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BROKEN FENCES: LEGAL AND PRACTICAL REALITIES OF IMMIGRATION REFORM IN THE POST-9/11 AGE*

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There is a consensus in the United States today that our immigration system is broken. The question before Congress is “What is required to fix this broken system?” It is clear to many political and opinion leaders, and much of the public, that more of the same will not work. Our nation’s labor market, as well as our nation’s values in support of family unity, requires bold and comprehensive reform of our broken system. America is a nation of immigrants, and immigration is still good for America. Our Twentieth Century immigration laws need to be reformed to respond to the Twenty-first Century reality in which we live.

I. OUR IMMIGRATION SYSTEM IS BROKEN

In the years since the tragic events of September 11, 2001, many parts of our broken immigration system have become more visible, including the fact that there are an estimated eleven million undocumented persons living and working in the United States today. Furthermore, smugglers, traffickers, and criminal elements preying on undocumented migrants have negatively impacted border communities. Nearly 2,000 migrants have died trying to cross our border from the south in the five years from 1998 through 2003. The frustration with the border situation has reached a boiling point in many communities, and local vigilante groups threaten to take matters into their own untrained hands. Lou Dobbs feeds the frenzy with his nightly mantra of “broken borders.”

There are also several not-so-visible signs that our immigration system is broken. Highly skilled foreign-born professionals cannot obtain work visas—our H-1B nonimmigrant visa cap of 65,000 per year was reached four months before the start of the 2006 fiscal year.

* Jeanne Butterfield was the keynote speaker at the *University of Maryland Law Journal of Race, Religion, Gender and Class* symposium entitled *Broken Fences: Legal and Practical Realities of Immigration Reform in the Post-9/11 Age*. These are her remarks.

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The result is complete unavailability of these visas for a sixteen month period, effective until a new allotment is issued with the start of the new fiscal year in October 2006. Additionally, service sector employers cannot get legal workers—restaurants, nursing homes, construction companies, childcare centers, and landscaping firms are among those facing severe and growing worker shortages, and seasonal temporary visas are insufficient to meet the demand. Foreign student enrollments are down. Family immigration backlogs are extensive. Spouses and children are currently waiting three to five years to reunite with their lawful permanent resident loved ones, with the waits extending to seven to ten years for Mexicans. Lastly, employment-based permanent resident visas (“green cards”) are completely unavailable for nationals from certain countries, with employment-based visa numbers “retrogressing” for the first time in more than a decade.

Additionally, there are the invisible signs that our immigration system is broken. We have seen a trend of criminalization of immigration. Immigrants who violate our immigration laws are no longer characterized as those who violate other civil laws—tax laws come to mind—but rather as criminals. Those who previously could put their case before an immigration judge and seek a second chance are no longer given that option—waivers have been eliminated and deportation is mandatory. Minor non-violent crimes are characterized under our current broken immigration system as “aggravated felonies,” and mandatory deportation is the required result. Detention of non-violent immigration law violators is rampant and expanding, and conditions of detention do not conform to the most widely accepted Bureau of Prisons standards. Alternatives to detention, such as electronic monitoring, are applied to those who in the past would have never been detained, such as asylum seekers. Expedited removal is being expanded to the interior of the country, and fewer refugees are being admitted to the country on an annual basis. Unaccompanied immigrant children, now entering the United States at the rate of over 8,000 per year, are being detained and not afforded representation by counsel. The “right to counsel,” long enshrined as a fundamental part of our system of justice, is a theoretical “right” only in the immigration context. This is illustrated by the fact that immigrants detained in the massive law enforcement sweeps in the days and months following September 11, 2001, were denied even the ability to contact a lawyer. The invisible signs that our immigration system is broken are signs of

an all-sided assault on fundamental constitutional principles of due process and justice.

A. More of the Same Will Not Work

What will it take to fix our broken immigration system? One thing is certain—more of the same will not work.

“Prevention through deterrence” was the name of the border control strategy implemented in the mid-1990s. “Operation Hold the Line,” “Operation Gatekeeper,” “Operation Safeguard,” and “Operation Rio Grande” were implemented at various border areas in California, Arizona and Texas. In fact, spending on border enforcement quintupled in the years from 1993 through 2004—from \$740 million to \$3.8 billion. The number of Border Patrol agents tripled in the same period, from 3,965 to 10,835. During this same period, the number of undocumented immigrants in the country more than doubled, from 4.5 million to 9.3 million. It is therefore clear that simply throwing more money and resources at the border will not lead to effective enforcement.

Interior enforcement in the form of employer sanctions introduced in 1986 legislation has been ineffective as well. The plan was to turn employers into immigration enforcers. But employers had no way to detect fraudulent documents, and were provided with no secure employment verification system. Document fraud grew even more rampant, employers were fined for paperwork violations, and large-scale workplace raids were determined to be too disruptive of the economy. Measures calling for local law enforcement personnel to take on immigration enforcement duties were opposed as bad for public safety. Attempts to make driver’s licenses into de-facto immigration status ID cards were opposed as contributing to a deterioration of safety on the highways and to an increase in auto insurance premiums, based on the rationale that more unlicensed and uninsured motorists would be using the highways.

B. Our Labor Market Needs Immigrant Workers

The health and vitality of the United States economy, now and into the future, depends on immigrant labor.

In 2001, undocumented workers composed fifty-eight percent of the labor force in agriculture, twenty-four percent in private household services, seventeen percent in business services, nine

percent in restaurants and six percent in construction. The growth of availability of jobs in many sectors of the United States economy continues to “pull” Mexican and other workers to the United States.

It is no surprise that the great percentage of undocumented workers currently in the United States come from Mexico. Economic integration engendered by NAFTA has resulted in the addition of 500,000 export manufacturing jobs in Mexico in the years from 1994 to 2002. In that same period, however, over 1.3 million workers were displaced from the Mexican agricultural sector. The search for cheaper labor has led many “maquiladoras” on the Mexican side of the border to move overseas, resulting in a further job loss of thirty percent of “maquila” jobs during the 1990s. These factors continue to “push” Mexican workers to the United States in search of work.

The dynamics of the United States labor force only promise to increase the need for immigrant labor in the decades ahead. The United States native-born workforce is aging, and baby-boomers will begin retiring in greater numbers starting in 2008. The United States economy is projected to add seventeen million new jobs by 2010, and the pool of available United States workers is shrinking at the rate of approximately one million per year. The Bureau of Labor Statistics estimates that there will be growing demands for workers in the coming years as a result of these trends: nursing homes will need 800,000 new nurses aides by 2008, homebuilders will need 200,000 new workers per year for the coming years, and restaurants, which already employ 11.3 million workers, will need two million new workers by 2010.

An aging native workforce and an expanding economy mean that immigrant workers are essential to the nation’s economic health. Unless our immigration laws are reformed in a way that provides legal channels for willing workers to enter the United States, the flow of undocumented workers will only increase in the years ahead.

C. Immigrant Families Need to Be United

The lengthy backlogs in the family immigration system are another cause of undocumented immigration and an important issue that must be addressed by comprehensive immigration reform.

The quotas for family immigration are unrealistic and do not correspond to current reality. Mexican lawful permanent immigrants seeking to bring their spouses and minor children to live with them in the United States face waits of seven to ten years to reunite with their

loved ones. In the face of such lengthy separation, many make the hard choice to try to enter the United States illegally, rather than remain apart.

Other nationals face waits of three to five years for their spouses and minor children to join them. Siblings of United States citizens, an important element of family life, especially in Asian communities, face waits of twenty and thirty years for reunification. Such a system only feeds undocumented immigration, while imposing great hardship on family units. This situation must be addressed if undocumented immigration is to be controlled.

II. COMPREHENSIVE IMMIGRATION REFORM IS THE ONLY WORKABLE SOLUTION

We need comprehensive immigration reform that will make immigration safe, orderly, legal, and controlled. Such reform would replace an illegal flow with a legal immigration flow. Essential components to such reform are an opportunity for people living and working here to earn a permanent adjustment of their status, a “break-the-mold” worker program that would allow essential workers to enter the United States safely, legally, and expeditiously without displacing United States workers, and backlog reductions in family-based immigration. Proposals that fail to embrace these three components and seek only to increase enforcement of the current unworkable system will only perpetuate and exacerbate current problems.

Two major bills have been introduced in the current 109th Congress that focus on reforming our current immigration system. Each represents dramatically different approaches to such reform. The Secure America and Orderly Immigration Act of 2005 (S. 1033/H.R. 2330), introduced on May 12, 2005 by Senators John McCain (R-AZ) and Edward Kennedy (D-MA), and Representatives Jim Kolbe (R-AZ), Jeff Flake (R-AZ), and Luis Gutierrez (D-IL) provides a comprehensive approach and meaningful reform. The Comprehensive Enforcement and Immigration Reform Act (S. 1438), introduced on July 20, 2005 by Senators John Cornyn (R-TX) and Jon Kyl (R-AZ) fails to provide a workable, realistic solution.

A. *The Secure America and Orderly Immigration Act of 2005*
(S. 1033/H.R. 2330)

This legislation would go a long way toward addressing the problems that have plagued our current immigration system. Among other things, it would:

- Create a national strategy for border security and enhanced border intelligence by mandating the development and implementation of various plans and reports dealing with information-sharing, international and federal-state-local coordination, technology, anti-smuggling, and other border security initiatives; authorize the development of a Border Security Advisory Committee made up of various stakeholders in the border region to provide recommendations to the Department of Homeland Security regarding border security and enforcement issues; and require the Secretary of State to provide a framework for better management, communication, and coordination between the governments of North America, including the development of multilateral agreements to establish a North American security perimeter and improve border security south of Mexico.
- Establish a break-the-mold new essential worker visa program (the H-5A visa) that would be portable and valid for three years, and renewable one time for a total of six years. At the end of the visa period, the worker would have to return home or be in the pipeline for a green card. The bill would be capped initially at \$400,000, with the annual limit gradually adjusted based on demand in subsequent years. It would require applicants to demonstrate the availability of a job in the United States, pay a \$500 fee in addition to application fees, and clear all security, medical, and other checks. The bill would allow employers to sponsor the H-5A visa holder for permanent residence, or after accumulating four years of work in H-5A status, allow workers to apply to adjust status through self-petition. The bill

also sets forth various employer obligations and worker protections, and an enforcement scheme to deal with violations of these provisions. In addition, the bill creates a task force to evaluate the H-5A program and recommend improvements, and requires updates of America's Job Bank to ensure that American workers are the first to see posted job opportunities.

- Promote family unity and reduce backlogs by exempting immediate relatives of United States citizens from the \$480,000 annual cap on family-sponsored immigrant visas and reallocating the family-sponsored numbers; increase the number of employment-based numbers from \$140,000 to \$290,000 per year, reallocating the distribution of those numbers, and providing for the recapture of unused numbers; increasing the per-country limits for both family and employment based immigrants; lower the income requirements for sponsoring a family member from 125% of the federal poverty guidelines to 100%; and remove other obstacles to ensure fairness.
- Provide a mechanism by which eligible undocumented immigrants present in the United States on the date of the bill's introduction can adjust to temporary nonimmigrant (H-5B) status with an initial period of stay of six years. Under this program, applicants would be required to undergo criminal and security background checks, submit fingerprints and other data, pay a fine, and establish a previous work history in the United States. Spouses and children would also be eligible for adjustment under this section. The bill provides a subsequent mechanism by which H-5B non-immigrants could adjust to permanent resident status upon meeting a prospective work requirement, paying a fine, and fulfilling additional eligibility criteria. Children and spouses would again be eligible for such adjustment.
- Create new enforcement regimes by requiring all new visas issued by the Secretary of State and

immigration-related documents issued by the Secretary of Homeland Security to be biometric, machine-readable, and tamper-resistant, within six months of the bill's enactment. The bill would also mandate the establishment of a new Employment Eligibility Confirmation System which would gradually replace the existing I-9 system, and which would contain certain safeguards to prevent the unlawful use of the system as well as a process by which individuals could correct false information. The bill further amends the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to provide for the collection of biometric machine-readable information from an alien's immigration-related documents upon arrival and departure from the United States to determine the alien's status, broadening the Department of Labor's investigative authority to conduct random audits of employers and ensure compliance with labor laws, and include new worker protections and enhanced fines for illegal employment practices.

- Promote circular migration patterns by authorizing the establishment of labor migration facilitation programs with foreign governments whose citizens participate in the new temporary worker program. The programs would facilitate the flow of foreign nationals to jobs in the United States, with an emphasis on encouraging the re-integration of foreign nationals returning to their home countries, and encourage the United States government to work with Mexico to promote economic opportunities for Mexican nationals in their home country to reduce migration pressures and costs.

The Secure America and Orderly Immigration Act of 2005 would reauthorize the State Criminal Alien Assistance Program for fiscal years 2005 through 2011 and require that such funds only be used for correctional purposes, such as facilitating integration by authorizing the establishment of the United States Citizenship Foundation, as well as a competitive grant program to fund civics and English language classes. The bill would also promote access to

health care by extending the authorization of federal reimbursement for hospitals that provide emergency care to undocumented immigrants and by adding H-5A and H-5B workers to the list of persons for whom hospitals may be reimbursed. Lastly, the bill would require periodic reports to Congress on the use of the worker programs established under the bill, provide for the distribution of fees and fines paid by H-5A and H-5B applicants, include H-5A and H-5B workers in the class of individuals protected under the INA's anti-discrimination provisions, and provide special immigrant status for certain women and children at risk of harm.

*B. The Comprehensive Enforcement and Immigration Reform Act
(S. 1438)*

While Senators Cornyn and Kyl correctly diagnose the problems endemic in our current system, S. 1438 provides no solution. If enacted, this bill would make a bad situation worse. It does not deal realistically with the population already here and working in the United States, as the design of its mandatory departure program would merely discourage participation and create instability in the labor force. In addition, the bill's temporary worker program would not meet the needs of American employers for predictable access to labor. Moreover, the bill's recapture of a small number of unused visas would not result in any resolution to the incredibly lengthy backlogs in family-based immigration, nor would it provide a realistic option to workers who fill our labor needs. Many of the measures included in the bill are excessive and, in some cases, counterproductive.

The bill provides for the Mandatory Departure "Report to Deport" Program, which creates a new program for certain undocumented people. The goal of this program is to encourage currently undocumented people to eventually leave the United States by granting them temporary permission to remain in and work in the United States for up to five years. Those meeting the following requirements would be allowed to remain in the United States for up to five years before departing: (1) be unlawfully present in the United States for twelve months as of July 20, 2005; (2) be currently employed; (3) pass a health screening and background check; (4) plead guilty to being unlawfully present and deportable; (5) report any Social Security number used without authorization; (6) turn in any fraudulent documents in their possession. Spouses and children can be

considered as derivatives on the application if they meet the same conditions.

Participants in the program have five years in which to leave the United States. Those who choose immediate departure can leave the country and apply to come back legally if they qualify for a visa. However, because the bill does not expand the available legal options, the possibility and timing of any return is questionable. Those who want to stay and continue to work must pay a fine after year one that begins at \$2,000 and increases annually to year five. These workers will receive evidence of documentation, but will be ineligible to obtain permanent residency while in the United States. After five years, they will have to leave the country. If they do not, they will revert to undocumented status and will be ineligible for any form of immigration relief (except asylum/protection claims) for ten years.

The Temporary Worker Program also creates a new non-immigrant visa category, the W Visa, for temporary workers. This visa is deeply problematic because it would require workers to return to their home countries for a year after participating in the program for two years. This visa can be renewed twice for a total of six years work authorization. In addition, a W visa-holder cannot apply to adjust status to permanent residency from this program, and family members can visit for only up to thirty days. Employers who participate in this program must conduct a labor market test, first offer the job to any qualified, willing United States worker, attest that there are no qualified and willing United States workers, that the employer will pay the minimum wage for the position, and that the working conditions provided to the W visa holder will not adversely affect those of similarly-situated workers. The employer also must verify that the W visa-holder or alien with mandatory departure status is work authorized through an electronic program similar to the Basic Pilot Program. The temporary worker must clear background checks and health screening and enter the United States and find work with an employer who is authorized to hire W visa-holders. Finally, the program establishes a W Nonimmigrant Investment Fund to capture the visa-holders' FICA contributions in an investment account until the workers permanently return home.

The Work-Place Enforcement Program does not offer foreign workers the same protections as United States workers. Rather, it mandates the following: (1) DHS and DOL audits of employers who hire W visa-holders; (2) the hiring of 10,000 new DHS investigators dedicated to worksite enforcement; (3) increased penalties for false

citizenship claims made for the purpose of obtaining employment, as well as for the misuse of social security numbers; (4) universal employer participation in the new electronic work authorization system within twelve months of the bill's enactment, including a requirement that every worker obtain a new social security card in order to participate; (5) penalties for employers who fail to comply with the weak wage and working condition provisions of the bill; (6) a task force to evaluate the W visa program and eventually recommend a program cap.

There are some obligations placed on the sending countries. Before individuals can obtain either W visas or participate in mandatory departure, their country of nationality must have entered into an agreement with the United States government. The agreements would include the following requirements: (1) participating countries must agree to accept their nationals who have been ordered deported within three days; (2) work with the United States government to control illegal migration, human trafficking and smuggling, and gang activity; (3) provide the United States government access to information on their nationals' travel history and criminal records; (4) provide health insurance (unless secured by the alien himself or through the employer). Participating countries are also encouraged to provide housing for "returning workers."

Many of the bill's enforcement provisions are excessive and counter-productive, and reflect an agenda other than reforming our dysfunctional immigration system. They repackage failed measures from the past, attempt to override key court decisions, and would massively increase current enforcement initiatives that have failed. Indeed, enforcing our current severely dysfunctional system will bring only more dysfunction. Our failed enforcement policies offer glaring evidence that more enforcement is not the solution. During the past decade, we tripled the number of agents on the border, quintupled their budget, toughened our enforcement strategies, and heavily fortified urban entry points. Yet during the same time period, there have been record levels of illegal immigration, porous borders, a cottage industry created for smugglers and document forgers, and tragic deaths in our deserts.

The bill's enforcement provisions include:

- The hiring of 10,000 additional Border Patrol agents, 1,250 Customs and Border Protection officers, 1,000 DHS investigators, 500 DHS trial

attorneys, 250 DOJ immigration judges, 250 attorneys for the DOJ Office of Immigration Litigation, and 250 Assistant United States Attorneys to litigate immigration cases.

- Increasing appropriations for border security technology and physical structures, including five billion dollars for border facilities and additional money for 10,000 new detention beds.
- Permitting the Border Patrol to establish additional checkpoints on roads close to the borders and expanding expedited removal along all land borders.
- Authorizing state and local police to enforce federal immigration laws.
- Improving security features of immigration documents and expanding training in fraudulent document detection for immigration inspectors.
- Canceling visas of non-immigrants who stay beyond their authorized time limit.
- Barring entry to aliens who have failed to submit biometric data when seeking to enter, exit, transit through, or be paroled into the United States.
- Setting mandatory bond minimums for certain aliens from non-contiguous countries apprehended at or between the ports of entry on the land borders.
- Providing increased penalties for drug trafficking, alien smuggling, document fraud, and gang violence.
- Authorizing money to reimburse states under the State Criminal Alien Assistance Program.
- Providing additional detention and removal powers that violate basic due process rights.

C. Support for Reform is Widespread

Public opinion research released on April 7, 2005 demonstrates American voters' overwhelming support for comprehensive, bipartisan immigration reform. Support for this proposal is strong along party lines, regional lines, and demographic lines. American voters support a system that combines toughness with fairness, and provides a path to citizenship with reasonable requirements, implements an effective

guest worker program, and reunites families. Voters want a system that rewards immigrants who come here to work hard, pay taxes, and learn English.

There is overwhelming and intense support among likely voters for the proposed outlines of bipartisan legislation on immigration reform. Fully seventy-five percent of likely voters favor a proposal that has the following components: registers undocumented workers as temporary guest workers, provides temporary work visas for seasonal and temporary workers, provides newly registered workers with a multi-year process for legal residency and eventual citizenship, provides newly registered workers with no preferential treatment for citizenship, provides tougher penalties for workers or employers who violate these laws, and puts a priority on reuniting close family members.

Each element of this proposal was also tested individually. Every element of this proposal enjoys the support of more than sixty percent of the likely electorate. Support for this proposal is also solid across party lines: seventy-eight percent of Republicans, seventy-seven percent of Independents, and seventy percent of Democrats are supportive; and regional lines: seventy-seven percent of Red State voters, seventy-nine percent of Blue State voters, and seventy-two percent of Purple State voters are supportive; and demographic lines: seventy-eight percent of whites, sixty-seven percent of African Americans, and seventy percent of Hispanics are supportive.

On a second test, after voters have heard several positive and several negative messages about the proposal, support among voters remains solid for the proposal, as seventy-seven percent of voters indicate support. In thinking about the impact this proposal could have on the upcoming Congressional elections, sixty-nine percent of likely voters indicate that they would be more likely to support a Congressional candidate who supported this type of immigration proposal.

More than three-in-four likely voters agree on these statements framing the immigration reform debate: "The immigration system is broken and needs to be fixed;" "If an immigrant has been in this country working, paying taxes, and learning English, there should be a way for them to become a citizen;" "Fixing our immigration system to make it safe, legal, and orderly will make us more secure from terrorists."

III. WHAT IS NEXT IN THE CONGRESSIONAL DEBATE?

The House of Representatives is planning to take up the immigration debate when it returns from its Thanksgiving recess, in early December. The danger in the House is that the leadership has indicated that it plans only to address the enforcement issues, without debating a truly comprehensive reform bill.

The Senate leadership has indicated that it will engage the immigration debate in February 2006, after it finishes debate on the Alito nomination. Senator Specter, chair of the Senate Judiciary Committee, will play an important role in determining how this debate will unfold and which bill will be the primary vehicle for debate.

The window of opportunity for significant action on immigration reform is spring 2006. By late spring, attention will turn to the upcoming midterm elections, and the immigration debate will once again be deferred until the new Congress convenes in 2007.

The dangers are many. Congress may enact harsh enforcement measures that do nothing to increase our nation's security, but will increase the pressures on hardworking, but undocumented, immigrants who will remain in the shadows, and will force more and more immigrants into dangerous paths of entry to the United States where increasing numbers will die attempting to cross.

Or Congress may truly engage the debate and enact realistic and comprehensive reform that will assure that the United States will remain a nation of laws and a nation of immigrants in the decades to come.

Sources:

Walter A. Ewing, *From Denial to Acceptance: Effectively Regulating Immigration to the United States*, 16 STAN. L. & POL'Y REV. 445 (2005), available at <http://www.aifl.org/ipc/ipf112204.pdf>.

Douglas S. Massey, *Beyond the Border Buildup: Towards a New Approach to Mexico-U.S. Migration*, IMMIGR. POL'Y IN FOCUS, Sept. 2005, available at http://www.aifl.org/ipc/infocus/2005_beyondborder.pdf.

IMMIGRATION POLICY CENTER OF THE AMERICAN IMMIGRATION LAW FOUNDATION, ECONOMIC GROWTH & IMMIGRATION: BRIDGING THE DEMOGRAPHIC DIVIDE, SPECIAL REPORT (2005), available at http://www.aifl.org/ipc/special_report/2005_bridging.pdf.