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Caught in the Immigration Cross-Fire: The Changing Dynamics of Congressional Support for Skilled Worker Visas

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CAUGHT IN THE IMMIGRATION CROSS-FIRE:
THE CHANGING DYNAMICS OF
CONGRESSIONAL SUPPORT
FOR SKILLED WORKER
VISAS

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ABSTRACT

Caught in the Immigration Cross-Fire: The Changing Dynamics of Congressional Support for Skilled Worker Visas

By

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This project examines the congressional politics associated with legislation on skilled foreign workers, specifically the H-1B visa which was created by the Immigration Act of 1990. It attempts to explain why legislative policies were successful on a small scale between 1998 and 2004 and completely unsuccessful after 2004.

Specifically, this study is a longitudinal qualitative analysis that uses Krehbiel's pivotal politics model (1998), Cox and McCubbins' party politics models (2005; 2007), Sinclair's (2007) unorthodox lawmaking theory, and Gilmour's (1995) strategic disagreement model to explain four key periods of H-1B legislation: (1) the passage of the Immigration Act of 1990; (2) passage of stand-alone legislation from 1998 through 2002; (3) passage of legislation through the use of riders from 1998 through 2002; and (4) complete stalemate after 2004. Using polarization as the main independent variable to explain shifts in congressional behavior, this study attempts to explain why congressional behavior dramatically shifted from 1990 to date. It concludes with a comparison of similar policies in Canada and Australia in order to ascertain whether their legislative experiences on foreign skilled workers coincide or differ from that in the United States and attempt to understand why.

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CHAPTER 1

INTRODUCTION

Various scholars have studied Congress as an institution and its individual members as policymakers. As a result, the literature on Congress and congressional behavior is extensive. It includes studies on elections and campaigns, bill adoption, partisanship, bipartisanship, polarization, budgeting, bureaucracy, campaign finance, committees, the filibuster, separation of powers, constituencies, decision making, redistricting, lobbying, agenda setting, and the media¹.

There is also a fair amount of research on immigration policy. As a policy area that Congress constitutionally maintains exclusive control over, scholars have found it an interesting area to study. These studies typically focus on one specific policy area as outlined below.

Immigration policy was delineated into two main realms in the Immigration Act of 1952: immigrant and nonimmigrant. Nonimmigrant visas are visas that provide authority to stay and/or work² for a temporary period only, and immigrant visas provide legal permanent residence status³. Both include categories for family and employment based immigration and within employment based immigration, categories exist for both skilled and unskilled labor.

Most studies on the politics of skilled worker immigration focus their scope on the immigrant category and policy on immigrant visas because it grants permanent resident status. Within these studies, scholars have examined congressional behavior on

¹ This is not meant to be an exhaustive list of all of the congressional literature, but an illustration of the various issues studied.

² Employment is not a requirement or even permissible for some nonimmigrant visas.

³ Throughout this study, the terms legal permanent residence and green card will be used interchangeably.

both family based and employment based immigrant visas, including skilled worker immigration. Yet the majority of immigrants to the United States that enter legally enter the country on a nonimmigrant visa first and then go through the process of permanent residence.

Additionally, the H-1B visa is the only visa category generally⁴ for U.S. employers to obtain foreign skilled workers in a relatively short period of time⁵. As a result, a study of congressional behavior on immigrant visas is premature without also looking at congressional behavior on nonimmigrant visas as well. Therefore, this study will attempt to fill that gap in the literature and attempt to understand congressional behavior on the H-1B visa.

Proposed Scope of Study

As stated, the H-1B visa is the only nonimmigrant visa available exclusively to skilled workers. It requires the applicant have a sponsoring United States employer, and that the position require at least a Bachelor's Degree or its equivalent in work experience. The visa was created by the Immigration Act of 1990 and was capped at 65,000. Since the cap was hit for the first time in 1997, Congress has debated various ways to increase the cap and/or alter the visa program in most years. Congress was successful in addressing the cap through legislation successfully between 1998 through 2004. After that, legislation was attempted between 2006 and 2008 as stand-alone legislation only and all failed. Post 2008, no legislation has been introduced. This study will attempt to

⁴ There are other nonimmigrant visa categories that can be used for foreign skilled workers but require some other showing, such as proof the alien is of extraordinary ability, a managerial type position, the alien is a national of Canada or Mexico, etc. The H-1B, however, is the only general visa available across the board for skilled workers without any additional showing (although in some cases if an additional obstacle to work exists, such as a license, proof of that is also required).

⁵ Employers can file green card applications on behalf of a foreign skilled worker(s), but this process is lengthy and expensive and can take many years before the worker can come to the U.S. to work.

explain the change in congressional behavior on the H-1B visa in order to understand why Congress was proactive on the issue through 2004 and then averse to touching the issue amid constituent demands for change.

In a relatively short period of time, policy on the H-1B visa went from being relatively noncontroversial with bipartisan support to complete stalemate. This analysis will attempt to explain what changed. Briefly, while Congress is a well bound institution, it is also not impervious to the external macro environment. One major shift over time and during this time period has been the increase in polarization both in the broader political environment and within Congress as a result of ideological sorting coupled with economic and social changes. What we are left with is legislation that was once routine can now only be passed through unorthodox methods, if at all.

Consequently, I will look at H-1B policymaking within the context of these broader trends in American politics. And while the timeframe is short, the forces shaping the internal and external environment accelerated a great deal during this period. As a result, no one model of congressional decision making can explain congressional behavior on the H-1B during this time. Therefore, it is necessary to use a variety of congressional models, including pivotal politics, party models, unorthodox lawmaking, and stalemate game theory models in order to explain policymaking (or the lack thereof) on the H-1B visa.

Additionally, this analysis will seek to ascertain whether similar congressional trends in the U.S. have occurred in Canada and Australia in order to provide a

comparative analysis⁶. I chose this comparison because all three countries share similar colonial histories, similar needs to populate their countries with immigrants, and similar ethnic restrictive policies throughout the late 1800s and early 1900s. Since then, both Canada and Australia have recently held similar types of relatively open immigration policies as the United States and as a result, these three countries have over time been the largest immigrant receiving countries in the world. Because of this, there are a number of studies comparing and contrasting the various political and social phenomena between and among the United States, Canada, and Australia.

Therefore, my qualitative analysis will attempt to answer the following research questions:

- 1) What factors explain congressional policy making within the context of skilled worker (H-1B) immigration?
- 2) Why did Congress stop using alternative methods (i.e. riders) to pass H-1B legislation?
- 3) Why did even minor changes to the H-1B program that were successful as stand-alone pieces of legislation pre-2004 fail after 2004?
- 4) Is the U.S. experience unique? How does it compare to legislation in Canada and Australia?

Essentially, I seek to explain a non event; specifically why Congress was not able to pass legislation just a few years after there was bipartisan support for it. Prior studies on congressional behavior use roll call votes to conduct quantitative analyses on individual members in order to explain shifts in support. While I would have liked to

⁶ While the selection of Canada and Australia may leave this study open to selection bias, I am not attempting to make a true comparative analysis but rather ascertain whether other countries with a similar history of immigration policy have experienced the same level of difficulty in passing similar legislation.

have conducted such an analysis, the data was not available for the legislation I examine in this study. In fact, roll call votes only exist for five pieces of legislation out of a total 36 bills. Because I am unable to examine individual members' voting patterns, I will need to make an assessment of how and why Congress as a body changed their support for this type of legislation. Therefore, with the exception of some descriptive statistics, my approach is largely qualitative. The body of the study is as follows.

Chapter two provides a broad overview of congressional policy goals on immigration generally and the H-1B visa specifically over time. It will begin by providing a history of general immigration law and immigration policymaking in the United States. The second part of the chapter will include an overview and detailed legislative history on the H-1B visa.

Chapter three presents a literature review where I highlight the theoretical underpinnings of congressional behavior. Specifically, I will outline the theories and policy models that are relevant to this discussion. As the most extensively studied institution in the world, theory on Congress and congressional behavior is numerous and has been well debated, but has also grown muddled over time. Additionally, because the macro environment was constantly changing over the period I examine, one model cannot accurately explain legislative behavior over this period of time. Therefore, an analysis of legislation over time will need to use a variety of different theories and models to explain congressional behavior. It will begin with a review of the literature, followed by an review of the main congressional models, and examine the traditional cues and influences utilized and felt by members of Congress in both a general sense and more specifically when dealing with immigration legislation.

Chapter four outlines and develops my hypotheses. It also provides a discussion of my methodology for the remaining analysis.

Chapters five through eight are the main analysis chapters. They are broken down into the various periods in which Congress dealt with H-1B policy and will analyze the context in which legislation was either successful or unsuccessful and attempt to explain why.

Chapters five and six will illustrate how the more traditional models of congressional behavior can be used to explain legislative behavior on the H-1B visa and why legislation either was or was not successful. Chapter five will examine the Immigration Act of 1990, the original piece of legislation that created the H-1B skilled worker visa within the context of pivotal politics. Chapter six will look at the legislation that was passed individually between 1998 and 2004 through party models.

Chapters seven and eight will delve into the lesser known and more niche models of congressional behavior, including unorthodox legislation and strategic disagreement. Chapter seven will explain how the institutional nature of Congress has changed and how this change affected the success and failure of legislation in the context of unorthodox legislation. Chapter eight will use strategic disagreement game theory to explain the failure of all H-1B related legislation that was introduced between 2006 and 2008 and the lack of any legislation after 2008 to date.

Finally, chapter nine will compare skilled immigration visa policies among the U.S., Canada, and Australia. It will attempt to ascertain whether Canada and Australia's legislatures have had similar experiences passing or failing to pass skilled worker

immigration during the same time period throughout the 2000s within the context of both similar and different macro conditions.

CHAPTER 2
TRACING THE LEGISLATIVE HISTORY OF IMMIGRATION
AND THE H-1B VISA

The purpose of this chapter is to provide a broad overview of congressional policy goals on immigration generally and the H-1B visa specifically over time. It will begin by discussing the history of general immigration law and immigration policymaking in the United States. These policy goals have ranged from being both restrictive and open. In the early years of the Republic, racial and ethnic differences were Congress's main source of consideration, followed by a period of post industrialization when cheap labor was key, only to return full circle by a post-9/11 period of security concerns that resulted in racial concerns and implications, and accentuated by the economic crises of the mid to late 2000s.

After providing a general historical view of immigration policy in the United States, I will then move on to examine the H-1B visa specifically. The second part of this chapter will include an overview and detailed legislative history on the H-1B visa, the only type of visa specifically reserved for skilled workers. In later chapters I will attempt to reconcile these policy goals with actual legislation (or lack thereof) on the H-1B visa.

A History of Immigration Law and Policymaking⁷

Article 1, Section 8, Clause 4 of the United States Constitution granted to the United States Congress the power to "...establish a uniform Rule of Naturalization." Pursuant to that power, Congress passed the Naturalization Act of 1790 which

⁷ This is not intended to be an exhaustive legislative history on immigration policy in the United States (for such a discussion see Gimpel and Edwards (1999) or Zolberg (2006)). In fact, many key pieces of immigration will not be discussed. This chapter is designed to overview the important policy decisions leading up to current policy on skilled workers and the H-1B visa.

established the requirements and grounds for naturalization. While naturalization refers only to the process of becoming a citizen of a country one was not born in, since the Act of 1790 Congress has maintained exclusive jurisdiction over not only naturalization but over all immigration policymaking dealing with admission and naturalization.

Following the 1790 Act, immigration was not a salient issue during the early years of the Republic. Throughout the 1800s, Congress remained relatively absent in immigration policymaking and its exclusive jurisdiction was exercised very little by early policymakers. The basic policy kept American borders open to immigrants from western European countries in order to maintain ethnic homogeneity while closed to others, resulting in the vast majority of immigrants to the United States being of western European descent (Gimpel and Edwards 1999; Timmer and Williams 1998; Mann 1953). As a result, early American borders were considerably closed when compared to today.

By the late 1800s, however, various groups began lobbying their anti-immigration interests to Congress. These groups included: (1) both unorganized and organized labor, represented by the American Federation of Labor and the Knights of Labor; (2) owners of capital, represented by the National Association of Manufacturers, the National Board of Trade, and local boards of trade and chambers of commerce; (3) immigrants; and (4) rural America, represented by Northern agriculturalists and the South (which was originally pro-immigration but became anti-immigration by the 1890s (Goldin 1994). Goldin (1994) lists several hypotheses to explain this shift in support. First, the South became adverse to immigration due to its own race problem and did not want to add an additional problem demographic. Second, because Southern manufacturing was not unionized, Southerners were able to benefit from paying their workers much lower wages

than their northern counterparts. Increased immigration would allow their Northern competitors these same benefits. Finally, the increase in immigration in the North had resulted in increased Northern control of the House. Thus, by the 1890s, these four groups created a united force to Congress staunchly opposing unrestricted immigration.

Congress was largely responsive to this lobby and in 1882 passed the Chinese Exclusion Act. The Act essentially marked a second era of exclusionary immigration practices which lasted through the 1940s, despite congressional efforts to reverse some of these policies (described below). In an effort to exclude Chinese immigrants, Congress created an immigration bureaucracy for the first time with the Chinese Exclusion Act. Over time, this bureaucracy has evolved and grown. Today it is used to not only keep out and remove undocumented immigrants, but also regulate the visa processes of those that are documented.

During this same period, however, many members of Congress began advocating for a more open immigration policy. As a result, Congress became divided on this issue throughout the late 1890s and there were no shifts or changes in immigration policy. By the 1900s, however, many groups who were previously against immigration, such as owners of capital, shifted their stance in favor of open immigration (Goldin 1994). In response, Congress began passing a variety of laws dealing with immigration, effectively steadily increasing the number of visas available across the board. The new debate among policymakers became not whether immigration policy should be open or closed, but rather whether immigrants should be granted access based on a first come first served policy or through some sort of preference rank order.

Beginning in 1921, Congress finally opted for a preference rank order under the Emergency Quota Act. The preference rank order system consisted of a strict per country preference system with annual quotas where national origin/ancestry determined admission to the United States. It created both numerical limits on immigration from Europe and a quota system to establish those numerical limits.

Several factors likely played a part in the 1921 Act limiting immigration from various regions (Fischer 2005; Scharf 1999; Cohen 1995; Goldin 1994). While the 1920s were largely a period of economic growth and industrialization in the United States, this period was also marred by an economic recession beginning in 1920 that lasted through 1921. Additionally, the end of the First World War in 1918 was still fresh in the minds of many and the success of the Russian Revolution in 1917 resulted in nationalistic sentiments and a fear of foreign radicalism and/or anarchy. These fears, combined with the addition of 800,000 immigrants from southern, eastern, and central Europe to the United States in 1920 resulted in a strong public sentiment against immigration that manifested itself in policy (Goldin 1994).

While the 1921 Act brought about some change in immigration policy, it still favored immigrants from Europe. Between 1951 and 1960, for example, 53 percent of all immigrants were from Europe, 28 percent were from North America, and only the remaining 19 percent from Asia, the Caribbean, South America, Central America, and Africa (Gimpel and Edwards 1999).

Congress amended the annual quota numbers in 1924, but the law still largely favored European immigrants. The Immigration Act of 1924 established quotas of two percent of a country's population with 1890 as the base year which granted Europeans a

higher quota. Additionally, effective in 1927 it created a ceiling of 150,000 total new immigrants to be calculated with the 1920 national origin proportions.

Immigration law and policy didn't change dramatically again until the mid 1950s with the passage of the Immigration and Naturalization Act (INA) of 1952⁸ over President Truman's veto⁹. Immigration policy as it exists today finds its roots the INA.

The INA established the current system of family and employment based immigration, as well as refugee admission. It created the first system of visa preferences¹⁰, which continues today. It also created a per country quota in an attempt to rectify prior discriminatory policy and cap the number of western Europeans granted admission. It also gave the government increased powers to deport legal immigrants in the United States suspected of having Communist sympathies.

The INA was likely partly a product of the Cold War and fears of communism, as well as a need for labor. The end of the Second World War resulted in a period of economic prosperity from 1945 to 1973 and technological advancements and growth in labor resulted in a shift from low income farm work to higher paying work in industry, resulting in a shortage of low paid farm workers¹¹.

Between 1924 to 1965 (and during the INA debates), liberal politicians led by Hubert H. Humphrey (D-MN), Warren Magnuson (D-WA), and Herbert H. Lehman (D-NY) rallied the charge for more liberal and less discriminatory immigration policy (Gimpel and Edwards 1999). They argued that the United States's anti-Communist

⁸ To date the legislation is referred to as the INA.

⁹ Truman preferred a greater departure from past policy and felt the INA was just an extension of the 1921 law.

¹⁰ Visa preference refers to giving preference to certain classes of immigrants with certain family relationships or certain employment skills.

¹¹ This resulted in the creation of the Bracero program in 1942, which continued until 1959.

foreign policy needed to be softened and combined with an open immigration policy (Reimers 1992). Additionally, after passage of the INA in 1952, liberal pressure from religious organizations (such as Protestants, Catholics, and Jewish groups), liberal groups such as the ACLU, and from business interests (including the National Association of Manufacturers, the Associated General Contractors, the U.S. Chamber of Commerce, and the National Industrial Conference Board) to liberalize immigration policy generally and refugee policy specifically resulted in the passage of 32 laws between 1953 and 1964 to modify the national-origins policy (Gimpel and Edwards 1999; LeMay 1987; Bennett 1963).

Additionally, existing support by Democrats combined with new support for immigration reform by the Republican Party led by Arizona Senator Barry Goldwater in the 1960s resulted in bipartisan support for policy reform. In addition, both the Republican and Democratic parties made open immigration policy a part of their platforms in the 1960 elections.

As a result, in 1965, Congress amended the INA to abolish the per country quotas that were instituted in 1921 and amended in 1924. This new amendment instituted a 170,000 annual quota on all persons in the Eastern Hemisphere and 120,000 in the Western Hemisphere with a limit of 20,000 for any one nation. Since 1965, Congress has regularly changed the annual quotas on family and employment based immigrant visas.

While Congress has delegated much of its general policymaking abilities to various agencies (Lowi 1979), Congress has maintained its exclusive jurisdiction on immigration policymaking as granted to them by Article 1, Section 8 of the Constitution. While various agencies (such as the U.S. Citizenship and Immigration Service, the

Departments of State, Labor, and Homeland Security, and Immigration and Customs Enforcement) have been created by Congress to implement and enforce congressional policy through regulation, Congress has maintained its exclusive jurisdiction over actual policymaking.

Through this jurisdiction, Congress has been active in not only making and passing legislation on the various immigration categories but also on setting quotas on the number of immigrants granted entry in each category. Specifically, Congress has exclusively set quota limits on the various immigration categories several times since 1965 (See Table 2.1).

Table 2.1 Various Immigration Categories and Congressional Quota Changes Over Time

| Year | Category | New Quota¹² |
|-------------|------------------|-------------------------------|
| 1965 | E. Hemisphere | 170,000 |
| | W. Hemisphere | 120,000 |
| | Per Country | 20,000 |
| 1978 | Total | 290,000 |
| | Per Country | 20,000 |
| 1980 | Total | 270,000 ¹³ |
| 1990 | Total | 700,000 ¹⁴ |
| | Employment Based | 140,000 |
| | Diversity Visa | 40,000-55,000 |

Source: USCIS

¹² Excluding those immigrants that obtain visas in categories without numerical limits, such as spouses of U.S. citizens.

¹³ Excluding refugees.

¹⁴ Excluding refugees. This quota was to be in effect for three years and then decrease to 675,000 for each subsequent year.

More recently, Congress delineated the regulation and admission of immigration policy into various categories, including asylum, enforcement, diversity lottery, family based immigration, and employment based immigration in the Homeland Security Act of 2002. While these immigration categories already existed, the 2002 Act simply delineated them into clear categories and established a clear chain of command. It put the implementation of immigration policy in the hands of the newly created United States Citizenship and Immigration Service (USCIS)¹⁵, an agency within the new Department of Homeland Security. USCIS was charged with crafting and implementing regulation to administer congressional policy within the areas of asylum, family based immigration, and employment based immigration¹⁶. As a result, the Act was simply a change in bureaucracy rather than a shift in policy or practice.

Categories for Admission to the United States

Since the Immigration and Naturalization Act of 1952, the two most common methods of admission¹⁷ into the United States are through immigrant visas and nonimmigrant visas. Nonimmigrant visas are visas that provide authority to stay and/or work¹⁸ for a temporary period only, and immigrant visas provide legal permanent residence status. These nonimmigrant and immigrant visas are issued through a variety of categories that were created by Congress for admission to the United States, including family based and employment based immigration (both created by the Immigration and Naturalization Act of 1952), and the diversity visa lottery (created by the Immigration

¹⁵ USCIS was immediately preceded by the Bureau of Citizenship and Immigration Services (BCIS) and the Immigration and Naturalization Service (INS).

¹⁶ Enforcement was handled by the Immigration and Customs Enforcement (ICE) rather than USCIS.

¹⁷ There are a variety of other types of admission, including asylum, deferred admission, visa waiver, Temporary Protected Status (TPS), etc.

¹⁸ Employment is not a requirement or even permissible for some nonimmigrant visas.

Act of 1990). Potential immigrants must obtain approval from USCIS and/or the Department of State¹⁹ and carry the burden of proof that they are admissible as immigrants based on both admissibility requirements set forth by Congress and various agencies, and the requirements of the visa they seek before obtaining authorization to enter the United States.

The asylum, diversity visa, and family based categories and the requirements for admission under each category will be briefly discussed below in an attempt to provide some background and context for the skilled worker visa category this study will focus on. The rest of the chapter will be devoted to employment based immigration and the H-1B visa specifically.

United States asylum policy is consistent with international laws on asylum, which were made a part of international law through the United Nations 1951 Refugee Convention Relating to the Status of Refugees and the 1967 Protocol. As a signatory and drafter of these agreements, the United States is obligated to accept any person who would otherwise face persecution if they were forced to return to the country they emigrated from. These agreements were codified in the United States with the Refugee Act of 1980. The United States is one of many states throughout the world that accepts asylees and allows them to become legal permanent residents upon establishment of asylee status.

The diversity visa lottery was established by the Immigration Act of 1990. As its name indicates, it is a lottery system that provides legal permanent resident status to

¹⁹ Applicants outside the United States typically must obtain a visa from a United States consulate, which falls under the purview of the United States Department of State rather than USCIS.

applicants who apply and whose lottery numbers are selected by the annual lottery²⁰. There is a per country quota on the number of diversity visas issued per year.

Family based immigration refers to immigration on the basis of a family relationship and is rooted in the humanitarian concept of family reunification. Historically, immigration policy in the United States has centered and focused on family reunification efforts. According to a study by the Brookings Institution²¹, approximately three quarters of immigrants to the United States has previously been and currently is admitted on the basis of family reunification. Family based immigration is typically authorized on a legal permanent resident basis through the grant of an immigrant visa²².

Congress has further delineated various categories of family based immigration. Some categories, such as spouses and unmarried children of United States citizens, are considered immediate, which means that these individuals are immediately²³ eligible for admission to the United States. Other individuals, such as married children, siblings, and parents of United States citizens and spouses and children of United States legal permanent residents, are granted admission based on a preference ordering of these categories. See Table 2.2 for a list of each of the above listed immigrant categories and the current annual cap for each.

Employment based immigration in the United States refers to immigration on the basis of employment in the United States, specifically employment with a United States employer in the United States or employment with a foreign company located in the

²⁰ Provided that all other requirements for legal permanent residence are met.

²¹ http://www.brookings.edu/papers/2011/01_immigration_west.aspx

²² Nonimmigrant visas are also available for fiancées of United States citizens for the sole purpose of entering the United States in order to conduct a legal marriage.

²³ As long as they are able to meet other requirements for eligibility for admission, such as security clearances, medical exam, etc.

United States. Within the context of employment based immigration, Congress has further delineated nonimmigrant visas (visas that provide authority to stay and work for a temporary period only), and immigrant visas (visas that provide legal permanent residence status).

As with family based immigration, within the category of immigrant visas, Congress has created an annual quota of available immigrant visas. As mentioned above, immigrant visas are available for both family based and employment based immigration. Employment based immigrant visas have been delineated into five categories. The first category is available for immigrants of international renown (which does not necessarily require a Bachelor's Degree or its equivalent), the second category for immigrants holding at least a Master's Degree or its equivalent, the third category for skilled, professional, or unskilled workers, the fourth for religious workers, and the fifth for investors investing a significant amount of money in a business that will employ American workers.

Table 2.2 provides an overview of the current visa numbers that are available per fiscal year in each of these categories. As Table 2.2 indicates, the largest majority of immigrant visas are issued in the family categories (FB). A total of 226,000 family based immigrants can be admitted each fiscal year, compared to just 139,800 employment based immigrants. Comparatively, the first three employment based (EB) visa categories, which include both skilled and some unskilled workers, are only available for about 120,000 workers.

Table 2.2 Annual Immigrant Visa Cap Numbers

| Visa Type | 2012 Annual Cap |
|--|--|
| Family | |
| FB 1 Unmarried Children of USCs | 23,400 + any unused FB 4 numbers |
| FB 2 Spouses / Minor Children / Unmarried Adult Children of LPRs | 114,200 + any unused FB 1 numbers |
| FB 3 Married Children of USCs | 23,400 + any unused FB 1 and 2 numbers |
| FB 4 Siblings of Adult USCs | 65,000 + any unused FB 1, 2, and 3 numbers |
| Employment | |
| EB 1 Priority Workers | 40,040 + any unused EB 4 and 5 numbers |
| EB 2 Advanced Degree / Exceptional Ability | 40,040 + any unused EB 1 numbers |
| EB 3 Skilled / Professional / Other Workers | 40,040 + any unused EB 1 and 2 numbers |
| EB 4 Certain Special Immigrants | 9,940 |
| EB 5 Entrepreneurs / Job Creation | 9,940 |

Source: U.S. Department of State Visa Bulletin

The first category is available to those who can prove they are aliens of international or exceptional renown (skilled or not). The second category is available for those with advanced degrees (at least a Master’s). The third category is available for those with either no degree or a Bachelor’s Degree. The fourth is for those in religious occupations (skilled or not). As such, because none of these categories encompass all skilled workers exclusively (either in their entirety or without the addition of other workers), analysis of immigrant visas in the United States will not be made in this study.

Aside from the above mentioned immigrant visas available for family and employment purposes, nonimmigrant visas are also available for applicants who wish to enter the United States for a temporary period of time for work or pleasure. Within the

category of nonimmigrant visas, Congress has delineated a variety of visas, known by practitioners in the field as an “alphabet soup”, that are available to a host of various candidates. These visas are alphabetically and numerically assigned from the letters A through V, and within many of these categories there is further numerical delineation, such as A-1 and A-2, for various subcategories of visas for a total of 82 in all. Applicants for most nonimmigrant visas must justify to the satisfaction of the consular officer at the time of the visa application that they do not have any intention of immigrating to the United States permanently²⁴.

There are some nonimmigrant visas²⁵ that individuals with a Bachelor’s Degree utilize, but none that specifically are reserved for skilled workers. For example, while the O-1 visa is available for those foreign nationals who can provide evidence that they are of extraordinary renown, it is available for both skilled and unskilled workers. It typically encompasses researchers, as well as actors, performers, and sports personalities. In real world terms, British soccer player David Beckham and Spanish and L.A. Laker basketball player Pau Gasol both likely entered the United States on an O-1 visa. Of all of the nonimmigrant visas, only one, the H-1B visa, is available exclusively to skilled workers. Together with the O-1, the H-1B comprises the all stars of all potential immigrants. Because the H-1B is the only visa exclusive to skilled workers, however, congressional action on only the H-1B visa will be the exclusive focus of study in this paper.

²⁴ There are three exceptions to this requirement. The H-1B, E, and L visas and in some cases the O-1 are known as dual intent visas and allow the applicant to have the intention to permanently immigrate to the United States. This will be discussed in more detail below.

²⁵ For example, the L-1, E-1 or E-2, TN, and O-1 visas.

The H-1B Visa

The original H-1 visa was created by the 1952 Immigration and Nationality Act. It was available to foreign nationals who were “of distinguished merit and ability and who [were] coming temporarily to the United States to perform temporary services of an exceptional nature requiring such merit and ability.” In 1970, Congress removed the requirement that the stay be “temporary”, making the H-1 and later the H-1B a dual intent visa. In 1989, Congress bifurcated the H-1 into the H-1A and H-1B categories, with the H-1A solely for nurses and the H-1B for all other specialty occupations.

The H-1B visa as it exists today was created by the Immigration Act of 1990. The prior H-1B visa category, as mentioned above, was reserved for applicants with distinguished merit and/or ability. Prior to the 1990 Act, there was no nonimmigrant visa category available exclusively for skilled workers. At that time the information technology (IT) industry was emerging, shortages in the healthcare fields were beginning to emerge for the first time, and Congress was suddenly faced with a new lobby in support of some type of visa to accommodate these shortages with qualified foreign workers. The Act redefined the H-1B as a category for “specialty occupation” workers as those with a minimum of a Bachelor’s Degree or its equivalent in work experience. As such, the evaluation of the H-1B visa and legislation on the H-1B visa in this study will begin in 1990 and continue to the present.

Currently, the H-1B visa is available to foreign skilled workers with a minimum of a Bachelor’s Degree or its equivalent and a sponsoring United States employer for work in a skilled occupation. It is employer specific and is only valid as long as the foreign national is employed by the sponsoring employer. It is the most popular method

for employment based immigration into the United States. The H-1B visa is available for an initial period of up to three years and is renewable for an additional period of three years, for a total of six years of eligibility²⁶. As mentioned above, nonimmigrant visas are available only for a temporary period and the applicant must provide evidence to the consular officer issuing the visa that the applicant does not have the intention to permanently immigrate to the United States. The H-1B visa, however, is a dual intent visa²⁷. As a dual intent visa, it is one of only three nonimmigrant visas that allow the foreign worker to have the intention at the onset of the application process of immigrating permanently to the United States. As such, applicants for the H-1B visa do not bear the burden of proving their intention to remain in the United States on a temporary basis. Additionally, H-1B visa holders can safely file applications for legal permanent status while traveling abroad and/or filing for extensions of their current H-1B status.

Arguments in favor of skilled immigration include the fact that skilled immigrants promote economic growth and American stature in the international market for science, research, and technology (Gimpel and Edwards 1999). Additionally, as skilled workers they typically are paid wages sufficient to pay taxes in the middle and higher tax brackets, and as a result, they typically do not seek governmental assistance (Gimpel and Edwards 1999).

Others however, argue that foreign workers create the effect of displacing American workers by providing cheap labor. The framework for this research, created by Harry Johnson's (1967) work on the effects of immigrants on the native population, put forth the gains from trade argument that if immigrants provide an aggregate bundle of

²⁶ There are some exceptions that allow for eligibility beyond the six year maximum. These exceptions will be discussed later in the chapter.

²⁷ The dual intent nature of the H-1B visa was established in the Immigration Act of 1990.

labor and capital that differs from the labor and capital that the native population possesses, then the native population will benefit and gain from the inflow of immigrants.

Since Johnson's (1967) argument, studies have largely shown that there is very little evidence that immigration affects the wages of American workers (Bean et al. 1988; Borjas 1990; Borjas 1994; Butcher and Card 1991; Simon 1989; Sorensen et al. 1992). Additionally, the H-1B visa has a requirement that the employer attest to pay the foreign employee at least the prevailing wage as set forth by the United States Department of Labor. The prevailing wage is the average wage paid to United States citizens in a particular county for any particular job position. Employers found violating this requirement can be fined heavily by the Department of Labor and may be banned from hiring foreign workers in the future. In practice, the Department of Labor has steadily increased their audits of H-1B sponsoring employers since the mid 2000s.

In addition to contributing to the American economy, immigrants in some highly skilled sectors have also been instrumental in filling desperately needed shortages in the U.S. labor market, particularly in the engineering and health care fields (Rumbaut 1994). Specifically, physicians and nurses have filled shortages in Health Professional Shortage Areas (HPSAs) and Medically Underserved Areas (MUAs) as designed by the United States Department of Health and Human Services by providing much needed medical care to uninsured, poor, and Medicare/Medicaid populations in rural and inner-city hospitals.

The Process of Immigrating to the U.S. and Obtaining an H-1B Visa

As mentioned previously, there are two main methods of legal entry into the United States, either through a nonimmigrant or immigrant visa. To enter the United

States for the first time, applicants must apply outside of the United States at a United States consulate for either a temporary or permanent visa. If they are granted a permanent visa, or an immigrant visa, they are allowed entry into the United States as legal permanent residents. If they are granted a temporary visa, or a nonimmigrant visa, they will eventually need an immigrant visa in order to remain in the United States permanently. On a practical level, for many, the ultimate goal is United States citizenship²⁸. Regardless of method of entry, applicants must typically²⁹ hold legal permanent resident status for at least five years plus meet a six month residency requirement prior to filing an application for citizenship.

The H-1B is a nonimmigrant visa. The process of obtaining an H-1B visa is far from easy. Let us follow the experiences of Dr. Singh³⁰, a cardiovascular surgeon and researcher from India, in order to illustrate the process. Dr. Singh wishes to immigrate to the United States to practice medicine because he believes he will be able to maximize on the research and medical facilities in the United States and further his own research on a new noninvasive surgical method for treating heart disease. Dr. Singh contacts an immigration attorney in the United States and learns that in order to practice patient care in the United States, he must first complete a residency or fellowship program in the United States³¹.

Dr. Singh completes all of the requirements set forth by the Educational Commission for Foreign Medical Graduates (ECFMG), the organization that assesses

²⁸ The terms citizenship and naturalization are used interchangeably in this study.

²⁹ An exception is made for spouses of United States citizens, who must hold legal permanent resident status for two years before being eligible for citizenship.

³⁰ Dr. Singh is a fictional person. His story is a combination of the real life experiences of several actual personal former clients. Any resemblance to any one specific individual is purely coincidental.

³¹ An exception does exist for physicians of extreme renown who will be employed at a public university.

whether foreign medical graduates are ready to enter residency or fellowship programs and certifies their credentials. He obtains ECFMG certification and applies for the National Residency Match Program. He is matched in an excellent surgery residency at the University of Miami. Dr. Singh applies for and is granted a J-1 visa³² to complete his residency and moves to Miami. He completes one year of the program and applies for a cardiovascular surgery fellowship at Johns Hopkins. Because of his credentials, talent, and experience, Dr. Singh is accepted into the program and moves to Maryland.

In his last year of fellowship, Dr. Singh calls his immigration attorney to let her know that he is interested in practicing medicine in the United States upon completion of his fellowship. She tells Dr. Singh that he will need to find an employer who is willing to sponsor him for a J-1 waiver and an H-1B visa³³. As it is his last year in his fellowship program, Dr. Singh is constantly being contacted by physician recruiters. Upon the advice of his attorney, he begins asking if the companies will sponsor a J-1 waiver and H-1B visa. Due to a severe physician shortage in the United States, most potential employers will sponsor an H-1B. Dr. Singh secures an employment agreement with a private physician's group in Boston, Massachusetts and the employer contacts their immigration attorney to begin the H-1B paperwork.

³² There are two visas available for foreign medical graduates to complete a residency/fellowship training program in the United States, the J-1, which requires a two year home residency requirement upon completion, or the H-1B which requires that the applicant have completed all three steps of the USMLE exam. Like nearly half of all foreign medical graduates, Dr. Singh has not completed step 3 of USMLE, and as such, must complete his program on the J-1 visa.

³³ The J-1 visa carries with it a two year home residency requirement for foreign medical graduates who complete a residency/fellowship. Congress created a waiver of this requirement for physicians who agree to work and receive approval to work in a facility located in a medical shortage area as designated by the United States Department of Health and Human Services. The waiver does not provide any legal status. Upon approval of the waiver, Dr. Singh can apply for an H-1B visa to actually give him legal status to stay and work.

Dr. Singh was able to secure a sponsoring employer because he was regularly courted by head hunters searching for employees with his qualifications. Some H-1B applicants may be intercompany transfers from a United States' company office abroad. Others are students in the United States in either undergraduate or graduate programs that are able to secure jobs through campus career centers or through their own post graduation internships³⁴.

Upon approval of the J-1 waiver, the first step of the H-1B application process requires Dr. Singh's potential employer to file a Labor Condition Application with the United States Department of Labor, attesting to pay the foreign employee at least the prevailing wage (discussed above), that the foreign worker will not adversely affect the working conditions of employees similarly employed, that there is not a strike, lockout, or work stoppage in the course of a labor dispute at the time the application is filed, and that notice of the filing will be given to current employees through a bargaining representative or physical posting at the work site.

Upon the Department of Labor's certification, the employer will need to file an application for H-1B status with USCIS. All costs associated with the H-1B application must be paid by the employer, including both government filing fees and legal fees. Upon approval, Dr. Singh may either apply for a visa at a United States consulate abroad, or since he is currently in the United States on a different status, he may request that USCIS change his status to H-1B.

Upon securing H-1B status, the process is far from over for Dr. Singh. Since he wants to remain in the United States permanently, he will need to begin the process for

³⁴ The F-1 student visa allows one year of Optional Practical Training (OPT) with a U.S. employer following graduation of an undergraduate or graduate program in the U.S.

legal permanent residence, which is extremely time consuming and costly. Depending on the type of application he decides to pursue, his employer will likely have to sponsor his green card application and pay all costs (government and legal) associated with the application. In the best case scenario, Dr. Singh will be looking at least at an additional four to five years³⁵ and several thousand dollars before he actually has his green card in hand. Once he is awarded the green card, he will have another five year wait before he can file an application for naturalization.

This lack of efficacy and efficiency of this process to permanent residence makes it exceedingly difficult, time consuming, and expensive for both the foreign national and the potential employer. Without permanent residence status, foreign nationals are not eligible for various programs, including federal grant money, home mortgages, and business travel outside the United States in certain circumstances. As such, without grant funding, Dr. Singh's plans to patent a new noninvasive surgical method for treating heart disease are likely to be on hold for another five years until he can secure a green card.

Change of Status to H-1B from Another Visa Category

Foreign nationals can either obtain an H-1B visa at a United States consulate abroad, or, if they are already in the United States on a different visa category, they can change status from their previous visa category to the H-1B as our friend Dr. Singh did. The data in Tables 2.3 and 2.4 provide a good illustration of the number of applications received for H-1Bs, including new petitions for a change of status inside the United States, new petitions for consular processing, and extension applications. As Tables 2.3 and 2.4 illustrate, approximately 260,000 applications were filed on average each year

³⁵ Because Dr. Singh has obtained a waiver, he must wait three years before he is eligible to apply for permanent residence. Applicants on H-1B without the waiver can apply at any time.

between 2001 and 2009. Approximately 120,000 of these applications were for new employment, and for these, nearly 63,000 or over one half of all new applications filed were for a change of status from a different visa category to the H-1B.

Table 2.3 Percentage H-1B Petitions Approved by Type, Fiscal Years 2001 to 2009

| | FY 2001 | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 | FY 2009 | Aver age |
|--------------------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|---------------------|
| Total | 100 | 100 | 100 | 100 | 100 | 100 | 100 | 100 | 100 | |
| Initial Employment | 61 | 52 | 48 | 45 | 44 | 40 | 43 | 40 | 40 | 45.8 9 |
| FN outside U.S. | 35 | 18 | 19 | 21 | 20 | 21 | 22 | 20 | 16 | 21.3 3 |
| FN inside U.S. | 26 | 34 | 29 | 24 | 23 | 19 | 21 | 19 | 25 | 24.4 4 |
| Extension | 39 | 48 | 52 | 55 | 56 | 60 | 57 | 60 | 60 | 54.1 1 |

Source: USCIS Characteristics of Specialty Occupation Workers (H-1B): Fiscal Years 2004, 2008, 2009

Table 2.4 Total Number of H-1B Petitions Approved by Type, Fiscal Years 2001 to 2009

| | FY 2001 | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 | FY 2009 | Aver age |
|--------------------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|---------------------|
| Total | 331, 206 | 197, 537 | 217, 340 | 287, 418 | 267, 131 | 270, 981 | 281, 444 | 276, 252 | 214, 271 | 260, 398 |
| Initial Employment | 201, 079 | 103, 584 | 105, 314 | 130, 497 | 116, 927 | 109, 614 | 120, 031 | 109, 335 | 86,3 00 | 120, 298 |
| FN outside U.S. | 115, 759 | 36,4 94 | 41,8 95 | 60,2 71 | 54,6 35 | 57,2 64 | 60,7 85 | 55,8 93 | 33,2 83 | 57,3 64 |
| FN inside U.S. | 85,3 20 | 67,0 90 | 63,4 19 | 70,2 26 | 62,2 92 | 52,3 50 | 59,2 46 | 53,4 42 | 53,0 17 | 62,9 34 |
| Extension | 130, 127 | 93,9 53 | 112, 026 | 156, 921 | 150, 204 | 161, 367 | 161, 413 | 166, 917 | 127, 971 | 140, 100 |

Source: USCIS Characteristics of Specialty Occupation Workers (H-1B): Fiscal Years 2004, 2008, 2009

While USCIS does not keep data on the types of visas that foreign nationals have changed status from, some inferences about the prior visa status of H-1B applicants can be made. According to the U.S. Citizenship and Immigration Services Characteristics of Specialty Occupation Workers (H-1B) Fiscal Year 2004 Report, in fiscal years 2003 and 2004, applicants in four occupational categories comprised 66 percent of all initial applications. These four categories included computer related occupations, occupations in architecture, engineering, and surveying, occupations in education, and occupations in administrative specializations. Foreign nationals in these occupational categories do not have an alternative employment category available to them. As such, it can be inferred that if these applicants were already in the United States at the time of their application, they were likely here on either a student visa (F-1) or a visitor visa (B-1). However,

because visitor visas are only valid for a period of up to six months at a time and a visitor wanting to change status to the H-1B category would need to find an employer and go through all of the H-1B application steps prior to their visitor visa expiring, it is unlikely that many applicants are changing status from a visitor visa. As such, it can be logically assumed that the majority of H-1B applicants change status from student visas (F-1).

Congressional Changes to the H-1B Visa: Passed Legislation

As mentioned above, the H-1B visa as it exists today was created by the Immigration Act of 1990. The new H-1B visa was designed for applicants in a “specialty occupation”, which was defined as an occupation requiring “theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States”³⁶. It has a six year period of total eligibility and a requirement for approval of a Labor Condition Application by the United States Department of Labor (discussed above).

Congress also set an annual cap of 65,000 on the number of H-1B visas available each fiscal year with the Immigration Act of 1990. Since then, Congress has over the years increased and decreased the annual cap through various pieces of legislation (See Table 2.5).

³⁶ INA Section 205(c)(2)

Table 2.5 Timeline of H-1B Legislation

| Year | Legislation | Provisions |
|-------------|--|--|
| 1990 | S.358 Immigration Act of 1990 | Created the current H-1B visa. Created an annual cap of 65,000 on H-1B visas. Requirement that employer obtain LCA certification from U.S. Dept. of Labor. |
| 1998 | H.R.4328 ACWIA / Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 | Increased the cap to 115,000 in 1999 and 2000, to 107,500 in 2001, and back to 65,000 in 2002. Created new filing fee of \$500 for initial applications to be earmarked for job training, low-income scholarships, grants for mathematics, engineering, and/or science enrichment courses. New requirements for employers who become H-1B dependent. Provisions to protect U.S. workers from layoffs. Changes in enforcement and penalties. |
| 2000 | H.R.5362 / Pub. L. 106-311 | Increased the \$500 filing fee to \$1000. |
| 2000 | S.2045 AC-21 / Kids 2000 Act | Increased the cap to 195,000 for 2001-2003. Created extensions beyond the 6 year period of eligibility for applicants with a filed immigrant visa application but no available visa number. Allowed for portability. Created cap exemptions for higher education and research institutions and their affiliates. |
| 2000 | H.R.3767 Visa Waiver Permanent Program Act | Created exemption from filing an amendment application when the employer engages in corporate restructuring. |
| 2002 | H.R.2215 21st Century DOJ Appropriations Authorization Act | Created additional extensions beyond the 6 year period for applicants who have filed a labor certification application 365 days prior to the end of their 6 year H-1B eligibility. Banned displacement of U.S. workers. Established prevailing wage requirement for employers. |
| 2004 | H.R.4818 H-1B Visa Reform Act / Consolidated Appropriations Act, 2005 | Set new compliance standards. Created a new anti-fraud filing fee of \$500. Reinstated and increased the previously sunset job training and scholarship fee to \$1500 for employers with at least 25 employees and \$750 for fewer than 25 employees. Created an additional new cap of 20,000 for applicants with a Master's degree from a U.S. educational institution. Instituted procedures for a Dept. of Labor audit investigation. Changed the fee structure for job training, low income scholarships, and grants. |
| 2004 | S.2302 | Created cap exemption for physicians with an approved J-1 waiver who agree to work in a federally designated medical shortage area for 3 years through the Conrad 30 program. |

The 1990 cap of 65,000 was not actually reached until 1997 when it was hit for the first time since its creation. When the cap was reached, various pieces of H-1B related legislation were introduced and passed by the United States Congress to either increase or decrease the annual cap between 1998 until 2004. In 1998, Congress passed the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). Among other things, the Act increased the annual cap of 65,000 on the number of H-1B nonimmigrant visas available per fiscal year that was passed in the Immigration Act of 1990 to 115,000 available visas for the fiscal years 1999 and 2000. The cap would then decrease to 107,500 in 2001 and decrease again in 2002 by reverting to the original 65,000.

ACWIA also created a new filing fee of \$500 for initial applications to be earmarked for job training, low-income scholarships, grants for mathematics, engineering, or science enrichment courses. It created provisions to protect U.S. workers from layoff and for employers who become H-1B dependent. ACWIA also made changes in enforcement and penalties for employers who violate the law. This legislation was extremely important because the 65,000 cap was hit for the first time prior to the end of the 1997 fiscal year and in 1998, the cap was hit within the first two months, according to a report by the United States General Accounting Office (GAO)³⁷. As a result, employers were unable to get the amount of skilled workers they needed in order to successfully run their businesses. It was passed in an attempt to remedy the shortcomings of the immigration system at the time and allow businesses and corporations to hire more skilled foreign employees.

³⁷<http://www.gao.gov/new.items/d03883.pdf>

In 2000, three pieces legislation were passed by Congress. First, Congress passed a single bill to increase the previous \$500 filing fee for job training and scholarships to \$1000. Another minor act, the Visa Waiver Permanent Program Act, included a provision that created an exemption from filing an amendment application when the employer engages in corporate restructuring.

Congress also passed during this period the American Competitiveness in the Twenty-First Century Act of 2000 (AC-21). AC-21 was introduced and passed by the Senate as a reaction to the business sector's need for more H-1B nonimmigrant visa numbers. The Act retroactively increased the previously apportioned cap numbers allocated in ACWIA to the number of H-1B visas that was actually issued the prior 2000 fiscal year³⁸ and prospectively increased the cap to 195,000 in fiscal years 2001, 2002, and 2003.

AC-21 also created exemptions from the annual cap for institutions of higher education as defined by section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), nonprofit entities related to or affiliated with a nonprofit educational entity as defined by section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), and nonprofit or governmental research organizations as defined by 8 CFR 214(h)(19)(iii)(C). It also allowed for H-1B extensions beyond the six year maximum mentioned above for foreign nationals with a pending immigrant visa application who cannot file an adjustment of status application for a green card due to a lack of immigrant visa availability when the annual immigrant visa quota had been met. AC-21 also provided portability provisions allowing H-1B employees wanting to change employers to be

³⁸ In 2000, USCIS actually issued more H-1B visas than Congress had allotted. As a result, Congress retroactively passed AC-21 to cover the visas that were issued beyond the cap.

eligible to port and change employers once an application is filed with USCIS, rather than having to wait several months for an approval. It also instituted new government filing fees to be paid by the sponsoring employer to go towards public programs, including educational grants, low income scholarships, programs to provide technical training skills, crime prevention, and computer education.

As mentioned above, the H-1B visa was available for a maximum of six years. Congress created an exception in AC-21 for foreign nationals who were unable to obtain a green card due to the annual per country quota. Attached as a short rider to the 21st Century Department of Justice Appropriations Authorization Act of 2002, H.R. 2215 extended H-1B status beyond the previously apportioned six year maximum for foreign nationals who had filed either an application for labor certification (the first of a series of applications for legal permanent residence) at least 365 days prior to the end of the six year period, or an application for an immigrant visa. This extension was available even for foreign nationals with a visa number available because the annual immigrant visa quota for their home country had not been met. Essentially, this exception allowed for indefinite visa extensions without requiring a foreign national to become a legal permanent resident. Additionally, it established the prevailing wage requirement for employers and banned the displacement of United States workers for H-1B foreign nationals.

The H-1B Visa Reform Act of 2004 (H.R. 4818) was attached as an amendment to the Omnibus Spending Bill passed by the House. The significance of H.R. 4818 was that it set forth compliance standards for the H-1B visa, reinstated the previously sunset filing fee for job training and scholarships to \$1500, created a new \$500 Fraud

Prevention and Detection fee for initial applications filed by employers per foreign worker, and more importantly created a second cap and exemption from the annual 65,000 cap for up to 20,000 foreign nations who have obtained at least a Master's Degree from an educational institution in the United States. In effect, this cleared 20,000 from the annual cap and raised the cap to 85,000.

Finally, S.2302 was the last piece of successful H-1B legislation passed during this era. It was created to supplement the previously approved Conrad 30 program (aptly named after bill drafter Senator Kent Conrad (D-ND)) which allowed physicians who entered the United States on a J-1 waiver to complete a medical residency/fellowship training program with a two year home residency requirement to obtain a waiver if they agree to work in a federally designated medical shortage area for a period of three years (as our friend Dr. Singh did). The Conrad 30 program requires that the physician obtain an H-1B visa in order to complete this three year obligation. S.2302 (also introduced by Senator Conrad) created a cap exemption for these physicians.

Failed Legislation

From 2005 to 2008, USCIS saw more applications for H-1B visas than ever before. The federal fiscal year begins on October 1 each year and per USCIS regulation, applications for H-1B visas can be filed up to 180 days prior to the employee's start date. Because the fiscal year begins on October 1, this is the earliest an employee's start date can be. As such, applications for H-1B visas can be filed as early as April 1 for each fiscal year (180 days before October 1). Beginning in 2004 through 2009, the annual cap

was hit earlier and earlier until 2007 when the 2008 fiscal year cap was actually hit on the first day applications were accepted³⁹ (See Table 2.6).

Table 2.6 The H-1B Cap

| FY | Date H-1B Cap Was Reached |
|-----------|----------------------------------|
| 2005 | October 1, 2004 |
| 2006 | August 10, 2005 |
| 2007 | May 26, 2006 |
| 2008 | April 3, 2007 |
| 2009 | April 7, 2008 |
| 2010 | December 21, 2009 |
| 2011 | January 26, 2011 |
| 2012 | November 23, 2011 |
| 2013 | June 11, 2012 |

Source: USCIS

During this period, twenty nine pieces of H-1B legislation were introduced in the House and the Senate. Each one would have increased the annual H-1B cap in order to remedy the severe shortage felt by the business sector. Every single one of these bills failed. This sustained failure was extraordinary considering that salience among the business sector was extremely high during this period with Congress hearing testimony from the likes of Microsoft Chairman Bill Gates and other large Fortune 100 CEOs urging Congress to either increase or remove the H-1B cap entirely.

³⁹ Per USCIS regulation, if USCIS receives a sufficient number of applications to reach the H-1B cap on the first business day applications can be filed, applications will be received for two consecutive business days and a random lottery will select the appropriate number of applications to fulfill the annual cap. As such, the annual cap was actually hit on the first day in both the 2008 and 2009 fiscal years.

Interestingly, each of these 29 bills was introduced as stand-alone pieces of H-1B legislation or part of a larger immigration related bill. Not a single provision was introduced as a rider to a non-immigration related bill as was the primary method of success in the prior period of 1998 to 2004. The large majority of these bills died in the Senate Judiciary Committee and in the House Judiciary Committee, Immigration and Claims Subcommittee, and the Immigration, Citizenship, Refugee, Border Security, and International Law Subcommittee.

During this period, from 2006 to 2007, the Republicans were in control of the House and Senate, and in 2008, the Democrats were in control of the House and Senate. From 2006 to 2007, the Chair of the House Judiciary Committee was James Sensenbrenner (a Republican) and the Chair of the Senate Judiciary Committee was Arlen Specter (a Republican). Of the bills that were introduced, there was a split in introductions from both members of the Republican and Democratic Parties. With this bipartisan split in introductions, it is unusual that not a single bill was able to be compromised on and passed. This lack of congressional support will be further discussed in the analysis chapters.

Conclusion

In this chapter, I provided a brief historical overview of congressional policymaking on immigration generally in order to provide a context for understanding legislation on the H-1B visa. Early immigration policy was relatively closed with a preference for white Europeans. Throughout the twentieth century, policy gradually became more liberal as Congress opened immigration across the board to various areas of the world, and created a variety of different visa categories.

I also outlined the requirements for the H-1B visa and congressional changes to it since its creation in 1990. I then provided a brief overview of some of the legislation that was attempted and failed. Chapter six will examine these specific congressional phenomena in more detail in order to understand why the wave of H-1B cap policy was abruptly over. In the next chapter, I will examine some of these issues and highlight the theoretical underpinnings of congressional behavior. I will begin with a review of the literature, followed by an review of the main congressional models, and examine the traditional cues and influences utilized and felt by members of Congress in both a general sense and more specifically when dealing with immigration legislation.

CHAPTER 3

LITERATURE REVIEW

In chapter two, I gave a brief introduction into the politics associated with H-1B visa legislation in Congress. Here, I will outline the theories and policy models that are relevant to this discussion. As the most extensively studied institution in the world, theory on Congress and congressional behavior is numerous and has been well debated, but has also grown muddled over time. Additionally, because the macro environment is constantly changing, one model cannot accurately explain legislative behavior over a period of time. Therefore, a longitudinal analysis of legislation over time will need to use a variety of different theories and models to explain congressional behavior.

The ensuing analysis will attempt to explain congressional behavior on the H-1B visa since 1990. The theories and models relevant to this analysis include the following: the macro political environment (Sabatier and Jenkins-Smith 1988); member goals (Mayhew 1974; Sulkin 2005; Sinclair 2007); policy substance (Sulkin 2005; Carmines and Stimson 1980; 1989); polarization (McCarthy; Poole; and Rosenthal 2006); pivotal politics (Krehbiel 1998); party politics (Cox and McCubbins 2005; 2007); unorthodox lawmaking (Sinclair 2007); and bargaining failure (Gilmour 1995).

While these are just a snapshot of all of the congressional models, they still encompass a wide range of models and theories for one policy issue. This is the case largely because while the issue of skilled worker immigration has remained the same, the politics both within and outside of Congress have changed dramatically in the past twenty years since the H-1B visa has been in existence.

The Substance of the Analysis

Congress was last successful with comprehensive immigration reform with the Immigration Reform and Control Act of 1986. Passed by a Republican controlled Senate and Democratic controlled House and signed into law by Republican President Reagan, the bill signaled the last true comprehensive immigration related bipartisan compromise.

Four years later, the Immigration Act of 1990 was introduced by Democratic Senator Edward Kennedy and was passed by a Democratic controlled Senate and House and signed by Republican President George H.W. Bush. While not a true comprehensive bill in the traditional sense⁴⁰, the bill made significant changes to immigration policy, changing both the number and type of immigrants granted entry into the United States.

The Immigration Act of 1990 had several functions. First, it created the Diversity Visa Lottery Program, which is essentially a lottery system that allows up to a predetermined number of “winners” per country to be eligible for legal permanent residency in the United States. It was designed to grant legal permanent residence to foreign nationals from countries that historically have a small percentage of emigrants to the United States through other, more traditional legal means.

The Act also created the current preference system in place for employment based immigrant visas, and increased the number of immigrant visas issued per year in both the family and employment categories. Congress has established an annual quota for the number of immigrant visas/legal permanent resident applications granted each year per country. When and if that quota is reached each fiscal year, all additional applications are rolled over and are adjudicated first in the next fiscal year. The quota is updated each

⁴⁰ The bill focuses on nonimmigrant and immigrant visa categories and some enforcement issues but does not address illegal immigration.

month by the Department of State in their monthly visa bulletin. As an example, in the May 2012 Department of State Visa Bulletin, categories for foreign nationals with applications pending based on employment requiring at least a Bachelor's Degree or its equivalent in work experience were backlogged to 2007 for nationals of India and China. What this essentially means is that there were more applications filed than the annual fiscal cap of visa numbers available so the numbers have simply rolled forward for five years (2007 to 2012). Each month, the Department of State assesses how many applications are approved (based on how many immigrant visas are issued) and issues a new priority date.

The Act also created several new nonimmigrant visa categories, including the H-1B (which we now know are for skilled workers), O-1 (for aliens with extraordinary ability in the sciences, arts, education, business, or athletics), P (for athletes or entertainers), Q (for international cultural exchange programs), and R (for aliens in religious occupations) visas. Additionally, it set forth a series of new administrative requirements for naturalization, changed some enforcement provisions for criminal aliens, and revised the grounds for exclusion and deportation, as well as a number of other miscellaneous immigration related provisions.

The 1986 and 1990 Acts mark the beginnings of the effect that polarization had on immigration related (and particularly for H-1B related) legislation within Congress. As we will see, 1990 was the last major immigration success story for Congress. With regard to legislation on the H-1B visa (the focus of this study) after 1990, we had a series of bills that for the most part failed when introduced on their own unless they were narrow in scope or passed through the use of riders until 2004, followed by a stalemate

period between 2006 and 2008 when legislation was introduced but failed at every instance, culminating in a lack of any legislation introduced post-2008. So while Congress attempted to change the H-1B process, their efforts were stymied by a series of initial failures, which were overcome by some unorthodox lawmaking practices for a short period, only to be followed by a period where risk adverse members resisted even those previously successful unorthodox practices. Why was Congress successful (to some degree) pre-2004 and not after? This chapter will lay the theoretical framework for the ensuing analysis.

Previous Literature

While there are a myriad of policy models and theories attempting to understand Congress and congressional behavior, this discussion will be confined to the literature that is relevant to the analysis at hand, specifically those studies dealing with: the macro political environment (Sabatier and Jenkins-Smith 1988); member goals (Mayhew 1974; Sulkin 2005; Sinclair 2007); policy substance (Sulkin 2005; Carmines and Stimson 1980; 1989); polarization (McCarthy; Poole; and Rosenthal 2006); pivotal politics (Krehbiel 1998); party politics (Cox and McCubbins 2005; 2007); unorthodox lawmaking (Sinclair 2007); and bargaining failure (Gilmour 1995).

The Macro Environment

Sabatier and Jenkins-Smith (1988) argue that legislators are impacted by the larger macro political environment. Their theoretical framework, the advocacy coalition model of policy change, resulted out of a need for an alternative to the stages approach and incorporates the role of external forces on the policy process. It begins with three “foundation stones:” a macro-level assumption that specialists create policy within a

policy subsystem and are influenced by the broader political and socioeconomic system; a micro-level individual model; and a meso-level where actors are aggregated into advocacy coalitions based on their expertise and areas of specialization. The model assumes that actors will form advocacy coalitions with others with similar policy core beliefs to achieve common policy objectives.

With regard to this aggregate level, Jacobson (2004) argues that the economy, presidential approval rating, and partisan control in Congress are the most important macro-level factors in explaining the macro political environment. As a result, congressional performance is dependent upon how members win their seats and how they maintain their seats. Therefore, because Congress is internally affected by the macro political climate, when policies become unattractive, legislators become risk averse to signing on to such legislation.

Member and Constituent Preferences

The classical early rational choice applications of Congress including Mayhew (1974) and Fenno (1978), examine various congressional goals. According to Mayhew (1974), congressional members are first and foremost concerned with reelection. To achieve reelection, a member should engage in advertising, credit claiming, and position taking. These actions are easily attainable through the organization of Congress, including congressional offices, the committee structure, and parties.

Building on Mayhew's (1974) research, Fenno (1978) and others outline a variety of congressional goals, but argue that reelection is of foremost importance for members because it is necessary for legislators to attain any other goals. To attain these additional

goals, according to Fenno (1978), legislators must first cultivate trust among their constituencies. That trust in turn allows them to justify their congressional decisions.

These other congressional goals can include constituent preferences and individual member goals. Yet because, as we learned above, Congress is internally affected by the macro political climate, when policies become unattractive, legislators become risk averse to signing on to such legislation. When this occurs, members can use unorthodox practices to circumnavigate the traditional legislative process to realize some of their individual or constituent policy goals. In certain cases and at certain times, some legislation becomes too risky and legislators become completely risk averse, preferring not to have their names attached to certain types of legislation.

More recently, following the reelection camp, Sulkin's (2005) uptake theory is based on strategic motivation theory and posits that legislators adjust their legislative agenda based on criticisms of their own legislative history from their previous election challenger. She looks at how past electoral experiences influence congressional behavior and her theory is that winning legislators regularly take up their previous challenger's priority issues from previous campaigns and act on them during their new term.

This essentially follows Zaller's (1992) logic that voter decisions are made from the most recent information available to a particular voter. Because legislators are concerned with achieving their individual policy goals and achieving influence in Congress (Fenno 1974), they are primarily concerned with reelection because without reelection, those goals cannot be realized (Mayhew 1974). As a result, legislators must constantly be forward thinkers (Arnold 1990) and engage in uptake in order to, at the very least, create the appearance that have shifted their policy attention to issues the

public may be concerned with. As a result, constituents may recognize and reward this responsive behavior in a future election (Fiorina 1981).

Sulkin (2005) also argues that the substance of the policy is also increasingly important for reelection goals. Mayhew (2004) and Fenno (1978) found that legislators behave differently when issues are either nationally or locally salient to their constituents. A highly salient issue/policy is “one that affects a large number of people in a significant way” (Gormley 1986: 598). Issues can be highly salient within a particular member’s constituency, but perhaps not necessarily salient to the public at large (Gormley 1986).

Therefore, H-1B legislation that increases the number of skilled H-1B workers could be highly salient to the business sector needing to employ foreign skilled workers, but low in salience or even hostile by the general public who are not concerned with the number of foreign skilled workers. Further, issue salience can change and become more or less salient if an underlying problem within the issue worsens or improves. For example, immigration as a general matter can also be salient to the general public during times of high unemployment and/or national security. The more salient an issue, therefore, the more involved Congress will likely be (Mayhew 2004; Fenno 1978).

Additionally, Carmines and Stimson (1989; 1980) stress the distinction between “easy” and “hard” issues. “Easy” issues are those that tend to generate a visceral gut reaction on the part of the public. They tend to be symbolic rather than technical, address policy ends rather than means, and are issues that have been on the policy agenda for an extended period of time. The public tends to be familiar with these types of issues. A common easy issue is crime. Hard issues, on the other hand, are more complex and nuanced and require a much higher level of political sophistication and sophisticated

decision making. Examples include social security and government sponsored health care.

The public has largely been introduced to immigration as an easy issue in the context of border security and illegal immigration issues through the media and other outlets. As a result, immigration generally has become an emotional and easy issue that the public over time has become largely adverse to. On the other hand, the H-1B visa is a very complex issue with so many nuances that it requires very sophisticated knowledge of both the policies and the economic reasons underlying it. As a result, we have this complex hard issue trapped within a larger easy issue that carries with it high level of negative public opinion.

Having established this relatively odd juxtaposition between immigration policy generally and the H-1B visa specifically, I turn back to the issue of salience. Because immigration has been presented to the public as a border security type issue over time, as a relatively small segment of immigration policy, it is highly unlikely that most members of Congress, much less the general public, are very familiar with the relatively complex regulations that regulate the H-1B visa.

However, because the business and corporate sector, which is a large portion of the United States economy, does rely on H-1B skilled workers to keep their businesses both operational and successful, it can be said that when H-1B visa numbers are no longer available and the corporate sector suddenly is faced with decreased production, the issue of H-1B numbers suddenly becomes extremely salient with both the business sector and consequently with Congress. As a result, it seems clear that as an increase in demand for skilled foreign workers in a particular year occurs, the issue of H-1B legislation

becomes more salient and the more involved Congress, and particularly the Republican members of Congress, is likely to be. On the flip side, a decrease in demand for foreign workers should make the issue of H-1B legislation less salient and Congress less involved.

In sum, salience helps define the stakeholders and the incentives facing legislators. If an issue is highly salient, then Congress will likely take the time to understand the issue and make careful decisions. If an issue is highly technical or complex and low in salience, then there should logically be less incentive to spend lots of energy on the matter, based on rational choice theory. As a result, high salience can compensate for low information or technical settings.

Additionally, the complexity of congressional processes allows policy makers to manipulate rules and procedures to their advantage to pass legislation that may be inconsistent with the broader political environment. As such, if the political environment, as is hypothesized here, is such that members are unlikely to vote in favor of any immigration related bill, policy goals of individual members may still be achieved by less orthodox ways.

Polarization

Earlier analyses on congressional behavior focused on a time when ideology across party lines did not diverge to the degree that they do today. As a result, a relatively new literature has emerged dealing with the issue of partisanship and the increased polarization of the parties. As I mentioned in the beginning of this chapter, there are a variety of models and theories explaining congressional behavior, yet each only captures

a snap shot of behavior within a broader longitudinal dynamic that consists of a polarized Congress with very few median members.

According to McCarty, Poole, and Rosenthal (2006: 1), “in the middle of the twentieth century, the Democrats and the Republicans danced almost cheek to cheek in their courtship of the political middle”. Since the 1970s, however, McCarty, Poole, and Rosenthal (2006: 1) argue that “the parties have deserted the center of the floor in favor of the wings” and that politics have become more divisive. They define polarization as “a separation of politics into liberal and conservative camps” and note two consecutive polarizing phenomena: the vanishing moderates and the fact that the two parties have pulled apart and clustered as conservatives or liberals (McCarthy, Poole, and Rosenthal 2006: 3).

Analyzing individual roll call voting patterns of members in the House and Senate, they found that the median legislative position of each party has diverged sharply since the mid 1970s (Poole and Rosenthal 1984; McCarthy, Poole, and Rosenthal 2006). Said differently, they showed that that in both chambers Republicans and Democrats have become either more conservative or more liberal and moderates have slowly begun to vanish since in the 1970s. Additionally, they showed that while members are becoming more partisan, the parties themselves are becoming more homogenous.

McCarthy, Poole, and Rosenthal (2006) attribute this change largely to economic and social changes. They argue that polarization occurred because Republicans in the North and South moved sharply to the right after realignment in the 1960s and in response, the remaining Northern Democrats moved further to the left than Democrats had been in the 1960s. As a result, individual members have become increasingly more

liberal or conservative within their respective parties. Additionally, they also argue that income inequality has worked hand in hand in the increase in polarization, Essentially, they claim that as income inequality has increased, people at the top devote more time and money to supporting the party that does not emphasize redistribution. This party, which has become the Republican Party, over time generates policies that either increases inequality or blocks policies that would increase redistribution. Over time, this works to divide the two parties further apart.

While McCarthy, Poole, and Rosenthal (2006) found that income inequality was one of the root causes of polarization, Galston and Nivola (2006) point to four root causes of polarization: historical transformations, the changing role of religion, the media, and the electoral nature of the national legislative branch. First, regional realignment of the parties in the 1960s as a consequence of the civil rights movement and particularly the 1965 Voting Rights Act which mobilized black voters and sent scores of white conservatives into the arms of the Republican Party resulted in a dramatic change in politics. The Republican Party became the white, conservative party throughout the South and West. The Democratic Party lost their conservative southern base, and as a result, were forced to turn to an alternate constituency – the Northeast and later California (Black and Black 2002). After realignment, a series of political events further delineated party divisions, including *Roe v. Wade* (1973), the Vietnam War, and East-West tensions during the Cold War (Galston 2004; Sinclair 2006).

With regard to religion, observance and political preference have been found to be correlated. The more one attends church, the more likely they are to identify with conservatives. Additionally, the media has also intensified partisanship by focusing on

feuds between players in order to maintain viewership (Galson and Nivola 2006; Hamilton 2006).

Finally, with regard to congressional elections, competitive districts have over time diminished. As a result, on a national level, because districts have become one party districts, candidates have no incentive to appeal to voters outside of their party.

It cannot be stressed enough how much of an impact polarization has had on the legislative branch. Although Congress is a well-bound institution, it is still a permeable institution and is often affected by external events and forces. Thus, polarization has changed congressional behavior in a number of ways. According to McCarthy, Poole, and Rosenthal (2006), polarization increases gridlock, and major legislation is successful less frequently (a finding Sinclair also makes in her unorthodox lawmaking argument – see below). While they examine legislation within the context of income redistribution, the ensuing analysis will attempt to explain how polarization has affected policymaking on the H-1B visa specifically.

This brings us full circle. Congress was able to use less orthodox ways successfully for a period of time until a series of macro-level factors made members risk averse to even using riders to realize their policy goals. Meanwhile, all of this was occurring within the context of increased party polarization. The following chapters will attempt to understand how polarization affected legislation and what changes in the macro environment occurred to make legislators so adverse to even introducing this type of legislation in order to attempt to explain this shift in legislative support for H-1B visas. This will be done using four of the above mentioned congressional models: pivotal

politics, party models, unorthodox policymaking, and stalemate. The literature on each will be outlined in turn below.

Pivotal Politics – The Median Voter

Krehbiel's (1998) pivot politics model goes beyond the traditional divided government argument to explain why gridlock occurs in Congress and how legislation can pass over gridlock. Krehbiel (1998) argues that gridlock occurs for a variety of reasons, including moderate status quo policies, supermajority procedures, heterogeneous preferences, and partisanship. Therefore, in order for policy change to occur, both moderate policy proposals and moderate members are needed. As a result, policy change is incremental and passed only through the use of supermajorities.

The argument is Senate centric and while legislation must pass both chambers to be successful, the same institutional constraints do not exist in the House. As a result, Krehbiel shows us why successful legislation has become so difficult in the Senate (and consequently in Congress) as successful legislation must have more than a just a minimum winning coalition of a majority.

The argument is also an institutional one in that Krehbiel argues that institutions matter in a way that can undermine democratic norms such as majority rule. This follows Riker's (1980: 445) classic argument that the political system in which institutions operate lack equilibria, and as a result, outcomes result not only from institutions and individual tastes, but also from legislative "political skill and artistry... in order to exploit the disequilibrium of tastes for their own advantage".

Returning to the claim that supermajorities are needed to pass legislation, prior to Rule 22, any member within the Senate could file a motion for extended debate, or

filibuster. Since the Senate's adoption of Rule 22 in 1917, the filibuster can be terminated and the motion at hand brought to a vote through the use of cloture. To invoke cloture, a senator must file a cloture petition while a filibuster motion is pending, which requires the signatures of 16 other senators. In two days, a cloture vote will be brought before the full Senate. It requires a supermajority, or 3/5 of the Senate in order to be invoked. Once cloture is invoked, the original pending motion will be brought to a vote after the time stipulated in the cloture motion.

The effect of cloture is this. While the original motion may require only a simple majority, in order to overcome filibuster in the Senate a supermajority is necessary. This means the pivotal player becomes the filibuster pivot rather than the median voter.

Looking at the relationship between cloture and roll call votes, Binder and Smith (1997) found that votes on cloture were votes on the actual legislation on which cloture was being sought, rather than procedural votes on the length of debate. Within the context of pivotal politics, when cloture makes it more difficult for senators to change unattractive policies relative to alternative policies, they will "lash out" against the filibuster (Krehbiel 1998: 96).

If there are enough moderates to refuse cloture, then these moderates have the power to water the proposal down and over towards their side of the policy space. Using a specific example, if there are enough Republicans in the Senate to refuse to invoke cloture, then Democrats will need to move their policy more towards the right to create a more moderate policy that Republicans will be happy with or fear gridlock (which would also occur in the absence of moderates).

Party Models

The traditional theory on responsible party government (Schattschneider 1942) holds that the various parties have both different and well-defined platforms. Citizens elect a unified government, the majority party attempts to enact and implement policies within their platforms, and policy preferences are realized. This model proved to be insufficient in explaining legislative politics in the postwar era and the conditional party government theory was born (Rohde 1991; Aldrich 1995), which requires a homogenous majority that is distinct from the minority party (Aldrich 1991; Rohde 1995).

The theory on conditional party government (Rohde 1991) is more concerned with individual member preferences. Specifically, party responsibility exists when member preferences are homogenous within the party, meaning party leaders will support the legislation amid widespread agreement within the majority party. Rohde's (1991) argument was that party leadership in the House is strongest with the presence of three interdependent factors: (1) homogenous party membership; (2) institutional leverage; and (3) a strong leader.

Rohde argued that institutional reforms in the House in the 1970s and increased partisanship in the 1980s are related and the variation in intraparty homogeneity and interparty heterogeneity shapes the level of influence that party leaders have. When parties are unified internally and there is a gap between the party medians (or the medians have disappeared as they do by the 2000s), members suddenly have agreement on the party agenda and this empowers party leaders. When these conditions are not present, party leaders are not extended the same degree of authority, and policy making power tends to shift to the committees.

Party theories generally argue that legislators play two games simultaneously: lawmaking within the legislature and reelection within their constituencies (Key 1964; Sorauf 1964; Cox and McCubbins 2007; and Aldrich 1995). These two games have been linked together within the concepts of brand names (Kiewiet and McCubbins 1991) and collective dilemmas (Kiewiet and McCubbins 1991; Cox and McCubbins 2007; Rohde 1991; Aldrich 1995).

The literature on brand names theorizes that parties are organized in order to provide information to the electorate. The party becomes akin to a brand name, and the reputation of one actor of the brand (or party) spills over to the whole brand line (party). The voter, in turn, can gauge the characteristics of a lesser known actor of a brand/party simply by knowing which brand/party it belongs to. With regard to collective dilemmas, Cox and McCubbins's (2007) cartel theory tells us that parties are designed to solve the collective action problems faced by individual members who cannot obtain their policy goals on their own.

Recent literature has also indicated that parties have become increasingly important in sorting ideologies and providing cues for legislators (Cox and McCubbins 2007; Rohde 1991). Additionally, parties provide individual voters with cues that help legislators in their reelection goals. Over time, the role of parties has become more important and parties serve an even greater role in agenda setting and organizing committees (Kingdon 1984; Cox and McCubbins 2005, 2007). Essentially, this literature has found an inverse relationship between parties and committees.

Immigration policy, as discussed in chapter two, has largely been made on the congressional level and Congress has been active in maintaining their exclusive

jurisdiction over immigration policymaking. Therefore, in order to make policy, legislators are required to amass and understand a great deal of information about current immigration law and the needs of various interests. Since the average legislator would have to invest a tremendous amount of time in understanding the complicated nuances of immigration law and policy (and every other subject area they legislate on), studies have shown that legislators instead turn to parties to provide them with “cues” on how to vote (Campbell et al. 1980).

At the level of implementation, however, immigration has become an extremely complicated policy area with overlap among agencies, a myriad of complex visa categories, and the distinction between enforcement and entry. As such, following the logic of Campbell et al. (1980), it can be expected that the average legislator does not understand the nuances of every piece of immigration policy that comes through the floor, particularly a niche segment of immigration policy such as skilled worker nonimmigrant visa policy. Therefore, parties are necessary to not only provide cues but to organize parties as well.

The importance of party organization is the thesis of Cox and McCubbins’ (2005; 2007) works on the House of Representatives. Following in the tradition of Rohde (1991), they provide the seminal work on parties through their work studying the House. They argue that lawmaking in the House is predicated by collective efforts that are difficult due to individual member and constituent policy goals. As a result, parties organize the House in order to solve these collective action problems on the part of individual members. Essentially, parties act as market cartels, organizing individual members in an attempt to create collective benefits for the party as a whole. Additionally,

the majority party has the ability to control the policy agenda, allowing a greater likelihood of bill passage for the policy goals of individual members. These institutional arrangements have become more constricting for legislators over time, and as a result, we have seen legislators utilize some unorthodox practices (Sinclair 2007) which will be described in the next section.

While their findings are important, a major shortcoming to this, and many of the congressional studies, is that they focus on explaining decision making within the House⁴¹. Yet as Krehbiel (1998) shows us, policy making in the Senate is vastly different, particularly due to institutional systems in place such as filibuster and cloture. As legislation is not produced in just one chamber but requires identical versions of the same bill to pass both chambers in order to become law, a study of both chambers is necessary in order to fully explain congressional behavior. As a result, these studies miss the mark to some degree in explaining policymaking and congressional behavior.

That said, these studies still have an important place in the literature as they do show us, as we have seen, that parties are important in Congress. They are able to organize members, provide them with cues, and make the leadership's job easier. As a consequence, since the 1970s, party polarization has been increasing in both chambers (see Figure 5.2). This has resulted in an increase in gridlock and a steady decrease in bipartisan legislation (McCarthy; Poole; and Rosenthal 2006). The movement within Congress began with the modern conservative movement that shifted the Republican Party to the right (McCarty, Poole, and Rosenthal 2006; Micklethwait and Wooldridge 2004). This, followed by a change in income distribution among the voting population, polarized campaign contributions by economic elites, and polarization among the

⁴¹ Other studies focus solely on the Senate.

electorate⁴² along economic lines (the higher income voters are more likely to align with Republicans while the lower income groups are less likely to participate in voting due to immigration levels and incarceration) which has resulted in a decreased demand for income redistribution. This decrease in the number of moderates has made it more difficult for legislation to pass. Party polarization and its effect on policymaking will be discussed in greater detail in forthcoming chapters.

Unorthodox Policymaking

As noted previously, Sinclair (2007) makes the argument that Congress no longer follows the traditional textbook lawmaking process. She outlines these changes in policymaking over time by comparing the 1970 Clean Air Act with the 1990 Clean Air Act. The 1970 Act, for example, was introduced in both respective House and Senate committees, and then proceeded to a vote on the floor where it passed. In 1990, however, the bill was introduced in three different House committees and then went to the floor where a series of compromises through informal processes occurred. In the Senate, the bill was introduced in committee, went to the floor where a series of informal compromises occurred, followed by filibuster before a vote. Sinclair (2007) argues that the 1970 process is not likely to ever occur again as most bills today are now passed through short cut procedures for small bills and a variety of once unorthodox practices and procedures for major legislation.

These unorthodox practices and procedures include the increase in usage of larger omnibus bills, the use of multiple committees for the same piece of legislation, more complex and restrictive rules tailored to deal with problems associated with a particular

⁴² This remains hotly contested within the literature. See Fiorina, Abrams, and Pope 2008 and DiMaggio, Evans, and Bryson (1996).

bill in the House; and in the Senate, the fact that bills are subject to greater floor amendments (many irrelevant to the bill at issue), and filibuster threats and cloture votes are much more routine.

Additionally, Congress is certainly affected by the macro political climate. When policies become unattractive, legislators become risk averse to signing on to such legislation. Recently, however, Sinclair (2007) argues that there are opportunities for members to circumnavigate the traditional legislative process in order to realize some of their individual or constituent policy goals through the use of riders. Yet even with these Sinclairian opportunities, in certain cases and at certain times, some legislation becomes too risky and legislators prefer not to have their names attached to certain pieces of legislation. This is where Congress finds itself after 2004 and particularly after 2008 when no legislation is introduced.

According to Sinclair, however, these unorthodox practices have become so routine that they are actually no longer unorthodox. While Sinclair does not tell us why the legislative process has changed over time, largely because there is no agreement among scholars as to why this change occurred (Cooper 1981; Gamm and Shepsle 1989), polarization does appear to play a role in this as well. In a different work, she does make the argument that polarization and the “ideological gulf” between the parties in both the Senate and the House (which she terms “hyperpartisan”) has accelerated unorthodox lawmaking (Sinclair 2006). The role of polarization will be discussed further in chapter seven.

As a result of these new and previously unorthodox practices, consequences are such that major legislation has a better chance at passage than non-major legislation.

Similarly, members are less specialized today and face greater information problems than before. Additionally, in the Senate, the supermajority requirement has made coalition building more difficult and gridlock more likely.

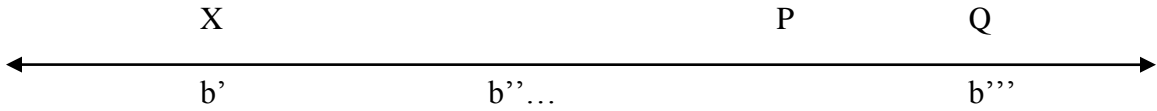
Stalemate

The bargaining failure or stalemate argument is a rational choice game theory model that claims that failure occurs when a zone of agreement exists between two parties but one side deliberately chooses to avoid that zone. The defecting side avoids compromise in an attempt to seek some other type of political gain that they believe will ultimately be preferable in the long run. Gilmour (1995) calls this the “accepting half a loaf” argument where the defector feels that accepting half of a loaf today may keep them from obtaining the whole loaf (which is their ultimate preference) at a later date.

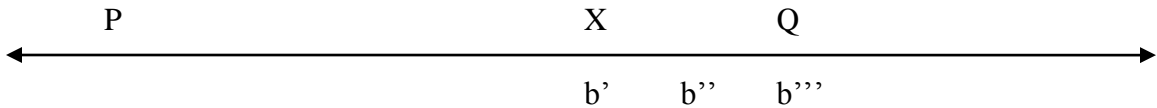
Gilmour (1995) argues that it is common for supporters of a comprehensive reform measure to oppose piecemeal measures because they fear that in accepting a smaller portion of a policy, they risk not getting the comprehensive measure passed at a later date. In fact, Gilmour (1995) argues that passing piecemeal legislation actually does make it harder to pass comprehensive legislation. Therefore, rather than pass piecemeal legislation, supporters will simply wait until they can gain control in both chambers and the presidency. Figure 3.1 below illustrates this policy strategy.

Figure 3.1 Strategic Disagreement

Before Election and Comprehensive Reform



After Election



- Q = Status Quo
- P = President's Position
- X = most extreme proposal that can win
- b = alternatives that can beat Q

Source: Adapted from Gilmour (1995: 46)

It is worth recalling here that following Krehbiel (1996; 1998), in order for policy change to occur, both moderate policy proposals and moderate members are needed. As a result, policy change is incremental and typically passed only through the use of supermajorities. Therefore, in order for legislation to pass, the majority party would simply need to shift the legislation to the position of the median legislator. In 2006, for example, when Republicans controlled both chambers, but failed to meet the threshold for cloture with only 55 Republicans, we would expect the median legislator to be center right, and in 2007 and 2008 when Democrats controlled both chambers but the Senate with only 51 and 55 Democrats respectively, we would expect the median legislator to be center left and policy to shift accordingly. This however did not happen. In each instance, the parties remained firm in their positions and no shifting of policy occurred. Instead,

with contemporary increasing levels of polarization, no policy space remains for individuals to use Sinclairian tactics and the consequence has been gridlock.

Macro-Level Factors

Public Opinion

With regard to public opinion and elections, Arnold (1990) argues that Congress is partly manipulated by coalition leaders, voters, and free agents. They enact legislation based on general interests, concentrated interests, and geographic interests. Assuming that legislators are most concerned with reelection (Mayhew 1974; Jacobson and Kernell 1983), he argues that when Congress enacts legislation for concentrated or geographic interests, they do so as a result of strong lobbies and reelection goals. Legislators, according to Arnold (1990: 8) “choose among the paired alternatives presented to them in part by estimating the electoral consequences of being associated with each option.” And while voters may not know about each legislator’s policy positions, these positions can be used against a candidate in future elections (Kingdon 1989; Sulkin 2005). Voter preferences are typically gauged by either punishment or reward of an individual candidate or party (Fiorina 1981).

Arnold’s (1990) model assumes that voters are more concerned with outcomes rather than the policy itself. Actors in the political process (voters, legislators, and coalition leaders) make four separate decisions: (1) citizens establish policy preferences by evaluating policy proposals and effects; (2) they choose among candidates by evaluating their policy positions and connections with policy effects; (3) legislators choose among policy proposals by establishing voters’ potential policy preferences and establishing the likelihood that they will incorporate these preferences into their vote

choice in a future election; and (4) coalition leaders adopt strategies for enacting their policy proposals by anticipating how the legislators will act.

In the literature, public opinion is typically viewed in the context of salience. Salience refers to the importance that voters place on a particular issue (Berelson et al.; 1954; Behr and Iyengar; 1985). Salient issues are those that voters are most likely pay attention to by way of legislative behavior or through the media (Brody 1991). The more salient an issue, the more likely Congress will act on it. Typically, Congress will respond in a manner consistent with public opinion because legislators are first and foremost concerned with reelection (Mayhew 1974; Jacobson and Kernell 1983).

For the most part of U.S. history, however, Congress acted in direct opposition to public opinion on immigration and as a result, public opinion and actual policy on immigration did not converge. With the exception of a brief humanitarian exception following the second World War, public policy has tended to be more restrictionist on matters dealing with immigration, while Congress has tended to exhibit a more liberal policy since the 1940s (Simon 1989; Epenshade and Hempstead 1996; Kane et al. 1984; Pear 1986; Day 1990).

Yet Muller (1996) hypothesizes that immigration policy becomes salient and captures public opinion when three factors converge: (1) in areas where and when immigration is high; (2) at times and in places where the public is uneasy about the economy; and (3) when the public begins to question the potential contribution of immigrants and views them more of a burden than a benefit. Upon aggregation, Gimpel and Edwards (1999) claim that immigration still is not a salient political issue unless the economy is so bad that immigrants are blamed. As such, I hypothesize that in the wake of

the recent economic recession, Congress has become more receptive to public opinion, a new key variable in explaining failure of immigration bill passage (which will be discussed independently below).

Earlier I outlined Carmines and Stimson's (1980; 1989) "easy" and "hard" issue distinction. Remember that easy issues are those that generate a gut reaction on the part of the public. Hard issues, on the other hand, require much more political sophistication and knowledge and tend to be much more nuanced and complex.

Immigration as a general issue has over time been presented to the public through the media and other outlets in the context of border security and illegal immigration issues. As a result, I hypothesize that it has become an emotional and easy issue that the public is largely adverse to. On the other hand, the H-1B visa is a very complex issue with so many nuances that it requires very sophisticated knowledge of both the policies and the economic reasons underlying it. As a result, we have this complex hard issue trapped within a larger easy issue that most are familiar with and adverse to at the macro-level and we have spillover effects from issues pertaining to illegal immigration, unskilled labor, and border security issues seeping into policy dealing with skilled foreign workers, a completely separate policy area dealing more with economics and business than border security.

Economic Conditions

Studies on immigration policy often begin with a more general conceptualization of migration as a social global phenomenon (Zolberg 2006). As a social phenomenon, migration theorizing typically touches on political science, political economy, sociology, and anthropology. While migration is the social act of an individual moving from one

sovereign state to another, it also impacts the social, political, and economic fabrics of both the losing and receiving states within both domestic and international systems and markets.

In industrialized capitalist states, such as the United States, immigrants have long been viewed as a class of labor. This classification has resulted in animosity towards immigrant workers as they are viewed as competing for jobs with domestic workers. Economic studies of immigrant labor have traditionally been reviewed in a Marxist framework (Zolberg 2006; Castles and Kossack 1985; Petras 1981). Additionally, studies abound on the debate on whether immigrants are, on average, contributing members of society through consumption and taxation or are simply free riders.

Using organization theory, Freeman (1995) argues that immigration policies tend to be both expansionist and inclusive because policymakers tend to be more responsive to organized interest than individual members of the public who are anti-immigration. This results in policies that are more liberal than the public opinion of the median voter.

He creates a political economic model of policymaking for liberal democracies, including the United States with the units of analysis being the individual voters, organized groups, and state actors. He argues that immigration policy in liberal democracies relies more on organized interest than public opinion because it is in politician's best "electoral interest" to cater to interest groups because while public opinion is restrictionist, it is not "well articulated" (Freeman 1995: 886-887). As a result, policymakers in the United States would be expected to align with business interests when making immigration policy dealing with the employment side of immigration⁴³.

⁴³ While studies on congressional behavior typically do include an analysis on interest group pressure, it is impossible to disaggregate the amount of group pressure attributed to immigration versus other areas. For

As the traditional textbook Congress has changed dramatically, there are other factors that can impact congressional behavior on immigration policy as well. For example, the state of the national and international economy can affect domestic immigration policy. In a positive growth or status quo economy, voters are less likely to be concerned with increased immigration and effects on employment opportunities. In times of weak economic growth and high levels of unemployment, however, constituents are less likely to be tolerant of any type of immigration policy increasing the number of foreign nationals competing for jobs.

While the H-1B visa is designed to fill a market void of skilled workers in any given field, voters typically view any increase in immigrants as direct competition for jobs (Foner 1964; Higham 1985; Olzak 1992; Passel and Fix 1994; Pomper 1993; Citrin, Green, Muste, and Wong 1997). As a result, I hypothesize that the recent economic recession starting in 2007 contributed in a shift in legislative support for H-1B legislation.

Media

The media plays a strong role in policy, specifically in providing information, whether objective or not, to the public. It has been shown that the media plays a stronger role in salient issues and less of a role in complex issues (Gormley 1986; Eshbaugh-Soha 2006; Epstein and Segal 2000). Additionally, Mazur (1981) has shown that when the media increases their coverage of technical issues, public support typically decreases.

Immigration has been a salient issue for many years now, particularly with the increase in undocumented immigration and the complex solutions proposed by elites. As

example, if company X contributes Y amount in campaign contributions to member Z, it is impossible to disaggregate how much of that contribution is attributed to immigration, and how much is attributed to other political aspects, i.e. tax incentives, various regulatory changes, etc. Therefore, this study will not examine the impact interest groups have on H-1B policy.

a result, the media has certainly been very involved in issues surrounding undocumented immigration. Following Mazur's (1981) logic, public support for immigration generally should have decreased due to the complex nature of immigration legislature.

Additionally, however, the issue of skilled workers and the visa options is a much more complicated issue that has largely been left untouched by the media. Not only has the media as a whole neglected to distinguish between the differences between skilled and unskilled workers, it has also neglected to distinguish between the various policies and goals that legislators have for skilled workers. As such, the public as a whole is relatively ignorant to both the general differences that exist between skilled and unskilled immigrants, as well as the legal immigration differences. Based this lack of distinction and attention, I hypothesize that the media is responsible for creating a spillover effect from their constant coverage of unskilled and undocumented immigration and issues stemming from those issues that has resulted over time in creating negative public opinion towards immigration, immigration related issues, and immigration related legislation as a whole.

Conclusion

In this chapter I outlined the literature, theory, and policy models dealing with migration, immigration policy, and congressional behavior. Specifically, because the congressional literature is extensive and attempts to explain numerous phenomena within the legislative branch, I outlined those theories and policy models most relevant to this discussion.

Additionally, I provided the framework for my analysis. Because the macro environment is constantly changing, one model cannot accurately explain legislative

behavior over a period of time and a longitudinal analysis of legislation over time such as this one will need a variety of different theories and models to explain congressional behavior. Specifically, my longitudinal analysis will be broken into four time periods and use four congressional models to explain these periods of congressional behavior. These include: pivotal politics (Krehbiel 1998); party politics (Cox and McCubbins 2005; 2007); unorthodox lawmaking (Sinclair 2007); and bargaining failure (Gilmour 1995). In the next chapter, I will outline and develop my hypotheses and discuss my methodology for the remaining analysis.

CHAPTER 4

RESEARCH DESIGN

The previous chapter provided a literature review of the relevant studies on congressional behavior and policymaking, as well as the foundation of my theory and hypotheses. In this chapter I will outline and develop my hypotheses and set the stage for the forthcoming analysis. In order to do that, it might be helpful here to provide a quick recap of the legislative history on the H-1B visa program. In 1997, the H-1B cap was hit for the first time since the creation of the current H-1B visa program in 1990. Since 1997, seven pieces of legislation were able to be realized into policy, through the use of stand-alone legislation and riders until 2004. During that same period, twenty-nine other pieces of legislation were introduced in either the House or Senate as stand-alone pieces of legislation. Many of these policy proposals were in some way actually realized as policy through the seven successful pieces of legislation.

In 2005, Congress was silent on legislating on the H-1B visa. In early 2006, however, the House introduced a bill to increase the H-1B cap, followed by the introduction of comprehensive immigration reform in the Senate just a week later. A series of sixteen total bills during the period from 2006 to 2008 were introduced in either the House or Senate dealing with increasing the H-1B cap in one way or another. Each of these bills was introduced individually and consequently each failed. After 2008, no legislation has been introduced to date.

Research Design

While polarization increased during this period, the traditional internal and external factors surrounding Congress typically used to explain shifts in congressional

behavior remained the same between the time Congress was able to pass legislation on the H-1B visa and when it could not. Partisanship did not change from 2001 through 2006 as both chambers were controlled by the Republican Party as was the President. According to the U.S. Department of Labor Bureau of Labor Statistics⁴⁴, the unemployment rate remained steady throughout this period. It was at 4.0 percent in 2000, increasing to 5.5 percent in 2004 and then falling to 4.6 percent by 2006 where it remained until increasing again in 2008 to 5.8 percent. Additionally, according to the U.S. Department of Commerce Bureau of Economic Analysis⁴⁵, the real GDP (based on chained 2005 dollars) also remained steady during this period, increasing slightly in each year between 1998 until leveling in 2008 and beginning to fall in 2009. Therefore, we have both a political climate that does not change and an economic climate that actually appears to be improving through this period of stalled legislation. This leads to the following research questions:

- 1) What factors explain congressional policy making within the context of skilled worker (H-1B) immigration?
- 2) Why did Congress stop using alternative methods (i.e. riders) to pass positive H-1B legislation?
- 3) Why did even minor changes to the H-1B program that were successful as stand-alone pieces of legislation pre-2004 fail after 2004?
- 4) Is the U.S. experience unique? How does it compare to legislation in Canada and Australia?

⁴⁴ http://www.bls.gov/cps/prev_yrs.htm/

⁴⁵ <http://www.bea.gov/>

Traditionally, studies on Congress, congressional behavior, and policymaking have been conducted using quantitative statistical methods. Due to the institutional nature of Congress, when a bill is decided by roll call votes, a tally of these votes is available through the Library of Congress's THOMAS website. This allows for neat statistical analyses on stand-alone pieces of legislation, as well as on individual congressional members.

There are, however, some limitations to this type of quantitative study on Congress. Obviously it necessitates that the researcher have the roll call votes for each piece of legislation he intends to analyze. Additionally, while this type of analysis does allow for some sophisticated statistical methods, which has increasingly become expected in this discipline, it does not allow a researcher to analyze member or party views on issues and/or the substance of policymaking. Looking only at roll call votes only allows the researcher to analyze the end result, or passage or failure of a bill, when other factors may be just as important to the end result.

I will begin the analysis by demonstrating the change in legislative support over time. I will then explain why this change has occurred using public opinion data from Gallup, as well as data from the Vanderbilt Television News Archive. After explaining why the change in legislative support over time has occurred, the next step in the analysis is explaining how proponents of H-1B legislation have used institutional procedures to obtain favorable outcomes in terms of bill passage looking at both individual sponsorship and party support for each bill. Finally, I will analyze the literature and legislative outcomes in Canada and Australia and compare their recent experiences with that in the

United States. Below I outline my data sources, followed by my hypotheses for the ensuing analysis.

Data

This study is a qualitative study on congressional behavior due largely to the fact that individual roll call votes do not exist for each of the bills I will be examining. In fact, roll call votes only exist for five out of a total 36 bills. Given the small number of observations, a statistical examination of roll call voting would not provide any predictive findings. Instead, I will look at data provided by the Library of Congress's THOMAS website on each piece of legislation, including the names and parties of bill sponsors and co-sponsors, as well as the text of floor debate within the congressional record in order to determine legislative intent and preferences during this period.

I decided to select only those bills that made (or purported to make) positive changes to the H-1B program. This includes legislation that would increase the annual cap, create exemptions from the cap that essentially would increase the cap, or legislation that would make the application process easier for U.S. employers. While there were a handful of bills introduced during this time period to either decrease the annual cap or eliminate the visa category entirely, little movement occurred with the exception of some limited debate on the floor in opposition to positive legislation on the H-1B⁴⁶. Additionally, I am attempting to understand under what context Congress is able to pass legislation to increase the number of skilled workers within the market, rather than decrease them. I also chose not to include other extraneous pieces of legislation that were neither positive nor negative, such as the Free Trade Agreement between the U.S. and Singapore and Chile, which simply carved out a number of cap numbers for nationals of

⁴⁶ Four bills were introduced in 1997, 2001, 2003, and 2005. None of them came out of committee.

Singapore and Chile. It did not affect the cap numbers in any way. Numbers not used by nationals of Singapore and Chile are recaptured that year by individuals from other countries.

While the general trend in polarization has been an increase over time, there are some major increases that coincide with the patterns of congressional behavior on H-1B legislation. To illustrate the change in polarization over time and compare it with those patterns, I use McCarthy, Poole, and Rosenthal's (2006) own statistical measure, termed NOMINATE, which scores members directly from roll call voting records using all recorded votes. They use individual roll call votes for all members and examine when and which members vote with other members and how often. One example they provide looks at the voting patterns among Senators Specter, Clinton, and Frist. They argue that if Specter votes with Clinton and Frist more frequently than Clinton and Frist vote together, then Specter is the moderate. Using this algorithm over millions of individual roll call votes made by thousands of Senators and Representatives on tens of thousands of roll calls over time allowed them to develop precise measures of each member's position and use that to measure polarization over time with the higher the score, the higher the level of polarization. Because it includes all recorded votes over time, it provides the most comprehensive measure for changes in polarization over time.

In addition to data on the legislation itself and on polarization, I will also use a variety of other data sources to explain how changes in the macro political and economic climate affected congressional behavior. This will include public opinion data from Gallup, media data from the Vanderbilt Television News Archives, and data on Latino voting patterns from the Pew Research Center.

Finally, as stated above, this analysis will seek to ascertain whether this is a uniquely American phenomenon. In so doing, I will analyze the literature and legislation in Canada and Australia in the penultimate chapter in order to provide a comparative analysis. These three countries share similar colonial histories and relied to a large extent on immigration to populate their countries at one point. As such, Canada, Australia and the U.S. have historically been the largest immigrant receiving countries in the world. Yet some important differences in the immigration policies of these three countries exist. In Canada and Australia, for example, skilled worker immigration has been much less restricted by their respective Parliaments than in the United States. It will be interesting to ascertain whether different institutional structures tempered by some similar and some different macro-level conditions yield similar or different outcomes in these countries.

Hypotheses

My hypotheses are rooted in the easy versus hard issue dynamic discussed in the previous chapter. Largely, I hypothesize that H-1B bills have failed to pass on their own in the past ten to fifteen years as a result of party polarization and that individual legislators have responded to this by using alternative tactics to further their policy goals. I also hypothesize that in addition to this polarization, macro-level factors such as public opinion, the economic downturn, and the media have all resulted in legislators becoming adverse to H-1B legislation over time. I hypothesize that the macro environment became less accepting of immigration related legislation over time, with the tipping point being the introduction and failure of comprehensive immigration reform in 2006 and 2007. As a result, members who previously may have supported H-1B legislation found themselves

risk averse in supporting any immigration related legislation. My primary hypotheses are as follows:

- 1) Party polarization has over time made it more difficult for this type of legislation to pass.
- 2) The increase in the Latino voting population has changed the dynamics of legislative politics on the subject of immigration generally.
- 3) Changes at the macro-level over time have resulted in less congressional support for the H-1B program and the 2006 failure of comprehensive immigration reform (CIR) was the tipping point for this shift in policy.
- 4) Because these changes are unique in nature to the U.S., I expect a more open policy in Canada and Australia.

With regard to the comparative section of the analysis, as mentioned previously, a number of historical and cultural similarities among these three countries combined with relatively similar economic conditions (with the United States obviously having a larger labor base and economy due to a larger domestic population) could result in an expectation that such similar states would have similar policies when it comes to immigration policy. Specifically with regard to foreign skilled labor policy, one could expect to find similar policies or at least relatively unrestrictive policies across these three states. Additionally, however, the sheer size of the United States labor force and the great labor shortages in many highly skilled fields could result in an expectation that the U.S. should have a more liberal and open policy. Instead, however I hypothesize that the spillover effect of undocumented immigration, and the increased polarization over time combined with the institutional arrangements in place within the legislative branch are

unique phenomena to the United States which I hypothesize should result in the United States having a more restrictive skilled immigrant worker immigration policy. As a result, it will be interesting to ascertain how policies compare or differ in these countries.

Conclusion

Up to now, I have provided an introductory background into immigration law in the United States generally, a more thorough background into legislative policy on skilled worker immigration, provided a literature review on Congressional behavior, and outlined my theory and hypotheses. I have also provided an overview of the methods to be used in the forthcoming analysis. In the following four chapters, I will begin the analysis of the data collected as set forth here in an attempt to answer my research questions.

The pattern of legislative behavior on the H-1B visa is very neat. The original legislation was passed in 1990. From 1998 to 2004, legislation was introduced and passed both individually and through the use of riders, and from 2006 to date legislation was only introduced individually and each failed. Chapters five through eight will be broken down into these various periods of time and will analyze the context in which legislation is either successful or unsuccessful and attempt to explain why.

Chapters five and six will illustrate how the more traditional models of congressional behavior can be used to explain legislative behavior on the H-1B visa and why legislation either was or was not successful. Chapter five will examine the Immigration Act of 1990, the original piece of legislation that created the H-1B skilled worker visa within the context of pivotal politics. Chapter six will look at the legislation that was passed individually between 1998 and 2004 through party models. Chapters

seven and eight will delve into the lesser known and more niche models of congressional models. Chapter seven will explain how the institutional nature of Congress has changed and how this changed affected the success and failure of legislation in the context of unorthodox practices. Chapter eight will use congressional stalemate theory to explain the failure of all H-1B related legislation post-2004. Finally, chapter nine will compare the U.S. phenomenon to that of Canada and Australia.

CHAPTER 5

PIVOTAL POLITICS

Thus far, I have examined both the history of immigration policy generally as well as the history of the H-1B visa and the politics surrounding it. As we have seen, support for the H-1B program has steadily waned in Congress over time. In this and the next three chapters, I will look at why this shift in support occurred and argue that no one model of congressional behavior adequately describes legislative behavior relevant to this issue. Rather, I will show that over time, a variety of congressional models must be used to explain congressional behavior on the H-1B visa. Each captures different strategies that are shaped by changes in the broader political environment and the internal dynamics of Congress.

As I showed in chapter two, immigration policy generally has not changed much since the Immigration Act of 1990 and neither has policy on skilled worker immigration. The current immigration system still closely resembles the 1952 Immigration and Nationality Act. After 1952, major legislative changes to immigration policy were limited to the Acts of 1965, 1986, and again in 1990. With regard to the H-1B, today it still remains nearly identical to the 1990 program with the exception of some additional government filing fees and some cap exemptions. As such, post 1990 there are just a few minor tweaks to the initially created H-1B as the scope of this legislation slowly decreases over time, but no major legislation on either the H-1B/skilled labor specifically or on immigration policy generally is successful.

Although the current nonimmigrant skilled visa policy has not changed, the politics in Congress have changed over time. Party polarization has increased over time,

making it more difficult for members to realize their individual and/or constituents' goals (McCarty, Poole, and Rosenthal 2006; Nivola and Brady 2006; 2008). Additionally, since immigration reform has been rendered impossible since 1986, members of the Democratic Party are increasingly more willing to sacrifice other types of immigration reform (including not only comprehensive reform but also the Dream Act) in an attempt (albeit failed) to get total comprehensive immigration reform (more on this in chapter eight).

I begin this analysis with the assumption that both parties have an incentive to pass positive legislation on foreign skilled workers, specifically the H-1B visa. Traditionally, the cost of immigration has divided elites along party lines (Gimpel and Edwards 1999). Because Democrats were the New Deal party and favored civil rights legislation and first generation immigrants were working class individuals who lived in Northern urban areas, they easily identified with the Democratic Party⁴⁷, making them a significant constituency base for the Party. In the 1950s and 1960s, conservative Republicans and Southern Democrats began to voice opposition to immigration based on Cold War fears. Additionally, the 1965 Act resulted in an inflow of Hispanic and Asian immigrants, resulting in an expansion of the welfare state that Republicans had opposed since the New Deal. This led to clear cleavages over time on partisan attitudes towards immigration.

As mentioned, traditionally, Democrats have generally been pro-immigration while Republicans, on the other hand, have tended to oppose positive immigration related legislation. Instead, they tend to favor tighter borders and increased enforcement

⁴⁷ The exception here being Southern Democrats who operated in a region without much immigration, and did not support broad immigration policy like their Northern counterparts.

measures. Again, however, the subject matter of the legislation makes a difference in the traditional partisan cleavage on immigration. Republicans, have historically been the party of business (Huntington 1950; Miller and Schofield 2008). Many are donor beneficiaries of larger corporations who coincidentally are in great need of foreign skilled workers. As a result, while Republicans tend to oppose general immigration policy, supporting measures that make hiring foreign skilled workers easier is consistent with their party platform.

Table 5.1 below outlines the various years in which H-1B legislation was introduced, the partisan makeup of both chambers as well as the president and his party, whether legislation passed, and which congressional paradigm best explains the political phenomenon occurring during that particular congressional term. Additionally, the table includes Poole and Rosenthal's NOMINATE polarization measure which estimates the distance between the two parties in each chamber for each year. This measure will be described in greater detail later in this chapter and in the following three chapters.

Remember that the greater the score, the greater the amount of polarization within a chamber in a given year. The following analysis will delve deeper into each of the H-1B pieces of legislation in order to better explain the context in which legislation is able to pass as well as when it fails.

Table 5.1 Internal Factors in the Years H-1B Legislation is Introduced

| Year | Type | Pass? | Control | | Pres | Paradigm | Polarization* | |
|------|--------------|-------|---------|-------|-------------|---------------------|---------------|-------|
| | | | S | H | | | S | H |
| 1990 | Immig-ration | Y | D-55 | D-260 | Bush (R) | Pivotal Politics | 0.622 | 0.645 |
| 1997 | Stand Alone | N | R-55 | R-228 | Clinton (D) | Party Models | 0.755 | 0.857 |
| 1998 | Rider | Y | R-55 | R-228 | Clinton (D) | Unorthodox Politics | 0.755 | 0.857 |
| 1998 | Stand Alone | N | R-55 | R-228 | Clinton (D) | Party Models | 0.755 | 0.857 |
| 1999 | Stand Alone | N | R-55 | R-223 | Clinton (D) | Party Models | 0.734 | 0.878 |
| 2000 | Stand Alone | N | R-55 | R-223 | Clinton (D) | Party Models | 0.734 | 0.878 |
| 2000 | Stand Alone | Y | R-55 | R-223 | Clinton (D) | Party Models | 0.734 | 0.878 |
| 2001 | Stand Alone | N | D-51** | R-221 | Bush (R) | Party Models | 0.745 | 0.91 |
| 2002 | Rider | Y | D-51 | R-221 | Bush (R) | Unorthodox Politics | 0.745 | 0.91 |
| 2004 | Rider | Y | R-51 | R-299 | Bush (R) | Unorthodox Politics | 0.731 | 0.938 |
| 2004 | Stand Alone | Y | R-51 | R-299 | Bush (R) | Party Models | 0.731 | 0.938 |
| 2006 | Stand Alone | N | R-55 | R-232 | Bush (R) | Bargaining Failure | 0.776 | 0.972 |
| 2007 | Stand Alone | N | D-51 | D-233 | Bush (R) | Bargaining Failure | 0.787 | 0.982 |
| 2008 | Stand Alone | N | D-55 | D-233 | Bush (R) | Bargaining Failure | 0.787 | 0.982 |

* Source: Poole and Rosenthal, Polarization America, www.voteview.com

**The Senate was split in half until May 24, 2001 when James Jeffords (R-VT) became an independent and subsequently switched to the Democratic Party effective June 6, 2001, giving the Democrats a slight majority.

The Immigration Act of 1990

As mentioned, the H-1B visa as it exists today was created by the Immigration Act of 1990. The prior H-1B visa category was reserved for applicants with distinguished merit and/or ability. Prior to the 1990 Act, there was no nonimmigrant visa category available for skilled workers. By 1990, the information technology (IT) industry was emerging, shortages in the healthcare fields began to emerge for the first time, and Congress was suddenly faced with a new lobby in support of some type of visa to accommodate these shortages with qualified foreign workers. The Act redefined the H-1B as a category for “specialty occupation” workers, and defined them as those with a minimum of a Bachelor’s Degree or its equivalent in work experience. As such, the evaluation of the H-1B visa and legislation on the H-1B visa in this study will begin in 1990 and continue to the present.

As indicated in Table 5.1, the 1990 Immigration Act was passed in a Democratic controlled Senate and House with a Republican president, one of the types of divided government. There has been a debate in the literature over whether divided government causes gridlock. The widespread claim within the literature and the media has been that divided government is the main cause for gridlock (Cutler 1989). Mayhew (1991), however, argued there was not much difference between divided or unified control when it came to gridlock. These theories of divided and unified government were tested again in 1992 when Clinton was elected president and the Democrats maintained their majorities in both chambers yet gridlock still occurred (Krehbiel 1996).

As a result, Krehbiel (1998) examined gridlock in the context of institutional variables rather than partisan makeup. According to Krehbiel’s (1998) pivot politics

theory, gridlock occurs for a variety of reasons, including moderate status quo policies, supermajority procedures such as cloture and the presidential veto, heterogeneous preferences, and partisanship. Because some of these institutional tactics such as cloture and the presidential veto require moderate members to overcome gridlock, in order for policy change to occur, both moderate policy proposals and moderate members are needed. As a result, policy change is incremental and passed only through the use of supermajorities. Obviously this is a Senate focused study and discounts any lawmaking in the House. Regardless, because passage is required in both chambers, Krehbiel's game theoretic model is necessary in explaining how legislation passes in the Senate and why it often fails.

The cloture rule is one of the more recent institutional changes that distinguishes policymaking in the Senate from the House. Prior to Rule 22, any member within the Senate could file a motion for extended debate, or filibuster. Since the Senate's adoption of Rule 22 in 1917, the filibuster can be terminated and the motion at hand brought to a vote through the use of cloture. To invoke cloture, a senator must file a cloture petition while a filibuster motion is pending, which requires the signatures of 16 other senators. Then, a cloture vote will be brought before the full Senate within two days. To be invoked, it requires a supermajority⁴⁸, or 3/5 of the Senate. Once cloture is invoked, the original pending motion will be brought to a vote after the time stipulated in the cloture motion.

Krehbiel argues that because 60 members are required to invoke cloture, 60 members are needed in a coalition to enact legislation. Using Mayhew's (1991) dataset of

⁴⁸ Since 1975, three-fifths of membership is required to invoke cloture. Cloture from 1917 to 1975 required only two-thirds of those present and voting.

major successful legislation, Krehbiel found that between 1947 and 1994, the average coalition size was 81.9 percent.

In Krehbiel's game theoretic model, the pivot is an exogenous institutional element. A player/member is pivotal when his support is necessary for the passage of legislation. Pre-cloture, the pivot was the median voter or the veto pivot (the member needed to pass legislation or override a presidential veto, respectively). Post-cloture, the filibuster pivot determines the outcome of legislation because without the support of the filibuster pivot (the 60 percent member), cloture cannot be invoked, and without cloture, a final vote on the legislation cannot occur. Therefore because cloture requires 60 percent of the voting membership, the filibuster pivot is the 60th percentile.

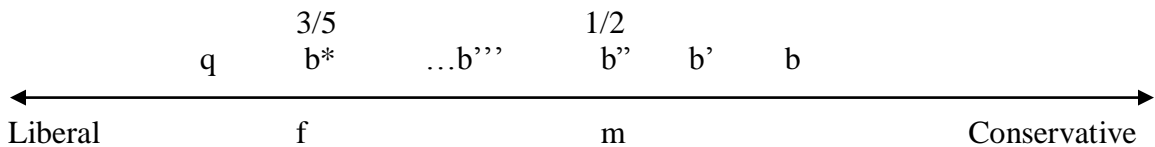
The effect of cloture is that while the original motion may require only a simple majority, in order to overcome filibuster in the Senate a supermajority is necessary. Pre-cloture the pivotal player was the medial voter. Post-cloture, however, the pivotal player moves either left or right (left if the majority is liberal and right if the majority is conservative) and is the filibuster pivot rather than the median voter. The cloture vote is largely important because it has been argued that the cloture vote amounted to a vote on the actual legislation on which cloture was being sought, rather than a procedural vote on the length of debate (Binder and Smith 1997). Within the context of pivotal politics, when cloture makes it more difficult for senators to change unattractive policies relative to alternative policies, they "lash out" against the filibuster (Krehbiel 1998: 96).

Additionally, Sinclair (2006: 190-191) has shown that as the frequency of filibusters and cloture votes has increased, so too has polarization. The increase in filibusters and cloture votes begins in the 1970s and continues throughout the 2000s.

Similarly, polarization began in the mid-1970s and polarization along partisan and ideological lines increased throughout the 1980s and 1990s.

If, however, there are enough moderates to refuse cloture, then these moderates have the power to water down the proposal and move it towards their side of the policy space. Using a specific example, if there are enough Republicans in the Senate to refuse to invoke cloture, then Democrats will need to move their policy more towards the right to create a more moderate policy that Republicans will prefer over the status quo or Democrats will need to fear gridlock (which would also occur in the absence of moderates). Figure 5.1 provides this spatial diagram.

Figure 5.1 Pivotal Politics Spatial Model



Source: Adapted from Krehbiel (1998)

In Figure 5.1, Congress is majority conservative, f denotes the filibuster pivot and m denotes the median voter. The filibuster pivot is the legislator whose ideal legislative point and all points to his left make up exactly or just more than 3/5 of the legislature. Therefore, in order for legislation to pass (b*), conservatives will need to dilute the legislation (b) to the point where f (and the 59 members to his right) prefers the legislation over the status quo and the legislation is still right of the status quo.

Turning back to the legislation at hand, the Immigration Act of 1990 was introduced by Senate Democratic veteran and Chair of the Senate Committee on Labor

and Human Resource, Edward “Ted” Kennedy as Senate Bill 358 in February 1989. The Act was a bipartisan effort cosponsored by Democratic Senators Christopher Dodd of Connecticut and Daniel Patrick Moynihan of New York, and Republican Senators Alfonse D’Amato of New York and Alan Simpson of Wyoming.

It made a number of changes to the immigration system and arguably is the closest Congress has come to comprehensive immigration reform since 1986. The Act set permanent annual worldwide limits on immigration in the family based, employment based, and diversity immigration categories beginning in 1995. It also set a ceiling per country in each immigrant category, excepting spouses and minor children. It delineated categories within the family based and employment based categories, with annual numerical caps of each category. It also made changes to a variety of nonimmigrant visa categories including the H, created the diversity visa program, and the O, P, Q, and R visas⁴⁹. It created the Temporary Protected Status (TPS) program, a new system and requirements for naturalization, as well as added additional enforcement provisions.

With a measure such as the Immigration Act of 1990, the expectation is that the status quo was slightly liberal, much like the spatial model in Figure 5.1. With Democratic control of both chambers and a Republican President, in order for legislation to pass, the legislation (b) would have to be diluted until f (and the 59 members to his right) prefers the legislation over the status quo and the legislation is still right of the status quo.

⁴⁹ The H visa, as we know, is a temporary worker and trainee visa. The O visa is available to aliens with extraordinary ability in the sciences, arts, education, business, or athletics. The P is available for athletes or entertainers for a specific performance, for a reciprocal exchange program, or a culturally unique program. The Q is available for international cultural exchange programs and the R is for aliens in religious occupations.

The legislation as explained above was sufficiently liberal while still maintaining some conservative aspects, such as the H-1B provisions. The bill was introduced by a Democrat and co-sponsored by two Democrats and two Republicans. Thus far we have a bipartisan effort.

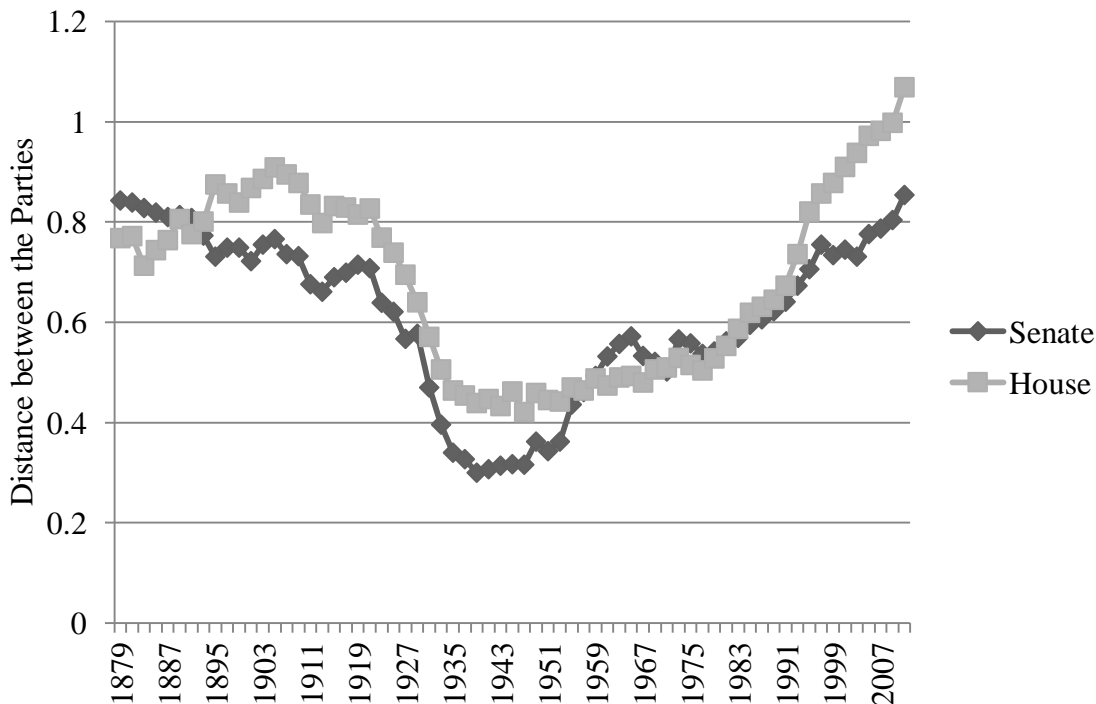
It was passed in the Senate by a supermajority of 89 to 8 and in the House by 264 to 118. With an 89 vote in the Senate, the bill clearly overcame the required 60 votes in order to overcome cloture. Of the 89 yea votes in the Senate, 51 were Democrats and 38 were Republicans. Nay votes in the Senate came largely from conservative Republicans, including Jesse Helms (R-NC), Trent Lott (R-MS), Bill Roth (R-DE), Warren Rudman (R-NH), William Armstrong (R-CO), as well as three Democrats including Dale Bumpers (D-AR), Robert Byrd (D-WV), and Jim Exon (D-NE). In the House, the 264 yea votes were comprised of 171 Democrats and 93 Republicans and the 118 nay votes were comprised of 64 Republicans and 54 Democrats. In sum, the 1990 Act was a clear bipartisan effort. While Kennedy did not have 60 Democratic Senators, there were greater numbers of moderate Republicans (as we will see below). As a result, with 89 yea votes Senator Kennedy clearly had true bipartisan support and well above the 60 votes needed for cloture.

Because polarization has been increasing in both chambers since the 1970s (see Figure 5.2 below), gridlock has been more rampant and bipartisan legislation has been steadily decreasing (McCarthy, Poole, and Rosenthal 2006). Figure 5.2 shows Poole and Rosenthal's illustration of party polarization from 1879 to 2011. The graph provides their data estimates for the distance for each individual member in each chamber in each year which they use to estimate the distance between the two parties in each chamber for each

year. Looking at roll call voting over time, they show that polarization declined in both the House and Senate beginning in the early 1890s until the Second World War and then steadily began to increase beginning in the 1970s.

Looking at Poole and Rosenthal's party polarization data (Figure 5.2), it is evident that beginning in about 1969, party polarization has steadily increased and the distance between the parties has steadily increased since the mid 1990s. In the 1990s particularly in the House, we see a significant spike in polarization. Sinclair (2006) attributes this spike to Gingrich's Republican Revolution in 1994. During this period there only one major, albeit slight, decrease in the mid 2000s when Republicans regained control in 2004. Over time, however, they argue (as is evident from the Figure) that the median member has slowly diminished and as a result it has become much more difficult for legislation to pass. These dates are extremely consistent with the dates on H-1B legislation where legislation was successful through 1990, and after that both the scope and number of successful legislation began to decrease (as polarization was increasing) until eventually no legislation was successful.

Figure 5.2 Party Polarization 1879 - 2011



Source: Poole and Rosenthal, Polarization America, www.voteview.com

Conclusion

With the Immigration Act of 1990, both chambers exhibited complete bipartisan passage, a phenomenon that according to Krehbiel requires a pivotal actor or moderates. As we will see in future chapters, however, this increase in party polarization will result in the failure of H-1B related legislation.

If we could have stopped time in 1990, this analysis would have been for naught as legislation could have continued in a similar fashion. The way in which the Immigration Act of 1990 passed was in a completely textbook example and illustrated bicameralism in its purest form. Since then, increased polarization of parties has led to

new groups entering the political arena and tilting the balance of power in several key states.

After 1990, the 1994 midterm election resulted in a Republican takeover of Congress and the net gain of 54 seats in the House and eight seats in the Senate for Republicans. The takeover gave the Republican Party their first majority in the House in over forty years. In the subsequent 1996, 1998, and 2000 elections, Republicans maintained control of the House and Senate. It was not until 2006 when Democrats regained control of the House and Senate⁵⁰.

Additionally, the realignment along ideological lines that occurred, with median members being replaced by ideologues who positioned themselves at either ideological pole also significantly changed the manner in which legislation passed (Sinclair 2006; Theriault 2003; McDonald and Grofman 1999; Sinclair 1982). As we will see in chapters six, seven, and eight, this new balance of power changed the way in which legislation on the H-1B visa was passed in Congress.

⁵⁰ For a brief period in 2001, Republicans held a majority when James Jeffords (R-VT) became an independent on May 24, 2001, splitting the Senate in half with neither party holding a majority until Jeffords subsequently switched to the Democratic Party effective June 6, 2001, giving the Democrats a slight majority.

CHAPTER 6

PARTY MATTERS

In the last chapter, I outlined how Krehbiel's (1998) pivotal politics model explained the success of the original 1990 bill that created the H-1B visa as it exists today. As we have seen, however, the relative success enjoyed by the pro-immigration camp was short lived. After a series of successful immigration policies throughout the larger part of the twentieth century, this all came to a halt after 1990.

After 1990, there were a total of 34 pieces of positive H-1B legislation introduced in both chambers between 1998 and 2004. Of these, seven pieces of legislation passed that were designed to increase the annual cap, increase a government filing fee, or create a cap exemption. Of these seven bills, three were attached as riders to larger pieces of omnibus or appropriations legislation. The remaining four either were stand-alone pieces of legislation or attached to a larger immigration bill and made relatively trivial changes to the H-1B program. These bills will be examined in turn below and as will be shown, we are not just concerned with the number of bills that were passed, but also the scope of the legislation. By definition, the party bills have a much smaller scope, as will be shown below. The only substantive pieces of successful legislation were those that were only able to pass through the use of riders. Those will be discussed in chapter seven.

Recent literature has indicated that parties have become increasingly important in sorting ideologies and providing cues for legislators (Cox and McCubbins 2007; Rohde 1991). This has been particularly enhanced by party polarization since the 1970s. Additionally, parties provide individual voters with cues that help legislators in their reelection goals. Over time, the role of parties has become more important and parties

serve an even greater role in agenda setting and organizing committees (Kingdon 1984; Cox and McCubbins 2005; 2007). Essentially, this literature has found an inverse relationship between parties and committees. The limitation here, as mentioned before in chapter three, is that these studies focus on politics within the House only. As legislation must make it through both chambers in identical form in order to pass, a model explaining legislative behavior for both chambers is necessary, particularly considering recent cloture changes in the Senate as discussed in the previous chapter.

Additionally, institutions are framed in the literature largely in terms of party politics. Specifically, when member preferences are homogenous within the party, party leaders will support the legislation. Rohde (1991) argues that a series of House reforms by liberal Democrats in the 1970s allowed party leaders to push legislation through that a majority of House Democrats supported. Essentially, his argument is that party leadership in the House is strongest with the presence of three factors: (1) homogenous party membership; (2) institutional leverage; and (3) a strong leader.

Following in the tradition of Rohde (1991), Cox and McCubbins (2005; 2007) provide the seminal work on institutions through their work studying the House. They argue that lawmaking in the House is predicated by collective efforts that are difficult due to individual member and constituent policy goals. As a result, parties organize the House in order to solve these collective action problems on the part of individual members. Essentially, parties act as market cartels, organizing individual members in an attempt to create collective benefits for the party as a whole. Additionally, the majority party has the ability to control the policy agenda, allowing a greater likelihood of bill passage for the policy goals of individual members and/or their constituencies.

While parties were able to solve some collective action problems, another problem began to take shape within Congress. Over time, McCarty, Poole, and Rosenthal (2006) argue that since the 1970s, politics have become more divisive largely due to income inequality. As a result, individual members have become increasingly more liberal or conservative within their respective parties, a phenomenon referred to as polarization. With the Republican takeover of Congress in 1994, members began polarizing within their parties to a greater degree. Because of this polarization, we see some trepidation within the Republican camp as members have become much more conservative and less supportive of general immigration measures. This trepidation, however, has been countered with a constituent base of big business that needs H-1Bs in order to successfully run their businesses. As such, as Republicans have congressional control during this period the party is able to get some legislation passed.

Across the board, however, their efforts are minor as two of the three successful pieces of legislation during this period are relatively trivial. That third piece of legislation (S.2045) was, of all of the passed legislation, the most significant piece of H-1B legislation yet still minor when considering it did nothing to meet an ever increasing demand for more cap numbers.

For the past 35 years or so, the parties have as McCarty, Poole, and Rosenthal (2006: 1) claim, “deserted the center of the floor in favor of the wings”. Analyzing individual roll call voting patterns of members in the House and Senate, they found that the median legislative position of each party has diverged sharply since the mid 1970s (Poole and Rosenthal 1984; McCarthy, Poole, and Rosenthal 2006). Said differently, they showed that that in both chambers Republicans and Democrats have become either more

conservative or more liberal and moderates have slowly begun to vanish since in the 1970s. Additionally, they showed that while members are becoming more partisan, the parties themselves are becoming more homogenous.

Therefore, the theoretical expectation here is that the parties should organize individual members in order to realize individual and party goals through legislation. However, as members have increasingly clustered around either the conservative or liberal poles and our moderates have slowly been replaced by ideologues (Mann and Ornstein 2012) and as both the numbers of filibusters and cloture votes have increased (Sinclair 2006) in concert with polarization, this polarization over time has resulted in the death of the pivot. As a result, rather than having a continuum of members across the board from left to right (liberal to conservative) we now have clusters of conservatives and liberals with very few moderates to temper legislation and bring the two poles together. Therefore, bills that are successful are party driven bills.

We can particularly see this phenomenon occurring with our H-1B legislation. After 1990, the legislation that passed on its own was relatively minor and few and far between. As we will see, the scope of legislation begins to decrease over time, and the success of these bills is predicated on party support.

It is worth noting here that typically, roll call votes are necessary in order to prove that legislation is predicated on party based support. Because I do not have roll call votes on this legislation, proving party based support is extremely difficult. As a result, I am forced to use the only data available to me, which is sponsorship and co-sponsorship of legislation, as well as relying on the above listed literature which indicates that legislation was predominately passed through party based support during my timeframe. The

following section will examine this legislation within the context of party politics and polarization.

Successful Legislation

H.R.5362

H.R.5362 was a small two section bill passed in 2000 that that simply reauthorized⁵¹ and increased the \$500 filing fee established to fund training and education programs by the National Science Foundation and the Department of Labor to \$1000 and created an exemption of that fee for nonprofit primary and secondary educational institutions. It was sponsored by David Dreier (R-CA), and cosponsored by John Moakley (D- MA). In 2000, Republicans controlled the Senate with 55 members and the House with 223 members. It was passed through unanimous consent in both chambers and as such, we do not have actual roll call votes to ascertain votes along partisan lines. Since Republicans had control of both chambers, the bill did very little to change the program and was sponsored by a Republican member, it could reasonably be asserted that voting along party lines likely occurred.

S.2045

Called AC-21 and also passed in 2000, S.2045 increased the H-1B cap to 195,000 for fiscal years 2001 to 2003. It created exemptions from the annual cap for institutions of higher education as defined by section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), nonprofit entities related to or affiliated with a nonprofit educational entity as defined by section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), and nonprofit or governmental research organizations as defined by 8 CFR

⁵¹ The training fee of \$500 was originally passed in the ACWIA in 1998 as was set to sunset October 1, 2001.

214(h)(19)(iii)(C). It allowed employees to change employers upon the filing of a change of employer application while the application is pending for a period of up to 240 days. This change was significant in that it allowed a subsequent employer to begin employing the foreign national upon just the filing of the application for a period of up to 240 days, rather than having to wait several months for an approval⁵². Additionally, it created extensions beyond the six years of eligibility initially allocated in the 1990 Act for applicants who have filed an immigrant visa application but do not have a visa number available to become permanent residents.

The bill also included a provision on crime provisions and computer education for kids. It was sponsored by Sheila Jackson-Lee (D-TX) and designed to ensure proper training of American workers in order to both increase diversity in the high tech industry and lessen the need for foreign workers.

To illustrate the importance of AC-21, let us use our friend Dr. Singh from chapter two as an example. As a reminder, Dr. Singh is a cardiovascular surgeon and researcher from India who obtained an employment agreement with a private physician's group. Let's call this group the XYZ Group. XYZ files an H-1B application on behalf of Dr. Singh for the initial 3 year period and the application is approved. Dr. Singh works for XYZ for two years and is approached by the ABC Group who is desperate for a cardiovascular surgeon of Dr. Singh's caliber and they offer to pay him an extra \$100,000 in salary. Dr. Singh signs a new employment agreement with ABC Group who promptly files a change of employer H-1B application with USCIS. Once the application is received into the system by USCIS, Dr. Singh is free to change employers and begin

⁵² A request for premium processing of an H-1B application is typically available. It requires a government filing fee of an additional \$1000 for a response within 15 calendar days. AC-21 saves employers that fee as well.

work with ABC for a period of up to 240 days while the application is pending. This saves both ABC and Dr. Singh several months of having to wait on an approval and the possibility of early termination by XYZ if he provides notice too soon which would require him to leave the U.S. and consular process the H-1B visa which could result in another several months of having to wait on security checks once his H-1B is approved⁵³.

Now let us pretend that Dr. Singh works for ABC for an additional two years and he decides he likes the company and would like to stay there for the foreseeable future. He asks the CEO if they would consider sponsoring a green card application for him. ABC really likes Dr. Singh and would like to keep him for the foreseeable future as well so the CEO decides they will sponsor Dr. Singh's green card application. The CEO contacts an immigration attorney and begins the process. The attorney files the labor certification application before the end of his fifth year on H-1B and it takes about another year and a half before the applications are approved. Because Dr. Singh is from India, however, there is a backlog on green card availability (see chapter two for an explanation of visa numbers) so he is not eligible for a green card until the numbers become current. At this point, Dr. Singh has already been on his H-1B for five and a half years out of the statutorily allowed six years.

Thanks to AC-21, because Dr. Singh has filed an immigrant visa application but does not have a visa number available to him, he is eligible for an extension beyond the

⁵³ For applicants outside of the United States, the employer still files the H-1B application with USCIS. Once the application is approved, the foreign national must actually obtain a visa from a U.S. consulate abroad before they can enter the U.S. Waiting times for visas and countries vary, but the H-1B carries with it a lengthy FBI security check which will certainly delay Dr. Singh's process even longer.

six year period. As such, ABC can continue filing three year extensions on behalf of Dr. Singh until his visa number becomes current, which can take up to five to ten years⁵⁴.

AC-21 was introduced by Orrin Hatch (R-UT) and cosponsored by 24 Senators: Spencer Abraham (R-MI), John Ashcroft (R-MO), Robert Bennett (R-UT), Sam Brownback (R-KS), Jim Bunning (R-KY), Paul Coverdell (R-GA), Mike DeWine (R-OH), John Edwards (R-NC), Dianne Feinstein (D-CA), Slade Gorton (R-WA), Bob Graham (D-FL), Phil Gramm (R-TX), Rod Grams (R-MN), Chuck Hagel (R-NE), Jesse Helms (R-NC), Joseph Lieberman (D-CT), Trent Lott (R-MS), Connie Mack (R-FL), Mitch McConnell (R-KY), Don Nickles (R-OK), Gordon Smith (R-OR), Arlen Specter (R-PA), George Voinovich (R-OH), John Warner (R-VA). We have clear partisan support here as 21 of the 24 Senators represented the Republican Party. Additionally, AC-21 passed with near unanimity. In the Senate it passed 96-1 with 54 Republicans and 42 Democrats voting yea and Ernest Hollings (D-SC) casting the sole nay vote, and passed by voice vote in the House. The level of bipartisan support for this legislation at least in the Senate in 2000 is staggering. Unfortunately, we cannot gauge the level of support in the House for this legislation as it passed with a voice vote.

Based on prior partisan support, the expectation is that when Republicans sponsor an immigration bill, we can expect that Democrats will support it as well. However, when the Democrats sponsor a bill, there is a greater expectation that party voting will occur simply due to the subject matter of the bill. The more liberal the provisions are, the less likely it is that Republicans will sign on. With increased polarization and fewer

⁵⁴ It could take less or more time, depending on the number of applicants in any given year as well as prior years.

median members, polarized members are more likely to vote along party lines as median members are not available to temper the legislation.

H.R.3767

Part of an immigration related bill, H.R.3767 made an extremely minor change to the H-1B program. This provision of the bill allowed employers engaging in corporate restructuring to have an exemption from having to refile an H-1B application. Remember that the H-1B is employer specific so whenever an employer changes, a new application must be filed with USCIS. This provision allows companies that are simply engaging in corporate shuffling to maintain the same H-1B approval without having to pay the several thousands of dollars in government filing fees and legal fees.

H.R.3767 was sponsored by Lamar Smith (R-TX) and cosponsored by twelve Representatives: Ken Bentsen (D-TX), Shelley Berkley (D-NV), Charles Canady (R-FL), Barney Frank (D-MA), Elton Gallegly (R-CA), Bob Goodlatte (R-VA), Sheila Jackson-Lee (D-TX), William Jefferson (D-LA), Matthew Martinez (D-CA), Bill McCollum (R-FL), Cynthia McKinney (D-GA), and Joe Scarborough (R-FL). Again it passed by unanimous consent in the Senate and by Voice Vote in the House, although we can ascertain that among the cosponsors were seven Democrats and five Republicans.

S.2302

Finally, the last piece of successful H-1B legislation was a short, one section bill that simply created an exemption from the annual cap for physicians with an approved J-1 waiver who agree to work and obtain a sponsoring employer in a federally designated medical shortage area by the Department of Health and Human Services through the Conrad 30 program.

Remember from the plight of our friend Dr. Singh in chapter two that there are two visas available for foreign medical graduates to complete a residency/fellowship training program in the United States: the J-1, which requires a two year home residency requirement upon completion, or the H-1B which requires that the applicant have completed all three steps of the USMLE exam. Like nearly half of all foreign medical graduates, Dr. Singh had not completed step 3 of USMLE, and had to complete his program on the J-1 visa. The J-1 visa carries with it a two year home residency requirement for foreign medical graduates who complete a residency/fellowship.

The original Conrad 20 program (now termed the Conrad 30 program) was created by Senator Kent Conrad (D-ND) and passed as an amendment to the Immigration and Nationality Technical Corrections Act of 1994. It gave each of the 50 states 20 (the number has subsequently been increased to 30) waivers of this home residency requirement to grant to physicians who agree to work and receive approval to work in a facility located in a medical shortage area as designated by the United States Department of Health and Human Services for a period of three years. The waiver does not provide any legal status. Upon approval of the waiver, Dr. Singh had to apply for an H-1B visa to actually give him legal status to stay and work.

The bill was introduced (as would be expected) by Kent Conrad and cosponsored by Jeff Bingaman (D-NM), Sam Brownback (R-KS), Maria Cantwell (D-WA), Thad Cochran (R-MS), Mike DeWine (R-OH), John Ensign (R-NV), Russell Feingold (D-WI), Chuck Hagel (R-NE), James Jeffords (I-VT), Edward Kennedy (D-MA), Herb Kohl (D-WI), Blanche Lincoln (D-AR), Patty Murray (D-WA), Benjamin Nelson (D-NE), and Charles Schumer (D-NY). The bill was cosponsored by nine Democrats, four

Republicans, and one Independent. It passed by unanimous consent in the Senate and by a staggering 407 to 4 in the House. While there is bipartisan support, the scope of the legislation here is obviously much smaller than prior legislation and other attempted legislation that fails.

Additionally, this really is an extension of already existing legislation that requires a J-1 physician to complete three years of service in a medical shortage area on an H-1B visa. Congress has already authorized the H-1B for these foreign nationals yet the annual cap could, and in practice, was limiting their ability to do so. As such, S.2302 simply granted these physicians a waiver from the cap in order to provide the medical services Congress had already authorized them to do at a time when median members still existed.

With each of these successful bills, we have Republican control of both chambers. With AC-21, we have individual roll call votes in the Senate that indicate that all voting Republicans in the Senate voted yay. While we do not have individual roll call votes for any of the remaining bills to ascertain voting along party lines, I expect that when Republican support is high, Democratic support will also be high due to traditional and historical support on immigration legislation. When, however, Democratic support is high, party voting is much more likely. Therefore, we can reasonably assume based on the levels of increased polarization and realignment that these are party driven bills.

Failed Legislation

My hypothesis is that as polarization increases, H-1B legislation is more likely to fail. After 1990, a total of 34 bills are introduced and only 7 passed. Through 2004, a number of the provisions in these failed bills were included in the legislation that did

pass, although as we will see below, it becomes harder and harder for legislation to pass over time until eventually legislation is not able to pass at all (see chapter eight).

Following the creation of the H-1B visa program, the H-1B cap was not hit until 1997. Thus, beginning in 1997 and through the last piece of successful legislation in 2004, 13 additional pieces of legislation were also introduced dealing with the H-1B visa and all failed (see Table 6.1 below). These were all introduced as stand-alone pieces of legislation. However, most of the provisions included in this legislation were eventually passed through riders (see chapter seven) or passed individually.

Table 6.1 below indicates the unsuccessful legislation that was introduced in either chamber between the period of 1997 and 2001. As the table indicates, 13 pieces of legislation were introduced during the period of time when the parties were able to get some legislation was passed, either individually or through the use of alternative methods.

Table 6.1 Timeline of Unsuccessful H-1B Legislation (Pre-CIR)

| Year | Legislation | Key Provisions | Bill Sponsor |
|-------------|--------------------|------------------------------|---------------------------|
| 1997 | H.R.3736 | Increase cap | Lamar Smith (R-TX) |
| 1998 | S.1723 | Increase cap/enforcement | Spencer Abraham (R-MI) |
| 1999 | H.R.2698 | Increase cap/exemption | David Dreier (R-CA) |
| 1999 | H.R.3508 | New cap for high skilled | David Wu (D-OR) |
| 1999 | S.1440 | Increase cap/exemption | Phil Gramm (R-TX) |
| 2000 | H.R.3814 | Increase cap/fee | Lamar Smith (R-TX) |
| 2000 | H.R.3983 | Increase cap/fee | David Dreier (R-CA) |
| 2000 | H.R.4200 | Increase cap/fee | Sheila Jackson Lee (D-TX) |
| 2000 | H.R.4227 | Increase cap | Lamar Smith (R-TX) |
| 2000 | H.R.5625 | Cap exemption | Christopher Cox (R-CA) |
| 2001 | H.R.2809 | Increase cap/exemption | Silvestre Reyes (D-TX) |
| 2001 | H.R.2984 | Accurate cap computing | Robert Andrews (D-NJ) |
| 2001 | S.1342 | Increase cap for rural areas | Byron Dorgan (D-ND) |

I + C Sc: Immigration and Claims Subcommittee
 Tech Sc: Technology Subcommittee

Source: THOMAS (Library of Congress)

In the 105th Congress, two pieces of legislation were introduced. H.R.3736 and S.1723 proposed increasing the cap for fiscal years 1998 to 2000 and 2001 respectively, as well as changing enforcement and penalties for fraud. These provisions were ultimately passed as a rider to an omnibus bill in 1998 and will be discussed in the next chapter. In the 106th Congress, seven pieces of legislation were introduced. Of these seven, the only provisions not included in the passed legislation included a cap exemption for foreign nationals with a Master’s Degree from a U.S. institution (this was ultimately passed in 2004), creating a new cap for the highly skilled, reserving 10,000 of the annual cap for nonprofit organizations (a variation of this was passed in AC-21 in 2000), and

creating a cap exemption for employers who make a scholarship contribution and are employing a highly skilled foreign national.

Finally, three pieces of legislation were introduced in the 107th Congress in 2001. None of these provisions found themselves in passable legislation. H.R.2809 would have provided a cap exemption for locally owned hospitals located in federally designated shortage areas and similarly S.1342 would have carved out cap numbers for employers located in rural areas. H.R.2984 would have changed numerical computation procedures in order to make sure computation of the cap numbers was accurate in order to prevent any foreign national from being counted twice against the cap.

Conclusion

Polarization has resulted in making the leadership's jobs easier by providing them with more tools to work the party's agenda, particularly in the House which is where Cox and McCubbins focus their attention and research. Additionally, while party polarization has increased over time, the scope of legislation has decreased. Through the early part of the 2000s, this is how H-1B related legislation was able to pass. Legislation, however, is not solely passed through the House. In the Senate, cloture makes it much more difficult for the parties to further their agendas. They have to be much more concerned with overcoming the 60 vote requisite for invoking cloture, meaning concessions must be made or risk losing legislation. The increase of party polarization, however, has made it more difficult for the members to succumb to alternative proposals from a competing party. This is where Cox and McCubbins' model fails.

Prior to 1980, the Democratic Party regularly had a majority of over 60 in the Senate⁵⁵. Since 1977, however, neither party has been able to have a 60 member majority purely based on party. Therefore, in no congressional term between 1997 and 2008, did either party have a 60 member majority. So now that the parties cannot get to 60 when a bill gets to the Senate, it either dies or gets substantially watered down because a mismatch currently exists in the Senate that previously did not.

As a result, the stage is set for members to try alternative tactics to try to get their goals realized. In this chapter, I examined legislation that was able to pass on its own without any additional interference or manipulation on the part of individual members. For the most part, this legislation made trivial changes to the H-1B program and the scope was small. During this same period, however, not all H-1B legislation was able to pass on its own and members were reduced to using some newer and alternative methods in order to get their policy goals realized. These alternative methods will be discussed in the next chapter.

⁵⁵ The Democratic party had a member majority of over 60 in the 86th through 90th and 94th through 95th congressional terms (1961-1968 and 1975-1978).

CHAPTER 7

UNORTHODOX LAWMAKING

As we know, the scope of H-1B legislation has become smaller and smaller over time. Additionally, a number of external and internal changes such as cloture and the increase of polarization throughout Congress have resulted in a shift from the relative (albeit small) success that members were able to realize throughout the last 1990s and early 2000s. While these internal and external changes have occurred, the goals have remained intact as members and their constituents still needed positive changes to the H-1B program, particularly with regard to increased cap numbers. Therefore, because members were unsuccessful in getting legislation passed in the traditional manner, they needed to find alternative methods in order to get their goals realized.

As institutional arrangements have become more constricting for legislators over time, Sinclair (2007) argued that Congress no longer follows the textbook process described by countless political scientists, historians, and even the media over the past several decades. She outlines these changes in policymaking over time by comparing the 1970 Clean Air Act with the 1990 Clean Air Act. The 1970 Act, for example, was introduced in both respective House and Senate committees, and then followed to a vote on the floor where it passed. In 1990, however, the bill was introduced in three different House committees and then went to the floor where a series of compromises through informal processes occurred. In the Senate, the bill was introduced in committee, went to the floor where a series of informal compromises occurred, followed by filibuster before a vote. Sinclair (2007) argues that the 1970 process is not likely to ever occur again as

most bills today are now passed through short cut procedures for small bills and a variety of once unorthodox practices and procedures for major legislation.

These unorthodox practices and procedures include the increase in usage of larger omnibus bills, the use of multiple committees for the same piece of legislation, more complex and restrictive rules tailored to deal with problems associated with a particular bill in the House, and in the Senate, bills are subject to greater floor amendments (many irrelevant to the bill at issue), and filibuster threats and cloture votes are much more routine. This is a significant departure from prior literature on the manner in which the textbook Congress makes policy.

Additionally, Congress is certainly affected by the macro political climate. When policies become unattractive, legislators become risk averse to signing on to such legislation. Erikson, McKuen, and Stimson (2006), for example, argue that public preferences influence congressional policy. However, in the face of negative macro factors, there are Sinclairian (2007) opportunities to circumnavigate the traditional legislative process and legislators can realize some of their individual or constituent policy goals with little public notice through other methods such as riders. In certain cases and at certain times, however, some legislation becomes too risky and legislators prefer not to have their names attached to certain pieces of legislation.

The increased use of riders and other unorthodox practices is a departure from traditional policymaking. Traditionally, we expect legislation to pass in a majoritarian institution when one party has a majority and the legislation favors that majority's position. Recently, however, members have had to resort to "unorthodox" measures in order to get legislation passed in a Congress that has institutional measures in place, such

as the filibuster, that just one member can use to easily halt the progress of any piece of legislation.

As a result, members have become increasingly receptive to using riders to realize their policy goals, particularly when polarization has made it more difficult for legislation to pass on its own. Riders allow members the ability to pass legislation without specifically having to vote on the rider itself. Instead, they are able to return to their districts and shy away from the vote on the rider by claiming to have voted on the whole bill, or rather the bill that was, for example, a must pass appropriations bill. Specifically, while members might have an incentive to reform the H-1B program, they may not want to have their names attached to that legislation, particularly if they have a contested seat. Because individual votes on riders are not transparent, there is an incentive to shift to this mode of passage.

During the 1998 to 2004 period, various members were successful in attaching legislation as riders to larger bills likely to pass bipartisan muster in both chambers. As with the stand-alone legislation, Congress is still driven by various internal and external factors limiting their ability to pass any significant changes to the H-1B visa program. As a result, the scope of legislation over time remains small. The three bills listed below are examples of members attempting to use these unorthodox Sinclarian tactics in an attempt to realize their individual and/or constituents' goals.

As a side note, before getting to these bills, it should be noted that there are various methodological issues with studying riders. There is not a lot of information on riders within the congressional record, and this information is actually difficult to find. The congressional record only keeps data on floor amendments during floor debate so it

is not possible to ascertain if riders were attempted through another method during committee debate. Therefore, with regard to H-1B riders, I could not ascertain whether there were any unsuccessful attempts to attach a rider, but only when riders were successfully attached to a must pass bill. Additionally, the only information typically available on any given rider is the sponsor and any members who speak in favor or against the attachment of a rider.

As a side note, there are no individual votes on the riders themselves so it is impossible to ascertain the level of support for a given rider. Instead, the votes on a piece of legislation are votes on the larger bill itself that the rider is attached to. Consequently, as I mentioned earlier, this is precisely why members like to use riders. Now that I have briefly outlined these methodologically problems, let us turn now to examining the riders that were attempted and passed as part of larger, non-immigration related legislation.

H.R.4328

In 1998, Congress passed the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). It increased the annual cap of 65,000 on the number of H-1B nonimmigrant visas available per fiscal year that was passed in the Immigration Act of 1990 to 115,000 available visas for the fiscal years 1999 and 2000. The cap would then decrease to 107,500 in 2001 and revert to the original 65,000 in 2002.

ACWIA also created a new filing fee of \$500 for initial applications to be earmarked for job training, low-income scholarships, grants for mathematics, engineering, or science enrichment courses. It created provisions to protect U.S. workers from layoff and for employers who become H-1B dependent. ACWIA also made changes in enforcement and penalties for employers who violate the law.

This legislation was important because the 65,000 cap was hit for the first time prior to the end of the 1997 fiscal year and in 1998, the cap was hit within the first two months, according to a report by the United States General Accounting Office (GAO)⁵⁶. As a result, employers were unable to get the skilled workers they needed in order to successfully run their businesses. It was passed in an attempt to remedy the shortcomings of the immigration system at the time and allow businesses and corporations to hire more skilled foreign employees.

The bill was a compromise amendment bringing together H.R.3736 which was introduced by Lamar Smith (R-TX) and S.1723 which was introduced by Spencer Abraham (R-MI). Together they proposed increasing the cap for fiscal years 1998 to 2000 and 2001 respectively, as well as changing enforcement and penalties for fraud. Together with House and Senate Judiciary Committee Chairmen Henry Hyde (R-IL) and Orrin Hatch (R-UT), Smith and Abraham created a workable compromise between the House and Senate bills. These provisions were ultimately passed as a rider to the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1998.

H.R.2215

Attached as a rider to the 21st Century Department of Justice Appropriations Authorization Act, H.R.2215 established the prevailing wage requirement for employers. The prevailing wage is the average wage paid to United States citizens in a particular county for any particular occupation and is compiled by the United States Department of Labor. Employers found violating this requirement can be fined heavily by the Department of Labor and may be banned from hiring foreign workers in the future. In practice, the Department of Labor has steadily increased their audits of H-1B sponsoring

⁵⁶<http://www.gao.gov/new.items/d03883.pdf>

employers since the mid 2000s. The rider also created additional extensions beyond the six year period of eligibility for applicants who have begun the green card process and filed a labor certification application 365 days prior to the end of their six years of H-1B eligibility.

Using Dr. Singh again as an example, assume that visa numbers are currently available for nationals of India. Remember that Dr. Singh began the immigration visa process after his fourth year on H-1B and his labor certification application was filed before his fifth year of H-1B eligibility. H.R.2215 would allow the ABC Group to file one year extensions for Dr. Singh indefinitely until his green card is approved⁵⁷.

This provision was included in the conference report through the work of Senators Ted Kennedy (D-MA), the Chairman of the Immigration Subcommittee of the Judiciary Committee, and Sam Brownback (R-KS). Additionally, a speech in support of the measure (and other immigration measures) by Senator Diane Feinstein (D-CA) helped gain widespread support for approval of the slight modification to previously existing law.

H.R.4818

After hearing from the American Immigration Lawyers Association, the U.S. Chamber of Commerce, the Institute of Electrical and Electronics Engineers, and Intel Corporation to determine the importance of the H-1B visa to the U.S. economy, Ted Kennedy, Chair of the Committee on the Judiciary attached the H-1B Visa Reform Act of

⁵⁷ Upon the filing of an adjustment of status (or more commonly termed green card) application, an applicant for a green card is granted legal stay and can apply for authorization to travel outside the U.S. and work authorization. As a result, many do not maintain a valid underlying nonimmigrant visa. However, it is recommended that green card applicants maintain a dual intent nonimmigrant visa during this period in the event that the green card is denied. Otherwise, the foreign national will have no legal basis to remain in the U.S. and will have to leave immediately upon denial and start the H-1B process anew and obtain a visa at a U.S. consulate before being able to reenter the U.S., a process that can take up to a year or longer if the applicant is outside of the U.S.

2004 as an amendment to the Omnibus Spending Bill passed by the House. The significance of H.R. 4818 was that it set forth compliance standards for the H-1B visa, reinstated and increased the previously sunset filing fee for job training and scholarships to \$1500, created a new \$500 Fraud Prevention and Detection fee for initial applications filed by employers per foreign worker. This portion of the Act was originally introduced in the Senate by Senator Chris Dodd (D-CT) and later supported by Senators Frank Lautenberg (D-NJ), and Joe Lieberman (D-CT).

More importantly, however, the Act created a second cap and exemption from the annual 65,000 cap for up to 20,000 foreign nationals who have obtained at least a Master's Degree from an educational institution in the United States⁵⁸. In effect, this cleared 20,000 from the annual cap and raised the cap permanently to 85,000.

Conclusion

In chapter seven, I examined legislation that was able to pass through party models without any manipulation on the part of individual models between 1998 and 2004. For the most part, this legislation made trivial changes to the H-1B program and the scope was small. During this same period, however, not all H-1B legislation was able to pass on its own and members were reduced to using some newer and alternative methods in order to get their policy goals realized.

This chapter looked at some of these alternative ways that legislators were able to get legislation passed that served their constituents' interests. As was shown, most of the provisions of the introduced legislation were able to pass either individually or through

⁵⁸ In the event the Master's cap is hit first, an applicant with a Master's Degree from a U.S. institution can still apply for an H-1B through the general 65,000 cap.

the use of alternative methods such as amendments and additions to the conference report (riders) by senior ranking members.

The increase in polarization is clearly impacting the success of H-1B legislation. As I have shown thus far, as polarization increased, it has become more difficult for this legislation to pass and as a result, members have been forced to use Sinclairian methods in order to get their goals realized.

The meat of this analysis will be in the next chapter, which will shift gears and look at the legislation that failed and attempt to explain why members stopped using Sinclairian tactics to get legislation passed and why 2004 marked the end of positive H-1B legislation while demand for these visas remained high.

CHAPTER 8

STALEMATE

The previous three chapters examined how individual members and coalitions within Congress were able to pass positive legislation on the H-1B visa. As we have seen, however, after 2004, fourteen pieces of legislation were introduced in either chamber and each of these failed. Additionally, for the first time since the creation of the H-1B program individual legislators failed to use Sinclairian tactics and not a single piece of legislation was attempted as an amendment to a larger piece of non-immigration related legislation⁵⁹. This chapter will attempt to explain why. My hypothesis is that a variety of changes in macro-level variables resulted in a Congress risk averse to any immigration related legislation.

After the last piece of positive legislation passed in 2004, there was a two year moratorium on H-1B legislation introduced in either chamber. In 2006, legislation picked back up again and 14 pieces of legislation were introduced as stand-alone bills between 2006 and 2008. Interestingly, during this period, not a single bill passed and not a single legislator attempted to attach any of these provisions onto a larger must pass omnibus or appropriations bill as an amendment during floor debate on those bills. Of these bills, all would have either directly increased the annual cap or created a new cap (thus increasing the total cap) for the highly skilled foreign nationals. After 2008, another moratorium on H-1B legislation begins and until May 2012, not a single piece of positive H-1B related legislation has been introduced in either chamber.

⁵⁹ Congress through the Library of Congress (THOMAS) only keeps data on floor amendments during floor debate. As such, it is not possible to ascertain whether riders were attempted during committee debate. Regardless, assuming for the sake of argument that riders were attempted at the committee level, the fact that they are no longer able to come out of committee debate onto the floor is still telling of a shift in support for this type of legislation.

As Table 6.1 indicated, 13 pieces of legislation were introduced during the period of time when some legislation was passed through 2004. This legislation included either trivial changes to the program through stand-alone legislation or through the use of riders. In 2004, Representative Sheila Jackson-Lee (D-TX) introduced comprehensive immigration reform (H.R.3918) for the first time since 1986⁶⁰. After 2004 and the introduction of comprehensive immigration reform in the House, a two year moratorium existed when neither H-1B related legislation nor comprehensive immigration reform was introduced, and consequently none was passed. In early 2006, however, Representative Thomas Allen (D-ME) introduced for the first time in two years a measure to increase the current H-1B cap (See Table 8.1). One week later, Senator Arlen Specter (D-PA) introduced comprehensive reform in the Senate with a provision to also increase the H-1B cap. For the first time in nearly twenty years comprehensive immigration reform passed in the Senate with a vote of 62-36.

⁶⁰ In 1994, Senator Alan Simpson introduced S.1884 titled Comprehensive Immigration and Asylum Reform Act of 1994. While given the comprehensive reform title, the text of the act was not truly a comprehensive reform measure. Rather it focused solely on border control and asylum reform and had no provisions for dealing with undocumented immigrants.

Table 8.1 Timeline of Unsuccessful H-1B Legislation (Post-CIR)

| Year | Legislation | Key Provisions | Bill Sponsor |
|-------------|--------------------|----------------------------|--|
| 2006 | H.R.5058 | Increase cap | Thomas Allen (D-ME) |
| 2006 | S.2611 | Increase cap (CIR) | Arlen Specter (D-PA) |
| 2006 | S.2691/H.R.5744 | Increase cap/exemption | John Cornyn (R-TX) / John Shadegg (R-AZ) |
| 2007 | S.1083/H.R.1930 | Increase cap/exemption | John Cornyn (R-TX) / John Shadegg (R-AZ) |
| 2007 | S.1092 | Increase cap/exemption | Chuck Hagel (R-NE) |
| 2007 | S.1348 | Increase cap/exemption/CIR | Harry Reid (D-NV) |
| 2007 | S.1351 | Increase cap | Judd Gregg (R-NH) |
| 2007 | S.1397 | Increase cap/exemption | Joe Lieberman (D-CT) |
| 2007 | H.R.1645 | Increase cap/exemption | Luis Gutierrez (D-IL) |
| 2007 | H.R.1758 | New cap for high skilled | David Wu (D-OR) |
| 2008 | H.R.5630 | Increase cap/exemption | Gabrielle Giffords (D-AZ) |
| 2008 | H.R.5642 | Increase cap | Lamar Smith (R-TX) |
| 2008 | H.R.7184 | Cap exemption | Jeff Flake (R-AZ) |
| 2008 | S.2839 | Increase cap/fee | Ted Kennedy (D-MA) |

E, T, + Sc: Environment, Technology, and Standards Subcommittee
 ERC, P, + R Sc: Emergency Communications, Preparedness, and Response Subcommittee
 I, C, R, B, IL Sc: Immigration, Citizenship, Refugee, Border Security, and International Law Subcommittee

Source: THOMAS (Library of Congress)

Yet this success was short lived. Comprehensive reform failed both in 2006 and 2007, and as a consequence, H-1B reform was swept up with that failure. What explained this shift in support? Cox and McCubbins (2005) argue that Congress views legislative changes within the context of the status quo. The legislative median is to the right in a Republican controlled Congress and to the left in a Democratic controlled Congress. So when Republicans control Congress we expect policies that sit to the left of the median to be blocked or at the very least fail.

Legislation that failed between 2006 and 2008 was introduced in unified Congress controlled by Republicans in 2006 (with a Republican President) and controlled by Democrats in 2007 and 2008 (see Table 5.1), a scenario very similar to the period between 1997 and 2000 and 2004 when the Republicans controlled both chambers and legislation was still able to pass. Additionally, in each of these years the presidency was held by a Republican who actively was in support of comprehensive immigration reform. In 2006, President Bush not only addressed comprehensive immigration reform but urged Congress to come up with a bipartisan solution in 25 various national addresses and 34 times in 2007⁶¹. In one such address to the nation in May 2006, he indicated that he supported comprehensive reform that accomplished five objectives: border security, creating a temporary worker program, holding employers accountable for the workers they hire, dealing with illegal immigrants in a manner other than amnesty, and honoring the American melting pot through assimilating immigrants into American culture. In urging Congress, Bush argued that “An immigration reform bill needs to be comprehensive, because all elements of this problem must be addressed together, or none of them will be solved at all”.

In 2006 the median is to the right and from 2007 to 2008 to the left. In 2006, only one piece of legislation actually passed in the Senate and none passed in the House. Using Figures 8.1 and 8.2 to illustrate what occurred, the expectation here (per Cox and McCubbins) is that Republicans in 2006 would have blocked legislation that was too far left of the median (m), or essentially any legislation that included comprehensive reform and/or amnesty (Figure 8.1), and Democrats would have blocked legislation that was too far right of the median in 2007 and 2008 (Figure 8.2).

⁶¹ <http://georgewbush-whitehouse.archives.gov/infocus/immigration/archive.html>

Figure 8.1 2006 Expected Spatial Model under Republican Control

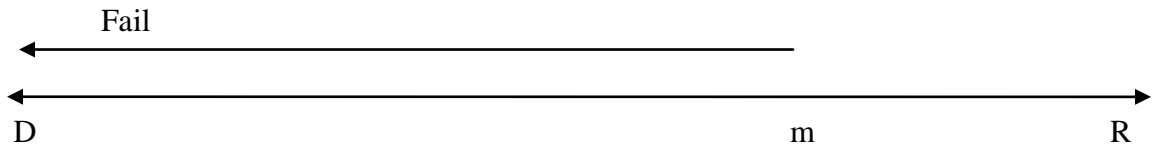
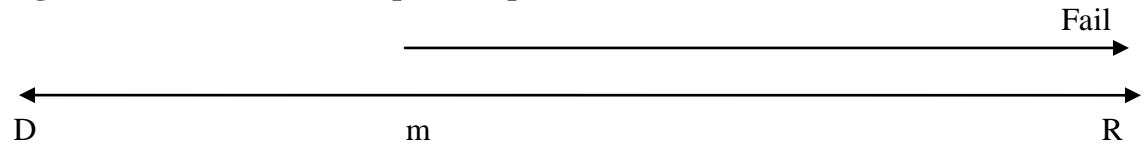


Figure 8.2 2007 and 2008 Expected Spatial Model under Democratic Control



In practice, this did not happen. The legislation that was introduced (with the exception of the two pieces of comprehensive immigration reform in 2006 and 2007) should have appealed to a bipartisan audience, and in 1990, would have. Since members were not able to pass legislation on their own and had to resort to Sinclairian tactics, the expectation is that this should have continued throughout the 2000s. However, here we have a situation where the legislation fell in line with the median legislative voter (and even the median filibuster voter), but some outside influence kept him from voting yai. I argue that the broader macro political and economic climate shifted politics from Sinclarian tactics and caused this stalemate. The following section will outline and analyze each of these macro factors in turn in order to explain why the stalemate occurred.

The Latino Vote

Between 1980 and 2000, the number of Latinos registering and voting in the United States more than doubled. Geographically, Latinos have been concentrated in the states with more than half of the required electoral votes needed to win the presidential

election, particularly California, Texas, New York, Florida, and Illinois. Additionally, the Latino vote in the 2000 election has been shown to have been particularly important in Nevada, New Mexico, Arizona, and Oregon, swing states where elections were decided by less than six percentage points.

According to a 2007 Pew Hispanic Center Report⁶², a majority or 57 percent of Latino registered voters affiliate themselves with the Democratic Party, 23 percent with the Republican Party, leaving 34 percent independents. This percentage is up from 33 percent in 1999. In a 2010 Pew study⁶³, voter preference among Latinos for Congress is heavily slanted in favor of the Democratic Party. In this study, 65 percent or two-thirds of all Latino registered voters indicated they planned to support a Democratic candidate compared to 22 percent for Republican candidates in their local districts. Compared to all registered voters, 47 percent indicated a preference for a Democratic candidate and 44 percent for a Republican candidate. Additionally, the survey also revealed that party identification remains high among the Democratic Party for Latinos. Nearly two-thirds, or 62 percent of Latino registered voters indicated they identify with or lean towards the Democratic Party while only a quarter or 25 percent indicated the same for the Republican Party.

Additionally, over time, support for the Democratic Party has increased by Latinos, and conversely support has decreased for the Republican Party. As Table 8.2 indicates, over time, a greater percentage of Latinos have consistently identified themselves with the Democratic Party than the Republican Party. This gap narrowed in 2006 and then widened again in 2007.

⁶² <https://latinamericanstudies.org/~latinam2/latinos/latino-vote-08.pdf>

⁶³ <http://www.pewhispanic.org/2010/10/05/latinos-and-the-2010-elections-strong-support-for-democrats-weak-voter-motivation/>

Table 8.2 Partisanship (%) of Latino Registered Voters

| Year | Republican | Democrat |
|------|------------|----------|
| 1999 | 25 | 58 |
| 2002 | 25 | 56 |
| 2004 | 28 | 55 |
| 2006 | 28 | 49 |
| 2007 | 23 | 57 |

Source: Taylor, Paul and Richard Fry. 2007. "Hispanics and the 2008 Election: A Swing Vote? Pew Hispanic Center.

This new factor can explain the recent mobilization on the part of the Republican Party in the mid 2000s to pass comprehensive immigration reform and why Bush was largely in support of such a measure, particularly surrounding the 2004 reelection. Essentially, whoever could claim credit for comprehensive immigration reform would get the big prize of the Latino vote in the next election.

Reelection Concerns

As the Democrats have already been largely successful in obtaining the Latino voting base, they have little incentive to bargain. Additionally, a younger voting base is emerging that is less hostile to immigrants than previous generations that also support the Democratic Party. Beginning with Kevin Phillips' (1969) *The Emerging Republican Majority*, many have predicted the end or fall of one party's hegemony and the rise of another's. In reality, from 1932 to 1968, New Deal Democrats held a majority, followed by a period of transition with Republicans holding a majority from 1980 to 1992. Most recently, Judis and Teixeira (2002) argued that changes in work (including a new

immigrant workforce), values, and geography in the 2000s would lead to an “emerging Democratic majority”.

Similarly, Matthew Dowd, former chief campaign strategist to President Bush, feared that a generational divide would soon put an end to the Republican majority. Looking at exit polls from the 2004 election, he noticed that younger voters favor Democrats in strong numbers because they favor gay marriage and school funding, are more positive towards immigration, and less hostile to Social Security cuts and military cuts than the Republican Party platform projects. Writing to other top Bush aides just after Bush was reelected in 2004, he argued that a new Republican majority was not emerging, but rather that younger voters “don’t think the Republican Party thinks like them”⁶⁴.

Ultimately, comprehensive immigration reform failed in 2006⁶⁵, and in each subsequent year in which it was introduced. There are a variety of reasons that can explain its failure. First and foremost, as members have become increasingly more partisan, the parties have also over time become more and more ideologically homogenous (McCarthy, Poole, and Rosenthal 2006; Fiorina and Levendusky 2008). As a result, concerns for reelection beginning in 2004 and continuing in 2008 and 2010 after the economic recession and the rise of the base may be one reason. Additionally, the economic downturn can explain the post 2008 moratorium when not a single piece of positive H-1B related legislation has been introduced as members became risk averse to having their name attached to any legislation that might in any way be perceived as taking jobs away from Americans.

⁶⁴ http://www.nytimes.com/2012/06/24/opinion/sunday/the-generation-gap-is-back.html?_r=2&partner=rss&emc=rss

⁶⁵ The House was unable to pass a similar reform package.

Various studies have shown that politicians have increasingly become more concerned with reelection (Mayhew 1974; Ornstein and Mann 2000). This obsession with reelection has been manifested in what Sidney Blumenthal (1982) termed the “permanent campaign” cited by Heclo (2000) here he suggests is “a nonstop process seeking to manipulate sources of public approval to engage in the act of governing itself” where campaigning and governing occurs simultaneously in a continuous loop. According to Heclo (2000), six trends have caused this loop: the changing role of political parties which are weaker in organization and mobilization but stronger in ideology and social distinctiveness, the expansion of interest group politics, new communications technology, political technologies, the need for political money, and the higher stakes in activist government.

Additionally, as reelection has increasingly become more important, Republicans have become much more fearful of their own base. Since 2008, moderate Republican incumbents have been repeatedly replaced by more conservative Tea Party backed candidates. According to Mann and Ornstein (2012), the parties (particularly the Republicans) have become more ideological in a system that requires supermajority support in order to overcome filibuster in the Senate. As a result, moderates have become more fearful of their base as conservative Tea Party candidates have gained speed and attention from the base.

The importance of reelection and the permanent campaign members are engaged in also brings into play Sulkin’s (2005) uptake theory where she argues that legislators adjust their legislative agenda based on criticisms on their own legislative history from their prior election challenger. Essentially, she argues that winning legislators regularly

take up their previous challenger's priority issues from previous campaigns and act on them during their new term. So if an incumbent is criticized by his opponent for his stance on immigration in a previous term, he will adjust his voting record in the future in order to keep that critique at bay during the next election.

Media and Public Opinion

Recent reelection concerns based on the 2008 recession are manifested in the media and in public opinion. The Vanderbilt Television News Archive is the most complete archive of national television news from 1968 to the present. The Archive provides data on the number of times any given phrase was mentioned in a national news broadcast. It includes data from ABC, CBS, NBC, CNN, PBS, FOX, MSNBC, CSPAN, CNBC, UNIV, and BLOOM. Between 2004 (the first introduction of comprehensive reform) and May 2012, the Vanderbilt Archives found 1,425 items where the title or abstract contained the word immigration, 379 mentions of immigration reform, and 13 mentions of skilled worker immigration. Table 8.3 breaks down the number of times immigration was mentioned in a national news broadcast in the United States since the passage of the Immigration Act of 1990.

Table 8.3 Media Mention of Immigration and H-1B Post CIR

| Year | Immigration | Immigration Reform | Skilled Worker Immigration |
|-------------|--------------------|---------------------------|-----------------------------------|
| 1990 | 33 | 2 | 1 |
| 1991 | 26 | 0 | 0 |
| 1992 | 12 | 1 | 0 |
| 1993 | 69 | 13 | 0 |
| 1994 | 118 | 8 | 0 |
| 1995 | 49 | 4 | 0 |
| 1996 | 94 | 18 | 0 |
| 1997 | 52 | 4 | 0 |
| 1998 | 26 | 2 | 0 |
| 1999 | 34 | 1 | 0 |
| 2000 | 116 | 0 | 0 |
| 2001 | 66 | 11 | 0 |
| 2002 | 51 | 4 | 0 |
| 2003 | 25 | 1 | 0 |
| 2004 | 99 | 39 | 6 |
| 2005 | 88 | 23 | 6 |
| 2006 | 465 | 130 | 1 |
| 2007 | 339 | 112 | 0 |
| 2008 | 65 | 11 | 0 |
| 2009 | 29 | 10 | 0 |
| 2010 | 245 | 23 | 0 |
| 2011 | 75 | 10 | 0 |

Source: Vanderbilt Television News Archive

Looking at Table 8.3, we can see that the mention of immigration in the media has several punctuations throughout the 1990s and then increases steadily throughout the early 2000s. The 1990s punctuations can be explained by the World Trade Center bombing hearings in 1993, the introduction and passage of California Proposition 187, an initiative designed to keep undocumented immigrants from using state resources in 1994, and the passage of IIRAIRA in 1996.

In 2000 the Elian Gonzalez case hit the media and all but a handful of these media stories revolved around young Elian directly or the issue of human trafficking. In 2003 we hit a low point, but picked back up in 2004 with the introduction of comprehensive immigration reform and then 2006 occurred. With the introduction of comprehensive reform again in the Senate, the media rewarded us with 465 various mentions of immigration throughout the 2006 year and another 339 in 2007 when reform was reintroduced in both the House and Senate. Once talk of reform (and particularly amnesty died down), and the economic recession hit in 2008, we see a decrease in media speak on immigration for the next two years. We have another increase in 2010 due largely to the Arizona immigration bill SB 1070. Looking specifically at the number of times “immigration reform” has been mentioned in national media, we see a similar trend as well with significant punctuated increases in 2006 and 2007.

The effect the failure of comprehensive immigration reform had on H-1B legislation is staggering. After its introduction, an additional 12 pieces of legislation were introduced. Combined with the failure of comprehensive reform, which included an H-1B provision and the legislation introduced the week before, there was a total of 14 pieces of legislation that all failed as they were swept up by the failure of comprehensive immigration reform.

The effect of public opinion follows similar trends. Gallup has polled Americans on issues dealing with immigration for a number of years. As part of their poll, Gallup asks “in your view, should immigration be kept at its present level, increased, or decreased?”. Their data since 2004 (see Table 8.4) provides a telling story.

Table 8.4 Gallup Poll Results (%): "In your view, should immigration be kept at its present level, increased, or decreased?"

| Year | Status Quo | Increased | Decreased | No Opinion |
|------------------|-------------------|------------------|------------------|-------------------|
| 2011 Jun 9-12 | 35 | 18 | 43 | 4 |
| 2010 Jul 8-11 | 34 | 17 | 45 | 4 |
| 2009 Jul 10-12 | 32 | 14 | 50 | 5 |
| 2008 Jun 5-Jul 6 | 39 | 18 | 39 | 3 |
| 2007 Jun 4-24 | 35 | 16 | 45 | 4 |
| 2006 Jun 8-25 | 42 | 17 | 39 | 2 |
| 2006 Apr 7-9 | 35 | 15 | 47 | 4 |
| 2005 Jun 6-25 | 34 | 16 | 46 | 4 |
| 2004 Jun 9-30 | 33 | 14 | 49 | 4 |
| 2003 Jun 12-18 | 37 | 13 | 47 | 3 |
| 2002 Sep 2-4 | 26 | 17 | 54 | 3 |
| 2002 Jun 3-9 | 36 | 12 | 49 | 3 |
| 2001 Oct 19-21 | 30 | 8 | 58 | 4 |
| 2001 Jun 11-17 | 42 | 14 | 41 | 3 |
| 2001 Mar 26-28 | 41 | 10 | 43 | 6 |
| 2000 Sep 11-13 | 41 | 13 | 38 | 8 |
| 1995 Jul 7-9 | 27 | 7 | 62 | 4 |
| 1995 Jun 5-6 | 24 | 7 | 65 | 4 |
| 1993 Jul 9-11 | 27 | 6 | 65 | 2 |
| 1986 Jun 19-23 | 35 | 7 | 49 | 9 |
| 1977 Mar 25-28 | 37 | 7 | 42 | 14 |
| 1965 Jun 24-29 | 39 | 7 | 33 | 20 |

Source: Gallup

Table 8.4 indicates that public opinion has remained relatively steady on immigration levels since the first introduction of comprehensive reform in 2004. While we have seen a shift in Americans being very anti-immigrant (over 60 percent) in the mid 1990s, the trend throughout the 2000s on average, however, indicates that Americans still largely favor decreasing immigration levels as opposed to increasing them. Since 2000, for example, 14.5 percent of those polled favored increasing immigration levels,

compared to 45.8 percent in favor of decreasing them. The percentage of those favoring the status quo has remained steady over the course of the past 60 years which is not surprising on the one hand as legal immigration levels have not increased much over that period of time, but surprising on the other as illegal immigration levels have.

If we look specifically at the impact that comprehensive immigration reform had on public opinion, some interesting trends emerge. Table 8.5 provides data from a Gallup survey conducted in 2007 following the introduction of reform in 2006 and the subsequent debate, both in Congress and in the media. The results indicate that only a narrow majority of those polled were actively following the news on immigration reform and a majority of people were not fully informed on the issue. Of those that were actively following the issue, however, poll results indicate that the greater majority were strongly opposed to the proposed plan.

Table 8.5 2007 Gallup Public Opinion (%) on CIR

| Party | Following news about proposed bill very or somewhat closely | Favor | Oppose | Don't know enough to say |
|--------------|--|--------------|---------------|---------------------------------|
| Republicans | 63 | 15 | 30 | 58 |
| Independents | 62 | 7 | 36 | 56 |
| Democrats | 57 | 11 | 25 | 64 |

Source: Gallup

Political sophistication refers to the quantity and organization of one's political cognitions (Luskin 1987). Within the political sophistication literature (Zaller 1992; Lupia and McCubbins 1998; Luskin 1987) is the claim that information flows from elites,

the media, and others to the mass public. Within the mass public, there are various considerations in determining whether one will actually consider the information, including one's political sophistication and predispositions on a continuum with the highly aware most likely to receive the greatest amount of political messages and the least aware less likely to receive any message.

Additionally, those who are predisposed to favor a message are more likely to accept new messages that are consistent with their beliefs and vice versa. The expectation is that those who are politically sophisticated and aware on a given issue are more likely to have predispositions on that issue. Additionally, Erikson, MacKuen, and Stimson (2002) found that when Congress debates and/or makes policy, the large majority of the voting public is unaware and unresponsive to it. There is, however, an attentive minority that makes demands on Congress and responds either favorably or unfavorably with their votes. As a result, public opinion typically refers to minority opinion. Therefore it is not surprising that while only a narrow majority of those polled were actively following the news on immigration reform, that the greater majority of them were strongly opposed to the proposed plan.

Additionally, trends concerning the media and changes in public opinion appear to be correlated. Looking at Tables 8.4 and 8.5, in the years when the media was most active in reporting on immigration and immigration reform, more people indicated that they preferred decreasing immigration levels over either the status quo or increasing immigration levels. It would be interesting to see if this was the case, however as I do not have individual roll call votes, this is not possible to ascertain.

While there does appear to be some correlation between media mentions of immigration and public opinion, there does not seem to be a correlation with unemployment levels at least on a national scale. I would expect, however, that on a local level, the likelihood of correlation is greater with states with greater immigrant populations, particularly border states, showing a correlation among media mentions, public opinion, and local unemployment levels.

Additionally, based on the punctuation and number of times immigration is mentioned in the media from 2005 through 2007, it is evident that members responded in a risk adverse manner. As discussed previously, the H-1B has been swept up in the tide of the larger and easier issue of immigration and border security. Therefore, when the media reacts to the easy issue of immigration and public opinion follows in negative fashion, members can be expected to be risk averse to the harder issue of H-1B legislation even when it is relatively unrelated to the issues that the general public opposes.

As I mentioned in chapter three, Gimpel and Edwards (1999) argued that immigration is not salient unless the economy is so bad that immigrants are blamed, a situation that began to occur in the late 2000s. In addition, due to the easy versus hard issue distinction, the H-1B legislation gets swept up into the easy issue of immigration and suffers.

As a result, when Congress was faced with the decisions of either granting legal status to the estimated millions of illegal immigrants or increasing skilled immigrant numbers throughout the 2000s, they were met with the majority of the American public (nearly half) who favored decreasing immigrant numbers generally and less than 15 percent who favored increasing them, as well as a majority who were against

comprehensive immigration reform. Therefore, I argue that Congress's reluctance to pass comprehensive immigration reform amid low public support created a spillover of negative public support on skilled immigration, particularly within the Republican Party where increasing polarization resulted in far more conservative members.

Additionally, while members previously followed a variety of cartel party and unorthodox models to pass legislation, we begin to see a shift away from this trend in the mid-2000s following the introduction of comprehensive immigration reform in 2004 and again in 2006. Instead what we have now is stalemate, or the bargaining failure argument made by both Gilmour (1995) and Binder (2003). Therefore, I argue that members of the Democratic Party were also engaged in a new political strategy to continue to reap the benefits of the Latino vote.

Bargaining Failure

Essentially, the bargaining failure argument is a rational choice game theory model that claims that failure occurs when a zone of agreement exists between two parties but one side deliberately chooses to avoid that zone. The defecting side avoids compromise in an attempt to seek some other type of political gain that they believe will ultimately be preferable in the long run. Gilmour (1995) calls this the "accepting half a loaf" argument where the defector feels that accepting half of a loaf today may keep them from obtaining the whole loaf (which is their ultimate preference) at a later date.

Remember that per Krehbiel (1996), in order for policy change to occur, both moderate policy proposals and moderate members are needed. As a result, policy change is incremental and typically passed only through the use of supermajorities. Therefore, in order for legislation to pass, the majority party would simply need to shift the legislation

to the position of the median legislator. In 2006, for example, when Republicans controlled both chambers, but failed to meet the threshold for cloture with only 55 Republicans, we expect the median legislator to be center right, and in 2007 and 2008 when Democrats controlled both chambers but the Senate with only 51 and 55 Democrats respectively, we expect the median legislator to be center left. Policies between the filibuster pivot and median voter should have passed. This however did not happen. In each instance, the parties remained firm in their positions and no shifting of policy occurred.

Let us examine why. Polarization has been found to result in gridlock in many instances. In our case, however, even in the face of polarization we clearly have a zone of agreement. Both Republicans and Democrats have an incentive to pass this kind of legislation and they been able to compromise on passing this type of legislation in the past. Therefore, we need to understand what changed.

Following Gilmour's (1995) logic, we can expect that Democrats have been giving up their half of the loaf in an attempt to obtain comprehensive immigration reform. As Gilmour (1995) showed, supporters of comprehensive reform often oppose smaller piecemeal measures because it makes it harder for them to pass comprehensive legislation. So essentially, Democrats might give up their half of the loaf in the short run and work instead towards gaining bipartisan support or obtaining unified government so they can pass comprehensive immigration reform that will include some measure of H-1B reform as well.

In reality, the Democrats appear to be content to sacrifice reform on the H-1B in the short run and to simply wait for comprehensive reform. In no instance have they

attempted to couple the H-1B legislation with even Dream Act legislation. They want it all or nothing at all. On the other hand, Republicans are not willing to budge on other immigration issues. The alternatives provided by the Democrats have been too far left of their status quo position for them to compromise. Therefore, they prefer the status quo of 65,000 visas for their business constituencies over passage of comprehensive reform (at least in the forms presented to them). Whether there will be long term ramifications for the Republican Party and individual members remains to be seen. Regardless, neither party is currently willing to get legislation on the H-1B passed through use of riders and the bargaining failure argument is the best explanation of why this is the case.

The dilemma members face here is whether they are shorting their constituents in the process. On the one hand, we have Democratic elected officials that are willing to hold off on passing piecemeal legislation in the hopes of pressuring Republican members to concede or wait until they have a majority to pass comprehensive reform. On the other hand, we have a Republican membership that over time has become much more conservative, and consequently more staunchly opposed to any amnesty type measures that the Democrats would like to see in a comprehensive reform package.

Politically, polarization has also increased since the demise of comprehensive immigration reform. Republicans have continued to move more to the right and as a result, Democrats know that if they give up on H-1B legislation, they will lose any leverage they have on getting a comprehensive reform package. As the Latino vote has become increasingly more important and as parties have become more internally consistent ideologically, Democrats now find themselves in a unique win-win position politically. As they have polarized on the left, they rely on big business to a lesser extent

when it comes to reelection than Republicans. Therefore, they do not lose much sleep when H-1B legislation fails. Additionally, many have found that polarization contributes to gridlock by incentivizing “blame game” politics (McCarty, Poole, and Rosenthal 2006: 194; Gilmour 1995; Groseclose and McCarty 2000). Therefore when comprehensive immigration reform fails, Democrats can blame the Republicans for failing to compromise, gaining votes from the Latino camp. This is evident in our case where Democrats have been able to use immigration as a wedge issue to split the Republican Party into conservative ideologues and those who are beholden to big business.

Conclusion and Comments on the Future of the H-1B Program

In this chapter, I used the bargaining failure game theory model to explain why Congress was unable to pass any legislation after comprehensive immigration reform was introduced and failed, as well as why the introduction of H-1B legislation stopped after 2008. Essentially, a number of macro-level factors, including the Latino vote, the economy, public opinion, and reelection concerns left members risk averse to this type of legislation.

Yet even in the midst of an economic recession, there is still a high demand for foreign skilled workers. As we saw in chapter two, the 65,000 cap on H-1B numbers fails to meet the demand each year. Even in the economic recession years of 2008, 2009, 2010, 2011, and 2012, the cap was met each year prior to the end of the fiscal year (see Table 2.6). Most recently, the 2013 fiscal cap was reached on June 11, 2012. Thus, in the course of just ten weeks, all H-1B numbers were filled and employers will now have to wait another 18 months until October 1, 2013 before they can hire another foreign skilled worker in the 2014 fiscal year.

The Silicon Valley Leadership Group, a business advocate coalition for Silicon Valley businesses, has been active in recent years in organizing lobbying trips and sending dozens of Bay Area executives to the Hill to lobby expanding both H-1B cap numbers and green card availability for skilled workers. Additionally, individual CEOs, Bill Gates for example, have been active in lobbying and testifying before Congress throughout the 2000s. Clearly, the business sector is not only in need of additional numbers but has been active in asking members for them as well.

There have been some rumblings of potential movement in the 112th Congress to increase H-1B numbers again and/or make other changes to the immigration system generally to shuffle the current immigrant visa category to increase the green card visa numbers available in the employment sector and specifically the number of foreign skilled workers by decreasing (or completely eliminating) the diversity and family categories. As of May 2012, no actual legislation has been introduced in either chamber to change the H-1B program. However, Senate members Jerry Moran (R-KS) and Mark Warner (D-VA) have introduced legislation that would create a new visa category for skilled workers graduating with an advanced degree in a STEM field (science, technology, engineering, or mathematics) from a U.S. institution of higher education. Other legislation proposed in both chambers respectively by Senator John Cornyn (R-TX) and Representative Darrell Issa (R-CA), would eliminate the existing diversity lottery program and allocate these green cards to advanced STEM graduates from a U.S. institution of higher education.

I anticipate that either there will need to be significant changes in the macro environment, specifically with regard to the economy, or one party will need to create

unification within both chambers and the presidency for any legislation to actually pass. This is not likely as the chances of getting to 60 members without moderates in the Senate (thanks to polarization) are slim. The Republicans already have an incentive to pass skilled worker legislation and the Democrats will likely have the numbers they need to pass comprehensive legislation with some changes to the skilled worker program as well.

CHAPTER 9

IS THE U.S. EXPERIENCE UNIQUE?:

COMPARING THE U.S. TO CANADA⁶⁶ AND AUSTRALIA

Introduction

While debate looms about what the future of our immigration policy should be, the U.S. remains the world's largest receiver of immigrants. According to a Brookings Institution study, there are currently 42 million immigrants in the United States, which translates into one in seven residents and one in six workers⁶⁷. The Organisation for Economic Cooperation and Development (OECD) estimates that in the international market, immigration to the U.S. accounts for 27 percent of the world's permanent immigration flows and 23 percent of temporary labor immigration⁶⁸.

Turning to the issue of skilled workers, a study by the Georgetown Center on Education and Workforce⁶⁹ estimates that by 2018, the U.S. will have 2.8 million STEM jobs available. They further estimate that of these, 779,000 will require some level of graduate training and based on current education trends, only 555,200 U.S. workers will have the qualifications to fill these jobs. As a result, the immigration of skilled workers remains relevant and necessary to the U.S. economy.

⁶⁶ The Canadian province of Quebec has separate legislation and policies in place with regard to the immigration of skilled workers. This paper will examine only Canadian policy and disregard the nuances of Quebec's policies.

⁶⁷ Audrey Singer, *Immigrant Workers in the U.S. Labor Force*, Brookings Institution, March 2012. Available at

http://www.renewoureconomy.org/sites/all/themes/pnae/img/Immigrant_Workers_Brookings.pdf

⁶⁸ Organisation for Economic Co-operation and Development (OECD) *International Migration Outlook 2011*. Available at http://www.wiso.uni-hamburg.de/fileadmin/vwl/aussenhandel/internationalewirtschaftsbeziehungen/Hauptstudium/Migration/WiSe2011_12/oecd_2011.pdf

⁶⁹ Carnevale, Anthony P., Nicole Smith, and Jeff Strohl. 2010. "Help Wanted: Projections of Jobs and their Education Requirements Through 2018." The Georgetown Center on Education and the Workforce. Available at <http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/FullReport.pdf>

The U.S. invites and grants visas to thousands of students to obtain post secondary education yet we have no program in place to allow, much less facilitate, them to stay and work after their education is complete. Table 9.1 provides a list of how many F-1 student visas and how many H⁷⁰ visas have been issued each year since 1992 by the U.S. Department of State⁷¹.

Table 9.1 Student and Worker Visas Issued Per Fiscal Year

| Year | Student Visa (F) | Worker Visa (H) |
|-------------|-------------------------|------------------------|
| 1992 | 239,751 | 97,489 |
| 1993 | 231,903 | 86,357 |
| 1994 | 235,218 | 98,008 |
| 1995 | 235,218 | 114,370 |
| 1996 | 235,218 | 121,340 |
| 1997 | 288,582 | 161,278 |
| 1998 | 273,410 | 190,671 |
| 1999 | 285,435 | 246,814 |
| 2000 | 308,944 | 289,562 |
| 2001 | 319,517 | 348,995 |
| 2002 | 256,534 | 293,805 |
| 2003 | 235,580 | 286,930 |
| 2004 | 237,807 | 331,628 |
| 2005 | 255,993 | 317,493 |
| 2006 | 294,637 | 372,254 |
| 2007 | 320,548 | 424,371 |
| 2008 | 364,423 | 363,511 |
| 2009 | 353,798 | 278,168 |
| 2010 | 411,317 | 289,192 |

Source: U.S. Department of State

⁷⁰ The Department of State does not break down the H visa category into the various types of H visas that exist. Therefore, this statistic includes H-2A and H-2B visas as well. Regardless, the point remains the same. Exponentially more student visas are issued each year than temporary worker visas.

⁷¹ While the visa category approval comes from the U.S. Citizenship and Immigration Service, the actual visa comes from the State Department.

In most years (with the exception of 2001 to 2007, but keep in mind that cap numbers were increased through 2004), the number of student visas far outweighed the number of H visas issued. In 2010, the U.S. issued nearly a third more student visas than H visas. There is an argument here (that has also been made in the mass media by both politicians and media pundits) that the policy of educating people from around the world and then letting them return home is counterproductive.

The policies in Canada and Australia are, as will be shown in this chapter, more conducive to attracting and keeping the highly skilled. What accounts for these differences among these three countries, considering the fact that all three share similar colonial histories, similar needs to populate their countries with immigrants, and similar ethnic restrictive policies throughout the late 1800s and early 1900s?

Sharing similar colonial backgrounds and similar cultures, there is no shortage of studies comparing and contrasting the various political and social phenomena between and among the United States, Canada, and Australia. These historical and cultural similarities combined with relatively similar economic conditions (with the United States obviously having a larger labor base and economy due to a larger domestic population) could result in an expectation that such similar states would have similar policies when it comes to immigration policy. Specifically with regard to foreign skilled labor policy, one could expect to find similar policies or at least relatively unrestrictive policies across these three states. Additionally, the sheer size of the United States labor force and the great labor shortages in many highly skilled fields should expect one to predict that the United States would have a less restrictive skilled immigrant worker immigration policy than their counterparts.

In reality, Canada, Australia and the United States did have a shared skilled worker immigration policy until the mid-twentieth century. This policy was based on a preference for immigrants from states with “similar values and norms” (Somerville and Walsworth 2009: 149). As a result, most immigrants to the United States and Canada were from western and northern Europe.

Additionally, Australia’s prewar immigration policy has been termed the “White Australia” policy⁷². This policy existed from the 1850s until 1949, and essentially restricted Chinese and Pacific Islander immigration to the island and preferred the immigration of white immigrants. Beginning in 1949, many non-white refugees were permitted to enter Australia and the Immigration Minister allowed these refugees to be admitted as immigrants, forever changing immigration policy. In 1957, non-Europeans with 15 years of Australian residence were permitted to become Australian citizens and in 1958, permanent residence status was opened up to non-Europeans. In 1966, the “White Australia” policy was officially abolished and non-European immigration began to increase. A series of laws were passed throughout the 1960s and 1970s in an attempt to reverse the “White Australia” policy. Australia’s current Migration Program allows for immigration regardless of ethnicity, culture, religion, or language.

Canada in 1967, Australia in 1966, and the United States in 1965 dramatically changed their immigration policies as a result of various economic, social, and humanitarian goals. Since then, the policies of these countries have varied, especially with regard to their policies on skilled worker immigration. The United States has a much stricter policy of admission for foreign skilled workers than its Canadian and Australian counterparts. Additionally, the U.S. still largely favors family based immigration efforts

⁷² <http://www.immi.gov.au/media/fact-sheets/08abolition.htm>

over employment based immigration as evidenced by the numbers allocated to each (see chapter two), a dramatic difference among these three countries.

Comparing the Legislative Political Systems of Canada, Australia, and the U.S.

As majority white settler colonies of the former British Empire, the United States, Canada, and Australia all evolved into industrial, capitalist, self-governing federal states. Politically, Canada and Australia are both parliamentary plurality legislatures with merged executive and legislative branches on both federal and provincial levels. In Lijphart's (1999) study of political institutions in 36 various democracies, both rank closely together. Australia's political system is made up of one central federal level, six states, and two territories, and Canada has one central federal level, ten provinces, and three territories.

The Australian constitution borrowed heavily from the U.S. constitution. Both have a bicameral legislature, with specific legislative powers to the federal government and a preemption clause. Canada's constitution also outlines specific powers for the federal government, with immigration being a concurrent power for the federal and provincial governments. The legislature in Canada is unicameral, however, at the provisional and territorial levels. The federal Senate is executive appointed and regionally based. Partisan makeup in Canada is made up of a multiparty system with three to five significant parties varying across jurisdictions. Australia has two major parties and various minor ones. Institutionally, Australia is the most formal and Canada traditionally has had much more informal procedures (Watts 2003).

Levels of party polarization have been low in both Canada and Australia over the same time period (Dalton 2008). And while party identification and loyalty has been an

important aspect of American politics, the same cannot be said for politics outside the U.S. (Harrop and Miller 1987). In Australia, the two major parties are the Labor Party (the left party) and the right Liberal/National Party. In Canada, the major parties include the moderate right Progressive Conservative Party, the centrist Liberal Party, and the moderately socialist New Democratic Party, the Green Party, and the Bloc Quebecois.

In both Canada and Australia, party discipline and disciplined voting has been extremely high in both legislatures (Depauw and Martin 2009). As we will see, this has allowed some significant positive and liberal changes to their skilled worker immigration programs. Yet in the U.S., while party discipline is high particularly in the era of polarization, institutional constraints have made legislation increasingly more difficult to pass.

With regard to immigration policy, both Canada and Australia's immigration policy is determined by their respective Parliaments, or legislative branches much like in the United States. Over time, the legislature in Canada has enjoyed tripartisan support and Australia's legislature has enjoyed bipartisan support on immigration measures (Hawkins 1991). In both Canada and Australia (and the U.S. to some degree), major institutional changes designed to increase migration numbers occurred after World War II (Walsh 2008). The Australian government founded the Department of Immigration in 1945, and in 1947 the Canadian Prime Minister outlined a new major immigration program. As a result, immigration increased over ten times in both countries. In both instances, increased immigration was designed to bolster economic growth. Much like in the United States, restrictive ethnic immigration policies soon gave way to nondiscriminatory reforms in 1962 in Canada and 1973 in Australia.

Canada's Parliament has a Standing Committee on Labour, Manpower, and Immigration that exclusively examines relevant annual estimates of immigration, reports, and proposed policy changes (Hawkins 1991). Australia does not have its own standing committee on immigration. In the U.S. where the committee structure is more structured, immigration is typically handled by the House Subcommittee on Immigration Policy and Enforcement and in the Senate in the Subcommittee on Immigration, Refugees, and Border Security (both under their respective Committees on the Judiciary) although legislation could be passed to a different committee at the Speaker or Majority Leader's discretion.

A Comparison of United States, Canadian, and Australian Skilled Worker Policy

Canadian Policy

In Canada, both the federal and provincial governments have shared jurisdiction over immigration and immigration policy pursuant to Section 95 of the Constitution Act, 1867. The Immigration Act of 1967 created the point system currently in place for adjudicating and granting status as a skilled economic immigrant. Consequently, Canada was the first country in the world to implement a point based immigrant system, and was followed shortly after by Australia. Other European states have recently also followed in Canada's footsteps. In June 2002, Canada's Immigration Act of 1967 was updated with the Immigration and Refugee Protection Act. Since 2002 and pursuant to the Department of Citizenship and Immigration Act and the Immigration and Refugee Protection Act, the Minister of Citizenship and Immigration (with the approval of the Governor in Council) has signed various agreements with the provinces and territories throughout Canada in order to facilitate the implementation of immigration policy. In 2008, the Citizenship and

Immigration Canada (CIC) was created to adjudicate applications for noncitizen admission into Canada.

Due to the point system, Canadian immigration policy differs drastically from policy in the United States. The Canadian immigration system is divided into temporary travel for work or study, permanent immigration, and humanitarian asylum. Temporary travel for work visas can include both skilled and unskilled workers. Permanent immigration is available for skilled workers/professionals, investors/entrepreneurs/self-employed, those who have recent work experience in Canada, and those who receive nominations from one of Canada's provinces or territories.

As such, skilled workers can obtain authorization to live and work in Canada either through temporary travel for work visas or by applying as a federal skilled worker. Applications for temporary travel for work typically require a labor market opinion by the Human Resources and Social Development Canada⁷³ that the employer is authorized to hire a foreign worker for the position. Requirements include evidence of English language proficiency, and an offer of employment or one year of full time experience within the past ten years in one of the 29 major high demand occupations as determined by the Government of Canada. Because these visas are available for both skilled and nonskilled workers, they will not be analyzed here.

Applications for permanent immigration as a skilled worker/professional are adjudicated based on a point system. The grid is comprised of various factors within the six selection factors. Points are awarded for education (up to 25 points), language

⁷³ Some exceptions to this requirement exist: jobs covered under international treaties, workers in specific occupations as listed in Canadian-Provincial/Territorial Immigration Agreements, entrepreneurs and intra-company transferees, participants in exchange programs, co-op students, spouses/common-law partners/children of students and/or skilled workers, academics, students, religious workers, and/or refugees.

(English and/or French) abilities (up to 24 points), work experience (up to 21 points), age (up to 10 points), whether the employment has already been secured and arranged (up to 10 points), adaptability (up to 10 points), and financial stability. Points are not necessary in all areas in order to achieve the minimum score for approval. Citizenship and Immigration Canada is responsible for setting the “pass” score and adjudicating the applications. As of 2011, the “pass” score is a 67 out of a possible 100, and applicants with a score of at least 67 are eligible to immigrate as a permanent skilled worker upon a favorable determination by a Citizenship and Immigration Canada officer. Upon approval and entry into the country, the applicant (and any immediate family) is eligible for citizenship in as little as four years.

Canada has shown a steady commitment to accepting skilled workers in their immigration policy. In 1985, the Canadian government increased the number of visas available to skilled workers by including work experience and employment related factors to the point system. In 1990, a five year Immigration Plan through 1995 was passed in an attempt to double immigration, and more specifically increase skilled matches to areas experiencing regional/national labor shortages.

In 2008, Budget Bill C-50 was passed to slow the backlog of immigration applications from 6 years to only 6 to 12 months. Additionally, it was intended to align Canadian labor shortages with immigration applicants in order to provide employment opportunities for applicants wanting to immigrate to Canada, as well as fill labor shortages in the Canadian labor market. As an example, the government has developed occupation shortage lists that are updated every six months to make sure that immigrants are being utilized in sectors that Canadian nationals are not filling.

Additionally in 2008, Canada's Parliament granted their immigration minister a special regulatory tool called a "Ministerial Instruction" that allows him to make adjustments to immigration policies without having to consult with Parliament. According to a study by The Partnership for a New American Economy and the Partnership for New York City, this Ministerial Instruction has already been used by Minister Jason Kennedy to prioritize skilled workers. Specifically, he has recently requested that immigration agents evaluate immigration petitions submitted by those with skills in higher demand and leave the low skilled and low demand applications unprocessed. Recall that in the U.S., Congress maintains exclusive control over all immigration policy making and has not ceded this authority to any outside agency or individual.

Additionally, on June 26, 2010, the Government of Canada passed legislation that dramatically changed the skilled worker program. Legislation implemented a cap of 20,000 or 1,000 per occupation available per year for skilled workers. Exemptions to this cap, however, are available for applicants who have arranged their own employment and have a job offer with an employer in Canada. Therefore, in practice, it is not expected to hinder employment of foreign national to any great extent.

Australian Policy

Australia's immigration system is a hybrid of the systems in place in Canada and the United States. As mentioned above, in 1979, Australia followed in the steps of Canada by implementing the Numerical Multifactor Assessment System (NUMAS), a point based system based on individual economic contributions. It divided potential immigrants into three classes: skilled, family, and humanitarian (much like in the U.S.).

In 2010, however, they changed the point system to an economic needs based system called SkillSelect⁷⁴. The program allows prospective immigrants to apply online and obtain an overall point score. Immigration officials review these online applications and invite those who best meet employment needs to file formal visa applications. As mentioned above, Canada has also adopted a similar needs based process.

While Australia follows a version of Canada's point system, the immigration process is similar to that in the United States. Like Canada, Australia has both a nonimmigrant and immigration visa process, but unlike Canada the nonimmigrant visa is the most common method for entering the country initially (much like the U.S.).

The most common nonimmigrant process exclusively for skilled workers is the Subclass 457. Employer sponsored workers can enter the country through a Temporary Business (Long Stay) Standard Business Sponsorship, also known as Subclass 457. It requires employer sponsorship by either an Australian business or an overseas business operating in Australia. Applications for Subclass 457 must be for a skilled position that is specified by the government on a skilled occupation list that is based on the ASCO system, indicating national and regional labor needs⁷⁵. The list was changed most recently in 2010 to use the ANZSCO classification system, and the occupation list itself was changed only slightly. The visa allows employers to employ foreign workers for any period up to four years. Additionally, employers must pay equivalent market salary rates to foreign employees (much like the prevailing wage in the U.S.) and the visa is employer specific.

⁷⁴ <http://www.deccanherald.com/content/51465/australia-cancel-20000-visa-applications.html>

⁷⁵ http://www.immi.gov.au/skilled/_pdf/sol-schedule1.pdf

Subclass 457 bears many similarities to the H-1B. Both are temporary visas, valid for up to three years in the U.S. and four in Australia, require employer sponsorship, and have a minimum wage requirement. There are several noteworthy differences, however. The U.S. has an annual cap on these visas while Subclass 457 does not. Additionally, while the U.S. has a multitude of nonimmigrant visas available, the majority of all long term immigrants to Australia are on Subclass 457, or approximately four out of five immigrants⁷⁶.

Unlike the U.S., Australia also has a program (the General Skilled Migration Program or GSM) for professionals and other skilled migrants who do not have employer sponsorship but whose skills are in demand. Because Australia (like most countries) has a documented shortage of physicians and nurses, they have a system in place that essentially allows doctors and nurses to register with a government agency, find employment, and obtain either a Subclass 457 visa or go through the permanent visa process. This is vastly different from the U.S. process where permanent residence for even the most highly skilled and in the fields with the greatest shortages (i.e. healthcare) can take at least a couple of years at the very minimum in the very best case scenario to over a decade in the worst case.

As with Canada, Australia has been successful in making positive changes to their skilled worker program in the late 2000s when their U.S. counterpart completely halted any legislative efforts. In 2011, for example, Australia's Minister for Immigration and Citizenship announced a new Migration Plan that would reform their immigration policy in order to increase the number of skilled immigrants and make the process for skilled

⁷⁶ <http://www.radioaustralia.net.au/international/radio/onairhighlights/australian-government-overhaul-of-visa-scheme?autoplay=423328>

immigrants more efficient and effective⁷⁷. Through these reforms, the federal government will allocate immigrant visas for specific regional areas. Additionally, a fast track process green card process was implemented in 2012 for those on a temporary business visa (Subclass 457) whose employers agree to sponsor them for an additional two years.

Comparing the U.S., Canada, and Australia

While Canada and Australia have attempted to increase their share of skilled workers, the U.S. has experienced a decrease, due likely to stagnant immigration policies. Between 2001 and 2011, for example, employment based immigration decreased from 17 percent to 13 percent. Additionally, the U.S. allocates approximately 7 percent of its permanent visas to employment categories, compared to 25 percent in Canada and 42 percent in Australia⁷⁸.

In the United States, positive policy on skilled workers halted after 2004. In Canada, however, policymakers passed a positive immigration bill in 2008, in the midst of a worldwide economic recession, to reduce the application backlog and fill labor shortages in the Canadian labor market. Two years later, however, as the economic recession continued with no end in sight, Canadian policymakers passed a law to cap the number of skilled workers admitted each year, for the first time mirroring U.S. policy. Yet even with the cap, applications are granted based on labor needs and those regions with substantiated labor needs are still able to obtain skilled foreign workers. Additionally, Canada is actively trying to improve their immigration system by attempting to decrease backlogs and granting the Immigration Minister carte blanche

⁷⁷ <http://www.embraceaustralia.com/australian-migration-thinks-local-9475.htm>

⁷⁸ Orrenius, Pia and Madeline Zavodny, *From Brawn to Brains: How Immigration Works for America*, Federal Reserve Bank of Dallas: 2010 Annual Report, p. 15. Available at <http://www.dallasfed.org/assets/documents/fed/annual/2010/ar10b.pdf>

authority to fix the system. The same is true in Australia where recent legislation has been passed to make the green card process for skilled workers faster and more efficient.

While the percentage of high skilled immigrants as a percentage of all immigrants has increased in both Canada and Australia in each 10 year period since 1991, the percentage has steadily decreased in the United States over the past 20 years. Table 9.2 shows a staggering difference between actual immigration numbers among these three countries. Between 1991 and 2011, the percentage of skilled immigrants jumped from 37 percent to 67 percent in Australia and from 18 percent to 67 percent in Canada. In the U.S., however, the percentage fell from 18 percent in 1991 to 13 percent in 2011.

Table 9.2 High Skilled Immigrants as a Percentage of All Immigrants

| Year | U.S. | Canada | Australia |
|-------------|-------------|---------------|------------------|
| 1991 | 18 | 18 | 37 |
| 2001 | 17 | 55 | 60 |
| 2011 | 13 | 67 | 67 |

Source: "Not Coming to America: Why the U.S. is Falling Behind in the Global Race for Talent"

Comparing the Annual Cap Restriction in Canada and the U.S.

In Canada, exemptions from the annual cap exist for applicants who have secured a job offer with a Canadian employer. In the United States, exemptions from the annual cap exist only for institutions of higher education as defined by section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), nonprofit entities related to or affiliated with a nonprofit educational entity as defined by section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), nonprofit or governmental research

organizations as defined by 8 CFR 214(h)(19)(iii)(C), for physicians who have obtained a waiver of their home residency requirement and agreed to work in a federally designated medical shortage area for a period of at least three years, and for applicants who have obtained a Master's Degree in a United States educational institution.

Examining the cap exemptions only on their face, the Canadian cap is clearly much less restrictive than the United States cap. Normalizing the percentage of the American and Canadian populations that are skilled workers and examining the percentage of that population that are skilled workers can shed some light on the regulations that have been implemented. As Table 9.3 below indicates, the total population of skilled workers in the United States is more than ten times the total population of skilled workers in Canada. However, upon examining the percentage of the total population with a Bachelor's Degree, the numbers are extremely close, indicating that a comparable share of the Canadian and American populations is comprised of skilled workers.

In contrast, however, the percentage of the skilled worker population that has a skilled visa in Canada is almost double the percentage of skilled workers with a skilled worker visa in the United States, indicating that Canada approves much more skilled foreign workers as a share of their population than the United States. Considering the fact that the United States labor market is much larger than the Canadian market, with shortages in many fields, it is interesting that Canada approves double the percentage of skilled workers than the United States.

Table 9.3 U.S. and Canadian Skilled Worker Populations (Foreign and Domestic)

| | Year | Total Population | Total Population with B.A. | % Population with B.A. | Total # with Skilled Visa | % Skilled Population with Skilled Visa |
|---------------|-------------|-------------------------|-----------------------------------|-------------------------------|----------------------------------|---|
| U.S. | 2006 | 299,398,485 | 33,496,187 | 11.5 | 270,981 | 0.8 |
| Canada | 2006 | 32,576,100 | 2,981,465 | 9.2 | 44,161 | 1.5 |

Sources: U.S. Census Bureau 2006 American Community Survey
 USCIS Annual Report, 2006, Statistics Canada
 CANSIM, Statistics Canada Census of Population 2006

Additionally, data from West's (2011) Brookings Policy Brief Series indicates that 26 percent of all Canadian immigrant visas are in the skilled worker category while only 6.5 percent of immigrant visas issued in the United States are for skilled workers. It is unclear whether West is referring to workers in the actual immigrant category (where they have received approval for legal permanent residence) or if he is simply using the colloquial definition of immigrant to refer to all foreign nationals admitted. Regardless, the data shows the extremely different results from two very different policies.

Comparing Actual Skilled Immigrant Flows

A 2006 study indicated that over the past decade, the greatest percentage of high skilled immigration to Canada came from China (18%), India (11%), Philippines (7%), Pakistan (4%) and Romania (4%). In Australia, the greatest percentage came from the United Kingdom/Ireland (25%), India (13%), China (11%), South Africa (5%), and Malaysia (5%)⁷⁹. Comparatively, in the United States, according to USCIS⁸⁰ between

⁷⁹ <http://www.cic.gc.ca/english/pdf/pub/labourmarket.pdf>

⁸⁰ The earliest H-1B data made public by USCIS is the 2004 Fiscal Year data, which includes data from 2003 as well.

2003 and 2006, the greatest percentage of H-1B visa holders came from India (43.5%), China (9.4%), Canada (4.2), Philippines (3.9), Korea (3.3%), and the United Kingdom (2.5%).

The greatest percentages of Indian immigrants are clearly coming to the United States while a greater percentage of Chinese immigrants are going to Canada. In Australia, however, the labor pool appears to rely more on United Kingdom/Ireland immigration flows. Regardless of the exact percentage, however, it does appear that the greatest number of skilled immigrants globally is coming from India, China, Philippines, and the United Kingdom. Immigrants from these countries make up the bulk of the skilled immigrants in at least two of these countries (which are also the three largest immigrant accepting countries in the world).

Therefore, our three countries appear to be competing largely for the same labor pool. The consequence of this is that the country (or countries) with the most favorable policy or policies will likely win this race in the long run, assuming other market conditions are comparable. Therefore, policy on skilled workers will increasingly become more important for the United States if employers will continue to need the same skilled immigrant flows in the future. Thus far, this flow has not slowed.

The Spillover Effect and an Explanation

While there is no cohesive explanation in the literature as to why policies among these three countries diverge, scholars have been able to make some important findings. Walsh (2008) argues that by the 1990s, ethnocentric fears began growing in both Canada and Australia, resulting in some anti-immigrant sentiment. In Australia, for example, the presence of “boat people” from Asia in both Australia and to a lesser extent Canada

became a new political issue (Walsh 2008: 802). Additionally, public opinion, particularly in Canada over time has not been positive towards immigration generally (Reitz 2004).

Yet immigration policies in both Canada and Australia have tended to be more open than public opinion in these countries would have preferred (much like in the U.S.). In both Canada and Australia, business interests mobilized in opposition to restrictive immigration policies (Reitz 2004; Skeldon 1995) and as a result, Walsh (2008) argued that both governments placed more emphasis on skilled workers in order to appease both constituencies. As a result, after 1996 in both countries the number of skilled workers admitted outpaced the number of family and refugee immigrants. This trend has continued to date. This has allowed both countries to maintain high levels of public approval (Walsh 2008).

These experiences in Canada and Australia are a major departure from the experience in the United States. In the U.S., polarization has majorly divided the parties to the extent where policy has been made very difficult to pass. This has not happened in either Canada or Australia (Dalton 2008). Additionally, the spillover effect from the “easy” issue of immigration (border security and the issue of undocumented Mexican immigration) has resulted in a public very averse to increasing immigration generally. Rather than switching gears and making immigration an economic issue, Congress, as opposed to its counterparts in Australia and Canada, remains focused on “solving” the issue of undocumented immigration where the Australian and Canadian Parliaments managed to distract their publics while their economies benefitted and individual

members benefitted from the support of both their base and their business constituents. Congress may have much to learn.

Conclusion

While both Canada and Australia have been able to pass positive legislation on skilled immigrants during the same period when the U.S. has failed to pass any, they have also managed to pass significant positive changes to their general respective immigration policies as well while the U.S. has also failed.

Australia has recently adopted policies to keep international students who studied in Australia within the country⁸¹. The Skilled Graduate Temporary Visa program allows highly qualified international students who fail to qualify for permanent residence through the point system to stay for up to 18 months after they graduate in order to gain the skills and job sponsorship they need in order to raise their score.

Similarly, three policy changes in 2008 in Canada made significant changes to allow international students who study in Canada to remain and work⁸². One policy grants additional points for the permanent residence points system through the Canadian Experience Class program. Another program grants up to 1,000 international students who have completed at least two years of a Ph.D. program in a STEM field permanent resident status. Those who still do not qualify for permanent residence can still qualify to stay and work for up to three years after graduating from a Canadian college or university.

Both of these policies diverge sharply from U.S. policy. There are currently no programs in place for a direct path for permanent residence for international students.

⁸¹ <http://www.immi.gov.au/skilled/general-skilled-migration/485/>

⁸² <http://www.cic.gc.ca/english/department/media/releases/2011/2011-11-02.asp>.

Additionally, the process can take many years for those that are able to obtain an H-1B visa. More puzzling still is the fact that roughly 40 percent of these international students receive federal funding in the form of grants and scholarships within the U.S.⁸³.

This chapter has examined the various skilled immigration policies of the United States, Canada, and Australia tracing their historical transformations over the years. It has attempted to provide a comparison of the policies, the changes to these policies over time, as well as the results of these policies.

As has been shown, both Canada's and Australia's policies have been much less restrictive and more receptive to using foreign skilled workers to alleviate domestic labor shortages. This has been done with support of both the voters and business constituents as their Parliaments have been able to distract voters from domestic issues of relatively high refugee numbers by increasing skilled workers and showing a link to relatively steady economic growth. In the United States, however, skilled worker immigration policy has been much more restrictive with annual caps and employer sponsorship requirements. Additionally, spillover effects from the high levels of undocumented immigrations in the U.S. has resulted in negative public opinion on immigration generally, and a Congress risk averse to doing anything at all about skilled worker immigration.

⁸³ <http://www.iie.org/~media/Files/Corporate/Publications/International-Students-in-the-US.ashx>

CHAPTER 10

CONCLUSION AND RECOMMENDATIONS

I began this project wanting to understand why in the years when H-1B numbers were in greatest demand Congress suddenly changed its tune and halted any real attempt at passing positive legislation to increase the cap in one way or another. My major finding was that the increase in polarization combined with a variety of changes in the macro environment resulted in a Congress risk averse to any immigration related legislation.

This work deviated from prior studies on skilled worker immigration in that these prior studies focused their scope on the immigrant visa category because it grants permanent resident status. Because the majority of immigrants to the United States enter the country on a nonimmigrant visa first and then go through the process of permanent residence, I found those studies premature. Therefore, this study attempted to fill that gap in the literature in order to understand congressional behavior on one particular nonimmigrant visa, the H-1B visa.

The H-1B visa is the only nonimmigrant visa available exclusively to skilled workers. This study attempted to explain congressional behavior on the H-1B visa in order to understand why Congress was proactive on the issue from the 1990s through 2004 and then refused to touch the issue regardless of constituent demands for change.

In a relatively short period of time, the same policy went from being relatively noncontroversial with bipartisan support to completely stalemated. This analysis attempted to explain what changed. One major shift over time and during our time period has been the increase in polarization both in the broader political environment and within

Congress as well, which resulted from ideological sorting coupled with economic and social changes. What we were left with is legislation that was once routine can now only be passed through unorthodox methods until eventually members become too risk averse to passing anything.

My analysis examined H-1B policymaking within the context of these broader trends in American politics. And while the timeframe is short, the forces shaping the internal and external environment accelerated a great deal during this period. As a result, a variety of congressional models needed to be used. These included pivotal politics, party models, unorthodox lawmaking, and stalemate game theory models in order to explain policymaking (or the lack thereof) on the H-1B visa and answer the following research questions:

- 1) What factors explain congressional policy making within the context of skilled worker (H-1B) immigration?
- 2) Why did Congress stop using alternative methods (i.e. riders) to pass positive H-1B legislation?
- 3) Why did even minor changes to the H-1B program that were successful as stand-alone pieces of legislation pre-2004 fail after 2004?
- 4) Is the U.S. experience unique? How does it compare to legislation in Canada and Australia?

The bulk of the analysis consisted of a four part longitudinal study that examined policy making using four different congressional theories to explain the following periods of passage and failure: (1) the creation of the H-1B skilled worker visa in 1990; (2) passage of legislation from 1998-2004 largely as individual pieces of legislation; (3)

passage of legislation through the use of riders from 1998-2004; and (4) failure of legislation from 2006-2008, followed by a lack of legislation introduced to date. My findings are as follows.

Findings

In chapter two, I provided a general history of immigration policymaking, as well as an overview of the H-1B visa in order to set the stage for the analysis. Chapter three outlined the relevant literature and congressional models used in the analysis, including Krehbiel's pivotal politics (1998), Cox and McCubbins' party models (2005; 2007), Sinclair's (2007) unorthodox lawmaking, and Gilmour's (1995) strategic disagreement. In chapter four, I outlined my research design. Specifically, this study has been a longitudinal qualitative analysis using the four congressional models just listed to explain four key periods of H-1B legislation: (1) the passage of the Immigration Act of 1990; (2) passage of stand-alone legislation from 1998 through 2002; (3) passage of legislation through the use of riders from 1998 through 2002; and (4) complete stalemate after 2004.

Chapters five through eight were the bulk of the analysis, where I examined the effect polarization had on legislation on the H-1B visa in order to ascertain the shift in congressional behavior. Finally, chapter nine compared similar policies in Canada and Australia. The following sections summarize my main findings.

Polarization: Causes and Consequences

Since the 1970s, the parties have increasingly polarized and members have become more ideologically homogenous. This has resulted in two consecutive polarizing phenomena: vanishing moderates and the clustering of the two parties as conservatives or liberals.

While Congress is a well-bound institution, it is still a permeable institution and is often affected by external events and forces. Polarization has changed congressional behavior by increasing gridlock, and making major legislation successful less frequently. In the Senate, polarization has made overcoming the filibuster very difficult, and has made Democrats unwavering in their reluctance to pass H-1B related legislation without a comprehensive immigration reform package attached. Polarization also explains why members stopped attempting to use riders to attach legislation onto larger, must pass legislation, and why the introduction of any H-1B related legislation stopped altogether after 2008.

Institutional Arrangements Matter

Many of the most well known studies on Congress focus on only the Senate or the House. Yet in order for legislation to pass, it has to get through both chambers in identical fashion. As a result, I showed that institutional arrangements in both chambers can and do hinder the ability of members to get legislation passed.

In the Senate, the cloture rule is one of the more recent institutional changes that has greatly impacted the success or failure of a piece of legislation. Since the 1970s, passing legislation in the Senate requires a supermajority of 60 votes in order for to overcome the filibuster and pass legislation. As neither party has been able to reach 60, reaching cloture instead requires the presence of moderate members. Combined with increased polarization and the clustering around the conservative and liberal poles, moderate members have all but disappeared and getting legislation passed has been rendered very difficult over time.

In the House, changes in the committee process combined with increased polarization have resulted in a much more divided chamber. In effect, legislation without partisan support dies before it makes it to committee or shortly after.

As a result of these institutional hindrances, the rider has become a tool for members to manipulate the institutions in order to get their goals' realized. For a number of years, members were unable to get H-1B legislation passed on its own and were successful in using riders in order to get their desired outcomes.

Conversely, however, in recent years a sharply divided electorate has rendered it nearly impossible for a party to make it to 60 members in the Senate or to obtain as much partisan support in the House for legislation to pass. Combined with increasing reelection fears and the permanent campaign members are engaged in, members are increasingly engaged in uptake, or adjusting their legislative agenda based on criticisms of their own legislative history from their prior election challenger, out of fear of their own base. Essentially, if an incumbent is criticized by his opponent for his stance on immigration in a previous term, he will adjust his voting record in the future in order to keep that critique at bay during the next election. Combined with a more hostile political and economic climate towards immigration generally, we have more gridlock than ever before. Now combine that with a Democratic Party that is dead set on passing comprehensive reform and you have stalemate.

Changes in the Macro Political Environment Affect Policymaking

Polarization has dramatically changed policymaking over the past thirty years. During this time, Congress created a new nonimmigrant visa category for foreign skilled workers and debated and passed a number of bills throughout the late 1990s and early

2000s to alter that visa category in a positive manner. As time went on, the scope of this legislation grew smaller and smaller until legislation became completely unsuccessful beginning in the mid 2000s.

While the issue of foreign skilled workers has remained the same during this time, the politics both within and outside of Congress have changed dramatically in the past 20 years. As we have seen, the one major political change that occurred during this period was the ideological sorting of the electorate and increased polarization within Congress which resulted in stalemate on this type of policy.

Additionally, a number of macro-level political and economic changes have also affected the ability of Congress to pass this type of legislation. First, the recent addition of Latino voters has shifted the balance of power in Congress. Democrats have largely been the winners of the Latino vote and as a result, have been successful at blaming Republicans when immigration related immigration fails, thus garnering greater support from the Latino base.

Second, I argue that the introduction and failure of comprehensive immigration reform was the tipping point for this failure in 2006. Desperate for reform (and to fully secure the Latino vote to boot), Democrats were content to sacrifice their half of the loaf, which consists of increasing H-1B numbers (pre economic recession) in an attempt to get the entire loaf of comprehensive reform. Yet Republicans have not budged on the issue and as a result, the H-1B visa, countless businesses, and foreign skilled workers have suffered.

Finally, the recent economic recession can explain the post 2008 moratorium on the introduction of any H-1B legislation. Gimpel and Edwards (1999) tell us that

immigration is not a salient issue to the public until the economy is so bad that people begin to blame immigrants. While the argument that H-1B skilled workers are not taking jobs away from U.S. workers may have merit, in reality the high unemployment levels in the late 2000s makes increasing immigrant numbers a dangerous stance for any legislator to take, particularly as public opinion for immigration generally was low during this period. As a result, members increasingly become more risk averse over time as the economy continues to slump and their concerns for reelection increase.

A Dysfunctional Congress

In addition to illustrating how polarization has impacted the success of H-1B legislation, this study also highlights the general dysfunction that exists in Congress. This theme is not unique to immigration policymaking but rather on policymaking within the institution as a whole.

Polarization has rendered it near impossible for members to deliberate and compromise. Instead, each party has its own policy agenda and is content on sacrificing legislation in the short run in the hopes of garnering enough party support in a later election. What the framers envisioned for the legislative branch, a majoritarian institution that would deliberate and compromise, has instead transformed into their worst nightmare, an institution rife with stalemate and gridlock.

The Unique U.S. Experience

Additionally, I sought to ascertain whether legislatures in Australia and Canada had similar experiences during this time throughout the 2000s. Canada, Australia, and the U.S. share similar colonial histories and relied to a large extent on immigration to populate their countries at one point. As such, Canada, Australia and the U.S. have

historically been the largest immigrant receiving countries in the world and a number of studies illustrate the similarities in their policies. Yet some important differences in the immigration policies of these three countries exist.

In looking at similar policies in Canada's and Australia, we see that they have been much less restrictive and more receptive to using foreign skilled workers to alleviate domestic labor shortages. While public opinion throughout the 1990s was negative towards immigration policy, the Parliaments in these countries were able to shift the public's negative focus on Asian refugees to passing legislation to increase the number of skilled workers. This has resulted in relatively steady economic growth and made public opinion on immigration more positive.

In the United States, however, skilled worker immigration policy has been much more restrictive with annual caps and employer sponsorship requirements. This can be attributed to a number of political phenomena that have been unique to the United States, largely: (1) party polarization has over time made it more difficult for this type of legislation to pass; (2) the increase in the Latino voting population has changed the dynamics of legislative politics on the subject of immigration generally; and (3) changes at the macro-level over time have resulted in less congressional support for the H-1B program and the 2006 failure of comprehensive immigration reform (CIR) was the tipping point for this shift in policy.

As can be seen, while polarization may have been unique to the U.S., Canada and Australia were able to turn the tide of public opinion in their favor by using skilled foreign immigration to improve the general economy. Had Congress employed a similar tactic prior to the recession, legislation on the H-1B may have taken a different course. I

am not optimistic, however, that a similar policy would be successful in the United States today with the state of the economy, the perception⁸⁴ that undocumented immigrant level are high, and the spillover effects that have made members risk averse.

Recommendations for Future Research

As I stated in the introduction, research on congressional behavior on nonimmigrant visas is nonexistent within the literature. This study focused on the change in congressional support for skilled worker nonimmigrant visas since its creation to date. As such, this study is simply a beginning to the study of congressional behavior on skilled workers.

Looking at the legislation that was introduced and/or passed, there does not appear to be much of a pattern among the members sponsoring H-1B related bills. Across the board, they do not appear to have much in common politically, institutionally, or geographically. The Brookings Institution is currently working on putting together a data set of where H-1B visa holders have resided over time. Therefore, future studies into these members' constituencies may provide a better understanding of their motivations and perhaps a pattern may emerge among sponsors.

Additionally, as we have seen, in each year since 1997, the H-1B cap has been hit prior to the end of the fiscal year. In 2006, 2007, and 2008, the cap was hit either on the first day applications were accepted or within just a few weeks. Yet in those years, Congress failed to pass any positive legislation.

The pattern in Congress thus far has been successful legislation from 1998 to 2004 (either as stand-alone legislation or attached as riders), the introduction of stand-

⁸⁴ While in recent years, the number of undocumented immigrants (particularly Mexicans) has decreased, both the actual numbers and the perception that numbers are high remain.

alone legislation but no passage from 2006 to 2008, and then no movement at all despite constituent demands for positive change. This is likely not the end of the line for congressional behavior on the H-1B visa, particularly since the 2013 fiscal year H-1B cap was hit in June 2012, more than five months ahead of the 2012 fiscal year and closer to cap dates in the mid 2000s, indicating that demand for foreign skilled workers is up again. As such, further notice of congressional behavior will be necessary to ascertain whether Congress continues on a trajectory of non-action or if and how they attempt to address the lack of cap numbers each year.

Additionally, this study focused exclusively on positive changes to the H-1B program. To date, very little movement has been made within either chamber to negatively impact the program. If negative economic conditions continue, future research may be warranted to determine whether a spillover effect occurs on the basis of the “easy” versus “hard” issue distinction between immigration generally and skilled worker immigration to either bolster or refute the findings here.

Policy Recommendations and the Future of Policymaking

In the wake of the recent economic recession, many argue that the United States will need to open and liberalize its immigration policies to the more highly skilled workers in order to remain competitive in the global economic market, especially as many of the developed European Union states have already enacted more aggressive policies in an attempt to attract highly skilled immigrants. It remains to be seen how Congress will deal with this issue in the future, but if past policies predict the future, the future of skilled immigration to the United States appears grim indeed.

Politically, Congress will likely continue to face the same obstacles to H-1B legislation as in previous years. Politics in Congress have certainly changed. With the increase of polarization, change in the electorate resulting in Republicans increasingly becoming more fearful of their own base, the increased presence of freshmen Senators (43 after the 2010 election, compared with 30 in the 2004 election), and the disappearance of the old Senate “giants” like Ted Kennedy who could “carry 10 votes with his mere presence”, members are much more concerned with the permanent campaign and fearful of losing their seats than ever before (Milbank 2012). As a result, gridlock is more likely to continue in greater numbers.

As H-1B cap numbers are being hit earlier and earlier again, I estimate that in a matter of years Congress will seriously have to face increasing cap numbers again. In order to be successful, however, Republicans will have to disentangle H-1B legislation from broader comprehensive reform and Democrats will have to sacrifice reform in the short run. Depending on the partisan makeup and where the pivot falls, this may have to occur with a package deal including the DREAM Act or some other type of concession on the part of Republicans that falls somewhere in between the status quo and the liberal right.

In concert with increasing cap numbers, a common recommendation has been to improve higher education in the United States so that employers do not have to import highly skilled workers. Some efforts have been attempted on this front, including some H-1B government filing fees earmarked for higher education and minority education, yet they do not appear to have been very successful. A more preferable policy would be to assess the industries that currently have major shortages, including health care and IT, for

example, and provide additional training opportunities in those fields. As outlined in the analysis, a number of bills have been introduced proposing a cap exemption for employers who create scholarships for U.S. students in U.S. institutions of higher education. As we have seen, however, thus far these have been unsuccessful.

Meanwhile, throughout the world, emigration of skilled workers has risen steadily since 1970, with the greatest numbers from developing states Philippines and India, Mexico, China, North and South Korea, Vietnam, and Poland (Legrain 2006:183-184). In the United States, population decline in the highly educated and skilled sector has already begun and is projected to continue. This decline should result in an increased demand for foreign skilled workers. This supply will likely come from developing states with the institutions to educate and produce skilled workers but not the infrastructure to employ them.

Skilled migrants, however, will likely favor states with economic opportunities and immigration incentives such as Canada and throughout the European Union. As is, immigration to the United States is relatively difficult with visa opportunities limited and overly narrow. Following the hypotheses of Cornelius and Rosenblum (2005) and Schachar (2006), in order to remain competitive in the global market, the United States will need to create policies to attract the more educated and skilled migrants to the United States. A good economy and the promise of a better life alone are unlikely to continue to attract higher skilled migrants as other economically sound states such as Canada, Australia, and even states through the European Union provide actual tangible incentives for skilled immigrants. In the years ahead, congressional members will need to examine the policies created by states gaining speed on skilled immigrants in an attempt to either

provide similar or better incentives to attract the highly skilled immigrants to the United States.

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