

## Congressional Shifting – Is this the Big One or Just a Pre-Shock?

*Article Contributed by L. Batya Schwartz Ehrens and Bernard P. Wolfsdorf, Managing Partner, Wolfsdorf Immigration Law Group*

Energy released into the earth's crust causes shifts which are known as earthquakes, tsunamis, landslides, and volcanic eruptions. Minor earthquakes occur constantly every day around the world, but most remain unnoticed until a single quake is large enough to claim the lives of thousands or millions of human beings. Like those tiny, unnoticed, but constant tremors, as well as the much more newsworthy catastrophes, the steady deterioration of the crumbling immigration system has been threatening the economic, political, and social infrastructure of the United States for decades, but all signs indicate that the "big one" still looms ahead.

Whispers and shouts from all sides of the immigration debate add human dimension to the complexities, and explain why there has been no viable solution to fortify our shaky immigration system. The anti-immigration voice shouts that enforcement, border security, and even deportation of millions of individuals and families are the solution, and must take priority to protect the security and economic interests of the United States. Immigration advocates and immigrant groups contest that the solution rests in designing a mechanism to transform unlawful migrants to lawful immigrants who will continue to strengthen the economy, and enrich what has always been a nation of immigrants.

Precariously hanging on the edge of the debate are the immigrant youth who migrated to the United States as children and infants, often accompanying their undocumented parents. These children grow up with visions of becoming business owners, teachers, doctors, nurses, and lawyers, serving their communities, and becoming productive members of society. However, as young adults, they soon learn that despite their ambition, drive, bi-lingual and bi-cultural skills, their options to pursue their dreams, as well as economic and social mobility, are stymied.

Some speak out and cry for legislation creating a pathway to become citizens of the only country they know. Far more shrink into the shadows, hoping to remain unnoticed as they silently navigate the system struggling to finance and obtain Bachelors and Masters degrees for jobs they will never be authorized to fill. Exclusion from opportunities is a personal and ethical tragedy for this group of highly motivated and creative youth. However, it is also a political and economic tragedy for the United States which could capitalize on the entrepreneurship, energy, creativity, and tax revenue<sup>1</sup> from some of the most productive members of society.

The corroding immigration system, which is rooted in the absence of legal pathways for many foreign nationals, affects not only foreign nationals, but

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also every American: those who depend on childcare or eldercare, those who eat in restaurants, or enjoy affordable fresh produce, employers seeking to keep the best and brightest in every industry in order to compete in an age of globalization, and US citizen spouses and children with a foreign national parent, spouse, or sibling who is being deported. Immigration is a national problem which Congress must address in order to respond to the distressed economy and its distressed citizens. Regardless of the viewpoint, pressure continues to build, and it is only a matter of time before Congress will be forced to choose to either face the hotbed of immigration issues in the US, or clean up the economic and societal catastrophe that will undoubtedly occur.

### *112<sup>th</sup> Congressional Elections*

On November 2, 2010, the 112th United States Congressional elections took place which marked the most recent political shift in the favor of the Republican Party. The 111th Congressional session, which began on January 3, 2009, during the last two weeks of the Bush Administration, resulted in an increase in the Democratic majority in both the House and the Senate. After two years of Democratic control under the Obama administration, on January 03, 2011, the House Majority will shift again as Congress enters its 112th session.

In the November 2, 2010 elections, Republicans gained control of 239 of the 435 seats in the House of Representatives (259 seats were previously held by Democrats during the 111th session). The Democratic majority will remain in the Senate with a 51 to 47 advantage (with two independents), which is reduced from the 111th Congress (which was previously comprised of 57 Democrats, 41 Republicans and two independents).

### *Congressional Plate Shifting – Aftershocks Expected to Strike Evolving Immigration Policies*

Lamar Smith (R-TX), who will chair the House Judiciary Committee, is known for his commitment to Border Security and “interior enforcement.” He

has advocated for national immigration laws modeled after Arizona’s SB 1070, as well as for his long-term support of mandatory verification programs.

Smith has opposed in-state tuition, educational benefits, as well as welfare and health care services for undocumented immigrants. Further, he is known for his stance against birthright citizenship for children of immigrants born on US soil (which is guaranteed by the 14<sup>th</sup> Amendment to the US Constitution) unless at least one parent has authorized status in the US. He has opposed the Diversity Lottery system, and in general views immigration as a problem weakening the United States.

Smith voted against increases in temporary and permanent working visas, which would effectively prevent the world’s most highly educated professionals from gaining authorization to work and live in the United States and eventually become Americans. Smith has been a leader of conservative immigration policy since the 1990’s. In 1994, he was the architect of the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRIRA), which coined the term “unlawfully present” to define undocumented immigrants and expanded the number of illegal immigrants who could be deported.

A palpable threat to immigrant interests, Lamar Smith’s rancor is actually surpassed by the upcoming head of the House Immigration Committee, Steve King (R-IA). At a June 2010 tea party event in Colorado, King stated that he would support a pathway to citizenship for unauthorized immigrants only if “every time we give amnesty for an illegal alien, we deport a liberal.” King is expected to push legislation including a birthright citizenship bill, legislation to reaffirm states’ right to enact Arizona-like immigration laws, a bill to take away deductions from employers who pay illegal immigrants and legislation to crack down on cities that don’t go after illegal residents.<sup>2</sup>

The situation in the Senate is somewhat brighter, but bleak considering how little was accomplished

even after a complete Democrat majority in both the House and Senate during the 111<sup>th</sup> session. Although Democrat Senators will remain the majority, many dependable pro-immigrant voices will leave including Arlen Specter (D-PA), Sam Brownback (R-KS), and Russ Feingold (D-WI). Changes in the Senate are unremarkable in terms of any affect on immigration, and pro-immigrant voices including Senate Majority Leader Harry Reid (D-NV) and immigration Subcommittee Chair Chuck Schumer (D-NY) will probably maintain their leadership positions. In contrast, House leadership under King and Smith represent not just a shift in political parties, but a powerful platform that has been embedded within Congress from which the most conservative positions in immigration policy may emerge.

#### *Economic Tremors Felt Throughout The Land*

If the 111th Congress was the window for finally passing a comprehensive immigration reform solution, that window was shattered after the 112th Congressional elections. Immigration advocates have now redirected their efforts toward stand-alone immigration solutions, which may be an opportunity to make some progress despite the changes in Congressional leadership. However, any move toward progressive reforms in immigration will undoubtedly be balanced (and probably preceded by) increased border security and immigration enforcement action. While stand-alone successes treat some symptoms and shortcomings, they do not heal the diseased, deteriorating system. Comprehensive Immigration Reform remains the ultimate goal in order to provide a holistic solution to redesign and replace the failed system.

#### *Speculating Legislative Changes*

DREAM Update: On November 30, 2010, Senate Majority Leader Harry Reid (D-NV) filed a revised version of the DREAM Act (S. 3992) addressing Republican concerns to attract broader support to obtain the requisite 60 votes to pass in the Senate during the “lame duck” session of the 111<sup>th</sup> session. The new bill could be up for a vote on December 6, 2010 at the earliest.

Worksite Compliance/E-Verify: With increased rumbling about worksite compliance, E-Verify, which has been mandatory for Federal contractors since September 2009, will undoubtedly be one of the next hot topics brought to the floor. The GOP is poised to use their increased representation to push for universally mandatory E-Verify, as well as increased worksite compliance enforcement. At this point, E-Verify is teeming with problems (which are too extensive to list here). Pre-mature universally mandatory E-Verify would disproportionately disadvantage small and medium size companies, but is a likely development in the next session.

Border Security/Increased Enforcement: Proposals to criminalize unlawful presence and increase penalties for unlawful entry are anticipated. Expedited removal, which currently includes any undocumented immigrant discovered within 100 miles of a border region, may also be expanded. Increased funding for enforcement, which includes border enforcement, a fence on the US Mexico border, and interior enforcement to pursue unlawfully present immigrants more aggressively is likely. Deportation is likely to increase under GOP pressure (a continuation of the trend of increased Deportation statistics under the Obama administration).

Foreign Investors: The 112<sup>th</sup> session might also be an opening for immigration legislation encouraging more foreign investors and business creators by means of offering immigration incentives or changing the existing EB-5 program.

Employment Based Immigration: Industries such as technology, health care, and agriculture depend on highly skilled and unskilled foreign workers. Legislation such as increasing H-1b visa availability and creating new immigration options for sectors dependent on foreign workers will further reduce barriers to economic growth.

The projected legislation includes a broad range of proposals both in favor and against the interests of immigrants and businesses employing immigrants. While these issues may not gain enough support to materialize, they will continue to polarize politicians

and their constituents, adding fuel to the fiery debate which to this point has been inextinguishable.

### *Extinguishing Fires*

The Republican House majority and Democrat Senate majority might actually present an opportunity for more legislative progress than has been made in the previous 10 years if both parties can capitalize on the opportunity to pass targeted stand-alone bills that further their interests, balanced by the concerns of the opposing viewpoints. However, without laying a solid foundation from which to build a completely redesigned and renovated comprehensive immigration system, true success will last only until another leak springs. For immigration advocates, the immediate solution rests in balancing the pull between immigration benefits and enforcement efforts. A more long-lasting comprehensive solution will integrate the benefits of increased authorized immigration as a means to decrease the expense of enforcing unauthorized immigration, in order to derive the economic and social benefits that immigration brings to the United States.

One of the largest obstacle to progressive reform solutions has been and continues to be anti-immigrant rhetoric from groups like Federation for American Immigration Reform (FAIR), NumbersUSA, and the Center for Immigration Studies, which claim to be non-partisan and pro-immigrant, but actually form an unofficial coalition espousing messages of white-nationalism and hatred. This coalition, which is supported by masses of primarily working-class, middle-aged, Anglo-Americans who are swept up by messages rooted in unfounded fears, xenophobia, and hatred, has a powerful effect on all immigration-related legislation passing through Congress.

A recent *Village Voice* investigative report explores FAIR's history and legislative projects, exposing the organization's deceptive tactics to mask its ties with white nationalism, despite portraying itself as an unbiased resource for the American people. Dr. John Tanton, who founded all three groups, has

stated, "as whites see their power and control over their lives declining, will they simply go quietly into the night? Or will there be an explosion?" Tranton's vitriolic rhetoric is echoed by Kris Kobach, who played a key role in drafting SB 1070, and the Immigration Reform Law Institute (the legal arm of FAIR) which portrays undocumented immigrants as social and economic burdens in their "neutral" reports reviewing proposed legislation.<sup>3</sup>

FAIR's message is widely received, embraced, and echoed in the media and incorporated into legislation. At a June 2010 rally in support of SB 1070 in Phoenix, Arizona, State Senator Russell Pearce (whose talking points come directly from FAIR) responded to the crowd's chanted gratitude for sponsoring SB 1070 with a joke that President Barack Obama might not have legal status. FAIR also advanced to Fox News a copy of a "neutral" report it prepared on the cost of illegal immigration in the US, which Fox cited as an unbiased source of its report on immigration on May 17, 2010.

FAIR disseminates messages that undocumented immigrants weaken the economy, steal American jobs, exploit public benefits and commit heinous crimes. In reality, the majority of undocumented immigrants are fighting to trade in their unenviable circumstances for the opportunity to work, pay taxes, send their children to college, and become constructive member of society. This session, advocates must find ways to convey to Congressional Republicans (and conservative or on-the-fence Democrats) that lawful immigration encourages economic revival and job creation, and house the key to economic recovery. If this can be accomplished to the same degree that the FAIR coalition has spread its message through state and national legislators, the next two years have the potential to be a time for true progressive negotiation.

The recently revised reintroduced DREAM Act will set the tone for how the next Congress will react to negotiated legislation. Future legislative proposals and the votes which follow will determine whether the 112<sup>th</sup> Congressional session will result in a prepared response to the increasing subterranean

rumblings, or erupt as an enormous earth-shaking calamity in the United States.

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<sup>3</sup> Sterling, Terry Green, *FAIR-Y Tales*, The Village Voice, Dec. 1, 2010, available at <http://www.villagevoice.com/2010-12-01/news/fairy-y-tales/>.

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<sup>1</sup> The Congressional Budget Office Cost Estimate introduced on November 30, 2010, reports that the Development, Relief, and Education for Alien Minors Act of 2010 (DREAM Act -S. 3392), which would grant conditional nonimmigrant status to qualifying unauthorized youth in the United States, would increase revenues by \$2.3 billion in the 2011-2020 period based on estimates provided by the Joint Committee on Taxation. *Available at* <http://www.cbo.gov/doc.cfm?index=11991>.

<sup>2</sup>

<http://www.azcentral.com/news/articles/2>