

Legal Immigration Reform

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INTRODUCTION

Congress recently passed sweeping legislation in order to control illegal immigration. That new law has been administered in a careful, deliberate manner and its provisions are now nearly fully in effect. While some observers predict that further significant immigration legislation is unlikely, an important issue was still left unresolved upon completion of the Immigration Reform and Control Act of 1986: the reform of legal immigration. This Essay will discuss the need for legal immigration reform and some of the major issues that Congress should consider when addressing it.

I. PROBLEMS WITH LEGAL IMMIGRATION

Many might ask, "Is there some problem with legal immigration?" In broadest terms, the answer is "No." Legal immigration has been of historic benefit to this country and it is clearly part of our nation's heritage. The United States accepts more foreign-born persons for permanent resettlement than the rest of the world combined. I am proud of this generous policy, I wish it to continue, and indeed part of the motivation for the Immigration Reform and Control Act of 1986¹ was to control illegal immigration in order that legal immigration might be preserved.

However, while our present generous policy should continue, this

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1. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered titles and sections) [hereinafter IRCA].

policy is not always serving the national interest as well as it could. There are three main problems with legal immigration today: (1) there is no overall level set on legal immigration and an inherent growth has resulted; (2) ninety percent of all legal immigrants are *not* selected based on their skills or potential contributions to our country; and (3) the system unintentionally discriminates against nationals from certain parts of the world.

Overall Level of Immigration

Legal immigration to the United States has three components: (1) an unrestricted number of "special immigrants"² and immediate relatives (spouses, parents and children) of U.S. citizens;³ (2) a flexible number of refugees (levels set each year in consultations between the Executive Branch and Congress);⁴ and (3) a numerically restricted group of 270,000 immigrants per year who are chosen based on family connections in the United States (216,000) and needed labor market skills (54,000).⁵ Because of the lack of numerical restriction on immediate relatives and because of recent trends in the refugee consultation process, the level of immigration to the United States has grown significantly in the last decade.

Immigration of immediate relatives has been growing at a rate of seven percent per year in recent years.⁶ Approximately 114,000 immediate relatives entered in 1976, and 223,000 immediate relatives were admitted in 1986.⁷ Thus, numerically unrestricted immigration of immediate relatives increased by 109,000 persons — nearly doubling during the last ten years. The structure of our present immigration system permits this inherent growth: no specific executive or legislative action was needed to approve of it.

Nearly every industrialized country in the world sets a national level of immigration. The United States is unique in not knowing how many immigrants will enter in a given year until that year is ended. As Malcolm Lovell, former Deputy Secretary of Labor, recently testified in the Senate, a specific national level of immigration, "in the same way as a household budget, can be an important disciplining device in policymaking, forcing us to determine our priorities

2. See Immigration and Nationality Act § 201(a), 8 U.S.C. § 1151(a) (1982) [hereinafter INA].

3. See *id.* § 201(b), 8 U.S.C. § 1151(b).

4. See *id.* 207, 8 U.S.C. § 1157.

5. See *id.* 203(a), 8 U.S.C. § 1153(a).

6. *Immigration Act of 1987: Hearings on S. 1611 Before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987) (response by Jerome C. Ogden to question from Senator Kennedy) (document not yet printed or paginated) [hereinafter *Hearings on S. 1611*].

7. IMMIGRATION AND NATURALIZATION SERVICE, 1986 STATISTICAL YEARBOOK (1987) 9 [hereinafter INS YEARBOOK].

thoughtfully and to make our choices consistent with the nation's overall highest interest within agreed limits."⁸

No level should be rigid. The national level of immigration should be set and adjusted based on current labor market and other information. However, our country should be able to firmly determine how many immigrants will enter in a given year. I favor a system that will include immediate relatives in the calculation for annual immigration levels, but which will not limit that category specifically. I support a mechanism that would review and adjust annual immigration levels every few years.

Refugee admissions are an important component of overall legal immigration. In the late 1970s and early 1980s, refugee admissions often equalled or exceeded 100,000 persons per year.⁹ Many of the refugees admitted during that time were from Southeast Asia, and a large portion were resettled in the United States because of their legitimate fears about returning home and their inability to find resettlement elsewhere.¹⁰ However, while the refugee crisis in Southeast Asia abated in the mid-1980s, the level of admissions to the United States has remained fairly high. The Refugee Act of 1980 set the "normal flow" of refugees (for periods during which no crisis or serious refugee situation existed) at 50,000 per year.¹¹ We have always exceeded that level and admissions have averaged between 60,000 and 70,000 per year during the previous four years.¹² In addition, there is evidence that these refugees do not always fulfill the definition of "refugee" under U.S. law.¹³ This policy is neither honest nor helpful in our quest to ensure strong public support for generous refugee admissions in times of true refugee crises.

Noted immigration scholar Michael Teitelbaum suggested that the United States must "recognize that the demand for immigrant visas to the U.S. far exceeds any conceivable supply. As in all cases of scarcity, hard choices will have to be made, tradeoffs will have to be adopted between worthy categories such as refugees, family members, independent immigrants, etc. . . ."¹⁴ Teitelbaum correctly

8. *Hearings on S. 1611, supra* note 6 (prepared statement of Malcolm Lovell, Jr.).

9. INS YEARBOOK, *supra* note 7, at xxii, 42.

10. U.S. DEP'T OF STATE, COUNTRY REPORTS ON THE WORLD REFUGEE SITUATION, REPORT TO THE CONGRESS FOR FISCAL YEAR 1983, 34, 45-50, 59-62 (1982).

11. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as Congressional Declaration of Policies and objectives, INA §§ 411-414, 8 U.S.C. §§ 1521-24).

12. INS YEARBOOK, *supra* note 7, at 42.

13. *See infra* note 28.

14. *Hearings on S. 1611, supra* note 6 (prepared statement of Michael S.

states the reality which the U.S. refugee program has so far failed to recognize.

Dominance of Family Connection Immigration

Our present legal immigration system is dominated by persons immigrating solely because of a family connection in the United States. Only ten percent of all immigrants are chosen because they possess certain skills or characteristics that would benefit particular U.S. employers or because they would otherwise serve the national interest.¹⁵ Ninety percent of all immigrants are admitted because of their family connections in the United States, or because of their family relationships to persons already immigrating to the United States (on either family or labor-related grounds).¹⁶

Immediate family members (spouses and unmarried children under age 26 of permanent residents, spouses, unmarried children and parents of citizens) should be given automatic eligibility to apply for immigration benefits, but an increased proportion of our immigrants should be selected because of their education, training, age, job skills, language skills, or other qualities that would benefit the nation as a whole. In distributing the available visas to legal immigrants, we have concentrated on the wants and desires of the individual alien and his family to such an extent that we have neglected to consider how well each immigrant serves our nation's interest. It is important, and a part of the American ethic, to maintain the nuclear family unit. However, there should not be automatic recognition of more distant ties — such as those of adult siblings or those of adult sons and daughters who have married and are raising their own families. We should allow aliens who immigrate to bring their immediate families with them. We should not guarantee them the right to bring their extended family, if that extended family would not serve the national interest as well as would another group of immigrants.

Other immigrant-receiving countries do not focus so exclusively on family-connected immigration. As one scholar has noted, "I know of no nation roughly comparable to ours that places such an emphasis on family connections. Australia, Canada and New Zealand, for example, all welcome some foreign-born as immigrants, not as guestworkers. Each of these nations is interested in securing talented

Teitelbaum).

15. This is based on the number of approximate admissions under the immediate relative and "family preference" categories (INA § 201(a), 8 U.S.C. § 1151(a) and INA § 203(a)(1), (2), (4) and (5), 8 U.S.C. § 1153(a)(1), (2), (4) and (5)) compared to the approximate "principle beneficiary" admissions under the "labor preference" categories, INA § 203(a)(3) and (6), 8 U.S.C. § 1153(a)(3) and (6). See INS YEARBOOK, *supra* note 7, at 8-9.

16. INS YEARBOOK, *supra* note 7, at 8-9.

people and investors, in addition to family members. Each has a system designed to meet these goals — as we do not now. Each is better positioned, frankly, than we are to attract the restless talent of the world.”¹⁷

There is no question that some of today’s family-connected immigrants display “restless talents” and contribute to the nation’s economy. However, it is also clear that some are less talented than others (or have talents less needed than others), and that given the tremendous worldwide interest in immigrating to the United States, our legal immigration system could do a more responsible job of selecting immigrants who serve the national interest.

Unintentional Discrimination

When the U.S. immigration system was revised in 1965 to emphasize family connections,¹⁸ Congress intended to abolish past discriminatory practices and to ensure equal treatment of potential immigrants from all countries of the world.¹⁹ These intentions were proper and necessary. However, there have been two unintended consequences of this revision: a few countries of the world have come to dominate the legal immigration system, and the level of immigration has risen dramatically.²⁰ Neither result was intended, and both have occurred because of the emphasis on family connections. Since the most recent immigrants tend to have the greatest number of family members abroad, they have the greatest opportunity to apply for relatives under our system. Thus, the relatives of most recent immigrant groups, from the countries of Latin America and Asia, now represent eighty-five percent of all legal immigrants.²¹ Under the current system they will continue to do so. In addition, the numerical exemption given to immediate relatives of U.S. citizens in 1965 has been responsible for a significant increase in legal immigration, with the level of immediate relative immigration increasing from 43,677

17. *Hearings on S. 1611, supra* note 6 (prepared statement of David S. North).

18. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified in various sections of 8 U.S.C. §§ 1101-1503 (1982)).

19. “The new selection system . . . is based upon first come, first served, without regard to place of birth, within the preference categories and subject to specified limitations designed to prevent an unreasonable allocation of numbers to any one foreign state.” H.R. REP. NO. 745, 89th Cong., 1st Sess. 12 (1965).

20. “The basic objective of the bill [is] to choose fairly among the applicants for admission to this country without proposing any substantial change in the number of authorized immigration.” *Id.* at 13. In 1965, annual immigration was 296,697; in 1986, that level was 601,708. INS YEARBOOK, *supra* note 7, at 1.

21. INS YEARBOOK, *supra* note 7, at 14-15.

in 1968 (the first effective year of the 1965 reforms) to over 223,000 in 1986.²²

Although neither of these two results was anticipated by those who drafted the 1965 amendments and neither of the effects developed immediately, the consequences have become clear and stark over the past twenty-three years, and the time is now ripe for change.

II. DIRECTIONS FOR LEGAL IMMIGRATION REFORM

The basic direction for reform should be to ensure that legal immigration to the United States best serves the national interest. The two essential methods to achieve this are: (1) set a national level of immigration which will be periodically reviewed by Congress and the Executive branch, and (2) increase the number and proportion of visas granted to immigrants based on their skills or U.S. labor market needs.

National Level of Immigration

I firmly believe that the United States should know how many immigrants will be permitted to enter the country permanently each year. This is merely good public policy. Immigration is now a significant component of U.S. population growth, and it is becoming increasingly important to other government programs and policies. No matter what the level is, we should know at least one year in advance the exact level.

The best practical system to set a national level of immigration would be to: (1) determine which types of immigration should be numerically unrestricted and what that level is now; (2) estimate the number of visas needed for numerically restricted immigration; (3) add the two numbers together to establish a national level; and (4) subtract from the numerically limited immigration any excess immigration from the unrestricted categories. This system would set a clear national level while ensuring that immigration of our citizens' closest family members remains unrestricted.

There is legitimate debate over what types of immigration should be "unrestricted" but still counted in the overall level calculations. Certainly immediate relatives of U.S. citizens should be in this category, since immediate relatives have been responsible for the unchecked growth in legal immigration during the past twenty-three years. The more difficult question is whether refugees also should be included.

In previous years, I have argued that refugees should not be in-

22. IMMIGRATION AND NATURALIZATION SERVICE, 1968 ANNUAL REPORT 34 (1969); INS YEARBOOK, *supra* note 7, at 9.

cluded in such a formula because they were admitted under a "consultation" system that allowed congressional participation in the setting of each year's admission level and because refugee admissions depend on foreign policy and humanitarian factors that are less influential in immigration procedures for family or labor purposes.²³ In 1982, I argued on the floor of the U.S. Senate that the refugee consultation mechanism was working and that amendments to the Immigration Reform and Control Act to include refugees when setting a national level of immigration were inappropriate.²⁴

However, conditions have changed since the late 1970s and early 1980s, when the refugee flow — particularly from Southeast Asia — was of a different nature, and when the Executive branch was more receptive to congressional preferences concerning refugee admissions. The original refugee flow from Southeast Asia consisted of a large number of persons who truly risked persecution if they were to return to their homeland and who did not have other permanent resettlement opportunities.²⁵ In addition, the Executive branch was quite responsive to congressional concerns over large (and to some, unreachable) refugee admission ceilings proposed by the administration. Initial requests for admissions of 173,000 in fiscal year 1982 and 98,000 in fiscal year 1983 were reduced to 140,000 and 90,000, respectively, in response to suggestions from members of Congress.²⁶

Today, the character of the refugee flow from Southeast Asia is different. Many refugees come now for economic reasons, or to be with family members already admitted to the United States, rather than out of a well founded fear of persecution if returned to Vietnam, Cambodia, or Laos.²⁷ While they have understandable reasons for migrating, these reasons are not sufficient to satisfy the definition of "refugee" in the Immigration and Nationality Act.²⁸ In addition,

23. J. VIALET, NUMERICAL LIMITS AND THE PREFERENCE SYSTEM FOR IMMIGRANTS IN THE SIMPSON-MAZZOLI BILLS, 97TH AND 98TH CONGRESSES: SUMMARY AND DEBATE 8 (1987) (Congressional Research Service, Library of Congress).

24. 128 CONG. REC. 10,450 (daily ed. Aug. 13, 1982).

25. See *supra* note 10.

26. S. REP. NO. 154, 99th Cong., 1st Sess. 4-5 (1985).

27. "The persons fleeing today are no longer predominantly persons who were associated with the United States, nor does it appear that the majority have been singled out for harsher treatment than that generally suffered by the rest of the population. Far more appear to be taking this perilous journey in search of economic and political freedom or to be reunited with family members. . . ." UNITED STATES DEPARTMENT OF STATE, REPORT OF THE INDOCHINESE REFUGEE PANEL 7 (1986).

28. "Refugee" is defined as "any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion,

despite congressional guidance in the refugee statute that the “normal flow” of refugees should be 50,000 per year, the Administration has consistently proposed higher levels, and it has largely resisted congressional interests in reducing actual admissions to this “normal flow.”²⁹

Because many recent refugees are being admitted who fit the definition of “immigrant” more closely than “refugee,” and because of a diminution in cooperation between executive and legislative players in the refugee consultation process, refugees should be considered when setting a national level of immigration. I am not adamant about any one particular method of achieving this, but there are at least two options which I find satisfactory: (1) including refugee admissions within the national level of immigration calculation at the “normal flow” level, and treating them as immediate relatives (any excess over the normal flow is not restricted, but subtracted from the numerically restricted categories), and an exception to the normal flow level would be available if the President were to certify (under the Refugee Act) that an “unforeseen emergency refugee” exists;³⁰ or (2) establishing a separate mechanism, outside the national level calculation, where Congress may revise or reject — in special, expedited procedures — any refugee admissions level proposed by the Executive branch which exceeds the normal flow.

Both approaches would provide greater stability and predictability in overall immigration admissions while preserving the United States’ ability to accept its fair share of the world’s refugees and to respond generously to true refugee emergencies.

Finally, there is much legitimate debate about what the national level of immigration should be. Many business, ethnic, and religious groups argue that immigration should be increased for both economic and historical reasons. Conversely, population and environmental groups believe immigration should be decreased because of immigration’s increasing role in population growth and natural resource depletion. Organized labor appears to have concerns about the number of new labor force entrants and yet they have a real interest in attracting new members.³¹

The American public, in a wide range of polls taken over the past

nationality, membership in a particular social group, or political opinion. . . .” INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

29. See S. REP. NO. 154, *supra* note 26, for administration admissions requests in excess of 50,000. For congressional requests to lower the level of admissions, see the letter of Hon. Romano L. Mazzoli, Chairman, Subcommittee on Immigration, Refugees and International Law, Committee on the Judiciary, suggesting that fiscal year 1986 admissions be reduced from the 70,000 proposed by the administration to 53,000. 132 CONG. REC. 5675 (daily ed. Jan. 30, 1986).

30. Refugee Act of 1980, *supra* note 11, 8 U.S.C. § 1157(b)(1982).

31. See generally *Hearings on S. 1161*, *supra* note 6.

decades, has shown a great reluctance to increase immigration over present levels. Today, only a small percentage favor increasing immigration at current levels, and an equally large plurality favor reducing immigration.³² While I have never believed in legislating based on public opinion polls, it is uncommonly clear in this instance that the public does not favor increasing legal immigration.

Therefore, legal immigration should not be significantly increased unless clear evidence emerges that an increase is necessary or otherwise justified. The United States already accepts more immigrants and refugees for permanent resettlement than the rest of the world combined. We should not doubt our own generosity. In addition, no convincing evidence yet exists that immigration should be substantially increased or decreased.³³

The wisest policy is to retain overall immigration at approximately current levels, to require studies on the effects of legal immigration on our economy, labor market, population, environment, infrastructure and other important factors, and then to review the overall level every few years to determine whether a change in immigration rates is necessary. We have not consciously altered the legal immigration system for twenty-two years. Regular review of the system is essential.

Independent Immigration

We should increase the proportion and absolute number of immigrants who are admitted to the United States because of their labor market skills or other qualities which would best serve the national interest. In addition, we should reduce our fixation on admitting immigrants merely because they have a family connection in the United States.

Public support is necessary for any immigration policy. Therefore, immigration policy should serve the general public's interest first, before it serves the interests of particular groups in society or partic-

32. See *New Restrictions on Immigration Gain Public Support, Poll Shows*, N.Y. TIMES, July 1, 1986, at A1, col. 4; *What Our Readers Have to Say*, U.S. NEWS & WORLD REPORT, Feb. 17, 1986, at 71; Simon, *Immigration and American Attitudes*, PUBLIC OPINION, July-Aug. 1987, at 47.

33. It is difficult to document the lack of information. Nonetheless, most assertions that changing demographics imply a future shortage in the U.S. workforce fail to note that the productivity of the U.S. workforce should increase, and that the labor demands of labor-intensive industries today might not exist in twenty years. For a response to the argument that there will likely be a U.S. labor shortage by the year 2000, see *Hearings on S. 1611*, *supra* note 6 (prepared statement and response to questions for the record of Christopher Hankin).

ular individuals in society. Our present policy, where only ten percent of all immigrants are chosen for their particular skills, and where ninety percent of all immigrants are not screened for their labor market impact, is not in the national interest. I propose instead that a significantly larger number and proportion of immigrants should be chosen either because a U.S. employer requests them (and qualified U.S. workers are not available), or because they possess skills that we determine would benefit the country as a whole.

Many members of Congress are now interested in the immigrant selection system that Australia and Canada use: a number of "points" are given to immigrant applicants for each skill or attribute they possess that the country has determined to be beneficial. The primary categories that might receive "points" are: age, education, language ability, citizenship skills, occupations where labor demand is high and labor supply is low, and specific training or experience in those occupations. When an applicant displays enough of the skills to attain a threshold level of "points," he or she becomes eligible for immigration.³⁴ Such a system would help our country choose a caliber of immigrant that would much better serve the nation.

Immigration based on one's family connections is certainly not objectionable. Indeed, we should continue to recognize automatic petitioning rights for all "immediate family" members; that is, the spouses, children and parents of U.S. citizens, and the spouses and children (under age twenty-six, unmarried) of permanent resident aliens.³⁵ However, we currently recognize much more distant family ties, and give such family members automatic petitioning rights. Examples include: (1) a U.S. citizen's adult, married sons or daughters are given automatic immigration rights (along with their spouses and children), even though they have established a home and family separate from their parents in the United States;³⁶ and (2) a U.S. citizen's adult brother or sister is given automatic immigration rights, along with that citizen's brother-in-law or sister-in-law, nieces, and nephews.³⁷

By granting such derivative benefits to the spouses and children and the more distant family connected immigrants, we establish a method by which these persons may petition for their immediate and more distant relatives. This creates the phenomenon of "chain migration," whereby demand for family-connection visas increases geometrically. In addition, the migration of extended families forces our

34. Senate Bill 2104, as passed by the U.S. Senate on March 15, 1988, would require a minimum score of 50 points (out of a possible 95) for a person to be considered for a visa under new INA Section 203(b)(5).

35. See INA § 201, 8 U.S.C. § 1151.

36. INA § 203(a)(4), 8 U.S.C. § 1153(a)(4).

37. *Id.* § 203(a)(5), 8 U.S.C. § 1153(a)(5).

immigration system to concentrate disproportionately on the most recent immigrant groups, since it is these groups that have both the family connection and the largest number of relatives living abroad. The focus of our system on family connections has effectively eliminated the opportunity of immigration from countries of "older" immigration — such as Europe, and for countries that have not significantly utilized our immigration system at all — such as Africa. Presently, nearly eighty-five percent of all legal immigrants come from either Latin America or Asia.³⁸ While I am not in any way opposed to immigration at substantial levels from these countries, I also do not think any countries should have a "lock" on our legal immigration system — no matter what their race, religion, or system of government, and no matter what their past immigration relationship with our country.

We should not reduce the number of visas that presently are available to the family connection categories that I favor retaining. Since independent immigrant visas should be increased in number, I suggest that a proper ratio of family to independent visas is approximately seven to three.

CONCLUSION

The problems that I have outlined warrant changes in the legal immigration system so that the system would better serve the national interest. I am confident that the cause I espouse in Part II of this Essay would substantially increase our legal immigration system's ability to accomplish this objective.

The U.S. Senate recently completed action on legislation that addresses many of the problems that I have described. On March 15, 1988, the Senate voted 88-4 to approve Senate Bill 2104, compromise legislation jointly sponsored by Senator Kennedy and myself to reform the legal immigration system. This legislation would set a national level of immigration, revise the "family connections" preference system, and establish an expanded "independent" preference system. While prospects for action in the House of Representatives are not quite as certain, I do believe that the strong bipartisan vote in the Senate ensures that a serious national debate will be held during this legislative year on the issue of legal immigration reform.

38. INS YEARBOOK, *supra* note 7, at 14-15.

