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Obama's Immigration Reform: The Triumph of Executive Action

John D. Skrentny and Jane Lilly López*

INTRODUCTION

In 2008, presidential candidate and Senator Barack Obama (D-IL) made several promises to various groups of voters in order to attract their support and ensure that they would be motivated to come out to vote on Election Day. To Latino voters, a key promise was to pass comprehensive immigration reform (CIR).¹ When he won the election—along with a Democratic Congress—expectations were high. However, Obama failed to get either chamber to pass a CIR bill, nor did his administration send a bill to Congress. Obama's first-term immigration failure exceeded that of his predecessor, George W. Bush, who similarly promised CIR and was able at least to persuade the Senate to pass a bill during his second term.²

Despite this failure, Obama did even better among Latino voters in 2012 than he did in 2008.³ Crucially, this Latino support helped him to win re-election.⁴ The purpose of this Article is to explain how and why this occurred and, in particular, to show how Obama was able to use the powers of the executive branch to make enough progress on immigration reform to signal to Latino voters that he was

* The authors wish to thank Gabriel Chin, Mariano-Florentino Cuéllar, Hiroshi Motomura, the editors of this *Journal*, and participants in the 2013 *Indiana Journal of Law and Social Equality* Symposium at the Indiana University Maurer School of Law.

1. See Barack Obama & Joseph Biden, *Barack Obama and Joe Biden: Fighting for Comprehensive Immigration Reform*, OBAMA FOR AMERICA, <http://www.agweb.com/assets/import/files/ImmigrationFactSheet.pdf> (Nov. 21, 2013).

2. See ANDREW WROE, *THE REPUBLICAN PARTY AND IMMIGRATION POLITICS: FROM PROPOSITION 187 TO GEORGE W. BUSH*, at 200 (2008).

3. See, e.g., Cindy Y. Rodriguez, *Latino Vote Key to Obama's Re-Election*, CNN (Nov. 9, 2012), <http://www.cnn.com/2012/11/09/politics/latino-vote-key-election/>.

4. Matt A. Barreto & Gary M. Segura, *2012 Election Eve Poll*, LATINO DECISIONS (Nov. 7, 2012), https://docs.google.com/viewer?url=http://www.latinodecisions.com/index.php/download_file/254/213/&chrome=true.

their friend and therefore win their votes. We argue that, though stymied by politics, Obama skillfully seized *legal* opportunities to make this happen. Specifically, the large population of undocumented immigrants coupled with Obama's legal authority and discretion gave Obama the power he needed to make a considerable variety of immigration policies. Some of these policies (for example, ratcheting up the number of deportations while targeting them toward criminals) were intended to appease skeptics of CIR and demonstrate that undocumented immigration was under control, in order to pave the way for CIR. For Latino voters, Obama offered some reforms to administrative procedures to ease burdens on citizens with an undocumented spouse.⁵ Additionally, after intense pressure from young immigrant rights activists and urging from legal scholars, he also offered the policy of Deferred Action for Childhood Arrivals (DACA) that provided at least temporary legal status for certain undocumented immigrants.⁶

We do not mean to claim that the executive route was or is the best way to create immigration policy in the long term.⁷ Obama's various executive strategies, however, were the only routes available to him and do appear to have played key roles in his re-election. Moreover, at the time of this writing, Obama has finally succeeded in getting a CIR bill passed in the Senate, though its future in the House of Representatives is far from certain.⁸

I. OBAMA AND THE 2008 LATINO VOTE

During the Democratic primaries for the 2008 presidential election, Hillary Clinton carried the Latino vote by a margin of nearly two-to-one over Barack Obama.⁹ When Obama ultimately won the Democratic nomination, it was unclear to what extent Clinton's supporters would shift their allegiance to Obama in the general election. While Obama included CIR in his top policy priorities,¹⁰ hoping to show his support for the Hispanic community, many more Hispanic voters said that education (93%), cost of living (92%), jobs (91%), and health care (90%) were extremely or very important to them than immigration reform (75%).¹¹ Nonetheless,

5. See, e.g., *infra* text accompanying notes 50–51.

6. See, e.g., *infra* text accompanying notes 64–69.

7. For an argument regarding immigration reform more directly rooted in democratic politics, see Daniel I. Morales, *Immigration Reform and the Democratic Will*, 16 U. PA. J.L. & SOC. CHANGE 49 (2013).

8. See, e.g., Ashley Parker & Jonathan Martin, *Senate, 68 to 32, Passes Overhaul for Immigration*, N.Y. TIMES (June 27, 2013), http://www.nytimes.com/2013/06/28/us/politics/immigration-bill-clears-final-hurdle-to-senate-approval.html?_r=0.

9. SUSAN MINUSHKIN & MARK HUGO LOPEZ, PEW HISP. CTR., THE HISPANIC VOTE IN THE 2008 DEMOCRATIC PRESIDENTIAL PRIMARIES 7 (Feb. 21, 2008), <http://www.pewhispanic.org/files/reports/86.pdf>.

10. See Obama & Biden, *supra* note 1.

11. MARK HUGO LOPEZ & SUSAN MINUSHKIN, PEW HISP. CTR., 2008 NATIONAL SURVEY OF

Latino voters overwhelmingly agreed that Obama would address their priority issues better than his opponent Senator John McCain (R-AZ) by a ratio of more than three-to-one.¹²

In the 2008 November election, Obama received the largest margin of support (67% for Obama versus 31% for McCain)¹³ among Latino voters since Bill Clinton was re-elected in 1996.¹⁴ This strong support from Latino voters helped Obama secure a majority of votes in key states, including Florida, Indiana, Nevada, and New Mexico—states that had gone to Bush in 2004.¹⁵ Obama could not have won Indiana or New Mexico without the votes he received from Hispanic voters.¹⁶ In short, it is not difficult to make the case that Obama owed the Latino community for their strong support, and it stood to reason that he owed them what he promised them during the campaign: comprehensive immigration reform.

II. THE LEGISLATIVE FAILURE OF COMPREHENSIVE IMMIGRATION REFORM IN OBAMA'S FIRST TERM

Obama's promise of CIR was hardly an original one. Congress has proposed many versions of CIR during and after the George W. Bush administration, and while they may vary in the details, they all share one thing in common: a grand bargain approach.¹⁷ This means that the hallmark of CIR is an attempt to broker a compromise or bargain between immigration restrictionists who oppose large-scale immigration and undocumented immigration (especially the legalization of persons

LATINOS: HISPANIC VOTER ATTITUDES 5 (July 24, 2008), <http://www.pewhispanic.org/files/reports/90.pdf>.

12. *Id.*

13. *How Groups Voted in 2008*, ROPER CTR. PUB. OP. ARCHIVES, http://www.ropercenter.uconn.edu/elections/how_groups_voted/voted_08.html (Nov. 21, 2013).

14. Kerry received 53% of the Hispanic vote in 2004. *How Groups Voted in 2004*, ROPER CTR. PUB. OP. ARCHIVES, http://www.ropercenter.uconn.edu/elections/how_groups_voted/voted_04.html (Nov. 21, 2013). Gore received 62% of the Hispanic vote in 2000. *How Groups Voted in 2000*, ROPER CTR. PUB. OP. ARCHIVES, http://www.ropercenter.uconn.edu/elections/how_groups_voted/voted_00.html (Nov. 21, 2013). Clinton received 73% of the Hispanic vote in 1996. *How Groups Voted in 1996*, ROPER CTR. PUB. OP. ARCHIVES, http://www.ropercenter.uconn.edu/elections/how_groups_voted/voted_96.html (Nov. 21, 2013).

15. See ANTONIO GONZALEZ & STEVEN OCHOA, WILLIAM C. VELASQUEZ INST., *THE LATINO VOTE IN 2008: TRENDS AND CHARACTERISTICS* 10, http://wcv.org/data/election/wcvi_nov2008nationalanalysis_121808.pdf (Nov. 21, 2013); see also MARK HUGO LOPEZ, PEW HISP. CTR., *THE HISPANIC VOTE IN THE 2008 ELECTION* 5 (Nov. 5, 2008), <http://www.pewhispanic.org/files/reports/98.pdf>.

16. *Id.* at 8.

17. See John D. Skrentny, *Obama's Immigration Reform: A Tough Sell for a Grand Bargain*, in *REACHING FOR A NEW DEAL: AMBITIOUS GOVERNANCE, ECONOMIC MELTDOWN, AND POLARIZED POLITICS IN OBAMA'S FIRST TWO YEARS* 273, 278–80 (Theda Skocpol & Lawrence R. Jacobs eds., 2011).

who entered the United States without authorization), and those who wish to make U.S. borders more open and welcoming to immigrants, including those persons already here.

Congress established this grand bargain model for today's CIR efforts in the Immigration Reform and Control Act of 1986 (IRCA).¹⁸ This legislation sought to control undocumented immigration by both preventing unauthorized entries into the United States from the southern border and by also establishing penalties on employers who knowingly hired undocumented immigrants. This legislation then combined these restrictionist measures with the legalization of the approximately three million undocumented immigrants who were already in the United States at that time.¹⁹ Since then, CIR bills and other proposals have retained some provisions for improved southern border security and some ways to legalize the status of millions of undocumented immigrants currently in the United States.²⁰ These bills usually come with other restrictionist measures, such as attempts to improve IRCA's regulations that prohibit the employment of undocumented immigrants.²¹

While IRCA succeeded in legalizing nearly three million undocumented immigrants, the restrictionist elements of the legislation failed to prevent a massive new population of undocumented immigrants from beginning to form.²² IRCA's failure to prevent undocumented immigration created a major problem for Obama's CIR aspirations. This was because many legislators believed that any new CIR legislation would similarly fail to prevent undocumented immigration. Moreover, given the much larger population of undocumented immigrants, it could allow the legalization of an undocumented population nearly four times larger than that legalized by IRCA.²³

However, negative perceptions of CIR-style grand bargains were not the only problem with Obama's CIR initiatives. There was also a problem with the sometimes deeply held perceptions of the policy beneficiaries themselves. Put simply, some in Congress and the electorate saw undocumented immigrants as lawbreakers who were morally unworthy of legalization.²⁴ These negative perceptions of undocumented immigrants—as lawbreakers unfit for American citizenship—

18. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified primarily in scattered sections of 8 U.S.C.).

19. See JAMES G. GIMPEL & JAMES R. EDWARDS, JR., *THE CONGRESSIONAL POLITICS OF IMMIGRATION REFORM* 166 (1999). For more on the legalization of three million immigrants, see *A Reagan Legacy: Amnesty for Illegal Immigrants*, NAT'L PUB. RADIO (July 4, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=128303672>.

20. See Skrentny, *supra* note 17, at 277.

21. See, e.g., *id.* at 278-80 (describing reform attempts in 2006 and 2007 under President Bush).

22. Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, U. CHI. LEGAL F. 193, 205-06 (2007).

23. See Skrentny, *supra* note 17, at 286; see also Wishnie, *supra* note 22.

24. See, e.g., Skrentny, *supra* note 17, at 286-87.

help us to understand why George W. Bush could not rally a majority of his own party to support CIR during his second term.²⁵

Additional problems for Obama and his CIR aspirations relate to these points, but are analytically distinct from them. While many restrictionists continued their skepticism toward the border security parts of CIR and their resistance toward policy designed to confer legalization and/or citizenship on persons they saw as unworthy of government help, some restrictionists in the Republican party turned this up to unprecedented levels, which made even the first moves toward legislation impossible. Whereas Republicans had joined in CIR efforts in 1986 and in Bush's failed efforts in 2006 and 2007, not a single Republican was willing to support CIR in Obama's first term.²⁶ Moreover, given the large number of "veto points" in the U.S. legislative process,²⁷ this unprecedented polarization stopped Obama's CIR legislative agenda dead in its tracks.²⁸

Republican intransigence was on display even when Obama and reformers in Congress tried for something less than CIR: the "DREAM Act," which applied only to those immigrants who were brought to the United States at a young age, had never been arrested, and had satisfied educational or military requirements.²⁹ Obama pushed the DREAM Act during his lame duck period of 2010 and it passed the Democratic House.³⁰ On December 18, 2010, however, all but three Republican senators joined with five Democrats in opposition, and the bill failed to reach the sixty votes needed to bring it to the floor for debate.³¹ The next term brought a Republican majority into the House³² and ended any hope for CIR legislation in Obama's first term.

III. THE LEGAL BASIS OF EXECUTIVE ACTION ON IMMIGRATION

With opportunities blocked in Congress, Obama was forced to rely on his authority as president to make progress. He had plenty of authority—perhaps more than any president in recent memory. This is because, as Adam Cox and Cristina

25. See, e.g., WROE, *supra* note 2, at 192–200.

26. Skrentny, *supra* note 17, at 289.

27. See EDWIN AMENTA, *BOLD RELIEF: INSTITUTIONAL POLITICS AND THE ORIGINS OF MODERN AMERICAN SOCIAL POLICY* 26 (1998).

28. See Skrentny, *supra* note 17, at 288.

29. See, e.g., Jeanne Batalova & Margie McHugh, *DREAM vs. Reality: An Analysis of Potential DREAM Act Beneficiaries*, *MIGRATION POL'Y INST.* 2 (July 2010), <http://www.migrationpolicy.org/pubs/dream-insight-july2010.pdf>.

30. See, e.g., Julia Preston, *House Backs Legal Status for Many Young Immigrants*, *N.Y. TIMES*, Dec. 8, 2010, <http://www.nytimes.com/2010/12/09/us/politics/09immig.html>.

31. E.g., Julia Preston, *Immigration Vote Leaves Obama's Policy in Disarray*, *N.Y. TIMES*, Dec. 18, 2010, http://www.nytimes.com/2010/12/19/us/politics/19dream.html?_r=1.

32. E.g., Suzanne Gamboa, *New Congress Frosty Towards Immigrants*, *SALON* (Dec. 26, 2010), http://www.salon.com/2010/12/26/us_immigration_what_next/.

Rodríguez have argued, Obama was able to enjoy the “de facto” delegation of authority given to him by Congress on immigration matters.³³ They argue that this has come about for two main reasons. First, Congress has greatly expanded the number of grounds on which legal immigrants may be deported.³⁴ Second, Congress’s tight restriction of admissions combined with the executive branch’s lax enforcement of the borders has ceded to the executive control over about eleven million undocumented immigrants now in the country.³⁵ With so many deportable immigrants, and so many laws on which to base their deportation, the executive branch has unprecedented control over who stays and who leaves, and on what terms removal may take place.³⁶ This provides an expansive—if still limited—discretion on immigration. Cox and Rodríguez explain:

“The President’s power to decide which and how many noncitizens should live in the United States operates principally at the back end of the system, through the exercise of prosecutorial discretion with respect to whom to deport, rather than at the front end of the system, through decisions about whom to admit.”³⁷

Nevertheless, the “back-end” discretion was enough to achieve Obama’s policy and political goals, as we show below.

The Supreme Court has also acknowledged the Executive Branch’s discretionary powers on immigration matters. In *Arizona v. United States*, the Court noted, “A principal feature of the removal system is the broad discretion exercised by immigration officials.”³⁸ The Court argued that this discretion could be based on “human concerns,” including decisions to pass over working families, those with ties to the community, or those with a record of military service, in order to focus on the removal of smugglers or criminals.³⁹ Though the majority did not base its opinion on it, the Brief for the United States also argued, “the Executive Branch’s ability to exercise discretion and set priorities is particularly important because of the need to allocate scarce enforcement resources wisely.”⁴⁰

33. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 *YALE L.J.* 458, 510–11, 514–16 (2009).

34. *Id.* at 514–16.

35. *Id.* at 463.

36. *Id.*

37. *Id.* at 464.

38. 132 S. Ct. 2492, 2499 (2012).

39. *Id.*

40. *Id.* at 2520 (Scalia, J., concurring in part and dissenting in part) (quoting Brief for the United States, *Arizona v. United States*, 132 S. Ct. 2492 (No. 11-182)) (arguing against the Executive Branch’s position on executive discretion, “Of course there is no reason why the Federal Executive’s need to allocate *its* scarce enforcement resources should disable Arizona from devoting *its* resources to illegal immigration in Arizona that in its view the Federal

Not only is there legal basis for the exercise of patterned, policy-driven discretion in the administration of immigration law, but as Hiroshi Motomura has described, there is also explicit statutory authorization of Obama's key policy moves designed to signal to Latino voters that he cares about them and their concerns.⁴¹

In other words, Obama had discretion regarding whom to deport and statutory authority to allow some people to stay. The president can offer parole to certain persons who lack legal authority to be in the United States.⁴² This has been used in the past for refugees and asylees, including 30,000 Hungarians fleeing a failed revolution there.⁴³ Other statutory means include deferred action, which is derived from statutory delegation of authority to the Secretary of the Department of Homeland Security (DHS) and allows the president to stop various processes that may precede deportation.⁴⁴ Yet another route for undocumented persons in the United States to stay is deferred enforced departure, which has had authority on the books since the Eisenhower administration, and which authorizes DHS to allow persons otherwise without legal authorization to be in the United States to stay.⁴⁵

IV. EXECUTIVE ACTION 1: TRY TO BUILD TRUST WITH RESTRICTIONISTS

Due to the lack of trust that restrictionist members of Congress had regarding the border security components of CIR, Obama's initial uses of his discretionary powers were focused on providing indicators that the government was (finally) up to the task of securing the borders and preventing future flows of undocumented immigrants. As DHS Secretary Janet Napolitano explained in 2009,

In 2007, many members of Congress said that they could support immigration reform in the future, but only if we first made significant progress securing the border. This reflected the real concern of many Americans that the government was not serious about enforcing the law. Fast-forward to today, and many of the benchmarks these members of Congress set in 2007 have been met.⁴⁶

Executive has given short shrift.”).

41. HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* (forthcoming 2014).

42. Immigration and Nationality Act § 212(d)(5) (codified as amended at 8 U.S.C. § 1182(d)(5) (2012)).

43. MOTOMURA, *supra* note 41.

44. Immigration and Nationality Act § 103(a) (codified as amended at 8 U.S.C. § 1103(a) (2012)). For details, see T.A. ALENIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 780 (7th ed. 2012).

45. 8 U.S.C. § 1103(a).

46. Janet Napolitano, Prepared Remarks by Secretary Napolitano on Immigration Reform at the Center for American Progress (Nov. 13, 2009), http://www.dhs.gov/ynews/speeches/sp_1258123461050.shtm.

Napolitano was able to rattle off various statistics related to enforcement, including increases in the number of officers on the border and the building of more fencing on the southern border.⁴⁷ However, the centerpiece of her statistical argument was that the Obama administration had increased the Bush administration's record number of removals of undocumented immigrants—a policy shift that continued throughout Obama's first term (see Figure 1).

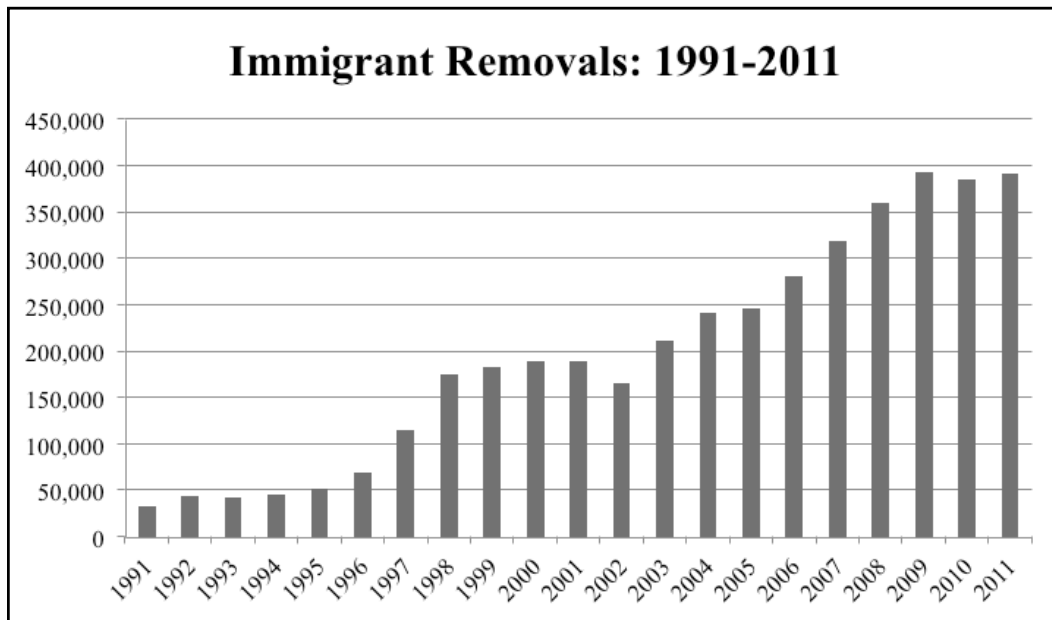


Figure 1.⁴⁸

V. EXECUTIVE ACTION 2: TRY TO INCREASE THE WORTHINESS OF UNDOCUMENTED IMMIGRANTS

Aside from demonstrating that the Obama administration was serious about border security, and thus trustworthy to oversee CIR, there was also a different executive strategy in place. This was similarly aimed at restrictionists, but also aimed at their perceptions of the undocumented. The Obama administration focused its removal initiative on those who were the least deserving or worthy of legalization: criminals.⁴⁹ In doing so, Obama could create a distinction between the undeserving undocumented (who were being deported), and those deserving of legalization (who were not). Obama explained to a Texas audience during his first term that his

47. *Id.*

48. *Yearbook of Immigration Statistics: 2011*, DEP'T OF HOMELAND SEC., <http://www.dhs.gov/yearbook-immigration-statistics-2011-3> (Nov. 21, 2013).

49. Barack Obama, Remarks by the President on Comprehensive Immigration Reform in El Paso, Texas (May 10, 2011), <http://www.whitehouse.gov/the-press-office/2011/05/10/remarks-president-comprehensive-immigration-reform-el-paso-texas>.

ramping up of deportations was not occurring “haphazardly,” but instead, “We’re focusing our limited resources and people on violent offenders and people convicted of crimes -- not just families, not just folks who are just looking to scrape together an income. And as a result, we’ve increased the removal of criminals by 70 percent.”⁵⁰ As shown in Figure 2, the number of criminals deported during the Obama administration increased substantially, though their percentage among the deported did not differ dramatically from previous administrations.

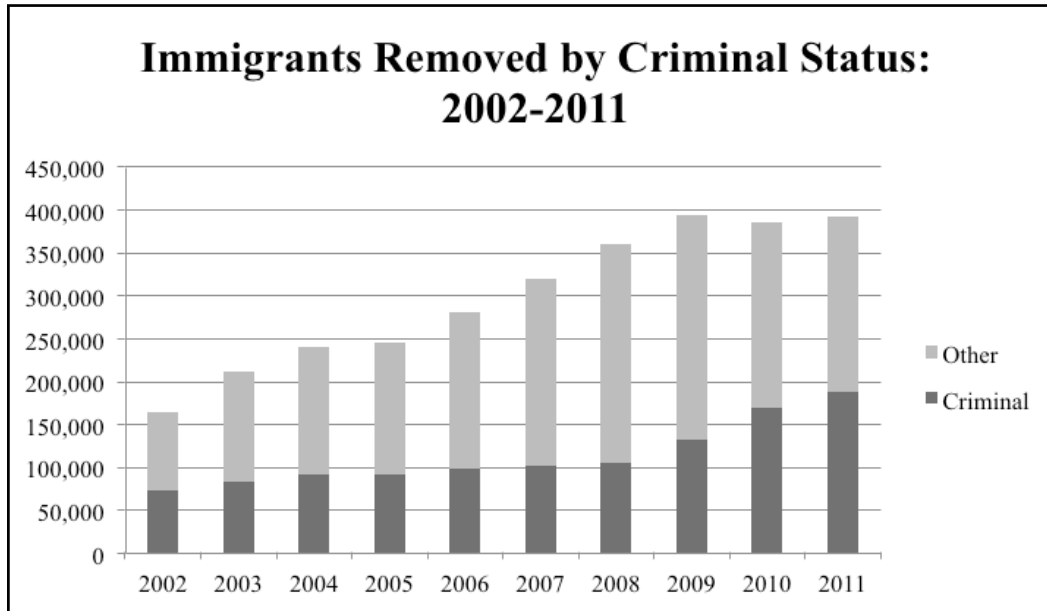


Figure 2.⁵¹

In addition, the Obama administration used some powers of the executive branch in order to facilitate its focus on undocumented immigrants who had committed crimes. For example, Napolitano modified Section 287(g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) to make it easier for DHS to make agreements with local police to perform immigration duties.⁵² Napolitano also made changes to a 2008 program called Secure Communities, which made it easier for local police to share information with the federal government so that criminals could be prioritized in deportations.⁵³ These moves

50. *Id.*

51. *Yearbook of Immigration Statistics: 2011*, *supra* note 48.

52. Press Release, U.S. Dep’t of Homeland Sec., Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements (July 10, 2009), http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm.

53. Press Release, U.S. Dep’t of Homeland Sec., Secretary Napolitano Announces Secure Communities Deployment to All Southwest Border Counties, Facilitating Identification and Removal of Convicted Criminal Aliens (Aug. 10, 2010), <http://www.dhs.gov/ynews/releases/>

were not ends in themselves, of course. They were a means to the end of CIR that were designed to address the concerns of those skeptical of border enforcement and the worthiness of the beneficiaries of legalization, in order to bring out much wider benefits for the millions of immigrants who would remain.

VI. EXECUTIVE ACTION 3: PROVISIONAL UNLAWFUL PRESENCE WAIVERS

Other executive moves benefited undocumented migrants directly. One of these moves, a sort of precursor to DACA, focused on families where one spouse lacked documentation to be in the United States. Though for many years undocumented spouses and children of U.S. citizens could adjust their immigration status relatively easily,⁵⁴ two of the many changes implemented in conjunction with IIRAIRA made such adjustment much more difficult. The first change required undocumented individuals with a citizen spouse or parent to prove that the citizen relative would experience “extreme hardship” as a result of the individual’s deportation in order to receive a waiver granting pardon for their illegal presence in the country.⁵⁵ That waiver was necessary to override the second change: automatic bars to reentry into the United States for individuals who had been illegally present in the United States for six months to a year (three-year bar) or more than one year (ten-year bar).⁵⁶ Without the waiver, these immediate relatives of U.S. citizens would be required to wait out the full three or ten years before being able to apply for legal immigration status and reentry into the United States.⁵⁷

While there is no specific definition for extreme hardship to the citizen relative, early legal decisions identified certain factors to be particularly relevant: citizen family ties to the United States; citizen ties (or lack thereof) to family outside of the United States; the conditions of the country to which the citizen would relocate; the financial impact of departure; and significant health conditions of the citizen that could not be addressed properly in the country of relocation.⁵⁸ Barring other causes for inadmissibility, individuals who prove extreme hardship and are granted

pr_1281457837494.shtm. For information on Secure Communities, see *Secure Communities Presentations*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT 4 (2009), http://www.ice.gov/doclib/foia/secure_communities/securecommunitiespresentations.pdf.

54. See Fernando Colon-Navarro, *Familia e Inmigración: What Happened to Family Unity?*, 19 FLA. J. INT’L L. 491, 505–08 (2007); see also Michael Fix & Wendy Zimmermann, *All Under One Roof: Mixed-Status Families in an Era of Reform*, 35 INT’L MIGRATION REV. 397, 410–12 (2001).

55. See, e.g., Julia Preston, *Tweak in Rule to Ease a Path to Green Card*, N.Y. TIMES, Jan. 6, 2012, http://www.nytimes.com/2012/01/07/us/path-to-green-card-for-illegal-immigrant-family-members-of-americans.html?_r=0.

56. 8 U.S.C. § 1182 (1990).

57. See, e.g., Preston, *supra* note 55.

58. See, e.g., Cervantes-Gonzalez, 22 I. & N. Dec. 560 (B.I.A. 1999); see also *Cervantes-Gonzales v. INS*, 244 F.3d 1001 (9th Cir. 2001).

unlawful presence waivers can apply for legal permanent residency in the United States and be admitted to the United States immediately after receipt of the visa.⁵⁹

In order to adjust their immigration status and apply for legal permanent residency, however, undocumented immigrants must attend visa interviews in their countries of origin (visa overstayers can be interviewed within the United States).⁶⁰ The reentry bar has made this travel to home country embassies for visa interviews extremely risky. If the waiver is denied, the bar remains in force and these immediate family members of U.S. citizens have to wait out the length of their penalty before they can reapply for a visa.⁶¹ As undocumented immigrants and their U.S. citizen family members became aware of this catch-22, many decided that remaining illegally in the United States and risking deportation at some future date was a more viable option than voluntarily leaving the United States to attend the visa interview without knowing whether or not their petition for a waiver would be granted.

The Obama administration, which recognized that this contradiction in the law was impacting many immigrants and their relatives who are voting-age citizens, remedied the issue through executive action. On March 30, 2012, the U.S. Citizenship and Immigration Services (USCIS) announced a proposed rule change “that would reduce the time U.S. citizens are separated from their spouses, children, and parents . . . who must obtain an immigrant visa abroad to become lawful permanent residents of the United States.”⁶² Once the rule change took effect in March 2013, immediate relatives of U.S. citizens could apply for a provisional waiver before leaving the United States for their visa interviews, reducing separation time by months or years.⁶³ While receiving the waiver before leaving the country does not guarantee that the individual will receive a visa, it significantly decreases the risk of long-term separation from family in the United States. Similarly, individuals who

59. *Provisional Waiver I-601A*, CONSULATE GEN. OF THE U.S. CIUDAD JUAREZ, MEXICO, <http://ciudadjuarez.usconsulate.gov/provwaiver.html>. For more information, see *Overview: Immigrant Visa Processing at the NVC*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/immigrants/info/info_5161.html. See also *Step 7: After You Receive Your Visa*, CONSULATE GEN. OF THE U.S. CIUDAD JUAREZ, MEXICO, http://ciudadjuarez.usconsulate.gov/iv_steps7.html.

60. See *Provisional Unlawful Presence Waivers*, DEP'T OF HOMELAND SEC. U.S. CITIZEN AND IMMIGR. SERVS., DEP'T OF HOMELAND SEC. (May 6, 2013), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=bc41875decf56310VgnVCM100000082ca60aRCRD&vgnnextchannel=bc41875decf56310VgnVCM100000082ca60aRCRD>; see also Preston, *supra* note 55.

61. See Preston, *supra* note 55.

62. *USCIS Proposes Process Change for Certain Waivers of Inadmissibility*, U.S. CITIZEN AND IMMIGR. SERVS., DEP'T OF HOMELAND SEC. (Mar. 30, 2012), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=e784875decf56310VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

63. *Id.*

are denied the waiver know they will be subject to the automatic bar if they leave the country and can make their plans accordingly.

Though the new rule only went into effect recently, early reports show the limits that executive changes often face and reveal that few individuals have been able to benefit from the change.⁶⁴ Still, the policy change was not a failure. As one of a handful of “immigrant-friendly” policy changes announced by the administration in 2011 and 2012, this policy—or, rather, its premise as a policy to reduce separation times of family members—helped contribute to the pro-immigrant image the administration hoped to project during the 2012 election and secured much needed votes from the immigrant community.⁶⁵

VII. EXECUTIVE ACTION 4: DEFERRED ACTION FOR CHILDHOOD ARRIVALS

After a few years of experimentation with executive forays into immigration policy, the Obama administration appeared to have exhausted its options. Activists, however, who were disappointed by the 2010 DREAM Act failure in Congress, continued to press for action to allow the targets of that bill (“Dreamers”) to stay in the United States and work legally.⁶⁶ In the spring and summer of 2012, a group called the United We Dream Network (“Network”), along with other immigrant advocacy groups, advocated on behalf of the young immigrants who would benefit

64. Of nearly 24,000 applications submitted during the first six months of the program, about 25% were rejected in the initial review phase for missing information. Susan Schreiber & Charles Wheeler, *Update from the NBC on Provisional Waivers*, CATHOLIC LEGAL IMMIGR. NETWORK, INC. (Oct. 1, 2013), <https://cliniclegal.org/news/update-nbc-provisional-waivers>. Of the remaining 18,000 applications, 5,789 have received decisions, with a rejection rate of 39%. *Id.* The initial rejection rate was much higher because of a broad interpretation of the “reason to believe” provision of the new policy, which states that if reviewers have a reason to believe that the applicant could be found inadmissible for some reason other than unlawful presence, the application should be denied. *Id.* Controversy surrounding this policy, and the high rejection rate that accompanied it, has led to a suspension of adjudication of applications affected by this issue while the policy is reevaluated, suggesting that the current acceptance rate of 59% overestimates the true success rate of applicants. *Id.* Given the low success rate of early applicants, many attorneys are discouraging their clients from applying for the waiver, at least until USCIS releases further clarifications to the policy, which are anticipated in late 2013. *See* Chip Mitchell, *Attorneys Steer Undocumented Clients Away From a Citizenship Path*, CHI. PUB. MEDIA (Mar. 4, 2013), <http://www.wbez.org/news/attorneys-steer-undocumented-clients-away-citizenship-path-105891>.

65. *See, e.g.,* Sophia J. Wallace, *It’s Complicated: Latinos, President Obama, and the 2012 Election*, 93 SOC. SCI. Q. 1360 (2012); *see also* Mirela Iverac, *Obama, Romney Differ in Approach to Immigration Problems*, WNYC NEWS (Oct. 15, 2012), <http://www.wnyc.org/articles/wnyc-news/2012/oct/15/obama-and-romney-promise-fix-immigration-system/>.

66. Miriam Jordan, *Anatomy of a Deferred-Action Dream: How Undocumented Youth Brought Their Cause to the Country*, WALL ST. J., Oct. 14, 2012, <http://online.wsj.com/article/SB10000872396390443982904578046951916986168.html>.

if the DREAM Act passed.⁶⁷

The Network made little headway with the Obama administration despite protests and meetings in 2011 as the administration maintained that it could not act without Congress. However, it gained new momentum in April 2012, when Senator Marco Rubio (R-FL), who was then being discussed as a possible vice presidential candidate, came out in support of his own proposal to confer temporary legal status on persons eligible for the DREAM Act.⁶⁸ The young activists met with Rubio, and then met with key DREAM Act supporter Senator Dick Durbin (D-IL) and Obama aides Valerie Jarrett and Cecilia Muñoz, who warned them not to support Rubio's plan.⁶⁹ However, activist Gaby Pacheco said, "We're not married to the Democratic or Republican parties. We're going to push what's best for the community."⁷⁰ More protest actions followed, including some at Obama campaign offices, and on May 25, aides to Secretary Napolitano began to discuss ways to use executive discretion to help the Dreamers.⁷¹

The Dreamer activists then conferred with law professor Hiroshi Motomura, a member of the Board of Directors of the National Immigration Law Center,⁷² who was advising the activists.⁷³ Motomura immediately sprang into action. On May 28, he drafted a letter explaining the various legal bases of executive discretion described above, and used a listserv of immigration law professors to recruit ninety-five of them to co-sign the letter before sending it to the White House.⁷⁴ Pacheco and other Dreamers brought the letter to a meeting with White House counsel, and said that if there was no White House response by mid-June that they would "escalate."⁷⁵

With this new political pressure and a legal roadmap provided by Motomura and the law professors, the White House finally agreed on June 11 to take its strongest executive action yet.⁷⁶ On June 15, Secretary Napolitano announced the

67. See Julia Preston, *Students Press for Action on Immigration*, N.Y. TIMES, May 30, 2012, <http://www.nytimes.com/2012/05/31/us/students-press-for-action-on-immigration.html>.

68. See, e.g., Peter Wallsten, *Marco Rubio's Dream Act Alternative a Challenge for Obama on Illegal Immigration*, WASH. POST, Apr. 25, 2012, http://www.washingtonpost.com/politics/marco-rubios-dream-act-alternative-a-challenge-for-obama-on-illegal-immigration/2012/04/25/gIQA5yqxhT_story.html.

69. Jordan, *supra* note 66.

70. Wallsten, *supra* note 68.

71. See Jordan, *supra* note 66.

72. *Board of Directors*, NAT'L IMMIGR. L. CTR., <http://www.nilc.org/boardofdirectors.html> (Nov. 12, 2013).

73. Bertrand M. Gutierrez, *Law Professors' Letter May Have Swayed Obama*, WINSTON-SALEM J. (June 26, 2012), http://www.journalnow.com/news/local/article_f5df40ee-138f-53d3-aef1-a4d0b0923cf5.html.

74. See *id.*

75. See Jordan, *supra* note 66.

76. See *id.*

administration's new policy of Deferred Action for Childhood Arrivals (DACA).⁷⁷ Specifically, DACA targeted undocumented immigrants thirty-one years old or younger who had been in the United States for at least the previous five years.⁷⁸ They had to be younger than sixteen when they arrived; be in, have graduated high school, or served honorably in the Coast Guard or Armed Forces; and have no significant criminal record.⁷⁹ While it would not help all 11 million undocumented immigrants living in the United States at the time,⁸⁰ an estimated 1.8 million undocumented youth and young adults were potentially eligible for DACA relief.⁸¹

The Obama administration's DACA policy announcement ended the protests and pressure from the activists.⁸² However, certain opponents, primarily hailing from right-wing groups and the Republican Party, have remained vocal in their opposition to the policy throughout the first year since its announcement. Other Republican leaders have criticized the program saying, "[W]e probably shouldn't reward the children for the sins of the parents."⁸³ Well into 2013, House Representative Steve King (R-IA), a long-time opponent of DACA, continued to attempt to dismantle the policy, this time by cutting funding for the administration of the DACA program through his amendment to a DHS appropriations bill.⁸⁴ A lawsuit brought forward in Texas charges that the Obama administration never had the authority to implement the DACA policy change, and a preliminary statement from the judge ruling in the case indicated he was likely to agree that the policy change was illegal.⁸⁵ A handful of states have also acted against DACA;⁸⁶ Arizona has changed its laws in order to prohibit DACA recipients from receiving driver's licenses even though they should now qualify for them.⁸⁷

77. See, e.g., *Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZEN & IMMIGR. SERVS., DEP'T OF HOMELAND SEC. (Jan. 18, 2013), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD>.

78. *Id.*

79. *Id.*

80. See, e.g., Obama & Biden, *supra* note 1.

81. See *Who and Where the DREAMers are, Revised Estimates*, IMMIGR. POL'Y CTR. (Oct. 16, 2012), <http://www.immigrationpolicy.org/just-facts/who-and-where-dreamers-are-revised-estimates>.

82. Jordan, *supra* note 66.

83. Hansi Lo Wang, *Deferred Action: A Bird in Hand for Young Immigrants*, NAT'L PUB. RADIO (Apr. 23, 2013), <http://www.npr.org/blogs/codeswitch/2013/04/23/178669698/Deferred-Action-A-Bird-In-Hand-For-Young-Immigrants>.

84. See Patrick Taurel, *Happy Birthday DACA!*, IMMIGRATION IMPACT (June 17, 2013), <http://immigrationimpact.com/2013/06/17/happy-birthday-daca/>.

85. See *id.*

86. Corey Dade, *New Immigration Battle: Driver's Licenses*, NAT'L PUB. RADIO (Dec. 28, 2012), <http://www.npr.org/blogs/itsallpolitics/2012/12/28/168214192/new-immigration-battle-drivers-licenses>.

87. See Wendy Feliz, *Reaching the Six-Month Mark on Deferred Action for Childhood*

Despite ongoing opposition, DACA appears to be a policy success. Through June 2013, 557,412 applications had been submitted, with only 19,750 rejected. Over 400,000 applications have already been approved, representing nearly 25% of all individuals who could potentially qualify under current policy requirements and nearly half of all individuals immediately eligible for DACA relief.⁸⁸ USCIS has accepted an average of 2,455 applications per day since the program was implemented on August 15, 2012, though the majority of those applications (with over 100,000 applications submitted in September and October of 2012) were submitted in the first few months of the program.⁸⁹ By June 2013, monthly submissions had dropped to just 17,506.⁹⁰ Perhaps most crucially for Obama, before the presidential election in 2012, USCIS had already received 274,015 applications and approved nearly 30,000 (rejecting only a small fraction of those applications), demonstrating to Latino voters across the nation that the Obama administration was sincere in its efforts to effect immigration reform, whether or not Congress was willing to participate in the effort.⁹¹

VIII. OBAMA WINS LATINO VOTE AGAIN

Securing a supermajority of Hispanic votes proved even more essential for Obama in 2012 than in 2008. In early 2012, such support appeared unlikely, with

Arrivals (DACA), IMMIGR. IMPACT (Feb. 20, 2013), <http://immigrationimpact.com/2013/02/20/reaching-the-six-month-mark-on-deferred-action-for-childhood-arrivals-daca/>.

88. Only individuals age fifteen and older who are currently in high school or have a high school degree are eligible for DACA relief. *See, e.g.*, TOM K. WONG, ANGELA S. GARCÍA, MARISA ABRAJANO, DAVID FITZGERALD, KARTHICK RAMAKRISHNAN & SALLY LE, CTR. FOR AM. PROGRESS, UNDOCUMENTED NO MORE: A NATIONWIDE ANALYSIS OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, OR DACA 2 (Sept. 2013), <http://www.americanprogress.org/wp-content/uploads/2013/09/DACAReportCC-2-1.pdf>. Given these requirements, only an estimated 53% of the estimated 1.8 million undocumented youth who could potentially qualify for DACA can immediately apply for relief. *E.g.*, *Who and Where the DREAMers are, Revised Estimates*, *supra* note 81, at 2. An additional 426,000 children between the ages of five and fourteen will become eligible at some future point if DACA remains in place, and 401,000 young adults between the ages of fifteen and thirty can become eligible for relief if they earn a GED. *Id.* One group that has remained underrepresented in DACA applications thus far is rural-dwelling undocumented youth who, among the first 150,000 applicants, represented less than 1% of submitted applications. *E.g.*, Taurel, *supra* note 84. Accessing and informing this rural population, as well as helping them and other qualified individuals cover the costs of application, should over time help the remaining 400,000 immediately qualifying individuals submit their applications.

89. U.S. CITIZENSHIP & IMMIGR. SERVS., STATISTICS: DEFERRED ACTION FOR CHILDHOOD ARRIVALS PROCESS (July 10, 2013), <http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca-13-7-12.pdf>.

90. *Id.*

91. *See id.*

his approval rating among Latinos hovering near 55%.⁹² However, the executive actions taken by the Obama administration and extensive campaign efforts targeting Hispanic voters, combined with a strong anti-immigration stance taken by the Romney campaign,⁹³ appeared to help Obama win back much needed Latino support. Despite his inability to pass CIR during his first term, the piecemeal executive actions he took with regard to immigration, particularly DACA, boosted Latino support, with 58% of Latino voters expressing increased enthusiasm for Obama because of DACA.⁹⁴ Other evidence also indicated that Latinos were paying a lot of attention to immigration—a poll on the eve of the election found that for both U.S.-born Latinos (32%) and foreign-born Latinos (39%), “Immigration reform/DREAM Act” was the second most frequently selected issue (after “Create more jobs/fix the economy”) when respondents were asked to name “the most important issues” that Latinos faced.⁹⁵

Meanwhile, presidential candidate Mitt Romney sent some mixed messages, indicating he would repeal DACA, but seek some other long-term solution.⁹⁶ However, his harsh rhetoric on immigration appeared to persuade other Hispanic voters to give Obama a second chance. Specifically, 74% of Hispanic voters felt that Romney either did not care about Hispanics or was hostile to them,⁹⁷ and 57% of Hispanic voters were less enthusiastic about Romney due to his immigration stance.⁹⁸

The actual 2012 election followed these poll numbers, with 71% of Latino voters choosing Obama, while only 27% choosing Romney.⁹⁹ Even more than in 2008, Hispanic votes were key to securing a majority of the popular vote for Obama—had Romney received just 12% more of the Latino vote, Obama would have lost the national popular vote.¹⁰⁰ Additionally, as in 2008, strong support from Hispanic voters in key swing states, including Colorado, Florida, and Nevada, en-

92. See Charlie Cook, *Huge Hispanic Support for Obama Was No Sure Thing*, NAT'L J. (Feb. 7, 2012), <http://www.nationaljournal.com/columns/cook-report/huge-hispanic-support-for-obama-was-no-sure-thing-20130207?mrefid=mostViewed>.

93. See, e.g., Ruben Navarrette, *Latinos Won't Forget Romney's 'Anti-Immigrant' Talk*, CNN (Jan. 31, 2012), <http://www.cnn.com/2012/01/31/opinion/navarrette-immigration-gop/>.

94. See Barreto & Segura, *supra* note 4.

95. See *id.* Fifty-one percent of Latinos born in the United States and 56% of foreign-born Latinos selected the economy. *Id.*

96. Julia Preston, *Romney Dials Back Acceptance of Obama Immigration Program*, N.Y. TIMES, Oct. 3, 2012, <http://thecaucus.blogs.nytimes.com/2012/10/03/romney-dials-back-acceptance-of-obama-immigration-program/>.

97. Barreto & Segura, *supra* note 4, at 14.

98. *Id.* at 19.

99. Mark Hugo Lopez & Paul Taylor, *Latino Voters in the 2012 Election*, PEW HISP. CTR. 4 (Nov. 7, 2012), http://www.pewhispanic.org/files/2012/11/2012_Latino_vote_exit_poll_analysis_final_11-09.pdf.

100. See Barreto & Segura, *supra* note 4, at 5–6.

sured Obama would receive the necessary votes in the Electoral College to win the election.¹⁰¹ These results strongly suggest that the immigrant-friendly executive actions taken by Obama in the months leading up to the 2012 election played a crucial role in ensuring his re-election.

CONCLUSION

President Obama promised much to Latino voters in 2008, and he did not deliver. He did not deliver because forces in Congress prevented promised comprehensive immigration reform. However, there were plenty of legal avenues available to make policy with political ends in mind. The large numbers of undocumented immigrants already in the country, the limited resources available to attend to this population, and specific statutory authorization put much “back end” policy at the president’s discretion. Obama skillfully used the powers of the executive branch to try to make the legislative ground fertile for CIR, and he used his powers to directly help some undocumented immigrants. These actions signaled that he cared about mixed-status families and the “Dreamer” beneficiaries of the high-profile DACA program.

DACA may have been the most important executive action, and it is clear that Obama only chose this policy shift when pressured. The Dreamer activists were crucial in keeping the plight of young, law-abiding undocumented immigrants on the presidential agenda. A large group of law professors, led by Hiroshi Motomura, played a key role in showing the administration how a program like DACA could be legally authorized. Additionally, Senator Marco Rubio gave an unintentional assist to the entire effort by signaling to Latino voters that they did not have to bet everything on Obama. This move was the final force persuading the boldest action. DACA may have won Obama the election and created in the GOP a new interest in the value of Latino voters.¹⁰²

We close with a final observation related to lawmaking and social equality. Rubio’s version of the DREAM Act played a key role in getting Obama to act to aid a group that is one of the most disadvantaged in America. Yet on this particular score, the willingness of both major parties to pursue votes with similar, but dueling, policies reveals an important distinction. Though these policies target an underprivileged community—undocumented immigrants, or more broadly, Latino voters—they do not target the most politically disadvantaged community in America, as that distinction may belong to African Americans. Why is the African American community not targeted in the same way as the Latino population? As Paul Frymer has shown, African Americans are solidly (more than 80%) in the Democrat

101. *Compare id.* at 8 with GONZALEZ & OCHOA, *supra* note 15.

102. *See, e.g.,* Henry Barbour, Sally Bradshaw, Ari Fleischer, Zori Fonalledas & Glenn McCall, *Growth and Opportunity Project*, REPUBLICAN NAT’L COMM. (2013), http://growthopp.gop.com/rnc_growth_opportunity_book_2013.pdf.

column,¹⁰³ and Republicans offer almost no policies to attract their votes, let alone come close to matching what the Democrats offer. Moreover, since the Clinton administration, even Democrats have offered very little in the way of new policies specifically targeted toward this group, both because they take African American support for granted and because they worry that prominent policy advocacy on their behalf will cause other coalition partners to leave or stay home.¹⁰⁴ What Latinos have to offer that African Americans do not is a larger, undecided voting bloc, and as the fastest growing ethno-racial group in the United States, Latinos could provide the winning votes in elections for decades to come. In short, the story of Obama's use of executive power on immigration policy has lessons not just for the politics of immigration or the law of the presidency, but also for the inequality of different categories of voters in America.

103. See PAUL FRYMER, *UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA* 120–21 (2d ed. 2010).

104. See *id.* at 3–5, 118–19.