

“Shortfalls of the 1996 Immigration Reform Legislation”

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The shortfalls of the 1996 immigration law come in two parts – defects in the legislation itself and, more important, defects in the execution of the law.

As to the first, there can always be debate over the specifics of any piece of legislation. This is also the case with the three major laws passed in 1996 relating to immigration – the Illegal Immigration Reform and Immigrant Responsibility Act of 1996; the Personal Responsibility and Work Opportunity Reconciliation Act of 1996; and Antiterrorism and Effective Death Penalty Act of 1996. For instance, should illegal aliens have been given an entire year after arrival to apply for asylum, as the law allowed, or should it have been only six months? Should expedited removal have been expanded more than it was? These are the kinds of questions that lawmakers always face, and although we will each have our own opinions on the merits of specific measures, compromise is an inevitable part of the legislative process. Such issues can’t really be described as mistakes or shortcomings.

But there was one very large mistake made by Congress in the 1996 law, and that was rejecting the late Barbara Jordan’s recommendations to cut overall legal immigration. The U.S. Commission on Immigration Reform, headed by Jordan during most of its existence, spent years examining all aspects of the immigration issue and delivered reports on illegal immigration, legal immigration, refugees, and Americanization policy. (See the reports at <http://www.utexas.edu/lbj/uscir/reports.html>.)

With regard to legal immigration, the Jordan Commission recommended a reduction of about one-third in total immigration, in particular focusing the family portion of the immigration flow more tightly and eliminating categories outside the nuclear family of husband, wife, and young children. Jordan's recommendations would also have eliminated the small but unjustifiable unskilled worker category (the Commission noted that "Unless there is another compelling interest, such as in the entry of nuclear families and refugees, it is not in the national interest to admit unskilled workers") and the egregious visa lottery.

The original versions of what became the 1996 immigration law incorporated Jordan's recommendations regarding legal immigration. But the supporters of continued mass immigration successfully maneuvered to split off the legal immigration sections of the bill as a tactic to spike those widely popular measures to moderate immigration.

This was a mistake for two reasons. First, we have too much immigration; mass immigration is simply incompatible with the goals and characteristics of a modern society. But that's a subject for another hearing.

Second, even if the goal of the 1996 law was solely to reduce illegal immigration, the decision not to streamline the legal immigration system and moderate the level of inflows was a mistake. As James Edwards, an Adjunct Fellow at the Hudson Institute, has written, "Because of the inextricable link between legal and illegal immigration, there is no way to continue massive legal immigration and reduce illegal immigration. To cut illegal immigration, legal immigration must be curtailed. To assert otherwise attempts to maintain a fiction that is unsustainable, judging from fact and experience." (See "Two Sides of the Same Coin: The Connection Between Legal and Illegal Immigration," <http://www.cis.org/articles/2006/back106.html>.)

But the bigger problem has been in the execution of the 1996 measures. As Barbara Jordan told this very panel in 1995, "Credibility in immigration policy can be

summed up in one sentence: Those who should get in, get in; those who should be kept out, are kept out; and those who should not be here will be required to leave.”

Needless to say, this has not happened.

In trying to understand why this didn't happen, a myth has developed that the enforcement initiatives dating from the mid-1990s had the perverse effect of *increasing* the settlement of illegal aliens. The story line goes like this: Illegal aliens – Mexican illegals, in particular – had been happily coming and going across the border since time immemorial, never even entertaining the idea of remaining permanently in the United States. “Circular migration,” is how such a process is described by scholars. Then, increased border enforcement – the additional agents and fencing authorized by Congress in 1996, as well as new tactics already being implemented by the Border Patrol – made it more difficult and expensive to cross the border, interrupting the “circularity” of the flow by forcing illegals to stay here, so they wouldn't get caught up in the dragnet the next time they left and tried to return. In other words, the claim is that border enforcement causes illegal immigration.

This line of argument is so comically absurd that it deserves a place in *The Onion*, or in cable TV's fake-news shows. To begin with, the research used to buttress this claim does nothing of the kind. The data from the Mexican Migration Project show that the probability of a Mexican illegal returning home within 12 months has been declining since at least the early 1980s, especially since 1986, and that the decline actually stopped around the time of the 1996 legislation. (See Douglas Massey's “Backfire at the Border: Why Enforcement without Legalization Cannot Stop Illegal Immigration,” <http://www.freetrade.org/pubs/pas/tpa-029.pdf>, and “Beyond the Border Buildup: Towards a New Approach to Mexico-U.S. Migration,” http://www.aifl.org/ipc/policy_reports_2005_beyondborder.shtml.) This might actually suggest that the IRCA amnesty was the reason for increased likelihood of permanent settlement, but it certainly wasn't caused by Operation Gatekeeper in San Diego.

What's more, Mexican immigration has been growing very rapidly for at least a generation, long before the 1990s increases in border enforcement. Massey's own data suggest this, since even at the beginning of the period he studied, the majority of Mexicans stayed here, and that majority has simply grown.

The census provides clear proof of massive and growing Mexican immigration. In 1970, there weren't even 800,000 Mexicans living in the United States; by 1980, the number had more than doubled, then doubled again by 1990, then doubled again by 2000. In fact, the rate of growth of the Mexican immigrant population has actually *slowed* since new enforcement measures were implemented at the border, though mainly because the base number has grown so large, that even with the continuing huge increases, it's mathematically impossible for it to keep growing at such a rapid rate. In short, it cannot be argued with a straight face that mass Mexican immigration is the result of increased border enforcement interrupting circular migration.

But let us concede for the sake of argument that Prof. Massey's research has indeed discovered something – that the minority of Mexican immigrants deciding to return to Mexico within 12 months of entry grew even smaller during a period of enhanced border control. Border control, however, is not the only thing that has happened since Operations Hold the Line and Gatekeeper were initiated early in the Clinton Administration. Specifically, the expansion of border enforcement has been accompanied by an almost complete abandonment of interior enforcement. To the extent the “circularity” critique has any validity, it is caused not by border enforcement alone, but by the dysfunctional combination of somewhat tougher border enforcement with a virtual absence of interior enforcement. In other words, if it is somewhat harder to get across the border *and* increasingly easy to remain in the United States illegally, then very little incentive remains for an illegal alien to return home, and there are great incentives for him to risk the dangers of a crossing.

The decline in interior enforcement of the immigration laws is well documented. The number of employers issued a “notice of intent to fine” for hiring illegal aliens fell

from nearly 1,500 in 1992 to a total of three (3) by 2004. The number of full-time equivalent workers devoted to worksite enforcement fell by more than half from 1999 to 2003. And the number of worksite enforcement arrests fell by nearly 95 percent from 1999 to 2004. (“Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts,” U.S. Government Accountability Office, August 2005, <http://www.gao.gov/new.items/d05813.pdf>.) Illegal aliens had thus been sent the very clear message that it would be a little bit harder to sneak into the United States, but those that survived were home free.

Over the past year, there has been a partial reversal of this process, with the administration finally permitting the Department of Homeland Security to modestly increase interior enforcement efforts, as seen in the larger number of worksite raids, employer prosecutions, and other efforts across the country. This modest and still-limited enforcement push is transparently political, intended by the White House as a last-minute effort to burnish its credibility on enforcement to strengthen its case for an amnesty. Be that as it may, even the limited, tentative enforcement measures we’re now seeing seem to be moving – very slowly and incompletely – in the right direction. Secretary Chertoff himself has said that the decline in illegal-alien arrests along every section of the border is because the flow itself has decreased. Although it’s still early and the data are not conclusive, the Census Bureau’s Current Population Survey suggests that the illegal population has grown somewhat more slowly (this at a time when legal immigration ballooned in 2006 to nearly 1.3 million, an 80 percent increase from 2003). Likewise, data from the Department of Labor suggest that wages for the poorest workers have increased slightly, yet another indication that immigration enforcement may be working, tightening the labor market and enabling low-skilled Americans to charge more for their labor.

This does not mean the immigration problem is “solved,” as the president seems to have suggested, and that it is therefore time to legalize the illegals and enact huge increases in immigration. What has come to be called “comprehensive immigration reform” would completely undo the baby steps toward improved enforcement that we’ve

seen over the last year, and put us back on the path to ever-increasing illegal immigration. On the contrary, the tiny glimmers of success we're seeing underline the need for *expanded* enforcement measures to solidify these small gains and change the momentum so that illegals increasingly give up and deport themselves, thus reducing the illegal population through attrition. Such expanded enforcement would include, in no particular order, aggressive marketing of the 287(g) program to promote cooperation between local police and federal immigration authorities; a reversal of the Treasury Department's decisions that banks are permitted to accept the Mexican government's illegal-alien ID card for purposes of opening a bank account; systematic, ongoing cooperation among IRS, Social Security, and DHS to identify illegal aliens in the workforce; and many other measures.

Specific policies aside, there are two broad approaches to the immigration question. The logic of one side leads to open borders, with all immigration redefined as legal; thus, there would be no meaningful interior enforcement *and* no border enforcement. The alternative – the only alternative – is a tightly controlled immigration system, with strict enforcement at the border *and* in the interior. If our experience since 1996 has shown us anything, it's that immigration enforcement is indivisible – to be successful, it needs to happen everywhere, both at the border and the interior.