



# THE QUEST FOR ELUSIVE REFORM: UNDOCUMENTED IMMIGRANTS IN A POLARIZED NATION

Daniel J. Tichenor, Ph.D.  
Knight Chair of Political Science, University of Oregon

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Daniel J. Tichenor, Ph.D.

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## Introduction: Biden’s U.S. Citizenship Act and the Politics of Immigration Reform

Major immigration reform to address the status of an estimated 11 million undocumented people living in the country has long been one of most contentious—and seemingly unattainable—items on the U.S. public agenda. Nearly all significant policy innovations in U.S. politics face formidable structural veto-points, cross-cutting interest group pressures, and deep partisan divides. Yet comprehensive immigration reform has proven especially difficult to achieve over time, despite wide agreement that the existing immigration system is flawed and in need of a drastic overhaul. For decades, congressional efforts to enact broad policy changes for the nation’s undocumented population have followed a tortured path of false starts, prolonged negotiation, and frustrating stalemate. As a result of legislative inertia, immigration governance over the past quarter century has been driven by unilateral executive action, state and local regulation, and judicial oversight.<sup>1</sup> At the grassroots level, congressional inaction on comprehensive reform has also fortified a durable caste system that marginalizes undocumented individuals and undermines basic democratic norms and principles.<sup>2</sup>

Undaunted by the political quagmires presented by this issue, the Biden administration made immigration policy a top priority during its first 100 days. Three weeks before his inauguration, President-elect Joe Biden announced that immigration reform was an urgent matter on par with the coronavirus, economic recovery, racial justice, and climate change.<sup>3</sup> On Biden’s first day in office, the new administration unveiled legislative plans for legalizing most of the country’s 11 million unauthorized residents and issued 17 executive actions, including measures to preserve and expand the Deferred Action for Childhood Arrivals (DACA) program, to rescind harsh deportation rules, and to provide a pause on most deportations from the U.S. interior.<sup>4</sup> By mid-February, President Biden’s allies in Congress introduced his

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<sup>1</sup> See, for example, Anna Law, *The Immigration Battle in the Courts* (New York: Cambridge University Press, 2010); Pratheepan Gulasekaram and Karthick Ramakrishnan, *The New Immigration Federalism* (New York: Cambridge University Press, 2015); Daniel Tichenor, *Dividing Lines: The Politics of Immigration Control* (Princeton: Princeton University Press, 2002); Aristide Zolberg, *A Nation by Design* (Cambridge: Harvard University Press, 2008); Adam Cox and Cristina Rodriguez, *The President and Immigration Law* (New York: Oxford University Press, 2020); and Allan Colbern and Karthick Ramakrishnan, *Citizenship Reimagined* (New York: Cambridge University Press, 2020).

<sup>2</sup> Roberto Gonzalez, *Lives in Limbo* (Berkeley: University of California Press, 2015); Elizabeth Cohen, *Semi-Citizenship in Democratic Politics* (New York: Cambridge University Press, 2009); Joseph Carens, *The Ethics of Immigration* (New York: Oxford University Press, 2013); Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton: Princeton University Press, 2006).

<sup>3</sup> Nick Miroff and Maria Sacchetti, “Biden Says He’ll Reverse Trump Immigration Policies but Wants ‘Guardrails’ First,” *The Washington Post*, December 22, 2020, [https://www.washingtonpost.com/national/biden-immigration-policy-changes/2020/12/22/2eb9ef92-4400-11eb-8deb-b948d0931c16\\_story.html](https://www.washingtonpost.com/national/biden-immigration-policy-changes/2020/12/22/2eb9ef92-4400-11eb-8deb-b948d0931c16_story.html).

<sup>4</sup> Michael Shear and Zolan Kanno-Youngs, “Biden Issues Orders to Dismantle Trump’s ‘America First’ Immigration Agenda,” *The New York Times*, February 2, 2021, <https://www.nytimes.com/2021/02/02/us/politics/biden-immigration-executive-orders-trump.html>; National Immigration Forum, “Biden Administration’s January/February Executive Actions on

ambitious reform bill, the U.S. Citizenship Act, the centerpiece of which is a pathway to citizenship for nearly all of the country's undocumented population. These blueprints promised the most sweeping overhaul of the nation's immigration policies in generations, calling for "big, bold, inclusive immigration reform" that "leaves no one behind," including immigrants without legal status.<sup>5</sup> As he vigorously championed expansive legalization plans, Biden told reporters that immigration is an "irrefutable source of our strength" and "essential to who we are as a nation."<sup>6</sup> Biden's rhetoric and policy goals were a dramatic break from the form and substance of the Trump presidency, which regularly used nativist appeals to fire up his rightwing base and sought to deport millions of undocumented individuals.<sup>7</sup> Biden's early brand of immigration activism was also a striking departure from the Obama administration, which expanded deportations and other enforcement efforts during its first term and chose not to propose immigration reform legislation when Democrats controlled both the House and Senate in its first two years.<sup>8</sup>

Eschewing the usual formula of pairing legalization with new enforcement measures, Biden's U.S. Citizenship Act spotlights two pathways to citizenship for undocumented immigrants. The first path offers immediate green cards and a three-year track to citizenship for so-called "Dreamers" (those who arrived in the United States as children), undocumented farmworkers, and people with temporary protected status—those who cannot return home due to wars or natural disasters. The second path also allows virtually all other unauthorized immigrants in the country to apply for citizenship after eight years if they pay taxes and pass background checks. Other provisions in the bill include economic aid and other assistance to address the root causes of migration out of Central America, as well as increases in the number of annual visas issued in the employment-based, family-based, and diversity categories.<sup>9</sup> The bill's congressional sponsors, Senator Bob Menendez (D-NJ) and Representative Linda Sanchez (D-CA), explained that they were "going big on immigration reform" by advancing an "all-of-the-above strategy" for legalizing the vast majority of the country's undocumented residents.<sup>10</sup>

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Immigration," February 12, 2021, <https://immigrationforum.org/article/biden-administrations-january-20-executive-actions-on-immigration/>.

<sup>5</sup> Molly O'Toole and Andrea Castillo, "Democrats Unveil Broad Immigration Reform with Citizenship Path for 11 Million," *Los Angeles Times*, February 18, 2021, <https://www.latimes.com/politics/story/2021-02-18/biden-takes-swing-at-immigration-reform-with-bill-on-citizenship-path-for-11-million>; Maria Sacchetti, "Democrats Call for 'Big, Bold' Action on Immigration as Biden's Bill Is Introduced," *The Washington Post*, February 18, 2021, [https://www.washingtonpost.com/immigration/democrats-introduce-biden-citizenship-bill/2021/02/18/e843bb22-7179-11eb-b8a9-b9467510f0fe\\_story.html](https://www.washingtonpost.com/immigration/democrats-introduce-biden-citizenship-bill/2021/02/18/e843bb22-7179-11eb-b8a9-b9467510f0fe_story.html).

<sup>6</sup> Sacchetti, "Democrats Call for 'Big, Bold' Action on Immigration as Biden's Bill Is Introduced."

<sup>7</sup> Sidney Milkis and Daniel Tichenor, *Rivalry and Reform* (Chicago: University of Chicago Press, 2019).

<sup>8</sup> *Ibid.*

<sup>9</sup> Osia Nwanevu, "Joe Biden's Immigration Acid Test," *The New Republic*, February 24, 2021, <https://newrepublic.com/article/161473/joe-biden-immigration-reform-test>; Matthew Brown, "Biden's Immigration Plan," *USA Today*, February 18, 2021, <https://www.usatoday.com/story/news/politics/2021/02/18/biden-immigration-plan-what-we-know-bill-chance-passage/4491072001/>.

<sup>10</sup> O'Toole and Castillo, "Democrats Unveil Broad Immigration Reform with Citizenship Path for 11 Million."

While Republican critics in Congress called Biden’s immigration plan a “nonstarter” and an unacceptable “blanket amnesty,”<sup>11</sup> immigrant rights advocates and Democratic progressives praised the new president for “leaning in pretty hard on this topic and moving in sync with us and being so closely aligned.”<sup>12</sup> At the same time, both the White House and congressional Democratic leaders have acknowledged that their razor-thin majorities in the House and Senate mean that reform will be all but impossible without at least some Republican buy-in and votes. Reformers have also coalesced around a targeted strategy of pursuing smaller immigration bills rather than a massive package, elevating specific measures that are popular and likely to win bipartisan support. In particular, they have focused on an April deadline for immigration bills that were passed last year—such as protections for undocumented “Dreamers” and a farmworker modernization reform—that could be brought to the floor without lengthy hearings.<sup>13</sup>

As the Biden administration, Congress, interest groups, and rival activists gear up for a new round of immigration reform politics, it is useful to recall past efforts to adopt legislation addressing the marginal status of millions of undocumented immigrants in the United States. The last major overhaul of national immigration policy affecting unauthorized residents was a bipartisan law passed thirty-five years ago—the Immigration Reform and Control Act of 1986 (IRCA). Since then, comprehensive reform efforts were launched and failed in 2001, 2006, 2007, and 2013. Immigration policymaking in these decades was not stuck in neutral, however. During the 1990s and 2000s, a number of laws focusing on border control and interior enforcement were enacted, while visa reform and legalization proposals were blocked. Taken together, these past attempts at immigration reform capture the rival interests and values unleashed by unauthorized immigration that make the formation of majority coalitions in Congress a tall order. National policymakers are well aware of the enormous challenges faced by earlier immigration reformers. False starts, grueling negotiations, and unappealing compromises have been the overwhelming norm, at least during the past quarter century.<sup>14</sup> Past reform campaigns have also encouraged pitched battles both within and between each major party. In addition to these recurrent patterns, past reform efforts also illuminate significant developments that have made policymaking more arduous over time, such as increased partisan polarization and the growth of movement activism on both sides of this issue. Unforeseen crises also have upended legislative plans. Many lessons from previous immigration reform battles remain powerful for assessing today’s political environment, providing a window into the possibilities and parameters of future policy innovation. The last comprehensive legislation addressing undocumented immigrants—IRCA in 1986—provides a helpful place to start.

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<sup>11</sup> Nwanevu, “Joe Biden’s Immigration Acid Test.”

<sup>12</sup> Heather Caygle, Sarah Ferris, and Laura Barrón-López, “‘It Would Be Very Difficult’: Dems Prepare for Heartburn Over Biden Immigration Plan,” *Politico*, February 11, 2021, <https://www.politico.com/news/2021/02/11/house-democrats-biden-immigration-plan-468720>.

<sup>13</sup> *Ibid.*

<sup>14</sup> Daniel J. Tichenor, “The Demise of Immigration Reform: Policy-Making Barriers under Unified and Divided Government,” in *Congress and Policymaking in the 21st Century*, eds. Jeffrey Jenkins and Eric Pataschnik (New York: Cambridge University Press, 2016), 242-271.

## A Long and Winding Road: The Immigration Reform and Control Act of 1986

The 1986 Immigration Reform and Control Act (IRCA) was the first congressional effort to comprehensively address unauthorized immigration and the status of undocumented persons living in the United States. The landmark legislation, which was fifteen years in the making, stalled for years in debate over stronger enforcement, legalization, employer responsibilities, and accommodation of agricultural labor demands. This effort to take on the issue of unauthorized migration began in the early 1970s when the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and other labor organizations urged their Democratic allies in Congress to enact employer sanctions penalizing those who knowingly hired undocumented immigrants. Representative Peter Rodino (D-NJ), chair of the House Judiciary Committee's Subcommittee on Immigration, led pro-labor liberals in the pursuit of employer sanctions legislation that they said would protect the wages and job opportunities of native workers while punishing unscrupulous employers.<sup>15</sup> Despite the progressive credentials of its messengers, the employer sanctions bill touched off fierce struggle within the Democratic party between champions of organized labor and liberals devoted to civil rights and immigrant rights. Congressional Democrats with strong ties to civil rights and civil liberties groups warned that that employer sanctions would lead to job discrimination against Latinos, Asians, and anyone who looked or sounded foreign.<sup>16</sup> The proposal also produced divisions among Republicans; pro-business conservatives staunchly opposed new regulations on employers, while conservative border hawks and nativists favored new methods to discourage the hiring of undocumented workers. The cross-cutting battles elicited by proposals for employer sanctions left Congress hopelessly deadlocked on immigration reform.

By 1977, the Carter administration sought to bridge the legislative divide by proposing a comprehensive plan on unauthorized immigration that presented costs and benefits for each major faction. The reform package included stiff civil and criminal penalties on those who engaged in a "pattern or practice" of hiring undocumented workers, the required use of the Social Security card as an identification document for verifying employee eligibility, enhanced Border Patrol forces at the Mexican border, and an amnesty program that would grant legal residency to all undocumented persons who had been living in the country since 1970.<sup>17</sup> Instead of winning bipartisan support, the White House proposal galvanized opposition from all sides in Congress. Pro-business conservatives argued that sanctions were an unfair regulatory burden for U.S. businesses large and small; lawmakers aligned with the National Council of La Raza (NCLR); the Mexican-American Legal Defense and Education Fund (MALDEF) saw the measure as detrimental to civil rights; and conservative

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<sup>15</sup> Andrew Biemiller to Peter Rodino, September 8, 1972; Biemiller to Rodino, March 23, 1973; Rodino to Biemiller, May 15, 1973, Papers of the Legislation Department of the AFL-CIO, Box 71, Folder #28, George Meany Archives.

<sup>16</sup> *Congressional Record*, September 12, 1972, 30164, 30182-83; National Council of La Raza (NCLR) documents made available to the author by the national office of the NCLR.

<sup>17</sup> White House Statement, August 4, 1977.

restrictionists complained that the plan rewarded law-breakers with amnesty.<sup>18</sup> With immigration reform mired in conflict, Congress formed a bipartisan Select Commission on Immigration and Refugee Policy (SCIRP) to study all aspects of the nation's immigration and refugee system and to issue recommendations.

The SCIRP completed a sweeping final report in 1981 that portrayed “lawful immigration” as “a positive force in American life,” serving the national interest in terms of economic growth and productivity, reuniting families, and advancing key foreign policy imperatives.<sup>19</sup> The commission concluded that unauthorized immigration was an urgent problem that needed to be controlled before legal immigration could be expanded. It also found that although disagreement existed about the economic impact of unauthorized immigration, there was little question that undocumented immigrants were a vulnerable subclass unlikely to report crimes, health problems, or violations of labor law by craven employers.<sup>20</sup> It also asserted that porous borders and undocumented entries encouraged a perilous disregard for the rule of law: “Illegality erodes confidence in the law generally, and immigration law specifically.”<sup>21</sup> To curb unauthorized immigration, the SCIRP endorsed employer sanctions and enhanced Border Patrol resources. It was careful to stipulate that the efficacy of sanctions hinged upon faithful enforcement and the development of a tamper-resistant national identification card as the linchpin of a secure and universal system of employee eligibility. To address the undocumented population already living in the United States, all 16 commissioners called for a legalization or amnesty program for nearly all undocumented immigrants residing in the country.<sup>22</sup>

During the 1980s, two lawmakers—Senator Alan Simpson, a conservative Republican from Wyoming who served on the SCIRP, and Representative Romano Mazzoli, a moderate Democrat from Kentucky with ties to the commission's chair, Father Theodore Hesburgh—took the lead in pressing for immigration reform. Early in 1982, the pair introduced a sweeping reform bill—the first version of IRCA—that proposed massive revisions in how the nation governed legal immigration, unauthorized immigration, refugees, asylum, border security, and the status of millions of undocumented immigrants. Designed as a tough-minded compromise package, the measure met strong resistance from business interests (including the U.S. Chamber of Commerce, the National Association of Manufacturers, agribusinesses, and the Business Roundtable), immigrant

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<sup>18</sup> “Memorandum to Interested Parties from the Mexican-American Legal Defense and Education Fund: Statement of Position Regarding the Administration's Undocumented Alien Legislation Proposal,” November 11, 1977, Papers of the Leadership Conference on Civil Rights, Container #23, “Issues: Alien Civil Rights” Folder.

<sup>19</sup> Transcript of SCIRP meeting, May 7, 1980, 34, Record Group 240, Box 26, National Archives.

<sup>20</sup> Lawrence Fuchs, *American Kaleidoscope* (Hanover: University Press of New England, 1990), 252.

<sup>21</sup> Transcript of SCIRP meeting, 34.

<sup>22</sup> Robert Pear, “Panel Asks Rise in Immigration, with Tighter Law Enforcement,” *The New York Times*, February 27, 1981, <https://www.nytimes.com/1981/02/27/us/panel-asks-rise-in-immigration-with-tighter-law-enforcement.html>; Austin Fragomen, Jr., “The Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy: A Summary.” *The International Migration Review* 15, no. 4 (Winter 1981): 758-68, <http://www.jstor.org/stable/2545523>.

rights and civil rights organizations (such as the NCLR, MALDEF, the American Civil Liberties Union, religious lobbies, and a new immigrant rights organization—the National Immigration Forum), and restrictionist groups led by the Federation for American Immigration Reform (FAIR). Cross-party opposition to the Simpson-Mazzoli initiative was reflected in the resistance of both the Reagan administration, which saw employer sanctions and national identification cards working at cross-purposes with its regulatory relief agenda, and House Democrats led by the Hispanic and Black Caucuses, who raised familiar concerns about discriminatory impacts of sanctions and other provisions. Simpson and Mazzoli reintroduced their IRCA bill in 1983, but House Democratic leaders refused to allow a floor vote. In 1984, four ambitious young House members—Howard Berman (D-CA), Leon Panetta (D-CA), Bill Richardson (D-NM), and Howard Schumer (D-NY)—took the lead in fashioning a new reform proposal of sanctions, legalization, and a new farmworker program that brought together disparate interest groups. The measure narrowly passed the House and failed to survive negotiations with Simpson and other Senate Republicans. A new immigration bill was passed by the Senate in 1985, but stalled in the House.<sup>23</sup>

In 1986, after months of intense bipartisan wrangling, a “strange bedfellow” coalition of liberal Democrats, conservative Republicans, business interests, organized labor, and immigrant rights groups coalesced behind a compromise package. Enacted in the final days of the 99th Congress with a narrow bipartisan majority and signed by President Reagan, the law became known as “the corpse that would not die.”<sup>24</sup> The final version of IRCA contains five main components. First, it provided a path to citizenship for undocumented immigrants who could prove their presence in the country since 1982. Second, the law extended legal permanent residency to undocumented farmworkers who completed at least 90 days of agricultural labor. Third, IRCA enhanced funding for immigration enforcement and border control, specifically mandating a 50% expansion of the Border Patrol. Fourth, it created the H2-A guest worker program that enables employers to sponsor temporary agricultural workers for up to three years to meet labor needs. Finally, the new law established civil and criminal penalties for employers who knowingly hired undocumented workers.<sup>25</sup> This final employer sanctions provision, the keystone of early reform efforts, ultimately proved to be a “toothless tiger” that did little to weaken the magnet of U.S. jobs for undocumented immigrants. Critics claimed that the ineffectiveness of sanctions as an enforcement tool was a result of poor design: In the absence of national identity cards or another reliable identification system, employers lacked a reliable means of verifying worker eligibility. The two legalization programs created by IRCA were much more successful in implementation, enabling approximately 2.8 million undocumented immigrants to gain legal permanent residency and a path to naturalization. A few years later, Congress turned its attention to legal immigration reform,

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<sup>23</sup> Tichenor, *Dividing Lines*, 258-62.

<sup>24</sup> Lawrence Fuchs, “The Immigration Reform and Control Act of 1986,” Paper presented at the American Political Science Association Meeting, Chicago, September, 1987, 26-27.

<sup>25</sup> Peter Schuck, “The Politics of Rapid Legal Change: Immigration Policy in the 1980s,” in *The New Politics of Public Policy*, eds. Marc Landy and Martin Levin (Baltimore: Johns Hopkins University Press, 1995), 47-54.

passing the Immigration Act of 1990 with large bipartisan majorities in both houses of Congress. Propelled once again by “strange bedfellow” politics that unified pro-business conservatives and progressive immigration champions, the law increased the number of annual visas granted by 40% for both family-based and employment-based admissions.<sup>26</sup> In the years immediately following IRCA, lawmakers in both parties agreed to keep families together by enacting legislation that granted legal status to undocumented family members of those who were legalized under the 1986 law.

### **When Both Parties Wanted to Look “Tough on Immigration”: The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)**

Although IRCA remains the last major immigration reform aimed at undocumented immigrants, Republican lawmakers authored a new law in the 1990s designed to strengthen enforcement and penalties for unauthorized immigrants—the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). As with earlier reforms, its enactment hinged upon bipartisan support, and most Democrats in Washington felt compelled to back the measure lest they appear weak on immigrants who violated U.S. law. This included Democratic President Bill Clinton, who was eager to demonstrate his administration’s commitment to strong immigration enforcement—just as he used a new crime bill to tout a strong record of crime control. Indeed, Clinton’s Violent Crime and Law Enforcement Act of 1994 already allowed certain aggravated felons to be removed without deportation hearings, increased penalties for reentry after deportation, and expanded funding for the Border Patrol. In this period, politicians also took note of public opinion polls in which unauthorized immigration joined crime and welfare reform among voters’ top concerns, and more than 70% of respondents saw porous borders as a “critical threat” to the “vital interests of the United States.”<sup>27</sup> In California, a new organization called Save Our State urged support for a new measure, Proposition 187, to deny undocumented immigrants and their children welfare benefits, nonemergency health care, and public education. Struggling to survive a statewide economic slump, the state’s Republican governor, Pete Wilson, threw his full support behind the proposal and blamed unauthorized immigrants for costing the state \$4.8 billion in public benefits expenditures. Both Wilson and Proposition 187 won easily in the 1994 election, although the latter was quickly enjoined by a federal court that held that its restrictions on public education were unconstitutional.<sup>28</sup>

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<sup>26</sup> Tichenor, *Dividing Lines*, 249-267.

<sup>27</sup> Gallup/Chicago Council of Foreign Relations Poll, October 7, 1994, in *American Public Opinion and U.S. Foreign Relations, 1995*, ed. Jack Reilly (Chicago: Chicago Council of Foreign Relations: 1995), 32; see also increasing restrictionist sentiment in Gallup Poll, *Public Opinion* (Wilmington: Scholarly Resources, 1994), 250-51 and NBC News/*Wall Street Journal* poll, October 14, 1994. For an excellent analysis of the rise and sources of anti-immigration opinion in this period, see Jack Citrin, Donald Green, Christopher Muste, and Cara Wong, “Public Opinion Toward Immigration Reform: The Role of Economic Motivations,” *Journal of Politics* 59, no. 3 (1997) 858-81, <https://doi.org/10.2307/2998640>.

<sup>28</sup> Robin Dale Jacobson, *The New Nativism: Proposition 187 and the Debate over Immigration* (Minneapolis: University of Minnesota Press, 2008).

If judicial intervention blunted popular assaults on immigrant rights at the state level, a shift in partisan control of Congress provided new opportunities for restrictionists in national policymaking. The 1994 election gave the Republican Party control of both houses of Congress for the first time since 1952, and Republican lawmakers like Senator Simpson and Representative Lamar Smith (TX) drafted new legislation designed to impose sweeping restrictions across the nation's immigration system. Yet overwhelming bipartisan opposition to massive changes in U.S. immigration law forced Simpson and Smith to scale back their blueprints to concentrate on enforcement and border security. The Clinton White House announced its support for the measure and issued an executive order denying federal contracts to businesses that knowingly hired undocumented immigrants. With a narrower focus on border protection, unauthorized immigration, visa violators, and criminal aliens, IIRIRA passed the House with broad bipartisan support in a 333-87 vote, and sailed through the Senate by an even more lopsided margin of 97-3. Clinton wasted little time in signing the bill into law, hailing the enforcement provisions of IIRIRA as a means of cracking down on unlawful entries.<sup>29</sup> "We all understand the problem of illegal immigrants," said White House Chief of Staff Leon Panetta. "We're all trying to ensure that we have additional enforcement to protect against illegal immigrants."<sup>30</sup> The Clinton administration's embrace of IIRIRA was consistent with its overall strategy to defend the virtues of legal immigration while attacking its unauthorized counterpart.

The final version of IIRIRA is comprised of various provisions strengthening enforcement and punishing immigrants who violate U.S. laws in some fashion. It predictably increased the number of Border Patrol agents and created new border control measures. The law also expedited removal proceedings, established mandates for detaining certain migrants, and limited the scope of judicial review of immigration decisions. It reduced government benefits for immigrants and quickened the removal of those apprehended within 100 miles of the border. IIRIRA established the statutory framework for cooperation between federal immigration agencies and state and local law enforcement, known as the 287(g) Program. The law also included a provision that created controversial "3- and 10-year bars"—banning migrants for three years if they lived in the United States without authorization for six months and for 10 years if they resided in the United States without papers for one year or longer. These bars apply to both migrants who overstay their visas and those who enter U.S. territory without inspection.<sup>31</sup>

As IIRIRA expanded the budget, personnel, and policy tools for stronger enforcement of U.S. immigration laws, the number of immigrant detentions and deportations exploded in the years that followed. So too did the unauthorized immigrant population in the United States, which grew from an estimated 5 million in 1996 to 12 million a decade later. Although interior enforcement increased, undocumented immigrants had new incentives

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<sup>29</sup> Statement on Signing Executive Order on Illegal Immigration, *Weekly Compilation of Presidential Documents*, February 19, 1996.

<sup>30</sup> Dara Lind, "The Disastrous, Forgotten 1996 Law that Created Today's Immigration Problem," *Vox*, April 28, 2016, <https://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration>.

<sup>31</sup> James Gimpel and James Edwards, *The Congressional Politics of Immigration Reform* (New York: Longman, 1998).

to settle with their families in the United States due to new year-round jobs and the militarization of the southern border. In the past, seasonal farm work and porous borders created a “revolving door” for many unauthorized immigrants who shuttled between temporary jobs in the United States and families in Mexico. New work opportunities and tightened border control, however, gave these migrants new incentives to stay in the United States. At the same time, as tougher border control helped to encourage undocumented immigrants to settle long-term in the country, IIRIRA limited their access to key public benefits and imposed significant new interior enforcement pressures.<sup>32</sup>

During the 1996 election, Republican presidential candidates sought to make getting tough on undocumented immigrants a signature issue for their party and campaigns. Governor Pete Wilson touted his support of Proposition 187; Pat Buchanan assailed unauthorized Latin American immigration as a source of economic and cultural decline at home; and Bob Dole, the eventual GOP standard bearer, endorsed stringent enforcement measures and the denial of birthright citizenship to the children of undocumented immigrants.<sup>33</sup> The Republican Party platform pledged to harden the southern border and to deny various benefits to undocumented families. In contrast to their support for IIRIRA, however, President Clinton and his fellow Democrats described their opponents as extreme and demagogic on immigration policy during the election campaign. In particular, they denounced “those who blame immigrants for economic and social problems,” and said it was a “mean-spirited and short-sighted effort of Republicans in Congress to bar the children of illegal immigrants from schools.”<sup>34</sup> In 1996, more than one million immigrants became U.S. citizens, and voter registration among Latino voters increased by 1.3 million. The results of the 1996 election left little doubt about two crucial developments: Immigrants comprised the nation’s fastest growing voting bloc, and Democrats were the immediate beneficiaries of their emergent electoral clout. The electoral dividends for Clinton were particularly strong: He won 72% of the Latino vote in 1996 (up from 60% in 1992). Asian voters, a smaller yet important swing bloc, increased their support for the Democratic ticket in the same years from 29% to 43%. Dole registered an all-time GOP low of 21% of the Latino vote in 1996, and he became the first Republican presidential candidate to lose Florida since Gerald Ford in 1980.<sup>35</sup>

Between 1997 and 2000, the Clinton administration and bipartisan majorities in Congress adopted several laws that loosened IIRIRA restrictions, providing modest relief for certain Central American migrants, restoring eligibility for some benefits, and allowing a small number of undocumented immigrants to legalize their status so they could be with their families. In the fall of 2000, the United Farm Workers (UFW) and agricultural industry representatives began serious negotiations on potential legislation addressing union desires to legalize undocumented farmworkers and industry desires to revise the H-2A guest worker

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<sup>32</sup> Tichenor, *Dividing Lines*, 282-288.

<sup>33</sup> *Congressional Quarterly Weekly Reports*, May 15, 1999, 1127.

<sup>34</sup> Democratic Party Platforms, 1996 Democratic Party Platform Online by Gerhard Peters and John T. Woolley, The American Presidency Project, <https://www.presidency.ucsb.edu/node/273267>.

<sup>35</sup> William Schneider, “Immigration Issue Rewards Democrats,” *National Journal*, November 30, 1996, Volume 28, 2622.

program. By December of 2000, bipartisan leaders in both houses of Congress endorsed a legislative compromise between the UFW and agribusinesses—the Agricultural Job Opportunity Benefits and Security Act (AgJOBS). The bill offered legalization for undocumented agricultural workers, championed by the UFW and immigrant rights groups, and revisions to the H-2A temporary farmworker program that streamlined recruitment procedures, promoted by the agricultural industry. Despite bipartisan backing, the AgJOBS bill failed to pass the lame duck session of Congress when key Republican lawmakers opted to postpone action until the George W. Bush administration entered office.<sup>36</sup>

## Immigration Reform in 2001: Bipartisan Momentum, the 9/11 Attacks, and Stalemate

From the start of the Bush administration in 2001, both Congress and the White House worked across the aisle on new legalization measures for the country's undocumented population. Bush had run for office as a border-state governor who believed in the economic benefits of linking U.S. employers and immigrant workers. He also reminded Latino voters that in Texas, he “rejected the spirit of Prop 187,” opposed “English-only” proposals, and refused “to bash immigrants” when it was popular. His campaign dramatically outspent Democrats in devoting millions of campaign dollars to Spanish-language advertising and direct-mail appeals. Bush also gave television interviews in Spanish and had his bilingual nephew George P. Bush stump for him extensively among Latino constituencies.<sup>37</sup> When the votes were counted, Vice President Al Gore maintained the Democrats' traditional edge in Latino voting, but Bush gained an estimated 34% among Latinos—13 points higher than Dole's 1996 total and only three points off the previous GOP record of 37% attained by Ronald Reagan in the 1984 election.<sup>38</sup> Bush's interest in comprehensive immigration reform was also kindled by the strong relationship he initially forged with Mexican President Vicente Fox, who was sworn into office one month before Bush and also previously served as a border-state governor. Fox placed a high premium on the well-being of Mexicans living in the United States, while Bush hoped that stronger U.S.-

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<sup>36</sup> The Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. No. 100-105 (November 19, 1997), and the Haitian Refugee Immigration Fairness Act, Pub. L. No. 105-277 (October 21, 1998), reversed restrictions on asylum application rules included in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208 (September 30, 1996), for some Central Americans and Haitians, making these immigrants eligible for lawful permanent residency (green cards). See also the 1998 Commerce, Justice and State Appropriations Act, Pub. L. No. 105-119 (November 26, 1997), and the Legal Immigration Family Equity (LIFE) Act of 2000, Pub. L. No. 106-553 (December 21, 2000).

<sup>37</sup> See *Hispanic Magazine*, January-February 2001. On earlier Republican adjustments, see Dick Kirschten, “Trying a Little Tenderness,” *National Journal*, January 10, 1998, 54.

<sup>38</sup> Robert Suro, Richard Fry, and Jeffrey Passel, “Hispanics and the 2004 Election: Population, Electorate and Voters,” *Pew Hispanic Center Report*, June 27, 2005, <https://www.pewresearch.org/hispanic/2005/06/27/hispanics-and-the-2004-election/>.

Mexican relations would become a “signature foreign policy legacy.”<sup>39</sup> The two new presidents soon began bilateral talks about a new temporary worker program and ways to legalize several million undocumented Mexicans living in the United States.<sup>40</sup>

Congress also took up three proposals in 2001 that involved legalization for particular undocumented groups. One was a measure approved by large House and Senate majorities that allowed unauthorized immigrants who were eligible for green cards to adjust their status without first having to leave the country. Second, new AgJobs bills potentially legalizing farmworkers were introduced in both chambers and were developed by separate committees. Finally, “strange bedfellow” coalitions of liberals and conservatives emerged in both the House and Senate to sponsor early versions of the Development, Relief, and Education for Alien Minors (DREAM) Act to provide legal status to undocumented young people who entered the United States without authorization as children. Bipartisan momentum in Congress was building for regularizing the status of millions of undocumented immigrants.<sup>41</sup>

During the first 100 days of both the Bush and Fox administrations, both presidents agreed to undertake exceptional bilateral talks and collaboration on migration between the two countries and on the well-being of undocumented Mexicans residing in the United States. A prominent working group on migration was established to coordinate bilateral discussions and planning, co-chaired by the U.S. secretary of state and attorney general and the Mexican ministers of the interior and foreign relations. The special working group was specifically charged with producing a broad plan on U.S.-Mexican migratory issues, particularly a binational agreement on legalization, border control measures, and a new temporary worker program. Both countries reached early agreement on enhanced cooperation between border control forces in enforcement and humanitarian search-and-rescue operations. Bush and Fox met five times during the first nine months of 2001, and they explained to reporters that they readily agreed on many bilateral policy issues because they both were “common-sense ranchers” who wanted to make the flow of persons across their shared border “safe, orderly, and legal.”<sup>42</sup> As a key step toward more comprehensive

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<sup>39</sup> George W. Bush, *Renewing America's Purpose: The Policy Addresses of George W. Bush, 1999-2000* (Washington, DC: Republican National Committee, 2000), 195–97; Kenneth Walsh with Thomas Omestad, “Broader Border?” *U.S. News & World Report* 131, August 20, 2001: 14.

<sup>40</sup> Mike Allen, “Immigration Reform on Bush Agenda,” *Washington Post*, December 24, 2003, <https://www.washingtonpost.com/archive/politics/2003/12/24/immigration-reform-on-bush-agenda/147ecec7-2392-4128-8152-dc70a5aaaf65/>.

<sup>41</sup> The House passed a four-month extension of Section 245(i) by a vote of 336-43 in May, and the Senate approved a one-year extension by unanimous consent in September. H.R. 1918 was sponsored by Rep. Chris Cannon (R-UT) in the House with 62 bipartisan cosponsors, and S. 1291 was sponsored by Sen. Orrin Hatch (R-UT) in the Senate with 18 bipartisan cosponsors. See Student Adjustment Act of 2001, H.R. 1918, 107th Cong. (2001); and Development, Relief, and Education for Alien Minors Act, S. 1291, 107th Cong. (2001-2002). The Republican-backed Agricultural Job Opportunity Benefits and Security (AgJOBS) Act of 2001 (S. 1161) was introduced by Sen. Larry Craig (R-ID) on July 10, 2001, and the Democratic H-2A Reform and Agricultural Worker Adjustment Act (H.R. 2736) was introduced during the 107th Congress by Rep. Howard Berman (D-CA) on August 2, 2001.

<sup>42</sup> Allen, “Immigration Reform on Bush Agenda.”

reform affecting immigrants from other countries, the Bush administration worked with their Mexican counterparts on a reform package that included legalization for most undocumented Mexicans in the United States, a new bilateral guest worker program, and stronger cooperation between the two countries in controlling the southern border.<sup>43</sup> During a September 6, 2001 visit to Washington, Fox called for a joint agreement on a guest worker program and legalization “by the end of the year,” and Bush replied that he intended to “accommodate my friend” and hailed Mexico as the United States’ most important ally.<sup>44</sup>

Bilateral efforts to produce a “grand bargain”—one that legalized undocumented Mexicans, established a new guest worker program, and coordinated border control—ended abruptly with the terrorist attacks on September 11. The perpetrators of the stunning attacks came to the United States on student and visitor visas, which led policymakers and the news media to question whether the U.S. visa and border control systems were lax and compromised national security. As the country focused on antiterrorism, immigration governance was swept up in new homeland security measures. First, under the Homeland Security Act of 2002, the Immigration and Naturalization Service was replaced by three new agencies: U.S. Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services, and U.S. Customs and Border Protection. These three new agencies were relocated from the Department of Justice to the newly created Department of Homeland Security.<sup>45</sup> Congress also swiftly passed the Enhanced Border Security and Visa Entry Reform Act, which strengthened document security and expanded exit-entry tracking systems. Additionally, this new law enabled immigration officials to require registration, biometric data, and interviews for immigrants from 25 targeted countries.<sup>46</sup> The 9/11 attacks and the subsequent transformation of the immigration policy environment compelled the Bush administration to set aside comprehensive reform. Relations with Mexico also cooled when Fox vigorously opposed the U.S.-led invasion of Iraq. The events of 9/11 dramatically captured the ability of significant crises to derail comprehensive immigration reform.

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<sup>43</sup> Eric Schmitt, “Bush Aides Weigh Legalizing Status of Mexicans in U.S.,” *The New York Times*, July 15, 2001, <https://www.nytimes.com/2001/07/15/us/bush-aides-weigh-legalizing-status-of-mexicans-in-us.html>.

<sup>44</sup> Allen, “Immigration Reform on Bush Agenda.”

<sup>45</sup> Executive Order 13228, Vol. 66, No. 196 (Federal Register, October 8, 2001). The House passed the Homeland Security Act of 2002, creating the Department of Homeland Security, on a 295-132 vote after two days of floor debate in July 2002, and the Senate passed the bill 90-0 four months later. See The Homeland Security Act of 2002, Pub. L. 107-296, 107th Cong. (November 25, 2002).

<sup>46</sup> Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 107th Cong. (March 12, 2002); Deborah Waller Meyers, “U.S. Border Enforcement: From Horseback to High-Tech,” Migration Policy Institute, November 2005, <https://www.migrationpolicy.org/research/us-border-enforcement-horseback-high-tech>.

## The Demise of the Bush and Kennedy-McCain Immigration Plans, 2006-2007

The 2004 presidential election signaled renewed interest in trying to enact comprehensive immigration reform. In the Democratic primaries that year, nearly every leading presidential candidate endorsed “earned legalization” programs that would provide green cards for nearly every undocumented immigrant living in the country. Indeed, Democratic candidates took aim at the Bush administration for failing to secure immigration reform, calling it “another broken promise.”<sup>47</sup> Not to be outflanked on the issue, the Bush administration unveiled a major reform bill during the campaign that made legalization and a new guest worker program its centerpiece. “The President has long talked about the importance of having an immigration policy that matches willing workers with willing employers,” White House Press Secretary Scott McClellan explained. “It’s important for America to be a welcoming society.”<sup>48</sup> Tellingly, the harshest criticism of Bush’s reform blueprints came from conservative members of his own party. Restrictionists like Representative Tom Tancredo (R-CO) and Ed Gallegly (R-CA) mocked the White House for becoming “the Mexican Department of Social Services.”<sup>49</sup> At a 2004 Republican retreat soon after Bush’s proposal was announced, White House adviser Karl Rove got an earful from outraged congressional Republicans who claimed that their constituents were overwhelmingly opposed to the Bush proposal and that “Hispandering” for votes would create a voter backlash within the party’s base.<sup>50</sup> By March of 2004, a truce was called on immigration battles within the Republican party, and Bush quietly put his immigration proposal aside for the rest of the campaign.<sup>51</sup>

Soon after the election, Bush met privately with pro-immigration House and Senate Republicans to coalesce support behind a measure that codified a new guest worker program and granted legal status to millions of undocumented immigrants. Immigration reform became the administration’s key post-election talking point, with Press Secretary McClellan explaining that immigration reform was “a high priority” that the president “intends to work with members to get moving again in the second term.”<sup>52</sup> Yet by 2005, the immigration restriction movement, led by groups like FAIR and Numbers USA, was gaining strength among the Republican base, and it enjoyed strong allies with rightwing media and key conservatives in Congress. In late November of 2005, House Republicans blocked an intelligence overhaul bill to signal to Bush that his immigration initiative would split the party and stall action in his second term.<sup>53</sup> Representative Tancredo accused the

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<sup>47</sup> Allen, “Immigration Reform on Bush Agenda.”

<sup>48</sup> James Lakely and Joseph Curl, “Bush will propose plan on illegals,” *The Washington Times*, January 6, 2004, 1.

<sup>49</sup> Wayne Washington, “Campaign 2004: Bush Upsets Part of Conservative Base,” *The Boston Globe*, January 9, 2004, 1.

<sup>50</sup> Ralph Hallow and James Lakely, “GOP slams Bush policies at retreat,” *The Washington Times*, 1.

<sup>51</sup> Ralph Hallow, “GOP To Finesse the Immigration Issue,” *The Washington Times*, August 23, 2004, 4.

<sup>52</sup> Bill Sammon, “Bush Revives Bid to Legalize Illegal Aliens,” *The Washington Times*, November 10, 2004, 1; Daren Briscoe, “Immigration—A Hot Topic,” *Newsweek*, November 22, 2004, 10.

<sup>53</sup> Stephen Dinan, “House Shuns Illegals Proposal,” *The Washington Times*, November 11, 2004, 1.

White House of abandoning the conservative values of law and order, adding that “their amnesty plan was dead on arrival, and if they send the same pig with lipstick back to Congress next January, it will suffer the same fate.”<sup>54</sup> His views were echoed by many Republicans, who commented on the subject when leaving a House Republican Conference the same month. One Republican leader anonymously observed that it was “highly unusual for the administration to use their political capital that was given by the base against the base.”<sup>55</sup>

Polls indeed showed that most conservative Republican voters disapproved of plans for granting legal status to undocumented immigrants. Yet the business base of the Republican party remained deeply supportive of the president’s guest worker plans throughout his two terms in office. The most active business lobbyists favoring Bush’s plan formed the Essential Worker Immigration Coalition (EWIC), an alliance of immigrant-dependent industry associations headed by the U.S. Chamber of Commerce. The coalition would bring together powerful associations like the American Health Care Association, the American Hotel and Lodging Association, the National Council of Chain Restaurants, the National Retail Federation, and the Associated Builders and Contractors. EWIC was initially formed by meatpacking conglomerates to advocate for the expansion of guest worker programs, and it counts many of the nation’s largest employers among its members, including Wal-Mart, Tyson Foods, and Marriott.<sup>56</sup> At the same time, nativist appeals—fueled by local and national talk radio and television commentators like Lou Dobbs and Pat Buchanan—resonated with many grassroots Republicans and restrictive politicians, such as Tancredo and his House Immigration Reform Caucus. New citizen patrols also popped up along the U.S.-Mexican border. In 2004, an accountant and decorated former Marine, James Gilchrist, formed the all-volunteer Minuteman Project to patrol the Arizona border armed with binoculars and cell phones. Former California schoolteacher Chris Simcox established the Minutemen Civil Defense Corps as an extension of this citizen patrol movement.<sup>57</sup> Described as extreme “vigilantes” by Bush, surveys showed that Republican voters strongly approved of the minuteman movement.<sup>58</sup>

In the winter of 2005, James Sensenbrenner (R-IL) shepherded H.B. 4437, a punitive bill favored by restrictionists and singularly focused on immigration enforcement, to narrow passage in the Republican-controlled House. It proposed for the first time to make unauthorized presence in the United States a felony and also made it a crime to lend support to undocumented immigrants. The Sensebrenner bill outraged a growing immigrant rights movement on the political left, who organized protests against the measure in the spring of 2006. Immigrant rights marches in U.S. cities and towns from March through May drew an

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<sup>54</sup> Sammon, “Bush Revives Bid to Legalize Illegal Aliens.”

<sup>55</sup> Dinan, “House Shuns Illegals Proposal.”

<sup>56</sup> Janice Fine and Daniel Tichenor, “A Movement Wrestling: American Labor’s Enduring Struggle with Immigration,” *Studies in American Political Development* 23, no.1 (March 2009): 109-112, <https://doi.org/10.1017/S0898588X09000042>.

<sup>57</sup> Jim Gilchrist and Jerome Corsi, *Minutemen: The Battle To Secure America’s Borders* (Los Angeles: World Ahead, 2006).

<sup>58</sup> “Immigration Issue Remains Divisive,” *Rasmussen Reports*, March 30, 2006 (containing earlier survey results).

estimated 3.5 to 5 million supporters, an unprecedented number that captured increasing grassroots support for progressive reform that could lead undocumented immigrants out of the shadows.<sup>59</sup> President Bush, however, confronted a Republican base that favored the reverse: crackdowns on unauthorized immigration. In the fall of 2006, the Bush administration sought to appease enforcement-minded conservatives by endorsing the Secure Fence Act of 2006, a bill that authorized the construction of a 700-mile fence along the southern border. At a time when enforcement measures drew far more support than legalization or visa reform, the Secure Fence Act passed easily. Signed just 12 days before the midterm elections, Bush used the occasion to urge moderation to assembled House and Senate Republicans. “There is a rational middle ground between granting an automatic path to citizenship for every illegal immigrant and a program of mass deportation,” he observed, “and I look forward to working with Congress to find that middle ground.”<sup>60</sup>

Democrats gained control of both the House and Senate in 2006, and in the months that followed, a bipartisan Senate coalition led by Edward Kennedy (D-MA) and John McCain (R-AZ), old hands at immigration reform, negotiated with the White House on a new compromise bill. The result was the Border Security and Immigration Act of 2007, a “grand bargain” that had the support of President Bush and became the focus of all meaningful subsequent discussion.<sup>61</sup> The bill included a new Z visa for undocumented immigrants that covered “a principal or employed alien, the spouse or elderly parent of that alien, and the minor children of that alien” currently living in the United States, provided they pay fees and penalties that could total as much as \$8,000. There was also a “touchback provision” requiring the leader of the household to return home before applying for legal permanent residency status. In addition, it contained a temporary Y-worker program that would allow roughly 200,000 workers to be admitted for a two-year period and could be renewed twice—as long as the worker spent a period of one year outside of the United States between each admission (which was eventually subject to a five-year sunset provision). Incorporating the White House proposal, the bill contained “triggers” to be met before the Z or Y visa programs could begin. These “triggers” included: hiring 18,000 border patrol agents, constructing 200 miles of vehicle barriers and 370 miles of fencing, allocating resources to detain up to 27,500 persons per day on an annual basis, and implementing the use of secure and effective identification tools to prevent unauthorized work.<sup>62</sup>

Subject to intense media scrutiny and criticism from both restrictionist and key immigrant rights groups, the public response to the compromise Senate immigration plan ranged from hostile to tepid. Many members of Congress were deluged with angry phone calls, emails, and

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<sup>59</sup> Chris Zepeda-Millan, *Latino Mass Mobilization: Immigration, Racialization, and Activism* (New York: Cambridge University Press, 2017); Kochitl Bada, Jonathan Fox, Robert Donnelly, and Andrew Selee, *Context Matters: Latino Immigrant Civic Engagement in Nine U.S. Cities* (Washington, DC: Woodrow Wilson International Center for Scholars, 2010).

<sup>60</sup> “Bush OKs 700 Mile Border Fence,” CNN, October 26, 2006.

<sup>61</sup> Robert Pear and Jim Rutenberg, “Senators in Bipartisan Deal on Immigration Bill,” *The New York Times*, May 18, 2007, <https://www.nytimes.com/2007/05/18/washington/18immig.html>.

<sup>62</sup> Tichenor, “The Demise of Immigration Reform: Policy-Making Barriers under Unified and Divided Government.”

letters from constituents and other activists. Surveys indicated that a majority of Republicans, Democrats, and Independents opposed the measure, with only 23% in favor. Significantly, most Americans opposed the initiative not because they opposed “amnesty” or other proposals for legalizing millions of undocumented immigrants in the country (roughly two-thirds supported earned citizenship options over deportation), but rather because they had little faith that it would provide genuine border security. More than 80% of surveyed Americans said they did not believe that the Kennedy-McCain bill would reduce illegal immigration or enhance border control.<sup>63</sup> In late June, angry constituents, organized interest groups (ranging from the AFL-CIO to anti-immigration lobbies), and both conservative and liberal lawmakers successfully blocked cloture on the Senate bill and thereby dashed hopes of avoiding killer amendments.<sup>64</sup> Fox News polling reaffirmed that conservatives bitterly opposed to the bill and were disenchanted with Bush, while a Democratic poll conducted by Stan Greenburg showed Democratic identifiers to be split 47% for and 47% against the bill.<sup>65</sup> Opposition was particularly ferocious on the political right, where FAIR, Numbers USA, and other restrictionist groups rallied grassroots conservatives to demand that their congressional representatives defeat the Bush plan. They “lit up the switchboard for weeks,” Sen. Mitch McConnell (R-KY) recounted. Meanwhile, conservative radio and television hosts filled the airways with withering attacks on any policy overhaul that included “amnesty” for unauthorized immigrants.<sup>66</sup>

Later in the summer of 2007, the White House and a small bipartisan group of senators worked quietly on a last-ditch effort to save their compromise plan. However, their private negotiations drew fire from opponents of the measure: “The process has been orchestrated by a handful of people behind closed doors,” Senator Bob Corker (R-TN) observed, “and they are paying a price for that.”<sup>67</sup> In truth, closed-door negotiations among rival lawmakers and interests represented the primary means by which past comprehensive immigration reforms were brokered and eventually passed by Congress. In 1986, for example, IRCA emerged from grueling bipartisan compromise and fleeting “strange bedfellow” majorities. Yet 11 years later, the expanded scope of conflict over immigration reform—thanks to grassroots mobilization on both sides of the issue, enormous media attention, and its increased salience for base voters—doomed behind-the-scenes congressional deal-making. Ultimately, the “grand

<sup>63</sup> “Support for Senate Immigration Bill Falls, 49% Prefer No Bill At All,” *Rasmussen Reports*, June 6, 2007,

[https://www.rasmussenreports.com/public\\_content/politics/current\\_events/immigration/support\\_f\\_or\\_senate\\_immigration\\_bill\\_falls\\_49\\_prefer\\_no\\_bill\\_at\\_all](https://www.rasmussenreports.com/public_content/politics/current_events/immigration/support_f_or_senate_immigration_bill_falls_49_prefer_no_bill_at_all); “Why the Senate Immigration Bill Failed,” *Rasmussen Reports*, June 8, 2007,

[https://www.rasmussenreports.com/public\\_content/politics/current\\_events/immigration/why\\_the\\_senate\\_immigration\\_bill\\_failed](https://www.rasmussenreports.com/public_content/politics/current_events/immigration/why_the_senate_immigration_bill_failed).

<sup>64</sup> This happened on June 8 when a majority—comprised of conservative Republicans and liberal Democrats—opposed the bill (34 Y: 61 N).

<sup>65</sup> Carolyn Lochhead, “Democratic Poll Finds Tepid Support for Immigration Bill,” *San Francisco Chronicle*, June 20, 2007; Angus Reid, “Americans Pick Enforcement in Immigration Debate,” *Global Monitor*, June 11, 2007.

<sup>66</sup> Jacquelyn Mahendra, “Latino Vote Fueling Republican Introspection,” *America’s Voice*, November 11, 2008, [https://americasvoice.org/press\\_releases/latino\\_vote\\_fueling\\_republican\\_introspection/](https://americasvoice.org/press_releases/latino_vote_fueling_republican_introspection/).

<sup>67</sup> Gail Russell Chaddock, “Senate Makes a New Try for Immigration Bill,” *Christian Science Monitor*, June 21, 2007, <https://www.csmonitor.com/2007/0621/p01s01-uspo.html>.

bargain” developed by Bush, Kennedy, and McCain fell 14 votes short of the 60 needed to force a final vote. Fifteen Democrats were among those who helped kill the bill, including new senators from swing states such as Claire McCaskill (MO), Jon Tester (MT), and Jim Webb (VA), who did not want to alienate independent and centrist voters who were ambivalent about immigration reform.<sup>68</sup> The U.S. political system is designed to make significant policy change of any kind very difficult to achieve. Yet immigration reform became especially arduous during and after the battles of 2005 to 2007, as long-standing divisions between policymakers and interest groups were intensified by the growing influence of rival immigration-restriction and immigrant-rights movements at the base of each of the country’s major parties.

### Obama, the “Gang of Eight,” and Comprehensive Reform, 2009-2014

The demise of the Bush-Kennedy-McCain reform plans in 2007 had notable repercussions in the 2008 presidential election. On the Democratic side, Senator Barack Obama (IL) ran for president pledging to win a bipartisan compromise package that would enhance border control while extending legal status to roughly 12 million undocumented immigrants. His resonant campaign slogan—“Yes we can!”—was the English equivalent of the “Si se puede!” rallying cry of immigration reform marchers in 2006 and of the United Farm Workers in the 1970s.<sup>69</sup> During a pivotal interview with Univision host Jorge Ramos in May of 2008, Obama declared that “I can guarantee that we will have, in the first year, an immigration bill that I can support.”<sup>70</sup> Obama’s immigration position drew strong support from most Latino and Asian voters, and it also distinguished him from his Republican opponent, Senator John McCain. McCain, the long-time sponsor of comprehensive reform and seasonal farmworker programs, became an eleventh-hour border hawk during the primaries to appease a partisan base adamantly opposed to extending legal status to undocumented immigrants. In the two previous presidential elections, both major party candidates touted strong pro-immigration credentials as they courted immigrant and co-ethnic Latino and Asian voters. With the Republican base now firmly committed to punitive responses to unauthorized immigration, however, McCain assumed a tough enforcement stance. When the dust settled, Obama’s pro-immigration appeals helped him garner 67% of the Latino and 64% of the Asian vote in 2008. Equally troubling to Republicans was the fact that Latino turnout increased to 11 million voters (9% of the total) in 2008, double the turnout in 2000.<sup>71</sup>

Soon after entering office, the Obama White House announced that an immigration initiative would have to come after the looming priority of helping the country recover economically

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<sup>68</sup> The actual vote was on invoking cloture, and it was 46 Y: 53 N; Tichenor, “The Demise of Immigration Reform: Policy-Making Barriers under Unified and Divided Government.”

<sup>69</sup> Teresita Perez, “Si Se Puede: A Phrase with a Rich History,” *Center for American Progress*, September 22, 2008, <https://www.americanprogress.org/issues/race/news/2008/09/22/4950/si-se-puede/>.

<sup>70</sup> Tom McCarthy, “The Evolution of Immigration Reform Under Obama — A Timeline,” *The Guardian*, November 20, 2014, <https://www.theguardian.com/us-news/2014/nov/20/immigration-reform-under-obama-timeline>.

<sup>71</sup> Mahendra, “Latino Vote Fueling Republican Introspection.”

from the Great Recession of 2008.<sup>72</sup> Its determination to push the issue off its action agenda was influenced by the reality that the Obama team could not find more than one Republican senator and a handful of Republican House members willing to work across the aisle on immigration reform. In order to justify future legalization efforts and to attract conservative lawmakers to negotiations, Obama acted unilaterally to station National Guard troops along the nation's southern border and to step up enforcement efforts by detaining and deporting record numbers of undocumented immigrants.<sup>73</sup> The president hoped that his aggressive enforcement efforts would provide a foundation for comprehensive reform, yet Republicans refused to bite. In an American University speech in the summer of 2010, Obama told an audience of lawmakers, immigration advocates, business executives, and labor leaders that he could not go it alone. "I'm ready to move forward, the majority of Democrats are ready to move forward," he said, "but the fact is, without bipartisan support, as we had just a few years ago, we cannot solve this problem."<sup>74</sup>

While policy stalemate prevailed in Congress, a number of state legislatures seized the initiative to enact new laws governing undocumented immigrants within their own borders. Arizona's Republican legislature gained notoriety when it enacted the 2010 Support Our Law Enforcement and Safe Neighborhoods Act—better known as S.B. 1070. The measure controversially included provisions requiring state and local law enforcement officers to determine the immigration status of anyone involved in a lawful stop, detention, or arrest where "reasonable suspicion exists" that the person is unlawfully present. The "show me your papers" law was ultimately hamstrung by the Supreme Court, but other Republican state legislatures adopted new enforcement, employment, and benefits restrictions targeting undocumented residents. Claims that undocumented immigrants would benefit from health care reform also became a prominent talking point for the rightwing Tea Party movement and conservative Republicans in the summer of 2009. One year later, at the first national Tea Party Convention in Nashville, Tennessee, delegates roared when keynote speakers like the nativist Representative Tancredo railed against "amnesty" proposals and fulminated that Obama was elected by naturalized immigrants and other people "who can't even spell the word 'vote' or speak English."<sup>75</sup> When a new DREAM Act that would protect undocumented children from deportation reached the Senate floor in 2010—a reform that enjoyed broad public support—Republican senators refused to end a filibuster supported by immigration restrictionists. During the 2010 midterm election, Republican candidates denounced "illegal aliens who take our jobs" and warned of "millions of illegal aliens, swarming across our border, joining violent gangs, forcing families to live in fear." Even as Democratic control of the House slipped away,

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<sup>72</sup> Ginger Thompson and David Herszenhorn, "Obama Set for First Step on Immigration Reform," *The New York Times*, June 24, 2009, <https://www.nytimes.com/2009/06/25/us/politics/25immig.html>; Michael Farrell, "Obama Delays Immigration Reform – At Great Risk," *Christian Science Monitor*, August 11, 2009, <https://www.csmonitor.com/USA/Politics/2009/0811/obama-delays-immigration-reform-at-great-risk>.

<sup>73</sup> Peter Slevin, "Deportation of Illegal Immigrants Increases Under the Obama Administration," *Washington Post*, July 26, 2010.

<sup>74</sup> Peter Baker, "Obama Urges Fix to 'Broken' Immigration System," *The New York Times*, July 1, 2010, <https://www.nytimes.com/2010/07/02/us/politics/02obama.html>.

<sup>75</sup> Brian Kates, "Tea Party Convention's Racial Brouhaha," *New York Daily News*, February 5, 2010.

Obama said of comprehensive immigration reform that he was “committed to making it happen. We’re going to get it done.”<sup>76</sup>

Despite Obama’s assurances, his administration’s vigorous enforcement strategy in its first term and his inability to overcome confounding partisan polarization in Congress created deep strains within a youth-led “Dreamer” movement, which broke with established immigrant-rights advocates who insisted that they had a friend in the White House. While old guard reformers favored more conciliatory, insider tactics to press Democratic allies in the presidential administration and Congress, “Dreamers” openly assailed Obama, branding him the “Deporter-in-Chief.” They also launched disruptive protest actions, from high-profile marches and hunger strikes to arrests for blocking traffic and “sit-ins” at congressional offices. As protests and conventional lobbying by movement activists expanded, so too did media coverage and the attention of Democratic leaders. Key Democratic senators, including prominent leaders like Harry Reid (NV) and Dick Durbin (IL), urged Obama to grant administrative deportation relief for undocumented youth.<sup>77</sup> After tense negotiations with movement activists, Obama announced in June 2012 an executive initiative—Deferred Action for Childhood Arrivals (DACA)—that granted relief to roughly 1.4 million undocumented youth, who otherwise were subject to deportation. Obama’s willingness to use unilateral executive power to provide temporary relief to undocumented young people helped him shore up strong support from the immigrant-rights movement as well as Latino- and Asian-American voters in the 2012 election. In the end, Obama won 71% of the Latino vote with a 44-point advantage that was even more decisive than his 36-point margin (67% of the Latino vote) in 2008. Obama also won 76% of the Asian vote, an electoral bloc that once provided majority support for Republican presidential candidates. The alignment between immigrant rights activists, Obama, and the Democratic party only grew stronger after the 2012 election, advanced by executive actions designed to protect undocumented immigrants and promote immigrant rights.

Troubled by presidential election returns, Republican House and Senate leaders conceded on election night in 2012 that “a comprehensive approach is long overdue” and said they were ready to negotiate with the president and Democrats on the status of unauthorized immigrants.<sup>78</sup> On January 17, 2013, prominent Republican officials, business leaders, and other conservatives who favored an immigration overhaul and hoped to improve the party’s standing with Latino and Asian voters met in the Washington office of anti-tax lobbyist Grover Norquist. Those present formulated a plan to overcome restrictionist forces in their party.<sup>79</sup> In the months that followed, comprehensive immigration reform was advanced in the Senate by a “Gang of Eight” comprised of four Republicans (Jeff Flake of Arizona, Lindsey Graham of South Carolina, John McCain of Arizona, and Marco Rubio of Florida) and four Democrats (Michael Bennet of Colorado, Richard Durbin of Illinois, Robert Menendez of New Jersey, and

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<sup>76</sup> “Univision Transcript: Piolin Interview with President Barack Obama,” October 26, 2010.

<sup>77</sup> Author’s interviews with Dreamer activists, *Democracy’s Shadow Project*, 2017-18.

<sup>78</sup> McCarthy, “The Evolution of Immigration Reform Under Obama.”

<sup>79</sup> Ashley Parker, “Senators Call Their Bipartisan Immigration Plan a ‘Breakthrough,’” *The New York Times*, January 28, 2013, <https://www.nytimes.com/2013/01/29/us/politics/senators-unveil-bipartisan-immigration-principles.html>.

Charles Schumer of New York). Early on, this “strange bedfellow” alliance coalesced around four main pillars for reform: stronger border enforcement, enhanced workplace enforcement, improved visa processes for seasonal farmworkers and high-skilled laborers, and a pathway to citizenship for nearly all undocumented immigrants in the country. McCain, the veteran of earlier battles for reform, broke with most Republicans on the Hill by underscoring the importance of legalization. “We have been too content for too long to allow individuals to mow our lawn, serve our food, clean our homes and even watch our children, while not affording them any of the benefits that make our country so great,” he said. “I think everyone agrees that it’s not beneficial to our country to have these people hidden in the shadows.”<sup>80</sup>

By April of 2013, the group of eight senators presented a comprehensive reform bill supported by an unlikely coalition of labor unions and business groups, farmworkers and grower interests, as well as “Dreamers,” Latino, Asian, and immigrant rights groups. The Border Security, Economic Opportunity, and Modernization Act provided a 13-year path to citizenship for undocumented immigrants physically present in the United States before 2012 and a streamlined process for agricultural workers and those who arrived as children. It also included \$46.3 billion in funding for border security, including a mandate to double the number of Border Patrol agents and fencing along the southern border. In addition, the bill aimed to strengthen the enforcement of employer sanctions through a mandatory E-Verify employment eligibility verification system and the creation of a new point system for legal visas that expanded and streamlined legal immigration. In June of 2013, the Senate adopted the immigration measure by a 68 to 32 vote, yet only 14 Republicans backed the reform.<sup>81</sup>

For months, House Speaker John Boehner (R-OH) and Majority Leader Eric Cantor (R-VA) tried to persuade Republican House members to take up comprehensive immigration reform. Their efforts got nowhere, as most members of their caucus either adamantly opposed any form of legalization for undocumented immigrants or feared a backlash from their base. Cantor’s defeat in a 2014 primary upset by Dave Brat, who made Cantor’s support for immigration reform his chief target, was taken as an ominous warning to most House Republicans. Once again, a major overhaul of the nation’s immigration system—including a large-scale legalization program—died in Congress. In response, the Obama administration announced in November of 2014 that it would undertake new executive actions beyond DACA to protect unauthorized immigrants from deportation. The most ambitious of these unilateral actions, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), faced lawsuits from several states and was eventually blocked by the Supreme Court.<sup>82</sup> Amidst unflinching partisan polarization and legislative paralysis, U.S. immigration policymaking was now dominated by the actions of an administrative presidency, assertive states, and federal courts.

DACA and DAPA predictably outraged Republican officials and their conservative constituents

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<sup>80</sup> Ibid.

<sup>81</sup> Seung Min Kim, “Senate Passes Immigration Bill,” *Politico*, June 28, 2013, <https://www.politico.com/story/2013/06/immigration-bill-2013-senate-passes-093530>.

<sup>82</sup> *United States v. Texas*, 579 U.S. 2016.

who saw the actions as executive usurpation by an illegitimate president. Their anger also was fueled by an anti-immigrant nativism that took root among the rank-and-file of the Republican base in the 1990s and flourished in the early twenty-first century. The Republican dark horse Donald Trump ardently exploited these xenophobic tempers, distinguishing himself as the most overtly nativist major party candidate for the Oval Office in modern times. Indeed, his remarkable political ascendance was more than a cult of personality or the discovery of anti-immigrant demagoguery. It was the culmination of years of cultivation of the GOP base by nativist groups, conservative politicians, and pundits devoted to draconian restrictions on immigrant rights and admissions.<sup>83</sup>

Once in office, President Trump wasted little time in advancing his immigration policy agenda through autonomous presidential action. The great partisan divide in Congress continued to frustrate legislative solutions to the country's immigration problems, and the Trump administration's meager attempts to propose immigration legislation went nowhere. Yet guided by key White House advisers and appointees drawn from the restrictionist movement, Trump delighted his popular base by unilaterally barring migration from seven predominantly Muslim countries deemed to harbor "radical Islamic terrorists," eliciting airport protests from the grassroots left and judicial challenges that were ultimately overcome. His administration also unilaterally terminated DACA; separated families at the border; declared a border emergency to finance new barriers; expanded the powers of the Department of Homeland Security to expedite and broaden the detention and deportation of undocumented immigrants; threatened to deny federal grant funds to "sanctuary" states and locales that refused to assist federal authorities in enforcement of national immigration law; and imposed a "public charge" rule to deny green cards to immigrants who rely on government assistance.<sup>84</sup> The coronavirus pandemic also enabled Trump officials to impose significant new restrictions on immigrants, refugees, asylum seekers, and foreign workers. In addition, the Trump administration streamlined the deportation process during the pandemic, threatened sanctions on countries that did not accept deported migrants, and rebuffed calls to release immigrant families from detention centers where COVID-19 infection rates exploded.<sup>85</sup> The Trump presidency demonstrated that the administrative presidency is a double-edged sword that unilaterally can just as easily advance a nativist agenda as an inclusive one.

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<sup>83</sup> Milkis and Tichenor, *Rivalry and Reform*, chapter 7.

<sup>84</sup> Ibid.

<sup>85</sup> Candice Norwood, "Trump Restricts Immigration Amid the Pandemic," *PBS NewsHour*, July 28, 2020, <https://www.pbs.org/newshour/politics/trump-restricts-immigration-amid-the-pandemic-critics-see-it-as-an-excuse-to-push-his-own-agenda>; Catherine Shoichet and Priscilla Alvarez, "How Trump Is Using the Pandemic To Crack Down on Immigration," CNN, July 14, 2020, <https://www.cnn.com/2020/07/07/politics/trump-administration-pandemic-immigration-changes/index.html>; Leila Seidman, "How Trump's Coronavirus Orders Affect Visas and Green Cards," *Los Angeles Times*, July 23, 2020; Alisa Reznick, "'You Can Either Be a Survivor or Die': COVID-19 Cases Surge in ICE Detention," *National Public Radio*, July 1, 2020, <https://www.npr.org/2020/07/01/871625210/you-can-either-be-a-survivor-or-die-covid-19-cases-surge-in-ice-detention>.

## Conclusion

Like every other twenty-first century occupant of the Oval Office, President Biden was confronted on day one with significant immigration policy challenges and employed broad executive powers to address a number of them. Following the most avowedly nativist president of the past century, he predictably used the stroke of a pen to immediately rescind, or to begin the process of undoing, elaborate restrictions imposed by the Trump administration. Yet many of the most nettlesome problems in this policy area, including the democratic marginalization of an estimated 11 million undocumented immigrants, can only be solved through major immigration reform. To this end, Biden wasted little time in proposing his sweeping U.S. Citizenship Act. In so doing, his administration was credited by immigrant-rights advocates for learning important lessons from the Obama years. First, he made immigration reform a top priority from the start while his party controlled both houses of Congress, in contrast to the Obama administration's decision to postpone a legislative fight over immigration during its first two years in office. Second, Biden's proposal placed a strong focus on paths to citizenship for unauthorized immigrants and contained only limited border control items—a very different approach from Obama's efforts to win over potential Republican support by emphasizing a strong commitment to enforcement. As one Biden adviser put it, the president is “not willing to start at the 50-yard line.” Finally, Biden and his Democratic allies in Congress have expressed a willingness to pursue smaller bills, such as legalization measures for “Dreamers” and farmworkers, if a piecemeal approach is more achievable than sweeping legislation.<sup>86</sup>

Past attempts at immigration reform addressing the nation's undocumented population are deeply instructive about the prospects for Biden's U.S. Citizenship Act and for other would-be policy innovations in the future. These earlier reform efforts—from laws like IRCA in 1986 and IIRIRA in 1996 to failed efforts in 2001, 2006-2007, and 2013-2014—reveal both durable patterns and new developments that shape the chances for legislative breakthroughs as well as the substance of these measures. For generations, immigration has been a potent cross-cutting issue in U.S. politics that fuels contentious public debate over rival interests and ideals and regularly produces legislative stalemate. Significant crises, as the 9/11 terrorist attacks and the Great Recession illustrate, can also upend policymakers' best-laid plans. Another recurrent pattern is that Congress traditionally has only been able to overcome gridlock on immigration reform through the formation of “strange bedfellow” coalitions that bring together normally competing groups and lawmakers from both sides of the aisle. Substantively, bipartisan reform typically has required compromise packages that balance enforcement and legalization provisions, along with some accommodation for guest worker admissions. These recurring dynamics of U.S. immigration politics nearly always present formidable hurdles for reformers, and new developments—such as unprecedented partisan polarization and movement activism on both sides of this issue—make legislative action all the more daunting. Given their narrow control of Congress and the great divide between the major parties, Biden and Democratic lawmakers face enormous headwinds in their quest to achieve major immigration reform

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<sup>86</sup> Ibid.

that has eluded policymakers for thirty-five years. Yet as veterans of more than one previous attempt to overhaul the country's immigration laws, the Biden administration and its legislative allies have already demonstrated a sophisticated understanding of the perils and possibilities of immigration policymaking. Their capacity to translate that knowledge into tangible policy change—great or small—hinges upon structural opportunities and barriers that are difficult to predict. What is certain is that, absent significant reform, immigration governance will continue to be driven by the unilateral power of shifting presidential administrations, judicial activism, and variations in state and local regulations. By perpetuating a caste system that marginalizes an estimated 11 million undocumented immigrants, legislative deadlock reinforces permanent gradations of membership that make inclusive democracy impossible.