

## When Policy Meets Politics: An Analysis of U.S. Immigration Issues, 1998–2018

JAMES S. PULA<sup>1</sup>

Purdue University

International migration is a major issue in many parts of the world today. In the United States, with its history of immigration, it has been a recurring theme in political discussion for over two centuries. This article addresses three issues: (1) providing data to establish the size, composition, and recent trends in immigration to the U.S. today, (2) a review of 2018 U.S. public opinion polls on immigration, and (3) an interpretation of why a subject where most Americans generally agree has caused protracted emotional and divisive debates over the past two decades.

**Keywords:** Immigration, immigration policy, public opinion, chain migration, diversity visa lottery, family reunification, immigration act, immigration reform, Simpson-Mazzoli, DACA, illegal immigration.

Every nation has historical themes that, throughout its existence, define its nature and often its economic, social and cultural development. In the United States, the most recurring of these themes has been immigration. Everyone in that country today is descended from ancestors who originated somewhere else. Given the continuous arrival of people from a wide variety of national, ethnic, and religious traditions, it should be no surprise that immigration has been a persistent national political issue. The length of the residency requirement for citizenship has occasionally changed, the definition of who may enter has been altered over time, and even the number of people and their origins have shifted periodically. Today is no different. Immigration policy remains a major political issue in 2018 with opposing sides often so entrenched in their positions as to prevent any attempt to resolve unsettled but seemingly simple issues.

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<sup>1</sup> contact: [jpula@pnw.edu](mailto:jpula@pnw.edu)

In this article I intend to address three questions. First, I will present data designed to establish an understanding of contemporary immigration in the United States – its size, its composition, and its recent trends. Second, I will provide the results of 2018 public opinion polls on immigration that revealed some surprising results about how Americans view immigration issues. Third, I will offer my interpretation of why a subject upon which most Americans generally agree has caused protracted emotional and divisive debates over the past two decades.

## Immigrants in the United States, 2014–2018

Data collected by the Migration Policy Institute and the National Council of State Legislatures' Immigrant Policy Project revealed that by the end of 2017 there were 44.2 million immigrants living in the United States, approximately equivalent to the entire population of Poland, Lithuania, and Latvia together. This accounted for 13.7 percent of the population of the country. Of the immigrants, about 20 million were naturalized citizens, 13.1 million legal non-citizens (including permanent residents), and 11.1 million were in the United States illegally. Including the immediate U.S.-born children of immigrants, the Current Population Survey for 2016 recorded 84.3 million people, or 27 percent of the U.S. population, as either immigrants or second-generation Americans.<sup>2</sup>

Despite assertions in some popular print and electronic media to the contrary, the flow of immigration continues. In 2014, 1.36 million people entered the country with another 1.38 million arriving in 2015 and 1.49 million in 2016. In the latter year, 1,183,505 immigrants became legal permanent residents. The leading countries of origin were México (15 percent), China (7 percent), Cuba (6 percent), India (5 percent) and the Dominican Republic (5 percent).<sup>3</sup> Of the total number of immigrants in the U.S. in 2016, the largest number originated in neighboring México, followed by India, China, and the Philippines. The groups in the table below represented 56 percent of all immigrants residing in the U.S. in 2016.

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<sup>2</sup> Jie Zong, Jeanne Batalova, and Jeffrey Hallock, "Frequently Requested Statistics on Immigrants and Immigration in the United States," Migration Policy Institute, February 8, 2018, <https://www.migration-policy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Numbers>; Maria Pimienti, "Snapshot of U.S. Immigration 2017," NCSL Immigrant Policy Project, August 2017; U.S. Census Bureau, "American Community Survey," 2015. In 2017 the population of the United States was 322 million. Among the 11.1 million illegal immigrants, the largest groups were from México (56%), Guatemala (7%), El Salvador (4%), Honduras (3%) and China (2%). The illegals include 7.1% who have been granted deferred status under the Deferred Action for Childhood Arrivals Program. In 2015, 15 percent of those naturalized were from México and approximately six percent each from India and The Philippines.

<sup>3</sup> Zong, Batalova, and Hallock "Frequently Requested Statistics."

#### Percentage of Total Number of Immigrants in 2016<sup>4</sup>

México	26
India	6
China	5
The Philippines	4
El Salvador	3
Vietnam	3
Cuba	3
Dominican Republic	2
South Korea	2
Guatemala	2
Total	56

Although current political rhetoric in the United States leads many people to believe that the largest influx of new arrivals is from neighboring México, in recent years this has not been the case. According to a Mexican government report, emigration to the United States declined steadily beginning in 2007. This is supported by data from the Migration Policy Institute for 2016 that indicates India provided the most entrances followed by China, México, Cuba, and the Philippines.<sup>5</sup>

#### Largest Countries of Origin, 2016<sup>6</sup>

India	175,100
China	160,200
México	150,400
Cuba	54,700
The Philippines	46,000

Overall, the immigrant population is slightly older than the native-born U.S. population, the mean age for the former being 44.4 and the latter 36.1. This appears to

<sup>4</sup> Data is from Zong, Batalova, and Hallock “Frequently Requested Statistics.”

<sup>5</sup> Zong, Batalova, and Hallock “Frequently Requested Statistics”; *La Encuesta sobre Migración en la Frontera Norte de México* (El Colegio de la Frontera Norte, April 2018), <https://www.colef.mx/emif/>. The Mexican government study reported decreases in emigration to the U.S. in every year between 2007 and 2015 except for an increase in 2013. This is supported by the “Encuesta Nacional de Ocupación y Empleo” which indicates the emigration rate fell between 2008 and 2012 from 6.4 migrants per 1,000 residents to 3.3. For the latter, see “Encuesta Nacional de Ocupación y Empleo,” Instituto Nacional de Estadística y Geografía, <http://www.inegi.org.mx/est/contenidos/proyectos/accesomicrodatos/encuestas/hogares/regulares/enoe/15/>.

<sup>6</sup> Data is from Zong, Batalova, and Hallock, “Frequently Requested Statics.”

be largely due to fewer children among the immigrant population, a large percentage falling within the normal wage-earning ages between 18 and 64.

Percentage by Age Group<sup>7</sup>

Age Group	Immigrants	Natives
Under 5	less than 1	7
5 – 17	5	19
18 – 64	79	59
65 and Older	15	15

From about five percent in 1970, the participation of immigrants in the U.S. labor force rose to 17 percent of the civilian workforce in 2016. Contrary to the general belief, their occupations were not overwhelmingly low income positions as is often asserted. In reality, the largest portion of employed immigrants work in managerial, professional, and related fields as seen in the table below.

Civilian Workforce Occupations, 2016<sup>8</sup>

Occupation	Immigrants	Natives
Management, Business, Science & Arts	31.6	38.8
Service	24.1	16.8
Sales & Office	16.6	24.7
Natural Resources, Construction, Maintenance	12.9	8.0
Production, Transportation, Material Moving	14.9	11.6

In summary, over the most recent two decades immigration into the United States has remained high, although the sources of that immigration have gradually been changing with a decrease in Mexican and Hispanic immigration and an increase in people from southern and eastern Asia. Immigrants tend to be somewhat older on average than native-born Americans and 74.9 of immigrants are either naturalized citizens or permanent or other legal residents. Almost a third are employed in managerial or professional positions, calling into question the wide-spread stereotype of immigrants holding overwhelmingly low-paying jobs that are otherwise hard to fill.

<sup>7</sup> Note that data totals over 100 percent due to rounding. Data is from Zong, Batalova, and Hallock “Frequently Requested Statistics.”

<sup>8</sup> Data is from Zong, Batalova, and Hallock “Frequently Requested Statistics.” U.S. government statisticians define “civilian labor force” as civilians aged 16 and above who report being employed in the American Community Survey.

## American Public Opinion on Immigration in 2018

How do Americans feel about immigration? In January 2018 the Harvard University Center for American Political Studies and the Harris Poll released the results of a joint study on this issue. The outcome was quite surprising in view of intensive media stories about public support for maintaining a relatively open border policy and providing an avenue to citizenship for those in the country illegally. While the study revealed that Americans did support a pathway to citizenship for those who had been brought illegally into the country as young children by their parents, they also supported stronger border security and a reduction in the number of immigrants allowed into the country annually. Although recent years have seen the arrival of an average of 1.41 million people annually, survey results indicated that most Americans favored a cap of 500,000 per year or less.<sup>9</sup> The table below indicates the respondents' preferences.

Respondents to Harvard-Harris Poll<sup>10</sup>

Preference Per Year	Percentage
Reduce to less than 250,000	35
250,001 to 500,000	19
500,001 to 1 million	18
Over 1 million	19

Among the U.S. immigration policies in place at the time the poll was conducted were “Family Reunification” (sometimes referred to as “Chain Migration”) and the “Diversity Visa Lottery.” According to Joyce Vialet of the Congressional Research Service, “Although U.S. immigration policy incorporated family relationships as a basis for admitting immigrants as early as the 1920s, the promotion of family reunification found in current law originated with the passage of the 1952 Immigration and Nationality Act. ... [that] established a hierarchy of family-based preferences.”<sup>11</sup> Relationship to U.S. citizens or permanent residents – parents, siblings, aunts and uncles, cousins, and in some cases more remote relatives by marriage – became the first priority for acceptance. The Diversity Visa Lottery began with the Immigration Act of 1990 as a means to “promote immigration from countries

<sup>9</sup> Monthly Harvard-Harris Poll, Harvard University Center for American Political Studies, January 2018; Stephen Dinan, “Shock Poll: Americans Want Massive Cuts to Legal Immigration,” *The Washington Times*, January 22, 2018. Respondents to the poll favored a pathway to citizenship for children brought into the country illegally, the so-called “Dreamers,” by a margin of 77 percent to 23 percent.

<sup>10</sup> Data from Dinan, “Shock Poll.”

<sup>11</sup> Joyce Vialet, “A Brief History of U.S. Immigration Policy,” Congressional Research Service, December 22, 1980, <https://www.numbersusa.com/solutions/end-chain-migration>.

underrepresented in the United States.” It is available only to people from nations in which fewer than 50,000 people have been admitted to the United States in the previous five years.<sup>12</sup>

By 2018, most Republicans wanted to end the Family Reunification and Diversity Visa Lottery programs, arguing that they ought to be replaced to prioritize immigrants who could bring needed skills and abilities into the country. Democrats aggressively opposed any attempt to change the existing policies. Surprisingly to many people, 79 percent of those polled agreed with the proposal to eliminate the two programs and only 21 percent supported their retention.<sup>13</sup>

Another controversial issue was border security, particularly along the 1,954 mile (3,145 kilometers) boundary between the United States and México. During the presidential election campaign in 2016, Republican candidate Donald Trump promised to build a wall along the southern boundary to curb not only illegal immigration but also an influx of illicit drugs and the possible infiltration of terrorists and members of violent gangs across the porous border. Democrats overwhelmingly opposed the proposal. Data from the survey revealed that over 60 percent of respondents believed existing border security to be inadequate, while 54 percent expressed support for some form of physical or electronic barrier along the U.S.-México border.<sup>14</sup>

The debates over immigration in recent years have exposed a very decided political chasm between Democrats and Republicans. The former supported continued open borders, retention of existing priorities for entry, and preferences for illegal immigrants. The latter favored increased border security and revision of entry priorities to reward people with skills or other attributes beneficial to the country. The Harvard-Harris Poll revealed a general public preference for the Republican positions – ending the Family Reunification and Diversity Visa Lottery programs and providing greater security for the nation’s southern border. While most Americans appear to support elimination of the two policies in question, a Quinnipiac University poll released in January 2018 revealed that they were generally positive about *legal* immigration. An overwhelming 89 percent believed that legal immigration was good for the country, 78 percent agreed that immigration from diverse countries was good for the U.S., and 76 percent felt that the country of origin should *not* be a determining factor in whether a person is allowed to enter the United States.<sup>15</sup>

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<sup>12</sup> “The Diversity Immigrant Visa Program: An Overview,” American Immigration Council, November 13, 2017, <https://www.americanimmigrationcouncil.org/research/diversity-immigrant-visa-program-overview>.

<sup>13</sup> Data from Dinan, “Shock Poll.” There had normally been provisions in the immigration law providing a priority for skilled workers, or in the case of the 1921 and 1924 quota acts exempting skilled workers.

<sup>14</sup> Data from Dinan, “Shock Poll.”

<sup>15</sup> Quinnipiac University poll, January 2018, [poll.qu.edu](http://poll.qu.edu).

## The Immigration Issue, 1986–2008

The United States was facing much the same immigration dilemma in the mid-1980s that dominated the political debate thirty years later. In 1986 Congress moved to solve the problem with the Immigration Reform and Control Act, also known as the Simpson-Mazzoli Act. The legislation came about through political compromise. At the time, the Republican Ronald Reagan was president but the 99th Congress (1985–87) was split with Republicans controlling the Senate 53–47 and Democrats dominating the House of Representatives 253–182. The bill’s primary sponsors, Republican Senator Alan Simpson of Wyoming and Democratic Representative Romano L. Mazzoli of Kentucky, reflected a bipartisan approach. This also can be seen in the respective votes in the Senate and the House of Representatives. In the Senate, 81.0 percent of Democrats and 64.4 percent of Republicans voted in the affirmative, while in the House 55.5 percent of Republicans voted in favor along with 47.5 percent of Democrats.<sup>16</sup> Democrats in the Senate generally approved, while those in the House did not, with Republicans voting in favor in both instances. What is important to note is that this was a compromise bill in which the votes of both parties were split – it was not a straight party-line vote.

Signed into law by Pres. Reagan, the legislation was designed to address both the status of immigrants illegally in the country and provide stronger border security. To address the first, it provided that illegal immigrants who had been in the country continuously since January 1, 1982, could apply for temporary legal status. If they had no criminal record while resident in the U.S., after eighteen months they could apply for permanent legal status. More than three million people applied for legal temporary residency under this program and almost 2.7 million received legal permanent residency. To foster better border security the new law mandated sanctions against employers hiring illegal immigrants and provided for the hiring of thousands of new border patrol officers. To accomplish the security measures the budget of the Immigration and Naturalization Service was increased by \$123 million, \$33.7 million of which was earmarked for enforcing employer sanctions. The balance largely went to increasing the staff for the Border Patrol by some 50 percent. Although the program was partially successful, some 1.9 million illegals remained, mostly those who had arrived before 1982. Instances of fraudulent documentation soared and when Congress later reduced funding for the enforcement portion of the program the lack of an integrated electronic system for employers to check on the status of employees

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<sup>16</sup> “Congress, Winding Up Work, Votes Sweeping Aliens Bill; Reagan Expected to Sign It,” *New York Times*, October 18, 1986, 1; “House, By 216–211, Approves Aliens Bill After Retaining Amnesty Plan In Final Test,” *New York Times*, June 21, 1984, 1; GovTrack, <https://www.govtrack.us/congress/votes/99-1986/s738>. In the Senate 34 Democrats voted in favor and 8 against, while Republicans voted 29 in favor and 16 against. In the House the Democratic vote was 138 against and 125 in favor, while Republicans voted 91 in favor and 73 opposed.

and applicants greatly inhibited the effectiveness of the employer sanction mandate. The result was a continuing flow of unauthorized immigrants into the country across the southern border.<sup>17</sup>

Ten years after the adoption of the Simpson-Mazzoli Act the number of illegal immigrants in the United States had risen to an estimated five million with approximately 275,000 new unlawful entries each year causing immigration to once again become a major national issue.<sup>18</sup> In 1990 a special commission chaired by Democrat Barbara Jordan recommended the elimination of the family unification priorities arguing that “Unless there is a compelling national interest to do otherwise, immigrants should be chosen on the basis of the skills they contribute to the U.S. economy. ... Reunification of adult children and siblings of adult citizens solely because of their family relationship is not as compelling.”<sup>19</sup> Congress took no action.

In his 1995 “State of the Union Address” Democratic President Bill Clinton paid particular attention to the issue. “All Americans,” he strongly asserted, “are rightly disturbed by the large numbers of illegal aliens entering our country.” They fill jobs, he explained, that would otherwise be available for citizens or legal immigrants and the public services they use impose burdens on taxpayers. He concluded: “We are a nation of immigrants, but we are also a nation of laws. It is wrong and ultimately self-defeating for a nation of immigrants to permit the kind of abuse of our immigration laws we have seen in recent years, and we must do more to stop it.”<sup>20</sup> He received a standing ovation.

Congress responded with the Illegal Immigrant Reform and Immigrant Responsibility Act. The legislation provided enhanced penalties for immigration offenses and an increase in enforcement personnel and equipment to support expedited deportation and tighter scrutiny at points of entry. In addition, it strengthened employer verification and strictly regulated public benefits that might be available to immigrants including a provision that any state offering lower “in-state” tuition rates<sup>21</sup> to illegal

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<sup>17</sup> Betsy Cooper and Kevin O’Neil, “Lessons from the Immigration Reform and Control Act 1986,” *Policy Brief*, Migration Policy Institute, No. 3 (August 2005), 2–6; “Immigration Reform and Control Act of 1986,” U.S. Citizenship and Immigration Service, <https://www.uscis.gov/tools/glossary/immigration-reform-and-control-act-1986-irca>; “S.1200 – Immigration Reform and Control Act of 1986, 99th Congress (1985–1986),” <https://www.congress.gov/bill/99th-congress/senate-bill/1200>.

<sup>18</sup> U.S. Immigration and Naturalization Service, *Statistical Yearbook of the Immigration and Naturalization Service, 1997* (Washington, DC: U.S. Government Printing Office, 1999), 199.

<sup>19</sup> Jordan’s report was dated June 28, 1995. See Violet, “Brief History.” The U.S. Commission on Immigration Reform also recommended reducing legal levels of entry to 550,000 per year, eliminating the family reunification provision for adults, barring unskilled labor except for refugees and nuclear family members, and enforcing the employer sanctions for hiring illegal immigrants.

<sup>20</sup> William Jefferson Clinton, State of the Union Address, January 24, 1995, <https://millercenter.org/the-presidency/presidential-speeches/january-24-1995-state-union-address>

<sup>21</sup> In the United States, public colleges and universities are financed in part by state governments. Because the state taxpayers contribute to their support, students from the state pay a lower tuition than those attending from outside the state. One issue that emerged in the immigration debate was that some states were granting “in-state” (resident) tuition rates to illegal immigrants and charging citizens who were residents of other states the higher amount. This was the basis for the tuition controversy.



immigrants must also offer the same benefit to residents of other states. As part of its attempt to enhanced border protection the law specifically authorized the U.S. Attorney General to construct barriers along the U.S.-Mexican border and to sign agreements with individual states permitting state and local law enforcement officers and agencies to enforce federal immigration law. In a largely bipartisan vote, the measure passed the House of Representatives 333–87 with 97.4 percent of Republicans and 56.8 percent of Democrats voting in the affirmative. In the Senate the vote was 97 in favor and 3 opposed with 100 percent of Republicans and 93.6 of Democrats in favor. The bill was signed into law by Pres. Clinton on September 30, 1996.<sup>22</sup>

With the change in presidential administrations from the Democrat Bill Clinton to the Republican George W. Bush little changed in the immigration debate; the issues remained the same. Although the tragedy of September 11, 2001, distracted the national attention for some time, immigration continued to be a topic within the discussion of the new national security concerns. By mid-decade, immigration had regained its former status as a major domestic issue. In May of 2006 Pres. Bush spoke on the subject of immigration reform, calling upon Congress to find a compromise solution. In general, he echoed the sentiments of his Democratic predecessor, Bill Clinton. “We are a nation of laws,” he emphasize, “and we must enforce our laws. We’re also a nation of immigrants, and we must uphold that tradition, which has strengthened our country in so many ways. These are not contradictory goals. America can be a lawful society and a welcoming society at the same time.”<sup>23</sup>

Bush outlined a five-point plan that would accomplish both of these goals. First, “the United States must secure its borders. This is a basic responsibility of a sovereign nation. It is also an urgent requirement of our national security. Our objective is straightforward: The border should be open to trade and lawful immigration, and shut to illegal immigrants, as well as criminals, drug dealers, and terrorists.” Beyond that, Bush promoted a temporary worker program to create a legal way for people to enter the country for limited periods of time, development of a better system for holding employers accountable for the people they hired, adoption of a “rational middle ground” between automatic citizenship and deportation that would allow law-abiding illegals to become legal, and an emphasis on maintaining the “melting pot” tradition of welcoming legal immigration. “Tonight,” he concluded, “I want to speak directly to members of the House and the Senate: An immigration reform bill needs to be comprehensive, because all elements of this problem must be addressed together or none of them will be solved at all. The House has passed an immigration bill. The Senate should act by the end of this month so we can work out the

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<sup>22</sup> “H.R. 2202 – 104th Congress: Immigration Control and Financial Responsibility Act of 1996.” [www.GovTrack.us](https://www.govtrack.us). 1995. April 6, 2018 <<https://www.govtrack.us/congress/bills/104/hr2202>>

<sup>23</sup> George W. Bush, Address to the Nation on Immigration Reform, May 15, 2006, <http://www.americanrhetoric.com/speeches/gwbimmigrationreform.htm>.

differences between the two bills, and Congress can pass a comprehensive bill for me to sign into law.”<sup>24</sup>

A Pew Research Center survey revealed that a majority of Americans were individually conflicted with most favoring *some* of the proposal’s provisions, but not *all* of them. Consequently, public opinion remained divided. However, given the increasingly emotional nature of the ongoing debate, people who objected to one provision tended to reject the entire compromise causing an estimated 60 percent of Americans, according to a Gallup Poll, to oppose the final bill. This attitude was reflected in Congress with some members voting more *against* specific provisions than *for* others. A long series of amendments was proposed and debated with Senators attempting to bend the original provisions more to their liking; that is, to mold the bill to reflect their own priorities. When presented to the Senate, the Secure Borders, Economic Opportunity and Immigration Reform Act of 2007 attracted only 46 supporters and 53 votes against on a motion to close debate and bring the bill to a final vote. Once again, party polling was split with 68.8 percent of Democrats and 24.5 percent of Republicans approving, although the division between parties was stronger than it had been previously.<sup>25</sup>

Two other immigration-related bills also failed to gain a majority vote in the 109th Congress, while one passed, yet each unmistakably reflected the new chasm that had developed between the parties. The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 passed the House of Representatives by a vote of 239–182 with 92.3 percent of Republicans in favor and 82.0 percent of Democrats against. Senate Democrats prevented the measure from coming to a vote. The Community Protection Act of 2006 was adopted by the House 328–95 with 98.2 percent of Republicans voting “aye” joined by only 53.6 percent of Democrats. Again, Senate Democrats prevented the measure from coming to a vote. The Secure Fence Act of 2006 designed to promote border security passed the House 283–138 with 97.3 percent of Republicans in the affirmative and 67.2 percent of Democrats voting against. In the Senate 98.2 percent of Republicans voted in yes compared with only 60.5 percent of Democrats.<sup>26</sup>

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<sup>24</sup> “President Bush’s Plan For Comprehensive Immigration Reform,” <https://georgewbush-whitehouse.archives.gov/stateoftheunion/2007/>; “Bush’s Speech on Immigration,” *New York Times*, May 15, 2006. Bush explained the dilemma thusly: “Once here, illegal immigrants live in the shadows of our society. Many use forged documents to get jobs, and that makes it difficult for employers to verify that the workers they hire are legal. Illegal immigration puts pressure on public schools and hospitals, ... it strains state and local budgets ... and brings crime to our communities. These are real problems, yet we must remember that the vast majority of illegal immigrants are decent people who work hard, support their families, practice their faith, and lead responsible lives. They are a part of American life but they are beyond the reach and protection of American law.”

<sup>25</sup> Donna Smith, “Senate Kills Bush Immigration Reform Bill,” Reuters, June 28, 2007. “Yes” votes included 33 Democrats, 12 Republicans and 1 independent, while “no” votes numbered 15 Democrats, 37 Republicans and 1 independent. Most Republican disapproval centered on an opposition to “amnesty” for unlawful residents.

<sup>26</sup> For voting on the various bills, see <https://www.govtrack.us/congress/votes/>.

As indicated in the votes on the various immigration acts of the 1980s and 1990s, and the comments of Presidents Ronald Reagan, George H. W. Bush, and William J. Clinton, the majority of both Democrats and Republicans were in favor of stricter immigration enforcement to prevent illegal entry. Both also generally supported the 1986 legislation to provide a way for illegal immigrants who had been in the country for a period of time to gain legal status provided they had not committed any crime since their original entry. This relative bipartisanship began to shift toward more party-line voting during the Bush administration. Many Hispanic leaders supported Bush's pragmatic approach and his attempted compromise. Adding to this, the president's brother Jeb, the governor of Florida, spoke Spanish, was married to a native of México, and was well-received by Hispanic voters. Led by the president's family, Republicans began to make inroads into the nation's Spanish-speaking communities. Gradually, Democrats began to become concerned about a subtle but clear shifting of Hispanic voters toward the Republicans.

*President George W. Bush solicits the Mexican vote. Courtesy of Robert Ariail.*



With the permission of Robert Ariail.

An example of the changing public perceptions during these years can be seen in the evolving political cartoons. Cartoon 1 by Robert Ariail depicted a fence with a person crawling under it dragging a suitcase. Standing next to the fence is a man in uniform and next to him a vehicle labeled "Border Patrol." In between the border

patrol agent and the person crawling under the fence is a caricature of Pres. George W. Bush holding the agent back with one hand while he extends the other to the person on the ground as if to welcome him. The president says: “Whoa, officer! This is no illegal alien – *this* looks like a voter to me.” Then, to the other figure: “Aren’t you a voter, son?” The implication is clear. The president is holding back enforcement of the border controls because he believes the newcomers will vote for his Republican Party.

By 2010 the perception had dramatically changed when cartoonist Gary McCoy published the cartoon below showing people wearing sombreros using a rope to climb over a border wall while Pres. Barack Obama stands between two welcoming desks, one labeled “Welfare” and “Health Care” and the other “Voter Registration.” He says: “Now this is an immigration policy I can support.” The meaning is directly opposite the earlier cartoon, now it is the Democrats who are courting the votes of newly arriving immigrants.

*President Barack Obama solicits the Mexican vote.* Courtesy of Daryl Cagle at politicalcartoons.com



## When Politics Determines Policy

If there is one thing that politicians crave it is votes. Without votes, their tenures in office will be short. By 2008 it was apparent that a large and growing percentage of the Hispanic residents were becoming citizens and thus eligible to vote. In 2000 they formed 5.5 percent of the electorate, a proportion that rose to 7.4 percent by 2008. They were a sizable group that was becoming larger, and one of the issues they were most interested in was immigration, the large majority believing there ought to be a pathway to citizenship for illegal immigrants who had not committed any other crime, learned English, and fulfilled the other normal criteria. In 1994 Bill Clinton received 72 percent of Hispanic votes winning reelection over George Dole. But the Democratic inclination of Hispanic voters fell off by 13.9 percent in 2000 and by another 6.5 percent in the 2004.<sup>27</sup> Although the majority still leaned Democratic, the decline in Hispanic support convinced some Democratic leaders that the hard rhetoric on illegal immigration during the Clinton years was gradually driving a former Democratic voting bloc into the Republican fold. By the end of the Bush administrations in 2009, many Democratic leaders were changing their outlook on immigration policy away from enforcement to champion open borders and pathways to citizenship for people unlawfully in the United States because they believed this would be a winning political strategy.

The election of Barack Obama to the presidency in 2008 brought a substantial change in political control with not only the chief executive but also the Senate and the House of Representatives all under Democratic control. Democrats used this political muscle to push through national health care legislation, but immigration was largely ignored as an administration priority until after the 2010 Congressional elections when Republicans regained control of the House of Representatives. By this time most Republicans supported border control as a priority while a majority of Democrats sought legalization of those already unlawfully in the country. There were still those who wished to compromise, but by 2010 this number was dwindling as partisanship replaced bipartisanship as the principal consideration.

In an attempt to find a compromise solution to the immigration issue in the increasingly hostile atmosphere, a group of four Democratic and four Republican Senators crafted the Border Security, Economic Opportunity, and Immigration Modernization Bill of 2013. Its provisions promised to address the major issues by defining a route to legalization for those unlawfully in the country, improving the employer and visa verification systems, and decreasing the lengthy waiting list of people applying

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<sup>27</sup> Latino Votes Matter, <http://latinovotematters.org/stats/>; Julio Ricardo Varela, "The Latino Vote in Presidential Races: 1980–2012," October 29, 2015, <http://latinousa.org/2015/10/29/the-latino-vote-in-presidential-races/>; Steven A. Camarota and Karen Zeigler, "Projecting the 2012 Hispanic Vote," Center for Migration Studies, August 29, 2012, <https://cis.org/Projecting-2012-Hispanic-Vote>. By 2016, about 16 percent of the U.S. population was of Hispanic origin constituting around ten percent of the electorate.

for permanent residency status. Among its other provisions it would have eliminated the Diversity Lottery Visa program originally sponsored by Democrat Charles Schumer who was a member of the group now proposing its removal. The bill was adopted in the Senate by a 68–32 margin, but the House of Representatives failed to act and the proposal expired. As a sign of the times, some of those who attempted the compromise were later criticized by their own parties, especially the Republicans who were accused of promoting “amnesty” for illegal immigrants.<sup>28</sup>

Although Pres. Obama had consistently stated that he was limited in what he could do as president as long as Congress did not adopt new legislation, with the failure of the bipartisan compromise measure he pledged to “fix as much of our immigration system as I can on my own, without Congress.”<sup>29</sup> On November 20, 2014, the president addressed the nation on the immigration issue. “Families,” he stated, “who enter our country the right way and play by the rules watch others flout the rules. Business owners who offer their workers good wages and benefits see the competition exploit undocumented immigrants by paying them far less. All of us take offense to anyone who reaps the rewards of living in America without taking on the responsibilities of living in America.” He promised greater resources for border enforcement because “Even as we are a nation of immigrants, we’re also a nation of laws. Undocumented workers broke our immigration laws, and I believe that they must be held accountable.”<sup>30</sup>

Yet, having echoed similar sentiments to those who preceded him, he then went on to incongruously announce a new policy, not adopted by Congress which has the authority to legislate under the Constitution, but imposed unilaterally by the executive branch of government. “If you’ve been in America for more than five years; if you have children who are American citizens or legal residents; if you register, pass a criminal background check, and you’re willing to pay your fair share of taxes – you’ll be able to apply to stay in this country temporarily without fear of deportation. You can come out of the shadows and get right with the law.”<sup>31</sup> The unstated policy was now official, there would be no enforcement of the existing laws leaving the way clear for the continued influx of illegal immigrants with all of the attending problems

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<sup>28</sup> Democratic members of what the media labeled “The Gang of Eight” were Michael Bennet (Colorado), Richard Durbin (Illinois), Robert Menendez (New Jersey), and Charles Schumer (New York). Republican members were Jeff Flake (Arizona), Lindsey Graham (South Carolina), John McCain (Arizona), and Marco Rubio (Florida).

<sup>29</sup> Barack Obama, Remarks by the President on Border Security and Immigration Reform, June 30, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/06/30/remarks-president-border-security-and-immigration-reform>.

<sup>30</sup> Barack Obama, speech, November 20, 2014. For a transcript of the speech see <https://www.americanrhetoric.com/speeches/barackobama/barackobamaimmigrationnationalpolicy.htm>.

<sup>31</sup> Barack Obama, speech, November 20, 2014. Interestingly, while pursuing this public policy the Obama administration continued to deport large numbers of illegal immigrants. For example, the Department of Homeland Security reported 570,320 deportations in 2014, 462,463 in 2015, and 450,954 in 2016. Although this reflected about a 20.9 percent decline over the three years, the number of deportations remained high.

and divisiveness that would accompany them. The contrast between this statement by a Democratic president and the previous one by another Democrat, Bill Clinton, could not be more absolute. Whereas Clinton had recognized the unique and positive contributions of immigration to the growth of the United States and concluded that the immigration law needed to be enforced to make sure that newcomers met the same standards as those who came before them, Obama recognized the same historical development but concluded conversely that the system was “broken” and the laws of the nation ought not to be enforced.

Article II of the Constitution *requires* the President of the United States to “take Care that the Laws be faithfully executed.” Despite this legal requirement, Barack Obama consistently refused to allow Federal authorities to enforce the existing immigration laws. Because of this, the population of unlawful residents ballooned to an estimated 11.6 million by 2011. In some areas of the country this resulted in serious problems, especially in those states along the southern border where most of the illegal entries occurred. By 2009 the General Accounting Office reported that over 90 percent of the aliens currently in prison had entered the country illegally, costing some \$1.6 billion per year to support. As border states, much of this burden fell on Texas and Arizona. In the former, the U.S. Border Patrol estimated that 52.6 percent of all entries took place along the Rio Grande Valley resulting in 1.8 million illegal immigrant residents in the state at enormous cost to its taxpayers. In Arizona, by 2008 some 11 percent of all inmates in jail were illegal immigrants and they had committed 30 percent of all drug-related offenses. Because of the escalating problems, and the refusal of federal authorities to enforce the immigration laws, the Arizona legislature took action to address the crisis.<sup>32</sup>

Arguing that “there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona,” the act amended Arizona law “to make attrition through enforcement the public policy of all state and local government agencies in Arizona.” The intent was that they would work together “to discourage and deter the unlawful entry and [the] presence of aliens and economic activity by persons unlawfully present in the United States.” To do this, the law required that no official or agency within the state “may adopt a policy that limits or restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law.” The law further required that whenever a “law enforcement official or agency” stopped a suspect with “probable cause”<sup>33</sup> that the person had broken

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<sup>32</sup> Tara Helfman, “Obama the Scrivener & the Supine Court,” *Commentary*, Vol. 136 (December 2013), 28; James S. Pula, *Immigration & Immigrant Communities (1650–2016)* (Ipswich, MA: Salem Press, 2017), 218–19, 237.

<sup>33</sup> The term “probable cause” is important because under the Fourth Amendment of the U.S. Constitution to make an arrest, conduct a search, or receive a warrant, law enforcement officials must have “probable cause,” meaning a reasonable basis for believing that a crime may have been committed or that evidence of the crime is present at the time and place in question.

a law, and the official or agency had a reasonable suspicion that the person was an unlawful alien, they would have to verify the person's immigration status with the federal government. If the person was indeed in the country illegally, the alien must be "transferred immediately to the custody of the United States Immigration and Customs Enforcement or the United States Customs and Border Protection" services.<sup>34</sup>

In short, because the Obama administration was refusing to enforce federal immigration law, the state of Arizona determined to use its own law enforcement resources to do so. To achieve this, whenever a person was detained as a suspect of having committed some legal infraction, the officer involved would be required to check on the legal status of the individual and, if found to be in the country unlawfully, to turn that person over to federal authorities for deportation. In addition, Section 6 of the law made it a crime for an employer to "knowingly employ an unauthorized alien" or to contract with any other person or contractor for the employment of "an unauthorized alien." The purpose of this was to force cooperation from the business community, thereby removing a primary incentive for illegal entry into the country.<sup>35</sup> Significantly, voting was almost completely along party lines with every Republican voting "yes" and every Democrat voting "no" in the state House, while in the state Senate only a single Republican and two Democrats crossed party lines. A public opinion poll conducted following adoption of the law revealed that 71 percent of Arizonans supported the act.

Soon after adoption of the Arizona legislation the Obama administration filed a legal action in federal court to prevent enforcement of the state law. In a very closely argued case, the Supreme Court ruled against the state 5 to 3. In writing the majority opinion, Justice Anthony M. Kennedy noted that the Constitution gives the federal government authority to establish and enforce immigration policy. As early as 1849 in the "Passenger Cases" the Supreme Court had ruled that New York State laws imposing regulations on immigration were unconstitutional because only Congress had the authority to regulate immigration under the Commerce Clause of the Constitution (Article I, Section 8, Clauses 3–4). Although he agreed that Arizona had borne "many of the consequences of unlawful immigration" and that "aliens are reported to be responsible for a disproportionate share of serious crime" and other problems, he nevertheless argued that the Federal government had the sole right to make and enforce immigration policy and any state law conflicting with federal law was not enforceable. With this ruling the Court overturned the state law, but it left unanswered the question of what remedy a state might have to protect its interests,

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<sup>34</sup> Senate Bill 1070, Forty-ninth Legislature, State of Arizona, Sections 1 and 2, <http://www.azleg.gov/alispdfs/council/SB1070-HB2162>. The law specified that should the person in custody be convicted of a crime, the person would first serve the sentence attached to that crime and only then be turned over to Federal authorities.

<sup>35</sup> Senate Bill 1070, Forty-ninth Legislature, State of Arizona, Section 6, <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>; Helfman, "Obama the Scrivener," 28.



and those of its citizens, when a president refuses to fulfill the constitutional obligation to enforce the laws enacted by Congress.

Although administration supporters trumpeted the decision as a victory for their policy positions, the Court's decision was rather limited. It divided the issues raised in the case into provisions of the Arizona law that attempted to enforce the federal laws and those that added new criminal provisions relating to immigrant conduct. The justices found that since the Arizona law added new legal sanctions to existing federal law it was in conflict with federal statutes and could not be enforced. The Court did *not* decide other issues relating to the case, and in fact they unanimously agreed that nothing in federal law prevented enforcement of the Arizona provision requiring that state and local police investigate the immigration status of people who were stopped, detained, or arrested when there was probable cause for those actions. In other words, the Arizona law could not be enforced, but some of its provisions were most likely legal assertions of state authority. Thus, the fundamental issue in the case remained unresolved.<sup>36</sup>

While the Arizona case was being considered, in June 2012 the Obama administration's Secretary of Homeland Security, Janet Napolitano, announced that some 1.4 million illegal immigrants under the age of 30 would not be subject to deportation if they had arrived in the U.S. when they were under the age of sixteen, had continuously resided in the U.S., and had not been convicted of any serious crime. Known as the Deferred Action for Childhood Arrivals (DACA) program, in November 2014 Pres. Obama announced the expansion of the program to increase the number of people eligible for coverage. The following month 26 states filed a legal action in federal court seeking an injunction to prevent the enlargement. The plaintiffs argued that in the DACA order the president had illegally usurped Congress's right to legislate on immigration issues and had failed to enforce the existing laws. In defense, U.S. attorneys argued that the president was within his right to issue the order because Congress had delegated to the president the authority to enforce the immigration laws, improbably reasoning that being delegated authority to *enforce* the laws gave the president the right to *not* enforce them. In *Texas v. United States*, Judge Andrew S. Hanen of the U.S. District Court for the Southern District of Texas granted the requested injunction and chastised the government's attorneys for trying to mislead

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<sup>36</sup> Kate M. Manuel and Michael John Garcia, "Arizona v. United States: A Limited Role for States in Immigration Enforcement," Congressional Research Service, R42719, September 10, 2012. Tara Helfman argues that the *Arizona v. United States* (2012) and *United States v. Windsor* (2013) "rulings go well beyond upholding the constitutionality of the president's political agenda. They recognize and affirm the power of the president to shape public policy through what effectively amounts to the unilateral repeal of legislation—without the involvement of the legislative branch of the U.S. government. The Court has acquiesced in the creation of a super-veto that is a patent violation of the separation of powers." Justice Antonin Scalia sarcastically wrote of the decision: "To say, as the Court does, that Arizona *contradicts federal law* by enforcing applications of the Immigration Act that the President declines to enforce boggles the mind." Helfman, "Obama the Scrivener," 28–29.

the court. The Obama administration took the issue to the Court of Appeals where it lost 2 to 1. The justices who affirmed the injunction noted that the government's argument was "unlikely to succeed on its merits" and that the Immigration and Nationality Act "flatly does not permit" presidential deferred action. The government appealed to the United States Supreme Court which deadlocked at 4 to 4, thus leaving in place the earlier injunction.<sup>37</sup>

On January 20, 2017, Donald Trump succeeded Barack Obama as President of the United States. Having campaigned extensively on the issues of border security and immigration reform, these became important issues within days of his taking office. Only five days after his inauguration he signed Executive Order 13767 directing the Department of Homeland Security to begin construction of a barrier along the U.S.-México border to prevent "all unlawful entries." Two days later he issued Executive Order 13769 instituting a temporary ninety-day ban on the arrival of immigrants from seven nations. The legal basis for the order was Title 8 of the United States Code § 1182(f): "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate."<sup>38</sup> The purpose of the ban was to allow time for better screening mechanisms to be enacted to ensure that the identity of people arriving in the country was firmly established and that they posed no threat. The nations selected were deemed to be, in one way or another, countries that did not have in place adequate screening measures for passengers boarding airline flights within their jurisdictions. They were the same seven nations identified in a law signed by then-President Barack Obama in December 2015. That law actually went further, specifically restricting travel to the United States for anyone who had been in Iran, Iraq, Sudan, or Syria at any time beginning in or

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<sup>37</sup> *State of Texas, et al. v. United States of America*, U.S. Court of Appeals for the Fifth District, No. 1540238, November 9, 2015. See also *State of Texas v. United States*, Civil No. B-14-254, Document 145–2, U.S. District Court for the Southern District of Texas, February 16, 2015; Immigrant Legal Resource Center – <https://www.ilrc.org/daca>. The new Homeland Security policy also required that those covered not be above the age of thirty and (a) be in school, have graduated from high school, have obtained a general education diploma, or (b) be honorably discharged from service in the U.S. armed forces. The *State of Texas, et al. v. United States of America* case also included the Deferred Action for Parents of Americans (DAPA) program, a similar immigration policy aimed at the parents of American citizens who may themselves be unlawfully in the U.S. As it stood in April 2018, the Court had ordered the government to continue accepting DACA applications, but the Supreme Court had yet to rule on the president's order eliminating DACA protections.

<sup>38</sup> Quoted in Kyle Blaine and Julia Horowitz, "How the Trump Administration Chose the 7 Countries in the Immigration Executive Order," CNN, January 30, 2017, <https://www.cnn.com/2017/01/29/politics/how-the-trump-administration-chose-the-7-countries/index.html>. Executive Order 13769 was in force from January 27, 2017, until March 16, 2017, when replaced by Executive Order 13780. For Executive Order 13767 see Sela Cowger, Jessica Bolter, and Sarah Pierce, "The First 100 Days: Summary of Major Immigration Actions Taken by the Trump Administration," Migration Policy Institute Fact Sheet, April 2017, 2.

after March 2011. Obama’s Department of Homeland Security soon added Libya, Somalia, and Yemen to the list, labeling them “countries of concern.” In addition, Iran, Sudan, and Syria were all included in the Obama-era U.S. State Department’s list of “state sponsors of terrorism,” while Iraq, Libya, Somalia, and Yemen appeared on the State Department’s list of “terrorist safe havens.”<sup>39</sup>

The Obama designation of these nations as problem areas met with no political backlash, no media frenzy, no public uproar. But by 2017 the political climate had changed dramatically. With the announcement of the executive order one would have thought from the torrent of media hysteria that World War III had begun. The action was immediately dubbed a “Muslim ban” and the president who issued it labeled an anti-immigrant racist. Democratic leaders who acquiesced without comment in the Obama designation of these same seven nations for special precautions led the assault on the Trump order, each seemingly trying to surpass the others in finding just the right denunciations with which to condemn the act and its author. The facts were quite different. A report by the Pew Foundation identified 232 countries and territories in which there were discernable Muslim populations. The seven nations mentioned in the presidential order formed only 3.0 percent of those areas. In terms of population the 207,840,950 Muslims in those seven countries constituted only 13.2 percent of the world’s estimated 1,570,000,000 Muslims.<sup>40</sup> The words “Moslem,” “Muslim,” and “Islam,” or for that matter the word “ban,” do not appear anywhere in the executive order. It was certainly *not* a Muslim ban, but that is how most of the media and all of the Democratic spokespeople portrayed it to the nation and the world. In the new climate of partisan division, scoring political points was now more important than finding a solution to a problem, or even national security.

As much as lines dividing the two political parties had become hardened by 2017, so had divisions within the Federal court system. In the United States there are two parallel judicial systems, state and federal (national). In the local and state system, judges are normally elected by the people residing in those areas or appointed by the

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<sup>39</sup> Donald J. Trump, Executive Order 13769, January 27, 2017, <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states/>; Cowger, Bolter, and Pierce, “The First 100 Days,” 1; Aaron Reichlin-Melnick, “Travel Ban 3.0 Developments: What You Should Know,” American Immigration Council, December 8, 2017, <http://immigrationimpact.com/2017/12/08/travel-ban-what-you-should-know/>; Tom Kertscher, “Were the 7 nations identified in Donald Trump’s travel ban named by Barack Obama as terror hotbeds?” *Journal Sentinel*, February 7, 2017, <http://www.politifact.com/wisconsin/statements/2017/feb/07/reince-priebus/were-7-nations-identified-donald-trumps-travel-ban/>; Kyle Blaine and Julia Horowitz, “How the Trump Administration Chose the 7 Countries in the Immigration Executive Order,” CNN, January 30, 2017, <https://www.cnn.com/2017/01/29/politics/how-the-trump-administration-chose-the-7-countries/index.html>; “DHS Announces Further Travel Restrictions for the Visa Waiver Program,” Department of Homeland Security Press Office Release, February 18, 2016.

<sup>40</sup> *Mapping the Global Muslim Population: A Report on the Size and Distribution of the World’s Muslim Population*, Pew Research Center, October 7, 2009, <http://www.pewforum.org/2009/10/07/mapping-the-global-muslim-population/>.

state governor with the affirmation of the state legislature. In the federal system there are 94 District Courts distributed around the country. Above this level are 13 Circuit Courts of Appeals, loosely sized according to population, to which decisions of the lower courts can be appealed. The highest level is the U.S. Supreme Court which is the ultimate arbiter of issues it reviews from lower courts. Since Article VI, Paragraph 2 of the Constitution specifies that federal laws override any contrary state or local laws, the Supreme Court also hears appeals from the various state supreme courts.

The size of the Supreme Court is set at nine justices. When Justice Antonin Scalia unexpectedly passed away in February 2016 the Court was left with eight members, four of which tended to be liberals and four conservatives; that is to say, four believed in a “living” Constitution that justices were free to “interpret” as they wished, while four believed it their job to apply the Constitution as written and originally intended. Sometimes this division was not particularly important because opinions on some issues coalesced, but other times on the more divisive issues the gap in understanding of their perceived role proved important. One of those issues was the responsibility of the President and Congress in administering and directing immigration policy. There was a similar division among the lower federal courts. For example, the Ninth Circuit Court was universally known as very liberal while the Fourth Circuit tended to be conservative.<sup>41</sup> If one wanted a liberal decision on an issue, finding a reason to bring it before a liberal-leaning court gave one a better chance for a decision in one’s favor, and conversely a conservative would be well-advised to seek out a more conservative judicial venue.

Because of the political aspect of the federal court system, opponents of the executive order filed requests for injunctions in the more liberal of the District and Circuit Courts and were rewarded handsomely. In *State of Washington v. Trump*, on February 3, 2017, Judge James Robart of the United States District Court for the Western District of Washington issued a restraining order preventing enforcement of the president’s order. The administration appealed and only six days later the notoriously liberal U.S. Court of Appeals for the Ninth Circuit upheld the restraining order. Interestingly, in this case, as well as a later case in the District of Maryland, the rulings were based primarily *not* on Constitutional or legal grounds but on what the justices *thought* were the purposes of the orders based on political campaign statements. Opponents certainly had an argument when they pointed to these decisions as “judicial activism”; that is, the tendency of some justices to attempt to *make* law rather than *interpret* it. When the administration re-drafted the original order as Executive Order 13780 to eliminate clauses to which the courts objected, Judge Derrick Watson of the United States District Court for the District of Hawaii issued

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<sup>41</sup> The Third and Ninth Circuit Courts have been identified as the most liberal and the Fourth, Seventh, and Eighth the most conservative. See Andreas Broscheid, “Comparing Circuits: Are Some U.S. Courts of Appeals More Liberal or Conservative Than Others?” *Law & Society Review*, <https://www.questia.com/library/journal/1P3-2386674421/comparing-circuits-are-some-u-s-courts-of-appeals>.

a restraining order based on what he *believed* was the intent of the order rather than on what it actually said or on any specific legal or constitutional violation. The President and his supporters denounced it as “an unprecedented judicial overreach.” When the issue eventually reached the Supreme Court, it ruled on June 26, 2017, to reinstate the provisions to which the lower courts had objected. In early December the Supreme Court issued two orders to lower courts to reconsider their rulings in related cases, in the meantime lifting most of the restrictions imposed by those earlier decisions. In January 2018 it agreed to review the substance of the issues involved in the case.<sup>42</sup> These were at least temporary victories for the president.

The temporary victory became permanent on June 26 when the Supreme Court ruled in *President of the United States, et al., v. Hawaii, et al.* that Pres. Trump had acted within his authority under 8 U.S.C. §§1184(f) and 1185(a) in determining the need to enact restrictions designed to “elicit improved identity-management and information-sharing protocols and practices from foreign governments” to “prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information.” In doing so, the Court rejected the argument that the order as written discriminated against any religious group and affirmed that “foreign nationals seeking admission have no constitutional right to entry.”<sup>43</sup> This was a firm rebuke to those judicial officials who sought to interpret the president’s motives rather than the legality of his tangible actions.

Another issue that rose to national debate was Pres. Trump’s action to rescind the Obama Deferred Action for Childhood Arrivals (DACA) program. DACA is *not* a law. It was never submitted to Congress, much less adopted as legislation. It was begun through an executive order issued by Pres. Obama and his Secretary of Homeland Security. As Republican Representative Steve King of Iowa explained, “the President does not have the authority to waive immigration law, nor does he have the authority to create it out of thin air, and [Obama has] done both.” Since DACA is a unilateral action initiated by a president, it is logical that it can also be unilaterally ended by a president. By 2017 when Pres. Donald Trump took office popular sentiment in the country favored extending the program and offering an opportunity for people

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<sup>42</sup> Judge Watson was a recent appointee of Pres. Barack Obama. He argued that the ban would “disfavor a particular religion,” even though no religious test was specified in the order. The Supreme Court allowed the Executive Order to stand except that it exempted people with “a bona fide relationship with a person or entity in the United States.” Kyle Blaine and Julia Horowitz, “How the Trump Administration Chose the 7 Countries in the Immigration Executive Order,” CNN, January 30, 2017, <https://www.cnn.com/2017/01/29/politics/how-the-trump-administration-chose-the-7-countries/index.html>; Dan Cadman, “On Judicial Impartiality (or Lack Thereof) in Immigration Cases,” Center for Immigration Studies, <https://cis.org/Cadman/Judicial-Impartiality-or-Lack-Thereof-Immigration-Cases>; Andrew R. Arthur, “Supreme Court Clears Trump Travel Restrictions, for Now,” Center for Immigration Studies, December 6, 2017, <https://cis.org/Arthur/Supreme-Court-Clears-Trump-Travel-Restrictions-Now>. The cases involved in the December orders were *Trump v. Hawaii* and *Trump v. Int’l Refugee Assistance*.

<sup>43</sup> *Trump, President of the United States et al., v. Hawaii et al.*, No. 17–965, June 26, 2018, 2–4.

covered by it to gain legal status. A Quinnipiac University poll released in January 2018 found that 73 percent of Americans favored allowing those covered by DACA, referred to sympathetically by Democrats and their allies in the media as the so-called “Dreamers,” to remain in the country legally.<sup>44</sup>

Although estimates on the number of people involved varied, most agreed on about 750,000 eligible for DACA. In July of 2017 Pres. Trump explained in an interview that what he would like to see was a “comprehensive immigration plan” but he feared that “political forces are not ready yet.”<sup>45</sup> Inasmuch as the DACA program had never been approved by Congress, he wanted Congress to act by providing new legislation that he then pledged to enforce. In the meantime, he announced his intention to end the original DACA order which he, along with many others, believed had been an illegal usurpation of Congressional authority by the Executive branch of government. Although much of the politicized American media has characterized this as a heartless act of cruelty designed to end the program, Trump made it very clear at the time that he was delaying any enforcement of the action for six months – until March 5, 2018 – to give Congress an opportunity to enact legislation that would solve the problem, including “legalize DACA.” Expressing “love for these people,” he went on to say that with several months to act “hopefully now Congress will be able to help them [to become legal] properly.” In a subsequent news conference White House Press Secretary Sarah Huckabee Sanders explained that “The president wants to see responsible immigration reform, and he wants [DACA] to be part of it. Something needs to be done. It’s Congress’s job to do that.”<sup>46</sup>

A Harvard University/Harris public opinion poll on the Trump administration released in February 2017 indicated that people wanted the two political parties to work together to find a solution to these lingering issues. Responding to different questions, 68 percent of registered voters wanted Pres. Trump to work with Congress to arrange a compromise and 73 percent of Democratic respondents believed their party leaders should cooperate with the president to reach an accord on the issues instead of resisting compromise.<sup>47</sup> For a while it appeared that this might happen.

A Congressional group led by Democratic Senator Richard Durbin of Illinois and Republican Senator Lindsey Graham of South Carolina attempted to fashion a solution that would legalize the so-called “Dreamers” and provide for border security. With encouragement from Pres. Trump, the draft bill not only provided for legalization

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<sup>44</sup> Quinnipiac University poll, January 2018.

<sup>45</sup> Michael D. Shear and Julie Hirschfeld Davis, “Trump Moves to End DACA and Calls on Congress to Act,” *New York Times*, September 5, 2017, <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html>; “U.S. Ends Program Giving ‘Dreamers’ Legal Protection,” *New York Times*, September 6, 2017, A1.

<sup>46</sup> *Ibid.*

<sup>47</sup> Harvard University Center for American Political Studies/Harris Poll on Trump administration, February 22, 2017.

of the Dreamers, but over one million additional unlawful residents including the parents of the Dreamers. In all, this was more than twice the number of possible legalizations the Democrats were seeking. The draft also included provisions for ending chain migration, the Diversity Lottery Visa program, and enhancing border security. The president suggested that the visas saved on the chain migration and lottery programs could be used to reduce the backlog of applications for legal residency. It appeared to be a compromise in which each political faction received something, and which accorded with the sentiments of most Americans regarding legal status for the Dreamers as reflected in the Quinnipiac and Harvard/Harris polls. The latter poll also showed that American public opinion favored the other main provisions that would limit chain migration, end to the Diversity Visa Lottery, and provide initial funding to begin construction of a border “wall.”

The Dream Act of 2017, the compromise on DACA that resembled in many respects previous attempts at settling the recurring issues, met with the same fate as its predecessors. Democrats opposed the bill that would have allowed more than twice as many illegal immigrants to become legal as they originally wanted, their objection to the provisions for border security overriding their desire to assist the Dreamers for whom they professed to be so concerned. Without bipartisan support the bill failed and the president’s deadline for fixing the problem expired on March 5, 2018, making everyone covered by DACA liable to arrest and deportation. Despite that, the Trump administration moved *only* to pursue those who had committed crimes since being in the United States.<sup>48</sup>

While the Congressional negotiations were taking place, the DACA issue continued to be the subject of various court actions. Opponents of Pres. Trump’s order ending DACA appealed to the liberal U.S. District Court for the Northern District of California, requesting an injunction to prevent enforcement of the presidential order until the issue could be adjudicated in court. On January 9, 2018, Judge William Alsup not only granted the injunction but ordered the United States Citizenship and Immigration Services to continue accepting renewal applications under the program. Ironically, Janet Napolitano, who as Pres. Obama’s Secretary of Homeland Security had originally announced DACA, argued that Pres. Trump’s action was “unconstitutional, unjust, and unlawful.” She did not bother to try to explain how she believed

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<sup>48</sup> Interestingly, a Quinnipiac University study revealed that Hispanics were evenly split on the bill, 42 percent supporting and a like proportion opposing the measure. The key issue for them, as for Democrats and Republicans, was linking support for DACA with funding for border security. “S. 1615 – 115th Congress: Dream Act of 2017,” [www.GovTrack.us](http://www.GovTrack.us), 2017, <https://www.govtrack.us/congress/bills/115/s1615>; Christian Penichet-Paul, “Dream Act of 2017 Bill Summary,” National Immigration Forum, July 21, 2017, [https://immigrationforum.org/blog/dream-act-of-2017-bill-summary/?gclid=EAlaIqobChMlrOafvqyZ2gIVw7fACh3tpgMgEAAAYASAAEgJTv\\_D\\_BwE](https://immigrationforum.org/blog/dream-act-of-2017-bill-summary/?gclid=EAlaIqobChMlrOafvqyZ2gIVw7fACh3tpgMgEAAAYASAAEgJTv_D_BwE); “Dream Act of 2017,” S.1615, [Congress.gov](https://www.congress.gov/bill/115th-congress/senate-bill/1615), <https://www.congress.gov/bill/115th-congress/senate-bill/1615>; Donald Kerwin and Robert Warren, Dream Act, *Journal on Migration and Human Security*, Vol. 6, No. 1 (2018) 61–73, <http://jmhs.cmsny.org/index.php/jmhs/article/view/112>.

that one presidential order could be as constitutional and lawful while another on exactly the same issue could be neither. A month later, on February 13 Judge Nicholas Garaufis of the U.S. District Court for the Eastern District of New York granted a similar injunction but enlarged it by ordering the government to accept new applications as well as renewals. In his ruling he found that DACA was not unconstitutional, was not in violation of the Administrative Procedure Act, and was not contrary to the Immigration and Naturalization Act. This finding appears to be directly opposite that of Judge Hanen who ruled the Obama administration had “clearly legislated a substantive rule without complying with the procedural requirements under the Administration Procedure Act.” On February 26 the Trump administration asked the Supreme Court to review the lower court rulings, the Department of Justice arguing that “The district court’s unprecedented order requires the government to sanction indefinitely an ongoing violation of federal law.” The Supreme Court declined to expedite the case by allowing a direct appeal, so it will have to wind its normal way through the Circuit Court of Appeals system. With contrary rulings from separate District Courts, a final resolution on the issue awaits either the improbable adoption by Congress of legislation to fix the problem or a final decision by the Supreme Court.<sup>49</sup>

## Conclusion

The number of immigrants in the United States today is larger than it has ever been, and on a proportional basis at 13.7 percent is very close to its peak of 14.7 percent a century ago. Most of these people are either naturalized citizens or legal permanent residents. Over the most recent decade, more than one million people per year have entered the country, with India, China, and México being the largest countries of origin since 2014. The average immigrant is about eight years older than the typical American, which is largely explained by the fact that a leading attraction is jobs so there is a higher percentage of immigrants in the normal wage-earning age group than might otherwise be expected. Contrary to popular belief, these are not predominantly low skill/low income workers, almost one-third holding positions in management, business, science, and the arts.

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<sup>49</sup> Andrew R. Arthur, “SCOTUS Denies Review in DACA Lawsuit,” Center for Immigration Studies, February 27, 2018, <https://cis.org/Arthur/SCOTUS-Denies-Review-DACA-Lawsuit>. At the time of her statement, Napolitano was the president of the University of California system. For the Hanen decision see *State of Texas v. United States of America*, Civil Case B-14-254, District Court for the Southern District of Texas, Brownsville, Texas, February 16, 2015. The Administration Procedure Act defines legal requirements that agencies must adhere to when adopting rules. Adopted in 1946, a portion of it requires that federal agencies publish proposed actions in the Federal Register and allow at least thirty days for public feedback. It must then explain why its action is not “arbitrary” or “capricious” before implementing the new rule. Critics of DACA argue that these steps were never followed, thus it was illegally imposed.



Public opinion research in 2017 and early 2018 indicates that most Americans support legal immigration and believe that it is good for the country (89 percent), although a majority would like to see a reduction in the number. Most respondents favored eliminating the Family Reunification and Diversity Visa Lottery programs, but also believed that the place of origin should not be a factor in allowing entry (76 percent). A majority also believe that skills and potential contributions to the nation ought to be given priority for entry and that the nation's borders ought to be better secured.

From 1986 to 1996 there was a general bipartisan approach to immigration legislation; that is, both parties were split on the major issues. A study by Giovanni Facchini and Max Friedrich Steinhardt focusing on voting patterns in the House of Representatives from 1970 to 2006 supports this conclusion, finding that “empirical analysis suggests that labor market characteristics are statistically significant drivers of a representative’s voting behavior on immigration policy. ... These effects hold both when we compare representatives across districts, as well as when we consider the same congressperson over time.”<sup>50</sup> Between 1986 and 2006 voting in both the House and Senate was not along strict party lines, both Democratic and Republican presidents promoted border security and compromise legislation, and these were also backed by a majority of both parties in Congress. This clearly began to change in 2006 as Democrats became concerned that Republicans were beginning to attract Hispanic voters who had overwhelmingly cast their ballots for the Democratic candidate in the 1992 and 1996 presidential elections. Whereas most Democrats had previously supported efforts to secure the border and promote immigration based primarily on skills, they increasingly unified in support of the opposite positions. The election of Barack Obama in 2008 accelerated this trend toward partisanship with Democrats coalescing in favor of “amnesty” for those unlawfully in the country and against enhanced border security, making any compromise political solution less likely.<sup>51</sup>

<sup>50</sup> Giovanni Facchini and Max Friedrich Steinhardt, “What Drives U.S. Immigration Policy? Evidence from Congressional Roll Call Votes,” *Forschungsinstitut zur Zukunft der Arbeit*, No. 5561, March 2011, <http://hdl.handle.net/10419/51840>.

<sup>51</sup> Further evidence of the political motivations behind the partisanship is the Democratic opposition to requiring legal identification for voting and, in April 2018, opposing the U.S. Census Bureau’s plan to include a question on citizenship status in the 2020 census. Republicans argue that providing a legal identification for voting is especially important given a Judicial Watch report indicating California was in violation of the Voter Registration Act, 52 U.S.C. § 20507 and that as a result there were “more total registered voters than there were adults over the age of 18 living in each of the following eleven (11) counties: Imperial (102%), Lassen (102%), Los Angeles (112%), Monterey (104%), San Diego (138%), San Francisco (114%), San Mateo (111%), Santa Cruz (109%), Solano (111%), Stanislaus (102%), and Yolo (110%).” The apparent over-voting in some districts is a serious problem and ascertaining citizenship is important in the decennial reapportionment of seats in the House of Representatives and for various forms of federal financial assistance. For information on over-voting, see the Judicial Watch letter from Robert D. Popper to Alex Padilla, the California Secretary of State, dated August 1, 2017, available at [www.JudicialWatch.org](http://www.JudicialWatch.org).

Although the final arbiter of legal issues involving immigration should be the federal court system, the judiciary also has become increasingly politicized. Split along the same lines that divide Congress, the rulings of federal District and Circuit Courts have as yet provided no definitive answers on the basic underlying issues. Until the Supreme Court rules on some of the cases making their way toward it, the questions of legalization of unlawful immigrants, enforcement of immigration law, and border security will remain important and divisive national political issues.