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# The Administration of U.S. Immigration Policy: Time For Another Change

By Vernon M. Briggs, Jr.

Although immigration policy has exerted a significant influence on the development of American society since its founding, the quest to find an appropriate administrative structure to implement these policies has been a perplexing experience. It has been characterized by frequent changes and multiple reorganizations. Given the history of immigration policy itself (which has been one of lagged responses by Congress to social, political and economic conditions that have already changed), it is not surprising that the revealed pattern has been one in which the administrative structure has been frequently found to be inappropriate for the times in which it exists. Such an incongruity is precisely the situation the nation faces again as it prepares to enter the 21st Century.

With the Clinton Administration calling for efforts "to reinvent government" to meet the challenges of the next century, it is amazing that the nation's immigration system has so far been excluded from these reform proposals. For there are few other areas of policymaking where a mere change in administrative structure of government could enhance the effectiveness of public policy more than in the area of immigration.

## A Brief Historical Background

Prior to the Civil War, the attitude of the federal government toward immigration policy was essentially one of non-intervention. Except for establishing certain basic requirements for naturalization in 1802, the responsibility for immigration matters was left primarily to the individual states. Some federal laws were enacted in this era that sought to improve steerage conditions for passengers brought to the United States by sea and to impose some federal reporting requirements on steamship lines as to the number of immigrants they transported and their characteristics. The State Department was assigned the duty of overseeing compliance.

It was during the Civil War that Congress first created a centralized federal agency to oversee immigration policy. As part of legislation enacted in 1864 to encourage the immigration of contract workers to meet employer claims that there was a labor

shortage, a Commissioner of Immigration position was established under the jurisdiction of the U.S. Department of State to oversee the effort. In 1868, in response to fierce criticism by organized labor that contract workers were depressing wages, causing unemployment, and being used as strike breakers, the legislation was repealed and the Commissioner's post was abolished. Contract labor itself, however, was not prohibited; only federal support for the practice was terminated.

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During the 1870s, Congress passed laws that for the first time sought to establish some screening criteria on immigrants. Initially, these dealt with prohibitions on the admission of convicts and prostitutes. But who was to enforce these new bans? In 1876, the issue of responsibility for the administration of immigration policy took a historic turn when the U.S. Supreme Court ruled that state immigration laws in New York, California, and Louisiana were unconstitutional [*Henderson v. Mayor of the City of New York*, (1876)]. The era whereby states could act on their own initiative to pass laws to exclude certain categories of undesirable aliens and to levy taxes on incoming aliens was ended.

It was not until 1882, however, that Congress actually enacted legislation to create a system of federal control for the implementation of immigration policy. Legislation was adopted whereby the Secretary of the Treasury was authorized to supervise the activities of the separate states who were still given the actual power to examine arriving aliens to see that they did not fall into an excludable category. Simultaneously, the list of grounds for exclusion was increased to include lunatics, idiots, and persons likely

to become a public charge. The states were authorized to tax each alien entering by way of water a fee of \$.50 cents to defray the costs of their screening. Later that year, Congress enacted the Chinese Exclusion Act. In 1885 it also took action to outlaw the practice of contract labor. Actual enforcement of all of these federal statutes, however, was still left to officers of the various state governments.

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Following a series of congressional hearings in the late 1880s that revealed that these federal laws were being widely circumvented and unevenly applied, the era of joint federal-state administration was terminated in 1891. Legislation was adopted that specified exclusive federal responsibility for the implementation of the nation's immigration policies. In response, the Bureau of Immigration (BI) was created in the Department of the Treasury on July 21, 1891. All enforcement duties were transferred to federal officers; inspection stations were created on the Canadian and Mexican borders; and additional categories of exclusion were added. The following year, the Supreme Court upheld this claim of exclusive federal authority even though these regulatory powers were not specified in the Constitution [*Elkie v. United States*, (1892)].

In 1903, the Bureau of Immigration was shifted to the new Department of Commerce and Labor that was created that year. The change reflected the belief by Congress that immigration is primarily an economic issue. With the nation in the throes of mass immigration, and there still being no ceiling on overall immigration, the primary concerns of the agency at the time were its continuing efforts to prevent *sub rosa* arrangements for contract labor and to enforce the numerous provisions for exclusion.

The most immediate concern of Congress, however, was with the chaotic state of naturalization policy. Many immigrants were sought as workers but the prospect that they could become citizens was abhorrent to a number of citizen groups. Moreover, there were also vast differences among the practices of various courts which had actual jurisdiction over these procedures. Thus, naturalization requirements were overhauled and standardized in 1906. In the process, the responsibility for supervising naturalization was added to the agency's responsibilities and it became the Bureau of Immigration and Naturalization (BIN).

In 1913, Congress split the U.S. Department of

Commerce and Labor into two separate federal agencies. BIN was placed in the new Department of Labor. The placement of this authority in the Labor Department was further recognition by Congress that immigration was primarily connected with employment, wage, and working condition issues. Within this new home, the responsibilities for immigration and for naturalization were split into two separate bureaus.

Against the backdrop of these administrative changes in the first decade of the 20th Century, the subject of immigration policy itself rose to the forefront of public policy debates. Responding to congressional pressures, President Theodore Roosevelt appointed the U.S. Commission on Immigration in 1907 to study the adjustment effects of the mass immigration that the United States had been experiencing since before the turn of the century. It issued its famous report in 1911 that said that the continuation of virtually unlimited immigration was not in the national interest. It called for a number of significant changes — the most important being that illiterates, regardless of nationality, should not be allowed to enter the country and that ceilings should be placed by nationality on the number of immigrants who can enter each year. In 1917, over President Wilson's veto, a literacy test (requiring literacy in one's own language) was enacted by Congress. This law greatly increased the responsibilities of the federal agency in the screening process of would-be entrants.

It was also during this time that the United States entered World War I. Immigration levels declined sharply during the war years. The major concern, therefore, shifted to fears of the possible entry of spies or enemy agents. Hence, the country adopted requirements for passports for all aliens who sought to enter which added to the administrative duties.

Following the war, there were signs that mass immigration from Europe was about to be re-kindled. In 1921, Congress passed temporary legislation that placed an annual ceiling on overall immigration as well as individual quota restrictions based on nationality for each country of would-be immigrants. This law was extended by congressional resolution until it was replaced by the Immigration Act of 1924 which created an overall ceiling on legal immigration as a permanent feature of U.S. immigration law. The Act also established specific numerical quotas for each country of the Eastern Hemisphere that could not be exceeded.

In separate legislation in 1924, Congress responded to mounting concerns that the previous screening restrictions were being massively evaded by significant numbers of illegal immigrants crossing the land borders with Mexico and Canada. This law created the U.S. Border Patrol as part of the Bureau of Immigration. In the years that immediately followed, the issue of illegal immigration became of even greater concern as persons seeking to evade the restrictions of

the Immigration Act of 1924 also sought to enter surreptitiously through Canada or Mexico.

In response to the persistent problems associated with immigration matters, President Franklin Roosevelt — as one of the early efforts of his new administration to reorganize government — merged the separate bureaus of immigration and of naturalization into the U.S. Immigration and Naturalization Service (INS). This was done by Executive Order 6166 which was issued on June 10, 1933. The INS, however, still remained in the Department of Labor in recognition that of the fact that immigration was still viewed as essentially an element of national employment policy. By this time, however, the nation was primarily concerned with other domestic economic issues. While overall immigration pressures had somewhat diminished because of the onset of the Great Depression, the complexity associated with the day-to-day administration and enforcement of immigration matters continued unabated. A new issue concerning the admission of refugees arose during the 1930s. But during this decade the Labor Department was also on the front line in addressing the pressing domestic issues of the period — i.e., mass unemployment and the efforts of the Administration to establish job creation programs; the rapidly deteriorating and polarizing state of labor-management relations over the topic of collective bargaining; and a host of labor protection issues relating to unemployment compensation, child labor, minimum wages, and maximum hours legislation.

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Because the Department of Labor was at the vortex of the political debates surrounding these other domestic issues and because it was chronically understaffed and underfunded relative to its existing duties, the Secretary of Labor, Frances Perkins, began in the mid-1930s to agitate behind the scenes for relief from the immigration responsibilities that seemed to be diverting attention and the resources of her Department away from the New Deal's efforts to confront the domestic crises. The opportunity to accomplish this change came in 1940 with the approach of World War II.

### **The Fateful Decision Made As a Wartime Expediency**

As it became clear that it was likely that the United States would become involved in the war in Europe and probably in the Pacific region as well, the concern with immigration issues once again shifted

from employment worries to internal security matters. It was feared that immigration would become a way of entry for enemy spies and saboteurs. Hence, on May 20, 1940, President Roosevelt recommended that Congress shift the INS from the Department of Labor to the Justice Department. It was part of another reorganization plan for government made necessary this time not for efficiency but for national security reasons. Indeed, in his message to Congress, the President clearly stated that "in normal times much can be said for the retention of the Bureau [sic]<sup>1</sup> of Immigration and Naturalization in the Department of Labor where it has long resided" but, for "national safety" reasons, it was necessary to make this change because these were "not...normal days." In later background papers, the President said "after these days of emergencies have passed" that Congress should reconsider the matter of where the administration of immigration policy should be properly housed.

Interestingly, the Attorney General at the time, Robert H. Jackson, opposed the move and the Bureau of the Budget [known today as the Office of Management and Budget] that usually considers the efficacy of such administrative shifts was not even consulted. But the Secretary of Labor, who was a very close confidant of the President (their long administrative relationship dated back to the days when she worked with Roosevelt when he was Governor of New York), favored the change. In her autobiography, Perkins indicates that immigration issues had "swamped" the Department of Labor during the Depression Decade and it had caused "much neglect of the true function of the Labor Department." Perkins, on later reflection, however, indicated that she did not favor shifting these duties to the Department of Justice. In fact, in her autobiography, she explicitly states that "it should not be a permanent function" of that agency since it is not conducive to handling such "human affairs" issues. In fairness, it must also be said that she continued to believe it should not be returned to the Department of Labor either — but her reasons were simply that immigration issues would overshadow its other domestic responsibilities.

In any event, one thing is clear: the shift of the administration of immigration policy to the Justice Department was made as an expedient move. It was not intended to be a permanent action and it was certainly not made for any reason other than that of national security.

### **The Time for Reconsideration**

When World War II ended, however, there was no attempt made to reconsider the wartime administrative change. In the subsequent post-war years, immigration — which had been declining in significance since the 1920s as a feature of American life — was inadvertently revived in the mid-1960s. How this sleeping giant of America's past was aroused is too long a story to tell here and it is not relevant for

present purposes, but the numbers increased radically. Indeed, by the late 1970s another presidential commission had been formed, this time by President Jimmy Carter, to study the consequences of the revival of the mass immigration phenomenon. The Select Commission on Immigration and Refugee Policy issued its report in 1981 and concluded, in part, that immigration was "out of control." This Commission called for comprehensive changes and it specifically stated that "that this is not the time for a large scale expansion in legal immigration."

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Congress, however, chose to disregard these findings. In the years that followed the issuance of the Commission's report, Congress more than doubled the level of legal immigration suggested by the Commission; it enacted an ineffectual set of half-hearted measures to deter illegal immigration; and it has allowed the annual scale of entry of temporary foreign workers (called non-immigrant workers) and of refugees to be influenced more by the whims of special interest groups than by actual needs or circumstances. As a consequence, U.S. immigration policy in the 1990s is essentially a "hodge-podge" of politically-motivated initiatives that pays no attention to its collective economic implications.

Unfortunately, the revival of mass immigration has not occurred in a vacuum. Instead, it has taken place at a time when the nation's labor force has been subjected to unprecedented forces of expansion related to the entry of women and the movement of members of the "baby boom" generation into the work force. There has not been any labor force shortage *per se* that would warrant the increase in immigration that has occurred. Moreover, the lack of attention to the human capital attributes of most of those who are admitted each year completely ignores the powerful economic changes associated with technological change and enhanced international competition that are dramatically restructuring the demand for labor in the United States. The emerging employment trends clearly reveal that most of the employment growth is occurring in occupations that require skills and education. Likewise, the occupations that require little in the way of human capital are precisely the ones that are rapidly disappearing. Unfortunately, the preponderance of the immigrants entering the United States are lacking the human capital endowments that are needed and are exactly the types of workers whose skills are not needed.

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Although immigration policy itself is the heart of the current immigration crisis confronting the country, this does not mean that the administrative issue is unimportant. Indeed, it is precisely because the administrative structure is not open to the recognition of the fact that contemporary immigration policy has significant economic implications that immigration policy continues to function without accountability for its sizeable economic consequences.

There are many reasons why the Department of Justice is an inappropriate agency for the administration of immigration policy. To begin with it consists of a dozen or so major governmental divisions, all pleading for attention from the Attorney General. In this context, immigration matters have tended to be neglected or relegated to a low order of priority. Moreover, the Justice Department is the most politicized and politically sensitive of all federal agencies. It often chooses to pursue short-run, expedient solutions to controversial policy issues. Seldom has it manifested any interest in the economic consequences of immigration, nor has it ever seen fit to establish any ongoing research program to monitor the influences of immigration on the labor market or the economy. Moreover, the statistical data on immigration that it generates are primarily designed to meet administrative purposes rather than to serve policy-development needs.

An ancillary consequence of the shift of immigration policy to the Justice Department in 1940 has been that the Senate and House judiciary committees gained the responsibility for formulating immigration policy and for overseeing immigration affairs. Traditionally, membership on these committees has been reserved almost exclusively for lawyers. The result is that immigration law in the United States is obsessively complex and procedurally protracted. It also has meant that immigration lawyers and consultants have found a flourishing business venue — a "honey pot" — in manipulating the intricacies of immigration law. In a legalistic atmosphere that typically focuses on individual situations, the broader economic considerations that affect the collective welfare of society have become a distant concern.

It would be a major step toward the achievement of an immigration policy that is accountable for its economic effects if the INS were returned to its previous home in the Department of Labor, which is

far better equipped to understand labor market issues and to be able to design and administer an immigration policy targeted to meet specific labor force needs. Being an employment-oriented agency, it could best identify the appropriate level of immigration that is needed each year and the specific occupational needs that immigration might be able to address. The Labor Department is better qualified to explain how prevailing employment levels could adjust to the specific numbers of immigrants and refugees that are annually admitted. Moreover, because it already has enforcement responsibilities for wage and hour violations, child labor laws, occupational health and safety laws, and migrant farmworkers protections, it could easily add enforcement of employer sanctions and anti-discrimination protections for resident aliens to its present duties.

Such an administrative shift would also mean that the labor and human resource committees of Congress would regain oversight responsibilities for immigration matters. These committees are usually composed of members who are more familiar with labor market concepts, more sensitive to labor force needs, and more aware of the labor market institutions that protect workers and prepare citizens for employment.

Changing the administrative structure that is responsible for the nation's immigration policy is no panacea. But a "re-invention" of the contributory role that government agencies can have in better serving the national interest is long overdue in the area of immigration matters.

It is time for another change. ■

#### NOTE

<sup>1</sup> Presumably because the decision to shift immigration to the U.S. Department of Justice in 1940 was made in haste, President Roosevelt mis-named the agency in his message to Congress. By 1940, the agency's correct name was the U.S. Immigration and Naturalization Service, not the Bureau of Immigration.

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