

# Immigration

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No issue is more identified with President-elect Trump than immigration. And virtually no other issue presented a starker contrast between him and Hillary Clinton. The agenda of comprehensive immigration reform, with an emphasis on a pathway to legal or citizenship status for noncriminal undocumented aliens; providing for a reliable flow of seasonal workers, lower skilled workers, higher skilled workers, and agricultural workers; and a mandatory e-verify system, will be supplanted, in the early years of the Trump Presidency, by an emphatically different focus.

President-elect Trump's immigration policies will prioritize jobs, wages, and security for Americans including increased efforts both to control the border and remove undocumented criminal aliens. There will be a renewed emphasis on having open jobs offered to Americans first, and rigorous enforcement of the nation's immigration laws. Attorney General-designate Jeff Sessions has been a leading advocate of stricter enforcement of immigration laws and increasing border and interior security as a Senator. He is in a position to hit the ground running to effectuate Trump's policies and work with the Secretary of the Department of Homeland Security (DHS) on these matters.

## THE PRESIDENT-ELECT

*The Administration can undertake some policies on which the incoming President campaigned through executive action, including:*

- Ending "catch-and-release." The President-elect promised that anyone who is caught illegally crossing the U.S. border will be detained until they are removed from the U.S. This policy may face an upper limit defined by the number of available detention spaces.

### Key Players

#### Administration

Jeff Sessions  
*U.S. Attorney General*

Ret. Gen. John Kelly  
*Secretary of the Department of Homeland Security*

#### Senate

Judiciary Committee

Chuck Grassley (R-IA)  
*Chairman*

Dianne Feinstein (D-CA)  
*Ranking Member*

Other Key Members:

Lindsey Graham (R-SC)  
*Leading Republican on  
DACA*

#### House

Judiciary Committee

Robert Goodlatte (R-VA)  
*Chairman*

John Conyers, Jr. (D-MI)  
*Ranking Member*

Trey Gowdy (R-SC)  
*Chairman,  
Subcommittee on  
Immigration & Border  
Security*

Zoe Lofgren (D-CA)  
*Ranking Member,  
Subcommittee on  
Immigration & Border  
Security*

Other Key  
Members:

Luis Gutierrez (D-IL)  
*Leading House  
Democrat on  
Immigration Reform*

- Vigorously targeting criminal aliens for removal, including through joint local, state, and Federal law enforcement actions.

The President-elect has promised to revive the Secure Communities program, wherein state and local authorities were required to send arrestees' fingerprints not only to criminal databases but to immigration databases as well, facilitating immigration authorities' decision as to which such arrestees should be the subject of deportation proceedings. This program was replaced by the Obama Administration with the Priority Enforcement Program, which some supporters of Secure Communities consider a less vigorous, unsatisfactory approach. Trump has also said he will reinvigorate the Section 287(g) program, under which DHS deputizes state and local law enforcement officers to perform the role of Federal immigration agents. This program is voluntary. Many immigration rights groups are critics of these two programs. Some localities, counties, and states may not cooperate with Secure Communities, which could lead to confrontation with the Trump Administration, and also put at risk some of such recalcitrant jurisdictions' Federal funding.

- Withholding some Federal funding to "sanctuary" cities, where cities and other local governments do not cooperate with Federal efforts to detain or deport certain categories of criminal undocumented aliens. As mentioned earlier, failure to comply with a reinstated Secure Communities program, for example, could result in the loss of some Federal financial law enforcement assistance for those governments. Legislative action may be needed with respect to cutting other Federal funds to punish such localities, if the President is so determined.
- Reducing the backlog of over 500,000 cases before the Executive Office of Immigration review by appointing more judges. He can also appoint like-minded persons to the Board of Immigration Appeals.
- Revoke President Obama's Executive actions wherein the Department of Homeland Security would not deport a) certain undocumented parents of U.S. citizens and parents of legal permanent residents under the Deferred Action for Parents of Americans and Legal Permanent Residents Executive Order (DAPA); and b) certain youth under the Deferred Action for Childhood Arrivals (DACA). These Executive actions, which protect their designees from deportation and permit them to seek authorization to work, have currently been blocked by a lower Federal court. The court's decision was not overturned in a 4-4 vote of the Supreme Court, and the issue could eventually be revisited again when the Supreme Court has a full complement of Justices.

Even if these actions are revoked by the new President, the Executive Branch need not seek to apprehend and deport undocumented aliens in these categories; whether such forbearance will exist in the Trump Administration is a matter which will unfold. He has already indicated a possible softening of his stance on DACA, but it is unclear what that may mean. A bipartisan Senate group, led by Senators Lindsay Graham (R-SC) and Dick Durbin (D-IL), has vowed to seek legislative enactment of protections for the DACA children. Assuming such legislation contradicts the President's actions on DACA, it will have a difficult time reaching his desk, and would not survive a Presidential veto.

- Suspend the granting of visas to persons from any area where he believes there is inadequate screening, such as from some countries in the Middle East.

*Other components of the President-elect's immigration program will need Congressional approval or funding:*

- He may want a wall on the southern border – which he has since acknowledged may contain fencing in certain stretches – to be paid for by Mexico, but has never explained how he would achieve that goal. Congressional appropriations are the more likely source of funding for this initiative.
- While he can focus enforcement actions against criminal aliens as mentioned earlier, it is possible he will seek legislation to further assist this effort, including legislation to enhance further cooperation with state and local authorities to ensure criminal aliens will be swiftly identified and removed. He may also seek funding to add detention spaces. He has called for the addition of 5000 more Border Patrol agents. Both of these steps will cost money. Moreover, he will seek early enactment of mandatory minimum sentences for criminal aliens convicted of illegal re-entry into the U.S.
- Enactment of mandatory e-verify legislation. An expanded e-verify system is intended to make it more difficult for undocumented aliens to find employment.
- Completion of a biometric entry-exit system. This system is principally aimed at addressing visa overstays.
- He wishes to reform legal immigration to serve American interests and keep immigration levels “within historic norms.” He may seek to shift the focus of legal reform from family immigration in favor of more immigrants defined by their ability to contribute to the economy, likelihood of success in the US, and their financial self-sufficiency. Adjustments in the numbers, priorities, and categories of legal immigration will need Congressional action.

## THE CONGRESS

Each of these elements requiring Congressional action can be taken up early in the 115<sup>th</sup> Congress. Trump transition officials have been in contact with the two Judiciary Committees.

Measures “cracking down” on undocumented criminal aliens are likely candidates for early action. Given the Senate Judiciary Committee’s heavy responsibilities to confirm Department of Justice nominees, one or more of whom will likely be treated as controversial by Senate Democrats, as well as to confirm a Supreme Court nominee, whatever legislation the new Administration prioritizes will most likely proceed initially and more quickly in the House Judiciary Committee (HJC).

The HJC can also be expected to move legislation it has passed before, such as those addressing refugees, asylees, and unaccompanied children. But legislation embodying enhanced enforcement measures alone, or the “tightening up” of programs dealing with refugees, asylees, and unaccompanied children, and similar legislation, may face a Senate Democratic filibuster. Such a filibuster could be on the grounds that either the measures themselves are too harsh, or that only immigration legislation embodying a comprehensive approach should be considered, or both. The success of any such filibuster will turn on the struggle between the Senate Republican and Democratic Leaders to, in the former instance, hold his Caucus and pick up 8 Democratic votes, and in the latter instance, to avert the loss of

more than 7 Democrats or gain a Republican vote for each Democratic defection over 7. This dynamic will play out against the backdrop of 25 Democratic/Independent Senate seats up for re-election in 2018, including several in states won by Trump.

Reform of legal immigration, moreover, if it reduces family immigration or increases just one category of immigrant without addressing more of the comprehensive immigration agenda favored by Democrats, may also be subject to a successful Senate Democratic filibuster.

As a candidate, Trump spoke of deporting all undocumented aliens, a number that most experts estimate to be about 11 million people. He then spoke of allowing some to return lawfully, if vetted and consistent with his general immigration principles. Few, if any, experts thought it was practical to even approach this number of deportations. His more recent focus on the deportation of criminal aliens may be a permanent tempering of his original position of deportation of all undocumented aliens. At the same time, his adamant opposition to conferring legal status on undocumented aliens has thus far been firm. At some point in the future, when illegal immigration has been controlled and criminal aliens removed, he has suggested a discussion can take place about “the appropriate disposition” of those who remain.

Is it possible that President Trump, as part of his effort to orient legal immigration more toward economic immigrants and possibly away from family oriented immigration, will find room in his agenda for a portion of the comprehensive immigration reform that has been stymied for several Congresses? Perhaps, but this is highly uncertain at best. Increased higher skilled immigration might be one such possibility. He has, however, expressed largely hostile views of the current H-1B program. And while increases in higher skilled immigration has a powerful advocate in Senator Orrin Hatch (R-UT), some influential Senators on both sides of the aisle, including Senate Judiciary Committee Chairman Chuck Grassley (R-IA), have been critical of the H-1-B program. Indeed, the Trump administration could well seek to make the program less business friendly by, for example, increasing the age requirements for these visas.

An enlarged agricultural worker visa program also has some bipartisan Congressional backing, and its supporters claim that Americans are unwilling to do such work in adequate numbers might be persuasive that American workers will not be adversely affected by a steady flow of these immigrant workers. Again, however, Senate Democrats might be willing to block stand-alone legislation either increasing high-skilled, agricultural, or other individual category of immigration on the grounds that if other components of comprehensive reform are not included therein, no individual piece of reform should move.

The order and manner in which the President proceeds could well affect the success of some elements of his program. If his first actions on immigration target criminal aliens, those actions will likely be popular. If in his first week, instead, the President revokes DAPA *simpliciter*, let alone directs the removal of some of these children, the popular reaction may not be as favorable. Either popular reaction could have a spillover effect on his subsequent immigration moves.