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THE FADING PROSPECTS FOR COMPREHENSIVE IMMIGRATION REFORM

*Muzaffar Chishti**

INTRODUCTION

This last month has witnessed a significant new development in the immigration policy debate. Senators Schumer (D-NY) and Graham (R-SC) unveiled their new “framework” for comprehensive immigration reform legislation.¹ It took less than a day for President Obama to endorse the framework.² And it is estimated that about 100,000 people will march in Washington on Sunday, March 21, in support of a comprehensive immigration bill. It probably will be the largest rally ever held in Washington, DC, in support of an immigration legislative effort.³

All these developments would point toward a renewed momentum for the passage of a comprehensive immigration reform bill.

I. WHAT IS COMPREHENSIVE IMMIGRATION REFORM?

Before I go too far, let me clarify as to what I mean when I use the term

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¹ The “framework” includes requiring biometric Social Security cards so that the unauthorized cannot work, strengthening border security and interior enforcement, creating a temporary worker program, and providing a “tough but fair path” to legalization for the unauthorized. See Charles E. Schumer & Lindsay O. Graham, *The Right Way to Mend Immigration*, WASH. POST, Mar. 19, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031703115.html> (last visited Mar. 24, 2011).

² See Office of the Press Secretary, Statement by the President Praising the Bipartisan Immigration Reform Framework, (Mar. 18, 2010) (acclaiming the bipartisan effort and pledging to help work towards a bipartisan consensus on the topic of immigration reform).

³ See Julia Preston, *At Rally, Call For Urgency on Immigration Reform*, N.Y. TIMES, Mar. 21, 2010, available at <http://www.nytimes.com/2010/03/22/us/politics/22immig.html> (last visited Mar. 24, 2011) (reporting that the rally around immigration reform in Washington, D.C. was attended by tens of thousands).

“comprehensive immigration reform.” There are many examples and versions of legislation that have been ascribed that title. There is the Gutierrez bill;⁴ there is the Schumer-Graham framework.⁵ And then there are the bills Congress debated and failed to enact in 2006 and 2007.⁶

A. The Four-Legged Stool of Comprehensive Immigration Reform

Broadly speaking, these bills or legislative ideas have four components:

- (a) A program that would legalize the immigration status of approximately 11 to 12 million unauthorized immigrants currently living in the United States.
- (b) A beefed-up enforcement strategy that focuses not just on the border, but also on the workplace and the interior of the country.
- (c) A reform of the existing legal immigration selection system.
- (d) A new stream of workers entering lawfully, either as temporary workers or on some other nonimmigrant status, to meet the labor market needs of our country.

These four components are sometimes referred to as the “four-legged stool” of comprehensive immigration reform.⁷

⁴ See Randal C. Archibold, *New Immigration Bill is Introduced in House*, N. Y. TIMES, Dec. 19, 2009, available at <http://www.nytimes.com/2009/12/16/us/politics/16immig.html> (last visited Mar. 24, 2011).

⁵ See National Immigration Forum, *Schumer, Graham Publish Framework For Immigration Reform Legislation*, Mar. 19, 2010, <http://www.immigrationforum.org/policy/update-display/schumer-graham-publish-framework-for-immigration-reform-legislation> (last visited Mar. 24, 2011).

⁶ See Stephen Dinan, *Obama Pushes Immigration Bill*, WASH. TIMES, June 26, 2009, available at <http://www.washingtontimes.com/news/2009/jun/26/obama-pushes-immigration-bill> (last visited Mar. 24, 2011) (citing the failed efforts towards immigration reform in 2006 and 2007 due to a bipartisan filibuster).

⁷ See Schumer & Graham, *supra* note 1 (conveying the importance of each of these “legs” of immigration reform in the context of their bill).

II. PRESIDENT OBAMA'S AGENDA

When President Obama took office, many people expected that comprehensive immigration reform would soon become reality. And there were good reasons for this expectation.

A. Justifiable Expectations of Comprehensive Immigration Reform

First, it is understood that the issue is critical for the President's Latino base. Many have argued that President Obama was elected by the margin provided by the Latino vote, the constituency that the outcome of immigration legislation most affects. At least four states in the country, the argument goes, switched from "red" to "blue" on the basis of change in the voting patterns of the Latinos.⁸

Second, the President's own biography suggests that he would support a pro-immigration policy. After all, he is the first president we have had who is the son of an immigrant. Indeed, he is the son of a foreign student.⁹

Third, as a U.S. Senator, he was quite engaged in the immigration legislative debates. He served on the Senate Judiciary Committee, which has jurisdiction over immigration policy,¹⁰ and actively participated in and offered amendments to bills in the legislative sessions in 2006 and 2007.¹¹

Finally, Senator McCain, his opponent in the presidential election, had been a strong supporter of comprehensive immigration reform.¹² So you

⁸ See Antonio Gonzalez & Steven Ochoa, WILLIAM C. VELASQUEZ INSTITUTE, *The Latino Vote in 2008: Trends and Characteristics* 7 (2008) available at http://www.wcvi.org/data/election/wcvi_nov2008national_analysis_121808.pdf (last visited Mar. 24, 2011) (labeling such states as purple states that switched from red to blue on the basis of Latino block voting in the 2008 election).

⁹ See Bill Dedman, *Historians Write 1st Draft on Obama Victory*, MSNBC, Nov. 5, 2008, http://www.msnbc.msn.com/id/27539416/ns/politics-decision_08 (last visited Mar. 24, 2011).

¹⁰ See Committee Jurisdiction, United States Senate Committee on the Judiciary, <http://judiciary.senate.gov/about/jurisdiction.cfm> (last visited Mar. 24, 2011) (designating immigration as one of the policy areas considered by the Senate Judiciary Committee).

¹¹ See Kathy Gill, *Obama's Senate Record: 110th Congress*, available at <http://uspolitics.about.com/b/2008/09/05/obamas-senate-record-110th-congress.htm> (last visited Mar. 24, 2011) (observing that as a Senator in the 110th Congress, Barack Obama introduced 11 resolutions, 59 bills and 59 amendments).

¹² See Michael D. Shear, *McCain Pushes Immigration Reform Bill*, WASH. POST, June 4,

would think that, with President Obama in office, the Democrats in control of both houses of Congress, and Senator McCain renewing his support for it, comprehensive immigration reform would be within reach.

In fact, many advocates still hope that an immigration bill will successfully move this year. They believe the momentum the Schumer-Graham framework generated will lead to introduction of immigration bills and passage by both houses by Memorial Day.¹³ In this scenario, the two versions passed by the two houses would simmer toward a compromise for the conference committee to adopt in the fall. And before the midterm elections, the President would sign the legislation into law.

Advocates further point to 1986, the last time Congress passed comparable comprehensive immigration reform legislation. Final passage of that legislation, the Immigration Reform and Control Act, closely followed the calendar that advocates predict for this year.¹⁴ So the advocates' rosy picture has some precedent. And they may prove to be right. Who knows?

B. Why Comprehensive Immigration Reform Cannot Happen Now

Let me raise with you the countervailing factors that argue against comprehensive immigration reform materializing this year.

1. Not a Top-Tier Priority

Despite what many have reported on the subject, immigration reform was never on the president's first-tier legislative agenda. Whenever he has personally spoken to the issue—or answered questions from reporters—he has never listed it as a top priority of his presidency.¹⁵

2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/04/AR2007060401248.html> (last visited Mar. 24, 2011) (demonstrating John McCain's push for passage of an immigration reform bill in the 109th congressional session).

¹³ See Spencer S. Hsu, *Senators Draft Plan to Rework U.S. Immigration Policy*, WASH. POST, Mar. 18, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/18/AR2010031803762.html> (last visited Mar. 24, 2011) (citing the hope that the bill would make it to the Senate floor by Memorial Day).

¹⁴ See generally Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 1200, 100 Stat. 3359 (1986) (marking the enactment of the bill at the end of the session on November 6, 1986).

¹⁵ See *Can Obama Keep His Immigration Reform Vow?: Despite Continued Support for*

While people may be upset with the president for not keeping his promise on a number of issues, on immigration one cannot say that he broke a promise.

2. A Crowded Agenda

The President arrived in Washington with an incredibly crowded legislative agenda. The healthcare bill always topped the list, but other priorities included the new stimulus package, the financial regulation bill, and climate change legislation—not to mention the wars in Iraq and Afghanistan.¹⁶

In this environment, immigration could not be the top agenda item of any administration, and it certainly could not fit on this administration's as well.

The healthcare bill is extremely instructive about the fate of a possible immigration bill. By now we know that the bill proved to be extremely contentious. The process was much more protracted than we expected. And the President and the Democratic leadership still need to extract the last four votes in the House for the expected passage of the bill this coming Sunday.¹⁷

So if that kind of effort is required to pass the healthcare bill, which I believe is less controversial than immigration, you can see why immigration is going to be a much harder sell. The passage of the healthcare bill will leave little political oxygen for another controversial bill to move through Congress this year.

Emerging Legal "Framework," Little Room Left on 2010 Agenda for the Politicking, CBS/AP Mar. 19, 2010, <http://www.cbsnews.com/stories/2010/03/19/politics/main6313697.shtml> (last visited Mar. 24, 2011) (recalling instances in which President Obama stated that immigration reform would be a top priority but that after a few months in office health care and financial regulatory reform became more pressing issues).

¹⁶ See *Renewing Promise of 'Change,' Obama Tries to Reset Agenda*, Fox News, Jan. 28, 2010, <http://www.foxnews.com/politics/2010/01/27/obama-deliver-state-union> (last visited Mar. 24, 2011) (highlighting the many issues discussed during the State of the Union Address that make for a crowded agenda).

¹⁷ See Paul Kane, Lori Montgomery & Ben Pershing, *Four Democrats Change Sides, Will Vote for Health-Care Bill*, WASH. POST, Mar. 20, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/19/AR2010031905025.html> (last visited Mar. 24, 2011) (calling attention to the struggle over votes for the health care bill).

3. The Bleak Unemployment Picture

Since 2007—the last time Congress considered and did not pass a comprehensive immigration bill—the national unemployment rate has increased to nearly 10 percent, significantly changing the political landscape.¹⁸ The unemployment picture informs the immigration debate more than any other. At a time when the real or effective unemployment rate is inching up to 15 percent or 17 percent, it is politically difficult to sell legislation that would legalize the status of 11 to 12 million people.¹⁹ Americans are a generous people, but we do not feel particularly generous when we feel pessimistic about ourselves. We could not pass an immigration bill in 2006 and 2007 during the best of economic times.²⁰ Although the Great Recession has officially ended, the current times are not the best of economic times.

4. Lack of Republican Support

Immigration has generally been a bipartisan issue. Historically, Congress has never passed major immigration legislation without significant bipartisan support.²¹ Bipartisanship in immigration—at least for now—seems elusive because Republicans have been unwilling to cosponsor a comprehensive immigration bill.

Senator Schumer has categorically stated that he won't move legislation in the Senate unless he has the filibuster-proof 60 votes to support it.²² And,

¹⁸ See Patrick McGeehan, *City Unemployment Rate Dropped to 10% in March*, N.Y. TIMES, Apr. 15, 2010, <http://www.nytimes.com/2010/04/16/nyregion/16unemploy.html> (last visited Mar. 24, 2011).

¹⁹ See Mary Engel, *The Real Unemployment Rate? 16.6%*, MSN MONEY, June 4, 2010, <http://articles.moneycentral.msn.com/learn-how-to-invest/The-real-unemployment-rate.aspx> (last visited Mar. 24, 2011).

²⁰ See Carl Hulse & Robert Pear, *Immigration Bill Fails to Survive Senate Vote*, N.Y. TIMES, June 28, 2007, <http://www.nytimes.com/2007/06/28/washington/28cnd-immig.html> (last visited Mar. 24, 2011).

²¹ See, e.g., “Immigration Reform and Control Act of 1986,” *supra* note 14 (noting the Act was co-authored by Romano A. Mazzoli, a Democrat, and Alan K. Simpson, a Republican).

²² See Peter Nicolas, *GOP Senator: Healthcare Bill May Cost Immigration Overhaul*, L.A. TIMES, Mar. 20, 2010, <http://articles.latimes.com/2010/mar/20/nation/la-na-graham-immigration20-2010mar20> (last visited Mar. 24, 2011) (stating Senator Graham's decision not to endorse the immigration reform bill if the healthcare bill were to pass).

as the healthcare bill has taught us, getting every last Senate vote required a major concession.

5. The Disengaged Business Community

A major difference between 2007 and today is that the business community is no longer engaged in pushing for a comprehensive immigration bill. The broad-based coalition that came together for immigration reform in 2006 and 2007—including important business groups like the U.S. Chamber of Commerce, the National Association of Manufacturers, Silicon Valley venture capitalists, and major agricultural interests—has essentially collapsed.²³ Business groups have perhaps concluded that their interests will not be protected in this Congress. Perhaps they have political differences with the President. Whatever the reason, the fact remains that the unusual coalition between businesses and immigrant advocates forged in 2006 and 2007 does not exist today.

6. The Vulnerable Democrats

The current healthcare debate has reminded us again of a political reality: the closer we come to the midterm elections, the more the Democratic leadership in Congress will protect vulnerable party members. The leadership is not going to ask them to vote on a bill that is likely to hurt them in the upcoming elections. Democrats who were elected in 2008 in districts where immigration does not play well are particularly at risk.²⁴

7. The Latino Vote

Conventional wisdom says that if a group of voters feels intensely about an issue, it will make its voice heard—especially in a midterm election. That intensity of feeling, in turn, matters for turnout, and thus elected officials should pay special attention to that constituency. By this calculation, Latinos, who have a special stake in the immigration

²³ See generally Jeffrey H. Birnbaum, *Immigration Pushes Apart GOP, Chamber*, WASH. POST, Dec. 14, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/13/AR2005121301706.html> (last visited Mar. 24, 2011).

²⁴ See Greg Sargent, *Blue Dog Dem's TV AD Hits Obama as Part of "Washington Crowd"*, WASH. POST, Aug. 10, 2010, http://voices.washingtonpost.com/plum-line/2010/08/blue_dog_dems_tv_ad_hits_obama.html (discussing an ad for Congress aired by a Democratic candidate who separates himself from Obama and immigration issues emphasizing that he works only for his constituents).

legislation, will make their voice heard in the midterm elections. However, there are a number of counterpoints to this conventional wisdom.

The Latinos who have the most at stake in the passage of an immigration bill are the 11 to 12 million unauthorized immigrants—people who cannot vote.²⁵ Clearly, the intensity of their concern does not affect the outcome of the midterm elections.

But how about their U.S. citizen relatives and friends who identify with their concerns? I think it is true that the immigration question deeply affects the larger Latino community, but this is not the only thing that matters to them. Latinos are like the rest of the body politic: the economy, jobs, health care, and the financial crisis are equally important. Immigration is not a litmus test that Latinos will employ in the upcoming election.²⁶

I believe it is unlikely that the Latino vote will be a decisive factor in the 2010 elections. Indeed, if you are a political advisor at the White House today, you would conclude that given the last few elections, independent voters are more critical than Latinos. And immigration, at least for now, does not seem to play well with Independents.

8. The Legislative Calendar

The ultimate complicating factor is the calendar. Congress has only until the end of May to make immigration reform happen, because nothing major moves in Congress in the summer.²⁷ So if the legislative calendar does not accommodate an immigration bill before the end of May, it is unlikely an immigration bill will get through Congress in 2010.

²⁵ See Julia Preston, *Obama to Push Immigration Bill as One Priority*, N.Y. TIMES, Apr. 8, 2009, http://www.nytimes.com/2009/04/09/us/politics/09immig.html?_r=1 (last visited Mar. 24, 2011) (referencing the 12 million illegal immigrants in the United States and the correlation to mass Latino voting in 2008).

²⁶ See NALEO EDUCATIONAL FUND, "Latino Voters in the 2008 Presidential Election: Post-Election Survey of Latino Voters" 5 available at www.naleo.org/downloads/Post-Election%20Survey.pdf (last visited Mar. 24, 2011) (identifying the economic crisis as the primary issue of concern in the Latino community following the 2008 elections).

²⁷ See Perry Bacon, Jr., *With the Arrival of Summer, Congressional Legislating Gives Way to Campaigning*, WASH. POST, June 22, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/21/AR2010062104679.html> (last visited Mar. 24, 2011) (announcing that the summer session would be cut short by one week giving members six weeks in their districts rather than the usual five).

CONCLUSION

The obvious question then is, “Is this going to happen in 2011?” Again, conventional wisdom is that 2011 is the “last good year” for it to happen. Traditionally, the “last good years” are always off-election years.

I think an immigration bill could move in 2011. But three things will determine whether it happens.

First, the economy has to improve somewhat—especially on the employment front. Second, the House needs to hold a strong Democratic majority. A diminished majority would make it very hard for the president to push for an immigration bill. Finally, what happens on the healthcare bill will be instructive. If the president comes out from the healthcare debate in a fighting mood, he may have the energy to take on “second-tier” issues.

So stay tuned, and we’ll see what happens this fall.