

**COMPREHENSIVE U.S. IMMIGRATION REFORM:  
POLICY INNOVATION OR NONDECISIONS**

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## I. INTRODUCTION

On Monday, January 28, 2013, a group of eight United States (“U.S.”) senators introduced a “Bipartisan Framework for Comprehensive Immigration Reform” (“Bipartisan Framework”).<sup>1</sup> In asserting that the United States immigration system is “broken,” the senators offered a plan aimed at, *inter alia*, “creating a tough but fair legalization program for individuals who are currently here [that will] ensure that this is a successful permanent reform to our immigration system that will not need to be revisited.”<sup>2</sup> This model for immigration reform, proposed by Senators Schumer, McCain, Durbin, Graham, Menendez, Rubio, Bennet, and Flake included four “basic legislative pillars.”<sup>3</sup> The focus of this Article is one of these four legislative pillars of immigration reform: that aimed at creating “a tough but fair path to citizenship for unauthorized immigrants currently living in the United States . . . .”<sup>4</sup> This Article uses the analytical frameworks found in literature on policy innovation and nondecision making to explore whether the comprehensive immigration reform set forth in the Bipartisan Framework amounts to policy innovation or nondecision.<sup>5</sup>

According to the literature on policy innovation, policies adopted as “new” by an individual or aggregation of individuals are viewed as innovations.<sup>6</sup> The key is not whether the idea is new as measured by the interval in time since its first use or its invention; rather, it is whether the person or persons adopting the idea perceive

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<sup>1</sup> Senators Schumer, McCain, Durbin, Graham, Menendez, Rubio, Bennet, and Flake, *Bipartisan Framework for Comprehensive Immigration Reform* (Jan. 28, 2013), available at [http://www.flake.senate.gov/documents/immigration\\_reform.pdf](http://www.flake.senate.gov/documents/immigration_reform.pdf) [hereinafter *Bipartisan Framework*]. See also Julia Preston, *Senators Offer a Bipartisan Blueprint for Immigration*, N.Y. TIMES (Jan. 28, 2013), [http://www.nytimes.com/2013/01/28/us/politics/senators-agree-on-blueprint-for-immigration.html?\\_r=0](http://www.nytimes.com/2013/01/28/us/politics/senators-agree-on-blueprint-for-immigration.html?_r=0).

<sup>2</sup> *Bipartisan Framework*, *supra* note 1 at 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See generally Lawrence B. Mohr, *Determinants of Innovation in Organizations*, 63 AM. POL. SCI. REV. 111 (1969) (discussing policy innovation); Peter Bachrach & Morton S. Baratz, *Decisions and Nondecisions: An Analytical Framework*, 57 AM. POL. SCI. REV. 632 (1963) (discussing nondecisions).

<sup>6</sup> See generally EVERETT M. ROGERS, *DIFFUSIONS OF INNOVATION* 12 (5th ed. 2003).

it or deem it as new. In the particular context of immigration law, policy innovation refers to the adoption of problem-solving approaches that depart from traditional legislative approaches regarding regulation of immigration.<sup>7</sup>

The argument in this Article is that the Bipartisan Framework's plan to create a pathway to citizenship for unauthorized immigrants will not amount to policy innovation, but will instead reflect nondecisions by Congress resulting from the contentious nature of immigration reform and the resulting electoral stakes involved. Nondecisions are the absence of substantive decision making outputs that, in the context of legislation, result from a concerted effort by policy gatekeepers to keep "really pressing problems inherent in post-industrial American democracy off the political agenda by controlling what [is], and what [is] not, 'legitimate' to raise in government fora."<sup>8</sup> The nature of nondecisions in the legislative arena has been adequately characterized by Francis Lee, a professor of government and politics at the University of Maryland, who stated the following:

Nondecisions occur in congressional agenda setting when rank and file members willingly acquiesce in party leaders' authority or in legislative strategies developed in consultation with fellow partisans. Nondecisions also occur when members adjust their own actions in anticipation of what their party leaders and fellow partisans will support. These nondecisions take place for a variety of reasons, including members' electoral stakes in their parties' collective policy performance, their individual desires to move up through their party's ranks by "going along to get along," their susceptibility to peer-group pressures exerted by fellow partisans, and their inclination to support the party line as a default position in the absence of contrary inclinations.<sup>9</sup>

This Article argues that genuine reform of the United States immigration system will require a distinct departure from current and past U.S. immigration policies in order for such policies to be

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<sup>7</sup> *Id.*

<sup>8</sup> A. E. Keir Nash, In Re *Radical Interpretations of American Law: The Relation of Law and History*, 82 MICH. L. REV. 274, 324-25 (1983).

<sup>9</sup> Francis Lee, *Agreeing to Disagree: Agenda Content and Senate Partisanship, 1981-2004*, 33 LEGIS. STUD. Q. 199, 201-02 (2008) (internal quotations omitted).

innovative. Reform will require an approach that abandons old policies and introduces a new and improved course of action. Analyzed through this lens, it is clear that this portion of the Bipartisan Framework suggests that Congress will restate and revisit past Congressional policies, some of which remain in effect as codified in various sections of the federal law. Overall, this signals that Congress will promulgate policies cloaked in reform-oriented propaganda, but that are in reality nondecisions reflecting the strong degree of electoral uncertainty resulting from the polarizing nature of immigration policy. Such nondecisions are a means to avoid the potential pitfalls and risks of adopting true policy innovation while still maintaining the outward appearance of lawmaking.

The next section of this Article discusses the literature on policy innovation and nondecisions in the context of immigration policymaking. From there, the six major elements of the first pillar of the Bipartisan Framework, which relate to a pathway to citizenship for unauthorized immigrants already presented in the United States, are analyzed. After listing the six elements of the first pillar of the Bipartisan Framework, each element is analyzed by discussing how federal law already approaches or has historically approached addressing the stated legislative goal. This Article argues that the proposed plan suggests Congress will not innovate by adopting new immigration policies that are a departure from current immigration policies. Rather, the Bipartisan Framework suggests that Congress will restate and revisit immigration policies that are presently codified in various sections of federal law. This Article argues that the failure to adopt substantively new approaches towards regulating unauthorized immigration is a reflection of nondecision making by Congress.

## II. THE UTILITY OF THE LITERATURE ON POLICY INNOVATION AND NONDECISIONS FOR ANALYZING PROPOSED IMMIGRATION REFORM

Lawrence Mohr, Professor Emeritus of political science and public policy at University of Michigan, in a seminal work on policy innovation, states that innovation can be measured by the extent to which actors “adopt and emphasize programs that depart from traditional concerns.”<sup>10</sup> According to Mohr, the concept of innovation

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<sup>10</sup> Mohr, *supra* note 5, at 111.

is defined as “the successful introduction into an applied situation of means or ends that are *new* to that situation.”<sup>11</sup> Mohr argues that innovation tends to be a function of three major factors: (1) the motivation to innovate, (2) the strength of obstacles against innovation, and (3) the availability of resources for overcoming such obstacles.<sup>12</sup> Frances Stokes Berry and William D. Berry, two of the leading scholars in the field of policy innovation, likewise point out several factors that influence policy innovation.<sup>13</sup> According to Berry and Berry, social, political, and economic factors, as well as internal organizational factors, can affect whether decisionmakers ultimately decide to innovate or maintain the status quo.<sup>14</sup>

The framework set forth by Mohr, Berry, and Berry can be used to explain the lack of federal immigration policy innovation. The following section sets forth a number of examples to support this argument and to illustrate how the presence of these factors will impede congressional immigration initiatives and result in nondecisions.

Nondecision making in the lawmaking process is the antithesis to policy innovation. The literature on nondecision making is an outgrowth of the seminal work of Peter Bachrach and Morton S. Baratz, which focuses on the nature of community power and the characteristics of decision making versus nondecision making.<sup>15</sup> While many scholars have employed Bachrach and Baratz’s analysis to investigate agenda control and decision making in various contexts, this line of literature is sorely understudied and underemployed as a research paradigm in the legal academic field— particularly in law review articles.<sup>16</sup> This Article seeks to utilize the discourse on nondecisions and policy innovation in the context of lawmaking, and

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<sup>11</sup> *Id.* at 112 (emphasis added).

<sup>12</sup> *Id.* at 114.

<sup>13</sup> See generally Frances Stokes Berry & William D. Berry, *State Lottery Adoptions as Policy Innovations: An Event History Analysis*, 84 AM. POL. SCI. REV. 395 (1990).

<sup>14</sup> *Id.* at 396.

<sup>15</sup> Bachrach & Baratz, *supra* note 5 at 632-42.

<sup>16</sup> To be sure, however, there are a handful of law review articles employing Bachrach and Baratz’s nondecision paradigm. See, e.g., Ascanio Piomelli, *Foucault’s Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395, 402 (2004); Murray Edelman, *The Construction of Social Problems as Buttresses of Inequalities*, 42 U. MIAMI L. REV. 7, 28 (1987); Yoav Dotan, *Campaign Finance and the Social Inequality Paradox*, 37 U. MICH. J.L. REFORM 955,1016 (2003-2004).

to demonstrate its utility for understanding how critical decisions in the lawmaking realm are influenced by this paradigm.

One piece of scholarship that does employ the literature on policy innovation to examine the role of law and courts in promoting innovation is Mark Kessler's article on legal mobilization for social reform.<sup>17</sup> Kessler finds that, by manipulating judicial agendas, specialized interests are able to effectively constrain the voices of policy innovation advocates, such as poverty lawyers seeking to mobilize issues of social reform.<sup>18</sup> Kessler also notes that legal advocates who pressed for innovative changes in policies aimed at helping the poor were labeled with social stigmas (e.g., "unpatriotic," "radical," "rabble rousers," "trouble makers," etc.).<sup>19</sup> Such stigmas undermined these attorneys' willingness to effectuate change and ultimately resulted in nondecisions.<sup>20</sup> Kessler points out that advocates for change "had no alternative sources of support enabling them to resist efforts by powerful local interests to prevent reform issues from reaching court agendas."<sup>21</sup> Much like policies aimed at helping the poor, rhetoric surrounding immigration reform is so polarizing that lawmakers find it more prudent to maintain the status quo rather than to innovate, in order to avoid the possible electoral implications attached to supporting immigration reform. Indeed, the discourse on reform is laden with propaganda that aims to stigmatize those who advocate for reform.

The polarizing nature of immigration reform was illustrated in a 2007 *New York Times* article that featured comments by several newly elected senators regarding immigration reform.<sup>22</sup> For example, Senator Jon Tester, Democrat from Montana, stated that opposition to a 2007 immigration reform bill came from his constituents of all political leanings: "I do hear from my constituents, and I have to tell

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<sup>17</sup> Mark Kessler, *Legal Mobilization for Social Reform: Power and the Politics of Agenda Setting*, 24 *LAW & SOC'Y REV.* 121, 143 (1990).

<sup>18</sup> *Id.* at 114. Mohr makes a similar argument in his discussion of obstacles against innovation. See Mohr, *supra* note 5 at 114.

<sup>19</sup> *Id.* at 135.

<sup>20</sup> *Id.* See also, Mohr, *supra* note 5 at 114 (discussing motivation, or lack thereof, to innovate).

<sup>21</sup> Kessler, *supra* note 17, at 138. Mohr makes a similar argument that a lack of resources often poses an obstacle to innovation. See Mohr, *supra* note 5 at 114.

<sup>22</sup> Carl Hulse, *New Senators Resist Overhaul of Immigration*, *N.Y. TIMES* (June 28, 2007). <http://www.nytimes.com/2007/06/28/washington/28dems.html>.

you it is overwhelmingly do not touch [immigration reform].”<sup>23</sup> Joining in Senator Tester’s reluctance to support the 2007 immigration bill was Senator Claire McCaskill, Democrat from Missouri, who described her constituents’ response to the 2007 bill as “‘adamantly opposed’ to the legislation.”<sup>24</sup> As evidenced by these legislators’ statements, robust constituency disfavor towards immigration innovation was an obstacle that weakened motivation to adopt immigration policy reform.

Fast-forwarding to the immigration reform debate on Capitol Hill in 2013, not much, if anything, has changed. Despite the fact that the Senate passed the Bipartisan Framework as the Border Security, Economic Opportunity and Immigration Modernization Act in June of 2013,<sup>25</sup> later that same year the legislation remained mired in the web of Capitol Hill partisan politics— in particular, in the U.S. House of Representatives.<sup>26</sup>

In addition, President Barack Obama opined that blame for this lack of action on immigration reform is on internal Republican caucus politics.<sup>27</sup> It is noteworthy, however, that the arguments of lawmakers opposed to the 2013 immigration reform sound strikingly similar to those made during the 2007 debates. For example, Representative Steve King of Iowa characterized the battle over immigration reform as an issue of respect for U.S. law.<sup>28</sup> In an interview on *Meet the Press*, King said, “I’ve spent time at the state fair, at the Family Leadership Summit yesterday; I’ve been all over my district in Iowa, which is 39 of the 99 counties. It is a universal message that says, ‘Hold your ground. Keep telling the truth. Defend

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<sup>23</sup> *Id.*

<sup>24</sup> Alexander Bolton, *Conservatives: Public backlash to immigration reform is coming*, THE HILL (June 1, 2013), <http://thehill.com/homenews/senate/302893-conservatives-say-big-public-backlash-to-immigration-reform-is-coming>.

<sup>25</sup> S. 744, 113th Cong. (2013).

<sup>26</sup> Ashley Parker, *Republicans in House Resist Overhaul for Immigration*, N.Y. TIMES (July 10, 2013), <http://www.nytimes.com/2013/07/11/us/politics/gop-in-house-resists-overhaul-for-immigration.html>.

<sup>27</sup> Ben Shapiro, *Obama Blames Internal Republican Politics for Immigration Reform Slowdown*, BREITBART (Aug. 9, 2013), <http://www.breitbart.com/Big-Government/2013/08/09/Obama-Blames-Internal-Republican-Caucus-Politics-for-Immigration-Reform-Slowdown>.

<sup>28</sup> *Id.*

the rule of law and defend the Constitution.”<sup>29</sup> Many Republican members in the House of Representatives “represent conservative congressional districts and are not convinced that immigration reform represents good policy or good politics.”<sup>30</sup> As a result of the fear that a critical mass of Congressional Republicans, as well as centrist Democrats, have of alienating their conservative voting base, many legislators have little or no motivation to promulgate innovative immigration reform.<sup>31</sup> Steven Camarota, Director of research for the Center for Immigration Studies, summarized this position by stating, “the Republicans don’t have that much incentive to deal with [immigration reform].”<sup>32</sup>

Berry and Berry’s thesis that social, political, and economic factors affect innovation is similarly applicable in the context of immigration reform.<sup>33</sup> An investigation by Heather Creek and Stephen Yoder on local level efforts to address immigration enforcement illustrates how the factors identified by Berry and Berry come into play in the immigration policy arena.<sup>34</sup> Although the policies studied by Creek and Yoder are local in scope, they are similar in nature to the federal immigration policy reform studied in this Article because they deal with the contentious issue of immigration policies aimed at regulating the presence of persons unlawfully present in the United States.<sup>35</sup>

Creek and Yoder find there are a number of key social, political and economic factors that underlie whether a local government chooses to adopt Memorandum of Agreement (“MOA”) with the

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<sup>29</sup> Steve King, *NBC “Meet the Press” - Transcript: Immigration*, VOTESMART (Aug. 11, 2013), [http://votesmart.org/public-statement/802929/nbc-meet-the-press-transcript-immigration#.UmCLR\\_Mo7cs](http://votesmart.org/public-statement/802929/nbc-meet-the-press-transcript-immigration#.UmCLR_Mo7cs).

<sup>30</sup> Dan Nowicki, *Time Running Out for Immigration Reform*, USA TODAY (Oct. 20, 2013), [http://www.usatoday.com/story/news/nation/2013/10/20/hopes-dim-for-immigration-reform/3062199/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+usatoday-NewsTopStories+\(USATODAY++News+Top+Stories\)](http://www.usatoday.com/story/news/nation/2013/10/20/hopes-dim-for-immigration-reform/3062199/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+usatoday-NewsTopStories+(USATODAY++News+Top+Stories)).

<sup>31</sup> See *Mohr*, *supra* note 5 at 114.

<sup>32</sup> *Nowicki*, *supra* note 30.

<sup>33</sup> See *Berry & Berry*, *supra* note 14.

<sup>34</sup> See Heather M. Creek & Stephen Yoder, *With a Little Help from Our Feds: Understanding State Immigration Enforcement Policy Adoption in American Federalism*, 40 POL’Y STUD. J. 674 (2012).

<sup>35</sup> See generally *id.*



United States Immigration and Customs Enforcement (“ICE”) agency under § 287(g) of the Illegal Immigration Reform and Immigrant Responsibility Act, which authorizes states to enforce criminal immigration laws.<sup>36</sup> First, Creek and Yoder find that the political leadership of a state has a correlation to the adoption of MOAs.<sup>37</sup> In particular, states with Republican governors are more likely to adopt an MOA allowing local law enforcement to assist ICE in detaining violators of national immigration law.<sup>38</sup> As far as social variables, Creek and Yoder find that an increase in a state’s Hispanic population from one year to the next is related to a decrease in the likelihood of MOA adoption in the following year.<sup>39</sup> With regard to economic factors, Creek and Yoder find that states exerting more budgetary effort on public welfare are more likely to adopt an MOA; in other words, if there is a perception that “immigrants are driving up the expenditures on public welfare, then state elites will enact legislation intended to reduce that draw on the state budget.”<sup>40</sup>

Apart from those identified by Creek and Yoder, other economic and social factors have been believed to bear on the immigration reform discourse. One such additional economic factor that has been identified to affect immigration reform is the weak state of the U.S. economy.<sup>41</sup> With the U.S. economy in a state of recession and unemployment rates rising, American workers may fear that unauthorized immigrants will compete with them for jobs, driving down wages for labor and depleting new positions created by the taxpayer-funded stimulus plan.<sup>42</sup> Another social factor affecting decisions regarding immigration policy is a significant visible increase in the Latino population in locales that have not historically had significant populations of such persons.<sup>43</sup> The tension that can result

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<sup>36</sup> 8 U.S.C. § 1357(g).

<sup>37</sup> *Creek & Yoder, supra* note 34, at 680.

<sup>38</sup> *Id.*

<sup>39</sup> *Creek & Yoder, supra* note 34 at 684.

<sup>40</sup> *Id.* at 685.

<sup>41</sup> Moira Herbst, *Immigration Amid a Recession*, BUS. WK. (May 8, 2009), [http://www.businessweek.com/bwdaily/dnflash/content/may2009/db2009058\\_701427.htm](http://www.businessweek.com/bwdaily/dnflash/content/may2009/db2009058_701427.htm).

<sup>42</sup> *See id.*; *see also* Victoria M. Esses, et al., *The Immigration Dilemma: The Role of Perceived Group Competition, Ethnic Prejudice, and National Identity*, 57 J. SOC. ISSUES 389, 412 (2001).

<sup>43</sup> *See, e.g.*, Rene Rocha & Rodolfo Espino, *Racial Threat, Residential Segregation, and*

from an increase in racial and ethnic minority populations in traditionally homogenous white communities can be explained by the racial threat hypothesis, under which it is believed that high concentrations of minority populations becomes a threat to a larger group's economic and social privilege.<sup>44</sup> In addition, some believe that an increase in the unauthorized immigrant population is accompanied by a spike in the crime rate.<sup>45</sup> An additional political factor hindering immigration policy innovation is divided government, as illustrated by the case of the 2013 debate on immigration policy reform. In Congress, Republicans control the U.S. House of Representatives, and the Democrats, by a small margin, control the Senate.<sup>46</sup> As evidenced by the federal government shutdown of October 2013 and the acrimonious dialogue between the two political parties, it comes as no surprise that Congress has been unable to agree on innovative immigration reform policies.

Francis Lee's analysis of patterns of legislative conflict between the 1980s and the first decade of the twenty-first century has significant utility for understanding the effect divided government has on immigration policy reform. Lee finds that changes of the legislative agenda in the past two decades is to blame for the rise of legislative conflict.<sup>47</sup> According to Lee,

The types of issues that were most divisive along partisan lines in earlier periods became progressively more prominent on the congressional agenda. Meanwhile, issues that tended to divide the parties internally in earlier periods became a smaller proportion of the agenda. In short, the content of the Senate agenda was altered in ways that facilitated higher levels of partisan voting.<sup>48</sup>

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*the Policy Attitudes of Anglos*, 62 POL. RES. Q. 415, 416 (2009); Paul McClain, et. al., *Racial Distancing in a Southern City: Latino Immigrants' Views of Black Americans*, 68 J. POL. 571, 584 (2006).

<sup>44</sup> *Rocha & Espino*, *supra* note 43, at 415.

<sup>45</sup> Randal C. Archibold, *On Border Violence, Truth Pales Compared to Ideas*, N.Y. TIMES (June 19, 2010), [http://www.nytimes.com/2010/06/20/us/20crime.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/06/20/us/20crime.html?pagewanted=all&_r=0).

<sup>46</sup> See *Composition of Congress, by Political Party, 1855-2015*, INFOPLEASE, <http://www.infoplease.com/ipa/A0774721.html> (last visited Apr. 9, 2014).

<sup>46</sup> Lee, *supra* note 9, at 200.

<sup>47</sup> Lee, *supra* note 9, at 200.

<sup>48</sup> *Id.* at 200.

Lee argues that such internal consensus building on issues often results in nondecision making.<sup>49</sup> According to Lee, “although this behind-the-scenes collaboration and consensus building is not visible using the methods that empirical social scientists typically use, nondecisions profoundly shape the legislative agenda, biasing the legislative agenda toward issues that unify the parties internally while distinguishing the parties from one another.”<sup>50</sup>

The next section of this Article will identify six major elements to the first pillar of the Bipartisan Framework, which relates to a pathway to citizenship for unauthorized immigrants already present in the United States. The Article will then analyze how federal law already approaches or has historically approached the legislative goal aimed of each element. The Article will also assess whether the Bipartisan Framework proposes a substantively new approach towards regulating unauthorized immigration, or one that is merely a manifestation of nondecision making.

*A. Pillar Number One— A Path to Citizenship for Unauthorized Immigrants*

Pillar number one of the Bipartisan Framework, as it relates to a path to citizenship for unauthorized immigrants, includes six major elements, which are as follows:

- (1) Requiring those who came or remained in the United States without Congressional permission to register with the government;
- (2) Requiring unauthorized immigrants to pass a background check and settle their debts to society by paying a fine and back taxes in order to earn probationary legal status, which will allow them to live and work legally in the United States;
- (3) Providing that individuals with a serious criminal background or others who pose a threat to national security will be ineligible for legal status and subject to deportation;
- (4) Providing that illegal immigrants who have committed serious crimes face immediate deportation;
- (5) Requiring individuals with probationary legal status to go to the back of the line of prospective immigrants, pass an additional

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<sup>49</sup> *Id.* at 217.

<sup>50</sup> *Id.*

background check, pay taxes, learn English and civics, demonstrate a history of work in the United States, and current employment, among other requirements, in order to earn the opportunity to apply for and earn lawful permanent residency;

(6) Providing that individuals who are present without lawful status— not including certain childhood entrants and certain agricultural workers— will only receive a green card after every individual who is already waiting in line for a green card, at the time this legislation is enacted, has received their green card.<sup>51</sup>

These six elements were likely a result of a compromise in which the proposal's Democratic authors bargained for a pathway to legalization for an estimated 11 million undocumented aliens presently in the United States, in exchange for tighter border security and penalties for those unlawfully present sought by Republican party sponsors.<sup>52</sup> According to a *New York Times* article published simultaneously to the publication's release of the Bipartisan Frameworks' details, senate Democrats stated that while they were flexible in seeking the bill, "there's a bottom line, and that's a path to citizenship for the 11 or so million people who qualify."<sup>53</sup> Preston, the author of the *Times* article, described the proposal as an attempt to "address the failings of the immigration system in one comprehensive measure, rather than in smaller pieces, and to offer a 'tough, fair and practical road map' that would eventually lead to a chance at citizenship for nearly all of the immigrants [in the United States] illegally."<sup>54</sup> Notably, the proposal was released one day before President Barack Obama's anticipated release of his administration's proposal for immigration reform.<sup>55</sup>

#### 1. Element One— Registration Requirement

The Bipartisan Framework sets forth a plan to "require persons who came or remained in the United States without Congressional permission to register with the government."<sup>56</sup> In other words,

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<sup>51</sup> *Bipartisan Framework*, *supra* note 1 at 1-3.

<sup>52</sup> *See Preston*, *supra* note 2.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* (noting the date of President Obama's proposal for immigration reform, January 29, 2013).

<sup>56</sup> *Bipartisan Framework*, *supra* note 1 at 2.

persons who have entered without inspection (that is, without being “admitted”),<sup>57</sup> or who have overstayed the terms of their admission (“visa overstayers”),<sup>58</sup> would be required to affirmatively identify their unlawful presence in the United States through some type of document. This proposed registration requirement, however, is not a novel idea. Federal law already requires all aliens to register their presence in the United States.<sup>59</sup> The Immigration and Nationality Act (“INA”), which requires every alien in the United States who is fourteen years of age or older and remains in the United States for thirty days or longer to apply for registration and be fingerprinted before the expiration of that thirty days, is applicable to aliens who have not been admitted into the country.<sup>60</sup> Under the INA, willful failure to register carries a fine up to \$1000 and/or imprisonment for a term of no more than six months.<sup>61</sup>

Further, the issuance of entry documents, found in Part III of the INA, mandates that every alien who applies for a visa “be registered in connection with his application.”<sup>62</sup> In addition, “no visa shall be issued to any alien seeking to enter the United States until such alien has been registered in accordance with section 1201(b)” of the INA.<sup>63</sup> With the advent of this registration requirement, the U.S. government has mandated that non-immigrants complete the Form I-94 (or I-94W for visa waiver entrants).<sup>64</sup> This I-94 form records (1) the date and place of entry of the alien into the United States, (2) activities in which the alien intends to be engaged, and (3) the length

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<sup>57</sup> See 8 U.S.C. § 1101 (a)(13) (2013) (defining the term “admitted” as “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer”).

<sup>58</sup> See 8 U.S.C.A. § 1182 (a)(9)(B)(2) (providing that an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of authorized stay).

<sup>59</sup> 8 U.S.C. § 1302(a) (2010).

<sup>60</sup> *Id.* There is a corresponding requirement that parents register their children under 14 years of age. 8 U.S.C. § 1302(b).

<sup>61</sup> 8 U.S.C. § 1306(a).

<sup>62</sup> 8 U.S.C. § 1201 (2010).

<sup>63</sup> 8 U.S.C. § 1301 (2010).

<sup>64</sup> See *I-94 Automation*, U.S. CUSTOMS AND BORDER CONTROL, (last updated Mar. 2013) [http://www.cbp.gov/linkhandler/cgov/newsroom/fact\\_sheets/travel/i94\\_factsheet.ctt/i94\\_factsheet.pdf](http://www.cbp.gov/linkhandler/cgov/newsroom/fact_sheets/travel/i94_factsheet.ctt/i94_factsheet.pdf).

of time the alien is authorized to remain in the United States.<sup>65</sup> In the case of an alien who enters the United States with inspection, but overstays the terms of his or her visa, federal law similarly provides a scheme in which these persons must be registered.<sup>66</sup> Thus, existing federal law evidences that Congress has already articulated its policy stance that persons who “came or remained in the United States without Congressional permission” must register with the government.<sup>67</sup> On this point, the Bipartisan Framework simply restates current law, and does not propose a substantively new approach.

## 2. Element Two— Background Checks, Fines, and Back Taxes

The second element of the first pillar of the Bipartisan Framework is a proposed requirement that unauthorized immigrants pass a background check, and pay a fine and back taxes in order to earn probationary legal status allowing that a person to live and work legally in the United States.<sup>68</sup> However, federal law already requires non-citizens to undergo background checks in order to obtain immigration benefits such as “lawfully present” status.<sup>69</sup>

Since the September 11, 2001, terrorist attacks on American soil, the U.S. government (largely through the creation of the Department of Homeland Security), has increased its usage of background checks to screen applicants for immigration benefits.<sup>70</sup> According to the United States Citizenship and Immigration Services (“USCIS”), a government entity “responsible for ensuring that [the U.S.] immigration system is not used as a vehicle to harm our nation or its citizens by screening out people who seek immigration benefits

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<sup>65</sup> 8 U.S.C. § 1304(a) (1996).

<sup>66</sup> Such an alien is a “non-immigrant” because an immigrant visa holder cannot, by definition, “overstay.” See 8 U.S.C. §1101(a)(15)(A)-(V) (2010) *et. seq.* (listing the various classes of non-immigrants).

<sup>67</sup> *Bipartisan Framework*, *supra* note 1 at 2.

<sup>68</sup> *See id.*

<sup>69</sup> See 8 CFR §103.16; 8 CFR §240.67. See also U.S. CITIZEN AND IMMIGRATION SERVS., IMMIGRATION SECURITY CHECKS—HOW AND WHY THE PROCESS WORKS I (2006) [hereinafter “IMMIGRATION SECURITY CHECKS”], available at [http://www.uscis.gov/sites/default/files/files/pressrelease/security\\_checks\\_42506.pdf](http://www.uscis.gov/sites/default/files/files/pressrelease/security_checks_42506.pdf).

<sup>70</sup> See IMMIGRATION SECURITY CHECKS, *supra* note 68, at 1.

improperly or fraudulently,” background checks are done “to enhance national security and ensure the integrity of the immigration process.”<sup>71</sup> The USCIS has established a background security check process aimed at identifying risk factors that may affect an immigrant’s eligibility for an immigration benefit.<sup>72</sup> In general, USCIS uses three types of background check procedures and retains the prerogative to conduct other background investigations as needed.<sup>73</sup> The background check procedures include (1) the Interagency Border Inspection System Name Check, (2) FBI Fingerprint Check, and (3) FBI Name Checks.<sup>74</sup> Also part and parcel of the government’s existing background check process is the requirement that persons seeking certain immigrant benefits complete the Form G-325A.<sup>75</sup> This form facilitates the government’s construction of the applicant’s biographical history and provides the data needed to conduct a thorough background check.<sup>76</sup> Given that there is already a legal mandate for immigration background checks, the Bipartisan Framework proposes to restate current law and does not offer a substantively new approach.

The Bipartisan Framework’s proposal that persons unlawfully present in the United States first attain “probationary legal status” is also not a novel approach. Under the Immigration and Reform Control Act (“IRCA”),<sup>77</sup> a similarly reform-oriented piece of legislation signed into law by President Ronald Reagan in 1986, an alien first has to acquire “lawful temporary resident” (“LTR”) status before he or she can acquire lawful permanent resident status.<sup>78</sup> Also,

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 2.

<sup>73</sup> *Id.*

<sup>74</sup> *See id.*

<sup>75</sup> 8 CFR § 103.16 (providing the regulatory basis for requiring the Form G-325A for certain applications).

<sup>76</sup> *See* IMMIGRATION SECURITY CHECKS, *supra* note 68, at 1.

<sup>77</sup> Pub. L. No. 99-603, 100 Stat. 3359 (1986) [hereinafter “IRCA”] (amending scattered sections of 8 U.S.C.).

<sup>78</sup> IRCA § 245A (codified at § 8 USC 1255a). It is worth noting that the Bipartisan Framework uses the term “probationary legal status” rather than “lawful temporary resident.” It remains to be seen whether the Bipartisan Framework’s “probationary legal status” and all of its inner workings will be tantamount to IRCA’s LTR status. 80 Pub. L. No. 103-317, 108 Stat. 1724 (Aug. 26, 1994) (codified at 8 U.S.C. § 1255(i) (1994)).

the concept of a paying a fine before a person unlawfully present in the United States can embark upon the pathway to lawfully present status is in fact not entirely new. In 1994, Congress enacted Section 245(i) of the Immigration and Nationality Act (“INA”).<sup>79</sup> This provision allowed applicants who were otherwise ineligible under Section 245, such as by reason of having entered the United States without inspection,<sup>80</sup> to remain in the United States while completing the process of adjusting their status to lawful permanent resident instead of having to leave the country to complete consular processing.<sup>81</sup> A major hallmark of this provision was the requirement that the applicant pay a monetary penalty in return for the right to remain in the country while completing the adjustment process.<sup>82</sup> While Congress extended eligibility for 245(i) adjustment of status benefits when it passed the Legal Immigration Family Equity (“LIFE”) Act and LIFE Act Amendments,<sup>83</sup> it nevertheless retained the penalty structure.<sup>84</sup> Today, eligible applicants are required to pay a one thousand dollar penalty along with their submission of Form I-485, Supplement A.<sup>85</sup> In light of the penalty structure put in place by previous adjustment of status legislation, it is apparent that the Bipartisan Framework’s fine requirement restates current immigration policy and does not offer a substantively new approach.

Some argue that the Bipartisan Framework nevertheless contains a tougher stance than IRCA.<sup>86</sup> For example, IRCA does not require undocumented immigrants to pay back taxes to attain lawful temporary resident status.<sup>87</sup> Thus, the Bipartisan Framework’s proposal that undocumented immigrants pay back taxes before they

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<sup>79</sup> Pub. L. No. 103-317, 108 Stat. 1724 (Aug. 26, 1994) (codified at 8 U.S.C. § 1255(i) (1994)).

<sup>80</sup> 8 U.S.C. § 1255(a).

<sup>81</sup> 8 U.S.C. § 1255(i).

<sup>82</sup> *Id.*

<sup>83</sup> Pub. L. No. 106-553, 114 Stat. 2762 (2000).

<sup>84</sup> *See* 8 U.S.C. § 1255(i).

<sup>85</sup> 8 U.S.C. § 1255(i)(1)(C); 8 C.F.R. § 245.10(b).

<sup>86</sup> *See, e.g.,* Ryan Teague Beckwith, *Immigration plan: How 1986 amnesty compares to Senate proposal*, DENVER POST (Jan. 29, 2013) available at <http://www.marini.com/politics-national/2013/01/immigration-plan-how-1986-amnesty-compares-to-senate-proposal>.

<sup>87</sup> However, the process of applying for LTR status does require the applicant to pay a fee. *See* 8 C.F.R. § 245a.2(e)(3).



may attain lawful status is an admittedly novel reform. However, while it may be the case that the Bipartisan Framework's back taxes requirement is novel, it is nonetheless problematic and paradoxical in several ways. First, it presumes that an unlawfully present person who seeks to attain legal status has earned taxable income in the past. However, the INA makes it unlawful for any person who is an "unauthorized alien" to be, *inter alia*, hired for purposes of employment and thus paid wages.<sup>88</sup> Assuming the unlawfully employed alien has not acquired an Individual Taxpayer Identification Number and complied with the federal income tax filing guidelines, the government would require evidence that taxable wages have been paid to an alien employee and not reported (i.e., paid "under the table"). To achieve this goal, either the alien would have to self-identify and report taxable income earned but not reported to the federal government (potentially exposing the employer to civil and criminal penalties under INA Section 274A<sup>89</sup>, as well as I-9 raids), or the employer would have to report to the federal government its own unlawful employment practices. Thus, while the Bipartisan Framework admittedly contains a substantive reform with this particular proposal, it creates a paradoxical and infeasible goal.

3. Elements Three and Four— Deportation and Lack of Eligibility for Legal Status of Individuals with Serious Criminal Backgrounds and Those Who Pose a Threat to National Security

Element three of the Bipartisan Framework, dealing with deportation, and element four, dealing with lack of eligibility for legal status, although bifurcated in the report, should be analyzed as a single element because under the INA, individuals adjudged ineligible for legal status in the United States are typically deemed deportable as well.<sup>90</sup> Elements three and four of the Bipartisan Framework propose to make individuals who have serious criminal backgrounds or who pose a threat to the national security of the United States ineligible for legal status and subject to deportation.<sup>91</sup>

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<sup>88</sup> 8 U.S.C. §1324(a)(1)(A) (2005).

<sup>89</sup> 8 U.S.C. § 1324a.

<sup>90</sup> See 8 U.S.C. §1229(a) (2006).

<sup>91</sup> See Bipartisan Framework, *supra* note 1 at 2.

What is particularly striking about these proposals is that they imply that the law is currently silent or incapable of addressing the concerns underlying these elements. However, a current reading of the law regarding the grounds upon which a non-citizen can be deported from the United States reveals that this is not the case. Section 237(a)(2) of the INA currently lists various grounds for deportation, including a host of “serious crimes”, as well as some lesser crimes, such as multiple criminal convictions, commission of an aggravated felony, failure to register as a sex offender, controlled substances violations, crimes of domestic violence, and crimes relating to espionage, sabotage, treason, and sedition.<sup>92</sup> Further, section 237(a)(4) of the INA 237(a)(4) lists national security-related grounds of deportation, such as espionage, sabotage, and any other criminal activity that endangers public safety or national security.<sup>93</sup> This section also makes deportable “any alien whose presence or activities in the United States . . . would have potentially serious adverse foreign policy consequences for the United States.”<sup>94</sup> Thus, on these issues, the Bipartisan Framework does not propose substantive policy reform. On the contrary, the plan simply restates the current statutory approach.

#### 4. Element Five— Probationary Legal Status Requirements

The Bipartisan Framework appears to propose a two-step process for unauthorized immigrants currently living in the United States to attain legal status. The first step would require such individuals to attain a type of probationary legal status referred to as “registered provisional immigrant” status.<sup>95</sup> Presumably, it is the holders of this status who would be required to “go to the back of the line of prospective immigrants, pass an additional background check, pay taxes, learn English and civics, demonstrate a history of work in the United States, and current employment, among other requirements,” and only when the applicant satisfies these requirements may he or she attain lawful permanent resident status.<sup>96</sup> Overall, this portion of

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<sup>92</sup> 8 U.S.C. § 1227(a)(2) (2000).

<sup>93</sup> 8 U.S.C. § 1227(a)(4).

<sup>94</sup> 8 U.S.C. § 1227(a)(4)(C)(i).

<sup>95</sup> See S.744 § 2101.

<sup>96</sup> Bipartisan Framework, *supra* note 1 at 2.

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the Bipartisan Framework suggests a construct that mirrors the legalization requirements of IRCA and its regulations, which set forth requirements by which a person having lawful temporary resident status could adjust to permanent resident status.<sup>97</sup> The following table highlights the similarities between IRCA and the Bipartisan Framework in obtaining legal status.

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<sup>97</sup> See 8 C.F.R. § 245a.3.

Table 1: Similarities between 1986 IRCA and  
2013 Bipartisan Framework

IRCA 1986	Bipartisan Framework 2013 Proposals
Required proof that the applicant had not been convicted of any felony, or three or more misdemeanors. <sup>98</sup>	Applicant must undergo additional background check. <sup>99</sup>
Required applicant to demonstrate minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States. <sup>100</sup>	Applicant must learn English and civics. <sup>101</sup>
Required applicants to “stand in line.” <sup>102</sup>	Applicants must go to the “back of the line of prospective immigrants.” <sup>103</sup>
An applicant who had a consistent employment history which showed the ability to support himself or herself even though his or her income was below the poverty level was deemed not excludable. <sup>104</sup>	Applicant must have a history of employment. <sup>105</sup>
An applicant was not required to pay taxes.	Applicant must pay taxes. <sup>106</sup>

As shown in the above table, both the Bipartisan Framework and

<sup>98</sup> 8 C.F.R. § 245a.3(b)(3).

<sup>99</sup> Bipartisan Framework, *supra* note 1 at 2.

<sup>100</sup> 8 C.F.R. § 245a.3(b)(4)(i)(A).

<sup>101</sup> Bipartisan Framework, *supra* note 1 at 2.

<sup>102</sup> 8 C.F.R. § 245a.3(a)(1) (providing that an alien could not adjust to permanent residency until granted LTR status).

<sup>103</sup> Bipartisan Framework, *supra* note 1 at 2.

<sup>104</sup> 8 C.F.R. § 245a.3(g)(4)(iii).

<sup>105</sup> Bipartisan Framework, *supra* note 1 at 2.

<sup>106</sup> *Id.*

IRCA require vetting of an applicant's background to demonstrate that the applicant has not been convicted of any felony, or three or more misdemeanors. The Bipartisan Framework proposes that applicants must learn English and civics. Similarly, IRCA required applicants to demonstrate minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States. The employment history of an applicant is also considered under both the Bipartisan Framework and the IRCA. The Bipartisan Framework proposes that an applicant must have a history of employment. Under IRCA, applicants who could show a consistent employment history that demonstrated an ability to support themselves, even though their income was below the poverty level, were deemed not excludable as a public charge.<sup>107</sup>

5. Element Six— Unlawfully Present Persons Must Go to the End of the Line and Wait

While the IRCA and the Bipartisan Framework adhere to the idea of “standing in line,” they differ with respect to an applicant's placement in line. The Bipartisan Framework adopts a conservative approach by proposing that unlawfully present aliens in the United States be required to go to the “end of the line” and wait before attaining lawful status.<sup>108</sup> Unlawfully present aliens would “only receive a green card after every individual who is already waiting in line for a green card, at the time this legislation is enacted, has received their green card.”<sup>109</sup> The requirement that unlawfully present aliens be forced to the end of the line is a testament to the Republican Party's desire to avoid criticism that the proposal would be tantamount to amnesty.<sup>110</sup> In a statement made regarding the Bipartisan Framework, Republican Senator John McCain said, “[w]e have got to show my constituents and our Republicans . . . this is not amnesty . . . This is a tough road to citizenship but we have got to give

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Jordan Fabian, *Why Republicans Must Break the “Amnesty” Stereotype for Immigration Reform*, FUSION (Apr. 11, 2013, 10:53 AM), <http://fusion.net/leadership/story/immigration-republicans-break-amnesty-stereotype-12070>.

[unlawfully-present aliens] the opportunity to do so.”<sup>111</sup>

Under the INA, there are numerical quotas for the number of immigrant visas that may be issued to individuals in a certain preference category seeking permanent resident status each year. The limit for family-sponsored immigrants is outlined in INA 201(c)<sup>112</sup> for employment-sponsored immigrants in INA 201(d)<sup>113</sup> and for diversity immigrants in INA 201(e).<sup>114</sup> When an immigrant visa category becomes oversubscribed, the excess petitions roll over to the next quota period and a waiting list (sometimes referred to as a “visa queue”) is created.<sup>115</sup> Under INA 203(e)(1)<sup>116</sup> family and employment-based visas must be issued in the order in which the petitions were received, otherwise known as the “priority date.”<sup>117</sup> Thus, family and employment-sponsored immigrants must already go to the end of the numerical line and wait. For some applicants, particularly from countries like Mexico, the Philippines, and India, this can mean waiting as long as fifteen or more years until receiving a visa.<sup>118</sup>

Although the Bipartisan Framework does not suggest a separate line, or preference category, for unlawfully present aliens seeking to attain lawful presence in the United States does not change the current numerical quota system currently in place. Presumably, applicants in this category will be subject to the same visa issuance

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<sup>111</sup> Reid Pillifant, *Schumer: Immigration plan 'is not amnesty in any sense of the word'*, CAPITAL NEW YORK (Jan. 29, 2013), <http://www.capitalnewyork.com/article/politics/2013/01/7416538/schumer-immigration-plan-not-amnesty-any-sense-word>.

<sup>112</sup> See 8 U.S.C. §1151(a)(1).

<sup>113</sup> See 8 U.S.C. §1151(a)(2).

<sup>114</sup> See 8 U.S.C. §1151(a)(3).

<sup>115</sup> *Visa Retrogression*, US CITIZENSHIP IMMIGRATION SERVS. (June 15, 2011), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=aa290a5659083210VgnVCM100000082ca60aRCRD&vgnnextchannel=aa290a5659083210VgnVCM100000082ca60aRCRD>.

<sup>116</sup> 8 U.S.C. §1153(e)(1).

<sup>117</sup> THE OPERATION OF THE IMMIGRANT NUMERICAL CONTROL SYSTEM, BUREAU OF CONSULAR AFFAIRS, DEP'T OF STATE (2010), *available at* [http://travel.state.gov/content/dam/visas/Immigrant%20Visa%20Control%20System\\_operation%20of.pdf](http://travel.state.gov/content/dam/visas/Immigrant%20Visa%20Control%20System_operation%20of.pdf).

<sup>118</sup> See U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, VISA BULL. NO. 65, VOL. 9, IMMIGRANT NUMBERS FOR FEBRUARY 2014 (2014), *available at* <http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2014/visa-bulletin-for-february-2014.html>.

scheme set forth in INA 203(e)(1). A meaningful reform under the Bipartisan Framework would have been for Congress to make a drastic increase in the number of immigrant visas that can be issued annually, instead of simply capping the number of visas for this category of aliens just it did for the other categories of aliens.

### III. CONCLUSION

This Article focused on a framework articulated by a bipartisan group of eight U.S. senators proposing a purportedly major reform of the U.S. immigration system. This proposal came on the heels of President Barack Obama's inauguration to his second term of office and the President's longing desire to overhaul the nation's immigration system. The senators, in claiming that the U.S. immigration system is "broken," offered a plan aimed at, among other things, creating an arduous pathway for individuals who are currently unlawfully present in the United States. The framework, introduced by the Senate as the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, was passed by the Senate on June 27, 2013.<sup>119</sup> However, the proposal has not yet been considered by the U.S. House of Representatives.

This Article focused on one of the four "pillars" of the Bipartisan Framework that aimed at creating "a tough but fair path to citizenship for unauthorized immigrants currently living in the United States."<sup>120</sup> The goal of this Article was to explore whether, applying the literature on policy innovation and nondecision making, the policies proposed in each element of this pillar amounted to policy innovation or mere nondecision making. As used in this Article, policy innovation is the adoption of problem-solving approaches that depart from traditional legislative approaches to regulation of immigration. In light of the analysis above, this Article concludes that the plan to create a tough pathway to citizenship for unauthorized immigrants articulated in the Bipartisan Framework is not a policy innovation, but is instead a nondecision by Congress resulting from the contentious nature of immigration reform and the electoral stakes involved.

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<sup>119</sup> S. 744, 113th Cong. (2013-2014).

<sup>120</sup> Bipartisan Framework, *supra* note 1 at 1.