

To: President Barack Obama

From: Lucas Guttentag

Subject: *Immigration and American Values:
Some Initial Steps for a New Administration*

The treacherous debate over immigration was remarkably muted during the presidential campaign. But the system's failures are unchanged, and the need for reform more urgent than ever.

Today's dysfunction has multiple causes exacerbated by three seismic developments over the last twelve years. First, enormous changes to the immigration statute enacted in 1996 by IIRIRA (the Illegal Immigration Reform and Immigrant Responsibility Act) fundamentally altered deportation, detention, judicial review, and other core elements of the system. This legislation, adopted with virtually no debate or scrutiny, caused lasting damage to fairness, flexibility, and due process.

Second, in the aftermath of 9/11, the conflation of every immigration issue with national security inhibited nuanced debate and precipitated the expenditure of massive funds for enforcement. The invocation of security overwhelmed questions raised by those who wanted hardheaded assessments of whether particular policies or programs actually achieve greater security or spend money wisely.

Third, the collapse of the complex and controversial congressional efforts to enact "comprehensive immigration reform" in 2006 and 2007 triggered skepticism that significant federal reform to address endemic problems would ever be achieved. The failure underscored the complex politics of immigration, gave disproportionate prominence to hostile voices, and encouraged a flurry of state and local laws targeting immigrants and immigration.

We now confront a sclerotic system that tolerates indefinite delays; denies eligible immigrants legal status; imposes massive detention under inhumane conditions without adequate release hearings; compels deportation with virtually no consideration of individual equities; limits judicial oversight while overwhelming an overburdened federal judiciary with cases of flagrant error that the administrative process ignores; incites cities and states to intrude into immigration lawmaking out of misguided frustration with failed federal efforts; and prioritizes federal and local enforcement practices that impose huge costs while sacrificing fairness and constitutional protections.

Major legislation to restore fairness, credibility, and accountability is essential. But given the array of daunting challenges facing the administration and Congress, few observers believe that a major overhaul is imminent. Yet, most would agree that many key domestic initiatives are intimately intertwined with immigration reform.

But regardless of the prospects for legislation, executive action and policy changes are essential to address systemic failures that cry out for immediate attention. Strategic and

targeted measures—often highly technical—can begin the process of implementing key reforms, suspending disastrous last-minute Bush administration initiatives, and laying the foundation for more comprehensive change.

The following are some steps that your administration should pursue. They are not exhaustive and reflect only my view of some areas where urgent action is paramount and immediate improvement achievable.

Midnight Regulations

Most immediately, the Bush administration attempted to cement into place two new rules that would punish American workers and hurt U.S. businesses in a time of economic crisis. The proposals—widely condemned by civil rights groups, labor unions, and business associations as misguided, costly, and discriminatory—should be abandoned.

A pending Department of Homeland Security (DHS) rule—temporarily enjoined by the courts—would rely on the flawed Social Security database to threaten immigration penalties again workers and businesses that receive so-called "Social Security no-match" letters. These letters are based on computerized data never designed for immigration enforcement. The rule would punish citizens, penalize companies, cause discrimination against legal workers who look or sound "foreign," and cost the economy an estimated one billion dollars. DHS is rushing to try to vacate a federal court injunction before your administration can conduct a deliberate and comprehensive review.

The Bush administration also tried to ramrod through a new rule to force all federal contractors to enroll in a *voluntary* electronic worker verification system that ignores the system's gross deficiencies and lack of safeguards and is contrary to Congress's clear directive. The new rule, also subject to a pending legal challenge, was scheduled to go into effect literally days before the Inauguration; it should be reviewed and revoked.

Fairness and Justice

For many years, the Justice Department has recognized and reaffirmed that due process entitles immigrants to pursue "ineffective assistance of counsel" claims when incompetent lawyers miss filing deadlines, fail to assert bona fide political asylum claims, or otherwise commit inexcusable errors. But Attorney General Michael Mukasey announced in August that he was formally reconsidering that principle and the Bush Justice Department had urged courts to reject it. Your new attorney general has the authority to terminate this reconsideration and

to enshrine the principle of effective legal representation into a formal rule and policy.

Attorney Generals John Ashcroft and Alberto Gonzales together devastated the administrative process for adjudicating immigration cases. In addition to the notorious appointment of immigration judges based on ideological bias and political ties, the appellate review body, known as the Board of Immigration Appeals (BIA), was compromised by selectively eliminating BIA members and truncating the administrative appeals process. Your attorney general can restore credibility and fairness by immediately appointing a large complement of qualified and diverse BIA and immigration court judges and by restoring plenary administrative review.

Since 1996, there has been protracted litigation over judicial review of immigration orders. That was further complicated by the REAL ID amendments of 2005. Respect for the rule of law and for the essential protection of the great writ of habeas corpus should compel the Justice Department to abandon attempts, through litigation or interpretation, to weaken judicial oversight of the immigration process and of removal orders. Instead, judicial review should be strengthened by providing that the courts review immigration adjudications for abuse of discretion and arbitrary agency action.

In addition to undermining core principles of fairness and due process, the 1996 law also enacted penalties and prohibitions that have had the perverse effect of inhibiting eligible immigrants from obtaining legal resident status. Adopting new administrative procedures and standards could ameliorate that damage and allow qualifying immigrants residing in the United States to obtain legal residence without facing a punitive ten-year penalty against return that is triggered by the requirement of traveling abroad to obtain a green card. These irrational effects have caused immigrants to remain in unlawful status rather than take steps to regularize. Other administrative reforms to govern adjudication of statutory waivers and to require meaningful exercise of prosecutorial discretion would help restore a measure of flexibility and fairness to the system.

End Inhumane Enforcement Practices

Immigration detention has grown exponentially in the last eight years at a huge cost to taxpayers and without employing reasonable alternatives that would allow release of those who need not be detained. In place of case-by-case assessments, the Bush administration adopted blanket detention rules, resisted court rulings that authorize individual consideration for release, sought funding for constructing even more detention facilities, and refused to impose effective rules governing detention conditions on *all* immigration facilities, including those that are part of county jails or run by private, for-profit corporations.

Your administration should adopt release policies and procedures that require individualized hearings, ensure humane conditions through legally enforceable federal standards, faithfully enforce the Supreme Court's limit on indefinite detention, and facilitate fair procedures and legal representation for those who remain detained.

Recent mass immigration raids, overzealous criminal prosecutions, and allegations of constitutional violations have raised charges of racial and ethnic profiling, resulted in transfer of arrested immigrants to remote detention centers far removed from lawyers and families, and increased the concern of religious and humanitarian groups that families and children are improperly traumatized and denied basic rights. These tactics should be abandoned and renounced.

The Bush administration systematically encouraged local police departments to engage in federal immigration enforcement through a variety of cooperation agreements and memoranda of understanding. This has led to an upsurge in racial profiling, improperly mingled crime-prevention with investigation of immigration status, and undermined public safety. Until recently, most police leaders avoided involvement in immigration law recognizing that the support of communities whose cooperation is essential for effective policing depended on avoiding immigration screening or enforcement.

Your administration can restore the confidence of communities that now feel under siege by suspending existing cooperation agreements, initiating federal civil rights investigations of discriminatory police practices, and rejecting any new agreements with local police until the real cost and consequences of these initiatives are fully assessed.

Some states and localities are also enacting their own immigration laws to deny housing or employment to those who are deemed "illegal aliens" under idiosyncratic local procedures. While many places have rejected these proposals as divisive measures that exacerbate racial and ethnic stereotyping, ignore the uniform federal scheme for regulating immigrant employment, and hurt economic prosperity, the initiatives nonetheless proliferate. The courts are grappling with whether state and local enactments conflict with federal law and violate due process. The Justice Department should oppose such measures as preempted by federal law, reject them as a matter of policy, and prevent further balkanization of immigration regulation.

Protect Labor and Workplace Rights for All Workers

Instead of relying on flawed databases, conducting raids, and turning local police officers into Immigration and Customs Enforcement agents, your administration should mobilize government resources to protect American workers by safeguarding *all* employees against exploitation and abuse. Enforcing effective remedies for wage violations, interference with union organizing, unsafe work conditions, illegal discrimination, and other abuses is an essential and effective tool for penalizing and deterring unscrupulous employers who hire immigrant workers in order to exploit them.

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The steps outlined here are a beginning; many others are equally urgent and possible. Immigration is undeniably complex. But the difficulty of achieving consensus on major

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Enhancing workforce skills brings greater opportunities to workers and makes the nation's economy more productive and competitive.

Americans also must again be rewarded for their work. This can be accomplished through policies that allow workers to successfully navigate an employment system that increasingly requires career change by reforming unemployment insurance and adjustment assistance, promoting portable and universal retirement plans, creating a fairer tax system, making it easier for workers to join a union, and making work pay by ensuring that the minimum wage does not lag behind other wages.

Finally, long-term growth strategies must restore America's standing as an international economic leader both in terms of innovation and global labor standards. Your administration has the opportunity to leverage our entrepreneurial culture to create an innovation economy by making sustained increases in research funding and investing in training and education of workers. By focusing international economic policy on promoting higher living standards around the globe, your administration can help generate demand for American exports, solidify American leadership, and ensure that the rising tide produced by economic integration lifts all boats.

With a clear road map for action, the United States can regain its foothold as a global economic leader and rebuild economic security for all American workers.

David Madland is the director of the American Worker Project at the Center for American Progress in Washington, D.C.

Civil Rights

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Finally, the United States must comply fully with the international human rights treaties to which it is a signatory, including the International Convention on the Elimination of All Forms of Racial Discrimination and the International Convention on Civil and Political Rights. It can begin by addressing shortcomings identified in UN bodies' most recent reviews of the status of U.S. compliance.

Thank you for considering these significant and ever-evolving initiatives. By making major advancement on these priorities, you and your administration will rejuvenate our nation's stature and leadership role worldwide by making equality and opportunity the centerpiece of the role of the federal government. We encourage you to honor the aspirations and sacrifices of our forbears by making these priorities the heart and soul of your administration's quest to achieve "a more perfect union."

Barbara R. Arnwine is the executive director of the Lawyers' Committee for Civil Rights Under Law in Washington, D.C. The author wishes to acknowledge the civil rights concerns that are covered elsewhere in this magazine and are beyond the word limits of this article.

Immigration

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legislation should not become an excuse for delay or inaction. Your administration can take crucial steps through executive action and policy reforms that will enhance procedural fairness, protect the lives of deserving immigrants, and begin to move us toward a system that serves the national interest and reflects our constitutional values.

Lucas Guttentag is the founding national director of the Immigrants' Rights Project of the American Civil Liberties Union. The views expressed are solely those of the author. The author gratefully acknowledges the work of many groups, organizations, coalitions, and individuals on transition proposals and blueprints, some of which were consulted for this article.

Public Education

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Your administration should propose a major program of funding for states to develop or procure high-quality curriculum materials that are aligned with state standards and provide training on them to teachers.

One area of misguided federal support for curriculum has been for abstinence-only programs that rely on distortions, stereotypes, and fear. After more than \$1.3 billion in expenditures since 1998 for such programs, they have utterly failed to achieve their stated objectives. The programs should be discontinued and support provided instead for comprehensive sex education programs.

Invest in community schools. Too many children come to school every day burdened with hunger, health challenges like asthma, and worries about their families' distress. Schools should link to other supportive agencies and organizations in their neighborhoods and communities and open their facilities for much longer hours to these groups so that children are ready to learn every day. Your administration needs to foster and encourage these community schools.

Increase the federal investment in research and evaluation. Your administration should increase the investment in education research and development to help ensure that students nationwide benefit from strategies and methodologies that have proven effective in some locales. Just as in the health arena, where research and development are expected to lead to breakthroughs in diagnosing and treating the most serious illnesses, research and development in education have the potential to radically improve schools and student learning.

Cynthia G. Brown is the director of Education Policy at the Center for American Progress in Washington, D.C.