Written Testimony of

Stephen H. Legomsky
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Before the

United States House of Representatives
Committee on the Judiciary
Subcommittee on Immigration, Citizenship, Refugees,
Border Security, and International Law

Oversight Hearing on the Shortfalls of the 1986 Immigration Reform Legislation

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Madame Chairwoman and members of the subcommittee, I am grateful for the opportunity to appear before you today. My name is Stephen H. Legomsky. I am the John S. Lehmann University Professor at the Washington University School of Law. For more than thirty years I have devoted the majority of my professional life to the subject of immigration law and policy. I have taught U.S. immigration law to law students for approximately 25 years, am the author of the law school textbook "Immigration and Refugee Law and Policy" (now in its fourth edition), and have had the privilege of advising both Democratic and Republican administrations and several foreign governments on immigration policy.

America has two venerable traditions. One is to admit large numbers of immigrants. The other is to complain, vehemently, that today's immigrants are not of the same caliber as yesterday's. The irony is that today's immigrants invariably become the shining example to which tomorrow's immigrants suffer by comparison.

I have been asked to address the shortfalls of the 1986 Immigration Reform and Control Act (IRCA).[1] While that legislation covered a variety of subjects, its two main pillars were the provisions on employer sanctions and legalization. Today, of course, the volume of illegal immigration is several times as great as it was before the enactment of IRCA. It is common for opponents of either employer sanctions or legalization to infer from that observation that these strategies were unsuccessful. With respect, I do not believe that the success of either strategy can be gauged simply by noting that the undocumented population has increased. Immigration levels are influenced by so many variables that assumptions about cause and effect are hazardous. Although the size of the current undocumented population can be estimated (most

[1] Pub. L. 99-603, 100 Stat. 3359 (Nov. 5, 1986).

likely at about 12 million),[2] there is no way to know whether that number would have been higher or lower had the 1986 legislation not been enacted.

But we do know this: The 1986 legislation has not succeeded in resolving any of the major immigration challenges. The undocumented population is large and growing. Millions of qualified immigrants wait for years to be admitted, because of a combination of strict statutory numerical ceilings and lengthy administrative processing times. Nuclear families wait unbearably long periods to be reunited. Employers have labor needs that cannot be met entirely by the domestic workforce. And millions of refugees in temporary havens overseas have nowhere to go. In the meantime, in almost all 50 states and in hundreds of municipalities, serious anti-immigrant movements have spurred state and local legislation to address "the immigration problem." On a subject that all three branches of the federal government have consistently pronounced to be exclusively federal – a subject on which it is vital for the nation to speak with a single voice – the chaos and foreign policy consequences of hundreds of different immigration policies operating simultaneously is troubling.

I do not suggest that any of these problems can fairly be attributed to the 1986 legislation. There is only so much that one statute can do. In this testimony, however, I would like to attempt two things. First, I note a few specific features of IRCA that, with the benefit of hindsight, might be approached differently today. Second, and more important, I try to highlight what I see as one of the major omissions from the 1986 legislation. That omission relates to one of the most important categories of legal immigration – the so-called family-sponsored 2A's. It is that second section of the testimony to which I would respectfully direct the subcommittee's primary attention.

I
Specific Features of IRCA

My comments on the specific features of IRCA will be brief. The two pillars, as noted earlier, were employer sanctions and legalization. Concerns about both the concept of employer sanctions and its implementation have been aired frequently. Employer sanctions proponents believe that, if properly implemented, employer sanctions will dry up the job magnet that animates illegal immigration. The assumptions are that employer sanctions will induce employers to stop hiring unauthorized workers and that the resulting lack of employment opportunities in turn will diminish the incentive for illegal entry or overstaying. Proponents

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[2] Leading immigration demographer Jeffrey Passel estimated the undocumented population at 10.3 million as of March 2004. He also estimated the annual growth rate of this population at 485,000. See Estimates of the Size and Characteristics of the Undocumented Population (Mar. 21, 2005), http://pewhispanic.org/files/reports/44.pdf (last visited April 14, 2007). On those assumptions, the undocumented population would be just under 12 million today.

point to the relatively lax enforcement of employer sanctions, the proliferation of false documents, the absence of a reliable centralized database of authorized workers, and the growing incidence of identity theft as the principal explanations for the failure of employer sanctions to achieve their stated goals to date.

Opponents of employer sanctions are skeptical of their effectiveness. They question whether the problems that have plagued employer sanctions since 1986 can be fixed at an acceptable social and economic cost. They also point to existing costs – the dangers that employer sanctions will produce increased levels of national origin job discrimination (as the GAO documented in a congressionally mandated series of studies shortly after enactment of IRCA), the burdensome paperwork requirements for employers, and the cost to taxpayers of the large government bureaucracy needed to administer employer sanctions.

The Basic Pilot Program (BPP) is an attempt to solve some of the problems that have confounded the successful implementation of employer sanctions. As this subcommittee is aware, the BPP involves employers verifying the employment status of job applicants by consulting an electronic database jointly developed and maintained by the Social Security Administration and the Department of Homeland Security. In theory, the database contains the names and social security numbers of all authorized workers in the United States, citizens and noncitizens alike. In practice, as numerous studies have shown, there are huge practical problems in keeping such a database accurate and up to date. If the error rate can be dramatically reduced through a combination of adequate funding and new technologies, then employer sanctions might well be effective in reducing illegal immigration. The question is one of costs and benefits. I express no opinion on how great the administrative costs would be or on how Congress should value the benefits that those costs are meant to bring. My only suggestion here is that the current combination of a law that punishes employers for hiring unauthorized workers and the absence of both reliable documents and a reliable electronic database is untenable. Congress should either repeal employer sanctions or invest the huge resources needed to raise the reliability level of the electronic database and the paper documents to an acceptable standard.

With respect to legalization, ambiguities in IRCA's eligibility requirements led to erroneously restrictive INS interpretations that were eventually struck down in court. The errors required courts to repeatedly extend the statutory application deadline, with the result that the legalization process dragged on for years. The language contained in the legalization provisions of the more recent bills seems clearer and therefore less susceptible to similar problems.

Perhaps the most significant gap in the IRCA legalization program was the lack of provision for the family members of the legalized individuals. Under the original statutory scheme, it was only after obtaining temporary resident status, and later permanent resident status, that one could even initiate the multi-year process of petitioning for the admission of his or her spouse and children. That was true for both preexisting and after-acquired spouses and children. An INS initiative and a subsequent "family fairness" statutory amendment eventually plugged much of the gap. If a new legalization program is enacted, the issue of how best to accommodate at least

the preexisting spouses and children, and ideally the after-acquired spouses and children as well, should be addressed.

Notably, the 1986 legalization imposed no penalty fees. Under those circumstances, the popular term "amnesty" seems perfectly appropriate. In contrast, the legalization programs proposed by the more recently introduced bills impose substantial monetary fines on the potential beneficiaries. To characterize such programs as "amnesty" therefore seems peculiar. When a driver is apprehended for speeding, forced to pay a fine, and then permitted to resume driving, the word "amnesty" is not used. The person has violated the law and has been punished. Since the same is true of the more recently introduced legalization programs, the term "amnesty" seems equally inapt. "Earned legalization" is accurate and appropriate. I note these semantics only because it has become commonplace for opponents of legalization to dub these proposals "amnesty" and to deride the term "legalization" as a politically correct euphemism. Given the apparent public resistance to the word "amnesty," it seems paramount that the public understand that punishment for immigration violations, in the form of heavy fines, is a crucial component of these proposals and that they do not fit any commonly understood definitions of amnesty.

One clearly successful component of the 1986 legalization was the use of "qualified designated entities" – private organizations that assisted applicants for legalization and served as buffers between the applicants and the relevant immigration officials. These buffers were essential to encouraging eligible beneficiaries to come forward, as many in the local communities, rightly or wrongly, were fearful of appearing at INS offices. A similar process should be considered in connection with the recently introduced legalization plans.

II
The Larger Omissions

Neither employer sanctions nor legalization – nor any combination of strategies – will put a serious dent in illegal immigration as long as the rules that govern legal immigration leave so many people with incentives to enter or remain in the United States illegally. In my view, the single largest gap in both the 1986 law and subsequent legislation has been the failure to update the criteria for legal immigration. Families need to be reunited, and employers need practical ways to fill their labor needs. Until those goals can be achieved through legal mechanisms, violation of the law will continue to be the route chosen by many. In this testimony, I leave to the labor economists and other labor market experts the analysis of how best to modernize the employment-related visas for both immigrants and nonimmigrants. The remainder of my testimony respectfully proposes a partial solution to the problems that beset family-related immigration.

As the subcommittee is aware, lawful permanent family-related immigration to the United States takes several different forms. The spouses and the under-age-21, unmarried children of United States citizens, and the parents of over-age-21 United States citizens, are classified as

"immediate relatives" and admitted to the United States without any numerical limits.[3] "Family-sponsored" immigrants, in contrast, are given preferential treatment but are still subject to annual numerical limits that are established by statutory formulas. This group comprises certain people who do not fit any of the immediate relative categories but who either have other family relationships to U.S. citizens, or are the spouses or unmarried sons or daughters of lawfully admitted permanent resident aliens.[4] In addition, if a person is admitted for permanent residence under any of the family, employment, or diversity immigrant programs, or if the person is admitted as a refugee or an asylee, the law grants the same status to his or her otherwise admissible spouse and unmarried, under-age-21 children who accompany or follow him or her. Importantly, however, the law grants "accompanying or following to join" status only in the case of pre-existing relationships – i.e. cases in which the spouses married, or the children were born, before the principal immigrant's admission, not in cases of after-acquired spouses and children.[5]

Probably the greatest problem with the current criteria for family-related immigration relates to one subcategory of the family-sponsored immigrants – the so-called "2A's." These are the spouses and the unmarried, under-age-21 children of lawful permanent residents. The admission of the 2A's is subject to an annual numerical limit that varies from year to year in accordance with a statutory formula.[6] Because of those limits, the 2A's must wait many years to be admitted. Those being admitted today had to wait more than five years to reunite with their lawful permanent resident U.S. family members. Moreover, because of additional annual limits on the number of immigrants who may be admitted from any one country, 2A's from Mexico had to wait more than six years.[7] Had these individuals been the spouses or children of U.S. citizens rather than of lawful permanent residents, then as noted above they would have been "immediate relatives" and admitted without any waiting period (other than for the administrative processing).

Why are these long waiting periods a problem? There are several reasons.

The most obvious reason is the humanitarian one – the inherent hardship that occurs when husbands and wives are separated for the first several years of their marriages, and when parents and newborn children are separated for the first several years of the child's life. The 2A's are not the only subcategory who are subject to long waits, but they are by any definition members of the nuclear family. Whatever one's views on the waiting periods for extended family, the

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[3] INA § 201(b)(2)(A)(I). Under the INA, a "child" must be unmarried and under 21 and must meet various other conditions. INA § 101(b).

[4] INA § 203(a).

[5] See INA §§ 203(d), 207(c)(2), 208(b)(3).

[6] The formula appears in INA § 201(c).

[7] See INA § 202 and U.S. Dept. of State, Visa Bulletin for May 2007, at 2.

prolonged separations of newlywed husbands and wives, and parents from newborn children, are troubling. In a nation that rightly proclaims its fidelity to family values, the problem is one that requires fixing.

Humanitarian concerns aside, these long separations give rise to an assortment of other problems. They require lawful permanent residents to travel back and forth to their countries of origin, often located in distant reaches of the world, in order to maintain some semblance of family life. Perhaps more importantly, these separations virtually invite illegal immigration. Human nature will have to be remade before new spouses willingly separate for the first five or six years of their marriages or new parents willingly separate from their newborn children for the first five or six years of their children's lives. For too many people, illegal immigration will continue to be an irresistible temptation. Finally, although for convenience I have been referring to periods of five or six years, in actuality the period is unpredictable. The monthly Visa Bulletins issued by the State Department tell us how long those people who are receiving visas today had to wait. They do not tell us how long someone who applies today will have to wait. The statutory supply of visas changes from year to year according to the formula; in addition, the number of applicants fluctuates from year to year. As a result, the applicants have no way to predict how long it will take before they will be permitted to immigrate. Family and other planning becomes impossible.

Congress responded to the 2A problem in the Immigration Act of 1990.[8] Among other things, that Act altered the statutory formulas in ways that significantly increased the 2A numerical ceiling. The changes were beneficial; in the years immediately following the 1990 Act, the waiting periods for 2A's dropped sharply. Ultimately, however, they began to creep up again, reaching the current level of five years (more than six years for Mexicans).

HR 1645 (the STRIVE Act), introduced by Representatives Gutierrez and Flake in the present Congress, takes a number of major steps aimed at easing the 2A problem. Among other things, this bill would both increase the total ceiling on family-sponsored immigrant visas and increase the proportion of that ceiling allocated to the 2A's. Both of these changes would be tremendously beneficial.

In the end, however, I recommend, with respect, that Congress go one step further. I submit that it is not enough simply to increase the statutory ceiling (as was done in 1990) and hope the new number proves to be optimal in the long run. Better, I would suggest, is to make the 2A's – the spouses and the unmarried, under-age-21 children of lawful permanent residents – immediate relatives, just like their counterpart spouses and children of U.S. citizens. The effect of that change would be that they, like those who currently qualify as immediate relatives, would no longer be subject to annual numerical limits and thus would not face the prolonged and excruciating waits that now give rise to such hardship and to such compelling incentives for illegal immigration. They would need to wait for administrative processing, as the current

[8] Pub. L. 101-649, 104 Stat. 4978 (Nov. 29, 1990).

immediate relatives do, but once they are found qualified they would be admitted without further delay.

I would like to address first what I anticipate might be the greatest cause for concern with this proposal. At first glance, it might seem that repealing the numerical limits on 2A's would significantly increase total legal immigration. In fact, it would not. That is because every person who would benefit from this proposal is a person who would have been admitted in a future year anyway. The total number of immigrants in the long-term is unaffected; the only change is one of timing. Instead of asking the person to wait overseas for several years before being admitted, the person is admitted now. Thus, enactment of this proposal would have an upward effect on 2A immigration in the first few years after enactment and an offsetting downward effect in subsequent years. If the proposal is otherwise acceptable, but Congress is concerned that the short-term impact could be great enough to cause disruption, it could phase in the change over a period of years, as discussed separately below.

To be clear, then, this is ***not*** a proposal to increase legal immigration, though for independent reasons Congress might well wish to do precisely that. It is merely a proposal to expedite the admission of those nuclear family members who would eventually have been admitted in any event. There would be several tangible benefits:

First, and most obviously, it would solve the humanitarian problem noted above. It would put an end to the needless prolonged hardship of separating new spouses from one another and new parents from their children.

Second, while this proposal would not singlehandedly end all illegal immigration, it would at least remove one of the most powerful incentives for it.

Third, it would greatly reduce the wasteful back-and-forth international commuting to which so many lawful permanent residents now have to resort.

Fourth, by eliminating the current uncertainty that family members now face in trying to estimate the likely future waiting times, this proposal would enable them to formulate family and career plans vital to their futures.

Fifth, one of the concerns that opponents of legalization frequently voice is that legalization would be unfair to those who apply for immigration through legal channels and wait patiently for their turns to come up. By admitting 2A's sooner rather than later, Congress would be addressing this equity problem in a major way; the 2A's would not be made to continue waiting in line while those who are present unlawfully are permitted to stay.

Sixth and finally, this proposal would eliminate yet another anomaly that arises under current law. As noted earlier, the law gives immediate preference to the preexisting spouses and children of lawful permanent residents – i.e., those cases in which the relationships were formed before the admission of the permanent resident. But when a person is admitted as a permanent

resident and ***then*** marries or has children, the law imposes a waiting period of many years. There is no apparent reason to treat these two classes of family members differently. The importance of reuniting the nuclear family is equally compelling in the two cases. If anything, that need might be even more compelling in the case of the after-acquired spouse or children, since in those cases the delays occur for newlyweds and for newborn babies – i.e. during the fragile beginnings of the family relationship.

If Congress were to adopt this proposal, it would need to decide how quickly to put it into effect. As noted above, while the proposal would not increase total 2A immigration in the long term, it would clearly redistribute the numbers from year to year in the short-term. For that reason, Congress might wish to consider creating a transition period in which, each year, a fixed percentage of the 2A's who are either currently in the pipeline or who enter the pipeline during the transition, would be exempted from the annual numerical ceiling.

To decide how long that transition period should be, it will be crucial to estimate the total current backlog of 2A applicants. Unfortunately, that task is not as easy as it sounds, largely because the admission process for 2A's (like that for several other classes of prospective immigrants) involves a series of steps and multiple government agencies. Generally, the visa process begins with DHS and ends with the relevant U.S. embassies and consulates. In cases in which the family members are already lawfully present temporarily in the United States and otherwise qualify for "adjustment of status," the entire process can be completed in the U.S. On April 13, 2007, I spoke with Mr. Charles Oppenheim, of the State Department's Visa Office. Mr. Oppenheim was extremely helpful, and he would be able to provide a rough estimate of ***that portion of the 2A backlog that has reached the State Department***. Only DHS, however, would be able to estimate the number of 2A petitions that are (i) not yet adjudicated; (ii) approved but not yet forwarded to the State Department; or (iii) adjustment of status cases (a much smaller number) for which final decisions are still pending at regional DHS offices. For all these reasons, I would respectfully urge this subcommittee to request the relevant DHS and State Department agencies to provide data on the number of pending 2A applicants.

The size of the backlog should not, however, affect Congress's decision whether to make 2A's immediate relatives and thereby exempt them from the annual numerical ceilings. Rather, it would seem relevant to the duration of any transition period that Congress feels it prudent to establish.

Thank you once more for the privilege of being heard. I would be delighted to try to answer any questions that you might have.