

Testimony of
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Introduction

Mr. Chairman, Senator Kennedy, Members of the Subcommittee.

President Bush has challenged us all to fix our broken immigration system. In presenting his vision, he has demonstrated remarkable political courage and a willingness to think outside of the box that has been unmatched by any other president in recent memory--and has created an opening for the US Congress and all of us to be equally thoughtful and courageous.

The task is daunting. We are asked to re-engineer an immigration system riddled with bad or no longer relevant ideas and weighed down with the cumulative inconsistencies of more than a century of political expedience and "delicate" compromises. Furthermore, we all understand that we must do so in ways that are both politically feasible and can be administered with relatively few resources and little taste for regulation and enforcement. Finally, we must do so in a climate that is ambivalent at best--both about immigration and about immigrants. A tall order indeed, but one to which we must nonetheless respond.

The Requirements of Reform

Reform that is worth describing as "comprehensive, thoughtful and smart" must meet the following requirements:

? It must recapture the initiative on immigration from where it has moved to in the last two decades or so--individuals (whether employers or families) and, increasingly, more or less organized smuggling networks.

? It must extend the rule of law to a policy domain that has become increasingly resistant to it by seeking to regulate, rather than deny, critical facts on the ground.

? It must reflect unambiguously our values as a people--values that, as the President has said repeatedly, do not stop at our borders--by choosing legality over illegality, safety over unnecessary danger, and orderliness over chaos.

? It must advance our long-term economic interests while remaining demonstrably consistent with our short- and mid-term ones.

? It must anticipate correctly the social consequences of economically-motivated immigration decisions and act wisely to address them--especially with regard to essential labor standards and protections.

? Finally, it must hold the line both on our legal obligations and, within reason, on the budget.

Success will require equal amounts of clarity of purpose and dedication, of imagination and perseverance, of political courage and political skill. The effort must be approached in the spirit of a "national project" in which all of America's voices, but particularly those of our civil society institutions, have a fair chance to be heard. This perhaps peculiar requirement is not an ideological statement; rather, it is the very essence of pragmatism. It is these institutions that will eventually determine whether or not the reform proposals this Congress passes will have a fair chance to succeed--whether we are talking about a new law enforcement regime, a regularization program that elicits as close to 100 percent participation of the eligible population, or a temporary worker program that meets our labor market needs while protecting all workers.

Reactions to the President's Proposal

The President's announcement has provoked a maelstrom of political rhetoric: "Not Generous Enough!" howls the left. "Too Generous!" screams the right. "Just About Perfect!" purrs business. Of course, none of these interests are monoliths. Many Republicans appreciate the supreme act of leadership in the President's statement and, privately at least, most probably applaud his refreshing honesty. The Party's anti-immigration wing, however, is savaging the White House plan and simplistically demands that the government enforce the law instead. No amnesty for lawbreakers, say they. But this seemingly reasonable demand ignores two compelling facts.

? First, that some sort of a registration process--a census of the undocumented--is necessary if the government is to know much better who is already in our country. After all, this is the other half of the domestic security course we set for ourselves after September 11. Such knowledge will give Secretary Ridge the flexibility to deploy his (always limited) homeland security resources more effectively. But for that strategy to succeed, and for the security underpinnings of the President's immigration reform rationale to be validated, we need as close to 100 percent of the unauthorized immigrants as possible to participate in the registration program. After all, the best way to find the proverbial "needle in the haystack" is to make the haystack much smaller.

? The second thing anti-immigration Republicans ignore is a sequence of rather simple mathematical calculations. The illegally resident population is about 10 million persons.

1. Even if two-thirds of that population participated in the Administration's "illegal-to-temporary-to-temporary(for a second time)-to-return-to-one's-home-country" sequencing scenario;
2. Even if all of the program participants left within the 6 years envisioned by the President's plan (we all understand that the latter assumption is deeply flawed);
3. Even if the government were to get radically more efficient and effective in its anti-illegal immigration course than at any non-military operation in the last 50 years;
4. Even if the DHS and DOJ were given much higher levels of resources and made removing illegal immigrants priority one;
5. Even if we were able to arrest and remove 500 unauthorized residents every single day (for this to happen, we would have to suspend not only all disbelief but also most considerations of legal and civil rights); and, finally,
6. Even if not a single new immigrant came in illegally in the next two decades, it would still take nearly 20 years and billions of dollars to deport the remaining 3.5 million illegally resident persons.

Parts of the Republican Party, however, are not the only ones who have not thought hard enough about this issue. Some Democrats have already introduced their own large reform bills, often in bipartisan configurations, and other, more comprehensive bills may yet come. The authors of these bills wish to respond to the humanitarian challenge at the border and to the exploitation and broader labor market disorder large-scale unauthorized immigration breeds, while acknowledging both the social and economic facts on the ground. (The President's proposal focuses primarily on the economic facts.) But, besides being more explicit about worker protections and attempting to tackle the legalization issue--both worthwhile legislative objectives--I see nothing in their architecture that suggests to me that true solutions are at hand. Is this then, including this hearing, mostly about political posturing and electoral advantage as so many cynics suggest? I don't think so. There are certainly elements of both given that we are in an election year and that the issue is so politicized. But recent actions encourage me to think that there is, at long last, a truer recognition of the need to try to create a public policy and good government momentum on immigration. The President's acknowledgment that the system is a

broken is consistent with the facts on the ground: nearly half-a-million new unauthorized immigrants (mostly Mexicans) are added to our society each year.

Hardly anyone, however, has raised the more important question: Will the President's plan, inchoate in structure and purposefully--even magnificently-- ambiguous as it is, do what the President says it will do? Put differently, can the President's principles of reform form the nucleus around which a legislative reform package can be built that would accomplish most objective observers' interest in (a) channeling illegal migration into legal and safe routes and restoring the rule of law on this issue, (b) creating opportunities for those who are here illegally to earn permanent legal status by demonstrating their willingness and ability to meet tough but fair standards of conduct, (c) reunifying close family units in a timely manner, (d) meeting employer needs--and critical economic growth and competitiveness goals--in a timely manner without sacrificing worker protections, and (e) restoring faith on our immigration system and on those who are charged with managing it? And what would such an effort take?

Let me start with an obvious observation: Like single-cause fallacies, stable and lasting immigration reform cannot rest on a single idea, regardless of how compelling that idea might be. Accordingly, temporary work visas, the centerpiece of the President's proposal, cannot be a substitute for all that is needed on immigration. Perhaps more damning is my sense that if that is all that comes out of this round of immigration "reform," and if we get any of what we do in that regard wrong, the medicine may turn out to be worse than the disease!

Let me be clear. Temporary work visas are an important, even an essential, migration management tool. They give current and prospective foreign workers and employers a legal option; they provide an additional degree of needed confidence in terms of our domestic security; they should reduce the number of border deaths; they could curb many of the worse workplace and other abuses; they can restart the circular (back-and-forth) movement of workers from the region that has been lost as our border control policies have had the perverse effect of "locking people in" rather than keeping them out; they can be a down payment toward restoring order in what has become a disturbingly disorderly labor market situation; and, finally, they can begin to make the enforcement of our immigration, labor, and other laws more possible than it has been for decades.

Yet, necessary as temporary worker visas certainly are, they are not nearly sufficient enough to anchor a thoughtful comprehensive immigration reform plan on them. For that, we need to think in terms of a three-legged stool in which many more temporary work visas are but one of the legs.

The President is right in his apparent sense that putting our immigration house in order requires eliminating a status quo in which illegality is the norm and replacing it with a stable new environment that clearly rewards playing by the rules. This goal, however, requires being more thorough in our thinking about the nature of immigration and more ambitious than the President's announcement has allowed us to be.

Stable reform requires three interdependent and fully integrated responses. First, devising better (really, "smarter") border and interior controls. Our border and port-of-entry immigration enforcement is, by and large, already receiving the level of resources and attention that it deserves (although it, too, would benefit from more cooperation from our contiguous neighbors). The best way to improve such controls further is to frame them within a larger immigration architecture that relieves some of the pressure on border enforcement, in part by undercutting the human smuggling syndicates that profit from the chaos of our immigration system. The latter-- interior controls-- requires that we engage in nothing less than a "zero-based" policy review,

especially with regard to employer sanctions. We have never found the proper balance among preventing discrimination, protecting civil rights, resources, not placing an undue burden on the employer, and enforcing the law. By now, it should be obvious that a new strategy of interior enforcement that is credible is needed. In this regard, expanded pathways for legal migration and thoughtful regularization should be understood as guideposts that can point the way where enforcement of immigration law is more likely to succeed; they can never replace thoughtful regulation or smart enforcement.

Second, stable reform requires us to address the continuing demand for visas. Some of these visas should go to workers in our low-wage, low-value added (mostly but not exclusively service) economic sectors. Some of those visas, in turn, will need to be temporary but must have a tough but fair--and most importantly, clear--path to permanency. (The President's imaginative financial incentives for return are an excellent idea, but will not work in every case. Some workers will still want to stay and some employers will still want to keep their most reliable employees. Both should have a means for doing so.) The other work visas should be permanent at the outset.

These judgments may be politically complicated but basic rules can be devised that can make them less so. However, it is family (re)unification that must receive the lion's share of the new visas, at least until we honor a principle we all seem to agree on: family unity. Tough political choices will have to be made in this regard but keeping (or putting) immediate families (back) together is a "no-brainer"--morally and in terms of smart migration management.

Third, stable reform requires us to offer an opportunity to the unauthorized resident population in our midst to earn legal permanent status so that we can elicit near 100 percent participation. The first step in that effort must be the registration the President's plan calls for. Where the President's plan appears to come our short, however, is the reality that a program that leads only to temporary work visas is likely to partly fail in both of its key objectives: (a) getting the overwhelming majority of people to participate up front (for the domestic security purposes discussed earlier) and (b) moving people out of our country at the end of the plan's six year window.

Many of today's illegally resident immigrants have already spent years in the country, are parents of citizen children, qualify for but are unable to receive their immigration benefits in a timely fashion (at the end of the last fiscal year, DHS had more than 1.2 million pending green card applications), and are working at jobs that are permanent in every sense of the word. For most of these people, anything short of a real opportunity to obtain legal permanent residency is not likely to prove enough of an incentive to "play by the rules." If we think that picking a fight with the market is ultimately un-winnable, a fight with human nature will prove to be even more so, and the market will come readily to its aid--for a price: most of these people will very likely drop back out of status after the 6 years the President's plan offers, rather than return to a place that has not been their home for more than a decade. That is, if they choose to regularize in the first place.

A final issue is not directly related to the President's announcement and concerns pending legislation--AgJobs. The President chose not to mention this bill in his statement. Congress, however, cannot continue to ignore a policy area in which the cry for fundamental reform is the loudest. A bishop friend of mine has called the status quo in America's perishable crop fields unbearably immoral. And a number of your fellow legislators have worked very hard to put together a bill that may be less than perfect but is nonetheless good enough to enjoy wide bipartisan support--in and out of Congress. Let the AgJobs bill become law. It has been

painstakingly negotiated; it has made its peace with American agriculture's long "exceptionalism;" and it is a vast improvement over the status quo. Speaking crassly, perhaps, it also gets one of the most intractable issues on immigration (a true political "third-rail" on an issue seemingly full of third rails) out of the way--so that you can concentrate on the critical task at hand.

As this Subcommittee goes down the path of considering immigration reform seriously, two things might be worth emphasizing once more. First, no bill can become law without bipartisan support--a rather obvious observation. However, this is putting the bar too low and I will gladly raise it for you. Politically speaking, doing relatively small things on immigration will require as many political investments on all your parts as going for the big prize. It is both the nature of the issue and the degree of "brokenness" from which the system suffers. So, why not do it right this time?

In that spirit, I offer my own lessons from the last time we sought to address illegal immigration in a significant way, 1986, in the hope that in doing so, we might keep good governance from getting lost in the predictable ideological divides.

Reforms Past and Future

The last time we decided to tackle immigration reform in a fairly thorough way (the Immigration Reform and Control Act--IRCA) it took five years and many dozens of hearings, consultations, and briefings of various forms. The process was contentious. Most of that effort's protagonists have moved on. Some still serve on this body but have moved on to different issues--probably wisely. Senator Schumer is one of them. And one, Senator Kennedy, sits here again in a key role, just as he has done on all immigration matters since the mid-1960s. Senator, I don't know whether this represents good or bad judgment on your part; only history can judge that. But it does speak to a commitment, a depth of knowledge, and a level of experience that is unmatched by that of any other member of this Congress regardless of issue. Perhaps it is you, sir, who should be testifying and giving this partly historical part of the testimony that I present below.

The IRCA followed a three-pronged route to reform.

1. It allowed nearly 2.8 million illegally resident foreigners who met an array of different requirements to gain legal permanent resident status--about half of those estimated to be in the United States illegally at the time.
2. Simultaneously, it banned the hiring of foreigners who did not have work authorization and established various forms of legal liability for employers who broke the rules.
3. Finally, it committed to strengthening border controls, a policy which was not accompanied by increased resources until the mid-1990s.

Viewed through the lens of both human rights and economics, the 1986 reforms were in many ways successful. They brought millions of hard working, law-abiding people out of the shadows with absolutely no disruption to the economy. And two government reports on the labor market adjustments of the legalized population (I believe in 1990 and 1994) showed that most assumptions about the effects of legal status on the life chances of that population were vindicated.

In retrospect, however, the reforms did little to control future illegal immigration. So that we do not repeat the most easily avoidable mistakes of the past--and not create another batch of academic papers about the "unintended consequences" of Congressional action on immigration--

we should try to pull out some of the key lessons from our last experience with broad immigration reform in general and legalization in particular.

Lesson #1: Not Acknowledging the Robust and Growing Demand for Foreign Workers and Family Visas Is the Most Direct Path to Policy Failure

The 1986 law's first flaw was that it failed to address altogether the demand for foreign workers. No adjustments whatsoever were made to the visa system (at least until 1990) pretending that, in the language of the day, employers would be "weaned" from their already considerable reliance on foreign workers through a combination of an act of partial generosity (an amnesty) and an act of "tough love" (employer sanctions). The thought that reliance on (im)migrants had already become "structural" (that is, deeply imbedded in the economics of increasing segments on the US labor market and in the way in which our society was organizing itself) and that it was expanding, was something that few lawmakers were prepared to entertain.

It did not help that the fundamental architecture of the 1986 law was conceived of in 1981--a period of high unemployment, even higher interest rates, and a generalized sense of malaise. (As Senator Kennedy will recall, the outlines of IRCA were actually conceived by the Select Commission on Immigration and Refugee Policy earlier--during the even darker economic times of the very late 1970s.) By the time IRCA was enacted, however, the economy had rebounded and emerging labor mismatches (due to geography and skills) and even shortages, were already becoming the name of the game. So, IRCA's relevance may have been D.O.A. in many fundamental ways, even had it gotten most of the things it was trying to achieve right!

A plea, then, if I may: If we are going to go through the extreme pain of fundamental immigration reform, let's draft laws for "all seasons"--or, at a minimum, for more than one season. For whatever we do this next time, will define how we respond to immigration for the next couple of decades--a time funnel that will surely exaggerate our failures beyond whatever we can imagine today.

Nor did the law's employer sanctions manage to regulate the voracious demand for more work visas in jobs that few Americans were eager to do then (and are even more reluctant to do now). Penalizing employers for hiring unauthorized workers is a European invention that has never worked particularly well for the Europeans themselves--despite a tradition of heavy-handed governmental involvement in regulating labor markets, extraordinary expenditures (certainly by our standards), large and often specialized enforcement bureaucracies, and, in some instances, the creation of administrative courts focusing on prosecuting employers who violate immigration and other social insurance and social protection laws. In fact, in several of the strongest European economies, such as Germany, the underground economy--fed in large part through illegal immigration--has been growing in recent years at rates of between 5-7 percent annually! Given our loosely regulated labor markets and diverse workforce, can we do any better than Europe has done without anywhere near the financial investments we have been (and are likely to continue be) making? And can we do so without the discrimination that is always of concern to us and is finally beginning to be of concern to the Europeans? Finally, can we do so in light of, lip service aside, successive Democratic and Republican congresses and administrations having shown little appetite for strongly enforcing employer sanctions' rules?

However, employer penalties were not IRCA's only "tip-of-the-hat" to enforcement. Enhanced border controls were to be the other part of the law's one-two punch in "regaining control" over the issue. This one, however, arrived too late to make a difference by conveying the intended

signals to employers, would-be immigrants, and the rest of us. By the mid-1990s, when border enforcement and entry controls were really beginning to be funded, habits of illegal migration from Mexico had gone back to their pre-1986 pattern and the increased demand for low-wage labor was making "stopping" illegal immigration all but impossible.

Lesson # 2: Don't Do Things Halfway When it Comes to the Legalization Component of Comprehensive Immigration Reform.

The 1986 law's second major flaw was a shortsighted approach to legalizing immigrants. Most lawmakers fell into the intellectual and emotional trap of viewing legalization merely as an amnesty, that is, an act of generosity. The politics of the IRCA legalization drive as a result were limited to debates about how generous to be with the pardon of lawbreakers. Both the President's and, unsurprisingly, many of the reactions to his announcement seemingly reduced the proposals to fighting over the "A" word--if from different points. The problem is that difficult as the politics of the issue certainly are, any reform legislation that wants to meet the test of time with some dignity, must avoid setting arbitrary standards for legalization simply because amnesty is such a politically dreaded word.

IRCA offered people the opportunity to legalize only if they could demonstrate that they had been in the US "continuously" since before January 1, 1982. This is what the political marketplace of the day could bear, the authors of that law would argue. And they would be in large part right. Except that the public policy/good governance consequences of that line of political thinking are extremely troubling. In the politics of that day--come to think of it, they were probably no more propitious for serious reform than they may be today--lawmakers invested far too little effort in managing a public debate about those immigrants who didn't qualify. When the law was implemented in 1987, five years of illegal arrivals didn't qualify for regularization, yet had little incentive to leave. Those 3 million still illegal immigrants simply burrowed themselves into our communities, continuing to do essential work for all of us but in an even more unprotected legal environment, reunifying with their families from abroad legally or illegally, building new families and having American children, and seeding the next generation of illegal immigration that we are trying to address today.

Lesson #3: Beware of Creating Unnecessary Incentives for Fraud

One of the most immediate--if completely predictable--effects of this cut-off was the birth of a thriving document fraud industry, as immigrants scrambled to document their bona fides with proof (including affidavits) for all sorts of things from their prior life.

The 1986 experience demonstrates the need for a broader, more thoughtful and more flexible approach to immigration reform. Regularization is a worthwhile project, but we should approach it as an opportunity to strengthen our nation and deal with what has become a social and human rights issue of the first order, not just as an amnesty that so many Americans find distasteful. We should thus start from a different point: instead of asking people to prove when they arrived or were hired, matters easily subject to fraud and so simple that they risk appearing to reward illegal immigration, we should ask unauthorized immigrants to earn their new legal status.

Unauthorized immigrants could begin the regularization process by registering with immigration officials and then be given, say, three years in which to qualify. The criteria for regularization should be forward-looking, easily proven, and consistent with what we as a society consider

important. Steady employment, paying taxes, speaking English capably and having a clean criminal record are a good start. And the process should pay for itself by collecting a substantial but reasonable fee from the immigrants who are regularized.

Lesson # 4: Speak Unilaterally, if You Must, but Think and Act Bilaterally, Even Multilaterally. After All, This Is What the Administration Is Doing.

The final flaw of IRCA was an understandable lack of thinking beyond our borders. The 1986 law was conceived of as a purely domestic action, with no serious thought given to what Mexico and other countries could bring to the table. The debate was exclusively about our "sovereign right" to choose our immigrants and control our borders. Today, ten years after NAFTA, there is little dispute about the fact that our entry controls are stronger if they begin in Mexico, Canada, and elsewhere and that we can fight fraud and human smuggling better by cooperating with like-minded countries. I hope that we do not forget this lesson as we move ahead with comprehensive immigration reform.

Conclusion

If a comprehensive immigration accord becomes reality in the next few years, the shared reward of smarter, fairer, more orderly, safer, more economic-multiplier producing, and legal migration would certainly show ordinary Americans that we can have an immigration system that meets reasonable expectations of playing by the rules and benefiting our country as a whole. Looking back at the failures of the past, the President's vision for immigration reform appears incomplete, not misguided. He has been ambitious in setting this issue so starkly before the Congress and the American public, but his plan for change is not yet ambitious enough. However, our national discussion about immigration reform is just beginning, and there is still time to craft a plan that is complete and bold enough to not repeat the mistakes of the past.