training and years of experience, do CBP inspectors at border crossings and airports develop the skills needed

⁴³ See E-Verify, “History and Milestones” at: <http://www.uscis.gov>

⁴⁴ “USCIS Launches Redesigned E-Verify Employer Web Interface” USCIS News Release, June 14, 2010.

⁴⁵ FY2007-FY2009 data from: E-Verify, “History and Milestones” at: <http://www.uscis.gov>; 2010 data as of June 2010 from “USCIS Launches Redesigned E-Verify Employer Web Interface” USCIS News Release, June 14, 2010.

⁴⁶ As of June 2010.

⁴⁷ Source: E-Verify data from Congressional DHS Budget Justification, various years, at: <http://www.dhs.gov/xabout/budget>

to reliably detect fraudulent passports and other travel documents. They also use sophisticated specialized equipment to do it. It is unlikely that a new card in and of itself, even one with a variety of security features, will change the situation faced by employers attempting to use these new cards in order to verify identity. Identity cards are only as strong as the database that they are verified against and the E-Verify verification process as yet does not require a check of the identity document presented against any database. E-Verify added a photo screening tool that enables employers to match photographs on identity documents provided by employees with photos that already exist in federal databases, such as images of Permanent Resident Cards in the USCIS databases.⁴⁸ To expand this capability, the DHS has approached other federal and state agencies to acquire other photos such as passport photos from the US State Department and driver's license photos from states. At the end of August 2010, the E-Verify program sent out a notice to employers that the photo matching tool will include US passports in September and driver's licenses in 2011 on a limited trial basis.⁴⁹ Should a database of state driver's licenses images become available for employers to check against the driver's licenses presented to them by job applicants, E-Verify will become a very important tool in reducing the identity document fraud that has plagued enforcement of the federal law that made the hiring unauthorized foreign nationals illegal since its enactment in 1986.

The Obama Administration has shifted worksite enforcement priorities from arresting and deporting illegal migrant workers in large raids to the more difficult task of prosecuting law-breaking employers of unauthorized workers. Proving that employers knowingly hired unauthorized workers would be improved by the combination of an enhanced E-Verify program that utilizes photos and better identification documents linked to databases that can make the eligibility verification process more robust and less susceptible to fraud. Despite its usefulness to more robust worksite enforcement, the E-Verify program suffers from the same budgetary fate as spending on worksite enforcement staffing.

The rapidly growing employer enrollments in E-Verify and the increasing number of employers fined for employing unauthorized migrant workers may seem like tremendous strides forward in worksite enforcement but they are increases from very low starting points and remain very small numbers relative to the 7.8 million unauthorized migrant workers and 6 million employers in the US – that is a ratio of 1.3 unauthorized migrant workers for every employer in the US. If the number of employers has held steady at 6 million, it means that 3.5% of all employers now use E-Verify. If E-Verify continues to add as many new employers for the remainder of FY2010 as it did in the first part of the year, the program will approach a 100,000 per year employer enrollment rate. Even if additional piecemeal federal and state enrollment requirements were to bring the enrollment rate of up 200,000 per year and the number of employers remained constant, it would take 24 years to enroll all 6 million US employers. It is this slow pace of voluntary adoption by employers that partly motivated lawmakers to introduce legislation that would make E-Verify mandatory for all employers. The technology needed to expand E-Verify to handle employer verification of all new hires is readily available and, as the E-Verify process becomes better established, the marginal costs of adding employers will go down, as is indicated by the downward trend in the expenditures for E-Verify per employer enrolled (see Table 6). Nevertheless, the costs of scaling up the system are significant. “USCIS

⁴⁸ See E-Verify User Manual for Employers, USCIS, March 2009 at: http://www.uscis.gov/files/nativedocuments/E-Verify_Manual.pdf

⁴⁹ See “E-verify news, 08/27/2010 to 09/02/2010,” posted at: <http://www.electronici9.com/wp-content/uploads/2010/08/E-Verify-News.gif>

officials estimated that a mandatory E-Verify program could cost a total of about \$765 million for fiscal years 2009 through 2012 if only newly hired employees are queried through the program and about \$838 million over the same 4-year period if both newly hired and current employees are queried.... SSA has estimated that expansion of a mandatory E-Verify program would cost a total of about \$281 million for fiscal years 2009 through 2013 and require hiring 700 new employees for a total of 2,325 additional workyears over the same 5-year period.”⁵⁰

Even though the E-Verify budget was almost doubled in FY2009, the resources devoted to this tool of worksite enforcement still pales in comparison to funds appropriated to border security technology. For example, the E-verify budget is just over one tenth of the combined budgets of the automated biometric entry-exit system US-VISIT and the recently suspended SBInet program, which was to build a virtual fence in addition to the 670 miles of physical fencing and barriers mandated by the Secure Fence Act of 2006 (See table 7).

	FY2007	FY2008	FY2009	FY2010	FY2011 (Request)
E-Verify budget ⁵¹	\$21.1M	\$60.0M	\$115.2M	\$137.0M	\$103.4M
SBInet budget ⁵²	\$28.4M	\$1,282.8M	\$745.0M	\$800.0M	\$574.2M
US-VISIT budget ⁵³	\$362.5M	\$355.2M	\$300.0M	\$373.7M	\$334.6M
E-Verify budget as a percentage of combined SBInet and US-VISIT budgets	5.4%	3.7%	11.0%	11.6%	11.4%

Prosecuting employers who knowingly hire unauthorized migrant workers and supporting this effort by making E-Verify mandatory for new hires would probably reduce illegal migration much more than building border fences and hiring more border patrol agents.⁵⁴ It is much more politically difficult, however, for Congress to dramatically increase funding for the prosecution of US corporations and US citizen businesspeople (some of whom may be constituents), impose mandatory employment eligibility verification that may require secure national identity documents for US citizens and fund a billion dollar plus expansion of E-Verify than it is to increase appropriations for more Border Patrol Agents, border security technologies and fence construction jobs. That is why there will probably be more staffing on the border and perhaps even more fencing that will not significantly reduce illegal migration. That is why there will probably not be comparable increases in government capabilities to enforce existing employer sanctions that might work, if ever really seriously tried. That is why strengthening worksite enforcement and employer sanctions and making E-Verify mandatory may be high on the list of

⁵⁰ Richard M. Stana, Director Homeland Security and Justice Issues, US Government Accountability Office, Statement for the Record on “Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Employment Verification System,” to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, Committee on the Judiciary, House of Representatives, June 10, 2008, p.4.

⁵¹ Source: E-Verify data from Congressional DHS Budget Justification, various years, at: <http://www.dhs.gov/xabout/budget>

⁵² DHS Budget-in-Brief, various years at: <http://www.dhs.gov/xabout/budget>

⁵³ DHS Budget-in-Brief, various years at: <http://www.dhs.gov/xabout/budget>

⁵⁴ For a detailed discussion explaining why there is a low return on investment on border security technologies like SBInet and US-VISIT with respect to reducing illegal migration see Koslowski, *The Evolution of US Border Controls as a Mechanism to Prevent Illegal Immigration*, op. cit.

immigration reform agenda items across the political spectrum but remain agenda items that have not been acted upon even when new laws are not necessarily needed.

Members of Congress and presidents respond to their constituents and the interest groups that articulate public sentiment between elections and attempt to influence legislation, executive branch rule-making and policy implementation. Ever since the passage of employer sanctions legislation in 1986 and the initial execution of INS then ICE enforcement operations in which illegal migrant workers and employers have been arrested, employers have appealed to their representatives in Congress to intervene on their behalf. For example, in 1998, INS worksite enforcement operations in Georgia during led local US Representatives to write letter to the INS that criticized the INS for an “apparent lack of regard for farmers in this situation...[the raids] threaten one of Georgia's most famous and economically valuable crops, Vidalia onions.” Senator Paul Coverdell (R-GA) complained of the INS's “indiscriminate and inappropriate use of extreme enforcement tactics against Vidalia area onion growers...[interfering with] honest farmers who are simply trying to get their products from the field to the marketplace.”⁵⁵ Farmers acknowledged that up to half of their workers may have been unauthorized, but they claimed that all workers provided what appeared to be genuine documents. After members of Congress intervened, the INS Chief of Field Operations issued a 12 page memo to regional INS directors that among other things required that field offices receive permission from regional INS offices or national headquarters before attempting any arrests at a worksite.⁵⁶ The memo also instructed INS agents that they should inform employers privately that some of their employees are undocumented, identify them by name and then warn employers that “the INS will visit their businesses in the near future to arrest (them).”⁵⁷ If INS officers then go to businesses to arrest employees, the memo instructed that they would need to bring newly designated “community liaison officers” with them to answer any questions and to avoid “contentious circumstances,” such as conducting arrests in restaurants during lunchtime. Reflecting a decade later on worksite enforcement in the onion fields of Georgia, Doris Meissner, who was INS Commissioner at the time, noted that members of Congress, particularly Republicans, did not want to antagonize business. “There was hypocrisy...On one hand, you say you want enforcement, and then you see it’s not so easy to live with the consequences in your own district.”⁵⁸

Similarly, while both Republican and Democratic Party leadership may be in favor of phasing in mandatory electronic employment verification requirements, after President Bush signed an executive order in June 2010 that required all Federal contractors to use E-Verify for all employees, the US Chamber of Commerce not only opposed the new rule but sued the Federal government in December 2008 to stop it from going into effect. The action effectively delayed the implementation of the new rule until September 2009. The US Chamber of Commerce has also sued to try to stop state governments from implementing their own requirements that employers use E-Verify, with a case pitting the Chamber against the State of Arizona heading to the Supreme Court.

Finally, all of the politics of worksite enforcement take place a social milieu (particularly of the upper and upper middle classes) in which employing unauthorized workers is often considered acceptable behavior (except for individuals running for public office or seeking

⁵⁵ Quoted in “INS: Enforcement,” Migration News, June 1998 Volume 5 Number 6. Posted at: http://migration.ucdavis.edu/mn/more.php?id=1546_0_2_0

⁵⁶ John Brinkley, “More Polite INS Must Call Ahead Now,” *Daily News*, June 3, 1998.

⁵⁷ Quoted in Brinkley, “More Polite INS Must Call Ahead Now,” *op cit*.

⁵⁸ Steve Greenhouse, “Going After Migrants, but Not Employers,” *New York Times*, April 16, 2006.

Senate confirmation). From Attorney General nominee, Zoe Baird, to former Governor Pete Wilson to more recent California gubernatorial candidate Meg Whitman, there have been many cases of well-to-do professionals who employed undocumented workers in their households and probably would have continued to do so had they not had aspirations of high political office or major political appointments. In such a social milieu of well-to-do suburbs and neighborhoods of major metropolitan areas that tolerates employment of illegal migrant workers in households, it is difficult to generate political support, for instance campaign contributions, for those members of Congress who resist complaints from business and support the executive branch in following through with stricter enforcement of employer sanctions in onion fields, slaughterhouses and restaurants. Lax enforcement of employer sanctions and the employment of illegal migrant workers it perpetuates not only gives middle and upper middle-class families less expensive cleaning, cooking and landscaping options, it also reduces the costs of all products and services, many of which are widely consumed across the socioeconomic spectrum. Ultimately, the root of the political challenge to strengthening worksite enforcement is American consumer demand for cheap food, home building, restaurant meals, eldercare and childcare services that illegal migrant workers provide.

Conclusion

Democrats and Republicans in Congress and successive administrations agree that the immigration system is broken. Over the past decade some have introduced legislation in an effort to fix the situation and a series of bipartisan commissions have offered plenty of ideas for improvements but there have been few new federal immigration-related laws enacted as well as big gaps in the implementation of those laws that have been passed.

Part of the problem is that some members of Congress have been willing to abandon comprehensive reform by taking a piecemeal approach and passing stand-alone immigration law enforcement and border security legislation usually, perhaps not so coincidentally, within three months of national elections. Despite additional appropriations in such legislation for hiring Border Patrol Agents, building border fences and purchasing border security technology, some members of Congress, even some of those who had at previously supported comprehensive immigration reform, argue that “operational control of the border” has not been achieved and they set this threshold as a prerequisite for voting for comprehensive immigration reform legislation. Given that “operational control of the border” is defined by statute as stopping “all” illegal border crossings, this threshold is practically unattainable by a country with a non-totalitarian political system. Nevertheless, this definitional threshold functions politically as an ever receding horizon that can be used both as an excuse for postponing votes on comprehensive immigration reform and for justifying the next stand-alone border security bill with more appropriations to hire, build and purchase technology along the border.

The border security-only approach has not significantly reduced illegal migration because illegal migration is much more a function of demand for illegal migrant labor than it is a function of fencing, border patrol staffing and technology.⁵⁹ Immigration policy reforms that reduce the demand for illegal migrant labor will have most likely have a greater impact on decreasing illegal migration, reducing the flows of those attempting to cross illegally and, therefore, enable

⁵⁹ See Koslowski, *The Evolution of US Border Controls as a Mechanism to Prevent Illegal Immigration*, *op. cit.*

the Department of Homeland Security to gain “effective operational control” of the border, rather than the other way around.

Given that the top political priority of the Obama Administration heading into the 2012 election will be enacting policies to decrease the unemployment rate among American citizens who can vote as well as fending off Republican attempts to undermine implementation of health care reform, President Obama’s most important domestic policy achievement, it is unlikely that President Obama will do very much more on immigration reform than to reiterate his principles, suggest minor piecemeal legislation such as the Dream Act and offer to work with a bipartisan coalition in the Senate and House willing to take on comprehensive immigration reform, should one emerge.

Given that the political benefits that most members of Congress might realize by passing comprehensive immigration reform are overshadowed by the risks of this proverbial third rail of politics, it is unlikely that many members of Congress, other than those in very safe seats or those seeking a political legacy before retiring, would consider venturing into bipartisan legislative coalition formation. Republicans who witnessed the primary defeats of strong incumbents like former Senator from Utah, Robert Bennett, and the near-defeat of John McCain in 2010 may think twice about considering their seat “safe” in 2012. Given that no bipartisan partnership has emerged to begin coalition formation in the Republican-controlled House and that the partnership between Senators Schumer and Graham is tentative, to say the least, the prospects for coalition formation on the order of that which occurred in 2004-2005 are very unlikely until after the next election cycle.

It is more likely that stand-alone immigration law enforcement and border security legislation along the lines of Sen. Hatch’s “Strengthening Our Commitment to Legal Immigration and America’s Security Act” emerges in the House as the 2012 primaries approach and this border security legislation lines up Republican co-sponsors looking to protect their right flanks and perhaps even a few Democrats in swing districts who managed to hold onto their seats. While a bipartisan coalition led by Senators Schumer, Graham and, possibly, McCain may put comprehensive immigration reform on the Senate agenda; the House Republican leadership will most likely restrict debate to stand-alone immigration law enforcement and border security legislation. During the Summer of 2012, Congressional Democrats who may have wanted to vote of comprehensive immigration reform legislation may be left with the option of voting for border security legislation or doing nothing at all on the immigration legislative front. In the run-up to the Fall general elections, Democratic House members in swing districts will find it easy to vote for stand-alone border security legislation and those Democratic Senators up for re-election may be very reluctant to vote to block consideration of border security legislation. This would especially be the case if any major terrorist incident occurs in the US that involves a foreign national who entered the US legally or illegally or if the violent conflict between Mexican cartels in northern Mexican cities is increasingly viewed by the public as “spilling over” across the border into the US.

One possible scenario between the passage of comprehensive immigration reform and border security-only legislation would be the collection of piecemeal legislation into a mini-immigration reform package that would combine the DREAM Act and provisions that enable foreign students who graduate from US universities to easily adjust their status to permanent residents and some modification of temporary migrant worker programs to increase their numbers (e.g. increasing the H1-B visa quota for highly skilled workers, loosening regulations on issuance of H-2A visas for migrant farm workers) with increased border security funding and

few items from Sen. Hatch's proposed "Strengthening Our Commitment to Legal Immigration and America's Security Act," such as strengthening the 287(g) program. Such a mini-reform package would give something to each of the parts of a future strange bedfellow coalition similar to those that have developed to pass previous immigration reform legislation: market-oriented Republicans would get more temporary migrant workers and a greater supply of university graduates in science, technology math and engineering for their business constituents, liberal Democrats would get the Dream Act for ethnic group constituents and Republican and Democratic security hawks (as well as border state Senators and members of Congress) would get more Border Patrol hires, more technology deployments, like UAVs, and possibly more fence construction than a majority of Senate Democrats would support without a package deal. Given that such a mini-immigration reform package would allow President Obama to demonstrate his ability to "reach across the aisle" to get things done as well as enact components of the economic competitiveness agenda laid out in his State of the Union speech, President Obama would probably be inclined toward supporting such a mini-reform in lieu of comprehensive reform. However, the 2011 freshman class of House Republicans are adamant in their uncompromising opposition to the Obama administration and, together with Republican Senate leader, Mitch McConnell, are loath to allow the Obama Administration to claim victory through bipartisan compromise. This political factor may make any bipartisan coalition on immigration very difficult to form and, no doubt, very costly for the President. Much would depend on President Obama's priorities for the remainder of his term and how much political capital he would be willing to expend on passing some sort of immigration legislation beyond border security.

In sum, comprehensive immigration reform is unlikely in the near future, stand-alone immigration enforcement and border security legislation is more likely and a mini-immigration reform package is a possible scenario that is more possible than comprehensive immigration reform but still less likely than the stand-alone border security default position of Congresses past.