

**COMMON SENSE, COMMON INTERESTS: COMBINING
WORK PERMITS AND BILATERAL AGREEMENTS TO
REDUCE ILLEGAL IMMIGRATION, ENHANCE
SECURITY AND SAVE LIVES AT THE BORDER**

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EXECUTIVE SUMMARY

Neither legalizing those in the United States illegally nor increasing immigration enforcement will reduce illegal immigration or limit immigrant deaths at the border. A different approach is needed or else Congress will remain deadlocked or, even worse, pass a bill that fails to address the core problem that drives illegal immigration – the lack of legal avenues for lesser-skilled individuals from Mexico and Central America to work in the United States. The only way that issue can be addressed is through increased use of temporary visas.

To succeed new temporary work visas must 1) be sufficiently free of bureaucracy to be usable by employers and employees, 2) address concerns about possible exploitation, and 3) be of sufficient number to reduce illegal immigration.

The best approach is to combine fully portable work permits – not tied to a specific employer – with bilateral administrative agreements between the United States and countries that send illegal immigrants to America. This approach would provide labor market freedom and, therefore, protection for new workers, at the same time it would elicit cooperation on immigration enforcement from Mexico and (eventually) other key countries.

Congress would authorize the President to sign bilateral administrative agreements with Mexico, followed by El Salvador, Guatemala, Honduras, and potentially other countries, to distribute an agreed upon number of work permits annually in conjunction with additional commitments on immigration enforcement and security issues from these nations.

This approach is designed to address the “future flow” of workers, reduce illegal immigration and establish a reliable framework for improved border security and immigration enforcement. The proposal is not contingent on enacting specific enforcement measures or legalizing the status of those now in the United States illegally. However, as a practical matter, it is likely the proposal discussed here would only become law as part of a broader political compromise that included both some form of legalization and additional immigration enforcement. This proposal obviates the need for a “commission” to regulate the future flow of high and low-skilled workers, particularly since the commission described by former Carter Labor Secretary Ray Marshall is being proposed to prevent, not facilitate, employer-sponsored immigration and would thereby result in increasing both illegal immigration and deaths at the border.

Common Sense, Common Interests

The fully portable work permits described here would be almost identical to currently issued Employment Authorization Documents (EADs). Generally speaking, once an individual receives an Employment Authorization Document, he or she can work for any employer in the United States, enjoying the same freedom of movement in the labor market as a U.S. citizen or lawful permanent resident (green card holder). If the person is unhappy with one employer, then he or she can work for another establishment. In other words, the individual enjoys complete labor mobility.

This freedom of movement directly addresses the concerns raised about temporary workers potentially being exploited by, it is alleged, being “tied” to a single employer. Labor market mobility is better protection than any set of bureaucratic rules, particularly since such rules may not be enforced in a timely manner. Another advantage to this approach is procedures on temporary workers sometimes become so cumbersome that employers and employees do not avail themselves of the visas, leading to the hiring of illegal immigrants.

While a work permit allows an individual to be employed lawfully it does not guarantee anyone a job. Just like anyone else who possesses an Employment Authorization Document, to be employed the individual still must find an employer willing to hire the worker. The length of the work permit would be 5 years. It would allow an individual to travel back and forth to his or her home country. A provision can be included to require an individual who is without employment for 60 days to leave the U.S. Work permit holders would not be eligible for any type of welfare benefits while in the United States.

Potential work permit holders could be screened for skills likely to result in success in the U.S. labor market. Mexico has an interest in those who are most employable receiving the permits, since those individuals would be the most likely to send remittances back to the country. If the demand for the work permits exceeds the supply negotiated by the United States and Mexico, then it may be wise to issue permits to eligible individuals by lottery on a quarterly basis. This may further temper interest in crossing illegally, since even individuals who do not receive a work permit at first know they could receive one at a later date.

The work permits would allow for health and security screening, as well as biometric documentation. Additional details can be expected to be included as part of the bilateral agreements. Moreover, as noted, the proposal is compatible with other reforms Congress may choose to make on legalization or additional enforcement measures.

The work permit holders would not represent more workers but legal workers enjoying full labor market protections rather than the flow of illegal immigrants we would continue to see without this new approach.

Common Sense, Common Interests

The work permits would help reduce illegal immigration and prevent migrant deaths, and also serve as valuable “carrots” to gain cooperation on immigration enforcement that otherwise would be politically impossible for leaders in other countries. Each year Mexico and Central American countries receive billions of dollars in remittances from their nationals working in the United States. Since these remittances represent an important source of dollars flowing into these economies, there would be a great incentive for these nations to cooperate on immigration enforcement in exchange for work permits. The agreements themselves could serve as important foreign policy tools for the President and would show the United States working in a cooperative manner on issues of importance to people in both countries.

Congress would authorize the Secretary of Homeland Security to provide work authorization (work permits) within the limits agreed upon in bilateral negotiations. However, Congress would not vote on each bilateral agreement. Congress would always retain the right to revoke the authority of the Secretary of Homeland Security to issue the work authorization if it felt the authority was not being used appropriately or in the national interest.

Few Americans realize that Mexican immigration law requires its citizens to exit the country only through proper exits and with proper official documents. The relative lack of legal avenues to work in America has made it politically impossible for Mexican elected officials to enforce these provisions. However, a bilateral agreement with the United States as described in this report would fundamentally change the situation. It would put the two countries in a partnership on immigration and border security and provide tangible reasons for Mexico to enforce its own laws, which would help America control the border.

In his recollections on his service as Mexican Foreign Minister under Vicente Fox, Jorge Castañeda explained that Mexico was willing to go quite far in cooperating with U.S. immigration officials if negotiations with the Bush Administration had resulted in allowing a sufficient number of Mexicans to work legally in the United States. Without such an agreement it would be politically impossible for Mexican elected officials to empower their police authorities to limit Mexican border crossings simply to please U.S. officials or members of Congress. Castañeda argues a bilateral agreement with Mexico that includes temporary visas would force the Mexican government to make difficult choices and enforce policies some might find unpopular.

A related benefit is the work permits and agreements will cripple the criminal enterprises that derive their income from human smuggling. As many as 80 percent of illegal immigrants from Mexico now use a coyote, or guide, to cross into the United States, funneling hundreds of millions of dollars a year to criminal gangs. The safety valve of legal visas will encourage people to avoid the coyotes and the dangerous path of illegal entry into the United States.

Common Sense, Common Interests

The slow economy in the U.S. has prompted fewer Mexicans to attempt to cross illegally into the United States, according to recent data from Mexico's National Institute of Statistics and Geography. "Mexican and American researchers say that the current decline, which has also been manifested in a decrease in arrests along the border, is largely a result of Mexicans' deciding to delay illegal crossings because of the lack of jobs in the ailing American economy," according to a *New York Times* report on the Mexican data. However, it is not expected this decline in illegal entry will persist once the U.S. economy recovers.¹

Temporary Visas Effective in Reducing Illegal Immigration

Combining sufficient legal avenues for work and immigration enforcement can dramatically reduce illegal immigration. The actions of Mexican farm workers between 1953 and 1959 demonstrate that allowing legal paths for work can reduce illegal immigration and save lives. After the 1954 enforcement actions were combined with an increase in the use of the Bracero program, illegal entry, as measured by INS apprehensions at the border, fell by an astonishing 95 percent between 1953 and 1959. This demonstrated how access to legal means of entry can affect the decision-making of migrant workers. "Without question, the Bracero program was . . . instrumental in ending the illegal alien problem of the mid-1940's and 1950's," wrote the Congressional Research Service.

A survey of Mexican migrants found 66 percent answered "Yes" to the question: "If there were a new temporary visa program for Mexican workers, like the Bracero program would you be interested in participating?" (Mexican Migration Field Research Program). Given that the Bracero program carries some political baggage, it is likely the answer would have been even higher if the question were asked about a temporary work visa that allowed you work legally in the U.S. for a period of years with the ability to change employers. A 1954 House report concluded: "Reason clearly indicates that if a Mexican who wants to come to the United States for this employment can enter this country legally, with all the protection and benefits that a well-considered and well-administered employment program give him he will do so, rather than come in illegally..."

Other Steps Congress Should Take

In addition to the fully portable work permits and bilateral agreements, Congress should also keep the door open to other avenues of legal entry to work. First, H-2B visas, for non-agricultural, seasonal workers, should be increased. The visas in this category have been exhausted consistently during or at the start of previous fiscal years. Given the seasonal nature of the jobs they are often difficult to fill. Blocking an increase in these visas or imposing onerous terms for compliance will not help American workers but rather harm U.S. employers and their American workers who need the additional labor to keep the businesses viable. Second, Congress should pass the AgJobs Act, which would combine reform of H-2A visas for agricultural workers with a transition of currently illegal workers into the mainstream economy. Third, Congress should increase the allotment of green cards (for permanent residence) for low-skilled workers well above the current level of 5,000 a year.

New Approach Will Reduce Immigrant Deaths at the Border

Poverty in Mexico combined with the pull of better economic opportunities in the United States leads people to risk their lives on the journey to America. The absence of a way to enter legally to work has contributed to more than 4,000 men, women, and children dying while attempting to cross to America since 1998. This loss of life will almost certainly continue unless more legal paths are open to work in the United States.

There is no question making fewer temporary visas available for low-skilled workers will perpetuate the current deadly situation for immigrants crossing the U.S.-Mexico border. Those who oppose increased legal avenues for low-skilled workers from Mexico and Central America should do so knowing full well their proposals will increase misery, not alleviate it.

Enforcement Alone Will Continue to Be Ineffective in Reducing Illegal Immigration

The evidence indicates that current policies are ineffective in addressing illegal immigration. In fact, current efforts seem to have produced the unintended consequence of swelling the illegal immigrant population. Making entering the U.S. more hazardous means individuals who enter successfully stay in America rather than travel back and forth to Mexico or Central America. A great deal of circular migration that used to take place has simply stopped. By one estimate tougher enforcement has lengthened to 9 years the average U.S. stay of a Mexican migrant; in the early 1980s a typical Mexican migrant stayed three years. The number of authorized U.S. Border Patrol Agents has increased from 3,733 in 1990 to 14,923 by 2007. Meanwhile the illegal immigrant population in the United States rose from 3.5 million to 11.8 million between 1990 and 2007, according to the Department of Homeland Security. Neither increased fencing or expanded use of E-Verify hold great prospects for success in reducing illegal immigration.

Legalization Will Not Reduce Future Illegal Immigration

Whatever one's opinion of legalization, even supporters cannot argue that providing legal status to those in the country illegally will reduce illegal immigration. There may be moral, economic or security arguments in favor of legalization but there is no logical argument that legalizing those here will discourage or prevent individuals in the future from coming here illegally, except perhaps the spouses of current illegal immigrants. At best, legalization will have no impact on the future flow of illegal immigration.

Inherent Flaws in the "Commission" Approach

U.S. employers should oppose any immigration legislation that includes a commission to regulate the future flow of high and low-skilled foreign workers. Such a commission is likely to harm U.S. competitiveness, push more work outside the United States, fail to reduce illegal immigration and will increase the number of immigrants who die each year at the border due to a lack of legal avenues to work in America.

Common Sense, Common Interests

As described in a short book by former Carter Labor Secretary Ray Marshall – and endorsed by the AFL-CIO and Change to Win in a press release – the commission would include 9 members, appointed by the president and members of Congress for 9-year terms, and would possess the authority to set the conditions and annual limits for both high and low-skilled temporary visas and green cards, including the power to eliminate entire visa categories. Its findings and recommendations would become law unless blocked by Congress.

In addition to all current requirements, the commission model endorsed by the AFL-CIO and Change to Win in their press statement would set a new and formidable threshold for admitting foreign workers – a finding of a “certified labor shortage” in an occupation – that its own architect (Ray Marshall) says has not existed in America at any time in recent memory. Therefore, one could conclude if the commission had been functioning over the past two decades, few if any skilled immigrants who have come here to America in the past 25 years would have been allowed into the country.

The labor market is global, not only domestic, a fact ignored in any commission proposal. A key reason a “labor shortage” may not show up in any government data is that employers find “work arounds” and take creative action, such as offshoring, to address an inability to hire people they need. In the technology field, if companies cannot find the individuals they need in the United States they can send the work to be done elsewhere, such as China, or hire people in other countries and expand their labor force abroad. In agriculture, one reason it is difficult to document a labor shortage in agricultural workers is that analyses do not distinguish between legal and illegal workers. Most farm workers are here illegally, according to the Department of Labor. Therefore, a commission would ratify and encourage what many see as undesirable outcomes.

Even though the Migration Policy Institute is approaching the commission concept in more of a good faith model than other advocates of a commission, its proposal still presents many of the same risks. It still assumes that with sufficient data, a well-staffed group of public-spirited individuals can make a form of central planning work successfully for the nation. It also assumes that politics will not play a role in the appointment of commission members (the AFL-CIO and other unions spent \$300 million on the 2008 elections) or that intense lobbying will not shift to the commission.² Blind faith is required that the commission will come up with methods or standards for something difficult, if not impossible to measure, particularly given we live in a world where the demand for goods, services and labor is global, not purely domestic. And there is no assurance that family immigration will not be placed at risk in the hands of an unaccountable commission.

In truth, no advocate of a commission can be confident how it would work in practice. The mandates given to the commission in the MPI report are general enough that commission members would be able to recommend

Common Sense, Common Interests

anything they wish based upon personal preference, citing whatever data they desire to conform to their opinions. At best, everything would rest upon who is appointed, a dangerous “roll of the dice” for employers, immigrants and their families.

If any nongovernmental research group wishes to form a commission and send recommendations to Congress on the annual level of employment-based immigration that would be fine. However, to give a commission the immense authority to have such recommendations become law unless Congress could pass a bill within a certain timeframe provides the unelected and unaccountable too much power.

When Congress turns to immigration legislation it faces a choice: Will it continue the policies of the past by preventing Mexicans and others from entering America to work legally and safely? Will Congress establish a politically designed commission whose intention is to restrict (or virtually eliminate) temporary and permanent visas for employment? Will lawmakers attempt more elaborate versions of the same enforcement policies that have failed to reduce illegal immigration over the past two decades? Will the House and Senate repeat the mistakes of 1986 by simply legalizing many of those in the country illegally and passing new enforcement measures, while failing to providing sufficient legal avenues for lesser-skilled workers? Is it optimistic to hope Congress will instead choose a path that takes the profits from Mexican criminal gangs, saves the lives of potential immigrants seeking to work in America, and enhances immigration enforcement by forging bilateral agreements based on respect towards other nations and their citizens? We shall see.

A BRIEF HISTORY OF ILLEGAL IMMIGRATION

Prior to the 20th century individuals and families could immigrate to the United States virtually without restriction, meaning illegal immigration was not an issue. In 1882, Congress passed the Chinese Exclusion Act and later restricted immigration from Japan. But other than these restrictions, individuals could immigrate to the United States without being subjected to quotas until 1921, when restrictive immigration quotas were introduced on a temporary basis. These restrictions were later broadened and made permanent in 1924. Even with new restrictions, natives of Western Hemisphere countries and their families could immigrate outside of the quotas, although they would still need to present themselves at a port of entry and meet the legal grounds of admissibility.³

Illegal immigration was on people's minds in the 1920s. In the 70th Congress (1927-1929), a Senate committee passed an amendment to delete Mexico from the list of countries from the Western Hemisphere where individuals could immigrate without quota. "This action was apparently motivated by the problem of illegal entry from Mexico," writes historian E.P. Hutchinson. Facing opposition from Senators with agriculture in their states, especially sugar beets, the bill did not move on the Senate floor.⁴

The 18th amendment establishing Prohibition, which went into effect in 1920, and the new immigration restrictions passed by Congress increased the importance of border enforcement. "With the passage of this constitutional amendment and the numerical limits placed on immigration to the United States by the Immigration Acts of 1921 and 1924, border enforcement received renewed attention from the government," according to the official history of the Border Patrol.⁵

The Labor Appropriations Act of 1924 established the U.S. Border Patrol and its mission of seeking to secure the border between ports of entry. "Mounted watchmen of the U.S. Immigration Service patrolled the border in an effort to prevent illegal crossings as early as 1904, but their efforts were irregular and undertaken only when resources permitted," according to the Border Patrol. Some of the early focus was aimed at preventing illegal immigration from China. Congress authorized Mounted Guards in 1915, essentially immigration inspectors who patrolled mostly on horseback between border inspection stations.⁶ The first Border Patrol Academy was not opened until 1934 but by 1945 the Border Patrol employed more than 1,400 people, including civilians.⁷

During World War II, a lack of manpower, not concerns about illegal immigration, motivated U.S. policies toward Mexico. In April 1942, the United States and Mexico signed a bilateral agreement aimed at permitting Mexicans to work in America as a way to address concerns about U.S. food production during the war. This became the Bracero program. In April 1943, Congress passed an appropriations bill (H.J. Res. 96, Public Law 45) funding

Common Sense, Common Interests

various wartime programs for agriculture. The bill also established exemptions to certain immigration requirements (such as alien registration) to allow the Bracero program to be integrated with U.S. immigration law. The 1943 appropriations bill gave primary authority for regulation of the program to the Commissioner of the Immigration and Naturalization Service, rather than the Farm Security Administration or War Food Administration.⁸

After World War II, concerns about illegal entry from Mexico increased until by 1954 the Immigration and Naturalization Service (INS) believed it needed to take aggressive action. A controversial crackdown on illegal immigration in 1954, dubbed Operation Wetback, rounded up Mexican migrants, including some U.S. citizens and others in the country legally and deported them to Mexico. INS data show a 200,000 jump in apprehensions from 885,587 in 1953 to 1,089,583 in 1954.⁹ Some aspects of Operation Wetback, while a break in intensity from previous INS operations, were not dissimilar from Border Patrol practices accepted today, such as the use of manned aircraft to alert teams on the ground as to the location of aliens. Other tactics, including “sweeps” in urban areas, would raise civil rights concerns today, although it appears that INS personnel made the vast majority of its apprehensions during Operation Wetback in rural, rather than urban areas, and primarily in Texas and California.¹⁰

TEMPORARY WORK VISAS EFFECTIVE IN REDUCING ILLEGAL IMMIGRATION

Today, there are few legal avenues for lesser-skilled workers to enter America. The underutilized H-2A visa for seasonal agricultural workers is considered burdensome and litigation-prone by growers, while employers have often used up the annual quota of H-2B temporary visas for seasonal workers in resorts, crab fishing, nurseries and other industries. Employers generally cannot sponsor such workers for permanent residence (green cards) and, in any case, such immigrant visas for the “Other Workers” category are currently limited to only 5,000 a year.

This current state of affairs is unfortunate because expanded use of temporary visas represents far and away the best way to reduce illegal immigration and prevent the deaths at the border of those seeking economic opportunity in America.

The actions of Mexican farm workers between 1953 and 1959 demonstrate that allowing legal paths to work will reduce illegal immigration and save lives. “Without question, the Bracero program was . . . instrumental in ending the illegal alien problem of the mid-1940’s and 1950’s,” wrote the Congressional Research Service.¹¹ In short, combining sufficient legal avenues for work and immigration enforcement can dramatically reduce illegal immigration.

Common Sense, Common Interests

The story begins shortly before the increase in immigration enforcement that took place in 1954. INS Commissioner (General) Joseph Swing preceded Operation Wetback by cultivating support among growers to replace an illegal and, therefore, unpredictable source of labor with a legal, regulated labor supply. Swing wanted growers to more heavily utilize the legal means afforded by the Bracero program. Despite the view that employers preferred hiring people here illegally, in fact, Swing received favorable press from growers and in Congress for pushing the substitution of legal for illegal workers.¹²

After the 1954 enforcement actions were combined with an increase in the use of the Bracero program, *illegal entry, as measured by INS apprehensions at the border, fell by an astonishing 95 percent between 1953 and 1959*. This demonstrated how access to legal means of entry can affect the decision-making of migrant workers.

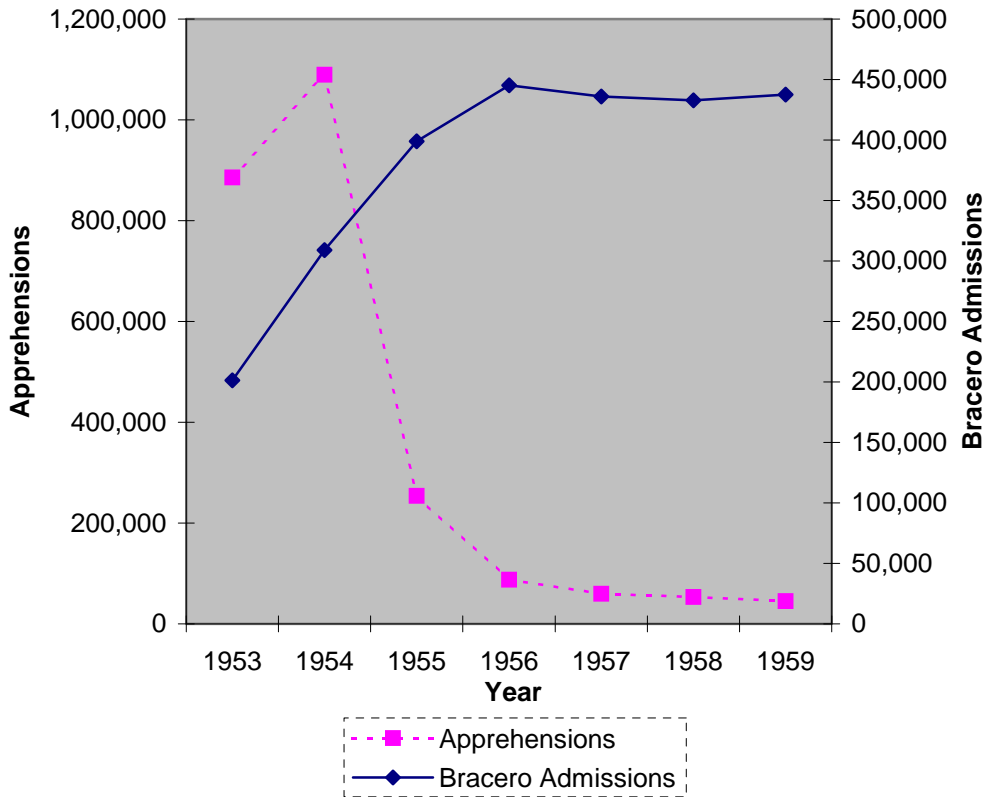
INS apprehensions fell from the 1953 level of 885,587 to as low as 45,336 in 1959. To place the 45,336 level of apprehensions in 1959 in perspective, it would have taken the Border Patrol only about 16 days to reach that level of apprehensions in 2006.¹³ To put it another way, if today illegal entry from Mexico was near the 1959 level at the height of the Bracero program, then illegal immigration from Mexico would not be considered a serious issue either in Congress or among the general public. Apprehensions are recognized as an important indicator of the illegal flow. In general, apprehension numbers drop when the flow of illegal immigration decreases.¹⁴

Figure 1 illustrates the dramatic decrease in illegal entry that accompanied the increase in legal admissions under the Bracero program. During this time period, the annual number of Mexican farm workers legally admitted more than doubled from 201,380 in 1953 to an average of 437,937 for the years 1956-1959. In addition, the number of Mexicans admitted as permanent residents (green card holders) increased from 18,454 in 1953 to an average of 42,949 between 1955 and 1959.¹⁵

In addition to the data, contemporaneous statements confirm the view that those on the ground understood allowing an easier path to legal entry had reduced illegal immigration.

- A February 1958 Border Patrol document from the El Centro (California) district states, "Should Public Law 78 be repealed or a restriction placed on the number of braceros allowed to enter the United States, we can look forward to a large increase in the number of illegal alien entrants into the United States."¹⁶

Figure 1
Apprehensions and Bracero Admissions: 1953-1959



Source: Congressional Research Service, Temporary Worker Programs: Background and Issues, February 1980, p. 40; *Annual Report of the Immigration and Naturalization Service, 1959*; *INS Statistical Yearbook 1996*.

- In April 1958, after the Mexican government asked for the removal of a large farm association in the Rio Grande Valley, the Border Patrol in Brownsville, Texas explicitly connected preventing employers from hiring through legal means to a predictable increase in illegal migration. In objecting to the prohibition on the farm association, the Border Patrol memo explains, “It (the farm association) has about 1,700 members in the four Valley counties which it supplies braceros and has handled an estimated 35,000 braceros during the current season. Revocation of this association’s certificate would result in an acute shortage of agricultural labor and offer employment to illegal entrants.”¹⁷

Common Sense, Common Interests

- Describing testimony before the House Committee on Agriculture by James Hennessy, Executive Assistant to Commissioner Swing, author Kitty Calavita writes, “While Hennessy at first insisted that INS enforcement policies be given full credit for both the reduction of illegal aliens and the subsequent expansion of the Bracero program, he was ultimately forced to admit that control of the border was in large part the consequence of an amply supply of Bracero labor.” When Hennessy was asked what would happen to illegal immigration if the Bracero program ended, he replied, “We can’t do the impossible, Mr. Congressman.”¹⁸

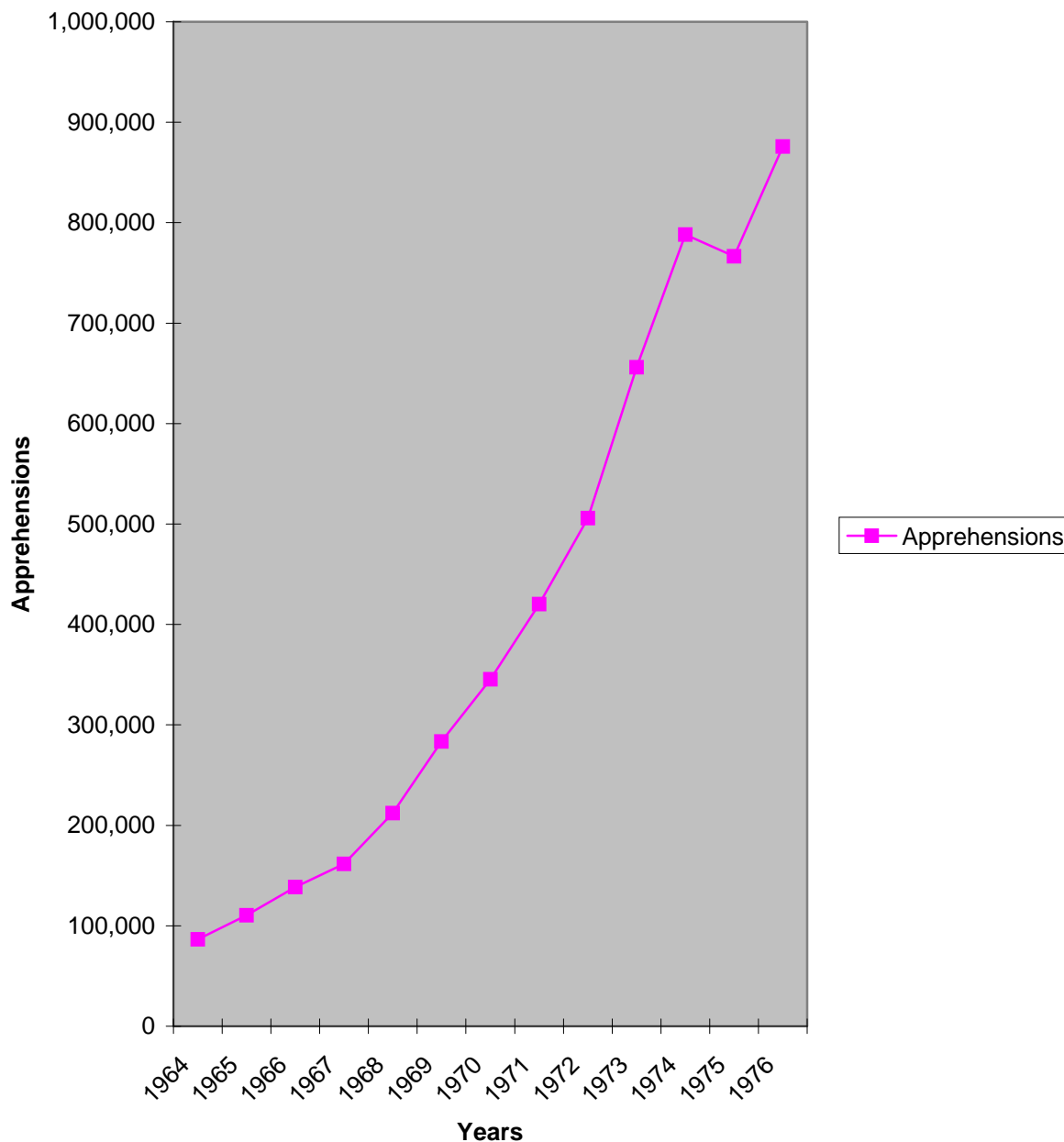
When the Bracero program ended in December 1964, Congress began asking the INS to do the impossible – stop or significantly halt illegal immigration without the use of sufficient legal avenues to meet the demand for labor in the United States.¹⁹

The data are equally telling on the rise of illegal immigration after Bracero admissions ended in 1964. From 1964 to 1976, INS apprehensions increased from 86,597 to 875,915 – *a more than 900 percent increase*. (See Figure 2) Not all of this increase can be attributed to the Bracero program ending. The state of the Mexican economy and, importantly, the lack of legal avenues for individuals to enter legally and work in service, construction or landscaping industries also contributed to the rise in illegal immigration. But an internal INS report found that apprehensions of adult male Mexican agricultural workers increased by 600 percent between 1965 and 1970, illustrating how terminating the Bracero program increased illegal immigration.²⁰ The 1970 INS annual report confirmed that the end of the Bracero program accompanied sharp rises in illegal immigration.²¹

Why did the end of the Bracero program result in vastly increased illegal immigration? Those who examined the issue only years before understood this would be a logical outcome of eliminating a reliable, legal path to entry. A 1954 House report concluded: “Reason clearly indicates that if a Mexican who wants to come to the United States for this employment can enter this country legally, with all the protection and benefits that a well-considered and well-administered employment program give him he will do so, rather than come in illegally...” The report goes on to note: “If, because the program is not available or is not realistically geared to the requirements of employers or workers, the Mexican seeking employment finds it’s impossible or difficult to come in legally, many of them will find their own way across the long border between the United States and Mexico and get employment where they can, under whatever wages and working conditions they are able to obtain.”²²

The data and contemporaneous analyses are so strong that it is difficult to dispute the beneficial impact the Bracero program had on limiting illegal immigration.²³ The Bracero program had flaws that we can learn from today. But the end of the Bracero program in 1964 and its curtailment in 1960 saw the beginning of the increases in illegal immigration that we see up to the present day.

Figure 2
Dramatic Increase in Illegal Immigration:
Apprehensions After End of Bracero Program (1964-1976)



Source INS Statistical Yearbook 1996.

IMMIGRANT DEATHS

Poverty in Mexico combined with the pull of better economic opportunities in the United States leads people to risk their lives on the journey to America. The absence of a way to enter legally to work has contributed to more than 4,000 men, women, and children dying while attempting to cross to America since 1998. This loss of life will almost certainly continue unless more legal paths are open to work in the United States.

The number of deaths would be even higher if not for the rescue efforts of U.S. Border Patrol Agents. Just since 2005, the Border Patrol has rescued more than 9,000 migrants in areas near the southern border.²⁴ This death toll – an average of about one person a day – has occurred in the context of great pressure from Congress and executive branch officials to “control the border.” The primary means of control has been to increase the size of the Border Patrol, build barriers, and deter illegal immigrants from crossing through easier terrain.

University at California-San Diego Prof. Wayne Cornelius writes, “The available data suggest that the current strategy of border enforcement has resulted in rechanneling flows of unauthorized migrants to more hazardous areas.” He argues the increased number of immigrant deaths is a natural result of that strategy, an approach influenced by pressure from Congress.²⁵

Table 1
Immigrant Deaths at the Border: 1998-2008

Year	Immigrant Deaths
1998	263
1999	249
2000	380
2001	340
2002	320
2003	338
2004	334
2005	492
2006	454
2007	398
2008	390
TOTAL	3,968

Source: U.S. Border Patrol. Note: In addition, there have been more than 130 immigrant deaths in FY 2009 as of April 2009.

Common Sense, Common Interests

Cornelius led a team for the Mexican Migration Field Research Program that conducted over 3,000 survey interviews with Mexican migrants in 2007 and 2008. According to the surveys, 72 percent listed purely economic reasons for immigrating illegally – higher wages and more jobs in the U.S. and a desire to build a house or start a business in Mexico.²⁶

The surveys found the current risks do not deter most illegal immigrants: 91 percent of the migrants surveyed believed it was “very dangerous” to cross the border illegally and 24 percent knew someone who died trying – yet still the migrants attempted to come themselves, viewing they had no viable legal ways to work in the U.S.²⁷

Would these individuals avail themselves of legal visas to work in America? According to the survey, 66 percent said, “Yes” to the question: “If there were a new temporary visa program for Mexican workers, like the Bracero program would you be interested in participating?” Given that the Bracero program carries some political baggage, it is likely the answer would have been even higher if the question was asked about a temporary work visa that allowed you work legally in the U.S. for a period of years with the ability to change employers.²⁸

While more than 4,000 immigrants have died trying to come to America for work since 1998, two closely-examined cases have helped put names to the tragedies and illustrate the logical consequences of a policy that denies legal entry and thereby empowers and profits criminal enterprises that smuggle people into the United States.

In *The Devil’s Highway*, Luis Alberto Urrea describes how in May 2001, 26 Mexican men crossed the border into the southern Arizona desert led by a coyote, a guide whose job is to lead illegal immigrants into American while avoiding detection by the Border Patrol. The coyote, known as Mendez, guided the men into brutal desert territory, the middle of what is referred to as the Devil’s Highway. He took wrong turns that got the group lost but did not want to turn back or play straight with his charges. “[The surviving victims] repeatedly asked the defendant how much further they would be required to walk. The defendant repeatedly advised them that they were within one to two hours of their destination . . . he never confessed to the members of the group that they were lost,” according to official documents on the case.²⁹

In fact, with several men near death, Mendez finally admitted they were lost and collected – or, some say, extorted – additional money from the men and went off with a cohort, promising to return with water for the group. He never came back and was found near death by the Border Patrol.

Describing the type of heat stroke these 24 men experienced, Urrea writes, “Dehydration had reduced all your inner streams to sluggish mudholes. Your heart pumps harder and harder to get fluid and oxygen to your organs.

Common Sense, Common Interests

Empty vessels within you collapse. Your sweat runs out . . . Your temperature redlines – you hit 105, 106, 108 degrees . . . Your muscles, lacking water, feed on themselves. They break down and start to rot . . . The system closes down in a series. Your kidney, your bladder, your heart.”³⁰

In all, 14 of the 26 men in the group died. One of them was Lorenzo Ortiz Hernandez, the father of 5 children age three to 12. He couldn’t support his family growing coffee so he decided to borrow \$1,700 at 15 percent interest and take a chance at crossing illegally for an opportunity to work. Describing what Border Patrol agents found when they encountered Hernandez’s body, Urrea writes, “Lorenzo was on his back, his eyes open to his enemy, the sun. His brown slacks were empty looking: his abdomen had fallen in . . . It was 110 degrees before noon.”³¹

The story of 73 or more illegal immigrants locked in the back of a tractor trailer in May 2003 for a 300 mile trip to Houston also sparked consciences but no change in policies. Various middlemen (and women) arranged for a group of immigrants from Mexico and Central America to ride in the truck as a way to smuggle them into the interior of the United States. However, the air conditioner on driver Tyrone Williams’ truck failed, leaving these men and women – and one child – to experience hellish conditions.

Two of the men managed to poke small holes in the truck and the passengers sought to take turns at breathing in through these tiny passages. One 911 call was generated by a passenger with a cell phone. A passing motorist, alerted by a waving cloth from the small hole in the truck, called police. Both failed to elicit help and prevent the tragedy. By the time the driver stopped, 19 people had died of “asphyxiation, dehydration and heat exposure as the result of being trapped inside a tractor trailer truck. Among the dead was a 5-year-old child.”³²

Throughout the trip, passengers expressed concern for 5-year-old Marco Antonio. “Please, for the sake of the child, get out of the way, let the father take the boy to the hole so he can get some fresh air,” one passenger yelled. The boy was brought through the packed truck and put near the breathing holes. It did not save the boy.”³³

“The coyotes were being exclusively blamed for the deaths of the undocumented immigrants . . . in reality the responsibility was a shared one. The governments of Mexico and the United States were also partially to blame for what happened,” writes Jorge Ramos, author of *Dying to Cross*. He points out that coyotes “had long since become a necessity for anyone who wanted to cross the border.”³⁴ In Wayne Cornelius’ survey of illegal immigrants from Oaxaca (Mexico), he found 80 percent paid a coyote to smuggle them across the border.”³⁵

“The coyote business had blossomed as the result of the U.S.’s very flawed immigration policies, Mexico’s permanent state of economic crisis, and both countries’ inability to reach any kind of immigration agreement,” concludes Jorge Ramos. “If, instead of hunting down immigrants and penalizing illegal border crossings, both

Common Sense, Common Interests

governments could find a way to regularize the entry of immigrants in an orderly fashion so that Mexico might provide the U.S. economy with the workers it needs, border deaths would become a thing of the past, and the countries would finally legalize something that occurs every single day, regardless of the law.”³⁶

ENFORCEMENT ALONE WILL CONTINUE TO BE INEFFECTIVE IN REDUCING ILLEGAL IMMIGRATION

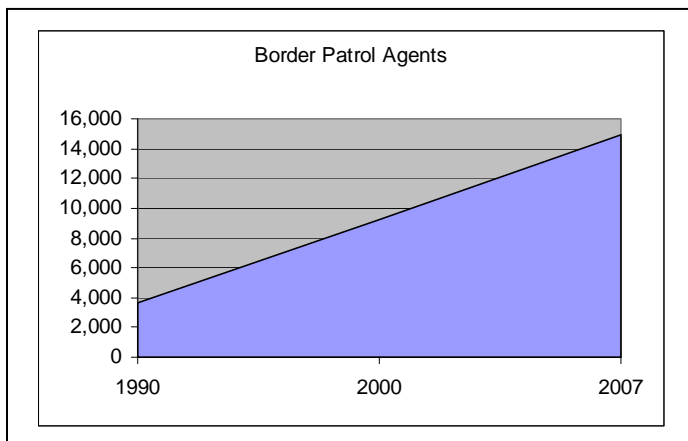
The evidence indicates that current policies are ineffective in addressing illegal immigration. In fact, current efforts seem to have produced the unintended consequence of swelling the illegal immigrant population. Making entering the U.S. more hazardous means individuals who enter successfully stay in America rather than travel back and forth to Mexico or Central America. A great deal of circular migration that used to take place has simply stopped.

By one estimate tougher enforcement has lengthened to 9 years the average U.S. stay of a Mexican migrant; in the early 1980s a typical Mexican migrant stayed three years.³⁷ Eighty-three percent of undocumented immigrants in the U.S. surveyed by the Mexican Migration Field Research Program said they did not return to their hometown for the annual fiesta; 61 percent had relatives who stayed in the U.S. due to tighter border enforcement.³⁸

The number of authorized U.S. Border Patrol Agents has increased from 3,733 in 1990 to 14,923 by 2007. Meanwhile the illegal immigrant population in the United States rose from 3.5 million to 11.8 million between 1990 and 2007, according to the Department of Homeland Security. Border Patrol levels today are far higher than at the height of the Bracero program.

Figure 3

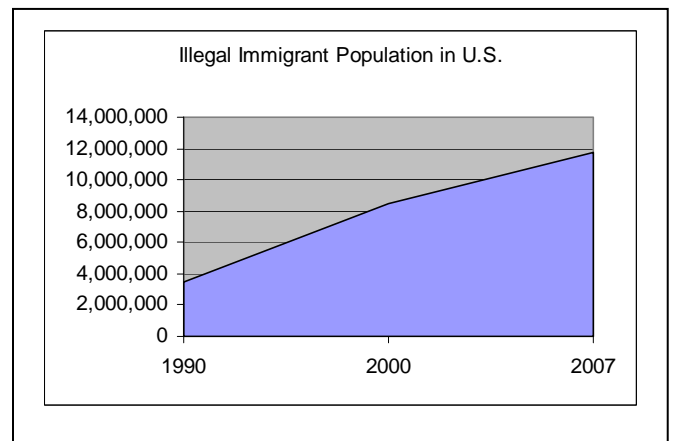
Since 1990 Border Patrol Levels Have Risen...



Source: U.S. Border Patrol

Figure 4

... And So Has the Illegal Immigrant Population



Source: DHS Office of Immigration Statistics

Common Sense, Common Interests

Two other issues related to border enforcement are important. First, simply because an illegal immigrant is apprehended does not mean he or she will not try again. In general, after being apprehended by the Border Patrol migrants are processed and returned to Mexico. Forty-four percent of undocumented migrants from the state of Oaxaca said they were apprehended on their most trip to the border. However, 97 percent of the migrants reported being eventually able to enter the United States successfully a relatively short time later after being apprehended.³⁹ Second, rather than trekking across the border, entering illegally through a legal port of entry, such as by hiding in a vehicle, is a viable option for many illegal immigrants. Approximately 17 percent of illegal immigrants from Oaxaca had entered through a legal port of entry between 2005 and 2007.⁴⁰ This illustrates the difficulty of trying to control illegal immigration through enforcement alone.

Since 1986, it has been unlawful for U.S. employers to knowingly hire an individual unauthorized to work in the United States. There is no evidence this provision has made a significant impact on illegal immigration. Some argue that the “employer sanctions” provisions of the Immigration and Nationality Act have not been vigorously enforced. Others counter that employers are not document experts and can run afoul of civil rights laws if they too closely scrutinize the validity of documents presented to them.

One potential way around the false document and civil rights dilemmas, some argue, is to use an electronic verification system known as E-Verify. To join E-Verify, an employer must enter into a Memorandum of Understanding (MOU) with the federal government, specifically the Department of Homeland Security’s (DHS) U.S. Citizenship and Immigration Services bureau (USCIS) and the Social Security Administration (SSA). An employer sends information electronically on a new hire to be checked against SSA and DHS databases.⁴¹

There is considerable debate on several aspects of E-Verify. Currently, the system covers only a small percentage of employed individuals in the United States. Could expansion to all or most employers occur without overwhelming the system, particularly when discrepancies in data must be checked in government files, including by hand? How large a problem are the errors in the data? Will many people be denied jobs from faulty data? Even though it is not allowed, will employers “pre-screen” applicants and deny individuals the opportunity to correct possible errors in the databases that show them ineligible to work?

Leaving aside these issues, a more obvious problem with E-Verify calls into question how effective it will really be as a “magic bullet” to prevent the hiring of illegal immigrants. E-Verify cannot reliably catch identity fraud, meaning the system is unlikely to reduce illegal immigration significantly. In a 2005 report describing the Basic Pilot Program, the forerunner to E-Verify, the Government Accountability Office (GAO) stated: “...the program cannot currently help employers detect identity fraud. . . If an unauthorized worker presents valid documentation that belongs to another person authorized to work, the Basic Pilot Program may find the worker to be work-authorized.

Common Sense, Common Interests

Similarly if an employee presents counterfeit documentation that contains valid information and appears authentic, the Basic Pilot Program may verify the employee as work-authorized.⁴² Re-naming the program E-Verify has not eliminated this problem.⁴³

The bottom line: It is difficult to argue that “ramping up” current enforcement measures, whether increasing the number of Border Patrol Agents or expanding E-Verify, hold great prospects for success in reducing illegal immigration.

LEGALIZATION WILL NOT REDUCE ILLEGAL IMMIGRATION

Legalization, even if combined with more enforcement, will not reduce illegal immigration. Today, close to 12 million illegal immigrants live in the United States. Whether or not to grant legal status to these individuals – or some portion of them – remains a focus of great debate. Advocates argue it is a matter of fairness, that such people have put down roots, raised U.S. citizen children, and deserve a chance to become full members of American society. Critics say illegal immigrants have broken the law, that it’s unfair to reward people here illegally and that any “amnesty” will only encourage more people to come here without authorization.

Whatever one’s opinion of legalization, even supporters cannot argue that providing legal status to those in the country illegally will reduce illegal immigration. There may be moral, economic or security arguments in favor of legalization but there is no logical argument that legalizing those here will discourage or prevent individuals in the future from coming here illegally, except perhaps the spouses of current illegal immigrants. At best, legalization will have no impact on the future flow of illegal immigration. Critics argue, of course, providing legalization will lead more people to come to America illegally in the hopes of having their status also legalized at some point in the future.

The debate is over whether legalization is a good idea and if would it encourage more illegal immigration, not whether it would reduce illegal immigration. Examining the 1986 law, economists Pia M. Orrenius (Federal Reserve Bank of Dallas) and Madeline Zavodny (Federal Reserve Bank of Atlanta). “An amnesty program also does not appear to encourage illegal immigration in the long run in the hopes of another amnesty program; we do not find a significant difference between apprehensions after the [1986] IRCA amnesty expired and before the program was created.” Even if critics concede that the study is correct, they might argue that the 1986 law failed to reduce or halt illegal immigration. In fact, the study concludes: “IRCA does not appear to have discouraged illegal immigration in the long run.”⁴⁴

PROPOSAL TO IMPROVE U.S. BORDER SECURITY, REDUCE ILLEGAL IMMIGRATION AND PREVENT MIGRANT DEATHS

Neither legalizing those in the United States illegally nor increasing immigration enforcement will limit migrant deaths or reduce illegal immigration. Another approach is needed or else Congress will remain deadlocked or, even worse, pass a bill that fails to address the core problem that drives illegal immigration – the lack of legal avenues for lesser-skilled individuals from Mexico and Central America to work in the United States. The only way that issue can be addressed is through increased use of temporary visas.

To succeed new temporary work visas must 1) be sufficiently free of bureaucracy to be usable by employers and employees, 2) address concerns about possible exploitation, and 3) be of sufficient number to reduce illegal immigration.

The best approach is to combine fully portable work permits – not tied to a specific employer – with bilateral administrative agreements between the United States and countries that send illegal immigrants to America. This approach would provide labor market freedom and, therefore, protection for new workers, at the same time it would elicit cooperation on immigration enforcement from Mexico and (eventually) other key countries.

This approach is designed to address the “future flow” of workers, reduce illegal immigration and establish a reliable framework for improved border security and immigration enforcement. The proposal is not contingent on enacting specific enforcement measures or legalizing the status of those now in the United States illegally. However, as a practical matter, it is likely the proposal discussed here would only become law as part of a broader political compromise that included both some form of legalization and new enforcement measures. This proposal obviates the need for a “commission” to regulate the future flow of high and low-skilled workers, particularly since such a commission is being proposed to prevent, not facilitate, employer-sponsored immigration and would thereby result in increasing both illegal immigration and deaths at the border.

Often the best ideas are the least complicated. Before delving into greater detail, it is instructive to show that the proposal presented here is simple enough to understand that the necessary legislative language would fill a page or less of the Immigration and Nationality Act.

To illustrate, the core legislative language for such a proposal could be as follows:

Section 401

“(a) In the case of an alien who is a national of a foreign state designated under subsection (b), the Secretary of Homeland Security shall authorize the alien to engage in employment in the United States and provide the alien with an ‘employment authorized’ endorsement or other appropriate work permit. The work permits shall have a term lasting 5 years. The alien must leave the United States after the 5 year-period for a period of one year unless sponsored for an employment-based immigrant visa under section 203. An alien described here cannot remain in the United States for more than 60 days without lawful employment. Failure to leave the United States upon the completion of the 5-year period, unless otherwise eligible to remain in the United States, shall make the alien ineligible for additional work authorization under this section for a period of 6 years.

(b) Nationals of a foreign state shall only be eligible for work authorization described in (a) if the country has concluded an administrative bilateral agreement with the United States that establishes:

- (1) specific commitments to the satisfaction of the Secretary of Homeland Security and Secretary of State to assist the United States in controlling illegal immigration from that foreign state;
- (2) the annual level of work permits issued.

(c) Committee on the Judiciary of the House of Representatives and of the Senate shall be informed upon the completion of such agreements described in (b). Reports shall be issued every 6 months as to the status of these negotiations.

(d) The annual levels should be set in a manner and at a level that will replace the current illegal flow of workers from a foreign state with a legal flow.

(e) Foreign states that are the largest sources of illegal immigration to the United States should be the initial focus of these administrative agreements.

(f) A binational body should be established between the United States and each foreign state to monitor the compliance of each nation with the agreements.

(g) A nongovernmental body should be chartered to serve as an employment clearinghouse for employers in the United States and aliens described in (a). Fees assessed to aliens shall fund the nongovernmental body.

The fully portable work permits described above would be almost identical to currently issued Employment Authorization Documents (EADs). Generally speaking, once an individual receives an Employment Authorization Document, he or she can work for any employer in the United States, enjoying the same freedom of movement in the labor market as a U.S. citizen or lawful permanent resident (green card holder). If the person is unhappy with

Common Sense, Common Interests

one employer, then he or she can work for another establishment. In other words, the individual enjoys complete labor mobility.

This freedom of movement directly addresses the concerns raised about temporary workers potentially being exploited by, it is alleged, being “tied” to a single employer. Labor market mobility is better protection than any set of bureaucratic rules, particularly since such rules may not be enforced in a timely manner. Another advantage to this approach is procedures on temporary workers sometimes become so cumbersome that employers and employees do not avail themselves of the visas, leading to the hiring of illegal immigrants. This has happened in agriculture with H-2A visas and at the tail end of the Bracero program to cite two examples.

The best labor protection enjoyed by all Americans is the ability to leave a bad employer and work somewhere else. Good employers would have no problem with the portability aspect of these work permits, since reputable employers maintain a good workforce by treating employees fairly, not by hoping to exploit people.

The work permits would allow for health and security screening, as well as biometric documentation. Additional details can be expected to be included as part of the bilateral agreements. As noted, the proposal is compatible with any other reforms Congress may choose to make on legalization or additional enforcement measures.

Some will oppose issuing these work permits because they do not want anyone coming into the country to work – legally or illegally. However, the work permits, particularly when combined with enforcement cooperation from Mexico, will be used to replace the workers who would have come in illegally. The work permits would not represent more workers but legal workers enjoying full labor market protections rather than the flow of illegal immigrants we would continue to see without this new approach.

One analogy that can be used is to the work authorization granted under Temporary Protected Status (TPS), whereby Congress has authorized work authorization under that status but it is the Secretary of Homeland Security that grants the work authorization to nationals of designated countries. For our purposes, the relevant aspect of TPS is it grants individuals an Employment Authorization Document that ensures labor mobility. Many human rights groups lobby for aliens in the United States to receive TPS, so clearly it is considered a good status for workers. To put it another way: Has anyone ever heard the complaint that “Someone with Temporary Protected Status took my job”? Or “People with Temporary Protected Status are undercutting my wages.” (Note: Unlike TPS, which is for individuals inside the United States, this proposal is only for temporary workers outside the country.)

Common Sense, Common Interests

HOW TO DISTRIBUTE THE FULLY PORTABLE WORK PERMITS AND SET ANNUAL NUMBERS

Having established that fully portable work permits that function similar to Employment Authorization Documents would meet the primary objection raised by critics of temporary visas, the next issue is how to distribute these permits. The key is to replace the current illegal flow with a legal flow of workers. Policymakers should focus their initial attention on the countries from where most illegal immigrants come to the United States.

As noted in the sample legislative language, the best approach is for Congress to authorize the President to sign bilateral administrative agreements with Mexico, followed by El Salvador, Guatemala, Honduras, and potentially other countries, to distribute an agreed upon number of work permits annually in conjunction with additional commitments on immigration enforcement and security issues from these nations.

The work permits would help reduce illegal immigration and prevent migrant deaths, and also serve as valuable “carrots” to gain cooperation on immigration enforcement that otherwise would be politically impossible for leaders in other countries. Each year Mexico and Central American countries receive billions of dollars in remittances from their nationals working in the United States. Since these remittances represent an important source of dollars flowing into these economies, there would be a great incentive for these nations to cooperate on immigration enforcement in exchange for work permits. The agreements themselves could serve as important foreign policy tools for the President and would show the United States working in a cooperative manner on issues of importance to people in both countries.

Congress would authorize the Secretary of Homeland Security to provide work authorization (work permits) to foreign nationals of these nations within the limits agreed upon in bilateral negotiations. However, Congress would not vote on each bilateral agreement. Congress would always retain the right to revoke the authority of the Secretary of Homeland Security to issue the work authorization if it felt the authority was not being used appropriately or in the national interest.⁴⁵

Mexico is by far the largest source country for illegal immigrants, according to the Department of Homeland Security. The estimated population of illegal immigrants from Mexico increased by an average of 330,000 per year in the United States between 2000 and 2007.⁴⁶ Overall, approximately 7 million of the estimated 11.8 million illegal immigrants in the United States in January 2007 were from Mexico.⁴⁷

As of January 2007, the next largest sources of illegal immigrants to the United States were El Salvador, with 540,000 nationals residing illegally in the United States, and Guatemala, with 500,000. The average annual

Common Sense, Common Interests

increase between 2000 and 2007 in the illegal immigrant population from El Salvador was 20,000, while from Guatemala it was 30,000, according to the Department of Homeland Security. For Honduras, the estimated illegal immigrant population in the United States rose from 160,000 in 2000 to 280,000 in 2007, an average of 20,000 a year.

The annual number and process for work permits should be set to correspond roughly with the yearly illegal flow but some details and the timing can be established during the course of bilateral discussions. As noted earlier, between 2000 and 2007, the number of illegal immigrants from Mexico increase, on average, by 330,000 a year. That is a net number in the increase of the illegal population, meaning the number of new Mexican illegal immigrants each year was likely higher. The best course would be for Congress to set the goal that the number of work permits should be established in a manner to reduce the illegal flow of workers and replace it with a legal flow. This way the United States can take into account the degree of cooperation with Mexico on immigration enforcement in establishing the annual number. In theory, the number could be adjusted over time.

Table 2**Illegal Immigrant Population in the U.S. and Annual Average Increase: 2000-2007**

Country of Birth	Estimated Population in January 2007	Average Annual Change (2000-2007)
Mexico	6,980,000	330,000
Guatemala	500,000	30,000
El Salvador	540,000	20,000
Honduras	280,000	20,000
Philippines	290,000	10,000
China	290,000	10,000
Korea	230,000	10,000
India	220,000	10,000
Brazil	190,000	10,000
Ecuador	160,000	10,000
Other Countries	2,100,000	10,000
All Countries	11,780,000	470,000

Source: Office of Immigration Statistics, Department of Homeland Security

MEXICO WOULD NEED TO SHARE RESPONSIBILITY FOR ILLEGAL IMMIGRATION TO THE U.S.

Few Americans realize that Mexican immigration law requires its citizens to exit the country only through proper exits and with proper official documents. The relative lack of legal avenues to work in America has made it politically impossible for Mexican elected officials to enforce these provisions. However, a bilateral agreement with the United States as described in this report would fundamentally change the situation. It would put the two countries in a partnership on immigration and border security and provide tangible reasons for Mexico to enforce its own laws, which would help America control the border.

Chapter II of the General Law of Population (Ley General de Poblacion) of Mexico refers to migration. The relevant sections of Articles 11 and 13 establish: "The international transit of people through maritime ports, airports and borders, may only be done through the places designated for this purpose and within the established hours with the intervention of migratory authorities. . . . To enter and exit the country, nationals and foreigners must fulfill the requirements established by this law, its regulations and other applicable legislation."

Furthermore, Chapter IV of the law refers to emigration, and the relevant sections of Article 78 establish:

People, who intend to emigrate from the country, are obligated to satisfy, among other general immigration requirements, the following:

Section I. Present an ID . . .

Section II. Be of legal age . . .

Section III. Evidence, if they are Mexican, that they can fulfill the requirements to enter the country they are heading to in accordance with the immigration status they intend to hold.

Section IV. Request from the corresponding office the necessary documents and present them to the immigration authorities at the port of exit . . .⁴⁸

Today, no Mexican elected official is going to use resources to prevent Mexicans from leaving to please a U.S. Congressman or President. However, in exchange for bilateral cooperation that included work permits for Mexican nationals that would be a different story.

In his recollections on his service as Mexican Foreign Minister under Vicente Fox, Jorge Castañeda explained that Mexico was willing to go quite far in cooperating with U.S. immigration officials if negotiations with the Bush Administration had resulted in allowing a sufficient number of Mexicans to work legally in the United States. Without such an agreement it would be politically impossible for Mexican elected officials to empower their police authorities to limit Mexican border crossings simply to please U.S. officials or members of Congress.

Common Sense, Common Interests

Castañeda points out that even the Mexican opposition failed to see the commitment the Mexican government under Fox had tacitly undertaken to prevent illegal migration from Mexico in exchange for a serious, well-designed program for temporary workers. Castañeda writes, “It was the most important concession Fox was to make to the United States during his presidency, and it will probably stand, if only because it is an absolute precondition for any immigration agreement between the two countries or for Mexican cooperation with the United States on immigration reform enacted by the U.S. Congress. Had the Mexican opposition understood at the time what Fox was promising, it would have raised hell; this had been an absolute taboo in Mexico for decades. By the time it figured it out in 2005, the commitment and its enormous significance had been assimilated at least by part of that opposition.”⁴⁹

After the September 11, 2001 terrorist attacks, bilateral talks between Mexico and the United States slowed down and eventually ended without substantial progress. Today, using the connection between work permits and a bilateral agreement on immigration enforcement issues with Mexico can result in a pact based on mutual respect, and one that can save the lives of Mexican migrants and reduce illegal immigration.

Jorge Castañeda argues a bilateral agreement with Mexico that includes temporary visas would force the Mexican government to make difficult choices and enforce policies some might find unpopular. “For my country, such an understanding and accord requires a series of steps that until now Mexico had been unwilling to take,” writes Castañeda. “The first one is to apply the law: no one should be allowed out of the country if the proper and respective procedures in the standing legislation are not complied with. If this means stopping people from leaving across the desert, so be it.”⁵⁰ He points out the Fox Administration ordered patrols in the summer 2001 to impede people seeking to cross the Sonoran Desert and it helped save lives.⁵¹

Castañeda believes the Mexican government could provide “rewards for staying and penalties for leaving” in sending communities if people do not use the legal work permits or visas allocated as part of a bilateral agreement. For example, state cash assistance to mothers with children could be doubled if the male head of household is shown to be present on an ongoing basis. Higher priorities for subsidized housing or even micro-financing for small businesses could become available for those heads of households. Castañeda argues the flip side of the rewards – the penalties – would be applied “to anyone who leaves outside the agreed-upon [worker] programs.”⁵²

In addition Mexico would secure its own southern border. “It is not simply an immigration question,” notes Castañeda. “Mexico’s frontier with Guatemala is mostly a nonpatrolled river, a theoretical line in the jungle, and a passageway for absolutely everything – contraband, drugs, gangs, migrants, arms, precursor chemicals – in both directions.”⁵³

OTHER ISSUES AND QUESTIONS ABOUT THE WORK PERMITS

While the work permits allow an individual to be employed lawfully it does not guarantee anyone a job. Just like anyone else who possesses an Employment Authorization Document the individual still must find an employer willing to hire the worker. The length of the work permit would be 5 years. It would allow an individual to travel back and forth to his or her home country. A provision can be included to require an individual who is without employment for 60 days to leave the country. Work permit holders would not be eligible for any type of welfare benefits while in the United States.

Potential work permit holders could be screened for skills likely to result in success in the U.S. labor market. Mexico has an interest in those who are most employable receiving the permits, since those individuals would be the most likely to send remittances back to the country. If the demand for the work permits exceeds the supply negotiated by the United States and Mexico, then it may be wise to issue permits to eligible individuals by lottery on a quarterly basis. This may further temper interest in crossing illegally, since even individuals who do not receive a work permit at first know they could receive one at a later date.

What about the role of employers? There is no need for employers to file petitions for the workers, such as with other temporary visas, since an individual with a work permit can work for any employer. However, the bilateral agreement can stipulate that a system will be set up to make new holders of work permits aware of jobs in the United States. This might best be handled by a nongovernmental, non-profit entity that would work as a clearinghouse. However, it is possible for-profit companies on either side of the border might see a role as a facilitator of worker-employer relationships.

Other issues worth clarifying: The work permits would have no connection to the North American Free Trade Agreement (NAFTA). If an individual violates the terms of his or her work permit such as by overstaying illegally, he or she could be made ineligible for future legal work permits for a period of time. The vast majority of illegal migrants do not bring family members when they cross the border illegally. Given the work permits will allow for circularity it does not seem necessary to include family members as part of the permits.

Will individuals who receive these work permits leave upon the expiration of the term? There is no evidence that workers in current temporary visa categories, such as H-1B, H-2A, or H-2B overstay their visas in large numbers. One reason is they wish to avail themselves in the future of those visas, enjoying the security of the safe entrance into the United States afforded by legal visas. Another reason, in the case of H-1B visas for high-skilled workers, is that individuals who wish to stay longer term can be sponsored for green cards (permanent residence).

Common Sense, Common Interests

Individuals on H-1B visas are allowed to stay and work in the United States while they await processing for their green cards.

Currently only 5,000 green cards are allocated each year for lesser-skilled workers (10,000 after the end of a visa set aside for certain Central Americans). If Congress is concerned about visa overstays, then clearing the existing green card backlog for the “Other Workers” category and raising that annual quota to 75,000 or higher would address the issue, since it would provide a legal avenue for employers to retain lesser-skilled workers long-term.

In a communication to Congress, the Department of Homeland Security reported less than 1 percent of individuals – 0.6 percent – who entered the country under the Visa Waiver program failed to leave within the legal limit.⁵⁴ While overstay rates could be higher for individuals from less prosperous countries than those enrolled in Visa Waiver, even if the overstay rates involving these work permits were 10 times higher, it would have a negligible impact on illegal immigration. In the unlikely event as many as 6 percent of those work permit holders “overstayed,” we would be looking at perhaps 20,000 or so individuals added to an illegal immigrant population that grew by an average of 470,000 a year from 2000 to 2007, according to the Department of Homeland Security.⁵⁵ Again, there is no evidence that individuals who would avail themselves of the legal avenues these work permits provide would be likely to overstay the terms of the permit.

OTHER STEPS CONGRESS SHOULD TAKE

In addition to the fully portable work permits and bilateral agreements, Congress should also keep the door open to other avenues of legal entry to work.

First, H-2B visas, for non-agricultural, seasonal workers, should be increased. The visas in this category have been exhausted consistently during or at the start of previous fiscal years. Given the seasonal nature of the jobs they are often difficult to fill. Blocking an increase in these visas or imposing onerous terms for compliance will not help American workers but rather harm U.S. employers and their American workers who need the additional labor to keep the businesses viable.⁵⁶

Second, Congress should pass the AgJobs Act, which would combine reform of H-2A visas for agricultural workers with a transition of currently illegal workers into the mainstream economy. The legislation has enjoyed support from both growers and unions.

Third, Congress should increase the allotment of green cards (for permanent residence) for low-skilled workers well above the current level of 5,000 a year. There is no reason our system offers the opportunity for individuals in

Common Sense, Common Interests

finance, technology and other fields to be sponsored for permanent residence but not those in fields such as hospitality, landscaping, agriculture and food production.

INHERENT FLAWS IN THE “COMMISSION” APPROACH

U.S. employers should oppose any legislation that includes a commission to regulate the future flow of high and low-skilled foreign workers. Such a commission is likely to harm U.S. competitiveness, push more work outside the United States, fail to reduce illegal immigration and will increase the number of immigrants who die each year at the border due to a lack of legal avenues to work in America.

In April 2009, the AFL-CIO and Change to Win announced “The Labor Movement’s Framework for Comprehensive Immigration Reform.” This announcement was viewed as part of a political compromise – the AFL-CIO would agree not to oppose legalization for up to 12 million illegal immigrants in the United States if it achieved one of the union’s long-standing objectives – virtually eliminating employment-based immigration into the United States.

The method chosen to achieve this objective is to establish a commission empowered to regulate the flow of foreign workers by radically redesigning employment-based immigration. While there is not sufficient space to discuss all the problems with the commission proposal endorsed by the AFL-CIO and Change to Win, it is important to address several issues. (See NFAP’s *A Commission to Regulate Immigration? A Bad Idea Whose Time Should Not Come*, May 2009 for an expanded discussion of the problems with a commission.)

- 1) It is untrue the commission is intended simply to “set the number” of employment visas.** Rather it would fundamentally change employment-based immigration by shifting the focus away from ensuring individual temporary visa holders are paid wages comparable to an American or, conducting individual labor-market tests, such as advertising, in the case of sponsoring a foreign national for permanent residence (a green card).

Instead, in addition to existing requirements, employer-sponsored visas would only be issued – even potentially – when an occupation is found by the commission to be experiencing a “certified labor shortage” in the United States. As discussed below, this is a new standard that will rarely, if ever, be met. Current rules and regulations (or tighter versions of them) would serve as a last line of defense to prevent the entry of a foreign worker should other means not succeed.

- 2) It is clear the goal of the commission is to define out of existence the circumstances under which foreign nationals would be permitted to enter the United States for employment purposes.** If

Common Sense, Common Interests

someone understands nothing else about the commission proposal it should be this. No one should be confused or convinced the commission could be “made to work” for employers, since the purpose of the commission as described in Ray Marshall’s book is *not* to work for U.S. employers. (And the commission would apply to both temporary visas and green cards for skilled immigrants.)

- 3) **The commission would set a threshold for admitting foreign workers – a finding of a “certified labor shortage” in an occupation – that its own architect says has never been reached.** Former Carter Labor Secretary Ray Marshall, writing the short book *Immigration for Shared Prosperity* (Economic Policy Institute), developed the commission concept for the unions.⁵⁷ Marshall and his supporters seek to establish a threshold for the admission of immigrants and temporary visa holders that Marshall himself says has not been met during the past 25 to 30 years. He goes through example after example of instances where there have been no “labor shortages” but cites no cases where such shortages actually happened.

Although Marshall states the proposed commission would need to find “certified labor shortages” to admit people, he argues there is no evidence there have been any shortages of science and engineering professionals over the past 25 years.⁵⁸ In short, Marshall sets a standard for admitting foreign nationals that, at least according to him, has not existed in America at any time in recent memory. Therefore, one could conclude if the commission had been functioning over the past two decades, few if any skilled immigrants who have come here to America in the past 25 years would have been allowed into the country.

- 4) **Government data are not good for determining shortages.** Marshall even concedes this, writing at one point, “Assessments of labor shortages are plagued by the paucity of reliable data and realistic definitions of labor shortages.”⁵⁹ He also states, “Objection: There are no accurate and timely data to enable the [commission] to measure labor shortages and no definitions and measures suitable for this purpose. Response: This is a valid concern.”⁶⁰ He then asks Congress and employers to have faith that the commission would come up with good definitions and measures (see below).
- 5) **A key reason a “labor shortage” may not show up in any government data is that employers find “work arounds” and take creative action, such as offshoring, to address an inability to hire people they need.** In the technology field, if companies cannot find the individuals they need in the United States they can send the work to be done in another country or hire people to expand their labor force abroad. In agriculture, one reason it is difficult to document a labor shortage in agricultural workers is that analyses do not distinguish between legal and illegal workers. Most farm workers are here illegally, according to

Common Sense, Common Interests

the Department of Labor.⁶¹ Therefore, a commission would likely conclude there is no need for a better visa system for agricultural workers because it cannot document a shortage, creating a situation that encourages even more illegal immigration.

The commission would ratify and encourage what many see as undesirable outcomes. At the high end, more work will be transferred outside the United States. In agriculture, some U.S. farmers have dealt with the difficulty of finding workers by leasing farm land in Mexico and hiring Mexicans in that country, another type of “work around” that would not show up in government data.

The labor market is global, not only domestic, a fact ignored in any commission proposal. The bottom line: the commission would create a cycle that will encourage illegal immigration and move more work offshore.

- 6) Blind faith in the commission would be required, since even its chief proponent cannot define the concepts and measures a commission would use to govern the fate of American competitiveness and hundreds of thousands future potential workers.** Ray Marshall writes, “Even though there are no generally accepted measures, economists have developed concepts that could be refined for this purpose . . . Congress could authorize the [commission] to allow it to develop concepts and measures as well as operating procedures, and then authorize it to begin operations.”⁶² This is pretty remarkable in that it represents a stark admission of how imposing a commission on U.S. employers and the economy would represent a truly blind leap of faith.

If a technology company needs to hire an individual with special expertise in quantum cryptography, how would it document a shortage in a profession where there may only be a dozen or so individuals in the world the employer would consider viable candidates? For lesser skilled jobs, would companies in Maryland be able to document a shortage of crab pickers when it is the type of job that is difficult to fill precisely because of its seasonal nature?

- 7) Marshall misdiagnoses the problem with the 1986 Immigration Reform and Control Act (IRCA), ignoring that the legislation’s lack of temporary visas was the main reason the bill did not reduce illegal immigration.** Instead, according to Marshall, “IRCA’s main technical defect was the lack of a secure worker identity and work authorization system, without which all other control measures were less effective and often counterproductive.”⁶³ By reducing the use of temporary visas not only would the commission fail to limit illegal immigration, it would actually make the problem worse.

Common Sense, Common Interests

- 8) Marshall ignores certain facts in making his commission proposal.** For example, Marshall approvingly quotes Princeton University's Douglas Massey, a major supporter of more temporary visas for Mexican workers, as pointing out immigration enforcement alone has been ineffective. But then Marshall leaves out that Massey advocates more temporary visas for Mexican workers as the real solution to illegal immigration.

Marshall writes, "So far, however, border enforcement has not been very effective, and, according to some experts, has even been counterproductive. For example, immigration specialist Douglas Massey (2005) argues that as Border Patrol budgets went up, apprehension declined. As fences are built in urban areas, people cross at more remote and physically hazardous places. Stronger enforcement causes undocumented immigrants to stay longer. He concludes, 'A border policy that relies solely on enforcement is bound to fail.'"⁶⁴

However, Marshall did not include Massey's next sentence. Here is the complete passage from Massey: "A border policy that relies solely on enforcement is bound to fail. *Congress should build on President Bush's immigration initiative to enact a temporary visa program that would allow workers from Canada, Mexico, and other countries to work in the United States without restriction for a certain limited time.*"⁶⁵

There is no question making fewer temporary visas available for low-skilled workers will perpetuate the current deadly situation for immigrants crossing the U.S.-Mexico border. Those who oppose increased legal avenues for low-skilled workers from Mexico and Central America should do so knowing full well their proposals will increase misery, not alleviate it.

- 9) Supporters of family immigration may unknowingly enter into a Faustian bargain if they support a commission out of a belief it will help ease the way for the legalization of current illegal immigrants.** It may be naïve to think that family preference categories will not eventually come under the authority of this commission. If supporters of the commission are arguing (incorrectly) that it is simply a non-political, objective group of experts setting numbers, then how could these supporters oppose an amendment to allow such ongoing, non-political and objective analysis on the impact of family immigration levels on U.S. workers?
- 10) On top of its other problems, the commission as proposed by Ray Marshall is likely unconstitutional.** Under *Buckley v. Valeo*, the U.S. Supreme Court ruled that a legislative appointee cannot exercise executive branch authority.⁶⁶ Marshall states, "The chair and four other members would be chosen by the president, and remaining members would be chosen one each by House and Senate

Common Sense, Common Interests

Democratic and Republican leaders. Members would serve for nine years.⁶⁷ Another case that may bear on the constitutionality of the Commission proposal is *Bowsher v. Synar*. A number of constitutional law experts consulted confirmed that the commission proposal as described in Ray Marshall's book is unlikely to be upheld as constitutional given the Supreme Court precedents.

- 11) A non-political commission in Washington, D.C. is an oxymoron.** Elected officeholders would choose all of the members. Lobbying from all sides of the issue would move to these commission members. Employers would be forced to go "hat in hand" to ask if the commission could please certify certain types of employees, while others will lobby the commission to oppose the entry of workers. A commission won't end lobbying, but simply shift its focus to this new, unelected body of bureaucratic officials.

An earlier commission on immigration, chaired by Congresswoman Barbara Jordan, produced a series of proposals that many family, business, and religious groups viewed as ill conceived and highly political. The Commission's recommendations to reduce family and employment-based immigration conformed to the views of the then-chairmen of the House and Senate immigration subcommittees and were ultimately rejected by Congress. The commission proposed by Ray Marshall is far more powerful (for example, it can eliminate visa categories) and represents a far greater threat, since its powers would be more far-reaching, operational and permanent.

The proposal for a commission presented in Ray Marshall's book is designed, in essence, to end, not reform, the use of employment-based temporary and permanent visas. Such a commission cannot be made to "work," since its reason for existence is to prevent the entry of needed workers.⁶⁸

ALTERNATIVE COMMISSION MODEL CARRIES MANY OF THE SAME RISKS

The Migration Policy Institute (MPI), a Washington, D.C. think tank, has presented an alternative vision of a commission. While the MPI proposal does not come from the purely restrictive framework of the commission proposed by Ray Marshall, it suffers from a number of the same problems. The MPI authors concede that it would be a bad idea to rely on "shortage analysis" to set visa levels, writing, "This is because, in brief, a shortage analysis assumes that at any given point in time, the United States' labor market 'needs' are identifiable and static. Both assumptions are highly questionable. Shortage analysis is also fraught with methodological difficulties and fails to account for the fundamentally dynamic process by which the labor market adjusts to changes in labor supply."⁶⁹

Common Sense, Common Interests

The methodology used to set immigration levels ultimately would be whatever the appointed commissioners and their staffs decide it should be. For example, in pointing out the limitations of a “shortage analysis,” the MPI authors state it “should not form the basis for setting visa limits.” On the other hand, the MPI authors also write that such analysis “will have a place in the process of creating an overall assessment of immigration’s role in the labor market.”⁷⁰ While MPI deserves credit for acknowledging the problems of setting immigration levels based on “shortage analysis,” its report really cannot explain what criteria ultimately would be used or what the results are likely to be.

Under the MPI model, a commission would still wield enormous and largely unaccountable power. It would not simply issue recommendations that Congress could ignore, accept or reject, so it is not true Congress will retain its current authority on immigration policy. Rather, under the MPI proposal, after the commission submits an annual report and recommendations, “unless Congress acted to maintain existing statutory baseline labor market immigration levels, the president would issue a formal Determination of New Levels, adjusting employment-based green-card quotas and preferences and temporary worker visa limits for the coming fiscal year.”⁷¹

It is difficult to force a vote on legislation in Congress. To allow recommendations to become law unless they are rejected provides enormous power to a commission. If the much-maligned Jordan Commission, which proposed restrictive measures on family, refugee and employment-based immigration, had possessed such power it’s much more likely its recommendations would have become law.

In truth, no advocate of a commission can be confident how it would work in practice. The mandates given to the commission in the MPI report are general enough that commission members would be able to recommend anything they wish based upon personal preference, citing whatever data they desire to conform to their opinions.

Even though the Migration Policy Institute is approaching the commission concept in more of a good faith model than other advocates of a commission, its proposal still presents many of the same risks. It still assumes that with sufficient data, a well-staffed group of public-spirited individuals can make a form of central planning work successfully for the nation. It also assumes that politics will not play a role in the appointment of commission members (the AFL-CIO and other unions spent \$300 million on the 2008 elections) or that intense lobbying will not shift to the commission.⁷² Blind faith is required that the commission will come up with methods or standards for something difficult, if not impossible to measure, particularly given we live in a world where the demand for goods, services and labor is global, not purely domestic. And there is no assurance that family immigration will not be placed at risk in the hands of an unaccountable commission.

Common Sense, Common Interests

If the Migration Policy Institute or any other nongovernmental research group wishes to form a commission and send recommendations to Congress on the annual level of employment-based immigration that would be fine. However, to give a commission the immense authority to have such recommendations become law unless Congress could pass a bill within a certain timeframe provides the unelected and unaccountable too much power.

CONCLUSION: ADVANTAGES OF COMBINING PORTABLE WORK PERMITS WITH BILATERAL AGREEMENTS TO IMPROVE BORDER SECURITY, REDUCE ILLEGAL IMMIGRATION AND PREVENT MIGRANT DEATHS

In his satirical novel *Candide*, Voltaire describes optimism as “the madness of maintaining that everything is right when it is wrong.” It would be a form of madness to think we can reduce illegal immigration, improve our border security and eliminate the deaths of hundreds of immigrants at the border each year by failing to provide new temporary visas for lesser-skilled workers or by decimating current visa categories by Congress outsourcing the function to a commission.

In contrast, combining fully portable work permits with bilateral agreements on border security and immigration enforcement with Mexico (and eventually other nations) holds great promise for achieving important objectives in immigration policy. This new approach would carry important security, economic and humanitarian advantages for the United States.

First, since the work permits will be fully portable, meaning the worker can change jobs and work for any employer (just like U.S. workers), there can be no complaints that individuals face possible exploitation. It eliminates the need for a commission whose political design and transparent purpose is to orchestrate the virtual elimination of temporary visas and green cards for employment purposes. Employers should oppose any legislation that includes a commission to regulate the future flow of high and low-skilled foreign workers, since such a commission will push more work outside the United States, fail to reduce illegal immigration and increase the number of immigrants who die each year due to a lack of legal avenues to work in America.

Second, the proposal described here would carry positive economic consequences – employers could find important legal workers and U.S. workers would face less competition from illegal immigrants who enjoy less bargaining power in the labor market. The portability of the work permits means there is no need for employers and employees to face the type of bureaucracy that burdens most temporary visa categories or leads individuals to immigrate illegally.

Common Sense, Common Interests

Third, the use of fully portable work permits will have a significant impact on reducing illegal immigration, as it had in the past when illegal entry dropped by 95 percent between 1953 and 1959 during the Bracero program. In contrast, legalization of those in the country illegally, while it may address other issues, will not reduce illegal immigration, and neither will “tougher” versions of current immigration policies. While the number of Border Patrol Agents has increased from 3,733 in 1990 to 14,923 by 2007, the illegal immigrant population in the United States rose from 3.5 million to 11.8 million during the same period.

Even if a border fence makes it more difficult to enter the country, the overall policy thrust will likely continue to have the unintended consequence of swelling the illegal immigrant population. This is because by making entering the United States more hazardous individuals who enter successfully decide to stay in America rather than travel back and forth to Mexico or Central America. A great deal of circular migration that used to take place has simply stopped.

Fourth, the use of additional temporary visas will save potentially hundreds of lives a year, as people with the option of entering America legally to work will logically choose that path over risk their lives to cross rivers and deserts.

Fifth, the bilateral agreements envisioned between the United States and Mexico will produce real cooperation from the Mexican government in reducing illegal immigration. Given the importance of remittances to Mexico, the prospect of saving the lives of its citizens, and the mutual respect between the countries embodied in such an agreement, the Mexican government will be incentivized to act to help control the border with the United States and its own southern border. The work permits and cooperation they signify will provide the political impetus for the Mexican government to enforce its own laws that require citizens to leave Mexico through lawful exits and with proper documents. Former Mexican Foreign Minister Jorge Castañeda confirms the Fox Administration was committed to such a policy if an agreement had been reached with the Bush Administration.

Sixth, the bilateral agreements will be an important foreign policy tool for the President and the United States as a whole. It will help change the relationship between the United States and Latin America from one where America is viewed as dictating to its neighbors to one of partnership. Both sides will gain from cooperating on security and immigration rather than the status quo of elected officials in both countries scoring political points instead of achieving practical results.

Seventh, the agreements will allow numbers to be set for the fully portable temporary visas in a way that will replace the illegal flow coming from Mexico and Central America. The numbers can be set (and potentially

Common Sense, Common Interests

adjusted) based on factors such as the degree of cooperation on immigration enforcement from Mexico (and other countries).

Eighth, the fully portable work permits and bilateral agreements will allow for health and security screenings of workers entering the United States, rather than the current flow of illegal immigrants who are not screened.

Ninth, by ensuring the availability of workers in the future, the work permits will help America as it faces an aging population.

Tenth, the work permits will free up Border Patrol and other enforcement resources. It would enhance immigration and security in at least two ways: 1) eliminating most workers from the flow of nightly border crossers would allow U.S. Border Patrol Agents and others to focus on genuine security threats; 2) the bilateral agreement can lead to unprecedented cooperation on immigration and security issues.

A related benefit is the work permits and agreements will cripple the criminal enterprises that derive their income from human smuggling. As many as 80 percent of illegal immigrants from Mexico now use a coyote, or guide, to cross into the United States, funneling hundreds of millions of dollars a year to criminal gangs. The safety valve of legal visas will encourage people to avoid the coyotes and the dangerous path of illegal entry into the United States.

Even individuals who do not receive a work permit in a given year will know they face a chance to receive one at a later date. If demand exceeds supply for the work permits, issuing to eligible individuals by lottery on a quarterly basis may further temper interest in crossing illegally. Mexican government cooperation to prevent the illegal crossings and funnel individuals toward the legal paths should help deter those less interested in waiting for the availability of work permits. Of course, great demand for the work permits would itself prove a point – Mexicans and others would enter legally to work if given the option.

At an April 29, 2009 press conference, President Barack Obama said, “We can't continue with a broken immigration system. It's not good for anybody. It's not good for American workers. It's dangerous for Mexican would-be workers who are trying to cross a dangerous border.”⁷³ While the Obama Administration has not made a policy statement on expanding temporary work visas, the evidence is clear that it is not possible to make the border less dangerous for Mexican workers without increasing the avenues for such individuals to work legally in the United States.

Common Sense, Common Interests

Policies to curtail illegal immigration have involved preventing illegal entry in the first place and interfering with these worker-employer transactions. History has shown that the law of supply and demand has trumped the laws against hiring illegal immigrants.

When Congress turns to immigration legislation it faces a choice: Will it continue the policies of the past by preventing Mexicans and others from entering America to work legally and safely? Will Congress establish a politically designed commission whose intention is to restrict temporary and permanent visas for employment? Will lawmakers attempt more elaborate versions of the same enforcement policies that have failed to reduce illegal immigration over the past two decades? Will the House and Senate repeat the mistakes of 1986 by simply legalizing many of those in the country illegally and passing new enforcement measures, while failing to providing sufficient legal avenues for lesser-skilled workers? Is it optimistic to hope Congress will instead choose a path that takes the profits from Mexican criminal gangs, saves the lives of potential immigrants seeking to work in America, and enhances immigration enforcement by forging bilateral agreements based on respect towards other nations and their citizens? We shall see.

END NOTES

¹ Julia Preston, "Mexico Data Say Migration to U.S. Has Plummeted," *The New York Times*, May 15, 2009.

² Kris Maher, "AFL-CIO to Endorse Obama, Start Spending," *Wall Street Journal*, June 25, 2008.

³ E.P. Hutchinson, *Legislative History of American Immigration Policy, 1798 – 1965*, University of Pennsylvania Press, Philadelphia, 1981, p. 194

⁴ *Ibid.*, p. 207

⁵ Border Patrol History on www.CBP.gov.

⁶ *Ibid*

⁷ *Ibid*

⁸ Congressional Research Service (February 1980), "The Bracero program falls into three distinct phases: The wartime period, which extended 2 years beyond the end of World War II, until the expiration of the special authorizing legislation in 1947; the post-war transition period from 1948 until the enactment of new authorizing legislation, Public Law 78, in 1951; and the Public Law 78 period, during which the program expanded until 1960, followed by a phase-down until its termination at the end of 1964," explains the Congressional Research Service., p. 15.

⁹ *1959 INS Yearbook*.

¹⁰ Congressional Research Service, *Temporary Worker Programs: Background and Issues*. A report prepared at the request of Senator Edward M. Kennedy, Chairman, Committee on the Judiciary, United States Senate, for the use of the Select Commission on Immigration and Refugee Policy, February 1980, p. 41, citing the 1955 INS Yearbook.

¹¹ Congressional Research Service (1980), p. 41.

¹² The reaction of California growers, according to the head of the California Farm Placement Service, was as follows: "Employers using legally contracted Mexicans welcomed 'Operation Wetback'. It relieved them from the unfairness they had felt in adhering to the wage, housing, and other regulations governing the legal use of Mexicans, while their neighbors using wet backs [sic] were not subject to such regulations." Edward F. Hayes, Richard H. Salter, Roy Plumlee, Robert B. Lindsey, "Operation 'Wetback' – Impact on the Border States," *Employment Security Review*, vol. 22, (March 1955), pp. 16-21, as cited in Kitty Calavita, *Inside the State*, Routledge, New York, 1992, p. 60.

¹³ *1959 INS Statistical Yearbook*; U.S. Border Patrol.

Common Sense, Common Interests

¹⁴ Congressional Research Service (1980), p. 36. “Despite their limitations, then, as now, INS apprehension figures are the best available indication of the degree of illegal immigration,” notes the Congressional Research Service. In general, the fewer the apprehensions, the lower the flow of illegal immigration. Law enforcement, market conditions, and the availability of means of legal entry all affect the illegal flow. Fewer apprehensions from once year to the next mean that more individuals are being deterred from entering the United States illegally. The more apprehensions, the greater the flow of illegal immigration.

¹⁵ Calavita, p. 218. It appears a good portion of those who received permanent visas were petitioned for by their agricultural employers, which was later limited by the federal government.

¹⁶ Monthly Sector Activity Reports (MSAR), El Centro, California, February 1958, Accession 63A1359, Box 3, as cited in Calavita, p. 83.

¹⁷ MSAR Brownsville, Texas, April 1958, Accession 63A1359, Box 4, as cited in Calavita, p. 84.

¹⁸ U.S. Congress, House Committee on Agriculture, Subcommittee on Equipment, Supplies, and Manpower, 1958, p. 450, cited in Calavita, p. 85.

¹⁹ INS, Calavita. In 1960, under pressure from labor unions and some members of Congress, the U.S. Department of Labor ended the “Special Program” that allowed through a streamlined process for growers to designate specific workers with whom they wished to contract. The Department of Labor’s action soon led to a decline in Bracero admissions (a drop of 51 percent) and a predictable increase in illegal entry – a rise of 46 percent in apprehensions for 1961-1964 compared to 1956-1959. Annual INS apprehensions averaged 89,223 between 1961 and 1964, an increase of 46 percent over the 1956-59 average of 61,106. Annual Bracero admissions averaged 212,750 for 1961-64, a drop of 51 percent from the 1956-59 average of 437,937.

²⁰ Unpublished INS report, October 21, 1971, CO 214h, as cited in Calavita, p. 151.

²¹ U.S. Department of Justice, Annual Report of the Immigration and Naturalization Service, 1970, p.11, as cited in Congressional Research Service (1980), p. 57. “Since the expiration of the Mexican Agriculture Act on December 31, 1964, the number of deportable aliens located has continued on an upward climb. For the 6-year period, FY 1965 through FY 1970, 71 percent of the 1,251,466 total deportable aliens located were of Mexican nationality. Year by year, the annual percentage of this nationality group has risen, from 50 percent in 1965 to 80 percent this year.”

²² Congressional Research Service (1980), pp. 41-42.

²³ Some have argued the Bracero program established networks that helped lead to illegal immigration after the program ended. However, this notion rests on two questionable premises: 1) That no one from Mexico came into the United States to work prior to the Bracero program (in fact, many thousands did so, including to work on the railroads), and 2) Despite the enormous wage differential between the two countries, people from Mexico would not have thought of coming to work in America without the establishment of the Bracero program. Neither proposition withstands scrutiny. It was after the program ended and no alternative means to work legally was

Common Sense, Common Interests

available that illegal immigration increased dramatically. Even a critic of the Bracero program, Cornell University Professor Vernon Briggs, who argues that Bracero admissions later encouraged illegal migration, noted, "By the same token, however, it is simplistic to conclude that the problem would not eventually have surfaced in the absence of the Bracero program." (Congressional Research Service (1980), p. 58.) The evidence indicates that a reasonable enforcement deterrent at the border is necessary to enable a temporary worker program to reduce illegal immigration. One reason relatively few Mexicans initially used the Bracero program is that "the INS...legalized on the spot illegal Mexican immigrants found employed in agriculture and contracted them to their employers as braceros. During the summer of 1947 the service legalized 55,000 undocumented workers in Texas alone." (Calavita, p. 24)

²⁴ U.S. Border Patrol.

²⁵ Wayne Cornelius, "Death at the Border: The Efficacy and Unintended Consequences of U.S. Immigration Control Policy 1993-2000," *Population and Development Review*, vol. 27, no. 4, December 2001.

²⁶ Wayne Cornelius, *Controlling Unauthorized Immigration from Mexico: The Failure of Prevention through Deterrence and the Need for Comprehensive Reform, Mexican Field Research Program*, Center for Comparative Immigration Studies, UC-San Diego, 2008.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Luis Alberto Urrea, *The Devil's Highway*, Little, Brown and Co., New York, 2005, p. 190.

³⁰ Ibid, pp. 127-129.

³¹ Ibid., pp. 144-45, 174.

³² Jorge Ramos, *Dying to Cross*, HarperCollins, New York, 2005, p. xi.

³³ Ibid., p. 84.

³⁴ Ibid., pp. 148-149.

³⁵ Cornelius, *Controlling Unauthorized Immigration from Mexico: The Failure of Prevention through Deterrence and the Need for Comprehensive Reform, Mexican Field Research Program*.

³⁶ Ibid., pp. 149-150.

³⁷ Eduardo Porter, "Tighter Border Yields Odd Result: More Illegals Stay," *The Wall Street Journal*, October 10, 2003, p. 1. "Not only have U.S. policies failed to reduce the inflow of people from Mexico, they have perversely reduced the outflow to produce an unprecedented increase in the undocumented population of the United States," writes Douglas Massey. "America's unilateral effort to prevent a decades-old flow from continuing has paradoxically transformed a circular flow of Mexican workers into a settled population of families and dependents." Douglas Massey, *Backfire at the Border: Why Enforcement Without Legalization Cannot Stop Illegal Immigration*, Cato Institute, Center for Trade Policy Studies, Trade Briefing Paper No. 29, June 13, 2005, p. 8.

Common Sense, Common Interests

³⁸ Cornelius, *Controlling Unauthorized Immigration from Mexico: The Failure of Prevention through Deterrence” and the Need for Comprehensive Reform, Mexican Field Research Program.*

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ The MOU for E-Verify can be found at <http://www.uscis.gov/files/nativedocuments/MOU.pdf>

⁴² GAO-05-813, pp. 22-23.

⁴³ Even though Swift & Co was enrolled in the Basic Pilot Program it was raided as part of an identity fraud action against individual employees, which the company estimated cost it up to \$30 million due to lost operating efficiency and the need to find new (untrained) workers.

⁴⁴ Pia M. Orrenius and Madeline Zavodny, *Do Amnesty Programs Encourage Illegal Immigration? Evidence from the Immigration Reform and Control Act (IRCA)*, Federal Reserve Bank of Atlanta, Working Paper 2001-19, November 2001, pp. 14-15.

⁴⁵ Similarly, Congress has granted the Secretary of Homeland Security the authority to designate countries for Temporary Protected Status and issue work authorization and could change or eliminate that authority at any time. However, TPS is only for individuals inside the United States and the bilateral agreements would only address those outside the country who wish to come in and work legally.

⁴⁶ Michael Hofer, Nancy Rytina, and Bryan C. Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 20, 2007*, Office of Immigration Statistics, Department of Homeland Security, September 2008, p. 4.

⁴⁷ Ibid, p. 4

⁴⁸ Thank you to Adriana Varela with Berry Appleman & Leiden LLP for assistance in translating the law. Also, thanks to Mexican attorney Enrique Arellano for providing a copy of the relevant sections of Mexican law.

⁴⁹ Jorge Castañeda, *Ex Mex, From Migrants to Immigrants*, The New Press, New York, 2007, p. 90.

⁵⁰ Ibid., p. 177.

⁵¹ Ibid., p. 177.

⁵² Ibid., p. 178.

⁵³ Ibid., p. 179.

⁵⁴ Office of Immigration Statistics, Department of Homeland Security.

⁵⁵ Hofer, Rytina, and Baker, p. 4.

⁵⁶ See for example NewsChannel 8, “Maryland Crab Picker Job Fair Falls Flat: Companies Turn to Congress for Help,” April 16, 2009.

⁵⁷ “Change to Win And AFL-CIO Unveil Unified Immigration Reform Framework,” Press Release, Change to Win and AFL-CIO, April 14, 2009. The press release stated the commission proposal “was developed in consultation with Former Secretary of Labor Ray Marshall and the Economic Policy Institute.”

Common Sense, Common Interests

⁵⁸ Ibid. p. 25

⁵⁹ Marshall, p. 23.

⁶⁰ Ibid., p. 25

⁶¹ “The U.S. Department of Labor’s National Agricultural Worker Survey (NAWS) reported in its 1998-99 survey that 52 percent of seasonal agricultural workers working in the U.S. self-identified as not authorized to work in the U.S. This was an increase from 37 percent in the previous survey only three years earlier, and from only about 12 percent a decade earlier. More than 70 percent of the new seasonal agricultural labor force entrants in the NAWS survey self identified as not authorized to work. Most experts agree that the statistics based on self identification in the NAWS survey are likely very conservative,” according to Monte Lake on behalf of the Agriculture Coalition for Immigration Reform, National Council of Agricultural Employers and American Nursery and Landscape Association before the Subcommittee on Workforce, Empowerment and Government Programs of the House Committee on Small Business, June 23, 2006.

⁶² Ibid, p. 25.

⁶³ Ibid., p. 10.

⁶⁴ Ibid., pp. 28-29.

⁶⁵ Emphasis added. Douglas Massey, *Backfire at the Border: Why Enforcement Without Legalization Cannot Stop Illegal Immigration*, Cato Institute, Center for Trade Policy Studies, Trade Briefing Paper No. 29, June 13, 2005, p. 1. Massey’s proposal differs slightly in detail from that presented in this paper but the thrust is similar. Instead of a 5-year visa that could be renewed after a year out of the country, Massey proposes a 2-year visa, with a renewal once in a lifetime. But Massey seems to compensate for the shorter visa time by emphasizing a significant increase in green cards for Mexicans to enable them to stay permanently in the U.S.

⁶⁶ In *Buckley v. Valeo* (1976), the decision cited the District Court’s finding: “. . . the provisions of the Act vesting such powers in the Commission and the prescribed method of appointment of members of the Commission to the extent that a majority of the voting members are appointed by the President pro tempore of the Senate and the Speaker of the House, violate the Appointments Clause, which provides in pertinent part that the President shall nominate, and with the Senate’s advice and consent appoint, all ‘Officers of the United States,’ whose appointments are not otherwise provided for, but that Congress may vest the appointment of such inferior officers, as it deems proper, in the President alone, in the courts, or in the heads of departments. Hence . . . the Commission, as presently constituted, may not because of that Clause exercise such powers, which can be exercised only by ‘Officers of the United States’ appointed in conformity with the Appointments Clause, although it may exercise such investigative and informative powers as are in the same category as those powers that Congress might delegate to one of its own committees.”

⁶⁷ Marshall, p. 28.

Common Sense, Common Interests

⁶⁸ Ibid., p. 39. “The FWAC’s determination of the need for short-term foreign workers will set the conditions and numbers for the various visa categories, but the Commission could decide to eliminate these categories altogether.”

⁶⁹ Demtrios G. Papademetriou, Doris Meissner, Marc R. Rosenblum, and Madeleine Sumption, *Harnessing the Advantages of Immigration for a 21st-Century Economy: A Standing Commission on Labor Markets, Economic Competitiveness, and Immigration*, Migration Policy Institute, Washington, D.C., May 2009, pp. 12-13.

⁷⁰ Ibid., p. 12.

⁷¹ Ibid., p. 16.

⁷² Kris Maher, “AFL-CIO to Endorse Obama, Start Spending,” *Wall Street Journal*, June 25, 2008.

⁷³ Transcript of Presidential press conference, April 29, 2009, CNN.com.

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