

Overview of Key Immigration Issues Facing the Immigrants' Rights Movement

NOVEMBER 2009

Immigration reform once again hovers on the horizon, but its prospects and timing are uncertain. President Obama has given mixed signals. He has regularly acknowledged that the immigration system is broken and comprehensive reform is required. But how hard he will push — and when that push might occur — remain unclear. His recent actions in the health care reform sphere are not encouraging. Going beyond the expected opposition to undocumented immigrants having access to subsidies in health care reform legislation, he also has unequivocally opposed allowing undocumented immigrants access to state exchanges through which they might purchase health insurance at full cost. This capitulation to Republican demands for harsh treatment of immigrants concerns advocates who fear a repeat when immigration reform is finally considered.

Immigration did not play a central role in the 2008 elections. And as the economy has worsened, states and localities have had to reconsider the economic and social costs of taking immigration enforcement upon themselves. But the downturn in the economy has not caused the massive self-deportation that anti-immigrant forces predicted, and the need for federal immigration reform continues unabated. Conventional wisdom says it has to happen well in advance of the 2010 elections, or it won't happen at all during the first Obama administration.

In the House of Representatives, Rep. Luis Gutierrez (R-IL) has announced that he will introduce immigration reform legislation in the near future. His bill is expected to be a "marker bill," unlikely to be passed but setting out progressive immigration reform concepts. He has not revealed specifics, but the principles he has announced include a pathway to legalization for undocumented workers, interior enforcement that includes fair immigration proceedings and protecting community policing, an improved employment eligibility verification system, managing future flow by establishing a commission that would match visa numbers with market demands, both AgJobs and a strengthened DREAM Act,

and committing federal resources to immigrant integration.

Sen. Charles E. Schumer (D-NY), chair of the Immigration Subcommittee of the Senate Judiciary Committee, has announced that he, too, will offer immigration reform legislation. The principles he has announced are more vague than those outlined by Rep. Gutierrez, containing a mix of operational control of the borders, required registration of undocumented persons, focus on family reunification, and managed future flow. His announced inclusion of a biometric-based employment eligibility verification system has attracted attention, troubling privacy advocates, who oppose the conversion of the Social Security card into a national identity card applying to all in the U.S. Immigrants' rights advocates also fear that this proposal will apply only to immigrants, subjecting them to the inaccuracy of immigration and Social Security databases and discrimination by employers.

Sen. Schumer has also ceded drafting of immigration enforcement provisions, including those related to an employment eligibility verification system, to the U.S. Department of Homeland Security (DHS). That concerns immigrants' rights advocates, who predict an expansion of the enforcement programs currently in place. Immigrant and civil rights advocates have pointed out that Sen. Schumer's announced principles leave out cures for deficiencies in recent immigration laws and policies, including any mention of enforceable detention standards, community-based alternatives to detention, right to a fair day in court, access to counsel, opposition to initiatives that pull state and local law enforcement into federal immigration enforcement (including the section 287(g) program and the Secure Communities initiative), protection of civil rights of non-U.S. citizens, and a responsible and accountable border policy.

While the Obama administration's commitment to immigration reform is uncertain, its commitment to stepped-up immigration enforcement is not. According to the Transactional Records Action Clearinghouse (TRAC), criminal prosecutions for immigration viola-



LOS ANGELES (Headquarters)
3435 Wilshire Boulevard
Suite 2850
Los Angeles, CA 90010
213 639-3900
213 639-3911 fax

WASHINGTON, DC
1444 Eye Street, NW
Suite 1110
Washington, DC 20005
202 216-0261
202 216-0266 fax

tions have surged this year, following in the path of increased criminal prosecutions in the Bush years. And the nature and location of the charges are changing. While charges related to crossing the southern border comprise the bulk of the criminal charges, the greatest projected increase in prosecutions involves fraud and related activities involving identity documents in the Southern District of New York.

Likewise, the federal government has expanded the entanglement of state and local law enforcement authorities in immigration enforcement. Though immigration advocates across the country and the Congressional Hispanic Caucus have called for an end to section 287(g) agreements, under which states and localities can enforce immigration law, the administration has expanded the program, along with other programs such as Secure Communities and the Criminal Alien Program, under which noncitizens (and sometimes citizens) are channeled from the criminal justice system into the immigration enforcement system.

The Obama administration may be trying to make the case that it is tough on enforcement in advance of immigration reform. But the mechanisms it is putting in place will outlast any potential reform.

This article focuses on the promise offered by the DREAM Act, enforcement at the federal, state and local levels, and detention. However, the challenges currently facing immigrants and their advocates go well beyond these issues.

■ The DREAM Act: 2009 and Beyond

While our communities wait for Congress to finish the hard work of legislative reform, students who would be eligible to legalize their immigration status under the Development, Relief, and Education for Alien Minors (DREAM) Act, were it to become law, 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 25 or 26 years old. Neither they nor the class that graduated this year can afford to continue to put their lives on hold. The DREAM Act would provide immediate immigration relief for about 360,000 such young adults who were brought to the U.S. more than five 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.

The DREAM Act was reintroduced in the House and Senate on March 26, 2009. The bill was introduced in the Senate by Senators Richard Durbin (D-IL) and Richard Lugar (R-IN), and in the House by Representatives Howard Berman (D-CA), Lincoln Diaz-Balart (R-FL), and Lucille Roybal-Allard (D-CA). Support for the DREAM Act has grown each year since it was first introduced in 2001 during the 107th Congress. It has twice passed the Senate Judiciary Committee in bipartisan fashion, by a 16-3 vote in the 2003–04 108th Congress, and again in 2006 by a voice vote without dissent as an amendment to the comprehensive immigration reform bill. In May 2006, the DREAM Act passed the full Senate as part of the Comprehensive Immigration Reform Act of 2006 (S. 2611). On October 24, 2007, on a 52-44 vote in the Senate, the DREAM Act (S. 2205) fell just 8 votes shy — with four senators absent for the vote — of the 60 votes necessary to proceed with debate on the bill.

The DREAM Act continues to attract bipartisan support, with 105 cosponsors in the House and 30 cosponsors in the Senate, and which includes, for the first time, the strong backing of the House and Senate leadership, all of the relevant committee chairs, as well as President Obama and Vice President Biden, both of whom were cosponsors of the Senate bill when they were in that body.

■ Expanded Dept. of Homeland Security Immigration Enforcement

The past two years have seen a continued increase in efforts on the part of 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. Thus, whereas in fiscal year 2007 U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) took into custody a total of 277,599 noncitizens, DHS has estimated the total de-

tained in fiscal year 2009 to be 369,483, an increase of over 91,000.¹

Under the Obama administration, ICE has shifted away from the practice of conducting large-scale immigration raids at workplaces and in neighborhoods. Instead, the agency has prioritized expanding the apprehension of immigrants through programs that operate in conjunction with state and local law enforcement agencies, such as the Criminal Alien Program (CAP), 287(g) agreements, and Secure Communities. At present, approximately 48 percent of noncitizens taken into custody by ICE come to the agency via CAP, and another 12 percent via 287(g) agreements.² Notably, although both these programs are ostensibly targeted at apprehending criminals, approximately 57 percent of immigrants apprehended via the CAP program in fiscal year 2009 and 65 percent of those apprehended via 287(g) agreements did not have criminal convictions.³ (More detail on state and local law enforcement is provided below.)

The past two years have also seen a steady increase in the use of procedures that result in removal without the fundamental due process protection of a hearing. These include expedited removal, a procedure authorized by Immigration and Nationality Act (INA) section 235(b), which was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Expedited removal 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 January 2006 the agency expanded the use of the procedure to all areas within 100 miles of the border, including coastal areas, applying it to noncitizens who the agency determines entered the U.S. without inspection less than 14 days before their apprehension.

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 had 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.⁴ 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. Data provided by the government in 2008 in response to a request under the Freedom of Information Act (FOIA) reveals that the use of stipulated orders dramatically increased between 2004 and 2008. The government began to implement stipulated removal in earnest in 2004, when 5,481 orders were entered nationwide. In 2005, that number nearly tripled to 15,733. The dramatic growth in the use of stipulated orders continued in 2006 (when 26,012 stipulated orders were

¹ Dora Schriro, *Immigration Detention Overview and Recommendations* (U.S. Dept. of Homeland Security, Oct. 6, 2009), www.ice.gov/doclib/091005_ice_detention_report-final.pdf (last visited Nov. 5, 2009), at 12. The figure for fiscal year 2009, which ended Sept. 31, 2009, is a projection made in June 2009, when this report was drafted.

² *Id.*

³ *Id.*

⁴ INA § 240(d), 8 U.S.C. § 1229a(d).

signed) and 2007 (when 31,554 stipulated orders were signed). The FOIA data did not cover all of 2008, but a projection based on the portion of the year that was provided results in a projected total of stipulated orders for 2008 of 34,890.⁵

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 those who fear persecution or torture may seek withholding and relief under the Convention Against Torture.

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 generally result in sentences of 30-90 days. After spending their sentences in local 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 has been expanded to other parts of Texas as well as all of Arizona. Operation Streamline is a major cause of the increase in immigration criminal prosecutions, which rose from 39,458 in fiscal year 2007 to nearly 80,000 in fiscal year 2008, and have continued to rise under the Obama administration.⁶

■ 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 fed-

eral immigration law. Their role is largely unregulated and unchallenged.

The movement to turn state and local police into immigration enforcers has occurred despite Congress’s repeated failure to enact legislation 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 increasing involvement of state and local agencies in immigration enforcement has occurred primarily through a merger of the state and local criminal justice system and the federal immigration enforcement apparatus, making legislation like the CLEAR Act unnecessary. The resulting entanglement of immigration enforcement with the criminal justice system makes this form of enforcement difficult to track and challenge, all the while diverting resources from law enforcement’s traditional role of protecting community safety.

ICE has organized local collaboration in immigration enforcement under its umbrella program, “Agreements of Cooperation in Communities to Enhance Safety and Security” (ICE ACCESS). ICE ACCESS offers localities a menu of options for participating in immigration enforcement; the three most significant of these programs are the 287(g), the Criminal Alien Program (CAP), and Secure Communities. While each program is separate, the programs often overlap and can operate simultaneously in the same jurisdiction.

Named after the section of the INA that enacted it, 287(g) cross-designates local law enforcement officers to enforce federal immigration laws. State and local agencies enter into a memorandum of agreement (MOA) with ICE, pursuant to which law enforcement officers become deputized immigration enforcement officers. According to ICE, “More than 1075 officers have been trained and certified through the program under 67 MOAs (61 Mutually Signed; 6 Agreements in Principle).”⁷ 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. DHS purported to address the problems associated with the program by drafting a new,

⁵ Jayashri Srikantiah and Karen Tumlin, *Background: Stipulated Removal* (NILC and Stanford Immigrants’ Rights Clinic, Nov. 2008),

www.nilc.org/immlawpolicy/removpsds/stipulated-removal-bkgrndr-2008-11.pdf (last visited Nov. 5, 2009).

⁶ *Operation Streamline Fact Sheet* (ACLU and National Immigration Forum, July 21, 2009), www.immigrationforum.org/images/uploads/OperationStreamlineFactsheet.pdf (last visited Nov. 5, 2009).

⁷ See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act: The ICE 287(g) Program: A Law Enforcement Partnership* (ICE webpage dated Oct. 28, 2009), www.ice.gov/pi/news/factsheets/section287_g.htm (last visited Nov. 5, 2009).

standardized MOA that all currently participating jurisdictions were required to sign, as well as those jurisdictions wishing to participate in the future. But the changes made in the MOA are cosmetic at best and, in some cases, represent a regression. Thus, there is every reason to believe that the program's history of mismanagement and civil rights abuse will continue.

Unlike the 287(g) program, which was explicitly authorized in the INA, ICE developed CAP and Secure Communities without any specific authorization and has yet to issue regulations governing the operation of either program. CAP focuses on identifying non-U.S. citizens who are incarcerated within federal, state, or local prisons and jails. Participating facilities notify ICE of foreign-born detainees in their custody based on information obtained from the booking process. Of those flagged, ICE then selects a handful for immigration interviews. According to ICE, as of March 2008, all federal and state facilities and about 10 percent of the approximately 3,100 local jails around the country were screening arrestees through the CAP program.

Secure Communities is essentially a technology-intensive version of CAP, allowing instantaneous information sharing among local jails, ICE, and the Federal Bureau of Investigations (FBI). During booking, arrestees' fingerprints are checked against the DHS databases, rather than just against FBI criminal databases. Secure Communities currently operates in 81 jurisdictions, spanning 9 different states. The agency expects it to be fully implemented in every jail and prison throughout the country by 2013.

Under both CAP and Secure Communities, after the initial screening by local officials, ICE conducts an immigration interview and determines whether to place a detainer (or immigration hold) on the individual in custody. ICE has not released guidelines or procedures regarding how it makes the determination of whom to interview or when to place a detainer. Yet, the existence of a detainer can affect release on bond or access to diversion programs. The data show that the average incarceration period for individuals with a detainer was significantly longer than those arrested for the same crime, but without a detainer.

Although ICE asserts that the purpose of these programs is to target serious criminals, the figures demonstrate that low-level offenders, for example individuals arrested for misdemeanor traffic violations, are the primary targets. Because these programs operate with very few guidelines or a focus on convictions for serious crimes before subjecting the individual to immigration screening, the programs in effect create incentives for the use of racial profiling and pretextual arrest. For this reason, police groups such as the Major Cities Chiefs Association and the Police Foundation have publicly

raised concerns about the ICE ACCESS programs.

These groups recognize that safety is undermined for the whole community if immigrants, because they fear deportation, are afraid to report crimes to the police.

Despite the civil rights and other concerns raised by involving state and local law enforcement agencies in immigration enforcement, all of the ICE ACCESS programs are set to grow: Congress is allocating a staggering \$200 million for expansion of Secure Communities alone. Thus the battle for immigration enforcement in line with the most basic constitutional protections remains center-front of an ongoing need for comprehensive immigration reform.

■ Immigration Detention Conditions under Heightened Scrutiny as Detention Continues to Expand

ICE has continued to hold record numbers of immigrants in detention, despite revelations of serious violations of the most basic standards for such detention, including repeated instances of detainee deaths due to lack of basic medical care. The steady growth of the detained population is dramatically illustrated by the following numbers: whereas in 1996 an average of 9,000 immigrants were held in immigration detention in any one day, by 2006 this number had tripled to 27,000, and by September 2009, it was over 31,000.

A series of reports released this year have shed light on the woefully unregulated immigration detention system. They include *Unseen Prisoners: A Report on Women in Immigration Detention Facilities in Arizona* (Southwest Institute for Research on Women and Bacon Immigration Law and Policy Program, U. of Arizona, Jan. 2009); *Dying for Decent Care: Bad Medicine in Immigration Custody* (Florida Immigrant Advocacy Center, Feb. 2009); *Detained and Dismissed: Women's Struggles to Obtain Health Care in United States Immigration Detention* (Human Rights Watch, Mar. 2009); and *Jailed Without Justice: Immigration Detention in the USA* (Amnesty International, Mar. 2009).⁸

Although ICE has national detention standards that set out basic requirements for immigration detention, they were issued as guidelines rather than legally enforceable regulations, and they are widely violated. In July 2009, NILC, together with the ACLU of Southern California and the international law firm Holland & Knight, LLP, released a comprehensive report based on a two-year review of hundreds of ICE, American Bar

⁸ These reports and others may be accessed via NILC's "Arrest and Detention" webpage, www.nilc.org/immlawpolicy/arrestdet/index.htm.

Association, and United Nations High Commissioner for Refugees detention facility review reports that had been withheld from the public but were obtained through litigation.⁹ These reviews showed that detention centers were permitted to continue in operation year after year despite significant violations of the standards. The report includes a number of policy recommendations to address the persistent and pervasive violations of basic standards, the foremost recommendation being a call for ICE to establish a core set of the national detention standards as enforceable regulations, in order to ensure that detention centers take action to correct violations of the standards.

However, in July 2009 ICE expressly rejected this recommendation in response to a petition for rulemaking that was submitted in January 2007 by dozens of immigrant detainees and advocacy groups. In its response, the agency relied upon its efforts to improve the monitoring of detention facilities in contending that enforceable standards are not necessary for protecting the rights of detainees.

In October, ICE released its own study of the immigration detention system, which was written by Dr. Dora Schriro, who had been appointed director of ICE's Office of Detention Policy and Planning.¹⁰ This noteworthy report recognizes that the immigration detention system is wrongly based on the criminal justice incarceration system, since immigration detention is civil and not for the purpose of punishment. The report calls for the development of new immigration detention standards reflecting the legal requirements of the detained population, and that any future ICE detention centers be designed, constructed, staffed and operated to reflect these standards. The report also calls for an expansion of alternatives to detention programs. And it calls for the development of an online tracking system for detainees, to enable attorneys and relatives to locate detainees, who are often sent to remote detention centers after they are apprehended by ICE. However, despite the report's frank acknowledgment of the enormous problems that exist with the current immigration detention system, its recommendations are short-term and limited, and they fail to address the size of the problems.

Litigation also has brought condemnation of, or sometimes helped improve, immigration detention conditions. In an April 2009 decision, the U.S. Court of

Appeals for the Ninth Circuit upheld a district court ruling denying the government's motion to dissolve the long-standing *Orantes* nationwide permanent injunction, based in large part on the district court's findings that the government had committed serious violations of its own standards relating to detention conditions. The ruling 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 September 2009, ICE settled a challenge to the conditions of confinement for immigrants held at the ICE Los Angeles Staging Facility, also known as "B-18," which is the room number of this detention area located in the basement of the downtown Los Angeles Federal Building. Although the facility is a holding area for short-term detention not exceeding 12 hours, at the time the lawsuit was brought many detainees were spending weeks and even up to two months at the facility. Detainees sometimes spent the night at the facility, despite its complete lack of beds, and more commonly were shuttled to local city jails late at night and returned to B-18 early in the morning. As a result, detainees were held for weeks without basic hygienic requirements such as a change of clothing, regular showers, access to toothbrushes and toothpaste, as well as access to writing materials and information about their legal rights, much less law libraries. Once the lawsuit — *Castellano v. Chertoff* — was brought, ICE acted promptly to settle the case, and the settlement requires that people not be held for over 12 hours at the facility, which has a capacity of over 400 detainees, and that while they are there they must have access to drinking water, soap, and writing materials when needed.

⁹ Karen Tumlin, Linton Joaquin, and Ranjana Natarajan, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers* (NILC, ACLU of So. Calif., and Holland & Knight, LLP, 2009), www.nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf (last visited Nov. 5, 2009).

¹⁰ Schriro, *supra* note 1.