



Solving Our Immigration Problem: From Controversy to Consensus

By Roger F. Noriega and Megan Davy

The thorny issue of immigration may yet prove to be a winner for President George W. Bush, but he has to gamble that leaders from both parties are more interested in solving this problem than in saving the debate for the 2008 campaign. The Bush administration can be faulted for failing to put more security resources at our borders after the terrorist attacks of September 11 and for not advancing the president's comprehensive immigration reform before the debate was dominated by shrill voices. President Bush's approach on immigration, however, remains a sound one, and his declarations during his March visit to Mexico indicate a dogged desire to tackle this issue. A Democratic Congress may find that it needs to demonstrate its ability to find practical, bipartisan solutions to even the toughest of problems.

If the debate is on the merits of the issue, it is inconceivable that the administration would not be able to find common ground with a bipartisan majority in Congress. Such a consensus would likely quell the formidable populist forces at work on this issue by convincing a majority of fair-minded Americans of the wisdom of solving a problem that, if left untreated, will only get worse.

The heated rhetoric over the ineffectiveness of U.S. immigration laws belies the fact that all the fuss is about a simple economic reality: there is a demand for workers to fuel a growing economy, but our government has failed to accommodate the immigrant labor that, as always, is called upon to meet that demand. The result is a mess. Frustrated Americans living on the U.S.-Mexico border and in rural communities well inside U.S. boundaries have demanded a crackdown on the “invasion” of undocumented immigrants. Others prefer a laissez faire approach, even suggesting that “nativist” arguments are racist. In a debate that is barely civil, however, there are noble intentions all around. If both sides set aside their absolutist positions, there would be plenty of room for workable solutions that could

balance the pressing economic, security, and cultural interests at stake.

Ten Essential Principles for Comprehensive Immigration Reform

Every nation has a right to control its borders, and any government that fails to meet this essential obligation is letting down its guard and, worse, letting down its people. Based on that indisputable premise, stepped-up border security and the rigorous enforcement of existing laws against illegal immigration are indispensable ingredients in the U.S. government's response to this crisis. But that is not where it ends, as a country that wants its economy to grow needs access to an adequate labor supply. We have always turned to immigrant labor to complement our workforce to meet this demand. Accommodating an adequate number of legal immigrant workers is another task our government has failed to fulfill, but that can be made right through

Roger F. Noriega (rnoriega@aei.org) is a visiting fellow at AEI and works for Tew Cardenas, LLP, a Miami-based law firm with a public policy advocacy office in Washington, DC. Megan Davy (mdavy@aei.org) is a research assistant at AEI.

comprehensive immigration reform. Despite partisan rancor and divided government in Washington, the prospects of progress on this sensitive subject may be brighter than ever.

There are ten essential principles that can form the basis for a bipartisan breakthrough on this issue:

1. Every nation has the undisputed right and inescapable obligation to control its borders and enforce its immigration laws rigorously.
2. Immigrants help build the United States, and foreign workers remain a vital part of the American economy.
3. As immigrant workers are legalized, they will be less vulnerable to exploitation and less the cause of depressed wages. Through strict enforcement of employment restrictions while accommodating a *limited* number of foreign workers, wages may increase to a point at which native-born Americans can afford to fill such jobs.
4. It is not practical to deport 12 million undocumented immigrants, but the government can expect recent arrivals to return home and avail themselves of legal avenues to enter the country. U.S. immigration and labor laws must be vigorously enforced to send recent illegal arrivals home.
5. For practical, economic reasons, a temporary-worker program should be created to legally register those who are established, responsible workers in their communities. Participants in such a program would be required to pay a hefty fine and any back taxes, to present a spotless criminal record, and to have a pending job offer.
6. There should be no amnesty; honest work should be the only path to legal permanent residency for anyone living illegally in the country. Temporary workers would not be eligible to apply for permanent residence unless they participated successfully in a new temporary-worker program for no fewer than five years as law-abiding, productive members of their community.
7. The U.S. government can and should adjust immigration numbers with temporary workers or permanent immigrants as our national interests require.

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8. Sound U.S. immigration laws should encourage most persons to return to their native lands. It does the United States no good to “hollow out” the productive-aged populations of our Latin American neighbors. Moreover, we should press Latin governments to build more modern and just economies that can generate jobs for their citizens.

9. Workplace enforcement is the key to the integrity and success of this program to discourage illegal immigration. Enforceable labor laws demand reliable Social Security records and counterfeit-proof biometric identification cards for legal immigrant workers.

10. The assimilation of immigrants is needed for them to be productive members of the U.S. community. Citizenship standards should be *strengthened*. Five years of lawful permanent residence, fluency in English, and a demonstrated understanding of how our history has shaped our democratic *values* should be essential prerequisites.

Immigration Stalemate

Congress’s first attempt at immigration reform in late 2005 and 2006 is instructive to those trying to untangle the mess today. The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (sometimes referred to as the Sensenbrenner bill, named after its sponsor, Representative James Sensenbrenner of Wisconsin) passed the House of Representatives on December 16, 2005. This bill was security-related in focus and addressed border control, workplace enforcement, the role of state and local law enforcement, and issues pertaining to smuggling and detention. A temporary-worker program and any attempt at “legalization” of undocumented persons were completely excluded from the debate by the House proponents. In response, and after a rather drawn-out debate, the Senate passed the Comprehensive Immigration Reform Act of 2006 (also known as the Hagel-Martinez bill or compromise, named after its sponsors, Senators Chuck Hagel of Nebraska and Mel Martinez of Florida) on May 25, 2006. This bill draws on earlier proposals that addressed not only border security and enforcement issues, but also provisions for temporary and permanent immigration and for undocumented immigrants currently

living in the United States. The Senate authors sought to placate the hard-line supporters of the Sensenbrenner bill by toughening up the border and interior enforcement sections in previous Senate proposals, but they stuck to their guns by insisting on the temporary-worker program and legalization provisions the House bill lacked.

These two bills are irreconcilable, representing polar opposite approaches to the problem. The way forward is for the administration and Congressional leaders to take elements that are essential and workable from each of the bills and to retool them with an eye to putting together viable legislation designed to solve a pressing problem rather than to score political points.

A Growing Consensus for Action?

Key leaders from both houses of Congress, both parties, and the executive branch are displaying a tenacious commitment to finding a way forward on an extraordinarily complicated and politically difficult issue.

Congressional Democrats—notably Senate Judiciary Committee chairman Ted Kennedy (D-Mass.) and Representative Luis Gutierrez (D-Ill.)—are advancing their own legislation. Whether or not Democratic leaders will place a premium on bringing in Republicans to forge a bipartisan package remains to be seen. It is clear that comprehensive immigration reform is more viable with Democrats in charge of the legislative agenda. The Republican leadership of the prior Congress was loath to advance any reform other than strict enforcement measures, convinced that American voters were too angry to consider accommodating immigrant workers. The 2006 midterm election results did not bear out the notion that the electorate was hostile to immigration reform; indeed, several vocal anti-immigrant House members apparently lost their seats over the issue, and the Democratic majority now controls key immigration policy committees.

News reports indicate that members of the Bush administration (particularly Homeland Security secretary Michael Chertoff and Commerce secretary Carlos Gutierrez) have been meeting with Congressional counterparts to prepare legislation that could address this thorny challenge. It says a lot about President Bush's abiding commitment to action on this issue that he has dispatched two key cabinet secretaries to sustain intense negotiations. Now that they have hammered out principles with Republican leaders, Secretaries Chertoff and Gutierrez will reportedly approach Democrats in

Congress in an attempt to outline legislation representing a viable consensus.

As of this writing, the first gambit on the immigration front is the Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (the STRIVE Act, cosponsored by Representative Gutierrez, Arizona Republican representative Jeff Flake, and a group of mostly Democratic House members). Bearing some resemblance to the Senate-passed Hagel-Martinez compromise, this bill represents the first bipartisan immigration initiative in the new Congress. Like the Hagel-Martinez compromise, the STRIVE Act includes border and interior enforcement, a temporary-worker program, and earned legalization for undocumented immigrants. It simplifies, however, the legalization program into one single path for all undocumented immigrants regardless of length of their presence in the United States, and it seems to dodge the "amnesty" label.

Border Security and Enforcement

As Congress debates comprehensive immigration reform, the executive branch has taken the lead on stepped-up enforcement along the border and in the workplace. The administration sent approximately 6,000 National Guard members to the border to aid Border Patrol, increased infrastructure and technology investments, ended the "catch-and-release" system at the border, and funded 6,700 new detention beds. The president also oversaw a dramatic increase in the number of workplace arrests (more than 4,300 arrests in FY 2006, up from 1,292 in FY 2005¹) and signed a bill doubling federal resources for worksite enforcement. These law-enforcement measures are indispensable and respond to a legitimate demand of the American people. It is important that those who knowingly hire and exploit illegal workers are prosecuted, and that those immigrants ordered deported are arrested and returned home.

These strict enforcement measures, however, illustrate the tough task and high cost of trying to deport thousands—let alone millions—of persons, many of whom have resettled in this country. There is anecdotal evidence that tough workplace enforcement will lead many illegal immigrants—particularly recent arrivals—to cash in their chips and go home voluntarily. A new immigration program must feature counterfeit-proof work permits and "green cards" and reliable Social Security rolls so that it will be increasingly difficult for an illegal immigrant to work here illegally. With strict enforcement

both at the border and in the workplace, federal authorities will be able to shift even more resources to the border to deter new illegal crossings. This is critical because any sort of legalization system will not work unless millions of undocumented persons realize they have no choice but to qualify for legal programs or go home.

The Heart of the Problem: Accommodating Low-Skill Temporary Workers

The idea of a temporary-worker program is not new to U.S. immigration policy. The current non-immigrant visa program allocates visas under a virtual alphabet soup of classifications. High-skill workers, diplomats, agricultural workers, and students are all considered temporary residents under our non-immigrant visa system, and each type of non-immigrant visa has its own set of qualifications, restrictions, and length-of-stay requirement. These programs, however, have not accommodated vast numbers of people who have been able to find work here outside the laws. As a result of two fundamental flaws in the non-immigrant visa program, there are an estimated 12 million undocumented immigrants who have come into this country or remained here with utter disregard for our laws.

First, the current system does not allocate visas for low-skill workers (with the exception of agricultural workers) and their immediate families. Both the Hagel-Martinez compromise and the STRIVE Act provide a good template for such a temporary-worker program. Both include a new non-immigrant visa (named the H-2C visa in both bills) that creates a legal channel for future immigrant workers as well as their spouses and children. The program is based on the essential principle that all holders must work, and it provides flexibility for them to change jobs. Applicants must provide evidence of a job offer from a U.S. employer to be eligible for the program. Visas in both programs are valid for three years and renewable for another three, after which point the immigrant must return home (or apply for legal permanent residence, as explained below). The program is funded completely through applicant fees, and it requires that all applicants undergo background and security checks as well as medical examinations to participate.

A second flaw in our current visa program is the failure to allow for the fact that many persons seeking “temporary” work eventually seek to make the United

States their home. Today there is no practical avenue for them to do so legally. The “dual intent” restriction refers to the fact that, with the exception of select high-skill workers, non-immigrant visa holders cannot apply to remain here as legal *permanent* residents (LPR); they cannot come here on a non-immigrant visa and subsequently adjust their legal status to remain permanently. Any workable, serious immigration reform proposal must accommodate “dual intent,” lest we back millions of future workers into an illegal corner.

According to research by the Pew Hispanic Center, up to 40 percent of undocumented immigrants in the United States are not people who entered the country illegally, but rather those who overstayed their visas.²

The idea of providing a path to legal permanent residence is supported by a majority of the American people.

While it would not be sound policy to make a new temporary-worker visa an automatic route to permanent residence, the fact remains that persons playing by the rules of a non-immigrant visa program still demonstrate their potential contribution as citizens. Any legislation must remedy the need for low-skill labor and also recognize that some immigrants

may indeed have the dual intention of working temporarily but choosing to stay here as lawful residents.

The temporary-worker visa should include an option for permanent residency for the realistic reasons explained above. It should not be taken for granted, however, that everyone who works here temporarily will stay as some sort of entitlement. In both the Hagel-Martinez compromise and the STRIVE Act, qualified H-2C workers and their spouses and children can apply for LPR status after four or five years, respectively, through one of two routes: an employer can sponsor the employee, or the employee can petition for permanent status. These proposals represent a reasonable starting point because they require an immigrant to literally *work* his way to residency.

Another issue to consider is how to treat hundreds of thousands of mostly Central Americans who are here legally under “temporary protective status.” This program suspends the deportation of persons fleeing from natural disasters or other disruptions. These persons, who have spent many years abiding by our immigration laws, should at least have the option of enrolling in a temporary-worker program or be able to have their years of lawful residency here count toward the time requirement for applying for LPR status.

Of course, even if our government adopts a rather generous formula for accommodating low-skill workers,

there are those who will continue to ignore the law altogether and seek to come and go as they please. For this simple reason, even the most accommodating system must be *compulsory*. We will not address our vital security interests absent the *robust* enforcement of the law against those who try to skate around the new restrictions.

If You Deport Me, Who Will Build the Wall?

Even more controversial than provisions for a temporary-worker program is the issue of how to treat the estimated 12 million undocumented immigrants already in the United States. All the legislative proposals rule out “amnesty,” but each seems to have a different definition of what that word means. Make no mistake: the hard-liners in Congress will continue to cry “amnesty” to discredit any plan that offers “legalization” to any undocumented immigrants, a tactic that succeeded in convincing the House to pass a bill that focused on strict enforcement but failed to address either a temporary-worker program or offer any alternative to mass deportations. The challenge of passing a viable plan will be acknowledging that illegal immigrants should not be given a free ride or rewarded for their law-breaking, while recognizing the reality that many have resettled here and mass deportations are neither workable nor humane.

As of 2005, 85 percent of undocumented immigrants had been in the United States for at least two years, and 60 percent at least five.³ Many have established roots in this country, a fact which, contrary to what anti-immigrant hard-liners may say, has to be taken into account for any immigration legislation proposal to work.

Furthermore, the idea of providing a path to legal permanent residence is supported by a majority of the American people. A recent Gallup poll showed that, when given the three options—deporting illegal immigrants already here, allowing them to remain in the United States to work on a temporary basis, or allowing them to become U.S. citizens assuming they meet certain requirements over a period of time—59 percent of Americans chose the third option. Twenty-four percent said all undocumented immigrants should be deported to their home countries. Even among Republicans, 50 percent support allowing undocumented immigrants to remain in the United States to become citizens.⁴

Given these realities, there seems to be room to maneuver on this polarizing question, as long as the illegal person does not benefit from any sort of “amnesty.”

The Hagel-Martinez bill misses the mark by allowing any person who has been in the country for five years prior to enactment, regardless of his legal status, to apply directly for LPR status. Moreover, although these applicants are put in the queue after prior LPR applicants, their applications for citizenship are processed ahead of those applicants who have not entered the country illegally. The STRIVE Act creates a separate “conditional non-immigrant” status for undocumented immigrants currently in the United States. Although functionally similar to a temporary-worker program, it does not require conditional non-immigrants to pay any price for their previous illegal status.

Various existing legislative proposals actually do a fair job of avoiding amnesty while addressing the reality that there are 12 million immigrants looking for a workable means to legalization. The Hagel-Martinez compromise gets it right for those undocumented immigrants already here for fewer than five years. Those who have been in the country for fewer than two years (and therefore do not have well-established roots here) must return to their home countries and enter the temporary-worker visa queue along with new entries. Those who have been in the country for two or more years would be allowed six months in “deferred mandatory departure” (DMD) status to register for the new temporary-worker program. If they do not do this, they must leave the country at the end of that period or be subject to deportation. The Hagel-Martinez compromise, however, is too generous in that it extends automatic eligibility for LPR status to those here more than five years. That would not be sound policy because it rewards lawbreakers by letting them skip ahead of those LPR applicants who have not violated our immigration laws.

In addition, those undocumented persons applying for LPR status should be required to take a few extra steps to atone for their illegal entry into the country. First, undocumented immigrants should admit their violation, surrender illegal documents, and register for DMD status. Second, they should pay a hefty fine and back taxes before being eligible for the temporary-worker program. Finally, they should comply with some form of “touchback”—that is, they should have to exit and reenter the United States. This provision would serve two purposes: First, it carries important symbolic meaning, as immigrants get a fresh start in the United States as legal, documented immigrants. Second, it serves an important security role, as it is easier to scrutinize and exclude individuals who have voluntarily presented themselves outside the country

than it is to round them up internally and deport them. For example, the STRIVE Act proposes a “legal reentry” requirement in which immigrants exit and reenter through a port of entry during their conditional non-immigrant status and wait no longer than ninety days before filing an application for adjustment to lawful permanent residence.

The Numbers Game

No discussion of a temporary-worker program or “legalization” of a large number of immigrants can avoid the question: how many? Current immigration policy is ruled by numerical caps on both temporary and permanent immigration. The unavoidable fact is that the demand for such legal immigration greatly exceeds supply. Of course, no nation should be expected to adjust the number of legal immigrants it allows merely to satisfy demand. These caps, however, can be increased as needed to accommodate our own interests, such as the apparent consensus that temporary immigrants are vital to our economy and that we must normalize a large number of undocumented immigrants already living in the shadows in our country.

For the temporary-worker program, this means numerical caps should follow labor demands. In fact, the current presence of 12 million undocumented immigrants is in part due to the fact that visa demand from U.S. businesses did not meet the supply. It is logical that the number of new temporary-worker visas should fluctuate with the realities of the U.S. economy and labor market. For example, the STRIVE Act sets an initial cap of 400,000 H-2C temporary-worker visas for new entrants, but this number is adjustable as the labor market changes.

With regard to LPR visas and earned legalization for undocumented immigrants, visa numbers will naturally increase temporarily to absorb the large number of persons now in the country. But these high levels of immigration do not have to be permanent. The Hagel-Martinez compromise acknowledges this reality by initially raising the legal permanent resident visa cap to reflect what would be a surge in applications arising from the fact that many immigrants now living in the United States will eventually be made newly eligible for LPR status. The cap, however, would eventually be reduced, reflecting the fact that these high levels of immigration are intended to be temporary,

meant to absorb persons who have already made their way into the United States.

The Urgency of Assimilation

An essential ingredient in America’s extraordinary economic success has been the contribution of immigrants, and in an increasingly competitive world, the contribution of “new Americans” may prove critical. We consider it a source of strength and pride that any person can become an American. But this ballooning of the immigrant population comes at a time when our culture and values are being assailed in the world. Moreover, we are pressed to compete with emerging nations that boast highly educated workforces in a high-tech, globalized economy. So while our public schools are working to sharpen our edge in mathematics and science, they also are saddled with the task of teaching English, democratic values, and other basic skills to large immigrant populations.

Vast foreign-born communities, unable to speak English and unfamiliar with our history or democratic vocation, would change this country in unacceptable ways. In this sense, citizenship must mean more than mere legal status. Foreign-born immigrants must be made to understand that the United States is much more than a fair place to work. Potential citizens must embrace the ideals behind self-government and the rule of law. Most of this will be taught by society, but the government is doing its part today by imposing a requirement that applicants for citizenship demonstrate fluency in English and familiarity with American values.

Matthew Spalding, who advocates “patriotic assimilation” in a paper on the vision of our founding principles, says it plainly and well:

Without the natural advantage of having been born and raised in this country, immigrants as a matter of public policy must be given a specific education in the history, political ideas, and institutions of the United States. They must know who we are and what we believe as a people and a nation. They must know that legitimate government is grounded in the protection of equal natural rights and the consent of the government—the principles of the Declaration of Independence—and must understand and appreciate how the Constitution and our

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institutions of limited government work to protect liberty and the rule of law.⁵

Perhaps the greatest lesson for any immigrant today will come from witnessing how our legislature grapples with applying our immigration laws to protect our citizens' security and rights while making adjustments to accommodate foreign workers and would-be immigrants.

The stormy debate over immigration may have produced enough energy to generate a solution. To be sure, no American benefits from a prolonged, festering problem of millions of people living in this country illegally. If the Bush administration and Congressional leaders invest the time and political capital in finding a solution, they may produce an important legacy by accommodating our economic needs, tending to our essential security, and allowing millions of immigrants the opportunity to prove themselves worthy of calling themselves Americans.

AEI editorial associate Nicole Passan worked with the authors to edit and produce this Latin American Outlook.

Notes

1. U.S. Immigration and Customs Enforcement, "Fact Sheets: Worksite Enforcement," U.S. Immigration and Customs Enforcement, www.ice.gov/pi/news/factsheets/worksite.htm (accessed April 5, 2007).

2. Jeffrey S. Passel, "Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey," Pew Hispanic Research Report, March 7, 2006, available at <http://pewhispanic.org/files/reports/61.pdf>.

3. Ibid.

4. Joseph Carroll, "Public Still Supports Path to Citizenship for Illegal Immigrants: Republicans More Likely Than Democrats to Support Deporting All Illegal Immigrants," Gallup Poll News Service, March 14, 2007, available at www.galluppoll.com/content/default.aspx?ci=26875.

5. Matthew Spalding, "Making Citizens: The Case for Patriotic Assimilation," *First Principles* 3, March 16, 2006, available at www.heritage.org/Research/PoliticalPhilosophy/fp3.cfm.