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RESTORING THE RULE OF LAW: REFLECTIONS ON FIXING THE IMMIGRATION SYSTEM AND EXPLORING FAILED POLICY CHOICES

KATHERINE L. VAUGHNS*

*A properly regulated system of legal immigration is in the national interest of the United States. Such a system enhances the benefits of immigration while protecting against potential harms.*¹

I. INTRODUCTION

As the panelists at a recent symposium on immigration reform noted,² all observers of immigration policies agree that the current system is broken and in desperate need of repair.³ The urgency of the problem is undeniable, particularly in the post-9/11 era; and the complexity of immigration issues has widespread consequences across a host of legal, social, political and economic spectrums.⁴ Many of the

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1. U.S. COMM'N ON IMMIGR. REFORM, *1995 Executive Summary: The National Interest, REPORT TO CONGRESS i* (1995).

2. Symposium, *Broken Fences: Legal and Practical Realities of Immigration Reform in the Post-9/11 Age*, U. MD. L.J. RACE, RELIGION, GENDER & CLASS (Nov. 10, 2005).

3. In his testimony before the Senate Judiciary Committee comprehensive immigration reform, Sen. Brownback (R-KS) succinctly stated: "We can all agree on two things: first, the current system is broken; and second, a national solution is desperately needed." *Comprehensive Immigration Reform: Hearing Before the Senate Comm. on the Judiciary*, 109th Congress (July 26, 2005) (statement of Sen. Sam Brownback (R-KS)), http://judiciary.senate.gov/member_statement.cfm?id=1588&wit_id=242.

4. See generally, Michael Fix et al., *Independent Task Force on Immigration and America's Future: The Roadmap*, MIGRATION POL'Y INST. (Jan. 2005), <http://www.migrationpolicy.org/ITFIAP/publications.php> (last visited Dec. 29, 2005), which states:

The Independent Task Force on Immigration and America's Future will focus on key policy questions in areas where today's U.S. immigration policy and practices are faltering. These include: upholding the rule of law; developing policies that meet immigration and national security needs; managing immigration in ways that increase the nation's economic

bills introduced in the 109th Congress, particularly in the House of Representatives, presented legislative initiatives, similar to legislation in the past, which failed to produce an orderly system operating within the bounds of the law. The bills introduced in the Senate, however, are more promising. Furthermore, the Bush Administration has finally offered its principles of reform, which lean towards a more realistic (but not comprehensive) approach.⁵ The public debate on policy choices, in simple terms, boils down to enforcement only or enforcement plus. However, the restoration of the system's integrity requires nothing less than a comprehensive approach, defined broadly,⁶ if reform efforts are to be beneficial to the national interest.

This article discusses the proposed reform measures while exploring certain policy choices that have led the immigration system of this country to its present state of disrepair.⁷ Arriving at a consensus on fixing the system (as opposed to erecting more fences on the Southwest border) is paramount to the national interest. Significantly, opinion polls indicate the public's acceptance of comprehensive immigration reform.⁸ Equally important are legislative initiatives that will curtail unauthorized immigration, address harsh and inhumane immigration laws passed in a misguided (or, perhaps, punitive) attempt to make U.S. borders more secure,⁹ and finally recognize the practical reality of a seemingly insatiable demand for cheap labor to fuel the U.S. economy. The only way to achieve a viable resolution is to employ thoughtful, bipartisan solutions instead of the business as usual mentality that has been employed since the

competitiveness; and promoting the economic and social integration of newcomers. *Id.*

5. Fact Sheet, White House, Office of the Press Secretary, Fair and Secure Immigration Reform (Jan. 7, 2004), <http://www.whitehouse.gov/news/releases/2004/01/20040107-1.html>.

6. See Jeanne Butterfield, *Broken Fences: Legal and Practical Realities of Immigration Reform in the Post-9/11 Age*, U. MD. L.J. RACE, RELIGION, GENDER & CLASS (2005) (published herein).

7. This article does not address all proposals or all immigration policies in need of scrutiny. A more comprehensive approach will undoubtedly be addressed by other scholars and commentators. In particular, the recently established independent task force, convened to study, inform and recommend possible policy choices covering a host of immigration reform related issues, will likely publish comprehensive recommendations on immigration reform in the near future. See Fix et al., *supra* note 4.

8. See, e.g., Richard R. Rulon, *A Good Time for Comprehensive Bipartisan Immigration Reform*, 232 LEGAL INTELLIGENCER 5 (2005) (describing the findings of the public opinion research conducted by the Tarrance Group and Lake Snell Perry Mermin & Associates as favorably disposed to a comprehensive approach to immigration reform).

9. See Christopher Nugent, *Towards Balancing a New Immigration and Nationality Act: Enhanced Immigration Enforcement and Fair, Humane and Cost-Effective Treatment of Aliens*, U. MD. L.J. RACE, RELIGION, GENDER & CLASS (2005) (published herein).

1990s. Despite huge expenditures of government resources over an extended period devoted to enhanced border enforcement, such narrowly focused reform efforts have remarkably failed to stem the rapidly increasing tide of illegal immigration.

The first part of this article provides background to the current debate. As the first section indicates, a new century brought a new challenge, namely, the impact of the September 11, 2001 terrorist attacks on immigration policy. The second section provides a historical note on the country origins of the dominant part of the current migration streams. The third section describes the legislative efforts undertaken over the course of a generation to address illegal immigration. Notwithstanding these efforts, immigration matters have gotten progressively worse at the U.S. border and in its interior, due in large part to the government's initial inattention to border enforcement, a total lack of resolve to police the worksite despite new laws prohibiting the employment of unauthorized workers, and a complete inability to appreciate how few opportunities exist under the current system to enter the United States lawfully.¹⁰ The final section of the first part examines how the toleration of illegal behavior in a host of immigration arenas undermines the rule of law, an essential tenet of a democratic society.

The second part of this article underscores the importance of making the right choices. Immigration regulation has reached crisis proportions. Early in 2006, Congress plans to debate immigration reform in earnest. For observers, the concern is whether the enforcement only proponents will carry the day (once again) or if the enforcement plus proponents will win over enough converts to reach a viable, innovative and sound resolution.¹¹ The country faces a problem of immense proportion if immigration reform is not resolved in a thoughtful, enlightened and bipartisan fashion. Fortunately, there are hopeful signs. Legislators on both sides of the aisle agree that solely implementing past policy choices is unacceptable. Indeed, if more of the same enforcement-oriented initiatives are enacted despite

10. See *infra* note 80 and accompanying text.

11. See, e.g., Tamar Jacoby, *The Immigration Temptation: The political issue that always disappoints is back*, 11 WKLY. STANDARD 10 (2006); Stephen Dinan, *GOP backs Bush on guest-worker plan; denies 'amnesty' to illegal aliens*, WASH. TIMES, Jan. 21, 2006, at A1; Peter Wallsten, *Immigration Rift in GOP Up for Vote*, L.A. TIMES, Jan. 20, 2006, at A1; Tamar Jacoby, *The GOP's border war: Immigration policy has split the Republican Party, with some advocating reform and others demanding only strict enforcement*, L.A. TIMES, Oct. 16, 2003, at 5, <http://www.latimes.com/news/opinion/commentary/la-oe-jacoby16oct16,0,6644809.story?coll=la-news-comment-opinions>.

the practical realities that dictate otherwise, this country could become a nation at risk on a number of levels, including, legal, social, political and economic.

II. SETTING THE STAGE FOR REFORM

A. *A New Century*

In the beginning of this century, the political pendulum was poised to swing back in favor of an amelioration of the harsh and draconian immigration reform measures Congress enacted in 1996.¹² Shortly after his inaugural address, President George W. Bush traveled to Mexico in February 2001—his first presidential trip abroad—signaling a return to a political climate more favorable to undocumented migrants in the United States.¹³ Providing opportunities for temporary worker status seemed to be eminent, which would provide long awaited relief for immigrants and free them from the shadows of the underground economy. This policy shift might have also created an opportunity for future lawful permanent residence status for the vast majority of Mexican nationals working and living in this country without authorization.¹⁴ Then the horrific events of September 11, 2001 occurred, shattering the nation's sense of domestic security and temporarily dashing the hopes of pro-immigrant advocates for any such beneficial reforms for the foreseeable future.

In addition to putting basic reform measures on hold, immigration enforcement underwent a dramatic change in the wake of the 9/11 terrorist attacks. Although most observers note that immigration regulation is largely unrelated to national security or

12. Barbara Hines, *So Near Yet So Far Away: The Effect of September 11th on Mexican Immigrants in the United States*, 8 TEX. HISP. J.L. & POL'Y 37, 40-44 (2002); Kevin R. Johnson, *Challenging the Boundaries of Nationality: September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 852-855 (2003) (describing the legislation passed in 1996 in the wake of the Oklahoma City bombing and the impact these harsh antiterrorism measures had on Mexican immigrants in the United States).

13. See Mike Allen, *Bush Proposes Legal Status for Immigrant Labor; Workers Could Stay Six Years or More*, WASH. POST, Jan. 8, 2004, at A1; Mary Beth Sheridan, *Invisible Community's Hushed Cheer; 'Guest Worker' Plan Excites Illegal Mexican Immigrants Here*, WASH. POST, Dec. 27, 2003, at A1.

14. See Lisa J. Bauer, Comment: *The Effect of Post-9/11 Border Security Provisions on Mexicans Working in the United States: An End to Free Trade?*, 18 EMORY INT'L L. REV. 725 (2004).

terrorism,¹⁵ those who wish to capitalize on the lingering fears of the public have emphasized the relationship between immigration and terrorism.¹⁶ Not surprisingly, however, policy choices in the political branches of government are now overwhelmingly driven by national security concerns.¹⁷ Finally, with the passage of the Homeland Security Act of 2002,¹⁸ almost all functions of the former Immigration and Naturalization Service (INS) were transferred to the new Department of Homeland Security (DHS).¹⁹ As of March 1, 2003, the former INS was abolished and its functions, save one relating to adjudication, were incorporated into (and dispersed throughout) three newly-established bureaus within DHS.²⁰

15. See STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 843 (4th ed., 2004) (stating that “national security is merely one of many policy ingredients in the mix”). For example, as part of the grounds of inadmissibility and deportability under the INA, section 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B), relates to the deportability of an alien engaged in terrorist activities as described in subparagraphs (B) or (F) of the INA provision regarding inadmissibility based on national security grounds, to wit, INA § 212(a)(3), 8 U.S.C. § 1182(a)(3). See also, e.g., Editorial, *Safe and Open Borders*, B. *GLOBE*, May 21, 2005, at A12 (observing that while immigration and terrorism are “largely separate issues,” the events of 9/11 underscore the urgency of increasing security at our borders).

16. Everyone now knows that the September 11 terrorists were foreign nationals who gained lawful temporary immigration status to enter the United States. See *Immigration: The Gatekeepers*, 1(6) *CUSTOMS & BORDER PROTECTION TODAY* (Aug. 2003), http://www.cbp.gov/xp/CustomsToday/2003/august/ins_gatekeepers.xml; THE 9-11 COMMISSION REPORT, NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, <http://www.gpoaccess.gov/911> (last visited Feb. 6, 2006). See also Press Release, Office of Sen. Johnny Isakson, Sen. Isakson Hails Passage of Immigration Reforms Along With Additional Funds for Iraq (May 10, 2005) (on file with U. Md. L.J. RACE, RELIGION, GENDER & CLASS) (discussing REAL ID Act as it relates to a national driver’s license and noting that almost all of the 9/11 terrorists, including Mohammad Atta, boarded the doomed airplanes using their state government-issued drivers’ licenses).

17. For example, Congress passed a national security measure aimed at illegal immigration called the REAL ID Act last May as part of an emergency appropriations bill for the military deployed to Iraq and Afghanistan. See Samantha Henry, *Immigration Advocates Slam REAL ID Act; Supporters say law will combat terrorism*, *HERALD NEWS*, May 12, 2005, at A6. The Act provides for a federal standard for state-issued drivers’ licenses. See Frank Stasio, *Real ID Act* (Nat’l Public Radio broadcast, May 16, 2005). Viewed as a national security issue, “[f]ederal lawmakers say that, because state drivers’ licenses are still used as the primary means of U.S. identification, they are a loophole that could be exploited by terrorists to board aircraft.” Edward Alden, *Governors challenge new driver’s licence law*, *FIN. TIMES* (London), July 19, 2005, at 3. Governor Bill Richardson of New Mexico called the measure, “a short-sighted, ill-conceived initiative.” *Id.* Finally, this Act overturns the carefully negotiated drivers’ license standards Congress enacted in December 2004, as part of the 9-11 Commission Anti-Terrorism law. See Cheryl Little, *New Law Won’t Make Us Safer*, *SUN-SENTINEL* (Fort Lauderdale, FL), May 23, 2005, at 15A.

18. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2153 (2002).

19. See *id.*

20. *Id.*, § 471(a). Stanley Mailman & Stephen Yale-Loehr, *Immigration Functions in the Department of Homeland Security*, 8 *BENDER’S IMMIGR. BULL.* 663 (2003).

Meanwhile, in January 2004, presumably to test the waters again, President Bush announced a vaguely defined temporary guest worker program.²¹ This announcement was met with opposition from the anti-immigrant hardliners in Congress because of the prospect that this proposal would lead to amnesty²² for migrants they labeled as lawbreakers.²³ The Bush White House momentarily acquiesced to the hardliners' concerns.²⁴ Thus, politics as usual has delayed any real progress in this particular area of basic reforms until now.

Maintaining national security is undeniably of paramount concern to any country, but Congress arguably rushed to judgment²⁵ in

21. Patricia Medige, *Perspectives on the Bush Administration's New Immigrant Guestworker Proposal: Immigrant Labor Issues*, 32 DENV. J. INT'L L. & POL'Y 735, 736 (2004) (questioning whether this is a serious proposal because little detail was provided about implementation of these announced principles).

22. See Dan Moffett, *Bush an alien in his own party*, PALM BEACH POST, Jan. 22, 2006, at 2E; Mark Krikorian, *Amnesty Again*, 56 NAT'L REV. 28 (2004); Valerie Richardson, *Republicans warn Bush on immigration policy*, WASH. TIMES, Jan. 28, 2004, <http://www.washtimes.com/national/20040128-124755-2167r.htm>; Valerie Richardson, *Lawmakers say angry voters may sit out election*, WASH. TIMES, Jan. 28, 2004, at A1; Sergio Bustos, *GOP delegates divided over party's immigration position*, GANNETT NEWS SERVICE, Aug. 27, 2004, at ARC.

23. As for criminalizing unauthorized entries, INA § 275 penalizes non-citizens entering the United States without authorization, see 8 U.S.C. § 1326 (2005); DAVID WEISSBRODT & LAURA DANIELSON, *IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL* 555-56 (5th ed., 2005). As for the debate regarding individuals who enter illegally as lawbreakers or essential workers, see, e.g., Victor Manuel Ramos, *Lawbreakers—or key workers? Debate rages about amnesty, tougher border controls*, ORLANDO SENTINEL, July 17, 2005, at A1; *Full Comm. Hearing on Immigration Reform: Hearing Before the Senate Judiciary Comm.*, 109th Cong. (2005) (witnesses such as Sen. Edward Kennedy (D-MA); Sen. John McCain (R-AZ); Sen. Jon Kyl (R-AZ); Sen. John Cornyn (R-TX); Tamar Jacoby, Senior Fellow, Manhattan Inst.; Gary Endelman, author and immigration practitioner; and Hal Daub, President and CEO, Am. Health Care Ass'n, described unauthorized migrant workers as either lawbreakers or essential workers). See also Michael A. Fletcher, *Bush Immigration Plan Meets GOP Opposition; Lawmakers Resist Temporary-Worker Proposal*, WASH. POST, Jan. 2, 2005, at A6 (noting that “[m]any House Republicans oppose any effort to grant legal status to undocumented workers, saying it would have the effect of rewarding law-breakers”).

24. See *infra* note 48 and accompanying text.

25. Rena Steinzor, *“Democracies Die Behind Closed Doors”: The Homeland Security Act and Corporate Accountability*, 12 KAN. J. L. & PUB. POL'Y 641, 643 (2003). But see Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act*, 72 GEO. WASH. L. REV. 1145, 1146 (2004) (asserting that despite the short time frame to enactment, the Act was nonetheless the product of intense work and negotiations involving a number of political and governmental sectors ending in “hard-fought compromises among all the participants”). Many of the major provisions of the Act were scheduled to sunset December 31, 2005 but lawmakers extended them initially until February 3, 2006. See Charles Babington, *Patriot Act Talks Hit Roadblock On Privacy Issue*, WASH. POST, Jan. 25, 2006, at A3. More recently, however, Congress extended sixteen sections of the 2001 Act for an additional five weeks until March 10, 2006. See *Bush Signs Extension of Patriot Act to March 10*, L.A. TIMES, Feb. 4, 2006, at A15; David Espo, *Agreement Reached on Patriot Act Changes*, ASSOCIATED PRESS, Feb. 9, 2006, available at http://news.yahoo.com/s/ap/20060209/ap_on_go_co/patriot_act. See also Charles

passing the much-criticized USA PATRIOT Act (PATRIOT Act).²⁶ Given the sobering effect of the attacks and their immediacy, most congressional members understandably jumped on the PATRIOT Act bandwagon. Nonetheless, whether the so-called “rush-to-judgment” was motivated by fear, a sense of true patriotism, or as a matter of political practicality in an effort to make the nation’s borders more secure, Congress arguably made policy choices that would have had little chance of passage but for the terrorist attacks.²⁷ Indeed, if the recent passage of the REAL ID Act²⁸ in 2005 and the immigration reform enforcement only bill recently passed²⁹ in the House is any indication, this scare-tactics pattern is playing out again today.

As the National 9/11 Commission Report issued in 2004 (and more recently)³⁰ reported, this nation’s borders are anything but secure.³¹ Focusing too heavily on national security will only hasten the passage of ill-conceived, unwise, and questionable policy choices (as occurred with the PATRIOT Act)³² in harsh and restrictive

Babington, *Patriot Act Compromise Clears Way for Senate Vote*, WASH. POST, Feb. 10, 2006, at A1.

26. See Act of Oct. 26, 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). See, e.g., John W. Whitehead, Note, *Forfeiting “Enduring Freedom” for “Homeland Security”: A Constitutional Analysis of the USA PATRIOT Act and the Justice Department’s Anti-Terrorism Initiatives*, 51 AM. U.L. REV. 1081 (2002).

27. See, e.g., Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act*, 72 GEO. WASH. L. REV. 1145, 1162 n.115 (2004).

28. Act of May 11, 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).

29. See Border Security Bill of 2005, H.R. 4437, 109th Cong. (2005). See also *infra* note 120.

30. See THE 9-11 COMMISSION REPORT, NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, <http://www.gpoaccess.gov/911> (last visited Jan. 5, 2006). See also Philip Shenon, *9/11 Panel Issues Poor Grades for Handling of Terror*, N.Y. TIMES, Dec. 6, 2005, at 24.

31. See THE 9-11 COMMISSION REPORT, NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, <http://www.gpoaccess.gov/911> (last visited Jan. 5, 2006). See also Richard Posner, Book Review, *The 9/11 Report: A Dissent*, N.Y. TIMES, Aug. 29, 2004, at 1.

32. See, e.g., Panel Discussion, *The USA PATRIOT Act and the American Response to Terror: Can We Protect Civil Liberties after September 11?*, 39 AM. CRIM. L. REV. 1501 (2002) (The panel included Congressman Barney Frank, Assistant Attorney General Michael Chertoff, Professor David Cole, Mr. Stuart Taylor, Jr., and Ms. Beth Wilkinson, and was moderated by Mr. Jeffrey Toobin. The discussion focused on national security as a priority after September 11 and noted the detrimental effects of the PATRIOT Act on immigration law.); Ruchir Patel, *Immigration Legislation Pursuant to Threats to U.S. National Security*, 32 DENV. J. INT’L L. & POL’Y 83 (2003) (discussing how the PATRIOT Act greatly expanded law enforcement’s powers to detain and deport innocent immigrants on the basis of national security concerns while vastly restricting immigrants’ rights to contest their deportations); Jan C. Ting, *Unobjectionable But Insufficient—Federal Initiatives in Response to the September 11 Terrorist Attacks*, 34 CONN. L. REV. 1145 (2002) (stating that national security concerns should trump all other issues, including the civil liberties of immigrants); Viet Dinh, *Freedom and Security after September 11*, 25 HARV. J.L. & PUB. POL’Y 399 (2002) (arguing that

legislation impacting this nation's immigration laws more directly and concretely. Such reform efforts will not provide the security needed to prevent future terrorist attacks or fix a broken system in desperate need of repair. In any event, such a focus is myopic and shortsighted. This new century thus presents lawmakers with a new challenge, an approach that overhauls the current immigration system into a "workable regulatory regime"³³ while securing the nation's borders against future threats with laws that are fair, humane and, above all, realistic.

B. A Historical Note

The origins of the largest population of unauthorized migrants in this country today are rooted in temporary "guest worker"³⁴ agreements between the United States and Mexico dating from 1942 to 1964.³⁵ The historical relationship between the United States and Mexico regarding their shared border in the Northern Hemisphere,³⁶ labor market dynamics³⁷ and, more recently, the impact of NAFTA,³⁸

national security concerns and the protection of civil liberties are not mutually exclusive goals).

33. Frank Sharry, Special Report, *Immigration Demystified; Despite all the heat from the right, a consensus is developing for workable solutions to the immigration mess. But we're not there yet*, AM. PROSPECT, Nov. 2005, at A2.

34. See *infra* note 48 and accompanying text.

35. See Lisa J. Bauer, Comment, *The Effect of Post-9/11 Border Security Provisions on Mexicans Working in the United States: An End to Free Trade?*, 18 EMORY INT'L L. REV. 725 (2004); DOUGLAS S. MASSEY ET AL., BEYOND SMOKE AND MIRRORS, MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 34-41 (2002).

36. See, e.g., Catherine E. Halliday, Note, *Inheriting the Storied Pomp of Ancient Lands: An Analysis of the Application of Federal Immigration Law on the United States' Northern and Southern Borders*, 36 VAL. U.L. REV. 181 (2001) (discussing the United States' inconsistent immigration policies with Mexico throughout the 19th and 20th centuries).

37. *United States and Mexico: Immigration Policy and the Bilateral Relationship: Hearing Before the Comm. on Foreign Rel.*, 108th Cong. 94 (2004) (statement of Dr. Demetrios G. Papademetriou, President, Migration Pol'y Inst.).

38. See generally, Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937 (1994) (explaining that while Americans viewed NAFTA as limiting Mexican immigration into the United States, Mexicans expected NAFTA to increase Mexican immigration into the United States); Carvana Hicks, *The NAFTA Aftermath: Analyzing a Free Trade Agreement Defectively Designed to Perpetuate Poverty and Dependency in Rural Mexico*, 13 CURRENTS INT'L TRADE L.J. 49 (2004) (concluding that in failing to consider the trade agreement's inherent impact on immigration, "NAFTA has worsened poverty in rural Mexico thereby increasing illegal immigration from Mexico to the United States"); Gabriela A. Gallegos, Comment, *Border Matters: Redefining the National Interest in U.S.-Mexico Immigration and Trade Policy*, 92 CALIF. L. REV. 1729 (2004) (criticizing policies that view immigration and trade between Mexico and the United States as distinct issues).

are important factors in understanding the current Mexico-U.S. migration patterns and associated political ramifications.³⁹ The Mexico-U.S. migration streams began because of “war emergencies” during the First and Second World Wars⁴⁰ and resulted in the (infamous) Bracero programs.⁴¹ These programs institutionalized networks such as family ties in the United States and certain labor market relationships. These networks continue today, thus making the continuation of unauthorized migration a virtual certainty well into the future.⁴² In other words, once a *de jure* program in the Twentieth Century, the old Bracero programs have become a *de facto* guest worker program today.

Some observers believe that once a government embraces a guest worker approach to solve an illegal migration problem, such a policy is doomed to failure for any number of reasons.⁴³ Studies indicate that illegal migration usually accompanies such band-aid type

39. Thus, the instincts of the former Texas governor were on target at the beginning of his first term in making Mexico his first foreign visit. See Alfredo Corchado & Laurence Iliff, *Expectations for meeting between Bush, Fox run high*, DALLAS MORNING NEWS, Feb. 16, 2001 (reporting on President Bush’s first foreign trip abroad to meet with Mexico’s President Vicente Fox). This also underscores the fact that immigration policy choices can also influence foreign policy goals. See Press Release, White House, Remarks by President Bush and President Vicente Fox of Mexico at Arrival Ceremony (Sept. 5, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010905-2.html> (discussing the importance of foreign policy goals with Mexico).

40. See Philip Martin, *Does the U.S. Need a New Bracero Program?*, 9 U.C. DAVIS J. INT’L L. & POL’Y 127, 128-30 (2003); Lisa J. Bauer, Comment, *The Effect of Post-9/11 Border Security Provisions on Mexicans Working in the United States: An End to Free Trade?*, 18 EMORY INT’L L. REV. 725 (2004); DOUGLAS S. MASSEY ET AL., BEYOND SMOKE AND MIRRORS, MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 34-41 (2002).

41. See *id.* See, e.g., Tisha R. Tallman, *Liberty, Justice, and Equality: An Examination of Past, Present, and Proposed Immigration Policy Reform Legislation*, 30 N.C. INT’L L. & COM. REG. 869 (2005) (discussing the dependence of American businesses on Mexican workers but the reluctance of Americans to support another temporary worker program in the aftermath of the failed Bracero programs); Kristi L. Morgan, *Evaluating Guest Worker Programs in the U.S.: A Comparison of the Bracero Program and President Bush’s Proposed Immigration Reform Plan*, 15 LA RAZA L. J. 125 (2004) (comparing President Bush’s proposed guest worker program to the Bracero programs of the 1940s and 1950s and arguing that the disadvantages of both programs to domestic and migrant workers outweigh the benefits of these programs).

42. Establishment of these networks makes it easier for the next generation of unauthorized “guest workers” to enter the United States without authorization. See *Congressional Testimony by Mark Krikorian, Executive Director, Center for Immigr. Studies: Hearing Before the Senate Judiciary Comm.*, 109th Cong. (2005).

43. Amanda Levinson, *Why Countries Continue to Consider Regularization*, MIGRATION POL’Y INST., Sept. 1, 2005, <http://www.migrationinformation.org/Feature/display.cfm?ID=330>.

programs.⁴⁴ Once in decline in other countries, such programs (considered alternatives to illegal migration) are on the rise again.⁴⁵

In any event, temporary guest worker programs are not well regarded universally as solutions to illegal immigration. First, as with the Bracero programs in this country,⁴⁶ guest worker programs tend to exploit and abuse the participant workers and result in lax enforcement by the government.⁴⁷ Second, as would be the case with the Bush proposal,⁴⁸ guest worker programs do not provide opportunities for permanent residence status in the host country.⁴⁹ Third, they do not afford guest workers opportunities to bring their families to the host country, underscoring the inadequacies of such an approach.⁵⁰ Finally, when it is time to leave, short of forced expulsion, they do not depart.⁵¹ Given the enhanced enforcement operations at the border, this is especially so today.⁵²

44. *Id.*

45. *Id.*

46. Despite elaborate contracts intended to cover contingencies such as housing, wages, and working conditions, "the central characteristics of the Bracero Program was widespread abuse." Doris Meissner, *U.S. Temporary Worker Programs: Lessons Learned*, MIGRATION POL'Y INST., Mar. 1, 2004, <http://www.migrationinformation.org/feature/display.cfm?ID=205>. A second characteristic of the Bracero Program was lax enforcement of its rules. *Id.*

47. *Id.*

48. See *President Readdresses Immigration Issues; Pushes for Comprehensive Reform*, 82 INTERPRETER RELEASES 1953 (2005). The Bush Administration's first proposed legislation was primarily favorable to undocumented Mexican nationals and included guest worker proposals that contemplated a form of amnesty. As noted earlier, the last time such a proposal for regularizing immigration status became a part of this nation's immigration laws was in 1986. At that time, Congressional concern was with so-called "illegal" immigration or non-citizens who most likely entered the United States surreptitiously without passing through one of the border checkpoints or ports of entry and being subject to examination by an immigration official. Another part of this undocumented population comprises non-citizens, namely, those who enter lawfully on temporary visits but fail to depart upon the expiration of their authorized stay in the United States. See Randolph Capps & Michael E. Fix, *Undocumented Immigrants: Myths and Reality*, URBAN INST., Nov. 1, 2005, <http://www.urban.org/url.cfm?ID=900898>. See, e.g., Gabriela A. Gallegos, Comment, *Border Matters: Redefining the National Interest in U.S.-Mexico Immigration and Trade Policy*, 92 CALIF. L. REV. 1729, 1749 (2004).

49. Amanda Levinson, *Why Countries Continue to Consider Regularization*, MIGRATION POL'Y INST., Sept. 1, 2005, <http://www.migrationinformation.org/Feature/display.cfm?ID=330>.

50. Rob Paral, *No Way In: U.S. Immigration Policy Leaves Few Legal Options for Mexican Workers*, 4 IMMIGR. POL'Y IN FOCUS 1 (2005), <http://www.aif.org/ipc/nowayin.asp> (last visited Feb. 13, 2006). The inability to bring family members underscores the fact that for the most part under the current immigration system there are too few avenues for lawful admission. *Id.*

51. *Id.*

52. In other words, prior to the increased enforcement efforts at the border, undocumented workers from Mexico would enter and voluntarily depart on a regular basis. This phenomenon was called "circularity." With increased enforcement efforts, however, the

More circularity in the patterns of unauthorized migration was apparent in earlier times.⁵³ Those circular migration patterns, however, changed during the 1990s when Congress significantly increased appropriations, including, personnel for enhanced border operations.⁵⁴ These enforcement efforts at the border, however, have only moved border crossings to more dangerous and inhospitable locations.⁵⁵ Yet, despite the ever-increasing dangers associated with surreptitious entries with unscrupulous smugglers, violence and attendant deaths in the desert, these unauthorized entries will likely continue.⁵⁶ United States policy makers appreciate that the criminality associated with border activity is unacceptable in a civilized nation. Nonetheless, a policy establishing a guest worker program may eventually come to be viewed eventually as a necessary evil or a necessary means to ending illegal migration, at least, temporarily.⁵⁷

C. Closing the Backdoor

Congress last addressed illegal immigration comprehensively (defined narrowly),⁵⁸ and in a bipartisan fashion, in 1986.⁵⁹ At that time, Congress enacted the Simpson-Mazzoli bill known as the Immigration Reform and Control Act of 1986 (IRCA).⁶⁰ This

level of danger increased precipitously, making it substantially more difficult for individuals to cross the border. Hence, once here, undocumented workers are unlikely to depart as they previously did prior to the increased enforcement efforts.

53. Francisco Alba, *Mexico: Crucial Crossroads*, MIGRATION POL'Y INST., July 2002, <http://www.migrationinformation.org/feature/display.cfm?ID=211> (last visited Jan. 11, 2006) (noting that many permanent immigrants began their journey to the United States as circular migrants); Daniel T. Griswold, *Willing Workers: Fixing the Problem of Illegal Mexican Migration to the United States*, CATO INST., Oct. 15, 2002, <http://www.freetrade.org/pubs/pas/tpa-019es.html>.

54. JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan Through Clinton, 1981-2001*, 16 GEO. IMMIGR. L.J. 601 (2002).

55. Tyche Hendricks, *Dangerous Border: Crossing into U.S. has increasingly become a matter of life and death*, S.F. CHRON., May 30, 2004, at A1.

56. *See id.*

57. *But see Top 10 Migration Issues of 2005, #4 Temporary Work Programs Back in Fashion*, MIGRATION POL'Y INST., http://www.migrationinformation.org/top_ten.cfm (last visited Jan. 5, 2006). According to MPI, the desire on the part of Western countries to appear in control of immigration flows, coupled with economic and demographic pressures, may well lead to more temporary work programs in the years ahead.

58. *See* Jeanne Butterfield, *Broken Fences: Legal and Practical Realities of Immigration Reform in the Post-9/11 Age*, U. MD. L.J. RACE, RELIGION, GENDER & CLASS (2005) (published herein).

59. Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics*, PEW HISPANIC CENTER, June 14, 2005, <http://pewhispanic.org/reports/report.php?ReportID=46>.

60. Act of Nov. 6, 1986, Pub. L. No. 99-603, 100 Stat. 3360 (1986) (codified as amended at 8 U.S.C. 1324(a) (2000)).

measure, for the most part, represented the culmination of work by the Select Commission on Immigration and Refugee Policy.⁶¹ The Select Commission, created in 1978,⁶² was charged with studying and reporting on recommendations to curtail the steady influx of undocumented migrants, principally from Mexico.⁶³ The Select Commission's primary goal was to make recommendations designed to close the so-called "backdoor" to immigration.⁶⁴ The Commission issued its final report in 1981.⁶⁵

IRCA, enacted after numerous congressional hearings, consultations, and briefings over a five-year period⁶⁶ was touted as the

61. See, generally, Lawrence H. Fuchs, *Strangers to the Constitution: Immigrants in American Law. Directions for U.S. Immigration Policy: Immigration Policy and the Rule of Law*, 44 U. PITT. L. REV. 433 (1983) (discussing the Select Commission on Immigration and Refugee Policy's mandate and the factors that led to its creation in 1978); see also Alan K. Simpson, *The Immigration Reform and Control Act: Immigration Policy and the National Interest*, 17 U. MICH. J.L. REFORM 147, 159-62 (1984) (discussing the Simpson-Mazzoli bill and the foundations of the bill which emanated from the recommendations of the Select Commission on Immigration and Refugee Policy).

62. Act of Oct. 5, 1978, Pub. L. No. 95-412, 92 Stat. 907 (1978); Fuchs, *supra* note 61, at 437 n.8. Public Law No. 95-412 established the Select Commission, with duties that included the submission of a report to Congress evaluating existing immigration laws and policies and the proposal of legislative and administrative amendments. Act of Oct. 5, 1978, Pub. L. No. 95-412, § 4(d), 92 Stat. 907, 908 (1978).

63. See, e.g., Barry R. Chiswick, *Guidelines for the Reform of Immigration Policy*, 36 U. MIAMI L. REV. 893, 925-29 (1982) (discussing the Commission's recommendations for controlling illegal immigration); see also Fuchs, *supra* note 61, at 438-39 (discussing the fact that the Commission's recommendations were guided by "one or more of three fundamental principles: international cooperation, the open society, and the rule of law").

64. David M. Turoff, Note, *Illegal Aliens: Can Monetary Damages Be Recovered From Countries of Origin Under an Exception to the Foreign Sovereign Immunities Act?*, 28 BROOKLYN J. INT'L L. 179, 183 (2002) (referring to closing the backdoor phenomenon associated with illegal migration and citing to H.R. Rep. 101-723(I), 101st Cong., 2d Sess., 32, 33 (1990). See also Lawrence H. Fuchs, *What Do Immigrants Deserve? A Warm Welcome and the Usual Benefits—but Not Affirmative Action*, WASH. POST, Jan. 29, 1995, at C2.

65. *Executive Summary, Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy*, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (1981). As President Reagan stated at the bill signing ceremony for S. 1200 on November 6, 1986, "[i]n 1981, this administration asked the Congress to pass a comprehensive legislative package, including employer sanctions, other measures to increase enforcement of the immigration laws, and legalization. The act provides these three essential components." Public Papers of the President, *Immigration Reform and Control Act of 1986*, 22 WKLY. COMP. PRES. DOC. 1534 (1986).

66. Demetrios G. Papademetriou, *Reflecting on Restoring Integrity to the United States Immigration System: A Personal Vision*, MIGRATION POL'Y INST., Sept. 2005, at 3, <http://www.migrationpolicy.org/ITFIAF/publications.php> (last visited Jan. 13, 2006); Lawrence H. Fuchs, *What Do Immigrants Deserve? A Warm Welcome and the Usual Benefits—but Not Affirmative Action*, WASH. POST, Jan. 29, 1995, at C2. See also ARISTIDE R. ZOLBERG ET AL., *IMMIGRATION RECONSIDERED: HISTORY, SOCIOLOGY, AND POLITICS* 315, 322-37 (Virginia Yans & McLaughlin eds., 1990) (discussing the intense political debate surrounding the passage of IRCA).

solution to illegal immigration. It contained three essential component parts: employer sanctions, legalization and enhanced border funding.⁶⁷ Employer sanctions addressed future influxes of undocumented migrants by sanctioning (and in some cases prosecuting) employers who hired individuals without work authorization.⁶⁸ Congress responded to concerns about discrimination in the implementation of this worksite enforcement regime by including anti-discrimination provisions.⁶⁹ Prior to enactment of IRCA, while unlawful entry was illegal, hiring unauthorized entrants was not.⁷⁰ The strategy behind this particular measure was aimed at, in effect, criminalizing the hiring of unauthorized workers and thereby cutting off a main pull factor that contributed to the illegal immigration population.

The legalization provisions,⁷¹ considered “the most ambitious amnesty program in U.S. history,”⁷² were intended to capture the then estimated three to twelve million undocumented migrant population by affording them opportunities to regularize their immigration status.⁷³ More recently, this earlier “guesstimation” has been revised downward. According to a recent report released by the Pew Hispanic Center, four million is a statistically closer approximation of the undocumented migrants living and working in the United States in 1986.⁷⁴ Nearly 2.7 million of the undocumented migrant population

67. See Captain George L. Hancock, Jr., *Legal Assistance and the 1986 Amendments to the Immigration, Nationality, and Citizenship Law*, 1987 ARMY LAW. 11 (1987).

68. 8 U.S.C. 1324(a) (1988). See Betsy Cooper & Kevin O’Neil, *Lessons From The Immigration Reform and Control Act of 1986*, MIGRATION POL’Y INST., Aug. 2002, at 2, <http://www.migrationinformation.org/Feature/display.cfm?id=352> (last visited Feb. 13, 2006). See also Linda Sue Johnson, Comment, *The Antidiscrimination Provision of the Immigration Reform and Control Act*, 62 TUL. L. REV. 1059 (1988).

69. See Linda Sue Johnson, Comment, *The Antidiscrimination Provision of the Immigration Reform and Control Act*, 62 TUL. L. REV. 1059 (1988).

70. Peter Brownell, *The Declining Enforcement of Employer Sanctions*, MIGRATION POL’Y INST., Sept. 1, 2005, <http://www.migrationinformation.org/Feature/display.cfm?id=332>.

71. See Act of Nov. 6, 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986). There were a total of three amnesty programs: a generalized plan, a special agricultural program and a special program for Cubans and Haitians. All were ad hoc programs with windows of opportunity for application that closed after a specified number of years. A more formalized amnesty program appears in the regular statutory provisions under INA § 249.

72. STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 607 (4th ed., 2004).

73. See Captain George L. Hancock, Jr., *Legal Assistance and the 1986 Amendments to the Immigration, Nationality, and Citizenship Law*, 1987 ARMY LAW. 11 (1987). See also Act of Nov. 6, 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

74. Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics*, PEW HISPANIC CENTER, June 14, 2005, <http://pewhispanic.org/reports/report.php?ReportID=46>.

eligible to apply for legalization ultimately had their unauthorized immigration status regularized.⁷⁵

At the bill-signing ceremony, President Ronald Reagan called IRCA “the most comprehensive reform of our immigration laws since 1952.”⁷⁶ President Reagan then predicted that “future generations of Americans will be thankful for our efforts to humanely regain control of our borders and thereby preserve the value of one of the most sacred possessions of our people—American citizenship.”⁷⁷ Unfortunately, his prediction fell far short of its mark. In fact, one could say remarkably so. To avoid the employer sanctions, which were never fully funded or adequately enforced,⁷⁸ a cottage industry of producing fake or fraudulent documents arose in the wake of IRCA’s passage.⁷⁹ Also, Congress adopted language in the governing provisions that, coupled with concerns about the anti-discrimination provisions and a decided leaning towards employing cheap labor, conspired to render worksite enforcement ineffectual.⁸⁰ This failed strategy contributed to the persistence of a black market or underground economy in which employers were willing to take the chance of being sanctioned in order to get the benefits of cheap labor in certain industries.⁸¹ Finally,

75. DOUGLAS S. MASSEY ET AL., *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* 90 (2002).

76. Public Papers of the President, *Immigration and Reform Control Act of 1986*, 22 WKLY. COMP. PRES. DOC. 1534 (1986). Prior to 1952, federal laws governing immigration were a compilation of separate measures enacted throughout the 20th century. Then in 1952 Congress passed the McCarran-Walter Act, the Immigration and Nationality Act of 1952 (INA) over President Truman’s veto. Although the INA has been amended substantially over the years, it is still the foundation for all U.S. immigration laws today.

77. Public Papers of the President, *Immigration and Reform Control Act of 1986*, 22 WKLY. COMP. PRES. DOC. 1534 (1986).

78. Peter Brownell, *The Declining Enforcement of Employer Sanctions*, MIGRATION POL’Y INST., Sept. 1, 2005, <http://www.migrationinformation.org/Feature/print.cfm?ID=332>; David Dixon and Julia Gelatt, *Immigration Facts: Immigration Enforcement Spending Since IRCA*, MIGRATION POL’Y INST., Nov. 2005, <http://www.migrationpolicy.org/ITFIAF/FactSheetSpending.pdf> (last visited Feb. 13, 2006).

79. See, e.g., *Fraudulent Use of U.S. Identification Documents*, Hearing Before the House Comm. on the Judiciary, Subcomm. on Immigr., Border Security, and Claims, 103 Cong. (1999) (Statement by David Simcox, Chair of the Board, Center for Immigr. Studies), available at <http://www.cis.org/articles/1999/simcox72299.htm> (last visited Jan. 5, 2006) (discussing increasing use of fraudulent immigration documents over past twenty years).

80. Betsy Cooper and Kevin O’Neil, *Lessons From The Immigration Reform and Control Act of 1986*, MIGRATION POL’Y INST., Aug. 2005, at 3, http://www.migrationpolicy.org/pubs/PolicyBrief_No3_Aug05.pdf (last visited Feb. 13, 2006); see generally, Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. REV. 345, 355-63 (2001) (discussing the ineffectual enforcement of IRCA’s employer sanctions regime and contending that immigration regulation of the workplace is “at the expense of labor and immigration policy goals”).

81. *Id.*

enhanced border enforcement, the third component, was not accompanied by significant new funding and personnel until the mid-1990s.⁸²

Today, the number of non-citizens residing in the United States without lawful immigration status is estimated to be around eleven million.⁸³ The annual increase of unauthorized entrants is estimated to be around 500,000 despite increased funding and personnel for border operations.⁸⁴ Interior enforcement is, however, capable of improving, specifically at the worksite given present-day advances in technological capabilities. Previously, verification of work authorization was left to the employer through immigration regulations concerning acceptable documentation.⁸⁵ Today, the ability to employ advanced technology in this enterprise at the worksite will make employment verification more reliable.⁸⁶ The question remains, however, whether there is the congressional will to solidify the employer sanctions regime. Even if this enforcement regime was capable of being effective in the new technology age, concerns about a national identification card will undoubtedly still be debated.

Completing the system overhaul begun in 1986, Congress passed the Immigration Act of 1990.⁸⁷ Among other things, this Act increased the availability of permanent visas for family-sponsored and employment-based immigration to the United States.⁸⁸ The 1990 Act

82. See Brownell, *supra* note 78. Also, Doris Meissner, the former INS Commissioner during the Clinton Administration, made this specific point during the panel on immigration reform in the video of that presentation at Harvard Kennedy School of Government in May 2005.

83. See Jeffrey S. Passel, *Estimates of the Size and Characteristics of the Undocumented Population*, PEW HISPANIC CENTER, Mar. 21, 2005, <http://pewhispanic.org/reports/report.php?ReportID=44>. Notably, the population of individuals in the United States without lawful status is comprised of non-citizens who entered surreptitiously without permission and those who were admitted on non-immigrant visas but overstayed their temporary visits. See also *id.*

84. See Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics, Background Briefing Prepared for Task Force on Immigration and America's Future*, PEW HISPANIC CENTER, June 14, 2005, <http://pewhispanic.org/files/reports/46.pdf>.

85. Marc R. Rosenblum, *Immigration Enforcement at the Worksite: Making it Work*, MIGRATION POL'Y INST., Nov. 2005, <http://www.migrationpolicy.org/ITFIAF/PolicyBrief-6-Rosenblum.pdf> (last visited Feb. 13, 2006).

86. Tamar Jacoby, *An Idea Whose Time Has Finally Come? The Case for Employment Verification*, MIGRATION POL'Y INST., Nov. 2005, <http://www.migrationpolicy.org/ITFIAF/PolicyBrief-9-Jacoby.pdf> (last visited Feb. 13, 2006).

87. Immigration Act of 1990, Public L. No. 101-649, 104 Stat. 4978 (1990).

88. See *id.* James F. Smith, *United States Immigration Policy—A History of Prejudice and Economic Scapegoatism?: A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227 (1995); Dave McCurdy, *The Future of U.S. Immigration Law*, 20 J. LEGIS. 3, 6 (1994); see generally Carlos Ortiz Miranda, *An Agenda for the Commission on Immigration Reform*, 29

also added a new category of visas known as the diversity visa, popularly called the visa lottery.⁸⁹ Congress even reduced the grounds of deportability and exclusion (now called “inadmissibility”), especially as they related to ideological and political grounds that had perplexed immigration scholars⁹⁰ since the 1952 passage of the INA over a presidential veto.⁹¹ Taken together, this major overhaul of immigration law required years of debate and political compromises to bring to fruition. Had the strategies worked as intended, the combination of the legislative measures enacted in 1986 and 1990 could have, potentially, altered the trajectory of the current state of immigration regulation.

In 1990, Congress created another bipartisan commission on immigration to assess immigration policy choices and make recommendations.⁹² Before the Commission could issue its final report, however, Congress intervened with the passage of the Immigration Reform and Control Act in 1996.⁹³ This Act and other legislative initiatives from that year⁹⁴ marked a new anti-immigrant era

SAN DIEGO L. REV. 701, 709-14 (1992) (describing the increased visa availability based on family and employment sponsorship together with the then newly-created diversity visas as a result of passage of the Immigration Act of 1990).

89. See Immigration Act of 1990, Public L. No. 101-649, 104 Stat. 4978 (1990); INA § 203(c), 8 U.S.C. § 1153(c). See Symposium, *Confronting Realities: The Legal, Moral, and Constitutional Issues Involving Diversity: Panel II: Immigration Policy: Critical Race Theory in Three Acts: Racial Profiling, Affirmative Action, and the Diversity Visa Lottery*, 66 ALB. L. REV. 375, 382-84 (2003) (describing the concept of the visa lottery in immigration regulation). This category of visas, although limited to 55,000 total opportunities to immigrate to the United States, was intended to benefit applicants who were from countries of low admission.

90. Kevin R. Johnson, *The Antiterrorism Act, The Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833, 862-65 (1997) (describing the Immigration Act of 1990's drastic narrowing of ideological grounds of exclusion).

91. Kathryn M. Bockley, Comment, *A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise*, 21 N.C. J. INT'L L. & COM. REG. 253, 264-65 (1995) (describing how the McCarran-Walter Act overcame a presidential veto to become the Immigration and Nationality Act of 1951).

92. Immigration Act of 1990, Public L. No. 101-649, 104 Stat. 4978 (1990). IRCA focused on illegal immigration; IMMACT focused on lawful immigration. Carlos Ortiz Miranda, *An Agenda for the Commission on Immigration Reform*, 29 SAN DIEGO L. REV. 701, 701-03 (1992). IMMACT also created the U.S. Commission on Immigration, a successor commission to the Select Commission on Immigration and Refugee Policy. *Id.* at 703. The congresswoman from Texas, Barbara Jordan, a proponent of maintaining the integrity of the rule of law in immigration policy reform, was eventually appointed as its chair. See *Barbara Jordan Appointment to Chair Immigration Reform Commission*, 70 INTERPRETER RELEASES 1669 (1993).

93. Act of Sept. 30, 1996, Pub L. No. 104-208, 110 Stat. 3009 (1996).

94. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public L. No. 104-193, 110 Stat. 2105 (1996); Illegal Immigration Reform and

of immigration reform. This era accompanied the anti-immigrant sentiment pervasive in states with the highest concentration of illegal immigration. Thus, this new era represented a shift away from beneficial legislation to harsher, more restrictive, and punitive measures, that were even directed at lawful permanent residents. It also represented an opportunity to embrace the fully-funded goal of enhanced border enforcement.

Thus began the enforcement-only mentality on Capitol Hill that is ever present in the current debate on immigration policy reform. Over the years, Congress has increased expenditures for border enforcement exponentially.⁹⁵ Yet, a host of issues unrelated to border enforcement have persisted; and if unattended, congressional failure to address them could render the regulation of immigration totally ineffectual, conspiring to undermine the rule of law in this country.

D. A Nation of Laws

The orderly and effective administration of our immigration system is in the national interest. At present, the legislative initiatives enacted since 1996 have rendered immigration laws so harsh and tough, it is not surprising that they are hard to enforce and virtually ignored.⁹⁶ A commentator once opined that the “law [is] so unrealistically strict that we might as well have no law at all.”⁹⁷ Labeling the undocumented migrant population as “lawbreakers” as opposed to “essential workers” is at the core of the public debate.⁹⁸ Arguably, the federal government and Congress are duplicitous in this “reign” of lawlessness. In other words, the laws that Congress has enacted and which the government has failed to implement rigorously (or that Congress has failed to fund adequately)—specifically, the employer sanctions regime renders the federal government, in a manner of speaking, responsible for the steady influx of illegal

Immigrant Responsibility Act of 1996, Pub L. No. 104-208, 110 Stat. 3009 (1996) (collectively, the Welfare Acts of 1996).

95. See *supra* note 78.

96. Tamar Jacoby, *Border Battles*, N.Y. POST, Oct. 24, 2005, <http://www.migrationinformation.org/Feature/display.cfm?ID=223>.

97. *Id.*

98. See Ramos, *supra* note 23. See also Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 773 n.4 (1996) (citing U.S. COMM’N ON IMMIGR. REFORM, 1994 *Executive Summary*, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY (1995), which stated: “Failure to develop effective strategies to control unlawful immigration has blurred the public perception of the distinction between legal and illegal immigrants.”).

immigration. This is arguably so because sanctioning employers has been little more than a “wink and a nod” course of action since 1986. The public, as consumers, have been complicit in this enterprise, too, benefiting from lower prices resulting from cheap labor.⁹⁹ In addition, while employers who knowingly hire unauthorized workers with impunity are able to be competitive in the global marketplace, this is unfair to those employers who are willing to play by the rules.

In her testimony before Congress in 1995 the Commission chair, the former congresswoman Barbara Jordan of Texas, stated in response to pro-immigrant comments that some of the Commission’s interim recommendations aimed at regaining control of illegal immigration were inherently anti-immigrant. Congresswoman Jordan continued by noting that “we are also a country of laws. For our immigration policy to make sense, it is necessary to make distinctions between those who obey the law, and those who violate it.”¹⁰⁰ Congresswoman Jordan concluded her testimony by stating that “[u]nlawful immigration is unacceptable.”¹⁰¹ Admittedly, the presence of approximately eleven million illegal immigrants in the United States without lawful status is an indication of illegal behavior. The system is broken and the undocumented migrant population is not the only indication of a broken system.

Other indications exist that relate to the lawful administration of the system. For example, the huge backlogs of pending visa applications and administrative processing delays under the regular immigration system facilitate and contribute to this phenomenon of unlawful immigration. One look at any current Visa Bulletin provides a clear picture of the problem.¹⁰² These systemic roadblocks to the overall policy goal of family reunification¹⁰³ arguably tempt immigrants to engage in unlawful conduct. Indeed, there exist within

99. Caroline Zaayer, *Economists Disagree on Immigrant Employment Puzzle*, FOX NEWS, Dec. 13, 2005, <http://www.foxnews.com/story/0,2933,178503,00.html>.

100. *Hearing Before House Judiciary Comm., Subcomm. on Immigr. Reform*, 104th Cong. (1995) [hereinafter *Jordan Hearings*] (testimony of Barbara Jordan, Chair, U.S. Comm. on Immigr. Reform), available at <http://www.utexas.edu/lbj/uscir/022495.html> (last visited Jan. 5, 2006).

101. *Id.*

102. See, e.g., *Visa Bulletin: Immigrant Numbers for Dec. 2004*, U.S. DEPT. OF STATE, http://travel.state.gov/visa/frvi/bulletin/bulletin_1343.html (last visited Jan. 26, 2006). This visa bulletin indicates that applications being processed for those qualified under the first preference as adult, unmarried children of U.S. citizens have been waiting for approximately five plus years; whereas applications being processed for those qualified under the second preference as adult, unmarried children of lawful permanent residents have been waiting for approximately double that amount of time.

103. See LEGOMSKY, *supra* note 15, at 250-53.

the undocumented population individuals who have been waiting for years to reunite with family members.¹⁰⁴

On the employment-based side of the immigration preference system, problems in need of reform exist as well. For example, employers who need to hire visa eligible individuals within a relatively short period of time find it difficult to utilize the current system to hire foreign workers in an expeditious manner.¹⁰⁵ Of note, the current system for employment-based immigration was established in 1952, at a time when our economy was focused domestically.¹⁰⁶ Now the global expansion of our economy and increased competition for highly skilled workers has placed a premium on such foreign workers.¹⁰⁷ Despite the provisions of the 1990 Act for increased visa availability in these highly competitive categories, according to well-known scholars in this area, the current system of immigration selection based on economic needs is simply not well-suited in this new era of globalization.¹⁰⁸

In other words, whether it is a lack of current visa availability under the family preference system or an outdated employment-based selection system that aspires to be globally competitive, simply put, too few opportunities are available under the current system to immigrate lawfully.¹⁰⁹ Whether lawful avenues to immigration are non-existent or administratively backlogged, the current system is in need of an overhaul if it is to function in a manner that meets current

104. See David A. Martin, *Twilight Statuses: A Closer Examination of the Unauthorized Population*, MIGRATION POL'Y INST., June 2005, http://www.migrationpolicy.org/pubs/MPI_PB_6.05.pdf (last visited Jan. 6, 2006). As stated in the summary to Professor Martin's report:

Discussion of the unauthorized often treats this population of between 8-11 million persons as a monolithic whole. In fact, an estimated 1-1.5 million of the unauthorized have current or incipient claims to legal status in the United States because they are either relatives of lawful permanent residents or have been granted temporary protected status (TPS). Prof. Martin calls for policy changes that speed processing of legal status claims for certain family members of lawful residents and incentives for those with TPS to return when their temporary status expires. This brief describes the twilight statuses that some among the unauthorized population hold and analyzes how changes would reduce the inducements for illegal migration and overstays.

Id. See also *infra* note 105.

105. See, e.g., DEMETRIOS G. PAPADEMETRIOU & STEPHEN YALE-LOEHR, *BALANCING INTERESTS: RETHINKING U.S. SELECTION OF SKILLED IMMIGRANTS* 15-34, 141-61 (Carnegie Endowment for Int'l Peace 1996) [*hereinafter* *Balancing Interests*].

106. LEGOMSKY, *supra* note 15, at 321-22 (citing *Balancing Interests*).

107. *Id.* at 323 (citing *Balancing Interests*).

108. *Id.*

109. See Paral, *supra* note 50.

realities of immigration in a new century. Consideration of overhauling the current immigration system would be in the nation's interest. Indeed, the late Barbara Jordan recognized that this country is a nation of immigrants with a rich and generous history of immigration.¹¹⁰ Then in her role as the chair of the 1990 Commission, in testimony before a congressional subcommittee, she stated that "[t]he Commission believes that we must take immediate steps to uphold both our immigration tradition and our commitment to the rule of law."¹¹¹ As for honoring the rule of law, Jordan concluded by stating that "[i]t is both a right and a responsibility of a democratic society to manage immigration so that it serves the national interest."¹¹² As such, a focus on both illegal and lawful immigration would not be inconsistent with a comprehensive approach to immigration reform.

This is the posture in which we find the current debate although the anti-immigrant hardliners view restoration of the rule of law in immigration policy reform only applicable to enforcement initiatives. Admittedly, a policy designed to secure the borders first is appropriately intended to stem the tide of illegal immigration. This type of policy, however, ignores a reality about illegal immigration that undermines the rule of law in the interior: that at the worksite, unscrupulous employers who abuse unauthorized workers arguably do so because of their vulnerable positions.¹¹³ In short, the rule of law has been supplanted by the rise of a black market economy including a cottage industry of fraudulent work authorization documents, international smugglers, and a failure by lawmakers to appreciate the on-going demand and need for low-skilled workers in this country. Such a pattern or trend is unlikely to correct itself without expanding the avenues for lawful immigration.

Finally, not only have legislators failed to appreciate the implications of the current demands for lawful immigration opportunities, but the United States Supreme Court has also unwittingly undermined the rule of law by interpreting congressional intent to place immigration reform above labor law protections.¹¹⁴ In *Hoffman Plastics*, the Court compared the requirements of labor and immigration laws and found by a five-to-four decision that the award

110. *Jordan Hearings*, *supra* note 100.

111. *Id.*

112. *Id.*

113. *See* Nessel, *supra* note 80.

114. *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

of backpay should be governed, and accordingly barred, by IRCA.¹¹⁵ In the wake of *Hoffman*, lower courts—consistent with an anti-immigrant mood—have extended that decision further than its limited holding.¹¹⁶ The intersection of immigration and labor law protection raises issues that only legislative initiatives can correct. Thus, it remains for Congress to correct the present imbalance.

III. MAKING THE RIGHT CHOICES

A. *Enforcement Only or Enforcement Plus*

Several times throughout his first and second terms in office, President Bush has indicated that immigration reform is a top legislative priority in his Administration.¹¹⁷ Other issues, however, keep getting in his way (and/or ability to exercise his political capital to spearhead this policy reform effort).¹¹⁸ Fortunately, there seems to be no shortage of leadership on this controversial issue on Capitol Hill. This is so whether advocating an enforcement only, single-minded, short-sighted and, at times, punitive approach, or a more enlightened, arguably more humane and realistic approach known as “enforcement plus.” In other words, enforcement plus recognizes the need for strong enforcement measures, not only at the border, but also at the worksite, and includes other reform measures that address the illegal migration population already living and working in the United States.

The anti-immigrant approach to immigration reform took a strong hold with the passage of the 1996 Acts. Regardless of status, immigrants were considered scapegoats and perceived as threats to the American way of life.¹¹⁹ Then the 9/11 events gave politicians

115. *Id.* at 140.

116. *See generally, Developments in the Law: Jobs and Borders: Legal Protections for Illegal Workers*, 118 HARV. L. REV. 2224, 2228-35 (2005) (discussing the progressive weakening of worker protections post-*Hoffman*).

117. *See, e.g., Bush calls for changes on illegal workers*, CNN, Jan. 8, 2004, <http://www.cnn.com/2004/ALLPOLITICS/01/07/bush.immigration>.

118. *See Peter Wallsten & Nicole Gaoulette, Immigration Rising on Bush's To-Do List*, L.A. TIMES, July 24, 2005, at 1.

119. *See MUZAFFIR A. CHISHTI ET AL., AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11*, at 41 (Migration Pol'y Inst. 2003) (“Over the course of American history, in times of national securities crisis the high courts have consistently acquiesced to executive branch crackdowns on civil liberties. Just as consistently, Americans have later come to view these crackdowns with regret, as misguided and ineffective attempts to scapegoat immigrants, and as undermining fundamental principles of American justice.”).

inclined to capitalize on the anti-immigrant sentiment opportunities to engage in fear-mongering to ensure passage of more harsh, restrictive and punitive measures. This unrelenting approach is emblematic of the enforcement-only mindset present in Congress today, especially in the House of Representatives.¹²⁰

In November 2005, President Bush renewed his attention to immigration reform with speeches in Arizona and Texas.¹²¹ He reaffirmed his commitment to enforcement plus by supporting both increased border enforcement and a temporary worker program aimed at meeting the demand for low-skilled workers.¹²² The guest worker program, however, does not lead to permanent resident status.¹²³ Observers believe this measure, which may be a step back from the early Bush-Fox talks in his first term, is an effort to appease his hardliner base in the Republican Party; but even they seem opposed to anything other than exceedingly tougher measures, principally focused on increased enforcement at the border. In other words, nothing that vaguely approaches a realistic solution in terms of the eleven million unauthorized workers already in the country would seemingly be acceptable to them.¹²⁴ In short, the enforcement only proponents advocate for more punitive and unrealistic measures that run counter to

120. For example, on December 6, 2005, Chairman James Sensenbrenner of the House Judiciary Committee introduced the Sensenbrenner-King bill, also known as the Border Protection, Antiterrorism, and Illegal Immigration Control Act, H.R. 4437, 109th Cong. (2005). The aim of this bill is to strengthen border security and purportedly reduce illegal immigration; but as one Congressman observed in opposing what he termed a flawed bill, it addresses only one side of the issue and fails to deal effectively with the unauthorized migrant worker population already present. See Press Release, Office of Rep. Dennis Cardoza, Rep. Cardoza Opposes Flawed Immigration Bill, Calls For Comprehensive Approach to Problem, (Dec. 17, 2005), available at http://www.house.gov/apps/list/press/ca18_cardoza/immigration.html; but see Press Release, Fed'n for Am. Immigr. Reform, House Immigration Enforcement Bill Step in the Right Direction; Senate Must Follow Suit With a Strong Enforcement-Only Bill in Early 2006 (Dec. 21, 2005) (on file with U. MD. L.J. RACE, RELIGION, GENDER & CLASS). This bill sparked a heated debate and an intensive lobbying effort. On December 16, 2005, the House passed the measure 239-182; its future in the Senate, however, is uncertain. See Alex Wayne, *House Passes Strong Illegal Immigration Curbs; Future in Senate is Uncertain*, CONG. Q., Dec. 20, 2005, available at 2005 WLNR 20718017.

121. Press Release, Nat'l Immigr. Forum, Bush Talks Immigration: The Good News and the Bad News (Dec. 1, 2005), available at <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=774>.

122. President Bush stated at a recent press conference that "We must pass comprehensive immigration reform that protects our borders, strengthens enforcement, and helps create a new temporary worker program that relieves pressure on the border but rejects amnesty." Public Papers of the President, *The President's News Conference* (Dec. 26, 2005).

123. See *supra* note 48 and accompanying text.

124. See Passel, *supra* note 83 and accompanying text.

laws that are fair, humane and essential in overhauling the system given the complexity of associated issues.

Although legislators in the Senate appear to be “deeply divided”¹²⁵ on the issue of immigration policy reform, the Senate¹²⁶ seems poised to take on the challenge of addressing comprehensive reform measures in a thoughtful, disciplined manner early in 2006.¹²⁷ This time the debate will still center on whether reform should focus on an enforcement only or enforcement plus approach, although enforcement plus may be a viable option.¹²⁸ Realistically, however, all the key players in the Senate appreciate the need for an enforcement plus approach. The latter approach contemplates the ability of the undocumented population of foreign workers in this country to either regularize or legalize their undocumented status.¹²⁹ On the other hand, the former focuses solely on increasing means to enhance border enforcement including large-scale deportation. The former is not a new policy. In fact, it has been observed that “[s]ome members of Congress clamor for increased immigration enforcement, as if it were a new idea.”¹³⁰

In the 109th Congress, the two best known reform proposals in the Senate are the McCain-Kennedy “Secure America and Orderly Immigration Act”¹³¹ and the Cornyn-Kyl, “Comprehensive Enforcement and Immigration Reform Act.”¹³² These two measures

125. Wayne, *supra* note 120.

126. Notably, the House of Representatives has already passed the Sensenbrenner-King bill discussed *supra* note 120. See also Sensenbrenner-King Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

127. Samantha Levine, *Frist outlines GOP strategy to change immigration law*, HOUSTON CHRON., Oct. 25, 2005, at A7.

128. See Nicole Gaouette, *GOP Senators Try to Unite on Immigration Overhaul*, L.A. TIMES, Oct. 26, 2005, at A15 (quoting Sen. Frist (R-TN) as stating: “We’ve agreed to come back very early next year to address the issue of comprehensive immigration reform, but to do it in a way that begins with border security that would add enforcement . . . and then build out from there.”).

129. The distinction between regularizing and legalizing is that regularizing one’s status does not necessarily contemplate the ability to obtain permanent resident status.

130. *Backgrounder: Immigration Enforcement: What Has Been Tried? What Has Been the Result?*, NAT’L IMMIGR. FORUM, Nov. 2005, <http://www.immigrationforum.org/documents/TheDebate/EnforcementBorderInterior/EnforcementFactsBackgrounder.pdf> (last visited Jan. 7, 2006).

131. See Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (2005) (introduced by Senators John McCain (R-AZ) and Edward Kennedy (D-MA)); Secure America and Orderly Immigration Act, H.R. 2330, 109th Cong. (2005).

132. See Comprehensive Enforcement and Immigration Reform Act, S. 1438, 109th Cong. (2005). The Cornyn-Kyl proposal would create a temporary worker program that would be open to illegal immigrants who first return home, but would not allow them to settle permanently in the United States. *Id.*

are the main “enforcement-plus” immigration reform bills now pending in the Senate. The Cornyn-Kyl bill emphasizes enforcement while the McCain-Kennedy bill’s emphasis is placed firmly on the “plus” of enforcement. Specifically, the McCain-Kennedy bill addresses many areas in need of attention: “border security; state criminal alien assistance; essential worker visa program; enforcement; promoting circular migration patterns; family unity and backlog reduction; adjustment of status for H-5B non-immigrants; protection against immigration fraud; civics integration; and promoting access to health care.”¹³³ This is arguably the most comprehensive measure presented to date. Also, it addresses lawful immigration by increasing visas available under the immigration family-sponsored and employment-based preference system.¹³⁴ Importantly, the McCain-Kennedy bill is a bipartisan measure that has broad support from pro-immigrant advocacy groups, labor, and business organizations.¹³⁵ As such, the McCain-Kennedy bill is likely to garner greater support as the debate progresses even though some legislators and scholars criticize the Act.¹³⁶

According to a policy analyst at the Migration Policy Institute (MPI), a non-profit Washington think-tank dedicated to migration issues,¹³⁷ the McCain-Kennedy bill represents “one of the most

133. Press Release, Rep. Ruben Hinojosa, Hinojosa Applauds Introduction of Real Immigration Reform (May 12, 2005), available at <http://hinojosa.house.gov/news/pressrelease.cfm?id=624>. Rep. Hinojosa also goes on to inform that the McCain-Kennedy bill (a) recognizes the contributions and hard work of the unauthorized migrants living and working in this country; (b) affords them an opportunity to come out of the shadows; (c) allows them to be a part of American society, “a place they have earned through hard work, paying taxes, and contributing to the national prosperity;” (d) imposes stiffer penalties on employers who violate labor laws; (e) creates a new employment verification system; and (f) creates a comprehensive plan to enhance border security. *Id.*

134. As Rep. Hinojosa notes further: “The Secure America and Orderly Immigration Act will reunite families, ending days of 20-year waits for a visa for a sibling, and provides a legal mechanism to fill our future workforce needs by establishing a temporary worker program that protects the rights of both the U.S. and immigrant worker while providing employees with the flexibility they need to fill their workforce needs.” *Id.*

135. See *Sens. Kennedy, McCain Detail Comprehensive Plan to Fix Broken Immigration System*, U.S. FED NEWS, Oct. 18, 2005. See also Dan Moffet, *Get Back to The 9/11 Mind-Set*, PALM BEACH POST, May 29, 2005, at 2E (noting that the bipartisan bill “has the support of at least 60 senators and growing numbers from both parties in the House”).

136. See, e.g., Frank Sharry, *Immigration Demystified; Despite all the heat from the right, a consensus is developing for workable solutions to the immigration mess. But we’re not there yet*, AM. PROSPECT, Nov. 2005, at A2 (noting that although the McCain-Kennedy approach has its critics, it is a “21st-century proposal to deal with a 21st century challenge”).

137. The Migration Policy Institute (MPI) “is an independent, non-partisan, non-profit think-tank in Washington, D.C. dedicated to the study of the movement of people worldwide. MPI provides analysis, development, and evaluation of migration and refugee policies at the

sweeping immigration reform bills of the past two decades.”¹³⁸ Upon the McCain-Kennedy bill’s introduction, Rep. Ruben Hinojosa (D-TX) stated that the Secure America and Orderly Immigration Act “is a comprehensive immigration reform that rationalizes the country’s immigration laws and makes them more just, more humane and more enforceable.”¹³⁹ Not surprisingly, this bill is widely supported in the pro-immigrant community and proponents of sensible immigration reform measures.

For example, according to another MPI report, the Secure America and Orderly Immigration Act would open a new channel to the United States for low-skilled temporary workers¹⁴⁰ while giving those already in the United States an opportunity to gain legal status. This is good news for U.S. businesses.¹⁴¹ The Act would also provide a path to permanent U.S. residence for these two groups,¹⁴² which labor groups support.¹⁴³ Such an approach recognizes the contributions of unauthorized immigrants to labor and addresses issues that immigration policy makers have failed to address until now.

The debate about legalization, however, centers on the two pervasive views about unauthorized workers: whether they are lawbreakers who should not be rewarded for entering the country illegally or essential workers who have earned the opportunity to regularize their status by taking low-paying jobs that American workers do not fill and have fueled the U.S. economy in recent

local, national, and international levels” and “aims to meet the rising demand for pragmatic and thoughtful responses to the challenges and opportunities that large-scale migration presents.” See *About MPI*, MIGRATION POL’Y INST., <http://www.migrationpolicy.org/about/index.php> (last visited Feb. 8, 2006).

138. Jennifer Yau, *Expansive Bipartisan Bill Introduced on the Heels of REAL ID Passage*, MIGRATION POL’Y INST., June 1, 2005, <http://www.migrationinformation.org/Feature/print.cfm?ID=316>.

139. Press Release, Rep. Ruben Hinojosa, Hinojosa Applauds Introduction of Real Immigration Reform (May 12, 2005), available at http://hinojosa.house.gov/news/press_release.cfm?id=624. But see Mark Krikorian, *The Latest Amnesty: McCain and Kennedy Make a Bad Pair on Immigration*, NAT’L REV., June 6, 2005, <http://www.cis.org/articles/2005/mskoped060605.html> (criticizing the McCain-Kennedy bill); *Kennedy-McCain Amnesty Wrong, Dangerous and Expensive*, FED’N FOR AM. IMMIGR. REFORM, June 2005, http://www.fairus.org/site/PageServer?pagename=research_jun05nl04 (last visited Jan. 7, 2006) (same); and Dan Stein, *How the McCain-Kennedy Bill Would Destroy America*, DAN STEIN REP., Nov. 14, 2005, <http://www.steinreport.com/archives/008648.html>.

140. See *supra* note 133 and accompanying text.

141. See, e.g., Press Release, Nat’l Immigr. Forum, Diverse Leaders Call for Comprehensive Immigration Reform (Jan. 19, 2006), available at <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=789>.

142. *Id.*

143. *Id.*

years.¹⁴⁴ Unfortunately, the likelihood of reconciling these two views is problematic in today's post-9/11 climate.

Alternatively, Senators John Cornyn (R-TX) and Jon Kyl (R-TX) introduced the "Comprehensive Enforcement and Immigration Reform Act of 2005"¹⁴⁵ after chairing joint hearings on immigration and immigration-related issues.¹⁴⁶ This bill seeks to reduce the illegal immigration population "by assuring that thousands of additional border patrol agents are hired and, if necessary, by deploying military personnel to the border."¹⁴⁷ As one commentator has observed, this bill is "neither comprehensive nor stands to make much of a difference in terms of enforcement."¹⁴⁸ Nonetheless, the bill's key components include "enhanced border security and interior enforcement, employer accountability, and reform that addresses temporary workers and the current illegal population."¹⁴⁹

Both bills afford opportunities to the unauthorized immigrant population to obtain temporary worker status. Like the President's vision for temporary legal status under a new (but old) guest worker program, the Cornyn-Kyl measure does not provide a path to permanent U.S. residence; but the McCain-Kennedy bill does.¹⁵⁰ The Cornyn-Kyl bill also has a "report and return"¹⁵¹ requirement attached

144. A Boston Globe editorial noted shortly after Senators McCain and Kennedy introduced the Secure America and Orderly Immigration Act bill that the unauthorized worker population in this country "are a policy contradiction: boosting the economy but breaking the law." *Safe and Open Borders*, B. GLOBE, May 12, 2005, at A12. See also Victor Manuel Ramos, *Lawbreakers – or key workers? Debate rages about amnesty, tougher border controls*, ORLANDO SENTINEL, July 17, 2005, at A1 (tells the stories of undocumented migrant workers who are at "the center of a congressional tug of war, reflecting a national debate about their presence and the underground economy they support").

145. S. 1438, 109th Cong. (2005).

146. Press Release, Sen. John Cornyn, Cornyn, Kyl to Introduce Comprehensive Border Security, Immigration Reform Bill; Senators to Hold Press Conference to Announce Legislation, (July 18, 2005), available at <http://www.cornyn.senate.gov/record.cfm?id=240872>.

147. Michael Easterbrook, *Comparing proposals*, NEWS & OBSERVER (Raleigh, N.C.), July 31, 2005, at A22.

148. *Competing goals; Immigration bill is a muddle work*, SAN DIEGO UNION-TRIB., July 27, 2005, at B8.

149. Press Release, Sen. John Cornyn, Cornyn, Kyl to Introduce Comprehensive Border Security, Immigration Reform Bill; Senators to Hold Press Conference to Announce Legislation, (July 18, 2005), available at <http://www.cornyn.senate.gov/record.cfm?id=240872>.

150. *Id.*

151. See, e.g., Barbara Ferry, *Senators Introduce Competing Immigration Plans*, SANTA FE NEW MEXICAN, July 24, 2005, at A8 (noting that those who work in the United States would have to return to their home countries first to apply for a visa). See Marcony Almeida, *Take Action for Comprehensive Immigration Reform*, MASS. IMMIGRANT & REFUGEE ADVOC. COALITION, Nov. 10, 2005, <http://www.miracoalition.org/index.pl/issues/federal/immigration->

to its temporary worker program.¹⁵² More importantly, both bills also require enhanced enforcement at the worksite in light of technological advances that make employment verification possible and increase penalties on employers who hire unauthorized workers.¹⁵³ Failure to police the worksite has been a sticking point since the 1986 reforms.

Aside from other differences discussed above,¹⁵⁴ a key ingredient that is present in the Cornyn-Kyl bill but missing in the McCain-Kennedy bill is the role of participating countries, *i.e.*, those sending countries whose citizens are among the unauthorized migrant population living and working in the United States today. Although the Cornyn-Kyl bill does include provisions relating to bilateral agreements with sending countries, their role is essentially one to facilitate the return (expulsion) of their citizens. However, scholars and policy analysts agree that an essential part of the long-term solution to illegal migration is coordinating pertinent issues with the sending countries such as economic development,¹⁵⁵ a so-called contributing (push) factor to outward migration.¹⁵⁶

Additional proposals for reform are currently pending in the 109th Congress. Late in October 2005, Sen. Chuck Hagel (R-NE) introduced four separate bills that would address border security, enhance interior enforcement at the worksite, create a guest worker program and encourage unauthorized migrants living in the United

reform3/updates/take-action-for-comprehensive-immigration-reform #Yg2TIH9 IKFXoiPqUy TMJOG (referring to this provision as “report to deport.”). *See also* Sharry, *supra* note 136 (citing John McCain’s comments on the “report to deport” provision in the Cornyn-Kyl bill as unworkable and bordering on fantasy).

152. Press Release, Sen. John Cornyn, Cornyn, Kyl to Introduce Comprehensive Border Security, Immigration Reform Bill; Senators to Hold Press Conference to Announce Legislation, (July 18, 2005), *available at* <http://www.cornyn.senate.gov/record.cfm?id=240872>. In introducing the measure, they acknowledged that the United States needs “both stronger enforcement and reasonable reform of [its] immigration laws.” *Id.* *See also* Easterbrook, *supra* note 147.

153. *See* Johanna Neuman, *Joint Bill Would Revamp Immigrant Worker Rules*, L.A. TIMES, May 13, 2005, at A1; Press Release, White House, President George W. Bush, Securing America Through Immigration Reform (Nov. 28, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/11/20051128-3.html>.

154. That is, the McCain-Kennedy bill is more comprehensive than the Cornyn-Kyl measure, which is heavily slanted toward increased enforcement.

155. *See, e.g.*, Sharry, *supra* note 136 (acknowledging that the McCain-Kennedy bill does not “adequately address the acknowledged long-term solution to the migration challenge: economic development in sending nations and communities”). *See also* *Mexico-U.S. Migration: A Shared Responsibility*, U.S.-MEXICO MIGRATION PANEL, Feb. 2001, <http://www.migrationpolicy.org/files/MexicoReport2001.pdf> (last visited Jan. 7, 2006).

156. *Mexico-U.S. Migration: A Shared Responsibility*, U.S.-MEXICO MIGRATION PANEL, Feb. 2001, <http://www.migrationpolicy.org/files/MexicoReport2001.pdf> (last visited Jan. 7, 2006).

States to apply for legal status.¹⁵⁷ Although considering the bills to be a serious effort to conform to President Bush's immigration reform principles,¹⁵⁸ Senator Hagel's proposal for a guest worker program differs from the Bush Administration's principles because it provides for a path to permanent U.S. residence.¹⁵⁹ One observer viewed Hagel's four-pronged approach as a "brilliant political maneuver."¹⁶⁰ According to this assessment, this outmaneuvering could bring about a meeting of the minds between anti-immigrant proponents who support tougher enforcement at the border and worksite and pro-immigrant advocates who desire guest worker programs and legalization.¹⁶¹ The meeting of the minds scenario, however, remains to be seen.

Additionally, on December 15, 2005, Senators Barack Obama (D-IL) and Mel Martinez (R-FL) held a press conference indicating their support for a comprehensive approach to immigration policy reform.¹⁶² The two senators urged Congress to enact comprehensive, realistic immigration reform legislation.¹⁶³ According to the two senators, "any immigration reform legislation must include tough border and workplace enforcement measures as well as a realistic guest worker program that acknowledges the role of the 11 million immigrants currently living and working illegally in the U.S."¹⁶⁴ Their requirements for comprehensive reform include "combining the strongest elements of the current border security and employment verification proposals by Senator Chuck Hagel (R-NE) with the most realistic workplace and earned citizenship reform program proposed

157. See *Hagel Floor Statement on Re-Introduction of Comprehensive Immigration Reform Legislation*, S.W. NEB. NEWS, Oct. 25, 2005, <http://www.swnebr.net/newspaper/cgi-bin/articles/articlearchiver.pl?157916>. The four bills are as follows: The Strengthening America's Security Act of 2005, S. 1916, 109th Cong. (2005); The Employment Verification Act of 2005, S. 1917, 109th Cong. (2005); The Strengthening America's Workforce Act of 2005, S. 1918, 109th Cong. (2005); and, finally, The Immigrant Accountability Act of 2005, S. 1919, 109th Cong. (2005).

158. *Id.*

159. *Frist Says Senate Will Address Border Security Early Next Year*, FRONTRUNNER, Oct. 26, 2005. Although Hagel's bill on a guest worker program differs from the one the Bush Administration proposes, the draft proposal which Senator Arlen Specter (R-PA) circulated in November 2005 does not even include guest worker provisions. See David D. Kirkpatrick, *Specter Draft on Immigrants Parts Ways With Bush*, N.Y. TIMES, Nov. 12, 2005, at A11.

160. Comment, *Anti-Immigrationists Outmaneuvered*, IMMIGR. DAILY, <http://www.ilw.com/immigdaily/digest/2005,1028.shtml> (last visited Feb. 11, 2005).

161. *Id.*

162. *Sens. Martinez, Obama Urge Comprehensive, Realistic Immigration Reform*, U.S. FED. NEWS, Dec. 15, 2005.

163. *Id.*

164. *Id.*

by Senators John McCain (R-AZ) and Ted Kennedy (D-MA).”¹⁶⁵ To underscore their support for a comprehensive immigration reform package that includes these principles, the senators also sent a letter to Senator Arlen Specter (R-PA), Chairman of the Senate Judiciary Committee.¹⁶⁶

The support Senators Obama and Martinez show for a comprehensive approach to immigration reform is not surprising. Both are from states with large immigrant populations and they consider their stories, like millions of Americans, to be immigrant stories as well.¹⁶⁷ Senator Obama’s father is from Kenya and Senator Martinez is an immigrant from Cuba.¹⁶⁸ While stressing the importance of border security in the post-9/11 era, they both appreciate and understand that addressing the issue of eleven million unauthorized migrants in the country requires a realistic solution.¹⁶⁹

B. Practical Realities

A few years ago, a knowledgeable expert observed that the government’s enforcement efforts since 1986 to curtail the influx of illegal migration have been “a spectacular failure.”¹⁷⁰ Congressional spending for border control over the past decade or so has increased exponentially.¹⁷¹ Yet the unauthorized migrant population has escalated to eleven million since 1986, the year of the last major overhaul of the immigration system aimed at illegal immigration.

165. *Id.*

166. *Id.* In their letter to Senator Specter, Senators Obama and Martinez also offered suggestions on how their principles for comprehensive reform could be included effectively into the Judiciary Committee Chairman’s Marker. *Id.* Senator Specter, apparently, has circulated a draft of a compromise immigration bill that, according to Senate aides, is intended to serve as a marker to ensure that the Judiciary Committee which he chairs plays a role in shaping any legislation. See Kirkpatrick, *supra* note 159. This draft is essentially for discussion purposes and according to spokesmen for the Senator, he has not yet taken a position on the terms of a guest worker program. *Id.*

167. Barack Obama and Mel Martinez, *Coming to America*, Dec. 15, 2005, http://obama.senate.gov/blog/051215-coming_to_america/index.html#more.

168. *Id.*

169. *Id.*

170. Gary Endelman, *Declare Victory And Go Home: The Solution To Illegal Immigration In America*, IMMIGR. DAILY, Nov. 12, 2003, <http://www.ilw.com/articles/2003,1112-endelman.shtm>. See also *Full Comm. Hearing on Immigration Reform: Hearing Before the Senate Judiciary Comm.*, 109th Cong. (2005) (testimony of Gary Endelman).

171. See Wayne Cornelius, *Evaluating Enhanced U.S. Border Enforcement*, MIGRATION INFO. SOURCE, May 1, 2004, available at <http://www.migrationinformation.org/Feature/display.cfm?ID=223>.

Another observer recently opined about the Cornyn-Kyl bill that “[y]ou can have the most thoughtful piece of legislation, in pursuit of the noblest of causes, and if it is not realistic, practical or workable, then it’s not worth the paper it’s printed on.”¹⁷² In other words, an enforcement only approach is not a realistic solution.

Even the polls indicate that the public would tolerate an “enforcement-plus” approach.¹⁷³ Fortunately, the Senate and the White House concur even though both political branches are a long way from agreeing on the constituent parts of a comprehensive reform package.¹⁷⁴ In other words, the hard work—and work that is likely to be hotly contested—will come in defining the specific parameters of an “enforcement-plus” legislative initiative. In particular, these parameters must include the policy choices intended to address the unauthorized migrant population already in the country.¹⁷⁵

As for the expulsion of multitudes of unauthorized migrants who have lived here for many years, a program of mass deportation would be administratively impracticable,¹⁷⁶ not to mention the associated hardships and human costs. Also, according to a recent report on the administrative costs associated with mass deportation published by the Center for American Progress, “[o]ur nation needs comprehensive immigration reform, not unrealistic and costly ideas that drain the Treasury with no benefit to our security.”¹⁷⁷ Put

172. *Competing goals; Immigration bill is a muddle work*, SAN DIEGO UNION-TRIB., July 27, 2005, at B8. The writer further stated that the bill sponsored by Senators Cornyn and Kyl “isn’t comprehensive because it is based on the farcical assumption that illegal immigrants will voluntarily come out of the shadows to work for two years as ‘guest workers,’ after which they’ll be deported.” *Id.* This is reminiscent of the discredited “bait and switch” consumerism decried and declared illegal in the 1960s.

173. See *Executive Summary: Key Findings from A Nationwide Survey of “Likely” Voters*, TARRANCE GROUP, Mar. 2005, available at <http://www.tarrance.com/summary.pdf> (last visited Jan. 7, 2006) and *A National Survey of Republican Voter Attitudes*, TARRANCE GROUP (2005) (charts related to Executive Summary), available at <http://www.tarrance.com/summary.pdf> (last visited Jan. 7, 2006).

174. Carolyn Lochhead, *Bush Revives Immigration Reform Push*, S.F. CHRON., Nov. 29, 2005, at A1 (President Bush emphasized that “people in this debate must recognize that we will not be able to effectively enforce our immigration laws until we create a temporary worker program.”).

175. For example, a guest worker program should be included (but as a starting point in the discussion). See also *supra* note 48 and accompanying text (discussing the feasibility of guest worker programs).

176. See generally RAJEEV GOYLE AND DAVID A. JAEGER, PH.D., *DEPORTING THE UNDOCUMENTED: A COST ASSESSMENT* (2005) (“illustrat[ing] the false allure of deportation as a response to our broken immigration system”).

177. *Id.*

succinctly, a reform initiative involving mass deportations would be fiscally irresponsible and morally intolerable.

Nonetheless, enhanced border enforcement is a certain component for any legislation. As discussed previously, the influx of illegal migration has increased significantly since 1986 despite expanded enforcement efforts at the border. This trend will certainly continue despite the ever-increasing dangers associated with border crossings in the Southwest.¹⁷⁸ In fact, two Democratic governors from states that share their borders with Mexico declared states of emergency.¹⁷⁹ As a practical matter, however, enhanced border control is an imperative in the post-9/11 era. Concerns about domestic security dictate a need to control the number of people who enter the country and account for them by monitoring them while they remain in the interior.

As for interior enforcement, specifically at worksites, IRCA established serious sanctions for the hiring of unauthorized workers under the first ever employer sanctions regime erected in 1986.¹⁸⁰ Unfortunately, these penalties, civil and criminal,¹⁸¹ were not rigorously enforced. Even today with technological advances to aid the employment verification process,¹⁸² lack of technology is not necessarily the reason for a lack of worksite enforcement.¹⁸³ Both Congress and the various Administrations¹⁸⁴ over the past twenty years have been unwilling to seriously enforce employer sanctions beyond a

178. Passel, *supra* note 83.

179. In August 2005, Governor Bill Richardson "declared a state of emergency in the state's four counties that share a border with Mexico, pointing to increased illegal immigration and property crime along the 185-mile border." *A Bounty of Politics; The Governor Started the Year with an Ambitious To-Do List. Then Came Border Worries, Rising Fuel Prices and a Spirited Albuquerque Election*, ALBUQUERQUE TRIB. (N.M.), Dec. 28, 2005 at A1. *See also* *New attention to an old problem*, LAS CRUCES SUN-NEWS (N.M.), Nov. 16, 2005, at 10A; Nicholas Riccardi, *States Take On Border Issues; Legislatures across the country look to deter illegal immigration by cutting services, making arrests or sanctioning employers*, L.A. TIMES, Jan. 16, 2006, at A1.

180. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended 8 U.S.C. 1324a (2000)).

181. *See* Immigration and Nationality Act, 8 U.S.C. §§ 1321-1330 (2000) (General Penalty Provisions); 8 U.S.C. § 1253 (2000) (Penalty for Failure to Depart).

182. *See, e.g.*, Jacoby, *supra* note 86, at 10-11. *See also* Rosenblum, *supra* note 85.

183. *See, e.g.*, Gabriela A. Gallegos, *Border Matters: Redefining the National Interest in U.S.-Mexico Immigration and Trade Policy*, 92 CALIF. L. REV. 1729, 1754-55 (2004) (describing how the implementation of IRCA's employer sanctions regime has been largely ignored thus undermining its potential as an "alternative to increased border militarization").

184. *See generally* JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan Through Clinton, 1981-2001*, 16 GEO. IMMIGR. L.J. 601 (2002) (describing the fate of the employer sanctions regime and lack of enforcement efforts during two administrations, one Republican and the other Democratic).

“nudge-nudge, wink-wink”¹⁸⁵ approach.¹⁸⁶ If Congress is genuine about interior enforcement, it needs to enact laws consistent with the improved technology and with sufficient funding. Due to the fact that employer sanction laws have been on the books for approximately twenty years, Congress should either enforce them appropriately or repeal them. Actually, the situation presented here is akin to the concept of *stare decisis*. Congress may be reluctant—and should be—to repeal them unless there is a very good reason for doing so.

As for a guest worker program, the inclusion of any program of this type will be at the core of the debate between the enforcement only and enforcement plus crowds once the debate begins again in Congress, especially during this election year. Additionally, it will not matter whether such a program eventually leads to permanent residence in the United States; any form of relief that contemplates the regularization of so-called lawbreakers amongst the anti-immigrant proponents is viewed as a form of amnesty and a reward for illegal conduct.¹⁸⁷ More important, any type of reform measure that includes legalization whether couched in terms of “earned” legalization or as part of a temporary regularization of immigration status for unauthorized migrants will be tough to sell. A regularization or legalization component, however, is critical to a major overhaul of the immigration system. Thus, if an unreceptive mind-set on this particular issue prevails among the lawmakers then the potential to torpedo any realistic reform efforts this year will indeed be a source of genuine concern.

185. See Videotape: Panel Conference on the Politics of Immigration Reform, held by the Harvard University Institute of Politics (Mar. 27, 2005), available at http://www.iop.harvard.edu/events_forum_archive.html (Members of the panel included Representative Jim Kolbe (R-AZ), Mark Krikorian, Center for Immigration Studies, Romano Mazzoli, former Democratic congressional representative from Missouri and co-sponsor of the Simpson-Mazzoli bill that became IRCA in 1986; and Doris Meissner, former INS Commissioner during the Clinton Administration and current Senior Policy Analyst at the Migration Policy Institute.).

186. See also *supra* note 181.

187. See Susan Jones, *Republican Lawmakers Won't Back Bush on Immigration*, CNSNEWS.COM, Jan. 26, 2004, <http://www.cnsnews.com/ViewPolitics.asp?Page=/Politics/archive/200401/POL20040126a.html> (House Speaker Dennis Hastert, Rep. Walter Jones (R-N.C.) and other members of Congressional Immigration Reform Caucus protested Bush's reform policy as amnesty plan.); Jerry Seper, *More aliens try to enter for amnesty*, WASH. TIMES, Feb. 20, 2004, at A10, available at <http://www.washtimes.com/national/20040219-115622-4260r.htm> (Rep. Lamar Smith characterized the Bush proposal as “an amnesty program.”); and Bill Sammon, *Bush revives bid to legalize illegal aliens*, WASH. TIMES, Nov. 10, 2004, at A1 (Rep. Tom Tancredo describes Bush plan as form of amnesty).

In general, the use of a guest worker program as a means to address the issue of illegal immigration is viewed as a band-aid approach, an alternative to a better means of handling the problem.¹⁸⁸ As a rule, such programs are rarely an enlightened mechanism for reform especially if they do not include opportunities for families to accompany the guest worker and/or a path to permanent residence in the host country.¹⁸⁹ For example, President Bush's guest worker program is merely another version of the old, infamous Bracero program with no guarantees that the past abuses associated with it will not similarly occur again. As such, it is unrealistic to think it will amount to a reversal of past patterns of illegal migration.

Given the complexity of the illegal immigration problem, a multiple approach to a resolution is required. A guest worker program may be a viable solution if it includes opportunities for permanent residence and U.S. citizenship. Actually, there is a so-called general guest worker program already on the books for H-2A and H-2B¹⁹⁰ agricultural and non-agricultural workers. Practically speaking, Congress should consider revising the temporary worker provisions instead of adding onto the existing statutory structure. Also, Congress should consider the issue of intent to remain here temporarily and to maintain a residence abroad.¹⁹¹ For example, requiring that visa applicants establish that they have no intention of abandoning their residence abroad under a temporary worker category, such as the McCain-Kennedy essential worker provision¹⁹² with stays that last as long as six years, is unrealistic.

As for the issue of legalization, an opportunity to regularize one's immigration status presently exists under the current system. The generalized form of legalization that is presently on the books is called "registry."¹⁹³ Under this statutory scheme, any individual present in the United States without authorization may be "forgiven" of his or her undocumented status if entry into the country occurred

188. Amanda Levinson, *Why Countries Continue to Consider Regularization*, MIGRATION POL'Y INST., Sept. 1, 2005, <http://www.migrationinformation.org/Feature/display.cfm?ID=330>.

189. See Doris Meissner, *U.S. Temporary Worker Programs: Lessons Learned*, MIGRATION POL'Y INST., Mar. 1, 2004, <http://www.migrationinformation.org/Feature/display.cfm?ID=205>.

190. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H) (2000).

191. See LEGOMSKY, *supra* note 15, at 403-06 (addressing general problems associated with temporary visas and specifically the issue of intent to remain in the United States permanently).

192. See S. 1033 §§ 301 and 302.

193. Immigration and Nationality Act, 8 U.S.C. § 1259 (2000).

prior to a certain statutorily prescribed date.¹⁹⁴ Additional criteria for eligibility are also required such as “good moral character” and continuous residence in the United States since such entry.¹⁹⁵ In short, as a policy matter, Congress—albeit a previous Congress—has already decided to, in effect, “reward” so-called lawbreakers under certain statutory conditions.

Congress addressed illegal immigration in 1986; then four years later, legal immigration. But despite the 1990 Act’s generous increases in visa availability,¹⁹⁶ the regular system for allocating them among eligible beneficiaries is no longer suitable as an orderly and efficient means for obtaining lawful immigration status in the United States.¹⁹⁷ For example, even if an applicant is eligible for one of the family-sponsored visas (unless they qualify for immediate relative status), none of the current immigrant categories indicate that a visa is presently available.¹⁹⁸ As for the employment-based visa allocations, the real problem relates to the limited availability of visas for low-skilled workers.¹⁹⁹ In fact, the allocated number of visas available is now a mere 5,000.²⁰⁰ This figure is unrealistic given the high demand for low-skilled workers in certain industries that thrive on cheap labor. Thus, the failure of policy choices implemented under IRCA and not realized under the 1990 Act, as one commentator has observed, was Congress’s failure to separate the issue of illegal migration from the American economy’s demand for low-skilled labor,²⁰¹ among other concerns. It seems like *déjà vue* all over again.

If Congress is indeed serious about immigration reform this year, playing the blame game or posturing for political gain in this election year will be its undoing.²⁰² Equally important, however, is congressional consideration of the attendant practical realities associated with overhauling the antiquated immigration system.

194. *Id.*, § 249(a).

195. *Id.*, §§ 249(b) and (c).

196. Immigration and Nationality Act, 8 U.S.C. §§ 1153(a)-(c) (2000). *See supra* note 88 and accompanying text.

197. *See* Martin, *supra* note 104, at 4.

198. *See supra* note 102.

199. Immigration and Nationality Act, 8 U.S.C. §§1153(a)-(c) (2000).

200. Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, § 203(d), 111 Stat. 2193, 2199 (1997); LEGOMSKY, *supra* note 15, at 606. If you compare this exceedingly low number to the 11 million or so unauthorized workers in this country, it is difficult not to conclude that most people in this illegal immigrant population could benefit from a program of increased visa availability for low-skilled workers.

201. *See* Gary Endelman, *Elephant In The Room: Amnesty And The Rule of Law*, IMMIGR. DAILY, <http://www.ilw.com/articles/2003,1022-endelman.shtm> (last visited Feb. 7, 2006).

202. *See* Kirkpatrick, *supra* note 159.

Congress should keep them in mind while defining the parameters of a comprehensive package of immigration reform measures. Otherwise, another generation of illegal immigration and its host of attendant problems will likely occur yet again.

IV. CONCLUSION

For a country of laws, the continued flow of illegal immigration is admittedly unacceptable. As suggested above, the realities associated with a broken system of immigration must first be acknowledged and addressed. Otherwise, greater violence at the Southwest border, deaths in the desert and the host of evils that attend the black market economy will more than likely continue at unacceptable levels. Restoration of the integrity and credibility of this country's immigration system is an imperative. Indeed, national security interests require it. So it is encouraging that the public consensus favors a comprehensive approach. An informed public to influence the lawmakers inside the Beltway is certainly critical to the success of any legislative proposals. In addition, such proposals should include not only stronger enforcement measures at the border but also at the worksite, together with increased opportunities for lawful immigration based on the arguably realistic demands of family-sponsored and employment-based immigration.

Unlike the approach undertaken twenty years ago when it decided to address illegal immigration first and then legal immigration four years later, Congress should now address both aspects of immigration—illegal and legal—at the same time if success is the intended outcome. In actuality, a generation ago Congress did put in place policies that had the potential to lead this country in the right direction in terms of its immigration policies. The failed implementation of certain initiatives, insufficient funding for others, and the lack of will to sustain those reform efforts altogether proved too problematic on a number of levels. So here we are facing a crisis of monumental proportions. Congress must now heed past lessons and enact realistic measures that will be fair, efficient and humane in their implementation and administration.

Finally, Congress will aid its mission immensely if it can put aside political gamesmanship and work concertedly in restoring the immigration system to a workable regulatory regime beneficial to the national interest. Hopefully, Congress will be informed in this

enterprise by the advice, information, statistics, studies and opinions expressed by diverse, knowledgeable and thoughtful experts such as the blue-ribbon, bipartisan and independent task force established by three of the most well-known and respected think-tanks in this country.²⁰³ Otherwise, this nation of laws will forever remain a nation at risk.

203. See Fix, *supra* note 4 (discussing the task force's Roadmap). See also Press Release, A.B.A., American Bar Association Adopts Policies Calling for More Modern, Fair, Transparent Immigration System (Feb. 13, 2006), available at http://www.abanet.org/media/releases/news021306_1.html.