

4-1-2010

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Sara E. Farber

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### Recommended Citation

Sara E. Farber, *Presidential Promises and the Uniting American Families Act: Bringing Same-Sex Immigration Rights to the United States*, 30 B.C. Third World L.J. 329 (2010), <http://lawdigitalcommons.bc.edu/twlj/vol30/iss2/4>

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# PRESIDENTIAL PROMISES AND THE UNITING AMERICAN FAMILIES ACT: BRINGING SAME-SEX IMMIGRATION RIGHTS TO THE UNITED STATES

SARA E. FARBER\*

**Abstract:** Binational same-sex couples in the United States all too often face a difficult reality. Due to discriminatory immigration laws, which prevent United States citizens from sponsoring their same-sex partners for permanent residence, same-sex couples must choose between deportation and separating their families. The Uniting American Families Act, however, offers a remedy to this unacceptable inequality. Yet the Act currently does not have the congressional support it needs to pass. This Note argues that President Obama, as the country's Executive, should use his "bully pulpit" to inspire the Act's passage. Specifically, this Note examines the manifestation and extent of Executive power in relation to immigration, the timeliness of the issue, and the recent broadening of Executive power to support a conclusion that Mr. Obama should take such action.

## INTRODUCTION

*While we have come a long way since the Stonewall riots in 1969, we still have a lot of work to do. Too often, the issue of LGBT rights is exploited by those seeking to divide us. But at its core, this issue is about who we are as Americans. It's about whether this nation is going to live up to its founding promise of equality by treating all its citizens with dignity and respect.*

—President Barack Obama<sup>1</sup>

A difficult reality faces thousands of same-sex binational couples in the United States: the Federal Government refuses to "grant benefits to same sex partners" and thus "immigration law interferes with the fundamental freedom of personal choice in matters of marriage and family

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\* Note Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (2008–2009).

<sup>1</sup> Barack Obama, Organizing for America, <http://pride.barackobama.com> (last visited Mar. 23, 2010).

life that have long been recognized by the Supreme Court.”<sup>2</sup> To illustrate this reality consider the following hypothetical. First, consider couple A and B. A and B are a heterosexual couple who met during college, fell in love and decided that they wanted to marry, reside, and find employment in Massachusetts. Person A is a United States citizen and B is in the United States on a nonimmigrant student visa. As a citizen and under current immigration law, A can sponsor B for immigration benefits in the United States, allowing B to live and work in the United States with A.<sup>3</sup> Couple C and D face a different reality because they are a same-sex couple.<sup>4</sup> Like A and B, they met in college. C is a United States citizen, but D is not. D is like B: in the United States on a nonimmigrant student visa. Even though C and D would like to marry, reside and work in Massachusetts, under current immigration law, they will be unable to do so.<sup>5</sup>

Like C and D, many same-sex binational couples are unable to reside in the United States, despite one party being a United States citizen.<sup>6</sup> There is a basic denial of immigration rights for same-sex binational couples.<sup>7</sup> With few exceptions, and very little paperwork, heterosexual binational couples can claim a right for a foreign individual to enter the United States.<sup>8</sup> Same-sex binational couples, unlike opposite-sex couples, are not eligible under U.S. laws for such sponsorship.<sup>9</sup> The hardships they face demonstrate the “discriminatory consequences of denying a class of people the recognition their relationships need and deserve.”<sup>10</sup>

According to the 2000 U.S. Census, of 594,391 self-identified same-sex couples living together in the United States, there are approxi-

<sup>2</sup> SCOTT LONG, FAMILY, UNVALUED: DISCRIMINATION, DENIAL AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW 7 (2006); Mara Schulzetenberg, *U.S. Immigration Benefits for Same Sex Couples: Green Cards for Gay Partners?*, 9 WM. & MARY J. WOMEN & L. 99, 117 (2002). For the purposes of this Note “same-sex” refers to homosexual relationships. See LONG, *supra*, at 4. The use of the term “same-sex binational couples” refers to couples where one individual is a U.S. citizen and the other individual is a citizen of another country. See *id.* at 7.

<sup>3</sup> See Immigration and Nationality Act, Pub. L. No. 82-414, § 205, 66 Stat. 163, 180 (1952) (codified as amended at 8 U.S.C. § 1154(a)-(b) (2006)). Married heterosexual couples may obtain legal permanent residence for the alien spouse. See *id.*

<sup>4</sup> See Schulzetenberg, *supra* note 2, at 99–100.

<sup>5</sup> See Defense of Marriage Act of 1996 § 7, 1 U.S.C. § 7 (2006); 8 U.S.C. § 1154(a)-(b) (2006); Schulzetenberg, *supra* note 2, at 99–100.

<sup>6</sup> See Schulzetenberg, *supra* note 2, at 100.

<sup>7</sup> See *id.*

<sup>8</sup> See LONG, *supra* note 2, at 8.

<sup>9</sup> See *id.* at 13.

<sup>10</sup> *Id.*

mately 35,820 same-sex binational couples.<sup>11</sup> Thus, approximately six percent of United States same-sex couples have “no recognition in federal law, and [similarly] no rights.”<sup>12</sup> This statistic likely underestimates the number of same-sex couples living in the United States for several reasons.<sup>13</sup> Specifically, “[t]he census does not allow same-sex couples who do not live together to report their relationship status.”<sup>14</sup> Additionally, many couples choose not to define their relationships as between “unmarried partners.”<sup>15</sup> Some same-sex couples may prefer the government not know the true nature of their relationship.<sup>16</sup> Lastly, given concerns regarding immigration status, many foreign-born individuals may choose not to identify themselves as in a same-sex relationship.<sup>17</sup> The current discriminatory immigration scheme for same-sex binational couples could and should be changed.<sup>18</sup>

As Representative Jerrold Nadler (D-NY) did in 2007, Senator Patrick Leahy introduced the Uniting American Families Act (UAFAs) in 2009 to his colleagues.<sup>19</sup> The UAFAs would recognize the rights of foreign same-sex partners of United States citizens to immigrate to the United States on a similar or equal basis as foreign opposite-sex spouses of United States citizens.<sup>20</sup> The UAFAs, however, does not have the congressional support it needs to pass in either house of Congress.<sup>21</sup> Fur-

<sup>11</sup> *Id.* at 173 app. C. The Human Rights Watch notes that there is no documented information by the Department of Homeland Security with respect to how many homosexuals reside in the United States. *See id.*

<sup>12</sup> *Id.* at 7, 173 app. C.

<sup>13</sup> *See* LONG, *supra* note 2, at 174 app. C. The 2010 census does, however, allow same-sex couples to report themselves as married. Tom McGhee, *GLBT Community Pressing for Census Question to Declare Sexual Orientation*, DENVER POST, Mar. 16, 2010, at A01.

<sup>14</sup> LONG, *supra* note 2, at 173 app. C (alteration in original).

<sup>15</sup> *See id.*

<sup>16</sup> *See id.*

<sup>17</sup> *See id.* at 174 app. C. Included in this group are individuals who avoid the census because they do not have legal status to stay in the United States. *See id.* at 7.

<sup>18</sup> *See id.* at 13; James D. Willets, *A Comparative Perspective on Immigration Law for Same-Sex Couples: How the United States Compares to Other Industrialized Democracies*, 32 NOVA L. REV. 327, 328 (2007).

<sup>19</sup> *See* Uniting American Families Act, H.R. 1024, 111th Cong. (2009); Uniting American Families Act, S. 424, 111th Cong. (2009); Uniting American Families Act, H.R. 2221, 110th Cong. (2007); Uniting American Families Act, S. 1328, 110th Cong. (2007). In fact, the bill, although not always referred to as the UAFAs, has been introduced in Congress every year since 2000. *See* Willets, *supra* note 18, at 328.

<sup>20</sup> *See* H.R. 1024; S. 424.

<sup>21</sup> *See* Victor C. Romero, *Crossing Borders: Loving v. Virginia as a Story of Migration*, 51 How. L.J. 53, 73 (2007); Billcast, H.R. 1024, 111th Cong. (Westlaw). Billcast provides statistical information on the likelihood of bills passing in their respective houses. *See* Billcast, *supra*. Billcast predicts a twenty-five percent chance of UAFAs passing the house floor and a

thermore, because the Supreme Court has held that Congress has the power to regulate immigration with wide discretion, equality in the area of same-sex immigration will almost certainly require some action from Congress.<sup>22</sup>

In 2000, the issue of same-sex federal benefits caught the country's attention in the presidential debates between candidates Al Gore and George W. Bush.<sup>23</sup> Despite his stance against gay marriage, Gore commented on the failure of the United States to offer equal rights to same-sex couples and suggested a civil union for such couples.<sup>24</sup> In 2008, the issue of same-sex binational immigration rights was once again brought to the election platform by then presidential candidate Barack Obama.<sup>25</sup> In a statement regarding gays and lesbians, Mr. Obama made a call for equality.<sup>26</sup> In addition to discussing his historical legislative support for eliminating discrimination against gays and lesbians, he also promised that as President he would "use the bully pulpit to urge states to treat same-sex couples with full equality in their family and adoption laws."<sup>27</sup> Specifically, Mr. Obama discussed his work to pass the UAGA in order to grant same-sex binational couples the same "rights and obligations as married couples in our immigration system."<sup>28</sup>

On January 20, 2009, Barack Obama became America's 44th President and began to confront the many challenges facing the entire

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thirteen percent chance of passing in the Senate in the 2009–2010 congressional session. *See id.*

<sup>22</sup> See Blythe Wygonik, Comment, *Refocus on the Family: Exploring the Complications in Granting the Family Immigration Benefit to Gay and Lesbian United States Citizens*, 45 SANTA CLARA L. REV. 493, 499–500, 519 (2005).

<sup>23</sup> See George W. Bush & Al Gore, Candidates for President of the United States, The Second Gore-Bush Presidential Debate (October 11, 2000) (transcript available with the Commission on Presidential Debates).

<sup>24</sup> *See id.*; see also Wilets, *supra* note 18, at 328 ("Vice President Gore noted the federal government's refusal to provide similar immigration rights to bi-national same-sex couples as provided by other industrialized democracies . . . . It is interesting to note that Gore raised this issue at the same time that he indicated he was against federal recognition of same-sex marriage." (citation omitted)). During the debate, Mr. Gore stated, "I agree with that, and I did support that law. But I think that we should find a way to allow some kind of civic unions, and I basically agree with Dick Cheney and Joe Lieberman. And I think the three of us have one view and the Governor has another view." *See* Bush & Gore, *supra* note 23.

<sup>25</sup> See Open Letter from Barack Obama, Candidate for President of the United States (Feb. 28, 2008) (on file with Organizing for America).

<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

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

country.<sup>29</sup> With gay and lesbian issues surfacing, it remains unclear whether President Obama will be able to live up to his campaign promises while simultaneously appeasing conservatives.<sup>30</sup> This Note discusses same-sex binational immigration in light of President Obama's election and his power to influence Congressional actions. Part I discusses the historical context of immigration for gay individuals in the United States, followed by the legal context for same-sex binational couples in the United States and a brief overview of same-sex immigration benefits in other western democracies. Part II details and analyzes the provisions of the Uniting American Families Act. Part III revisits the Obama campaign and Mr. Obama's specific promises regarding gay rights, as well as his personal political record on these issues. Part IV then examines the expansion of presidential powers under the George W. Bush administration and the relationship between the Executive Branch and Congress with regard to immigration rights and benefits. Lastly, this Note concludes that given the President's influential abilities with respect to immigration, President Obama should use his "bully pulpit" to influence Congress to bring equality to same-sex binational immigration. He must show his support of the UAFAs to remedy an egregious inequality and protect families and their children.

## I. THE LEGAL IMMIGRATION HISTORY FOR HOMOSEXUALS AND SAME-SEX BINATIONAL COUPLES

Although opposite-sex binational engaged and married couples in the United States are able to secure immigration status for the foreign partner, same-sex couples do not share that privilege.<sup>31</sup> In fact, the Immigration and Nationality Act (INA) explicitly declares that only foreign nationals that are federally recognized spouses qualify for legal

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<sup>29</sup> See President Barack Obama, Inaugural Address (Jan. 20, 2009) (transcript available at <http://www.whitehouse.gov/the-press-office/president-barack-obamas-inaugural-address>).

<sup>30</sup> See Kilian Melloy, *Obama Faces Choices Regarding Gay and Lesbian Federal Workers' Rights*, EDGE, Mar. 13, 2009, <http://www.edgeboston.com/index.php?ch=news&sc=&sc2=news&sc3=&id=88428>.

<sup>31</sup> See Amy K.R. Zaskie, Note, *Love Knows No Borders—The Same-Sex Marriage Debate and Immigration Laws*, 32 WM. MITCHELL L. REV. 625, 626 (2006). The United States government will, however, allow same-sex couples from other countries to live in the United States as long as one of them is working in the United States. See Bonnie Miluso, Note, *Family "De-Unification" in the United States: International Law Encourages Immigration Reform for Same-Gender Binational Partners*, 36 GEO. WASH. INT'L L. REV. 915, 923 (2004). The limitation to this is that they both must be foreigners. See *id.* For example, if C is from England and is working in the United States on a worker's visa, her/his partner D can obtain a B-2 category visa enabling her/him to live in the United States. See *id.*

permanent resident status in the United States.<sup>32</sup> When determining the meaning of an act by Congress, the word spouse “refers only to a person of the opposite sex who is a husband or a wife.”<sup>33</sup>

The denial of same-sex immigration benefits is not new to U.S. immigration policy and has been judicially upheld in the United States since 1982 when the Ninth Circuit held that same-sex couples do not qualify for federal immigration benefits.<sup>34</sup> Further, the denial of immigration rights to homosexuals was congressionally supported in 1917 and then again in 1952.<sup>35</sup> It was ultimately not until 1990 that homosexuality was removed as a basis for denying immigration benefits to individuals.<sup>36</sup> The current immigration law, which discriminates against same-sex couples, reflects U.S. laws and policies concerning same-sex marriage.<sup>37</sup>

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<sup>32</sup> See Defense of Marriage Act of 1996 § 7, 1 U.S.C. § 7 (2006); Immigration and Nationality Act, Pub. L. No. 82-414, § 205, 66 Stat. 163, 180 (1952) (codified as amended at 8 U.S.C. § 1154(a)-(b) (2006)).

<sup>33</sup> See 1 U.S.C. § 7.

<sup>34</sup> See *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1982). Adams was a male U.S. citizen, while his partner Sullivan was a male foreigner living in the United States on a visitor visa. See *id.* at 1038. Upon the visa's expiration the two were married in Boulder, Colorado. See *id.* Adams petitioned the Immigration and Naturalization Service (INS) to grant Sullivan, as his spouse, U.S. status, but it was denied. See *id.* The denial was upheld by the Board of Immigration Appeals (BIA) and the district court. See *id.* On appeal, the Ninth Circuit found that it was constitutional to define “spouse” as a member of the opposite sex and that Congress intended immigration benefits only for heterosexual marriages. See *id.* at 1042.

<sup>35</sup> Lena Ayoub & Shin-Ming Wong, *Separated and Unequal*, 32 WM. MITCHELL L. REV. 559, 563 (2006). In 1952, homosexuals were barred from immigrating to the United States on the basis of mental defect. See *id.* Additionally, the same year the American Psychiatric Association classified homosexuality as a mental illness. See JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 38 (2001). The latter classification supported homosexual immigrants being deported as psychopaths. See *id.* at 98. Similarly, in 1965 Congress again modified the INA expressly excluding homosexuals from entering the United States on the basis of their “sexual deviation.” See Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236 § 272, 79 Stat. 911, 920 (1965) (repealed 1990). Sexual deviation was expressly added to apply to homosexuals. See BERNADETTE MAGUIRE, *IMMIGRATION: PUBLIC LEGISLATION AND PRIVATE BILLS* 147 (1997).

<sup>36</sup> See MURDOCH & PRICE, *supra* note 35, at 236. Ironically, the American Psychiatric Association removed homosexuality from the category of mentally defected in 1973. See *id.* at 62. Although this lag time might seem surprising, it was not until 2003 that the Supreme Court found state sodomy laws unconstitutional. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>37</sup> See Zaskie, *supra* note 31, at 627. The Human Rights Watch reports that there is discrimination and gross “inequity in the immigration system that tears same-sex binational couples apart.” See LONG, *supra* note 2, at 14-15.

### A. *The Defense of Marriage Act*

Following the Ninth Circuit case, which held that marriage discrimination was unjustifiable, Congress passed the Defense of Marriage Act (DOMA), which then President Bill Clinton signed into law.<sup>38</sup> DOMA is composed of two parts.<sup>39</sup> The first provision permits states to ignore their obligations under the Full Faith and Credit Clause of the Constitution.<sup>40</sup> As a result states may choose not to recognize same-sex marriages from other states.<sup>41</sup> The second provision of DOMA declares that when interpreting federal laws, “marriage means only a legal union between one man and one woman as husband and wife.”<sup>42</sup> Therefore, in states where same-sex unions are legal, DOMA “stands as a broad wall between same-gender unions” and federal immigration benefits.<sup>43</sup>

Because U.S. immigration is a federal matter, DOMA has eliminated the ability of binational same-sex couples to be recognized as “spouses” under current immigration laws.<sup>44</sup> Additionally, individual states are prohibited from regulating immigration as it is strictly a fed-

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<sup>38</sup> See Defense of Marriage Act of 1996, 28 U.S.C. § 1738C (2006); Wygonik, *supra* note 22, at 504.

<sup>39</sup> See YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES 228 (2002).

<sup>40</sup> See *id.* at 228.

<sup>41</sup> See 28 U.S.C. § 1738C. The Act specifically states,

No state, territory, or possession, of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

*Id.*

<sup>42</sup> See 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C. Between 1996 and 2001 thirty-five states passed provisions defining marriage “as a union between persons of the opposite sex.” MERIN, *supra* note 39, at 229.

<sup>43</sup> Miluso, *supra* note 31, at 920.

<sup>44</sup> See LONG, *supra* note 2, at 30. In fact, even in states where marriage or domestic partnerships are available to same-sex couples, from an immigration perspective it might be better not to register as married or domestically partnered. See DENIS CLIFFORD ET AL., LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 28 (14th ed. 2007). Individuals staying in the United States on nonimmigrant visas are expected to show that they do not intend to stay in the United States permanently. See *id.* Registering as domestic partners or as a married couple can be used as evidence of an intent to stay in the United States, compromising that individual’s nonimmigrant visa. See *id.* The immigration situation can be different for binational couples where one individual is transgender and is now considered to be of the opposite sex. See *id.* at 61. If a state recognizes the marriage, the federal immigration authority should as well, and thus the non-U.S. citizen should be able to acquire marriage-based legal permanent residence. See *id.*

eral matter.<sup>45</sup> Therefore, “[b]arring repeal of the statute, the only institutions with the power to alter the status quo at the federal level are the federal courts.”<sup>46</sup>

### B. *Beyond Immigration Through Marriage: Other Immigration Options*

Because marriage between same-sex couples is not recognized by the federal government as a result of DOMA, binational same-sex couples desiring to live together in the United States have very few other means of establishing legal immigration status.<sup>47</sup> There are a few options that enable some of these couples to remain together in the United State; a majority of couples, however, are unable to pursue such options and are forced to separate or move to a country that will recognize their relationships.<sup>48</sup>

One such option involves engaging in unlawful sham marriages to acquire immigration status.<sup>49</sup> Persons who commit fraud via a sham marriage face serious fines (up to \$250,000), prison time, and even de-

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<sup>45</sup> See *DeCanas v. Bica*, 424 U.S. 351, 354 (1976). Aliens may be subject to state statutes, without such statutes rising to the level of an immigration regulation. See *id.* at 355.

<sup>46</sup> See *id.*; EVAN GERSTMANN, *SAME-SEX MARRIAGE AND THE CONSTITUTION* 7 (2d ed. 2008). DOMA's constitutionality is also an issue of contention; on March 3, 2009, a lawsuit was brought in the Federal District Court of Massachusetts questioning the constitutionality of the Act. See Jason Szep, *Married Gay Couples Sue U.S. Seeking Federal Rights*, REUTERS, Mar. 3, 2009, <http://www.reuters.com/article/topNews/idUSTRE52261H20090303?feedType=RSS&feedname=topNews>. In Massachusetts eight same-sex couples, as well as three gay widowers, filed the first major lawsuit questioning the constitutionality of the Act and seeking access to the federal rights of traditionally married couples. See *id.* The plaintiffs are being represented by Gay & Lesbian Advocates & Defenders (GLAD). □Complaint for Plaintiffs at 91, *Gill v. Office of Pers. Mgmt.*, No. 09 Civ. 10309 (D. Mass. Mar. 3, 2009). Plaintiffs argue that they have been denied a) “spousal protections based on their employment with . . . the United States Government,” b) “their correct spousal status by the Internal Revenue Service,” c) correct spousal “protections afforded by the Social Security program,” and d) correct passport issuance. See *id.* at 3–5. The suit specifically alleges that the plaintiffs are denied federal benefits that would be available to opposite-sex couples. See *id.* at 2, 5. Thus, GLAD is challenging this provision based on its violation of the Equal Protection Clause of the United States Constitution as found in the Fifth Amendment. See *id.* at 66–96. This suit will put President Obama's agenda to the test. See Ruth Marcus, *Obama's Words Put to the Test*, SEATTLE-POST INTELLIGENCER, Mar. 4, 2009, at A15. As a candidate, he continuously supported the full repeal of DOMA. See *id.* As President, however, his Justice Department is likely “obligated to defend the constitutionality of a statute.” See *id.* The question remains whether President Obama will stand by his election promises or avoid stirring controversy with conservatives. See *id.*

<sup>47</sup> Ayoub & Wong, *supra* note 35, at 560.

<sup>48</sup> See *id.*

<sup>49</sup> See CLIFFORD, *supra* note 44, at 61.

portation for the immigrant.<sup>50</sup> Other individuals successfully stay in the country through the Diversity Immigrant Visa Lottery (Diversity Lottery).<sup>51</sup> In 1988 Congress created the Diversity Lottery Program, which offers 50,000 diversity visas per year.<sup>52</sup> The lottery is available to those who meet the program's eligibility requirements and are from countries "with low rates of immigration to the United States."<sup>53</sup> Anyone can enter the Diversity Lottery if they are a native of a country with a low immigration rate, have a high school diploma, or, in the alternative, a minimum of two years job experience.<sup>54</sup> If successful, the immigrant will obtain legal permanent residence in the United States.<sup>55</sup> The unfortunate news for same-sex couples with respect to the diversity lottery is that millions apply every year and only 50,000 individuals win a visa.<sup>56</sup> Furthermore, many individuals will be barred from the lottery based on their country of nationality, because there are many countries not eligible for the lottery.<sup>57</sup> In other words, the lottery could be a "last-ditch chance" for acquiring immigration status for a non-U.S. national, but it would require the same-sex couple to stake their future together on a chance less than that of "the throw of the dice."<sup>58</sup>

Other individuals are able to remain in the United States through employment.<sup>59</sup> In some cases, individuals who possess job skills that are in short supply in the United States can be sponsored for a green card.<sup>60</sup> Nevertheless, employment-based immigration visas are incredibly difficult to earn.<sup>61</sup> An employment-based visa in almost every instance will require an employer to show that there are no qualified U.S. individuals to fill the immigrant's position.<sup>62</sup> Furthermore, there are very few companies who put the time or effort into hiring immigrants.<sup>63</sup> And the reality is that work visas expire; they do not offer permanent stability for

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<sup>50</sup> See *id.* Deportation will likely result in the immigrant being barred from ever returning to the United States. See *id.*

<sup>51</sup> See *id.* at 62; Dep't of State, Diversity Visa Program, [http://travel.state.gov/visa/immigrants/types/types\\_1322.html](http://travel.state.gov/visa/immigrants/types/types_1322.html) (last visited Apr. 5, 2010).

<sup>52</sup> See Dep't of State, *supra* note 51.

<sup>53</sup> See *id.*

<sup>54</sup> See *id.* Many individuals who "win" a diversity visa are unable to obtain their green cards due to no fault of their own. See CLIFFORD, *supra* note 44, at 62.

<sup>55</sup> See CLIFFORD, *supra* note 44, at 62.

<sup>56</sup> See *id.*; see also LONG, *supra* note 2, at 36.

<sup>57</sup> See LONG, *supra* note 2, at 36.

<sup>58</sup> See *id.* at 36-37.

<sup>59</sup> See *id.* at 36.

<sup>60</sup> See CLIFFORD, *supra* note 44, at 62.

<sup>61</sup> See *id.*

<sup>62</sup> See LONG, *supra* note 2, at 36.

<sup>63</sup> See *id.*

same-sex binational couples.<sup>64</sup> Also, employment visas are not only challenging to acquire but can also result in couples' intertwining their lives together and can damage their ability to stay together.<sup>65</sup> Employment visas are conditioned on an individual's intention to return to her/his country of origin.<sup>66</sup> If the government finds out an individual is in a same-sex relationship, it might assume that person's intent to remain in the United States and therefore deport her/him.<sup>67</sup>

There are a number of work-related visas for which individuals may qualify for: the H-1B visa, the O-1 visa, and the P visa.<sup>68</sup> An H-1B visa is a work-based visa.<sup>69</sup> An O-1 visa is available to persons who have extraordinary work ability.<sup>70</sup> Persons who are internationally recognized athletes or entertainers might be able to qualify for a P visa.<sup>71</sup> Students can also stay in the United States on student visas so long as they are registered as full-time students.<sup>72</sup>

Another option for gay and lesbian foreigners is to apply for asylum in the United States if they successfully demonstrate a "well-founded fear of persecution in their country of origin based on their

<sup>64</sup> See *id.* at 42.

<sup>65</sup> See *id.*

<sup>66</sup> See *id.*

<sup>67</sup> See LONG, *supra* note 2, at 42.

<sup>68</sup> See CLIFFORD, *supra* note 44, at 63.

<sup>69</sup> See *id.* An H-1B visa is for temporary workers in specialty occupations. See *id.* The employee seeking an H-1B must be sponsored by a U.S. Citizenship and Immigration Services (USCIS) approved employer for a particular position for a specific period of time, initially up to three years. See DIV. OF INT'L SERVS., NAT'L INSTS. OF HEALTH, SUMMARY OF NONIMMIGRANT VISA CLASSIFICATIONS (2006), <http://dis.ors.od.nih.gov> (follow "Visa Information" hyperlink; then follow "Visa Classifications Chart" hyperlink).

<sup>70</sup> See CLIFFORD, *supra* note 44, at 63. In order to obtain an O-1 visa foreigners must "demonstrate the sustained national or international acclaim and recognition for achievements in science, education, business or athletics." Yale Univ., O-1 Visa, <http://www.yale.edu/oiss/immigration/other/> (follow "Exceptional Ability" hyperlink) (last visited Mar. 25, 2010). The immigrant can only be employed through an employer who petitions for the worker's visa. See *id.*

<sup>71</sup> See CLIFFORD, *supra* note 44, at 63.

<sup>72</sup> See Yale Univ., F-1 Visa, <http://www.yale.edu/oiss/immigration/common> (follow "F-1 students" hyperlink; then follow "Reinstatement" hyperlink) (last visited Apr. 5, 2010). An F-1 student visa places an additional burden on the immigrant to show that she/he can fund their entire education. See CLIFFORD, *supra* note 44, at 63. Similarly, a J-1 visa allows an individual to stay in the United States while in school and further grants students eighteen months of "academic" job training during their program. See Yale Univ., J-1 Student Visa, <http://www.yale.edu/oiss/immigration/other/> (follow "Student Intern" hyperlink) (last visited Apr. 5, 2010). Unlike the F-1 visas, persons using a J-1 visa must return to their home country for two years after completing their program before they can qualify for other visas in the United States. See Yale Univ., F-1 Versus J-1, <http://www.yale.edu/oiss/immigration/common> (follow "F-1 versus J-1" hyperlink) (last visited Apr. 5, 2010).

proclaimed sexual orientation.”<sup>73</sup> Specifically, gays and lesbians are granted asylum based on their past persecution or fear of future persecution due to their sexuality.<sup>74</sup> The immigrant applying for asylum must be in the United States when she/he applies; individuals living abroad cannot apply for asylum, but only for refugee status, which is harder to obtain.<sup>75</sup> A gay individual seeking asylum would have to demonstrate that her/his need for asylum is based on the need “to stay alive and free.”<sup>76</sup> Nevertheless, because of anti-immigrant sentiments, a grant of asylum is quite difficult to obtain.<sup>77</sup>

The ability of gay immigrants to apply for asylum was affirmed by Attorney General Janet Reno in 1994, when she stated that *In re Toboso-Alfonso* would be “precedent in all proceedings involving the same issue or issues.”<sup>78</sup> In the case, Fidel Armando Toboso applied for asylum status after being paroled into the United States in June of 1980 as part of a Mariel Boat Lift.<sup>79</sup> In 1985 his parole was terminated, and he was placed before an immigration judge where he admitted he was deportable but applied for asylum rather than return to Cuba.<sup>80</sup> An immigration judge withheld his deportation based on his membership in a so-

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<sup>73</sup> See Wygonik, *supra* note 22, at 502. The first time asylum was granted on the basis of sexuality was in 1990. *See id.* In that year the BIA granted asylum to a Cuban man who was persecuted for being gay. *See In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 821–23 (B.I.A. 1990). Currently, a person may be granted asylum if it is determined an individual is “unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” *See* Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(42), 1158(b)(1) (2006).

<sup>74</sup> *See* Wygonik, *supra* note 22, at 503.

<sup>75</sup> *See* CLIFFORD, *supra* note 44, at 61. Individuals intending to apply for asylum must apply within one year of arrival in the United States. *See id.* at 62.

<sup>76</sup> *See* LONG, *supra* note 2, at 44.

<sup>77</sup> *See id.* Claims based on sexual orientation carry their own unique risks. *See id.* Because homosexual applicants are often unaware of the one year filing deadline, they may fail to apply in time. *See id.* Additionally, homosexuals might not apply for asylum due to danger in their own foreign communities. *See id.*

<sup>78</sup> Attorney General Order No. 1895–94 (June 19, 1994) (“I hereby designate the decision of the Board of Immigration Appeals in *In re: Fidel Toboso-Alfonso* (A-23220644) (March 12, 1990) as precedent in all proceedings involving the same issue or issues.”).

<sup>79</sup> *See In re Toboso-Alfonso*, 20 I. & N. Dec. at 820.

<sup>80</sup> *See id.* The immigration judge ultimately concluded that the applicant was statutorily eligible for asylum as he was a member of a particular social group who fears persecution by the Cuban government. *See id.* He was not granted asylum per the judge’s discretion, though he was withheld from deportation. *See id.*

cial group.<sup>81</sup> The Immigration and Naturalization Service (INS) appealed this finding; the BIA held that the INS did not provide sufficient information to determine gays were not part of a particular social group.<sup>82</sup> The BIA also determined that there was no error in the immigration judge's finding that Alfonso's life or freedom would be threatened if he remained in Cuba.<sup>83</sup>

The benefit of applying for asylum if successful is that the asylee can remain in the United States for as long as it is unsafe for her/him to remain in her/his country of origin.<sup>84</sup> The individual can also remain in the United States indefinitely as long as she/he applies for legal permanent residence within one year after getting asylum.<sup>85</sup> Yet, as indicated, achieving asylum in the United States has become increasingly difficult.<sup>86</sup> Also, asylum officers and immigration judges are sometimes insensitive to same-sex couples; due to a lack of knowledge regarding gender and sexuality, they could treat an individual with sarcasm and insensitivity resulting in applicants keeping their sexuality secret.<sup>87</sup> Overall, while gay rights were arguably expanded by the *In re Toboso-Alfonso* decision, they were also limited through the passage of DOMA.<sup>88</sup>

### C. *An International Perspective*

The immigration dilemma facing same-sex binational couples in the United States is further illuminated through a brief comparison of same-sex binational immigration rights in other western democracies.<sup>89</sup> In fact, most industrialized democracies recognize same-sex immigration rights.<sup>90</sup> Those countries offering same-sex immigration rights either by marriage, or simply immigration benefit include Belgium, Canada, Spain, South Africa, the Netherlands, Denmark, Finland, New Zea-

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<sup>81</sup> See *id.* Alfonso asserted that he was a homosexual who would be persecuted if he returned to Cuba. See *id.* He claimed that if he returned he would be regularly detained by the Cuban authorities. See *id.* at 820–21.

<sup>82</sup> See *id.* at 822.

<sup>83</sup> See *id.* at 823.

<sup>84</sup> See CLIFFORD, *supra* note 44, at 62.

<sup>85</sup> See *id.*

<sup>86</sup> See LONG, *supra* note 2, at 44.

<sup>87</sup> See *id.* at 45.

<sup>88</sup> See Wygonik, *supra* note 22, at 503–04.

<sup>89</sup> See Wilets, *supra* note 18, at 328.

<sup>90</sup> See *id.* at 329.

land, Norway, Sweden, Iceland, the United Kingdom, Australia, Brazil, France, Germany, Israel, Portugal, and Switzerland.<sup>91</sup>

The European Union (EU) has also established that same-sex couples in the EU are entitled to the freedom “to move and reside” among its member states in an equal manner as that of opposite-sex couples.<sup>92</sup> This establishing directive only affects same-sex couples where one individual is an EU citizen.<sup>93</sup> Ultimately, the directive allows freedom to move and live within the EU to registered partners.<sup>94</sup> Therefore, member states that recognize same-sex partnerships must grant the right to enter and reside to recognized partners, where one individual is an EU citizen.<sup>95</sup> For couples who are not married, the directive also provides some protection, in that Member States must provide the means for “unmarried partners [to] request admission.”<sup>96</sup>

In the EU, member states must ensure that their legislation: a) does “NOT exclude same-sex married couples;” b) “include[s] registered partners, where national law permits registered partnership;” c) provides a means for unmarried partners and their families to move and reside in the member state; d) “include[s] children who have a legally-recognized relationship with an EU citizen;” e) implements the Directive without discriminating based on sexual orientation; and f) provides that the admission of children into the EU is not discriminatory and is in the best interest of children.<sup>97</sup> The EU is an important point of comparison on the issue of same-sex immigration benefits in the United

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<sup>91</sup> See *id.* In addition to same-sex immigration rights, several western countries offer marriage rights to same-sex couples. See GERTSMANN, *supra* note 46, at 6. On April 1, 2001, the Netherlands became the first country to legalize same-sex marriage. See *id.* Then in 2003 Belgium also granted marriage rights to homosexuals. See *id.* Canada legalized same-sex marriage in 2005, as did Spain. See *id.* Several European countries also recognize same-sex civil partnerships or quasi-marital same-sex unions including the United Kingdom, Norway, Sweden, and Iceland. See *id.* Lastly, the highest court in South Africa found the definition of marriage as solely between a man and a woman unconstitutional. See *id.*

<sup>92</sup> See Council Directive 04/38, 2004 O.J. (L 229) 77, 79 (EU).

<sup>93</sup> See *id.*

<sup>94</sup> See MARK BELL, INT’L LESBIAN & GAY ASSOC., EU DIRECTIVE ON FREE MOVEMENT AND SAME-SEX FAMILIES: GUIDELINES ON THE IMPLEMENTATION PROCESS 6 (2005). Bell explains that the Directive does this by defining a “family member” as the partner of a EU citizen, who has a legal partnership based on “the legislation of a Member State.” See *id.* The Member State must, however, treat partnerships as equal to marriage. See *id.*

<sup>95</sup> See *id.*

<sup>96</sup> See *id.* at 9.

<sup>97</sup> See *id.* at 15.

States, because like the United States, the EU provides law for several of its member states, which affects individual EU citizens.<sup>98</sup>

Perhaps most interesting is Brazil, a country that has experienced recent progressive legislation, while also having a history of “significant[ly more] anti-gay violence than the United States.”<sup>99</sup> In April 2000, a Brazilian federal court decided that Brazilian gay and lesbian couples in permanent relationships have the same status as heterosexual couples for the purposes of social security benefits and public pensions.<sup>100</sup> In 2003, the Brazilian National Immigration Council decided that same-sex couples could enjoy immigration benefits in Brazil.<sup>101</sup> As of 2004, the country had established procedures to enable same-sex binational couples to immigrate to Brazil.<sup>102</sup> If a same-sex couple wants to pursue a family in Brazil, it can enjoy immigration rights that are comparable to those of opposite-sex married couples.<sup>103</sup>

## II. EQUALITY FOR SAME-SEX IMMIGRATION: THE UNITING AMERICAN FAMILIES ACT

On February 14, 2000, New York Democratic Representative Jerrold Nadler introduced the Permanent Partners Immigration Act, (PPIA).<sup>104</sup> The bill sought to “amend the Immigration and Nationality Act to provide a mechanism for United States citizens and lawful permanent residents to sponsor their permanent partners for residence in the United States, and for other purposes.”<sup>105</sup> In 2005, Vermont Democratic Senator Patrick Leahy introduced the bill in the Senate under the name Uniting American Families Act.<sup>106</sup>

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<sup>98</sup> See Willets, *supra* note 18, at 351 (analogizing the EU federal system to that of the United States).

<sup>99</sup> See *id.* at 331–32. Brazil, as in many South American countries, experiences high rates of “persecution and attack” toward gay individuals. *Millions Celebrate in Brazil at World’s Biggest Gay Pride Parade*, MONSTERS & CRITICS, May 26, 2008, [http://www.monstersandcritics.com/news/americas/news/article\\_1407578.php/Millions\\_celebrate\\_in\\_Brazil\\_at\\_worlds\\_biggest\\_gay\\_pride\\_parade](http://www.monstersandcritics.com/news/americas/news/article_1407578.php/Millions_celebrate_in_Brazil_at_worlds_biggest_gay_pride_parade).

<sup>100</sup> See MERIN, *supra* note 39, at 357–58.

<sup>101</sup> See Press Release, Immigration Equality, Brazil Clarifies Its Same-Sex Immigration Policy (Apr. 27, 2004) (on file with author).

<sup>102</sup> See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> See Miluso, *supra* note 31, at 916. Effectively the PPIA would not have recognized marriage rights between same-sex partners but would rather simply treat the partners as spouses. See Zasko, *supra* note 31, at 634.

<sup>105</sup> See Permanent Partners Immigration Act, H.R. 3006, 109th Cong. (2005).

<sup>106</sup> See Uniting American Families Act, S. 1278, 109th Cong. (2005).

On May 8th, 2007, the Uniting American Families Act was introduced to the House of Representatives and the Senate.<sup>107</sup> Due to UAFA's failure to pass in either the House or the Senate in 2007, it was most recently introduced to the House and the Senate on February 12, 2009.<sup>108</sup> The UAFA proposes to end discrimination in current immigration laws against same-sex binational couples.<sup>109</sup> Specifically, it allows same-sex permanent partners of U.S. citizens to gain immigration status in the United States in the same manner as opposite-sex couples but without a marriage requirement.<sup>110</sup>

A couple under the UAFA will have to meet several requirements to qualify for immigration benefits.<sup>111</sup> First, the UAFA defines a permanent partner as an individual who is over eighteen years old, and "in a committed, intimate relationship with another individual eighteen years of age or older in which both individuals intend a lifelong commitment."<sup>112</sup> Additionally, the partners must be financially dependent on one another, not be married to anyone else or in a permanent partnership with anyone else, not be able to legally marry one another under federal law, and not be first, second, or third degree blood relatives.<sup>113</sup>

As indicated, the UAFA does not grant or extend marriage benefits to same-sex couples; the lack of marriage benefits is important, as it avoids the larger issues of recognizing same-sex unions, but still grants same-sex couples an essential right to live in the United States.<sup>114</sup> In fact, the UAFA specifies that immigration benefits are contingent on the couple not qualifying for marriage under Federal law.<sup>115</sup> As a result, the Act has the propensity to "eliminate the physical barrier" that di-

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<sup>107</sup> See Uniting American Families Act, H.R. 2221, 110th Cong. (2007); Uniting American Families Act, S. 1328, 110th Cong. (2007). The Act states,

To amend the Immigration and Nationality Act to eliminate discrimination in the immigration laws by permitting permanent partners of United States citizens and lawful permanent residents to obtain lawful permanent resident status in the same manner as spouses of citizens and lawful permanent residents and to penalize immigration fraud in connection with permanent partnerships.

H.R. 2221; S. 1328.

<sup>108</sup> See Uniting American Families Act, H.R. 1024, 111th Cong. (2009); Uniting American Families Act, S. 424, 111th Cong. (2009).

<sup>109</sup> See H.R. 1024; S. 424.

<sup>110</sup> See H.R. 1024; S. 424.

<sup>111</sup> See H.R. 1024; S. 424.

<sup>112</sup> See H.R. 1024; S. 424.

<sup>113</sup> See H.R. 1024; S. 424.

<sup>114</sup> See Wilets, *supra* note 18, at 328.

<sup>115</sup> See H.R. 1024; S. 424.

vides same-sex binational couples.<sup>116</sup> Important to some, the UAFA does not even change the federal definition of spouse.<sup>117</sup> This “conceptual de-coupling” of same-sex relationships and same-sex immigration therefore avoids the controversial debate surrounding same-sex marriage.<sup>118</sup> This scenario is similar to the immigration scenarios for same-sex couples in both Australia and Israel.<sup>119</sup>

Similarly, the UAFA addresses another common concern in immigration benefits: fraud.<sup>120</sup> Specifically, section 14 provides that aliens can be deported for fraud if they enter into a same-sex relationship within two years of admission to the United States and then separate within two years following that admission, they will have the burden of showing that the partnership “was not contracted for the purpose of evading any provision of the immigration laws.”<sup>121</sup> Fraud can also be shown if “it appears to the satisfaction of the Secretary of Homeland Security that the alien has failed or refused to fulfill the alien’s permanent partnership, which the Secretary of Homeland Security determines was made for the purpose of procuring the alien’s admission as an immigrant.”<sup>122</sup> Therefore, not only would same-sex binational couples be subject to the same requirements of heterosexual couples and fraudulent marriages, but the UAFA also provides strict and severe punishment if partners are found to have committed fraud.<sup>123</sup>

<sup>116</sup> See Romero, *supra* note 21, at 73. Romero uses the phraseology “physical barriers” in a most literal sense, that the UAFA allows same-sex binational couples to live in the United States together, rather than be separated by national borders. *See id.*

<sup>117</sup> See Ayoub & Wong, *supra* note 35, at 571–72.

<sup>118</sup> See Wilets, *supra* note 18, at 328.

<sup>119</sup> See Ayoub & Wong, *supra* note 35, at 573. In April of 1991 the Australian government created a new visa category for common law relationship and same-sex couples. *See* Wilets, *supra* note 18, at 331. In 2000 the Israeli Ministry of the Interior created a same-sex immigration right for non-Jewish partners of Jewish citizens. *See id.* at 338. From a same-sex marriage perspective in Israel and Australia both countries recognize some sort of same-sex rights. *See id.* In Israel same-sex benefits date as far back as 1994 when the Israeli Supreme Court declared that not providing employee benefits to a same-sex partner was unconstitutional per the Israeli Equal Employment Opportunity Act, which protects homosexuals from workplace discrimination. *See* MERIN, *supra* note 39, at 356. In Australia the eight states that comprise the country enact their own laws with respect to family law, criminal law, and antidiscrimination law. *See id.* at 170. Currently the Capital Territory, New South Wales, and Victoria have legislation acknowledging the relationships of same-sex couples. *See id.* Victoria is the only state in Australia with laws that provide the same rights to same-sex couples as opposite-sex couples. *See id.* at 170–71.

<sup>120</sup> See H.R. 1024; S. 424.

<sup>121</sup> See H.R. 1024; S. 424.

<sup>122</sup> See H.R. 1024; S. 424.

<sup>123</sup> See Ayoub & Wong, *supra* note 35, at 573.

Currently the UFAA has support from twenty-three Senate members and 119 Representatives.<sup>124</sup> If passed, it would allow same-sex binational couples to strengthen their families.<sup>125</sup> Couples would be able to maintain family unity, rather than be forced to separate, face deportation, or leave the United States.<sup>126</sup> Similarly, through passing an act that would grant same-sex couples immigration benefits, the United States would no longer lag behind the many countries that offer same-sex immigration benefits.<sup>127</sup> The United States would have the opportunity to maintain its image as a country at the forefront of human rights.<sup>128</sup>

### III. BARACK OBAMA: 2008 ELECTION PROMISES AND HIS POLITICAL RECORD ON GAY AND LESBIAN ISSUES

Barack Obama, as America's 44th President, has assumed the leadership of the United States, a country that is still arguably "the most powerful in the world."<sup>129</sup> Richard Holbrooke notes that of President Obama's tasks he needs to a) control the sprawling federal bureaucracy, b) change the relationship between the executive and legislative

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<sup>124</sup> See Bill Summary and Status, H.R. 1024, 111th Cong. (2009), <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR01024>: (last visited Apr. 5, 2010); Bill Summary and Status, S. 424, 111th Cong. (2009), <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:s424>: (last visited Apr. 5, 2010). Senate supporters include: California Senator Barbara Boxer, Connecticut Senator Christopher J. Dodd, Hawaii Senators Daniel Akaka and Daniel K. Inouye, Illinois Senators Roland Burris and Richard Durbun, Maryland Senator Benjamin L. Cardin, Massachusetts Senator John F. Kerry, Minnesota Senator Al Franken, New Jersey Senators Frank R. Lautenberg and Robert Menendez, New York Senator Charles E. Schumer and Kristen E. Gillibrand, and Rhode Island Senator Sheldon Whitehouse, Ohio Senator Sherrod Brown, Oregon Senators Ron Wyden and Jess Merkley, Pennsylvania Senators Robert Casey, Jr. and Arlen Specter, Vermont Senator Bernard Sanders, Washington Senators Maria Cantwell and Patty Murray, and Wisconsin Senator Russell D. Feingold. See Bill Summary and Status, S. 424, *supra*.

<sup>125</sup> See Ayoub & Wong, *supra* note 35, at 596.

<sup>126</sup> See *id.*

<sup>127</sup> See Zaske, *supra* note 31, at 627.

<sup>128</sup> See *id.*

<sup>129</sup> See Richard Holbrooke, *The Next President: Mastering a Daunting Agenda*, FOREIGN AFF., Sept.-Oct. 2008, at 22; President Barack Obama, *supra* note 29. Barack Obama was born on August 4, 1961 in Hawaii. See Organizing for America, Meet the Candidate: Meet Barack, <http://www.barackobama.com/about/> (last visited Mar. 28, 2010). President Obama comes from a binational family: his father was born in Kenya and his mother was from Kansas. See *id.* He graduated from Columbia University in 1983 and Harvard Law School in 1991, where he was the first African-American president of the *Harvard Law Review*. See *id.* The President considers himself a politician who is cognizant of the globalized world we live in, preaching "fresh thinking and a politics that no longer settles for the lowest common denominator." See *id.*

branches, and c) recruit support for other non-governmental sectors.<sup>130</sup> President Obama also faces a crumbling immigration system that is in need of reform.<sup>131</sup>

During his 2008 campaign, Mr. Obama maintained that he was opposed to same-sex marriage, but also opposed an amendment to the United States Constitution defining marriage as solely between one man and one woman.<sup>132</sup> Mr. Obama also claimed to oppose bans on same-sex adoption rights and support civil unions for gay people.<sup>133</sup> Importantly, during his election he advocated for and remained committed to the message that “equality is a moral imperative” for Americans.<sup>134</sup> He specifically promised to fight for the repeal of DOMA.<sup>135</sup> Moreover, the President claimed to support the passing of the Employment Non-Discrimination Act (EDNA), which would prohibit job discrimination based on sexual orientation and gender.<sup>136</sup>

During his campaign, he also supported several other Gay, Lesbian, Bisexual, and Transgender (GLBT) issues such as 1) access to survivor benefits for same-sex partners; 2) equal tax treatment for same-sex couples; 3) domestic partner benefits for federal employees including health insurance; and 4) repealing the so-called “Don’t Ask, Don’t Tell” policy within the military.<sup>137</sup> Most importantly during his campaign Mr. Obama also stated that he supported equal immigration rights for same-sex couples via the UFAA.<sup>138</sup> During his tenure as a Junior Senator, however, he never signed the UFAA.<sup>139</sup>

<sup>130</sup> See Holbrooke, *supra* note 129, at 21. Between 1999 and 2001, Mr. Holbrooke was a U.S. Ambassador to the United Nations. *Id.* He is the architect of the 1995 Dayton Peace Agreement. *Id.*

<sup>131</sup> See Molefi Kete Asante, *Barack Obama and the Dilemma of Power: An Africological Observation*, 38 J. BLACK STUD. 105, 108 (2007).

<sup>132</sup> See Katherine Q. Seeley et al., *Election Guide 2008: On the Issues*, N.Y. TIMES, <http://elections.nytimes.com/2008/president/issues/abortion.html> (last visited Apr. 5, 2010).

<sup>133</sup> See HUMAN RIGHTS CAMPAIGN, WHERE THE PRESIDENTIAL CANDIDATES STAND (2008), [http://www.hrc.org/documents/Questionnaire\\_ReportCard-ObamaMcCain.pdf](http://www.hrc.org/documents/Questionnaire_ReportCard-ObamaMcCain.pdf).

<sup>134</sup> See Open Letter from Barack Obama, *supra* note 23.

<sup>135</sup> See *id.*

<sup>136</sup> See *id.*

<sup>137</sup> See HUMAN RIGHTS CAMPAIGN, WHERE THE DEMOCRATIC CANDIDATES STAND (2008), [http://www.hrc.org//documents/Questionnaire\\_ReportCard-ClintonObama.pdf](http://www.hrc.org//documents/Questionnaire_ReportCard-ClintonObama.pdf).

<sup>138</sup> See *id.*

<sup>139</sup> See Kathy Drasky, *Obama Says He Has “Worked to Improve” the Uniting American Families Act (UFAA)*, INDYBAY (S.F., Cal.), Feb. 29, 2008, <http://www.indybay.org/newstems/2008/02/29/18482630.php>. In the first weeks of his presidency, President Obama angered members of the gay community. See Ed Stoddard, *Obama Must Work for Compromise in U.S. Culture War*, REUTERS, Jan. 19, 2009, <http://www.reuters.com/article/idUSTRE5014BR20090119>. Namely, he came under criticism when he invited conservative pastor Rick Warren to his inauguration as a speaker. See *id.* Warren had previously made several controversial com-

#### IV. IMMIGRATION LAW: THE FEDERAL BALANCE

The Bush administration sought to strengthen the power of the executive branch, requesting minimal oversight from Congress and the Supreme Court.<sup>140</sup> President Bush used the September 11, 2001 attacks to expand the power of the executive branch.<sup>141</sup> Immigration law, particularly the executive's power to exclude, became one way Bush ex-

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ments regarding homosexuality, including that it is "not the natural way" and that "[c]ertain body parts are meant to fit together." See John Cloud, *The Problem for Gays with Rick Warren—and Obama*, TIME, Dec. 18, 2008, <http://www.time.com/time/politics/article/0,8599,1867664,00.html>. Yet Mr. Obama also invited openly gay bishop Gene Robinson to his inauguration. See Stoddard, *supra*. In its previous version, the White House webpage boasted an impressive commitment to expanding the rights of homosexuals in the United States. See The White House, Civil Rights, [http://www.whitehouse.gov/agenda/civil\\_rights/](http://www.whitehouse.gov/agenda/civil_rights/) (last visited Apr. 5, 2009). The administration explicitly advocated expanding hate crime statutes, fighting workplace discrimination, supporting full civil unions and federal rights for LGBT couples, opposing a constitutional ban on same-sex marriage, repealing Don't Ask-Don't Tell, expanding adoption rights for same-sex couples, promoting AIDS prevention, and empowering women to prevent HIV/AIDS. See *id.* While the current website continues to indicate support for the GLBT community, its explicit language is substantially reduced. See The White House, Civil Rights, <http://www.whitehouse.gov/issues/civil-rights> (last visited Apr. 5, 2010) [hereinafter White House, Civil Rights].

Despite recent progress, President Obama has disappointed some by moving slowly with respect to repealing the military's "Don't Ask-Don't Tell" policy. See Doug Sovern, *Obama Disappoints Gay Rights Advocates* (KCSC radio broadcast Feb. 2, 2009). "Don't Ask-Don't Tell" is a public policy in the United States codified by the National Defense Authorization Act for Fiscal Year 1994. See 10 U.S.C. § 654 (2006). It prohibits any person who (1) engages in homosexual activity; or (2) expresses that they are a homosexual; or (3) is in a homosexual marriage from serving in the U.S. military. See *id.* § 654(b). The law excludes openly gay individuals from military services because homosexuals "create an unacceptable risk to the armed forces high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." See *id.* § 654(a)(14). The U.S. military is currently investigating the possibility of eliminating the "Don't Ask, Don't Tell" policy. Gordon Lebold, *Pentagon Treads Carefully in Examining "Don't Ask, Don't Tell,"* CHRISTIAN SCI. MONITOR, Mar. 31, 2010, <http://www.csmonitor.com/USA/Military> (follow "View All Military" hyperlink; then follow "Pentagon Treads Carefully in Examining "Don't Ask, Don't Tell" hyperlink). On March 25, 2010, Defense Secretary Robert M. Gates revealed interim military provisions that will make it more difficult to discharge openly gay men and lesbians. Thom Shanker, *A Military Downgrading of "Don't Ask, Don't Tell,"* N.Y. TIMES, Mar. 26, 2010, at A17. The new measures limit those military members who can initiate "Don't Ask, Don't Tell" related proceedings. *Id.* The measures also attempt to eliminate the ability of third parties to "out" members of the military. *Id.*

The Administration has also made and kept promises with regard to AIDS/HIV. See White House, Civil Rights, *supra*. Namely, the Administration enacted the Ryan White HIV/AIDS Extension Act of 2009. See U.S. Dep't Health & Human Servs., *About the Ryan White HIV/AIDS program*, <http://hab.hrsa.gov/aboutus.htm> (last visited Apr. 5, 2010). The Act provides funding for nation-wide HIV healthcare to benefit those who cannot afford it. See *id.*

<sup>140</sup> See Anne Y. Lee, Note, *The Unfettered Executive: Is There an Inherent Presidential Power to Exclude Aliens?*, 39 COLUM. J.L. & SOC. PROBS. 223, 223 (2006).

<sup>141</sup> See *id.* at 224.

panded this authority.<sup>142</sup> Immigration law in the United States, however, is not solely in the hands of the Executive branch.<sup>143</sup> Rather, it rests within the hands of the entire federal government.<sup>144</sup> Nevertheless, immigration law has not always rested within the federal government's jurisdiction.<sup>145</sup> In fact, prior to the 1870s it was the individual states that patrolled interstate and international immigration.<sup>146</sup> Although the Constitution of the United States contains a Naturalization Clause, it does not explicitly give Congress the right to regulate the process of gaining admission to the United States.<sup>147</sup> It was not until 1889 that the Supreme Court found an inherent federal power granting Congress the right to regulate the United States' borders and exclude certain foreigners from entering the country.<sup>148</sup> Despite Congress's inherent power, in practice the President is an influential player in U.S. immigration policy.<sup>149</sup>

#### A. Congress's Immigration Power

The Supreme Court has declared that "over no conceivable subject is the legislative power of Congress more complete than it is over the

<sup>142</sup> See *id.*

<sup>143</sup> See Marc R. Rosenblum, Assoc. Professor Univ. New Orleans, Address at the American Political Science Association Annual Meeting, Congress, the President, and the INS: Who's in Charge of U.S. Immigration Policy? 6-7 (Aug. 28, 2002) (on file with All Academic Inc.).

<sup>144</sup> See *id.*

<sup>145</sup> See Lee, *supra* note 140, at 228-29.

<sup>146</sup> See *id.*

<sup>147</sup> See U.S. CONST. art. I, § 8. The Constitution grants Congress the power to "establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States." See *id.*

<sup>148</sup> See *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 585 (1889). In this case, the Court looked to the validity of the 1888 Chinese Exclusion Act, which prevented the re-entry of Chinese laborers who left the United States prior to the enactment of the Act. See *id.* at 605. The Court found that inherent in the power of the legislature and the national government was its ability to exclude aliens from its territory. See *id.* at 603. Echoing Chief Justice Marshall, Justice Field stated:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

See *id.* at 604 (quoting *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812)).

<sup>149</sup> See Rosenblum, *supra* note 143, at 1.

admission of aliens.”<sup>150</sup> Congress’s plenary power in the realm of immigration extends so far that it may be unconstitutional if applied to domestic policy.<sup>151</sup> Congress itself established its power in the realm of immigration with the Immigration Act of 1882.<sup>152</sup> The Act’s primary purpose was to act as a ban, prohibiting “undesirable migrants” from entering the United States.<sup>153</sup> In 1889 the Supreme Court, in the *Chinese Exclusion Case*, again declared that Congress had the power to regulate immigration, “even when doing so involved overriding international treaties.”<sup>154</sup>

Furthermore, the Supreme Court has repeatedly refused to interfere in Congressional alien admission requirements, even when those requirements would not pass constitutional scrutiny domestically.<sup>155</sup> An important example of such deference is evidenced in *Boutilier v. INS*.<sup>156</sup> Boutilier was a gay Canadian alien, ordered by INS to be deported to Canada.<sup>157</sup> His deportation was based on his status as a homosexual.<sup>158</sup> The INA specifically allowed the removal of individuals “afflicted with psychopathic personality,” and at the time, homosexuality counted as such an affliction.<sup>159</sup> The Court found that the language “psychopathic personality” was intended specifically to exclude homosexuals from the United States.<sup>160</sup> In its decision, the Court accepted and stood by the Congressional decision to exclude homosexuals.<sup>161</sup>

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<sup>150</sup> See *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972).

<sup>151</sup> See 3A AM. JUR. 2D *Aliens and Citizens* § 282 (2005). Congress, however, does share immigration power beyond its admission power with the executive branch through the Senate’s execution of treaties, the legislative powers of Congress, and sometimes, the executive’s own authority. See *id.*

<sup>152</sup> See Rosenblum, *supra* note 143, at 5.

<sup>153</sup> See *id.*

<sup>154</sup> See *id.* See generally *Chinese Exclusion Case*, 130 U.S. at 609 (upholding and explaining Congress’s plenary power to exclude foreigners even if contrary to a treaty).

<sup>155</sup> See Lee, *supra* note 140, at 228.

<sup>156</sup> See 387 U.S. 118, 122–25 (1967). While homosexuality is no longer a basis for excluding individuals from the United States, the case nonetheless shows the Court’s unwillingness to interfere with the Congressional right to determine admission criteria. See *id.* at 123.

<sup>157</sup> See *id.* at 118.

<sup>158</sup> See *id.*

<sup>159</sup> See *id.* at 118–19.

<sup>160</sup> See *id.* at 124.

<sup>161</sup> See *Boutilier*, 387 U.S. at 124. The Court stated that “[here] Congress commanded that homosexuals not be allowed to enter.” See *id.* Moreover, “[i]t can hardly be disputed that the legislative history of § 212(a) (4) clearly shows that Congress so intended.” *Id.* (discussing the possible ambiguity surrounding the words “psychopathic personality”).

The underpinnings of the INA's gay immigration ban, however, were essentially undone by *Hill v. INS* in 1983.<sup>162</sup> In 1980, Carl Hill arrived in San Francisco and verbally admitted to U.S. Customs that he was gay.<sup>163</sup> Based on his admission of homosexuality he was excluded from the United States.<sup>164</sup> Nevertheless, the Ninth Circuit found that his exclusion was improper and that one could not be excluded from the United States based solely on her/his admission of homosexuality.<sup>165</sup> Importantly though, the Court did not comment on the INA's homosexual ban but rather ruled that further exclusions of individuals based on their homosexuality would face "serious legal scrutiny."<sup>166</sup>

Therefore, even with the *Hill* ruling, it was not until Congress acted in 1990, finding that individuals could not be barred from immigrating to the United States based solely on their sexuality, that the homosexual immigration ban was repealed.<sup>167</sup> Additionally, the continued Congressional deference with respect to the admission criteria of aliens in the United States has allowed the exclusion of aliens for their male gender (father in an illegitimate-child relationship) as well as political beliefs.<sup>168</sup> But Congress's power in the realm of immigration is

<sup>162</sup> See LONG, *supra* note 2, at 26; see also *Hill v. INS*, 714 F.2d 1470, 1480 (9th Cir. 1983) ("The *only* evidence upon which a finding of insanity can be made for the purpose of an exclusion proceeding is a certification . . . by a medical officer . . . specially designated civil surgeons, or a board of Public Health Service Officers.").

<sup>163</sup> See *Hill*, 714 F.2d at 1473.

<sup>164</sup> See *id.*

<sup>165</sup> See *id.* at 1480.

<sup>166</sup> See *id.*; LONG, *supra* note 2, at 26–27 (analyzing *Hill*).

<sup>167</sup> See LONG, *supra* note 2, at 28. This decision marked the United States as the last industrialized country to remove a ban on homosexual immigration. See *id.* The 1990 Immigration Act also allowed the Department of Health and Human Services to lift the 1987 HIV ban. See *id.* In 1993, however, Congress reintroduced the ban specifying that the HIV/AIDS infections were grounds for excluding individuals from immigrating to the United States. See *id.* This is pertinent to homosexual immigration because of the many stereotypes homosexual individuals face associate them with the HIV virus. See *id.* at 29.

<sup>168</sup> See *Fiallo v. Bell*, 430 U.S. 787, 789 (1977); *Kleindienst*, 408 U.S. at 770; *Boutilier*, 387 U.S. at 124. In *Fiallo v. Bell*, three fathers and their children (either the child was an alien, or the father was an alien) born out of wedlock desired to attain immigrant status for the alien on the basis of their "relationship to a citizen or resident alien child or parent." See 430 U.S. at 790. They challenged INS law because, under the law, "the natural father of an illegitimate child who is either a United States citizen or permanent resident alien is not entitled to preferential treatment as a 'parent.'" *Id.* at 789. In *Kleindienst v. Mandel*, Mandel was a Belgian citizen who described himself as a "revolutionary marxist," despite his lack of membership in the communist party. See 408 U.S. at 789. The Court found that Mandel, and other excludable aliens, did not have a First Amendment Right to appeal their exclusion. See *id.* at 767–68.

not without limits, especially when balanced with the executive's power to exclude aliens.<sup>169</sup>

### B. *The President's Immigration Powers*

President George W. Bush's administration adopted an expansive view of presidential authority, accrediting the need for national security to the September 11, 2001 attacks.<sup>170</sup> The attacks spurred anxiety over terrorism that has since altered and impacted immigration debates.<sup>171</sup> Even sexual rights discussions encompass anti-terrorist sentiment.<sup>172</sup> For example, a same-sex married couple was stopped at the Canadian border because they tried to use the same paperwork as used by heterosexual married couples.<sup>173</sup> A conservative women's group reported that many people fear unregulated borders and that in this instance the border police were able to stop "domestic terrorists."<sup>174</sup>

Furthermore, President Bush expanded executive power through immigration law.<sup>175</sup> Specifically, the Bush administration used its authority over the nation's security and welfare as a means of creating a powerful executive branch that did not want oversight or to bargain with Congress.<sup>176</sup> Bush used the executive's power in immigration for an increase in "interrogation, incapacitation and deportation."<sup>177</sup>

Thus, as indicated, the President has substantial power with respect to immigration in the United States, especially regarding the exclusion of immigrants.<sup>178</sup> The Immigration and Nationality Act provides that when the President finds that the admission of a group of aliens is detrimental to the United States, he may suspend the entry of those aliens, or impose restrictions on their entry as he finds necessary.<sup>179</sup>

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<sup>169</sup> See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (discussing the inherent ability of the Executive to exclude aliens).

<sup>170</sup> See Lee, *supra* note 140, at 223–24.

<sup>171</sup> See LONG, *supra* note 2, at 32.

<sup>172</sup> See *id.*

<sup>173</sup> See *id.*

<sup>174</sup> See *id.*

<sup>175</sup> See JOHN P. MACKENZIE, *ABSOLUTE POWER: HOW THE UNITARY EXECUTIVE THEORY IS UNDERMINING THE CONSTITUTION 1* (2008); Lee, *supra* note 140, at 224.

<sup>176</sup> See MACKENZIE, *supra* note 175, at 1.

<sup>177</sup> See Lee, *supra* note 140, at 224 (stating that the Justice Department detained and deported more than 1000 persons on various immigration-related grounds following September 11, 2001).

<sup>178</sup> See Immigration and Nationality Act, 8 U.S.C. § 1182(f) (2006).

<sup>179</sup> See *id.* The INA specifically states:

Whenever the President finds that the entry of any aliens or any class of aliens into the United States would be detrimental to the interests of the United

The President also has a role in influencing the enforcement of these immigration policies.<sup>180</sup> Ultimately, the Executive has become successful in immigration enforcement because unlike congressional subcommittees, the executive branch has many resources.<sup>181</sup> Specifically, the Executive branch has the ability to write regulations, while Congress is often unaware of the enforcement policies and procedures already in place.<sup>182</sup>

The Supreme Court has also noted that the President's power in immigration is intrinsically linked to the executive power to control foreign affairs.<sup>183</sup> The Court in *United States ex rel. Knauff v. Shaughnessy* founded the doctrine of national sovereignty power and held that the President's right to exclude aliens was a fundamental act of such sovereignty.<sup>184</sup> *Knauff* involved a female German national, who left her country during Hitler's time in power.<sup>185</sup> She subsequently married a U.S. citizen while working for the U.S. government in Germany.<sup>186</sup> Upon seeking entrance to the United States, she was temporarily excluded and then per an order of the Attorney General, permanently excluded.<sup>187</sup> The Court held that it was in the inherent power of the executive as a result of the President's need "to control the foreign affairs of the nation."<sup>188</sup>

After the *Knauff* Court declared the President's inherent power to exclude aliens, Congress legitimized the decision in the 1952 Immigration and Nationality Act.<sup>189</sup> The Supreme Court, since the *Knauff* decision, has not clarified whether the Executive right to exclude is inherent or Congressionally delegated.<sup>190</sup> But since the 1950s the lower

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States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

*Id.*

<sup>180</sup> See Rosenblum, *supra* note 143, at 6.

<sup>181</sup> See *id.* at 10–11.

<sup>182</sup> See *id.* at 6–7.

<sup>183</sup> See *Knauff*, 338 U.S. at 542.

<sup>184</sup> See *id.*; Lee, *supra* note 139, at 238.

<sup>185</sup> See 398 U.S. at 539.

<sup>186</sup> See *id.*

<sup>187</sup> See *id.* at 539–40.

<sup>188</sup> *Id.* at 542. The Court also noted that an executive officer such as the Attorney General could be delegated to carry out the functions of exclusion. See *id.* at 543.

<sup>189</sup> See Immigration and Nationality Act, Pub. L. No. 414, § 212(e), 66 Stat. 163, 188 (1952) (codified at 8 U.S.C. § 1182(f) (2006)).

<sup>190</sup> See Lee, *supra* note 140, at 241.

courts have used § 212 of the INA as the basis of the President's ability to exclude aliens.<sup>191</sup> Yet, nowhere is the President authorized to establish the criteria of admission into the United States.<sup>192</sup> The President, however, is able to use immigration as a tool of foreign policy, even with Congress' domestically-oriented concerns.<sup>193</sup>

Even from a minimalist's perspective the President has some role in commenting on legislative proposals and also has the power to veto legislative agendas.<sup>194</sup> Examples include: executive commentary, which can be influential in the legislative process, and also Presidents' influence of legislative immigration via the veto.<sup>195</sup> Thus, Presidents comment on Congressional immigration proposals as well as have the ability to approve or veto a final immigration act.<sup>196</sup> Immigration is, in fact, one of the most divisive issues between the President and Congress.<sup>197</sup> Rosenblum notes that from 1882 to 1952 the President vetoed ten proposed immigration laws.<sup>198</sup> This number of vetoes by the President is significant as since the 1882 Chinese Exclusion Act, Congress "has passed only eight separate major immigration laws, amended the basic INA another half-dozen times, and held regular oversight and investigative hearings on a range of immigration issues."<sup>199</sup>

### C. *The Intersection of Presidential, Congressional, and Judicial Power Regarding Immigration Policies*

Generally, there is a very limited amount of interference from the judiciary in the areas of immigration and naturalization.<sup>200</sup> Government action with respect to aliens is not however completely immune from judicial interference.<sup>201</sup> Courts examine immigration policies when there is a concern that the Plaintiff's constitutional rights are being violated.<sup>202</sup> They are also may examine policies that involve separation of powers.<sup>203</sup>

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<sup>191</sup> See *id.* at 241.

<sup>192</sup> See *INS v. Chadha*, 462 U.S. 919, 1000 (1983) (White, J., dissenting).

<sup>193</sup> Rosenblum, *supra* note 143, at 7, 9.

<sup>194</sup> See *id.* at 6.

<sup>195</sup> See *id.*

<sup>196</sup> See *id.*

<sup>197</sup> See *id.* at 1.

<sup>198</sup> Rosenblum, *supra* note 143, at 6.

<sup>199</sup> See *id.*

<sup>200</sup> 16 C.J.S. *Constitutional Law* § 184 (1984).

<sup>201</sup> See *id.*

<sup>202</sup> See *id.*

<sup>203</sup> See *id.*

Nevertheless, due to several Cold War-era cases there is some confusion regarding the source of the Executive's power to regulate immigration.<sup>204</sup> Even recently the Justices disagreed on where the power to regulate immigration, particularly in exclusion cases, arises.<sup>205</sup> Yet, what is evident is that each elected branch of the government affects and influences the immigration policies in the United States.<sup>206</sup> Congress' immigration policies tend to be dominated by "domestic political concerns."<sup>207</sup> The President on the other hand, has a much broader perspective on immigration policy, as he tends to consider immigration from a perspective of foreign policy and the international implications of U.S. immigration policies.<sup>208</sup>

#### D. *The President's Power to Influence Congressional Outcomes*

Although the President can influence immigration legislation "in pursuit of his diplomatic goals" it is Congress that will ultimately have to pass legislation regarding the admission of aliens to the United States.<sup>209</sup> Although there are individuals who argue that Congress should unquestionably act and pass the UAFA, it has yet to do so.<sup>210</sup> An important part of passing the UAFA could be President Obama's addition of the UAFA to the Washington policy agenda.<sup>211</sup> Scholars have consistently commented that it is the President who has the most significant role in "setting the policymaking agenda in Washington."<sup>212</sup> Moreover, some argue that there is no other individual than the President who has the ability to motivate and focus the attention of many actors.<sup>213</sup> For example, both Presidents Clinton and Bush Sr. were able to increase Congressional attention to domestic issues such as education and healthcare.<sup>214</sup>

Even those who do not support an executively-centered government concede a President's ability to influence Congress is an important

<sup>204</sup> See Lee, *supra* note 140, at 224–25. The confusion lies in whether Congress delegates power to the executive regarding the exclusion of aliens or whether an inherent executive power to exclude aliens exists. See *id.*

<sup>205</sup> See *id.* at 225.

<sup>206</sup> See Rosenblum, *supra* note 143, at 8.

<sup>207</sup> See *id.* at 9.

<sup>208</sup> See *id.* at 9–10.

<sup>209</sup> See Lee, *supra* note 140, at 228.

<sup>210</sup> See LONG, *supra* note 2, at 15 (urging the United States to pass the UAFA to address "egregious inequality").

<sup>211</sup> See George C. Edwards & B. Dan Wood, *Who Influences Whom? The President, Congress and the Media*, 93 AM. POL. SCI. REV. 327, 327 (1999).

<sup>212</sup> See *id.*

<sup>213</sup> See *id.*

<sup>214</sup> See *id.* at 342.

strategic power.<sup>215</sup> Additionally, even though Congress has a substantial ability to continue its own agenda, the President has a significant influence over Congress's agenda setting.<sup>216</sup> Regarding specific immigration laws, the President successfully influenced immigration laws in 1942, 1965, 1986, and 1996.<sup>217</sup> Since World War II, Presidents have been the drafters of immigration laws or substantially bargained with Congress over their contents.<sup>218</sup> In the same light, President Obama might be able to act as an "issue entrepreneur" and highlight the UAFA to the legislature.<sup>219</sup> Depending on how support for the UAFA in Congress is structured, President Obama could either 1) try to convince congressmen to adopt the UAFA even if they disagree with the goal of the act or 2) attempt to reframe the debate surrounding the UAFA such that Congress believes the UAFA and their political interests are the same.<sup>220</sup> For example, instead of making the UAFA an issue of immigration, President Obama could reframe it as an issue of civil liberties.<sup>221</sup>

Another important component of President Obama's ability to obtain the passage of the UAFA, depends on the extent and details of his other legislative requests.<sup>222</sup> It is likely that a President's legislative proposal will spark debate between the President and Congress.<sup>223</sup> Thus, if President Obama is going to persuade Congress to pass the UAFA, he must do so by "bargaining and persuasion."<sup>224</sup> Just because Mr. Obama won the 2008 election does not mean that he has been in-

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<sup>215</sup> See *id.* at 327. An important piece of a president's power to influence congress is a president's public prestige. See Douglas Rivers & Nancy L. Rose, *Passing the President's Program: Public Opinion and Presidential Influence in Congress*, 29 AM. J. POL. SCI. 183, 184 (1985). "presidential influence in Congress" is defined in the Rivers and Rose article as the President's ability to pass his legislative program by Congress. See *id.* at 185.

<sup>216</sup> See Edwards & Wood, *supra* note 211, at 328, 342. However, some argue that presidents are only influential under certain circumstances. See Kimberly Maslin-Wicks, *Two Types of Presidential Influence in Congress*, 28 PRESIDENTIAL STUD. Q. 108, 109 (1998). Edwards and Wood believe that presidents are influential only at the margins of issues, rather than being the inspirers or leaders of change. See *id.* at 109. Those who advocate this position purport that members of congress vote on issues according to their own beliefs, which a president can largely do little to change. See *id.*

<sup>217</sup> See Rosenblum, *supra* note 143, at 17–22, 31.

<sup>218</sup> See *id.* at 31–32 (excluding the 1952 INA).

<sup>219</sup> See Edwards & Wood, *supra* note 211, at 342.

<sup>220</sup> See Maslin-Wicks, *supra* note 216, at 116.

<sup>221</sup> See *id.*

<sup>222</sup> Rivers & Rose, *supra* note 215, at 185.

<sup>223</sup> See *id.* at 185–86. Presidential influence is also interesting because presidents can achieve policies and legislation opposed by a substantial amount of congress, thus potentially and effectually putting a presidential agenda before a congressional agenda. See *id.*

<sup>224</sup> See *id.* at 186. The authors discuss various tactics presidents can use to achieve legislative persuasion including patronage, perquisites and other incentives. See *id.*

stantaneously successful in achieving his legislative platform.<sup>225</sup> If he is sincere in his care for bringing equal federal benefits to same-sex couples, he should use this limited political capital to bring the UFAA to Congress' attention, so that it does not "become lost in the complex and overloaded legislative process."<sup>226</sup>

### CONCLUSION

The election of President Barack Obama was prefaced by claims of hope and change for the United States. Included in Mr. Obama's election promises was his commitment to the repealing of the Defense of Marriage Act, which effectually denies same-sex couples the same federal benefits afforded to opposite-sex married couples. Of those federal benefits denied to same-sex couples are federal immigration benefits. As a result, over 35,000 couples in this country face a constant battle: how to keep their families together.

The denial of same-sex immigration benefits leaves U.S. citizens who are in same-sex relationships unable to sponsor their foreign partners. Couples are denied the ability to remain together solely on the basis of their sexuality. This situation can be changed. The Uniting American Families Act would provide same-sex binational couples, in which one individual is a U.S. citizen, equal immigration benefits to opposite-sex couples of similar circumstance. The Act not only achieves this goal, but also avoids the controversial and fiery debate surrounding same-sex marriage.

As of March 22, 2010 the Act does not have the support it needs to become law in the United States. Nevertheless, the more support the Act gets, the closer the egregious inequality facing same-sex binational couples in the United States is to being eliminated. President Obama should remain committed to his 2008 Election promises. He should use his influence as President and work with the Congress to achieve equal immigration benefits for same-sex couples. Or as he routinely stated in

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<sup>225</sup> See *id.* at 186; see also *Assessing Barack Obama*, N.Y. TIMES, NOV. 4, 2009, <http://topics.nytimes.com/topics/reference/timestopics/people/o> (follow "Obama, Barack" hyperlink; then follow "Assessing Barack Obama" hyperlink) (assessing the success of issues in his governing agenda and noting daunting tasks after his first year in office). Rivers and Rose note that an election inevitably leaves the minority party frustrated and perhaps able to prevent a president's legislative agenda. See Rivers & Rose, *supra* note 215, at 186. Therefore, while in the early moments of a new president's term one might experience a honeymoon-like atmosphere with congress, it will likely return to its established pattern of bargaining and persuasion. See *id.*

<sup>226</sup> See Edwards & Wood, *supra* note 211, at 328.

his presidential campaign, he should use his “bully pulpit” to influence Congress to bring equal immigration benefits to same-sex couples.

This Note has discussed three particularly compelling reasons that President Obama should work toward the passage of the UAFIA. First, the expansion of presidential authority under the Bush administration has broadened the President’s ability to regulate immigration policy. Second, the historical evidence that the Executive does have the ability to influence and shape immigration reform supports the notion that presidential influence in this arena is appropriate and effective. Third, Mr. Obama’s election commitment to the LGBT community should be prioritized. As a country that prides itself on its status as a global leader in human rights and equality, the United States should no longer lag behind the rest of the modernized world. Instead, as the President himself has stated, same-sex couples deserve “full equality under the law.”

