

Overview of Key Immigration Issues Facing the Immigrants' Rights Movement

NATIONAL IMMIGRATION LAW CENTER

November 2007

In June 2007, the United States Senate rejected the comprehensive immigration reform proposal that had been crafted by a bipartisan group of Senators during months of closed-door meetings. The complex Senate proposal included essential one-time programs, such as backlog reduction for many families with close relatives now languishing in untenable immigration backlogs, the DREAM Act, Ag-JOBS and, although flawed and precarious, a path to quasi-legal status for most undocumented immigrants. But it combined these long-sought, one-time relief provisions with devastating changes in the permanent immigration laws that were punitive towards immigrants and would have upended fundamental principles of real immigration reform such as family unity, workers' rights, immigrant integration, and a more realistic future flow.

But even this flawed proposal generated virulent anti-immigrant sentiment. On the other side of the issue, many of those who supported the bill understood its deficiencies but hoped improvements would be made in the U.S. House of Representatives or in the House-Senate conference committee, or believed that the status quo was so intolerable that the bill would be better than nothing. In October 2007, the DREAM Act likewise faltered in the Senate, when the bill could not garner sufficient votes to proceed to a debate on its merits. The DREAM Act has gathered strength over the years, though, and its supporters remain optimistic, even in the face of congressional inaction and presidential opposition, that this is one place where positive legislation may pass.

The House of Representatives has shown no indication that it will take up immigration reform before the end of the 110th Congress in December 2008. Immigration as a theme will nonetheless play a heat-generating role in Congress in the coming months, likely to the detriment of immigrants. Proposals to magnify immigration enforcement without providing any new routes to legal status have already been introduced in Congress and are likely to be replicated before the November 2008 elections. Even without the enactment of new laws, federal immigration enforcement has dramatically expanded, causing communities to be disrupted and families to be torn apart. This increased enforcement cannot effectively cause the deportation of the millions of undocu-

mented immigrants in the U.S. But it creates fear and leaves them vulnerable to increased exploitation.

The increased enforcement at the federal level is compounded by increased immigration enforcement at the state and local levels, as bills at those levels multiply. Many are subject to challenge as impinging on federal authority to enforce immigration law.

Using divisive rhetoric, anti-immigrant forces have fomented discord among different groups in our society. They have exploited the real challenges that African American communities face by blaming many of the country's economic and social ills on immigrants. A challenge to immigrants and their advocates in the coming months will be not only to fend off the anti-immigrants proposals that will undoubtedly proliferate, but to find common ground inside and outside immigrant communities in the quest for real solutions.

This article focuses on the promise offered by the DREAM Act, as well as on some of the issues currently confronting the immigrant rights movement in the current difficult environment. It discusses enforcement at the federal, state and local levels, detention, the need for reform within immigration agencies, and immigrant access to driver's licenses. However, the challenges to immigrants go well beyond these issues.

THE DREAM ACT: 2007 AND BEYOND

In a time when anti-immigrant sentiment and nativism abound, and American communities are divided more than ever over the immigration debate, the DREAM Act has remained a sensible and viable solution to fixing a broken immigration system. While our communities wait for Congress to finish the hard work of legislative reform, eligible DREAM Act students continue to graduate from U.S. high schools with a roadmap leading nowhere.

The class of students who graduated from high school in 2001, when the DREAM Act was first proposed, is now 23 or 24 years old. Neither they nor the class that graduates this year can afford to put their lives on hold while Congress debates the more complicated issues involved in broader immigration reform. The DREAM Act would provide immediate

immigration relief for about 360,000 such young adults who were brought to the U.S. more than 5 years ago, have grown up here, and have already graduated from high school. Another 715,000 children who potentially could qualify are now in elementary or high school, observing the impact of today's laws on their older brothers and sisters and making their own choices about whether to remain in school or drop out.

For numerous reasons, enactment of the DREAM Act would make progressive immigration reform more achievable. The immigrant student movement has been a truly bottom-up grassroots effort that has engaged thousands of young and talented organizers and advocates. Their success would bring them out of the shadows for the first time, providing a plethora of feel-good stories that would do everyone proud who supported and voted for the act. In addition, as they emerge from the shadows, they will be empowered to advocate for their parents and, longer-term, as they progress economically they will bring money and development into the communities where they live.

Although it represented a defeat because 60 votes were needed, the Senate's 52-44 vote in favor of the DREAM Act this past October demonstrated the committed support that it continues to draw from both sides of the congressional aisle, a testament to DREAM Act students' powerful stories and the work of students and their allies at every level.

Support for the DREAM Act has grown each year since it was first introduced in 2001 during the 107th Congress. In May 2006, the DREAM Act for the first time passed the full Senate as part of the Comprehensive Immigration Reform Act of 2006 (S. 2611). This year, the DREAM Act was included in the comprehensive immigration legislation that failed to pass the Senate in the summer. Brought to the floor as a stand-alone bill (S. 2205), the DREAM Act was the subject of a filibuster. Although the act did not garner the 60 votes that would have been necessary to break the filibuster, it is important to note that in its first recorded floor vote ever, the DREAM Act was supported by a healthy majority of senators who were present, including 12 Republicans. All 4 senators who were unable to make the vote are listed as DREAM Act cosponsors.

Conventional wisdom suggests that no progressive immigration reform can be enacted in an election year. That may prove true, especially in this particular election year, when the anti-immigrant side is expected to be politically ascendant. But it is noteworthy that congressional election years are overrepresented in the annals of recent immigration reform, including 1986, 1990, 1996, and 1998. Once the

primary season ends, the presidential campaign landscape will be favorably transformed, because significant immigrant populations reside in several possible battleground states, including Nevada, Colorado, New Mexico, Arizona, Virginia, and Florida. It looks as though the Senate races will be close in Texas and Oregon, and there might also be more competitive House races with significant foreign-born populations than in 2006.

Democrats may be looking for ways to demonstrate that they can deliver some movement towards reform, and at least some Republicans may well be looking for ways to distance themselves from the harsh rhetoric of the anti-immigrant wing of their party. Incumbents of both parties may be looking for ways to demonstrate that they are willing to work together in a meaningful way to fix our broken immigration system. If so, and if immigrant communities continue their bottom-up grassroots efforts to raise the issue, the DREAM Act could well defy the odds in 2008 and become law.

EXPANDED DHS IMMIGRATION ENFORCEMENT

Over the past two years there has been a dramatic increase in efforts on the part of the Department of Homeland Security (DHS) to detain undocumented immigrants and remove them from the U.S. These efforts, making increased use of laws and regulations that permit removal without the fundamental due process protection of a hearing, have resulted in dramatic increases in the numbers of immigrants who are detained and removed. Some of these measures, such as workplace raids, are discussed separately in this manual under "Employment Issues"; the others are addressed below.

Over the past two years, DHS has adopted a very aggressive approach to immigration enforcement that prioritizes increasing arrest statistics. In going to neighborhoods ostensibly to apprehend noncitizens who have been ordered removed, immigration officers do not just look for the persons subject to removal orders, but instead aggressively question and detain anyone who may appear subject to removal. As a result, it has become increasingly common for large numbers of immigrants to be arrested as "collateral" arrests during raids on neighborhoods. As one measure of the increase in this activity, the DHS press office reports that the agency increased its "fugitive operations teams" from 15 in 2005 to 75 as of November 6, 2007.

DHS also has expanded its use of expedited removal. This procedure, authorized by Immigration and Nationality Act (INA) section 235(b), enacted as

part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), allows immigration officers in certain circumstances to issue orders of removal against noncitizens who have not been lawfully admitted or paroled into the U.S., resulting in their summary removal from the U.S. without a hearing or review before an immigration judge. Under the statute, immigration officers may invoke expedited removal when they determine that an “arriving alien” is inadmissible for (1) having procured an immigration benefit through fraud or misrepresentation, or (2) lacking a valid visa or other entry document. Persons who express fear of return to their home country or ask for asylum must be interviewed to determine whether they have a “credible fear,” in which case they may apply for asylum but generally are subject to detention.

The statute permits DHS to use expedited removal procedures not only against immigrants seeking admission at the border, but also against immigrants who entered the U.S. without inspection and have not been continuously present in the U.S. for at least two years. Initially the former Immigration and Naturalization Service (INS) implemented the statute only against immigrants seeking admission at the border, but in August 2004 DHS published a notice in the Federal Register announcing the immediate expansion of expedited removal to apply to noncitizens encountered within 100 miles of the border who entered the U.S. without inspection less than 14 days before their apprehension. 69 FR 48,877-81 (Aug. 11, 2004). Due to resource limitations, DHS initially implemented the procedure only in select Border Patrol sectors: Tucson, McAllen, and Laredo. But in September 2005, the agency expanded the use of the procedure to all nine Border Patrol sectors along the southwest border, and in January 2006 the agency expanded the use of the procedure to all areas within 100 miles of the border, including coastal areas.

The expansion of the use of expedited removal is particularly troubling in light of DHS’s failure to address the findings and recommendations of the U.S. Commission on International Religious Freedom (USCIRF). Congress established the USCIRF in 1998 as an independent and bipartisan federal commission, mandating it to conduct a study of expedited removal to determine how the procedure was affecting asylum-seekers. The USCIRF employed experts who conducted an extensive study, including direct observation of expedited removal interviews. The USCIRF issued its *Report on Asylum Seekers in Expedited Removal* in February 2005. The study found serious deficiencies in the implementation of expedited removal. Among other problems, immigration officers frequently failed to provide noncitizens with

required information regarding the availability of protection under U.S. law for persons fearing torture, and officers often failed to ask noncitizens about their reasons for leaving their home country. Officers also were observed discouraging noncitizens from pursuing asylum claims. The study called for DHS to implement and monitor quality assurance procedures.

In February 2007, on the two-year anniversary of the study, the USCIRF issued a report card finding that DHS has failed to implement most of the commission’s recommendations and that the problems with respect to the conduct of expedited removal that the USCIRF study identified remain.

Another procedure enacted as part of IIRIRA permits noncitizens to stipulate to their removal from the U.S. INA § 240(d), 8 U.S.C. § 1229a(d). DHS interprets this provision to permit noncitizens to waive their rights to a hearing and any relief from removal without ever appearing before an immigration judge. Some immigration judges have refused to approve stipulated orders because it is not possible to ascertain from the forms used for the procedure that the noncitizen who signed for removal understood his or her rights and voluntarily decided to waive those rights. However, other immigration judges do approve such orders, and DHS has made increased use of the procedure in the last two years.

Reinstatement of removal is yet another procedure created by IIRIRA that results in removal without a hearing. The statute — INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) — provides that noncitizens who return to the U.S. unlawfully after having been removed may have their removal orders “reinstated” and be summarily removed. The statute provides that in such cases the noncitizen may not reopen the case or apply for any new relief. Although the statute does not address whether individuals should be afforded a hearing to determine whether reinstatement applies to them, the regulations implementing the statute provide for the entry of orders with no hearing. In *Fernandez-Vargas v. Gonzales*, 126 S.Ct. 2422 (2006), the U.S. Supreme Court ruled that the procedure applies to individuals whose unlawful return to the U.S. occurred prior to the April 1, 1997, effective date of the reinstatement statute.

Finally, DHS has expanded the criminal prosecution of immigrants. Operation Streamline started as a pilot project in the Del Rio, Texas, Border Patrol sector in December 2005. Characterized by DHS as a “zero tolerance” policy, the operation targets for criminal prosecution all non-Mexican noncitizens who enter the U.S. without inspection. The prosecutions for the criminal misdemeanor offense of entry without inspection result in sentences of 30-90 days. After spending their sentences in Texas jails, most

immigrants subject to the operation sign stipulated removal orders. Even immigrants with valid claims for asylum or other relief generally sign for removal, and the procedure effectively discourages such claims. The operation was expanded to the Yuma, Arizona, Border Patrol sector in December 2006, and to the Laredo, Texas, Border Patrol sector last October. DHS reportedly plans to expand the operation to other areas in Arizona in January.

LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW

One of the most troubling aspects of recent immigration enforcement is the degree to which state and local police have become involved in the enforcement of federal immigration law. Their role is undocumented, unmeasured, and largely unchallenged.

The movement to turn state and local police into immigration enforcers has happened despite Congress's repeated failure to enact into law bills such as the Clear Law Enforcement for Criminal Alien Removal Act (CLEAR Act), which would grant clear immigration enforcement authorization to state and local police. The CLEAR Act disingenuously claims to simply recognize that state and local police have "inherent authority" to enforce immigration law.

Localities continue to enact ordinances and resolutions that limit the role that their officers play in immigration enforcement. Congress also has failed to enact provisions — generally offered as amendments to appropriations bills — that would outlaw these policies, which are intended to protect the confidentiality of immigration information.

Many police departments continue to recognize the benefits of community policing that encourages all victims, whether immigrant or not, to come forward to report crimes. Police groups such as the Major Cities Chiefs Association continue to be wary of police enforcing immigration law because they recognize that safety is undermined for the whole community if immigrants, because they fear deportation, are afraid to report crimes to the police.

Despite this, increasing numbers of local governments are entering into agreements with U.S. Immigration and Customs Enforcement (ICE) under section 287(g) of the Immigration and Nationality Act. According to ICE, 597 officers in 34 state and local law enforcement agencies participate in the program. Seventy-five percent of those agencies joined in 2007. States that have agencies in the program are Alabama, Arkansas, Arizona, California, Colorado, Florida, Georgia, Massachusetts, North

Carolina, New Hampshire, New Mexico, Oklahoma, South Carolina, Tennessee, and Virginia. The vast majority of the agreements are with cities or counties. The agreements are divided between those that focus on identifying undocumented immigrants in prisons and jails, and those that allow for immigration enforcement as police carry out their regular policing duties.

These agreements are characterized by an absence of independent monitoring to ensure that racial or ethnic profiling does not occur, that the parameters of the agreements are obeyed, and that the involved officers do not abuse their authority. While complaint procedures exist under the agreements, they are unpublicized and unknown to the general public. As a result, few complaints are filed, though anecdotal accounts of police abuse abound.

Moreover, it is clear that state and local officers are in effect enforcing immigration law outside the 287(g) agreements, even though federal legislation authorizing it has not passed. This enforcement is notoriously difficult to track and document. Immigrants often are not sure how they ended up in immigration custody. They often are unrepresented by attorneys and are likely to be detained in immigration jails far from where they were initially arrested and where the evidence about the arrest exists. In any event, the legal hurdles to challenging a wrongful arrest are high.

The ability of state and local police to enforce immigration law has been facilitated by the U.S. Department of Justice's continued policy of entering civil immigration information into the National Crime Information Center (NCIC) criminal database. This is the database to which police officers throughout the country have access. This policy was challenged in a lawsuit filed in New York several years ago. After an inordinate delay, the judge dismissed the case, ruling that the immigration organizations that had filed the lawsuit did not have standing to do so. That case is on appeal. In the meantime, the pressure for police to enforce immigration law continues unabated.

IMMIGRATION DETENTION CONDITIONS UNDER HEIGHTENED SCRUTINY AS DETENTION CONTINUES TO EXPAND

The Bush administration's immigration enforcement campaign in the interior of the country has led to stepped-up immigration raids in neighborhoods, at bus stops, and at worksites from meat-packing plants to the local McDonald's. These ICE

raids not only have terrorized immigrant families and raised serious due process, civil liberties, and humanitarian concerns, they also have resulted in a dramatic rise in the number of detained immigrants, both documented and undocumented. Even more immigrants wind up in detention as a result of state and local law enforcement attempts to stand in the shoes of federal immigration agents. These recent federal and state enforcement activities only exacerbate the trend firmly established by federal legislation in 1996 that vastly expanded the categories of immigrants, including lawful permanent residents, subject to mandatory detention while they pursue claims to remain in the U.S. That year, only 9,000 immigrants were in immigration detention per day. By 2006, the number had tripled to 27,000. Over the course of 2006, ICE held a total of about 230,000 immigrants in detention.

Immigration detainees enter a woefully unregulated detention system. Although ICE has national standards outlining basic detention requirements, core elements of the standards are not legally enforceable. As a result, detained immigrants may be unable to win meritorious cases for relief from removal, such as asylum, because of the tremendous obstacles posed by detention, including lack of access to counsel and basic legal materials. Recently, however, independent agencies, advocates, and even government agencies have focused public attention on the substandard conditions immigrants face while detained by ICE.

On July 6, 2007, the Government Accountability Office (GAO) released a report finding “pervasive” problems with the phone systems in detention centers across the country. At virtually each of the 23 facilities it visited, the GAO encountered problems with the phone system that limited detainees’ ability to place calls free of charge as required under the ICE National Detention Standards. The report also raises concerns about ICE’s annual inspection process for detention facilities, which often dramatically under-reports violations of the standards. As a result of this report, ICE has agreed to take much-needed action to improve detainees’ access to phones. But ICE (as well as its predecessor agency, the INS) has made similar promises before.

Recent reports also have highlighted long-standing problems that detainees face in obtaining the most basic medical care. At the end of June, the *New York Times* reported a new tally of the number of immigrants who have died in detention — 62 since 2004. Before ICE disclosed this number to the *Times*, advocates only knew of approximately 20 deaths during this period. See Nina Bernstein, “New Scrutiny as Immigrants Die in Custody,” *New York*

Times, June 26, 2007. Many of these deaths could have been prevented had ICE adhered to its own standards regarding medical care and diagnosed and treated basic medical problems. On October 4, 2007, the House Judiciary Committee held a hearing on the problems with the provision of basic medical care for immigration detainees.

Litigation also has brought condemnation of, or sometimes helped improve, immigration detention conditions. In a July 2007 decision, U.S. District Court Judge Margaret M. Morrow found that the government had committed serious violations of its own standards relating to detention conditions. The judge’s findings came in a ruling that upheld a nationwide injunction to provide basic protections to nationals of El Salvador who seek asylum in the U.S. The court examined never-before-released reports regarding conditions at more than 200 immigration detention facilities and found widespread problems, including lack of access to telephones, attorneys, and legal materials, faced by thousands of immigrants seeking asylum or pursuing legitimate claims to legal residence in the U.S. In August 2007, ICE settled a challenge brought by the ACLU to the conditions of confinement for immigrant families with children detained at its Hutto detention facility in Texas. The settlement will ensure that children and families held at the facility enjoy the right to move freely and have adequate medical care and educational opportunities, among other provisions.

DHS REFORM

DHS’s U.S. Citizenship and Immigration Services (USCIS) bureau and its predecessor agency, the INS, have historically been plagued by incompetence, backlogs, and errors in implementing immigration laws. For over a decade, the GAO and both the Department of Justice’s and, more recently, the DHS’s Offices of the Inspector General have found chronic inaccuracies in the agency’s records, failure on the part of the agency to keep pace with its responsibilities, and other large-scale errors that hinder immigrants’ ability to adjust to lawful status in a timely fashion or to stay in their current status. This pattern of USCIS incompetence and error has drastic results for immigrants, whose immigration status or work authorization is often compromised as a result.

At the most basic level, the agency simply cannot keep up with its current workload. For example, a 2006 study found a tremendous visa application backlog, and the backlog of naturalization adjudications is significant and growing as well. Most recently, USCIS is lagging behind with its ministerial job issuing receipts for immigration applications,

causing a delay of months for applicants to receive just an acknowledgement that USCIS has received their applications. The result is that more and more immigrants are facing long and avoidable waits before they can even begin the process to sponsor their relatives or to prove they are authorized to be employed in the U.S.

Agency databases are also riddled with errors, due to the agency's inability to keep up as well as to failures in data entry. As a result, information in databases used by the Basic Pilot/E-Verify electronic employment eligibility verification program is often inaccurate, so that immigrants with work authorization may be incorrectly identified by E-Verify as lacking authorization. Mismanagement at the agency also has led to the loss of important immigration files. For example, USCIS lost over 111,000 files in the 14 busiest offices across the nation responsible for two-thirds of naturalization applications in 2006.

Comprehensive immigration reform failed in 2007 for reasons other than USCIS's disorganization, incompetence and inability to carry out its basic functions, but the current state of affairs at DHS presents an opportunity for advocacy to reform the agency. Any legislative or administrative proposal to task the agency with additional responsibilities must be viewed against the backdrop of the agency's chronic incompetence and lack of ability to adequately perform its current tasks. Of particular concern are proposals to limit review of immigration decisions to administrative appeals within DHS rather than allow review by the courts. For example, the limited judicial review available under proposed legalization programs is particularly problematic in light of DHS's consistent error rates and inability to timely adjudicate matters under its purview.

Immigration restrictionists who call out for increased enforcement of immigration laws have not paid the slightest attention to USCIS's inability to, in a timely and systematic way, grant immigration benefits to those who are eligible for them. A campaign to get the agency to implement its core functions would not be a tradeoff against increased enforcement. It would simply be a demand for the agency to do what the law requires it to do and to provide status even to those who already qualify.

DRIVER'S LICENSES AND THE REAL ID ACT

Issuance of driver's licenses — traditionally a state issue — became a federal issue with the passage of the REAL ID Act in 2005. REAL ID was signed into law without hearings or committee consideration and without even being voted on in the Senate. The

REAL ID Act prevents the federal government from accepting state driver's licenses as identification unless they meet the act's requirements by 2013. In addition to the many burdensome requirements put on states regarding information-sharing, technology, and better securing of facilities that produce driver's licenses, REAL ID also requires that driver's license applicants prove that they are U.S. citizens or are in certain lawful immigrant categories.

In the last year, state opposition to REAL ID has been strong, although primarily due to privacy and cost concerns. To date, 16 states have passed laws or resolutions stating that they will either not participate in REAL ID or will do so only when certain conditions have been met. Legislation or resolutions also have passed at least one chamber in an additional 11 states. At the federal level, Senators Sununu (R-NH) and Akaka (D-HI) (S.717) have sponsored legislation that would repeal the REAL ID Act and return to a process of negotiated rulemaking on driver's license standards that was established in a law passed in 2004 and then repealed only a few months later by REAL ID. That law did not set citizenship or immigration requirements for driver's license issuance.

DHS, which has the responsibility of issuing REAL ID regulations, delayed about two years in issuing proposed regulations for the law's implementation. Those proposed regulations extended the date for states to comply with the law's requirements and created certain flexibility in how states must meet the requirements. But it created no flexibility for the immigration requirements. To date, DHS has not issued final regulations.

Millions of immigrants in the U.S. lack access to state driver's licenses and identification cards due to immigration status restrictions that affect documented and undocumented individuals alike. Without these documents, immigrants face enormous challenges in everyday life when they need to drive to work, take their children to school, open a bank account, or rent an apartment. When immigrants are victims of crime, they may be reluctant to contact the police, or police officers may be unable to report crimes committed against individuals because the victims cannot present identification.

Unfortunately, anti-immigrant activists, often masquerading as security experts, have capitalized on the country's heightened concern about terrorism to claim that immigration status driver's license restrictions will enhance our national security. The true security experts, meanwhile, have been clear — though less vocal and dramatic in their claims — that it actually makes the country safer when everyone has access to identification. In addition to the security benefits, many other positive public policy out-

comes result when all people, regardless of their immigration status, have access to licenses and identification. For example, it is established fact that people who are licensed know the rules of the road better than those who are not, and that they are more likely to have auto insurance. People with identification are more willing to have contact with the police, which is critical for community policing programs that depend on trust between police and their communities. When drivers are able to identify themselves and prove their authorization to drive, people and courts do not have to divert resources to identify the identity of people who pose no threat to national security or to their communities.

Driver's licenses have a critical connection to the issue of state and local police enforcing immigration law. Purported driving violations are a critical point of contact with the police and are often a pretext for stopping drivers who "look" or "sound" foreign. That initial stop is often the gateway for inquiries about immigration status, which, though not authorized by law, can lead to devastating immigration consequences.

As we move into an election year in 2008, the negative rhetoric on this issue will likely intensify. False claims that immigration status restrictions will enhance national security continue to have considerable power as a justification for enacting measures that harm immigrants. The indisputable facts regarding the events of September 11, 2001, are easily ignored in favor of emotional and factually incorrect arguments, and immigrant advocates are at a serious disadvantage in media coverage of these issues. New York Governor Eliot Spitzer's recent announcement that he will rescind his proposal to grant driver's licenses to all New York residents, regardless of their immigration status, represents a sad triumph of politics over rational public policy. Although the opposition to Spitzer's policy was motivated in part by frustration with our flawed immigration system, fear-mongering also played a big role. It is a shame that this rhetoric prevailed over a common-sense approach to making all New Yorkers safer. The New York saga makes clear that driver's licenses will be a treacherous battleground for immigrants' rights.