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ILLEGAL MEXICAN IMMIGRATION: THE ROLE OF LEGISLATION

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I. Introduction

Few topics more fundamentally touch the essence of the American experience than the topic of immigration. An ethnically heterogeneous population in search of a homogeneous national identity has been the history of the United States. In its evolving and often controversial role, immigration policy has been instrumentally involved in such diverse areas of public concern as human resource policy, foreign policy, labor policy, agricultural policy, and race policy. Yet until only recently, immigration policy itself has been among the least examined of all public policy measures.

II. Components of Immigration Policy

Immigration policy consists of an evolving and complex set of satutory laws, administrative rulings, and court decisions. The federal agency responsible for the administration of the immigration statutes is the immigration and Naturalization Services (INS) of the U.S. Department of Justice.

With the enactment of the comprehensive Immigration Act of 1965, substantial changes were made to the previous body of immigration policy. The Act was designed primarily to end the ethnocentric policies of earlier legislation.[1] Little consideration was given to possible labor market ramifications.[2] The new immigration system continued the past humanistic

tendencies of the immigration system by accentuating family reunification as the highest entry priority consideration. For the first time, however, the Act of 1965 set an aggregate ceiling of 120,000 persons from all Western Hemispheric nations but no ceiling was set at the time on individual countries. For the Eastern Hemisphere, the ceiling was placed at 170,000 with a 20,000 person maximum allowed from any one country. In subsequent years, the total hemisphere ceiling (290,000 persons) has been annually exceeded due to quota exemptions for parents, spouses, and children. Mexico became the major source of legal immigrants. It averaged about 54,000 immigrants a year between 1966 and 1976, with the average increasing to about 66,000 immigrants a year between 1972 and 1976.[3] Effective January 1, 1977, the statutes were again amended to set a ceiling of 20,000 per country on all Western Hemisphere nations.[4]

III. A General Overview of the Issues

As the nation's formal immigration policy has developed, it has passed through three distinct eras: no restriction of any kind (prior to 1888); numerical restriction based upon ethnic discrimination (from 1888 to 1965); and numerical restriction with ethnic equality (since 1965). With the advent of the legal and numerical restrictions, of course, has come the problem of illegal immigration. The two issues are, therefore, inter-related and must be discussed together.

Under the 1965 act, the total number of legal immigrants admitted to the United States has averaged about 400,000 persons a year (or twice the annual flow for the 41 years prior to its enactment).[5] About 60 percent of the legally admitted immigrants go directly into the labor force.[6]

Accordingly, legal immigration has accounted for upwards to 12 percent of the annual increase of the civilian labor force since 1969.[7] Allowance for emigration would reduce this figure but it is not known by how much. These percentages, of course, do not include any estimates of the influence of illegal immigration.

The present legal system gives highest priority to family re-unification. In 1975, for instance, 72 percent of all visas were granted on the basis of family reunification.[8] For the small remainder a nominal effort is made to see that legal immigration does not adversely affect the domestic labor market. The Secretary of Labor has since 1952 been empowered to block the entry of legal immigrants if their presence would in any way threaten prevailing wage standards and employment opportunities.[9] The Act of 1965 bolstered the permissive language of the earlier legislation by making it a mandatory requirement that non-family related immigrants who are job-seekers receive a labor certification.[10] But even in these few cases, there is no probationery categories that were the conditions of their certification. Perhaps even more revealing of the lack of concern for local labor market impact is the fact that about 40 percent of all certification since 1970 have occurred after the applicant had already illegally entered the country and secured a job.[11]

Thus, on paper, the legal immigration system appears to be both reasonable (in the numbers of persons it annually admits), fair (in terms of its ethnic impartiality), and humane (in the dominance of family reunion and refugee accommodation over labor market impact considerations).

Yet the legal immigration system of the United States has been rendered a mockery. Illegal immigration has become the major avenue of entry. In

1976, for instance, a total of 875,915 illegal aliens were apprehended by the INS. This figure represents a 500 percent increase over the figure of a mere decade earlier. To be sure, these apprehension figures are artificially inflated due to the fact that many persons are caught more than once. On the other hand, the vast majority of illegal aliens are not caught. Various reports and studies all admittedly imperfect--have placed the accumulated stock of illegal aliens from 3-12 million persons.

When the annual numerical flow of legal immigrants is combined with conservative estimates of both the annual or numerical flow and the accumulated stock of illegal immigrants, it is apparent that the United States is in the throes of the largest infusion of immigrants in its history. The combined magnitudes--even using conservative estimates--means that there must be significant labor market implications.

IV. The Absence of an Enforceable Policy

It is not the purpose of this paper to enter into the continuing debate over who the illegal immigrants are, how many there are, or to attempt to assess their economic impact.[12] All of these issues are topics in and of themselves. Rather, the concern is with the what should be the central issue of policy regardless of how the aforementioned questions are answered. Namely, there is a prima facie case that the current immigration statutes of the United States are totally unenforceable.

As is evident from any elementary economics text book, the study of political economy begins with the confines that mark the political boundaries of nation states. Borders are the realities that restrict the movement

of money, products, and people. They also separate cultures and ideological systems. It is within these borders that the vast preponderance of public policy measures that affect the welfare of the citizens of each nation state are made. To be certain, there is a world economy and no major industrial state can expect to survive for long as an isolated entity. But the fact remains that policy-making beyond one nation's boundaries is the exception rather than the rule.

Just as every nation in the world has sought to enact policies that affect the import and export of products across its boundaries, so has each sought to regulate the immigration of people. In the case of the United States, there is an elaborate system of tariffs, quotas, credits, and exchange rates that affect both the import and export of goods. To be sure, all of these policy components vary at different times. But they are reasonably effective in the accomplishment of their specified goals. Likewise, immigration policy has changed over time as well. But in sharp contrast to the prevailing policies that regulate the flow of goods, current immigration policy has proven to be incapable of accomplishing its stated objectives. In essence, the alternatives are either to do nothing (and thereby continue the fascade that the nation has a stated policy, but chooses to ignore its inability to accomplish its objectives); to abolish the immigration statutes and let labor supply pressures and market forces find a level of international equilibrium with respect to wages, work standards, and employment opportunities; or the nation can seek to enact an immigration policy that is capable of accomplishing its stated objectives.

It is the thesis of this paper that the third alternative--to strive for an enforceable immigration policy--is not only imperative, but it is

also inevitable.

V. The Factors that Render Current Policy Ineffective

A complex set of factors is responsible for the growth of illegal immigration. Masses of people--such as those in the Mexico and Caribbean area--leave the familiarity of their homeland and go to an unknown land only if both push and pull pressures are operative. In most instances the "push" factors derive momentum from the related issues of over-population, massive poverty, and high unemployment. Of increasing significance are the pervasive structural changes that are occuring within the labor forces of many underdeveloped nations, changes that stem from technological developments and rural-to-urban migration. Likewise, there are the strong economic "pull" factors that emanate from the United States. The relatively higher wages and broader array of available job opportunities of the American economy function as a powerful human magnet.

Related to these broad forces are several other considerations. American employers are often willing to tap this pool of scared and dependent workers. Prevailing immigration law does not place any penalty upon the act of employing illegal aliens. Because of the "Texas proviso" in the Immigration and Nationality Act of 1952, employment does not constitute the illegal act of harboring.

As for the aliens who have entered the country illegally, 95 percent of those apprehended are given "a voluntary departure." They are simply returned to their homeland as quickly as possible and often at the expense of the government. Any law under which 95 percent of the violators are not punished can hardly be taken seriously as a deterrant.

Moreover, the INS, which has the responsibility for enforcement of the immigration statutes, has a force and budget that are miniscule relative to its assigned duties. As of 1977, there were fewer than two thousand border patrol officers plus ninehundred additional inspectors and investigators for inland duty. Only a fraction of these are actually on duty in any given eight-hour shift of any given day.

VI. The Reform of Prevailing Policy

Having completed a brief review of the prevailing immigration system of the United States, it is apparent that it contains little order; is inconsistent in its objectives; and its few prohibitions are observed more in their breech than in their adherence. The current system is ineffective primarily because it is unenforceable. As the scale of immigration in all of its forms has increased dramatically in the past decade, the absence of a meaningful immigration system has become both more obvious in its effects and more ominous in its implications. The immigration system should be liberal in the number of persons it admits; fair in its assurances that non-discrimination on any ethnic basis shall continue to be the foundation for its selection criteria; and equitable to the citizens and workers of the communities in which immigrants settle. It is, of course, in the area of equity that the adverse consequences of the area of equity that the adverse consequences of the unenforceability of the prevailing immigration system are manifested. A number of policy changes are in order.

In groping for the proper course for public policy to pursue, one must begin with the stark realization that in a free society illegal

immigration cannot be totally stopped. No consensus will support the erection of a "Berlin Wall in reverse" that is designed to keep people out rather than in--or any equivalent drastic step. The best that possibly can be hoped is that the problem can be brought within manageable proportions.

The mandatory first step is the passage of a federal statute that will forbid the employment of illegal aliens. Such a bill has cleared the U.S. House of Representatives in 1972 and 1974 only to die in a committee of the Senate. Passage of a federal statute of this nature is a must. The message must be clear that the employment of illegal aliens is an illegal act. Strong civil and, perhaps, criminal penalties should be set for repeat offenders.

Candidly speaking, one must say that the enactment of a law against employment of illegal aliens will not accomplish much. Such a law will depend upon proof that the employer "knowingly" broke the law. Proving this will be immensely difficult, if not impossible. Moreover, it is very doubtful that many district attorneys would press for enforcement or that many juries would convict an employer for the offense of providing jobs to anyone. With court dockets already back-logged with serious crimes, it is hard to imagine that many employers would ever be brought to trial. Yet the possibility of prosecution would exist. Moreover, there would be some voluntary compliance and, at least, the moral weight of the law would be against the employment of illegal aliens. As meaningless as such a ban may prove to be, nothing else makes sense until such a law is on the books.

The obvious question that follows is how does an employer know if a person is

citizen or not? A query is hardly sufficient. With fraudulent documents easily accessible to anyone desiring them, mere possession of any of the standard means of identification would likewise be no deterrent. The only answer is the issuance of noncouterfeitable and unalterable social security cards to the entire population. Through the use of special codes already developed by cryptographers and computer experts, such a social security card would allow easy verification of the citizenship status of any would-be employee. It was announced by INS in 1977 that a similar noncounterfeitable card will be issued to the 4.2 million resident aliens who live in this country. It will, in essence, become their identity card.

There are, of course, legitimate fears about the establishment of what is tantamount to a work permit system in this country. Despite the fact that work permits are used in all other free nations of the world, it is true that authoritarian governments also use them as a means of citizen control, thus depriving citizens of civil liberties. The social security card, however, is already required as a condition of employment of virtually everyone. Like it or not, the social security number has already become a national identification system. The social security number is used as a student number on many campuses; it is used as the driver's license number in many states; it is used by the Internal Revenue Service to identify taxpayers; and it is the serial number of all people in the military. The point is: it is absurd to worry about whether something will happen if it has already happened! The only questions that remain are should social security cards be made noncounterfeitable and should checks be made of these cards to assure that those who are using them to seek employment are legally entitled to have them? Certainly no

one can seriously disagree with such objectives.

The necessity of significantly enlarging the number of INS enforcement officials is too obvious to be belabored. As long as this staff is less than the size of the police force of the city of Houston, there is absolutely no way that even the current statutes can be enforced. Aside from apprehension of illegal aliens, the agency has numerous other duties to perform. A substantial increase in the number of INS enforcement officers would be by far the most effective short-run deterrent that could be initiated. In addition, the INS should have exclusive responsibility for checking all persons who pass through inspection ports of entry.

It is essential that the INS rely less on the voluntary departure system. The policy objective that illegal aliens are unwanted guests can never be taken seriously as long as there is virtually no chance of any penalty being imposed on offenders. Until all illegal aliens can be identified, records kept, and repeat offenders subjected to formal deportation (which would permanently preclude those individuals from ever becoming legal immigrants), there is no reason for an illegal alien to even ponder the risks--the alien has nothing to lose. More reliance on legal procedures, however, will be costly and time consuming and will also necessitate an increase in the INS budget. But these costs, as well as expenses related to the acquisition of more detection hardware, must be weighted against the aforementioned costs of allowing this mushrooming problem to continue. It will be far less costly to assume a strong posture of prevention than it will be to respond to the social problems inherent in this issue after they accumulate.

In the same vein, international policies must be part of the policy mix to reduce the flow of illegal immigrants. These must address the "push"

factors; they should be directed primarily at efforts to assist in the economic development of the hemispheric neighbors of Mexico and the Caribbean area. These measures should include extensive offers of technical and financial assistance. It may be that efforts of this kind must be made through established multinational agencies--such as the World Bank, the International Monetary Fund, or the United Nations--instead of unilaterally. Mexico, in particular, is a proud nation; its leaders abhor the concept of direct foreign aid.

It must be realized that to some degree the illegal alien problem from Mexico is a by-product of past actions by the United States. For too many years, Mexico was seen as a pool of cheap labor that could be tapped at will throughout the Southwest. Hence, U.S. policymakers cannot be oblivious of the involvement of policy in the creation of the problem. For this past role the United States is obligated to assist the Mexican government in the reduction of the economic forces that continue to push many of its citizens into the illegal immigration stream. To be sure, the population explosion, the rural-to-urban migration, and the structural labor market changes resulting from technological change in Mexico would cause the illegal alien flow to occur regardless of any past actions by the United States. But that contention is really moot. The fact is that the United States did contribute to some of the forces that have institutionalized the illegal alien process. The United States cannot place the full responsibility to stop the flow upon Mexico.

The United States should carefully reassess its trade and tariff policies pertaining to Mexico. Efforts to lessen the restrictive barriers to agricultural and manufacturing imports from Mexico should be initiated

at once. Such action would enhance the opportunities for Mexican export industries to expand and reduce some of the pressures causing illegal entry. It would also acknowledge the fact that Mexico is already a major importer of American-made goods. It might seem inconsistent to argue for a restrictive border policy toward Mexican aliens while favoring increased free trade with respect to the import of Mexican products. This is not so. The impact of increased imports can be more widely spread throughout the American economy. If there were any adverse domestic employment effects from increased imports, those effects could be determined more easily than in the case of illegal immigration. Moreover, there already exists legislation (the Trade Act of 1974) that provides substantial benefits to assist those particular industries and workers who may be harmed by such liberal trade policy adjustments. Nothing is available for those citizen workers who are adversely affected by unfair competition from illegal aliens.

To a slightly lesser degree the same arguments could apply to many of the nations of the Caribbean area. The United States has long manifested political, economic, and military interest in the affairs of this region. The establishment of a regional economic common market is long overdue. With economic assistance and relaxed tariffs some of the outward pressures on illegal immigration from these countries may be stemmed.

With respect to Mexico one change in the legal immigration system must be made. The imposition of the 20,000 person quota to Mexico in 1977 was arbitrary. The low quota serves only as an additional prod to illegal entry. Mexico deserves a continuation of the special treatment that it has always been accorded in the past. Although some ceiling should be imposed, it should at least be in rough approximation to past legal immigration levels.

The final step that must be taken to end the problem of illegal immigration is granting general amnesty to all illegal aliens who have been in this country since January 1, 1973, providing that they register with the INS within an established grace period and that they have no record of criminal activity. The date of January 1, 1973 is chosen because it was on that date that amendments to the Social Security Act took effect that specified that applicants for Social Security cards be required for the first time to furnish evidence of their citizenship.[13] There is precedent for such an amnesty. In 1965 amnesty was granted to all illegal aliens living in the United States prior to 1948. There should be absolutely no intention to issue another amnesty at some subsequent date. Because the tolerant policy of the past has unofficially condoned the influx of aliens, it is unrealistic to believe that any roundup of aliens who have established themselves in jobs and have families could be accomplished without serious hardship and much ill will. The accomplishment of the goal of ridding the labor market of illegal aliens should not be contrary to basic humanitarian concepts. Hence, amnesty is a must but only as the last step of a comprehensive program.

VI. The Proposals of the Carter Administration

On August 4, 1977 the long delayed proposals of the Carter Administration for reform of the immigration system were made public.[14] The accompanying system message noted that "at least 60 countries are significant regular source countries."[15]

A key element of the comprehensive package is the call for employer sanctions. Hiring illegal aliens would be made an illegal act. Enforcement,

however, would be limited to those employers who engaged in a "pattern or practice" of hiring illegal aliens. Injunctive relief and civil fines of up to $1,000 per alien would be the penalties. A list of acceptable identification items--including the existing social security card--would be prepared by the Justice Department. To be in compliance, an employer need only to see that they have seen one of them. Of crucial importance is the fact that the employers would not be required to verify the authenticity of the identification nor would they be required to keep records of the documents they have seen.

The proposed employer sanctions would pre-empt all existing state and local laws that prohibit the employment of illegal aliens. As of the time of the President's proposals, 3 cities and 12 states had enacted such statutes and 15 additional states had similar proposals pending. The constitutionality of these state bans was unexpectedly upheld by the Supreme Court in 1976.[16] The Court held that a California law forbidding the employment of illegal aliens did not invade the exclusive authority of the federal government to set immigration policy.

Accompanying the employer sanctions would be "increased enforcement" of the Fair Labor Standards (FLSA) and the Federal Farm Labor Contractor Registration Act as well as improved liaison between INS and FLSA enforcement personnel. Increased vigilance would be requested of the Equal Employment Opportunity Commission to assure that minority citizens are not adversely affected by any discriminatory fall-out from the alien hiring ban. Criminal penalties would be invoked against persons who act as human smugglers and brokers of alien workers.

The plan also calls for almost a doubling of the enforcement personnel

of the INS. Criminal penalties would be sought for those who provide false identification documents.

But perhaps the most controversial portion of the proposal deals with the question of amnesty. Permanent resident alien states would be given to all illegal entrants who have lived continuously in the United States since January 1, 1970. These persons would be eligible for full citizenship after waiting the normal five year interval. For those persons who entered after January 1, 1970 but before January 1, 1977, a new class of "temporary resident alien" would be created. These persons would be required to register with the INS within one year and they would be allowed to remain in this country in this new status for a period of five years. They would not be allowed to bring in any family members and they would be ineligible for almost all federally assisted social programs (e.g., food stamps, medicaid, and Aid for Families with Dependent Children). The adjustment status of all affected persons would not be counted against the existing legal quotas regardless of country of origin. Anyone who has entered the country since January 1, 1977 would be deported upon apprehension.

The proposal also includes foreign policy provisions. Negotiations would be sought with Mexico and other source nations to seek their assistance in the enforcement and anti-smuggling provisions. Furthermore, consideration would be given to ecnomic assistance to source countries to develop labor intensive projects. Information would also be given, if requested, about birth control methods. Increased trade with sending countries for the export of labor intensive projects would "be explored".

Finally, the proposal calls for a comprehensive intra-agency study of the current immigration system. This would be the first thorough review

since 1952. It was also announced that the Administration would support an increase in the current 20,000 person quota on annual immigration from Mexico (which has a demand in excess of this number) and Canada (which is not currently using its full allotment) to a combined total of 50,000 persons.

The Carter Plan was introduced as a "courtesy" into the Senate (as S.2252) and into the House of Representatives (as H.R. 9531). In each of the past three sessions of Congress, the House has initiated action on immigration. In most instances, the House received much criticism from all sorts of groups adverse to some or all of its reform proposals. In most instances, the Senate did not even act on the bills even at the House in the lurch. This time the House decided to let the Senate initiate action before the House again commits itself. The Senate did hold perfunctory hearings in May 1978 but no action was taken to enact the Administration's package by the time Congress adjourned in October 1978.

VII. Assessment and Concluding Observations

Obviously, the Carter plan is the product of a series of compromises within the Administration and between its political supporters. It is highly probable that if Congress does ultimately act that it too will seek to make a number of changes, additions, and deletions. Ultimately the courts will be involved as there are certain to be numerous ambiguous and controversial parts of such an ambitious policy initiative.

Looking, however, at the Carter Plan, it is apparent that it resembles in part but differs in significant degree from the comprehensive proposals outline in Section VI of this paper. There is no need to repeat the

similarities but the differences do bear elaboration.

The most crucial difference pertains to the critical identification question. The Department of Labor had sought to address the question head-on by re-issuing social security cards in a non-counterfeitable form. This card would have been the accepted identifier. The Department of Justice, however, feared civil liberties criticisms over the establishment of such a system and its position prevailed. As a result, the proposed employer sanctions provision is essentially meaningless. The real efficacy of the reform proposals, therefore, is in serious doubt.

The proposed two tier provisions for adjusting the status of the illegal entrants already in the country is of dubious merit. For those potentially eligible for permanent citizenship, it is unclear what is meant by the term "continuously" living in this country. As for the temporary resident alien status, it is widely believed that after five years that they too will be eligible for permanent resident alien status. But because there is no certainty that this will be the case, it will raise fears by many illegal entrants as to the wisdom of exposing their whereabouts through registration. Many may not come forth. Likewise, it is certainly questionable that a law can or should prevent families from being unified for upwards of five years. Also, by specifically declaring these persons to be ineligible for prevailing social legislation, aliens who are in dire need will be denied services.

The Carter proposal does recognize the need to enhance trade opportunities for source nations but it does not specifically recognize the necessity of tariff reductions. Nor does it take the opportunity to press for such a venture as a common market of Caribbean and/or North American continent nations. Reducing the "push" pressures for illegal immigration should be

given equal attention with those measures designed to reduce the "pull" forces. In the proposed package, this is not the case.

Yet, despite its apparent deficiencies, the reform proposals do acknowledge at the highest level of our government that the existing immigration laws are unenforceable. They do recognize the urgency to alter the ineffectural system that currently exists. They have attracted publicity to the issue and they have generated substantial public discussion. Immigration reform has not yet received the priority it deserves but, at least, it is now firmly secure on the nation's agenda of needed social action. The issue is no longer whether the nation will act but, rather, when and in what fashion.

14. Office of the White House Press Secretary, "Message of the President of the United States to the Congress on the Problem of Illegal Immigration," Washington, D.C., (August 4, 1977), (Mimeographed material).

15. Ibid., p. 7.

16. De Canas v. Bica, 424 U.S. 351 (1976).