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The Prospects for Comprehensive Immigration Reform

By STEWART J. LAWRENCE

After months of procedural delay and understandable preoccupation with the economy and health care, the White House has quietly announced plans to introduce a comprehensive immigration reform bill in the Senate next month. The move surprised many political observers who have watched the Obama administration constantly postpone action on immigration reform in order to address a host of other policy issues.

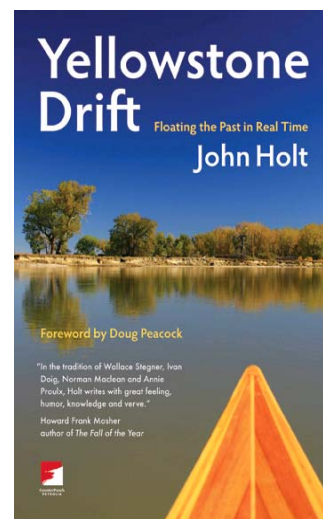
Several White House officials, most notably Rahm Emmanuel, are known to be deeply skeptical about the wisdom of Obama tackling immigration reform during his first term in office, let alone prior to the 2010 mid-term elections. Indeed, when Obama named Sonia Sotomayor to replace David Souter on the US Supreme Court last August, some took it as a sign that Obama was seeking to placate his Latino base with an "historic" appointment, in part to justify postponing first-term action on immigration reform.

And now, in the wake of Tuesday's shocking Democratic Party loss in the US Senate race in Massachusetts, some political observers fear that immigration reform, at least for now, is dead.

But the political calculus in the White House and among pro-immigration Democrats in the Senate appears to be quite different. If anything the

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prospective defeat of health care reform has highlighted Obama's need for a fresh legislative victory. But three key questions remain. First, without their filibuster-proof majority, do Democrats still have the votes needed to pass immigration reform, or is a prolonged and messy congressional debate like the one that engulfed health care reform inevitable?

Second is the question of time. With such a late start, and assuming that a measure of contentious debate is unavoidable, could the White House end up pulling the bill or at least suspending a final vote to make room for the mid-term election campaign? And finally, if the bill *is* delayed and Republicans score big in the mid-term elections, as they well might, could immigration reform, like cap-and-trade, another of Obama's promised first-year agenda items, simply wither on the vine?

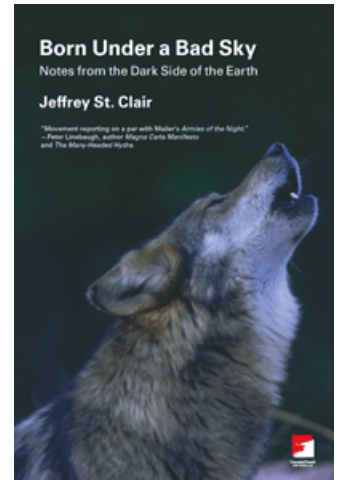
Despite the loss of his "filibuster-proof" majority, Obama still has a very good chance of passing immigration reform in the Senate, and if the Senate vote is large enough, he could probably convince skeptical House Democrats to go along. That's because immigration reform is not health care reform in at least two key respects. First, the terms of the debate are already well known to the contending parties, who fought each other to a legislative stalemate in 2006 and 2007. What's changed, in addition to Obama's election, is the composition of the Congress, which is even more Democratic than it was in 2006, when the GOP lost control of the House. That's no guarantee of victory, because immigration, unlike health care reform, has never been an issue that divides neatly, with Democrats on one side and Republicans on the other. But it certainly helps.

A number of US Senators, including the ailing Harry Byrd (D-WV), who was wheeled into Congress to cast his critical "yea" vote on health care reform, oppose granting legal status to undocumented workers. So do "Blue Dog" Democrats in the House, who have spent much of the past two years pushing for expanded immigration enforcement. By contrast, about a dozen GOP Senators have traditionally "crossed over" to support the Democrats on immigration. Thus, the good news is that pro-immigration Democrats won't have to go hat in hand to Olympia Snowe (R-ME) or Susan Collins (R-ME) to defeat a GOP filibuster. The bad news is they'll still have to convince a slew of their fellow Democrats to join the immigration reform bandwagon.

For the White House to win, two steps are essential, sources say. First, the White House shouldn't defer to Congress but should drive the legislative process "from above." This means Obama should take personal responsibility for the bill and should be willing to defend it to the public from the onset. He must also work closely with the two Senate immigration reform captains, Democrat Charles Schumer (NY) and Republican Lindsay Graham (R-SC), to line up his congressional ducks and forge the bipartisan deals needed to ensure speedy passage. If instead, Obama takes the cautious, hands-off approach he did during the health care debate, and simply lets Congress lead, the likelihood grows that obstructionists, especially House Republicans, will try to take their case to the public to exploit the same "nativist" fears that twice sunk immigration reform in 2007.

Obama met with Congressional leaders on both sides of the aisle last summer to float the White House's legislative strategy. And Homeland Security director Janet Napolitano has been meeting quietly with key immigration constituencies for much of the past month to identify and address the key fault lines in the debate. All of these hopeful signs point to an aggressive and pro-active White House approach that should improve the prospects for a bill's passage, assuming that no unexpected hitches develop. But if past debates on immigration reform are any guide, that's still a big "if."

Because the mid-term elections are fast approaching, and many House Democrats, especially freshmen, are still fearful of a public backlash on immigration, the White House also needs to shoot for a bi-partisan super-majority in the Senate – something on the order of 65-35 or even 70-30 - to trigger massive support in the lower chamber also. One key difference in this year's debate is that immigration proponents, in deference to organized labor, have dropped the idea of instituting a massive "guest worker" program intended, at least ostensibly, to fill economy-wide labor shortages that might occur if tightened immigration enforcement succeeds

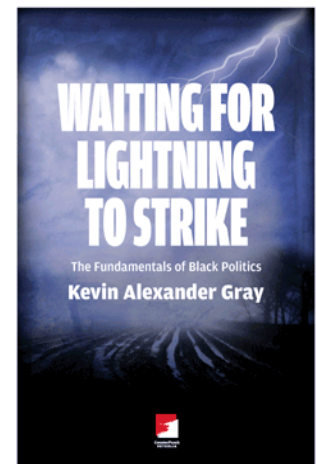


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in "drying up" illegal labor. GOP conservatives tend to view guest workers as a stalking horse and catalyst for illegal migration or as a backdoor path to permanent migration. In fact, liberal-conservative wrangling over a proposed guest worker program helped defeat comprehensive immigration reform in 2007. On balance, eliminating the guest worker issue probably improves the chances that a new White House bill will pass, Senate sources say.

At the same time, Obama also has to find a way to reconcile his opposition to guest workers with the demand of industry for improved access to temporary workers. According to those involved in the current negotiations, labor, business and Latino advocates have already reached agreement on the need for a special guest worker program for agriculture that will allow foreign-born farm workers to move from employer to employer and eventually qualify for permanent residency. Agreement here was fairly easy because the program is already contained in a set of legislative provisions known as "AgJobs" that were included in the comprehensive immigration reform bill introduced in 2007, but were never implemented because the bill failed to pass Congress.

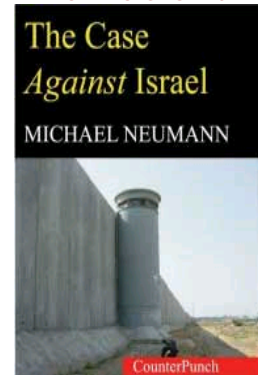
No such agreement, however, has yet been reached on how to handle temporary workers in the higher skilled sectors of the economy, sources say. High-tech firms like Microsoft have increasingly relied on so-called "H-1B" visas to recruit skilled computer programmers and engineers from places like India and China ("import" is a bit of a misnomer, since many of these workers work offshore but their contractors are US-based). These firms want to see the current skilled visa "cap" of 65,000 workers removed or expanded, but a growing chorus of pro-labor Democrats believes that H-1B deprives native-born American workers of jobs, undermines prevailing wage rates, and keeps foreign-born workers captive.

Obama needs support from high-tech businesses to promote his broader economic revitalization program, and in contrast to past years, these businesses have developed their own pro-immigration advocacy arm and are increasingly vocal. But except for labor, most other immigration advocates have not placed much emphasis on H-1B. That's in part because unlike unskilled agricultural workers, skilled engineers don't fit the public's image of the exploited "under-class." Moreover, since very few of these skilled workers are Latino, the main Latino advocacy groups don't see these workers as part of their ethnic constituency. But an increasing number of studies have shown that exploitation of the skilled foreign-born and the use of the H-1B program to displace American workers and depress native-born wages is a serious and growing problem. Sen. Bernie Sanders (I-VT), among others, has made H-1B a pet cause, and his vote will be needed to pass immigration reform, just as it was needed on health care reform, giving him and his labor allies significant leverage.

Insiders say that business-labor conflicts over H-1B and related issues, as serious as they've become, can probably be resolved through creative deal-cutting. The visa cap could be raised but recruiting and inspection requirements tightened to better protect domestic labor. There is also talk of creating a standing bipartisan commission on immigration labor markets that would set annual visa targets for certain classes of immigrants, and allow for adjustment to changes in market demand. It's an innovative idea that appears to have found favor with some leading pro-immigration Democrats, including Schumer, but has yet to be tested with regulation-averse Republicans. The idea probably won't survive in its current expansive form which would be tantamount to Congress devolving its policy authority to a "special" unelected body. However, the idea might prove useful as a bargaining chip or fig leaf to at least paper over outstanding policy differences.

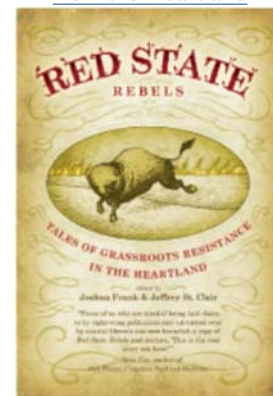
Ironically, the legalization program, though still the object of fierce attack by GOP conservatives (who view it as an unconscionable "amnesty" for "law-breakers") may turn out to be less of a stumbling block than it was in 2007. That's largely because moderate Republicans have been chastened by their party's defeat in 2008 and genuinely fear any further loss of Latino electoral support at a time when opposition to Obama among all political sectors, including Latinos, is growing. Moreover, unlike in 2007, the Senate GOP leader on immigration is not an anti-immigrant conservative like Sen. John Kyl, (R-AZ) but the pro-legalization maverick Sen. Lindsay Graham

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(R-SC). GOP hard-liners have long accused Graham of being "soft" on immigration. In fact, his support for legalization in 2007 so angered the Republican right that it tried to have him unseated. But Graham survived and has since emerged as a leading voice for pragmatic GOP compromise and collaboration with Democrats on a host of issues, from immigration to climate change.

Another reason legalization has become less threatening is that advocates – after conducting a slew of focus group research - have succeeded in recasting their case in a way that appeals more strongly to moderates. It's no longer simply about protecting the rights of the downtrodden or promoting ethnic inclusion. Legalizing the undocumented, advocates say, will be "smart" and "fair." It will help "stabilize labor markets," raise immigrant incomes, and add badly needed "stimulus" to the economy, without taking away "good" American jobs. Advocates are also emphasizing that legalized workers must admit that they committed a "crime," and pay a stiff fine -- anywhere from \$500 to \$2,000 per head. In 2006, the [Congressional Budget Office](#) estimated that legalization would earn the federal government \$48 billion over 10 years, which will help fund the program without additional federal outlays. This is a little noticed but perhaps critical selling point that could help win over – or at least neutralize - deficit-minded conservatives and independents.

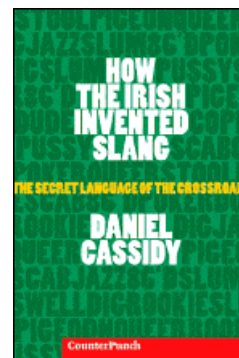
But probably the biggest factor influencing the current legalization debate is the labor market itself: because of the US recession, and thanks, in part, to past investments in immigration enforcement, illegal immigration has declined by 40% in the past two years as many prospective immigrants in Mexico, and those already here, have decided to stay put. The fact is, with far fewer border apprehensions, and a greatly reduced overall flow of workers, illegal immigration may not be "out of sight, out of mind" but it isn't the grassroots lightning rod it was three years ago.

That said, public anxiety and fear about illegal immigration is still lurking, and can easily erupt on the political scene, as we saw earlier this year when Rep. Joe Wilson shouted "You Lie" at President Obama during his State of the Union address. And lest one think opposition in confined to the halls of Congress, consider the continuing spate of state and legislative initiatives sponsored by states and local governments, mostly designed to punish illegal immigrants or the businesses that try to hire them. Arizona, the home state of Janet Napolitano and John McCain, has succeeded in weathering a legal challenge to its 2008 measure that allows the state to revoke the business license of companies found to be employing illegal labor. Even in San Francisco, a leading "sanctuary" city, the Mayor recently agreed to collaborate with federal immigration authorities in the arrest and deportation of illegal aliens after a string of high-profile crimes committed by aliens embarrassed him politically.

One of the key questions facing immigration advocates in the current reform debate is how far they are willing to go in supporting expanded immigration enforcement in order to secure the congressional votes needed to pass the legalization program. Advocates have faced this issue repeatedly over the years and have generally come out on top. In 1986, for example, Congress agreed to legalize almost 3 million undocumented workers in exchange for establishing sanctions on employers who knowingly hired future illegal aliens. But as everyone knows, the employer sanctions regime was toothless, and US businesses kept right on hiring illegal workers. Few employers were ever caught and fewer still were fined, and the fines, in any event, were too small to make much difference. Congress has revisited the enforcement issue time and again, but has generally voted for money for border enforcement, while promising to create a better system for verifying the legal status of immigrants seeking employment. But for the most part, the system has remained stillborn, mired down in concerns about protecting employer and work applicant privacy, avoiding racial discrimination in hiring, and hamstrung by persistent weaknesses in administrative databases that limit the reliability and accuracy of computer-based systems for verifying a work applicant's legal status.

The White House has pledged to move forward with workplace enforcement like no previous administration, and some of the steps taken by Obama since he took office have caused advocates deep concern. When the White House stopped the high-profile, draconian raids on workplaces begun under

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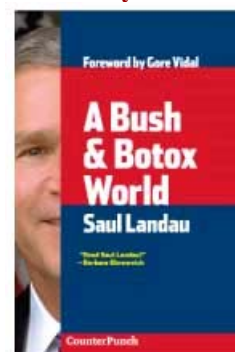


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Bush that had resulted in the arrest and deportation of thousands of illegal immigrants, causing enormous hardship for their families (including their US citizen children) and devastating already hard-pressed local communities, advocates cheered – at first. But it turns out that Obama has ratcheted up pressure on companies that hire illegal workers and has even instituted some highly publicized [crackdowns](#) of his own. These have resulted in the same kinds of mass dismissals that occurred under Bush – with many more planned in the future.

One of the most notorious raids occurred at a garment factory in Los Angeles last June, where immigration agents confronted the employer, American Apparel, with data showing that 1,800 of its workers had fraudulent working papers and demanded that these discrepancies be reconciled, or the workers fired. The move angered Los Angeles Mayor Antonio Villaraigosa, a top Obama ally, who sharply criticized the President in an editorial in the *The New York Times*. The move also surprised local observers because American Apparel, which pays higher than normal wages and even provides its workers with health benefits, is considered the antithesis of a company that hires illegal workers and then subjects them to abusive conditions. The company's CEO, Don Charney, even organized a rally and demonstration to protest the crackdown and has publicly pledged to re-hire the fired workers once they obtain their legal papers.

For advocates, the question is whether and how far to conciliate the administration's new enforcement thrust to ensure that legalization passes, and at the same time, how to shift the debate on enforcement away from simply cracking down on illegal hiring. The White House and Senator Schumer have made clear that they want to focus primarily on creating a fool-proof system for verifying who is legally permitted to work in the US, so that the "job magnet" for illegal immigration is eliminated almost completely. This means much more serious and prohibitive fines on businesses that knowingly hire and retain illegal workers, and expanded use of workplace verification systems like "E-Verify," which companies on [federal contract](#) are mandated to use, but is otherwise in use with only a small percentage of companies, and on a strictly voluntary basis.

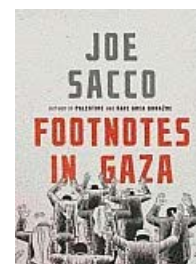
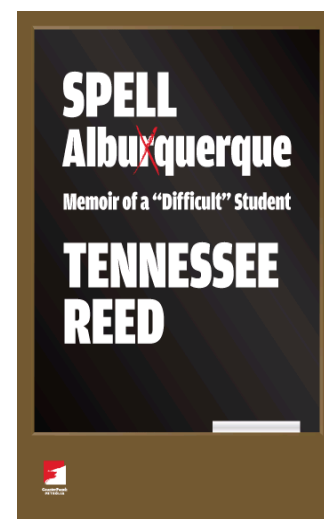
Amazingly, Schumer has even called for the introduction of a national identification card, with a "biometric" identifier such as a thumbprint, that all Americans, citizens and immigrants alike, would be required to purchase and use to verify their employment eligibility. Pro-privacy groups like the conservative libertarian CATO Institute attacked the national ID card concept when it was first introduced in 1986, and since then, no one in Congress has had the temerity to re-introduce the idea. However, Schumer says he's willing to confront the privacy groups and also immigration advocates who have refused to "bite the bullet" on workplace enforcement. In effect, the deal is now this: illegal workers already here can stay, and get legalized, but all future illegal flows must be stopped or reduced to a trickle. Schumer, in fact, envisions a 90% reduction in illegal hiring after just one year, which no one thinks is even remotely possible given the political and technical obstacles to implementation.

Still, some advocates want to appease Schumer by agreeing to the biometric card in pilot form, just as they agreed to the development of computer verification systems twenty years ago, but succeeded in bottling up and prolonging its implementation. Alternatively, advocates might agree to a partial expansion of the E-Verify system – making it mandatory in additional sectors of the economy, perhaps, but its full implementation subject to the achievement of lower error rates, especially a reduction in "false positives" (immigrants with green cards that the system wrongly "screens out"). Expanding E-Verify in this fashion wouldn't prevent most workers without legal papers from getting hired, at least not in the short term, and would continue to drag out the workplace enforcement issue for a number of years. But opponents of illegal immigration are well aware of this fact and will be pressuring moderates in both parties to take a much harder line.

For advocates, the big danger in the current debate, perhaps, is that GOP conservatives may eventually agree to back a legalization program but only if it's conditioned on a verifiable reduction in the level of illegal migration. When GOP conservatives introduced a bill along these lines in 2006-2007, it gained little support. But the idea has resurfaced after a [study](#) jointly



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sponsored by the Brookings Institution and Duke University and released in September 2009 endorsed the concept. The study proposed that the US Government Accountability Office be asked to formally "certify" reductions in illegal immigration, and that in place of a one-time sweeping legalization, illegal aliens currently residing in the US be legalized in proportion to certified reductions in the ongoing flow. The idea appalls advocates who see it as a clever ploy to undermine legalization. But depending on the degree of GOP opposition, and the emerging demands for compromise, a certification-based legalization concept could add additional pressure on advocates to agree to expanded enforcement.

In addition to these pressures, there are at least two other "wild cards" that could negatively influence the prospects for a reform bill passing this spring. They are:

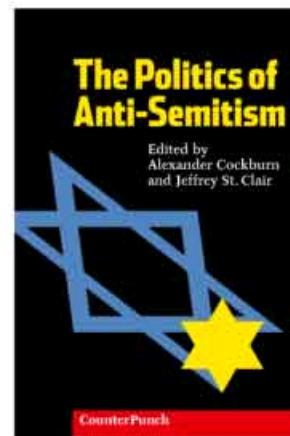
The Economy. GOP conservatives have recently criticized Obama for considering an immigration bill when so many Americans are still out of work. Advocates reply that immigrants don't take the jobs of the native-born; therefore, the level of native-born unemployment shouldn't matter. Besides, workers with legal status will earn higher incomes, increase consumer demand, and improve the overall economy. The problem here is not the facts – many Americans agree with them, according to polls – but with the *symbolism*. Improving the status of the foreign-born when conditions for native-born workers are still so dismal may strike some as unfair, even *preferential*. The idea might sell better if the recession were ending and unemployment were declining. In fact, unemployment is scheduled to increase steadily for the rest of the year. Expect GOP conservatives to hammer away at this point, and to call for a suspension of immigration reform until the economy improves.

"National Security." Recent history suggests that fear of domestic terrorism, real or imagined, can critically affect the public's receptivity to immigration reform. Recall the George W. Bush came to office touting the need for comprehensive reform and pledging to work with Mexico to achieve it. But after 9/11 all such talk ceased. It took another 5 years, and Bush's re-election, before immigration reform returned to the national policy agenda. Sadly, we may be entering a similar cycle. The deadly attack at Fort Hood, the arrest of US-based Muslim "extremists" in Pakistan, and the near-destruction of a US airliner at the hands of an inbound Muslim tourist, have created a new psychology of fear about subversion and terrorism on US soil linked to Al-Qaeda. While no one has suggested publicly that "lax" or "loose" immigration policies are responsible for these developments – in fact, the Ft. Hood shooter and the Muslims arrested in Pakistan were American citizens - renewed public suspicion about the loyalty and patriotism of foreign-born residents, or the effectiveness of homeland security defense systems could easily spill over into the immigration debate. As with the economy, much will depend on how heavily – and disingenuously – GOP conservatives decide to exploit these fears and concerns. But if they do arise in a big way, they will surely add more pressure on advocates to agree to even greater concessions on immigration enforcement - if only to keep the far right at bay.

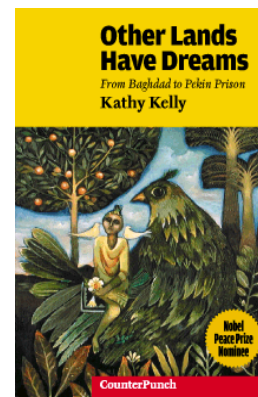
Senate sources, including a top aide to Schumer, say that the expected GOP push-back on the economy and national security, combined with fears over last Tuesday's loss in Massachusetts, could lead to several new Democratic options for handling immigration reform..

The least likely option, they say, is that the White House will simply pull the immigration reform bill and agree to postpone reform until after the mid-term elections. This is unlikely because the administration would lose too much face with its Latino base when the prospects for passing a bill are still good. Some have even argued that if health care reform is defeated, the White House should still push ahead with immigration reform because a bipartisan victory on this issue would provide a major political boost to the Democrats heading into November. Conversely, a White House retreat on immigration reform could result in a complete collapse of the administration's political momentum.

Alternatively, the White House might try to pass smaller and less controversial pieces of immigration legislation now, and postpone consideration of the big-ticket items, including a sweeping legalization



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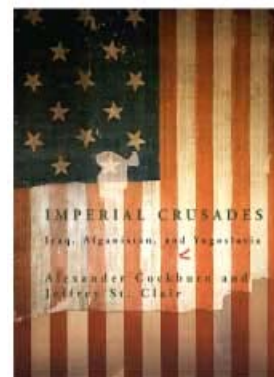
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program, until after the mid-term elections. In 2007, Democrats did try a more piecemeal approach to legalization that combined the agricultural "guest worker" bill protecting business and labor alike and the so-called "DREAM Act" that would have granted legal status to an estimated 2 million undocumented youth who agreed to go to college or join the US military. Conservatives, meanwhile, tried to pass a new immigration enforcement bill, including an expansion of E-Verify, but without an accompanying legalization program. Both of these efforts failed. In theory, though, the two sides could now agree to combine their separate measures into a single bill, and both sides might walk away claiming victory. Advocates, because they secured a partial but significant legalization, and conservatives, because they derailed a more sweeping one.

A third scenario, perhaps the most likely, is this: the White House continues to pursue a comprehensive immigration reform bill but simply begins the debate on the bill without trying to resolve it before November. This is certainly not the ideal scenario. A more GOP-controlled Congress that might emerge after November is likely to be less receptive to legalization, and indeed, to immigration reform as a whole. But the advantage of this approach for the White House, however cynical, is that it can still take credit for initiating long-overdue action on immigration reform without risking an embarrassing pre-election defeat or forcing potentially vulnerable House Democrats to defend their votes. One version of this scenario is to have the Senate alone vote on the bill in the hopes of securing provisional passage, just as the Senate did in May 2006, prior to the start of that year's mid-term election campaign.

Rahm Emmanuel, still the leading voice of White House caution on immigration reform, is reportedly pushing this "Senate vote-only" approach. However, Senate Majority Leader Harry Reid (D-NV), who insists that Democrats already have the votes to pass immigration reform, believes that further delay will damage the prospects for passage, just as it did in 2006. Democrats won a sweeping victory in the mid-term elections that year, but it turns out that they lost the momentum to pass reform in 2007. It's a cautionary tale that should remind the White House that if immigration reform fails to pass in 2010, or at least by the end of Obama's first term, Latinos won't just be pointing their fingers at the GOP.

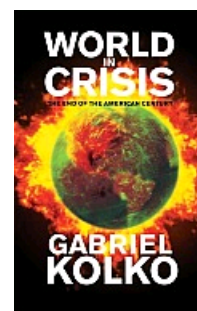
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