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**SENATE BILL 1639 AND
OTHER FEDERAL EFFORTS AT
REFORM:
WHAT WENT WRONG?
KEYNOTE PRESENTATION AT
LOYOLA PUBLIC INTEREST
LAW REPORTER SYMPOSIUM
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by JEANNE A. BUTTERFIELD, ESQ.

WHY DO WE NEED IMMIGRATION REFORM?

Everyone agrees that our immigration system is broken. U.S. immigration law is a hodgepodge of quotas, penalties, rules and regulations that rivals the tax code in complexity.¹ The last three major revisions in the law illustrate the ying-yang of American public opinion on immigration. In 1986, a legalization program was enacted that allowed more than 2.7 million immigrants to legalize their status, while a new employer-sanctions law turned employers into immigration enforcers.² In 1990, changes to the quota system allowed additional family and employment-based permanent immigrants to legally enter the United States each year.³ Finally, in 1996, a trio of laws tightened requirements on both legal and undocumented immigrants—restricting public benefits, eliminating waivers from removal and access to judicial review, and imposing harsh new retroactive penalties on longtime lawful permanent residents, including making people deportable for minor violations of the law committed decades ago.⁴

In 2001, U.S. President George Bush and Mexican President Vicente Fox committed themselves to a new initiative to regularize the flow of immigrants between the two countries; to not only deal with the undocumented immigrants already here, but to provide a new worker visa to allow future workers to come to fill needed jobs in the U.S. economy.⁵ However, in the wake of the terrible events of 9/11, reform was put on the shelf, and the entire immigration function was folded into the new Department of Homeland Security.⁶ Security and enforcement became top concerns, while the broken immigration system became more and more dysfunctional.⁷ Today, what most Americans know about our immigration system simply is that it is badly broken.

There are an estimated 12 million undocumented persons living and working in the United States today, and at least 300,000 new undocumented migrants are estimated to enter the United States every year.⁸ Smugglers, traffickers and criminal elements preying on undocumented migrants have a growing negative impact on border communities. Between 2,000 and 3,000 migrants have died trying to cross our border from the south since new border policies were instituted in the mid-1990s.⁹

There are also several not-so-visible signs that our immigration system is broken. Service sector employers cannot find legal workers—restaurants, nursing homes, construction companies, childcare centers and landscaping firms are

among those facing severe and growing worker shortages.¹⁰ Seasonal temporary visas are insufficient to meet the demand.¹¹ Family immigration backlogs are extensive.¹² Spouses and children are currently waiting three to five years to reunite with their lawful permanent resident loved ones, with the wait extending to seven to 10 years for Mexican nationals.¹³

Immigrants who violate our immigration laws are no longer characterized as those who violate other civil laws such as tax laws; but rather they are viewed as criminals.¹⁴ Those who previously could put their case before an immigration judge and seek a second chance are no longer given that option as waivers have been eliminated and deportation is mandatory, even for longtime lawful permanent residents.¹⁵ Detention of non-violent immigration law violators is rampant and expanding, and conditions of detention do not conform to the most widely accepted Bureau of Prisons standards.¹⁶ Fewer refugees are being admitted to the country on an annual basis.¹⁷ Unaccompanied immigrant children, at times entering the United States at the rate of several thousand per year, are being detained and not afforded representation by counsel.¹⁸

“ENFORCEMENT ONLY” WILL NOT WORK

Some argue that we simply need more enforcement of our existing laws. However, this country has been throwing resources at enforcement for the past several years, and the results underscore the simple fact that “enforcement only” will not work.¹⁹ “Prevention through deterrence” was the name of the border control strategy implemented in the mid 1990s.²⁰ “Operation Hold the Line”, “Operation Gatekeeper”, “Operation Safeguard” and “Operation Rio Grande” were implemented at various border areas in California, Arizona and Texas.²¹ In fact, spending on border enforcement quintupled in the years from 1993 through 2004—from \$740 million to \$3.8 billion.²² The number of Border Patrol Agents increased three-fold from 1993 through 2006, from 3,965 to 12,349.²³ Yet from 1993 to 2004, the number of undocumented immigrants in the country more than doubled, from 4.5 million to 9.3 million.²⁴ So it is clear that simply throwing more money and resources at the border will not lead to effective enforcement.

WHAT IS FUELING UNDOCUMENTED MIGRATION?

Labor Market Needs

The reality of an aging and increasingly highly educated native-born workforce, combined with continued economic growth, are the factors that continue to make jobs available in many sectors of our economy, jobs that “pull” Mexican and other workers to the United States.

In this country, the native-born workforce is aging, and baby-boomers will begin retiring in greater numbers starting in 2008.²⁵ As the native-born workforce becomes better educated, labor force participation rates are flattening.²⁶ The pool of available native-born U.S. workers is shrinking. Between 2000 and 2005, the less-skilled native-born workforce (without high school diplomas) shrank by 2.5 million workers.²⁷ At the same time, only 800,000 less-skilled immigrant workers joined the workforce—both documented and undocumented.²⁸ As a result, there was a net decline of 1.7 million less-skilled workers over that five-year period.²⁹ The U.S. economy is projected to add six million new jobs by 2014 that require only short-term, on-the-job training.³⁰

The Bureau of Labor Statistics (BLS) estimates that there will be growing demands for workers in the coming years as a result of these trends.³¹ The need for workers in long-term care facilities will grow by nearly one million jobs between 2004 and 2014 (34.7 percent).³² This is three times higher than the projected growth rate of the U.S. labor force as a whole (13 percent).³³ BLS projects nearly 2.5 million job openings in construction in the same period.³⁴ Restaurants, which already employ 11.3 million workers, will need two million new workers by 2014.³⁵

The lack of available legal channels for needed immigrant workers means that undocumented immigrants are increasingly filling these needed jobs in our economy. In 2005, undocumented workers composed 24 percent of the labor force in agriculture, 21 percent in private household services, 12 percent in food services, 12 percent in construction, 11 percent in administrative and support services, and 10 percent in hotels.³⁶

In specific occupations, the statistics tell an even more dramatic story. The undocumented include 36 percent of all insulation workers, 29 percent of all roofers and drywall installers, and 27 percent of all butchers and other food

processing workers.³⁷ These dynamics of the U.S. labor force only promise to increase the need for immigrant labor in the decades ahead. The health and vitality of the U.S. economy, now and into the future, depend in part on immigrant labor.

Need for Family Unity

The lengthy backlogs in the family immigration system are another cause of undocumented immigration and an important issue that must be addressed by comprehensive immigration reform. The quotas for family immigration are unrealistic and do not correspond to current reality. Mexican lawful permanent immigrants seeking to bring their spouses and minor children to live with them in the United States face waits of seven to ten years to reunite with their loved ones.³⁸ In the face of such lengthy separation, many make the hard choice to try to enter this country illegally, rather than remain apart.

Other nationals face waits of three to five years for their spouses and minor children to join them.³⁹ Siblings of U.S. citizens—an important element of family life, especially in Asian communities—face waits up to 30 years for reunification.⁴⁰ Such a system only feeds undocumented immigration, while imposing great hardship on family units. This situation must be addressed if undocumented immigration is to be controlled.

COMPREHENSIVE IMMIGRATION REFORM IS THE ONLY WORKABLE SOLUTION – WHAT WENT WRONG IN 2007?

In the spring of 2006, Congress accomplished a great deal in setting the terms for the immigration debate. The House passed an “enforcement only” bill (HR 4437), authored by House Judiciary Chairman James Sensenbrenner (R-WI) that galvanized opposition across the country.⁴¹ This bill was introduced and jammed through Congress with no hearings, no markup and no debate. It was breathtaking in its harshness and overreaching. It proposed making mere unlawful presence in the country a felony. It criminalized any act of offering humanitarian assistance to undocumented persons. And it piled on enforcement measures that had no chance of being effective since they failed to address the underlying issue—i.e. our 20th century immigration laws are inadequate to address the needs of the 21st century.⁴²

The Senate took a more thoughtful and comprehensive approach. It held hearings, conducted a lengthy and spirited markup, and engaged in a lengthy floor debate. The result was a bill, S. 2611, that while not ideal, asserted the basic necessary elements of comprehensive immigration reform (CIR) that could work: (1) a path to legal status and eventual citizenship for 12 million undocumented persons living and working in the United States; (2) a new “work visa” for those coming on a temporary basis to perform needed jobs in our economy; (3) family backlog relief and adequate visas to prevent new future backlogs; and (4) smart enforcement measures that could provide tough but fair enforcement of reformed laws, including a new employment verification system.⁴³

As Congress came back to work in 2007, the momentum of 2006 seemed sure to carry comprehensive immigration reform legislation over the finish line. However three things contributed to comprehensive immigration reform failure.

First, the supporters of CIR were divided. In Congress, the bipartisan core that helped the bill pass in the Senate in 2006 was nowhere to be found. Senator John McCain (R-AZ) was running for the Republican presidential nomination, and backed off from any visible role. The White House stepped in and decided that to get Republican support they needed to satisfy Senator John Kyl (R-AZ), who had led the opposition to the CIR bill the year before. The resulting bill, S. 1639, was deeply flawed, a mess of a new “point system” that would decimate family immigration, bad enforcement provisions, and an insufficient and overly complicated legalization and temporary worker program that attracted more opposition than support.⁴⁴ CIR advocates and grassroots organizations were rightly concerned that this flawed bill might not be sufficiently fixed in the House, and some decided that a “kill the bill” strategy was the best approach in 2007.

Second, the opposition was vocal and well organized. The restrictionist groups painted any CIR proposal as “amnesty” and continued their mantra of “secure the borders first.” Calls to Congressional offices from these forces outnumbered supporters of CIR by 400 to 1.⁴⁵ The opposition was louder than its numbers warrant, but it was heard.

Third, pro-immigration forces were not able to demonstrate sufficient political power to convince legislators that there would be a price to pay at election time

for their failure to enact CIR. At the end of June 2007, only 12 Republicans joined with 34 Democrats to vote in favor of the CIR bill, S. 1639, 14 votes shy of the 60 needed to overcome a filibuster and secure the “cloture” needed to move forward.⁴⁶

BACKLASH

In the aftermath of the failure of Congress to enact comprehensive immigration reform, a growing backlash has taken root across the country. The U.S. government has escalated and intensified its enforcement efforts against undocumented immigrants. The Immigration and Customs Enforcement agency (ICE) reported that it deported 276,912 people in 2007.⁴⁷ Worksite actions by ICE in 2007 resulted in 773 arrests of undocumented workers on criminal charges such as “identify theft” and 4,077 arrests of undocumented workers on administrative charges leading to removal hearings and eventual deportation.⁴⁸ These raids have intensified fear in local immigrant communities, have separated undocumented workers from their U.S. citizen children and family members, and caught untold numbers of U.S. citizens and lawful residents up in a dragnet of warrantless arrests, hours of unauthorized detentions and interrogations, and functional denial of right to counsel and other due process protections for those arrested.⁴⁹

Enforcement actions against employers have escalated as well. In 2002, 25 employers were arrested on charges of unlawfully employing undocumented persons.⁵⁰ In 2007, 90 employers and supervisors were charged with criminal violations including harboring illegal aliens, knowingly hiring them, or other criminal violations.⁵¹ This number pales in comparison to workers arrested and charged in worksite enforcement actions, but the heightened focus on employers resulted in the levying of \$30 million in fines and forfeitures against employers in 2007.⁵² In 2008, through August, ICE made more than 1,000 criminal arrest tied to worksite enforcement investigations.⁵³ Of the 1,022 individuals criminally arrested, 116 were owners or other supervisors and the remainder were workers.⁵⁴ ICE also made more than 3,900 administrative arrests of workers during the first eight months of 2008.⁵⁵

STATE AND LOCAL INITIATIVES

In an understandable but misguided attempt to fill the vacuum left by the failure of Congress to act, legislatures in 46 states adopted 244 immigration-related measures in 2007.⁵⁶ They were largely punitive, attempting to “crack down” on undocumented immigration and relieve state and local governments of the real and perceived cost burdens of illegal immigration. These measures have proven to be unconstitutional in some instances, unenforceable and costly in others, and filled with unintended consequences that actually harm local communities.

For example, Oklahoma enacted House Bill 1804, which took effect on November 1, 2007.⁵⁷ This legislation makes it a felony to transport or shelter illegal immigrants, and denies driver’s licenses and public benefits such as rental assistance and fuel subsidies to undocumented immigrants.⁵⁸ As a result, both legal and undocumented immigrants are fleeing the state.⁵⁹ Businesses, including cotton gins, hotels, home builders, grocery stores and restaurants are already complaining of lost workers and fewer customers.⁶⁰ Republican State Rep. Shane Jett said “this law will be the single most destructive economic disaster [for the state] since the Dust Bowl.”⁶¹ Oklahoma is home to 3.6 million foreign born residents (five percent of the state population), of whom about 75,000 are undocumented.⁶² An estimated 15,000 to 25,000 people have left Tulsa County alone since the new law went into effect on November 1, 2007.⁶³

UNLEASHED RACISM & XENOPHOBIA

The anti-immigrant backlash has taken a particularly virulent and hateful form as nativist and overtly racist groups have more openly resorted to hate speech and scapegoating of immigrants. A retired computer programmer, a member of “Riders USA,” showed up at a protest against a day-laborer center in Arizona, packing her Smith and Wesson.⁶⁴ She plans to join the “Minutemen” and told a reporter, “we just want to get the illegals out of here, it’s a black and white issue, I’m here to run them off. You turn the light on them, and they scatter like roaches.”⁶⁵

The Anti-Defamation League monitors these groups and has issued a new on-line report, "Immigrants Targeted: Extremist Rhetoric Moves into the Mainstream," that documents such hate speech.⁶⁶ Hate crimes against various immigrant groups are also on the rise. Recent FBI statistics show that hate crimes against Latinos have risen by almost 35 percent since 2003.⁶⁷ The Southern Poverty Law Center attributes the rise in violence against Latinos and other immigrants to the backlash over the recent immigration debate.⁶⁸

REBUILDING MOMENTUM FOR CIR

Education/facts/analysis

We need more aggressive fact advocacy to consolidate and build public opinion and convince legislators to enact smart and workable reforms. One had only to listen to the presidential primary rhetoric to realize that the debate was clouded by myths, distortions and outright lies.

There are six major myths impacting the immigration debate. First, deportation-only policies are a practical solution to the problem of undocumented immigration. Second, immigrant workers suppress the wages of American workers. Third, the nation spends billions on welfare for undocumented immigrants. Fourth, undocumented immigrants commit more crimes than the native-born. Fifth, that immigrants do not assimilate into U.S. society and that they do not want to become citizens. Finally, there is the contention, "they broke the law, they should go home and stand in line and come here legally like our ancestors did." All of these myths can be countered by data that needs to be made more easily accessible and be more broadly disseminated.

Public Opinion.

Poll after poll continues to confirm that Americans know that deportation-only policies will not work. In 23 polls conducted throughout 2007, two-thirds of Americans strongly favored allowing undocumented immigrants to get on a path to citizenship.⁶⁹ These statistics hold true no matter what cross-section of the American public is polled. For example, a November 2007 L.A. Times/Bloomberg poll showed 63 percent of Democrats, 64 percent of Republicans and 57 percent of Independents favored allowing undocumented immi-

grants who register, are fingerprinted, pay a fine, and learn English to earn citizenship over time.⁷⁰

Of course, people want to know that people are screened, come out of the shadows, pay taxes, work hard and keep a clean record within the criminal justice system. But the majority of people polled know that reasonable laws that can be enforced are the way forward, not harsh proposals that purport to round up and deport 12 million people. The challenge ahead is to transform this favorable public opinion into real political support for positive legislative initiatives.

Political Mobilization—the Latino vote.

Recent polling and the results of the 2006 midterm elections should have sent a signal to both Democratic and Republican party leadership that the anti-immigrant card does not play well in the electoral context. Yet, it seems both parties apparently failed to listen. The Republican presidential candidates, with the possible exception of Sen. McCain, outdid themselves in being harsh on the immigration issue. And Democratic House re-election strategist and Illinois Congressman Rahm Emmanuel declared that immigration is the “third rail” of American politics and continues to advise his colleagues running in closely contested races to prove their immigration enforcement credentials and stay away from any talk or action in support of legalization for the undocumented.⁷¹

In 2006, several Republicans tried to make immigration a “wedge issue” in their election races. In 15 races where immigration played a key role in the race, those who favored CIR won in 12 of these 15 races. For example, in Arizona, Democrat Gabrielle Giffords, a strong CIR supporter, clobbered Republican Minuteman candidate Randy Graff. Additionally, CIR advocate and Democrat Harry Mitchell unseated hardliner Republican incumbent J.D. Hayworth. In Pennsylvania, CIR advocate and Democrat Bob Casey trounced Republican incumbent immigration hardliner Rick Santorum, who had stooped so low as to launch a Web site called “Casey for Amnesty.”⁷² Further, in Arizona, Democratic Governor Janet Napolitano, a strong advocate of CIR, won a resounding victory over her opponent. And in Colorado, Democratic CIR advocates Bill Ritter and Rick Perlmutter won their races for Governor and Congress over immigration hardliners.

The fact that the anti-immigration card didn't work in Arizona and Colorado, as well as other races, demonstrates that the Republican "wedge issue" strategy was a loser, and that Americans who are concerned about our broken immigration system want real solutions, not political posturing. The long-term implication of alienating an increasingly active and vibrant Latino community that votes is fairly dire to the Grand Old Party.

The Latino vote is a growing bloc and will be a decisive factor in several swing states in 2008. Nine million Latinos voted in 2004, and 40 percent of them voted for George Bush.⁷³ In 2008, the Latino vote is expected to be 14 million.⁷⁴ The Latino vote could make a difference in five swing states: New Mexico has five electoral votes, and Hispanics make up 37 percent of the state's eligible electorate; Nevada has five electoral votes and 12 percent Latino voters; Arizona has 10 electoral votes and 12 percent Latino voters; Florida has 27 electoral votes and 14 percent Latino voters; and Colorado has nine electoral votes and 12 percent Latino voters.⁷⁵ To sharpen the point, in Nevada, Hispanics are 12 percent of the electorate with approximately 193,000 Hispanics eligible to vote in 2008.⁷⁶ President Bush won Nevada by just over 20,000 votes in 2004.⁷⁷

As Michael Gerson, President Bush's former chief speechwriter and senior policy advisor said:

I have never seen an issue where the short-term interest of Republican presidential candidates in the primaries were more starkly at odds with the long-term interests of the party itself. . . . A substantial shift of Hispanic voters towards the Democrats in [these five swing states] could make the national political map unwinnable for Republicans. . . . Some in the party seemed pleased. They should be terrified.⁷⁸

If Latinos and others exact a price at the polls against politicians who scapegoat immigrants and oppose comprehensive reform, then the chances of enacting positive legislation in the coming years will greatly increase.

PROSPECTS FOR REFORM

America needs comprehensive immigration reform in order to maintain a strong economy, to fill labor market needs, to preserve strong families, to remain true to its constitutional principles and its history and values as a nation of immigrants. Politicians who use immigration as a wedge issue have been

largely unsuccessful and run the risk of alienating increasingly vocal and strong immigrant voters. Public opinion favors workable reform. Immigration reform is not only smart, it is essential to the vitality and future of the country. The only question remains: When will Congress step up to its responsibility and enact meaningful and comprehensive reform?

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