

REMARKS

ADMINISTRATIVE LAW: IMMIGRATION, AMNESTY, AND THE RULE OF LAW, 2007 NATIONAL LAWYERS CONVENTION OF THE FEDERALIST SOCIETY

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Immigration is a divisive issue, but it is interesting that it is not one that necessarily falls along partisan lines. Recall when President Bush made common cause with the Democratic majority in the House and the Senate in 2007, and they were unable together to pass comprehensive immigration reform legislation.¹ Why is that? Rudy Giuliani may have had it right: After the failure of the legislation, he said that the problem with the bill was that there was no overarching theme; there was no compelling narrative to the legislation.² I agree with that.

The bill that was proposed in the House and the Senate was one that simply seemed to be cobbled together as a *mélange* of compromise provisions and conflicting elements: border enforcement, regularization,

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1. See Jonathan Weisman, *Immigration Bill Dies in Senate*, WASH. POST, June 29, 2007, at A1.

2. Council on Foreign Relations, *Campaign 2008: The Candidates on Immigration*, CFR.ORG, Aug. 24, 2008, http://www.cfr.org/publication/14766/c2008_and_immigration.html. Rudy Giuliani opposed the 2007 Senate comprehensive immigration reform bill and, after its collapse, referred to the bill as a "typical Washington mess." *Id.*

and the guest worker program.³ It didn't hold together. Interestingly, that combination of elements had worked in 1986, the last time we had major immigration reform. In that legislation, Congress imposed sanctions on employers who hired undocumented immigrants, and also provided a massive legalization program.⁴ But in 1986, we had a consistent story that put those elements together.

The claim in 1986 was that we were going to end illegal immigration forever. The idea was that (1) we would legalize long-stayers who were here; (2) those not eligible for legalization would not be able to find work (because of employer sanctions) and therefore would leave the United States; and (3) the flow of undocumented workers would end because new arrivals would not be able to find work. We now know that the strategy failed dismally. Because of the ready availability of fraudulent documents, the employer sanction provisions have yielded the odd combination of high compliance and zero deterrence. But whatever the outcomes have been, the narrative in 1986 was persuasive.

This story does not sell today. There is no reasonable claim that the package of measures that were debated in the House and the Senate and supported by the President will have any material impact on undocumented migration. There is no clear way to fix employer sanctions anytime soon. The widely discussed "smart cards" or "swipe cards" will be years in the making.⁵ Meanwhile massive work will need to be done on government databases to clean up misspelled, duplicate, and false names. Nor is there any reason to believe that the border will be effectively sealed anytime soon. Amnesty now is not defended in terms of ending undocumented migration; indeed, given the subsequent history of the 1986 legislation, it is argued that regularization leads to more undocumented migration.⁶

In the most recent debates, the Left and Right have not agreed on a coherent narrative. Indeed, the position of each side is fundamentally unattractive to the other and to many Americans. From the left, the story is one of human rights. Undocumented workers have earned their status in the United States; regularization is then not an amnesty. But this

3. See Weisman, *supra* note 1, at A1.

4. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 §§ 101 and 201(a) (1986).

5. See generally Robert Pear, '86 Law Looms Over Immigration Fight, N.Y. TIMES, June 12, 2007, at A15.

6. See generally GORDON H. HANSON, COUNCIL ON FOREIGN RELATIONS, THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION 30 (2007).

argument does not have widespread appeal. Undocumented immigrants may have basic human rights not to be subjected to harsh treatment, but they do not necessarily have a right to a status simply by coming here and working for a few years.

From the Right, the narrative has been that undocumented immigrants are criminals. Yet most of the nation finds this judgment too harsh. Many Americans know undocumented workers who watch their children, tend their lawns, and take care of their elderly parents. These workers tend to be rather law-abiding because they don't want to fall into the hands of authorities who may then send them home. Nor can one view as plausible the Right's demand that the border be sealed. And, if one is not in favor of a legalization program for some of the twelve million unauthorized migrants in the United States, suggestions need to be made about what to do with that population; clearly there is no widespread support for intrusive neighborhood raids and mass deportations.

The narrative that needs to be constructed, I believe, would focus on the dynamics of demographics. Here is the brief story: Immigration will be the primary engine to the growth of the United States' labor force over the next several generations. The number of native citizens in their primary working years—from eighteen to fifty-four—will not grow for the next twenty or thirty years.⁷ As many native workers will be entering the labor force as will be leaving it. If we are going to grow our workforce and have a dynamic economy, that growth will have to come either from immigration or from people working longer.

Second, immigration flows have an "hour-glass" distribution that matches domestic needs. Immigrants tend to be both more highly skilled and lower skilled than average Americans.⁸ This suggests the need for some kind of legal status for the undocumented workers already here and for robust policies of integration.

In this story, enforcement is not a price paid for regularization. Rather, enforcement is necessary for the system as a whole to have integrity—a system of laws and rules.

It seems to me that what we need in this system is a law of sensible rules—one that starts with regularization of status, reorganizes the categories we have, and recognizes the long-term trends in immigration in order to harness the benefits of immigration.

7. See MIGRATION POLICY INSTITUTE, IMMIGRATION AND AMERICA'S FUTURE: A NEW CHAPTER, REPORT OF THE INDEPENDENT TASK FORCE IMMIGRATION AND AMERICA'S FUTURE 3-4 (2006).

8. *Id.* at 9.