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The Immigration Program of the Reagan Administration

RUDOLPH W. GIULIANI*

American immigration law and policy are subjects of considerable national concern and attention. In recent times, parts of our country, including the South Florida site of this symposium, have been both enormously enriched and disturbed by the flow—sometimes legal, at other times illegal—of diverse multitudes coming to our shores. The questions and controversies surrounding the issue of immigration in Florida are illustrative of the national debate and of the tensions within American history and the American spirit.

I. THE NATURE OF THE PROBLEM

The United States is a nation of immigrants. All of us are the children of immigrants. This country has been enormously enriched in every way—socially, politically, culturally, and economically—by the fifty million immigrants who have come here since the first colonists. Now, however, there are 227 million Americans already here, and not all of them have realized the dreams that brought their parents to our shores.

In the last decade, our policies, which were intended to make immigration fair and orderly, have failed. We truly have lost control of our borders. These failed policies are unfair and inhumane,

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both to Americans whose welfare is threatened and to the illegal migrants who live without the dignity and legal protections to which all are entitled.

The American people correctly perceive this failure. Recent opinion polls indicate that ninety-one percent of Americans want "an all-out effort" to stop illegal immigration, and a significant percentage of Americans want legal immigration curtailed as well.¹ A portion of this sentiment may be attributed to the spectacle of the Cuban boatlift in 1980, which brought some 125,000 undocumented aliens to Florida in one six-week period, and to the sizeable and uneven resettlement of refugees in this country in recent years.² But the migration problem cannot be regarded as only of passing interest. The world conditions that stir migration will continue. If public concern again subsides before a thorough reworking of our laws and policies is accomplished, the problem may soon grow beyond remedy.

The problem is not of recent origin. For years we have pursued unrealistic policies. Through elastic avenues of legal migration, the United States now receives as many or more immigrants and refugees than at any time in our history, including the period of nearly unrestricted immigration early in this century. More than 800,000 people were legally admitted in 1980.³ This number is not only the largest number accepted by any country in that year, but is perhaps twice as many as were received by the rest of the world combined.⁴

The sum is staggering when the number of persons who enter the country illegally is added to the number of legal entrants. Each year nearly one and one-half million persons cross our borders ille-

1. Roper Organization Survey, Rep. No. 80-6, question 20 (June 5-12, 1980) (unpublished opinion poll) (available in *University of Miami Law Review* Office). Although polled opinions are sensitive to the manner in which issues are posed, the consistency of the public response to immigration questions reveals the depth of public sentiment. See also Washington Post/ABC Poll, question 33 (released Mar. 23, 1981) (available in *University of Miami Law Review* Office).

2. J. CLARK, J. LASAGA & R. REQUE, *THE 1980 MARIEL EXODUS: AN ASSESSMENT AND PROSPECT*, 1981 COUNCIL FOR INTER-AMERICAN SECURITY SPECIAL REPORT 5; *Annual Refugee Consultation for 1982: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 368 (1981) (table of Southeast Asian refugee arrivals).

3. Admissions in fiscal year 1980 included 135,000 Cuban/Haitian special entrants paroled into the United States after the Mariel boatlift and 232,000 refugees. SELECT COMM. ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: FINAL REPORT TO THE CONGRESS AND THE PRESIDENT 93 (1981).

4. See Teitelbaum, *Right Versus Right: Immigration and Refugee Policy in the United States*, 59 FOREIGN AFF. 21, 24 (1980).

gally. Although some leave, the illegal population may grow by as much as 500,000 each year.⁵ As a result, there are estimated to be some four to six million aliens now living illegally in this country.⁶ One-half of our annual population growth results from immigration, and one-half of that from illegal entries.⁷

Moreover, the pressures driving migration to the United States will increase dramatically in the coming decades. Poverty and unemployment in the third world will rise where population growth outruns economic development.⁸ The International Labor Organization has estimated that the developing world would have to provide between 600 and 700 million new jobs during the next twenty years merely to keep its unemployment rate from increasing.⁹ This number of new jobs is more than presently exists in the entire industrialized world. Just across our southern border lies Mexico whose population exemplifies this situation. Mexico's population, half of which is under the age of fifteen, will double in the next generation.¹⁰ It has been estimated that over the next few years, 700,000 new jobs per year would have to be created simply to keep unemployment that is already high from rising, but even optimistic predictions indicate that only some 350,000 jobs will be added annually.¹¹

The United States must also share in the world's responsibilities to political refugees—forced migrants of a particularly tragic sort. Lamentably, political oppression and conflict within and among nations offer little hope that refugee migrations will diminish. Their burgeoning numbers, now estimated at some sixteen mil-

5. Hewlett, *Coping with Illegal Immigrants*, 60 FOREIGN AFF. 358, 359-60 (1981).

6. *Id.* at 360.

7. Teitelbaum, *supra* note 4, at 42. The size and composition of the illegal population is, by its nature, difficult to ascertain with accuracy. For a discussion of the various estimates that have been made, see Keely, *Illegal Migration*, SCI. AM. 14 (Mar. 1982).

8. Between now and the end of this century—less than 20 years away—the world's population, barring unforeseen catastrophe, will probably increase from about 4.5 billion to over 6 billion, an increment that approximates the total population of the world as recently as 1930. This is equivalent to adding 20 new countries of the size and poverty of Bangladesh, for 90% of this population growth will occur in the world's low-income countries. This means that the industrialized north, which as recently as 1950 accounted for one-third of the world's population, will fall to about one-fifth in less than two decades. BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, CURRENT POLICY PUB. NO. 341, POPULATION GROWTH, REFUGEES, AND IMMIGRATION (1981).

9. INTERNATIONAL LABOUR OFFICE, 1950-2000 LABOUR FORCE ESTIMATES & PROJECTIONS: WORLD SUMMARY 88 (2d ed. 1977); see also Hewlett, *supra* note 5, at 360-61.

10. Teitelbaum, *supra* note 4, at 29.

11. *Id.* at 29 n.13.

lion worldwide,¹² place strong humanitarian claims on the free world.

Coupled with these conditions are the historic attraction and ease of entry into the United States. Wage rates in the United States are five to ten times higher than those typically prevailing in the developing world. The political freedom and tolerance and the social assistance to the poor in this country are unequalled elsewhere. Modern communication ensures that these facts are widely known, and falling costs of transportation give rising numbers of people ready means of travel to the United States.

These "push" and "pull" factors affecting migration confront the United States with a serious dilemma: How can the United States preserve its historic openness to those who seek a better life or freedom from oppression while ensuring that immigration is a fair and orderly process maintained within realistic limits? Plainly, the laws and policies of the past are not the solution.

II. THE NATURE OF REFORM

There is a perceptible, if uneven, rhythm in the history of immigration reform in the United States. While not all episodes in the past are a credit to our best instincts of fairness and openness, the law has evolved along fair and rational lines. Three principles that should continue to guide our national policy are discernible in this progression. First, there must be limits to immigration. No one nation, no matter how prosperous and humane, can accommodate all of the people in the world who seek a better life. Second, the limits on immigration must be drawn fairly and evenhandedly, without regard to nationality or race. Third, these limits must be enforced firmly, with due regard for procedural fairness and values of individual privacy and freedom.

The first principle—limiting the number of persons admitted as immigrants to the United States—is a policy of relatively recent origin. Historically, immigrants came without numerical limit. No distinctions were drawn among those seeking admission. Although the colonies and later the states enacted measures intended to discourage the arrival of paupers and other "undesirable" individuals, the federal government did not act to exclude classes of persons until 1875 when it barred the admission of convicts and prosti-

12. SELECT COMM. ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: SUPPLEMENT TO THE FINAL REPORT 21 (1981).

tutes.¹³ It was not until 1921 that Congress first limited the number of immigrants who could enter the United States.¹⁴ Since that time, however, numerical limits have remained a part of our laws.

Few people today question the necessity of imposing some numerical limitations in view of the enormous pool of would-be immigrants around the world. But choosing the actual number, absent agreement on the right criteria and knowledge concerning the practical consequences of the number chosen, is a much disputed and subjective question. The limits set in 1965,¹⁵ which have changed only slightly since then, are inescapably arbitrary. Nevertheless, a Senate report on the measure suggested that the figures were fixed at levels "believed to be the present absorptive capacity of this country."¹⁶ The level of immigration must remain within the political tolerance of the American people, whose view of our "absorptive capacity" is affected by a wide range of economic, cultural, and political considerations. The current level of legal immigration, approximately 600,000 individuals annually, is in danger of losing its historic consensus, unless Americans can be assured that this is a realistic limit.

The second principle—evenhandedness in administering restrictions on immigration—has been considerably longer in coming than the recognition that limits of some kind were needed. Early restrictive measures were blatantly discriminatory. The naturalization of Chinese aliens was forbidden in 1870, and their near total exclusion effected shortly thereafter.¹⁷ The national origins quota laws of the 1920's self-consciously favored immigrants from Northern and Western Europe and the Western Hemisphere, and severely restricted immigration from Southern and Eastern Europe and Asia.¹⁸ These discriminatory quotas remained a part of the law until the comprehensive reforms of 1965 replaced them with equal ceilings on annual admissions from all countries.¹⁹ While strict numerical equality for all countries does not guarantee fairness, particularly in the case of our Canadian and Mexican neighbors with

13. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (superseded 1907).

14. Act of May 19, 1921, ch. 8, 42 Stat. 5 (repealed 1952).

15. See *infra* note 18.

16. S. REP. No. 748, 89th Cong., 1st Sess. 209, reprinted in 1965 U.S. CODE CONG. & AD. NEWS 3328, 3332.

17. Act of May 6, 1882, ch. 126, 22 Stat. 58 (not codified).

18. Act of May 19, 1921, ch. 8, 42 Stat. 51 (repealed 1952); Act of May 26, 1924, ch. 190, 43 Stat. 153 (not codified).

19. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. §§ 1151-1152 (Supp. V 1981)).

whom we have long-standing historic ties of migration, the principles of universalism reflected in the 1965 reforms considerably improved the discriminatory quotas they replaced.²⁰

The third principle—that we are a country governed by the rule of law—is ingrained in the free and democratic traditions of the United States. But there may be no area in which the principle is breached more frequently than immigration. In 1964 some 50,000 illegal aliens were apprehended in this country.²¹ By 1980, the number of apprehensions had risen to more than one million.²² These figures demonstrate the magnitude of the problem, not our success in stemming the growth of the illegal population within our country.

There are several reasons for this failure to stop illegal immigration. The borders of this country are expansive and largely porous. They are patrolled by the Immigration and Naturalization Service, which has for too long been treated as the unwanted stepchild of the federal government and has been denied the resources necessary to enforce the law. Controls over foreign students, tourists, and other non-immigrant visitors to the United States have been exceptionally lax. Moreover, while in most countries it is unlawful for employers to hire illegal aliens, in the United States it is not only legal to do so, but the so-called "Texas Proviso"²³ specifically shelters employers from the law against harboring illegal aliens.

Whatever the economic consequences, it is widely agreed that the perpetuation of a hidden illegal class living outside the sanctions and protections of the law serves no beneficial purpose. Sometimes subject to considerable exploitation and intimidation, these aliens may be denied the essential dignity and protections to which all people are entitled. Cynicism and disrespect for legal and social institutions result from this mistreatment.

These conditions must be remedied and our immigration laws

20. This progress toward universalism is evident in the law's treatment of refugees. The Refugee Act of 1980, Pub. L. No. 96-212, §§ 101, 201, 94 Stat. 102, 102-03, removed from the law earlier provisions expressly favoring persons who fled Communist or Mideast countries, and adopted instead the United Nations' definition of refugee, without ideological or geographic limitation.

21. UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, 1979 STATISTICAL YEAR-BOOK 66-67.

22. *Id.*

23. "[F]or the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." Immigration and Nationality Act, Pub. L. No. 414, § 274(a), 66 Stat. 163, 228-29 (1952) (codified at 8 U.S.C. § 1324(a) (1976)).

must be enforced. This is both our sovereign right and our obligation to the American people. For these reasons, the United States must act to ensure adequate legal authority to control immigration in the future, and to deal realistically and humanely with the legacy of failed policies.

III. THE REAGAN ADMINISTRATION PROGRAM

It was for these reasons that the Reagan administration addressed the problems of immigration and refugee policy directly and comprehensively. Following four months of interdepartmental task force study and three separate Cabinet meetings, the presidential immigration initiatives were announced on July 30, 1981.

The President identified several principles on which the administration's proposals are based.²⁴ The first principle was that we shall continue America's tradition as a land that welcomes people from other countries and will share in the responsibility of resettling those who seek freedom from oppression. But the President also stressed that

we must have adequate legal authority to maintain control over migration; to enable us, when sudden influxes of foreigners occur, to decide to whom we grant the status of refugee or asylee; to improve our border control; to expedite (consistent with fair procedures and our Constitution) return of those coming here illegally; to strengthen enforcement of our fair labor standards and laws; and to penalize those who knowingly encourage violation of our laws.²⁵

The President also stated that we must deal realistically and humanely with people presently here illegally who have become productive members of our society and have established roots in the United States. In addition, he recognized that immigration and refugee problems require international solutions.

Congress now faces the serious and difficult task of translating these principles into realistic and enforceable laws. While history dictates some caution in predicting immigration reform, a consensus appears to be emerging concerning what must be done. This consensus is reflected in bipartisan legislation now pending before Congress, embodying provisions of a comprehensive immigration

24. United States Immigration and Refugee Policy, 17 WEEKLY COMP. PRES. DOC. 829 (July 30, 1981).

25. *Id.* at 829.

reform bill submitted by the administration in October 1981.²⁶ This legislation embodies badly needed reforms that will allow our enforcement of immigration laws to be both more rational and more humane.

First, the legislation would provide significantly greater resources for existing law enforcement programs to deter illegal entry and visa abusers.²⁷ The Immigration and Naturalization Service has been badly understaffed and underfunded. Even in this time of fiscal constraint, more funds and more personnel for the Service are needed and should be provided.

Second, the proposed legislation would prohibit employers from knowingly hiring illegal aliens. The law would be enforced along with existing fair labor standards and laws.²⁸ This is essential because it is the magnet of easily available jobs that draws illegal aliens here. The bill is designed to prevent discrimination that could be based on appearance. It does not give the employer latitude to make his own judgment as to whether a person is an alien or whether the documentation presented to him is authentic, and thus it gives him no latitude to discriminate.²⁹

Critics of employer sanctions ignore the fact that illegal immigration is itself inhumane and discriminatory. It discriminates

26. See S. 1765, 97th Cong., 1st Sess., 127 CONG. REC. 11, 993-12,002 (daily ed. Oct. 22, 1981); H.R. 4832, 97th Cong., 1st Sess. (1981), reprinted in *Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981). Following extensive hearings on the administration's proposed legislation, Senator Alan K. Simpson of Wyoming and Congressman Romano Mazzoli of Kentucky introduced legislation in March 1982, broadly similar to the Administration bill, which has become the vehicle for immigration reform in Congress. See S. 2222, 97th Cong., 2d Sess. (1982), discussed in 128 CONG. REC. 2218-19 (daily ed. Mar. 17, 1982); H.R. 6514, 97th Cong., 2d Sess. (1982), reprinted in P. RODINO, IMMIGRATION REFORM AND CONTROL ACT OF 1982, H.R. REP. NO. 890, 97th Cong., 2d Sess. (1982).

27. Based on the recommendations of his Cabinet Task Force, President Reagan sought a supplemental appropriation for INS in Fiscal Year 1982 of \$108 million, an increase of approximately 30% over the Fiscal Year 1981 budget request, most of which was voted by the Congress and carried forward in the Fiscal Year 1983 budget. Appropriations—Fiscal Year 1982, Pub. L. No. 97-92, 95 Stat. 1183 (1981); see also S. REP. NO. 584, 97th Cong., 2d Sess. (1982); S. REP. NO. 265, 97th Cong., 1st Sess. (1981) (reflecting Committee on Appropriations recommendations for the Department of Justice and other departments and agencies).

28. It is sometimes suggested that enforcement of minimum wage laws alone could stem the entry of illegal aliens, who are widely believed to be employed generally below the minimum wage. Immigration and Naturalization Service, *Illegal Alien Employment* (Fiscal Year 1981) (unpublished INS enforcement data).

29. The proposed legislation simply requires an employer to examine in good faith certain pieces of identification evidencing authorization to work in the U.S., and provides him with an affirmative defense if charged with knowingly hiring an illegal alien. S. 1765, *supra* note 26; H.R. 4832, *supra* note 26.

against American minorities and the poor, some of whom are displaced from their jobs by illegal aliens.³⁰ It also discriminates against the illegal alien himself, who may be subjected to exploitation and must live in hidden fear of deportation.

The third element is a legalization program. We must end the massive illegality that has resulted in an estimated four to six million illegal aliens in this country. Many of the immigrants in this group have lived and worked here for some time, yet they have had to live hidden and in fear. Few have dared to avail themselves of their rights under labor and other laws lest they be recognized and deported. The proposed reform legislation would, on a one-time basis, give legal status to certain illegal aliens now residing here.

Fourth, considering the particular labor needs in some localities and occupations, and the need to provide some realistic alternative to illegal immigration, the administration has proposed a pilot program that would allow a limited number of Mexican workers into the United States for a relatively brief period of time to fill jobs that Americans will not take.³¹

In the experimental program that the administration has proposed, the foreign workers would be covered by all the fair labor standards and other laws securing the rights of workers, and would be free to join unions while in this country. Like any American worker, a foreign worker could leave an employer who mistreated him and secure employment with another. It is a program of economic liberty and opportunity, promising an end to fear and exploitation. And there are safeguards to protect the jobs and welfare of American workers.

Fifth, the administration has proposed an increase in the numerical limits placed on annual permanent immigration from our two neighbors, Canada and Mexico, with whom our tradition of migration is nearly as long as our shared borders. In recent years, unrealistically low limits on legal immigration from these countries have needlessly separated immigrant families often leading to

30. The Department of Labor has estimated that of the assumed 500,000 aliens taking residence illegally in the U.S. each year, one in five may take jobs that otherwise would have gone to American workers. See Wachter, *The Labor Market and Illegal Immigration: The Outlook for the 1980's*, 33 INDUS. & LAB. REL. REV. 342 (1980).

31. Instead of the administration's proposed pilot program, the legislation proposed by Senator Simpson and Congressman Mazzoli would revise the existing "H-2" temporary worker program and establish in its place a distinct statutory program for agricultural workers. See S. 2222, *supra* note 26; H.R. 6514, *supra* note 26. The administration has supported this alternative approach for the admission of much needed temporary workers.

more illegal immigration.³²

Sixth, the administration has taken a series of steps that will permit us to deal rationally and fairly with the relatively new phenomenon of large numbers of people seeking asylum in this country. The procedures now in place did not contemplate, nor can they accommodate, the recent dramatic increase in applications for asylum. As recently as Fiscal Year 1978, fewer than 3,800 asylum applications were received. In Fiscal Year 1980, the number of applications rose to 47,450, and more than 100,000 applications are now pending. Many applications have been filed by persons who in fact have a well-founded fear of persecution, entitling them to be considered for asylum in this country. Many other applications, however, appear to have been filed either with a misunderstanding of the strict requirement for a valid claim of asylum, or with the intention of delaying or circumventing legal proceedings.

The administration is firmly committed to observing our traditions and obligations toward those seeking asylum. But we must ensure that the law is fairly and properly applied, so that those who are genuinely in fear of persecution can be helped without creating a backdoor immigration program for those who are not. To this end, the administration supports reforms of the asylum process that will permit a full and fair hearing of each claim without endless, repetitious consideration of the same issues.³³ Additionally, the administration has restored the policy, which is required by law, of detaining undocumented arrivals until a fair determination can be made as to whether they should be admitted to the United States.³⁴ The policy is applied evenhandedly to all undocumented aliens regardless of nationality.³⁵

32. The proposed legislation would raise the current per country ceilings for Mexico and Canada from 20,000 (the current limit for all countries) to 40,000 per year.

33. The Senate bill, S. 2222, which the administration supports, provides for asylum hearings before an independent immigration judge, with an administrative appeal to a newly established U.S. Immigration Board. Judicial review would be confined to writs of habeas corpus.

34. Immigration and Nationality Act, 8 U.S.C. § 1225(b) (1976).

35. In *Louis v. Nelson*, 544 F. Supp. 973 (S.D. Fla. 1982), the United States District Court for the Southern District of Florida held that the detention of undocumented arrivals was not racist or otherwise directed unfairly against Haitian migrants, but rather "was intended to be applied and was, in fact, applied equally to all similarly situated aliens regardless of their race and/or national origin." *Id.* at 1004. The court also held, however, that this return to enforcement of the law as written constituted rulemaking, which was null and void because of the government's failure to comply with the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551-576 (1976 & Supp. V 1981). 544 F. Supp. at 1003-04. This decision has been affirmed in part and reversed in part. *Jean v. Nelson*, No. 82-5772 (11th Cir. Apr. 12, 1983), *Petition for reh'g and suggestion for reh'g en banc filed*

Finally, since the causes of migration are international, international solutions to alleviate the conditions that impel it are necessary. President Reagan recently announced a Caribbean Basin Initiative to expand trade and investment in this critical region.³⁶ The Initiative also includes a generous expansion of economic assistance for several key countries whose situations are particularly critical. As Pope Paul VI said in his Encyclical on The Progress of Peoples, "The new name of peace is development. . . ."³⁷ This is the ambitious and generous goal of the Caribbean Basin Initiative.

America has benefited greatly from the many immigrants who have come to our shores. The country has developed as a result of their energy, their inventiveness, and their toil. Our freedom and our economic opportunity continue to attract many people. But we must ensure that those who come, enter and remain according to the laws that Congress has established. We have been lax in enforcing our laws, which in some instances were not realistic. The immigration reform legislation now pending in the Congress is designed to achieve practical, fair, and enforceable laws that will be respected. These reforms also reflect a realistic and humane concern for those who came here during a time of inadequate enforcement, and provide a basis for their entry into the mainstream of American life. These reforms are in the best tradition of America's generosity to persons seeking a new life here, and are at the same time fair to our own people.

President Reagan has said many times, quoting John Winthrop, "We shall be a city upon a hill. The eyes of all people are upon us. . . ."³⁸ As such a city, we draw toward us immigrants and refugees—seemingly in ever greater numbers. We must preserve our tradition of accepting foreigners to our shores, but in a legal and orderly fashion. Whether we, in fact, succeed in doing so is now up to Congress.

May 10, 1983. In accordance with the district court's opinion, however, rules have been promulgated to effect technical compliance with the Administrative Procedure Act. 8 C.F.R. §§ 212.5, 235.3 (1982).

36. See President's Message to Congress Transmitting Economic Revitalization of the Caribbean Basin Region Program, 1982 U.S. CODE CONG. & AD. NEWS D33 (Mar. 17, 1982).

37. *POPULORUM PROGRESSIO*, Mar. 26, 1967, ¶ 87.

38. J. WINTHROP, *A MODEL OF CHRISTIAN CHARITY* (1613).