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Reflections on US Immigration Reform: Donald Kerwin

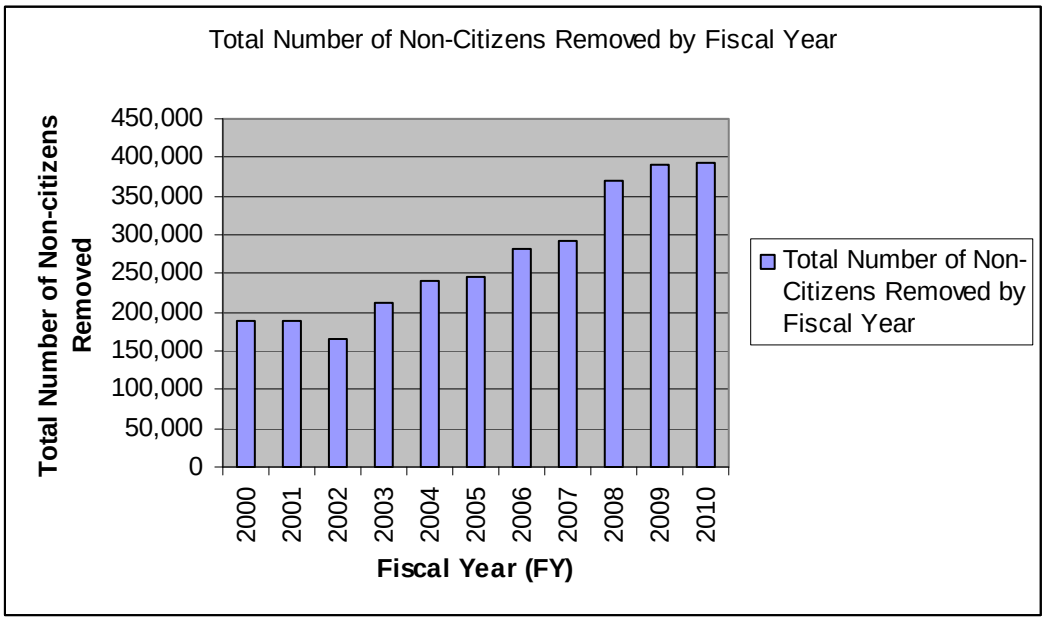
By Donald Kerwin

Comprehensive immigration reform (CIR) legislation – consisting of an earned legalization program, enforcement of the law, and an updated legal immigration system -- has failed in successive sessions of Congress. A weakened version of the DREAM Act did not secure the votes to defeat a filibuster in the waning days of the 111th Congress. State laws and local ordinances have made it more difficult for unauthorized persons and their families to rent apartments, to work, and to call the police. Many states are considering legislation that goes beyond Arizona's SB 1070 and would:

- challenge the 14th amendment's guarantee of birthright citizenship in the case of the US-born children of unauthorized parents;
- pave the way to challenge the equal protection guarantee of primary and secondary public education to unauthorized children;
- provide for the seizure of property of those who rent housing or transport unauthorized persons, or otherwise violate immigration laws; and
- make it a state crime to work and simply to be out of immigration status.

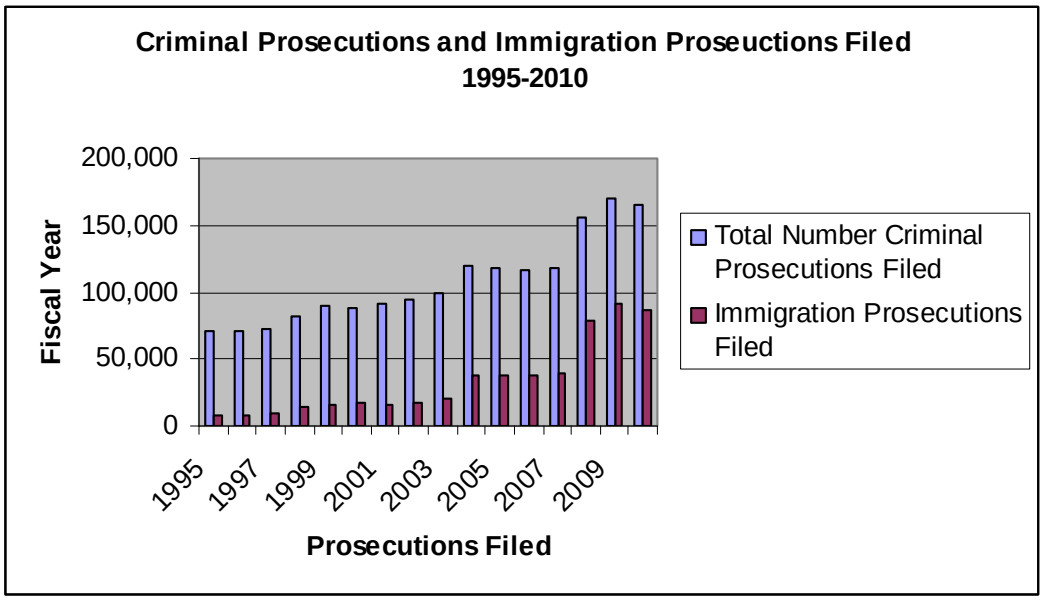
By virtually all metrics, federal immigration enforcement has reached historic levels, including number of deportations (Figure 1) and criminal prosecutions for immigration-related offenses (Figure 2).

Figure 1: Growth of Non Citizen Removals



Sources: FY 2000-2006, DHS Yearbook of Immigration Statistics, 2009; FY 2007-2010, "ICE Total Removals as of December 7, 2010." http://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals.pdf

Figure 2: Increase in Immigration Prosecutions Filed as Percentage of Total Criminal Prosecutions Filed



Source: Transactional Access Records Clearinghouse, "Going Deeper," Federal Criminal Enforcement and Immigration Enforcement, FY 1995-2010

Meanwhile, the budget crisis threatens federal and state immigrant integration programs. Given the current landscape, it is unlikely that CIR legislation will be seriously considered by Congress for a few years. For discussion purposes, the following are ideas for "interim" reforms. Several are discussed at length in a March 2011 Migration Policy Institute (MPI) report titled *Executive Action on Immigration: Six Ways to Make the System Work Better*, http://www.migrationpolicy.org/pubs/administrativefixes.pdf.

The most critical priority of the three-legged CIR stool is to fix the US system of *legal* immigration so that it better meets US labor market needs (both for skilled or unskilled workers) and reunifies families in a more timely way. It is remarkable, given the rapid changes in the world economy, that the United States has not meaningfully altered its legal immigration system over the last two decades and has not overhauled it since 1965. If the United States is to remain competitive in the world economy, it must address these deficiencies. MPI's 2006 Independent Task Force report titled *Immigration and America's Future* recommended the creation of a Standing Commission on Immigration and Labor Markets to provide Congress and the president with the information needed to set immigration levels in response to market demand -- both in times of economic expansion and contraction (http://www.migrationpolicy.org/ITFIAF/finalreport.pdf). The Commission could also analyze the extent to which the US family-based immigration system meets the nation's labor market needs. In addition, Congress should revisit the various proposals to reduce the multi-year, family-based immigrant visa backlogs.

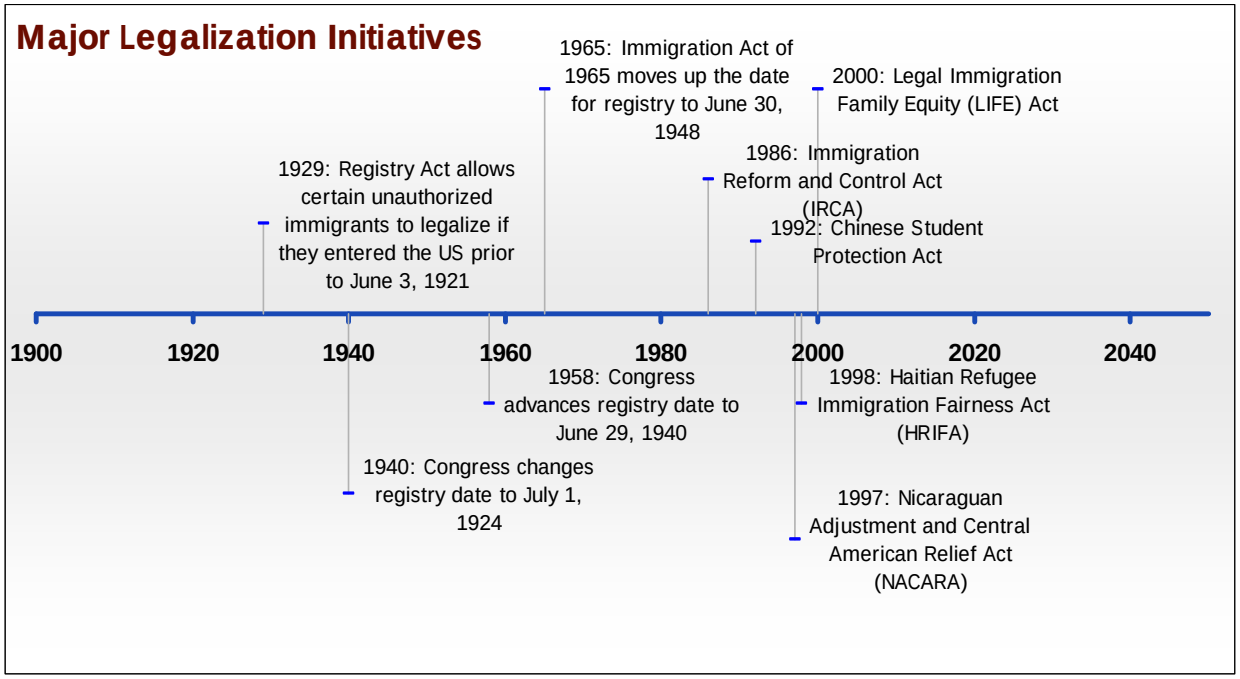
US refugee protection programs have eroded in recent years, particularly since the 9/11 terrorist attacks. The US system of political asylum rests on the ability of persons fleeing persecution to access US territory, a feat that has become increasingly difficult to manage. In addition, asylum-seekers who reach the United States face significant procedural barriers in trying to bring and to pursue their claims. According to a recent study, the one-year asylum filing requirement has affected nearly one-third of asylum cases since it went into effect in April 1998, and it has barred 18 percent of affirmative asylum claims. A heightened burden of proof and new corroboration requirements have also made it difficult for *bona fide* asylum-seekers to prevail in their cases. Terrorism-related grounds of inadmissibility have led to the exclusion of thousands of refugees and to delays and denials in the cases of hundreds of asylum-seekers, including victims of terror. The US refugee protection system needs to ensure that security-related programs do not prevent legitimate asylum-seekers from reaching protection and from gaining asylum. The Administration and Congress need to develop policy solutions to address the steep decline in asylum filings and grants since 2001, or to provide alternative means of protection.

Pending federal and state legislation seeks to deny birthright citizenship to the children of unauthorized immigrants without amending the US Constitution. In addition, several state laws are attempting to lay the groundwork – requiring school systems to collect information on unauthorized immigrant children, and report on the costs and burdens associated with educating them – to challenge *Plyer v. Doe*, the 1982 Supreme Court decision that held that undocumented children have an equal protection right to public primary and secondary education. The 14th amendment reversed the infamous *Dred Scott* decision which held that the descendants of slaves could never be citizens of the United States. It provides that "all persons born or naturalized in the United States and subject to the jurisdiction thereof" are citizens of the United States and of the states in which they reside. The Amendment's plain language, its legislative history, and subsequent Supreme Court decisions show that it applies to all children born in the United States, with a few narrow exceptions. From a policy perspective, the repeal of birthright citizenship would destroy the prospects of generations of children born and raised in the United States. The attempted repeal of *Plyler v. Doe* rounds out the nativist vision.

There are now 73 million immigrants and children of immigrants in the United States. US immigration policy governs who can come, who can stay, and who has to leave. However, the United States lacks a well-coordinated "integration" policy. Language skills, education, and workforce training – as well as legal status -- are central to immigrant integration. MPI has proposed a federally-led effort to expand, coordinate and support federal, state, local and non-governmental integration efforts, and to bring the lessons of integration programs to bear on the development of US immigration policy. Such an initiative would seek to benefit immigrants, the communities in which they settle, and the nation as a whole.

The nation's first legalization program came (fittingly) in response to anomalies created by its first systemic immigration restrictions; i.e., the 1921 national origins quota system which was made permanent in 1924. In 1929, Congress passed legislation that allowed the registration of non-citizens if they had arrived prior to June 3, 1921, resided continuously in the United States since that time, exhibited good moral character, and were not subject to deportation or ineligible for citizenship. Since that time, dozens of bills have passed to update the "registry" date and to legalize discrete populations of unauthorized immigrants (Figure 3).

Figure 3: Major US Legalization Initiatives

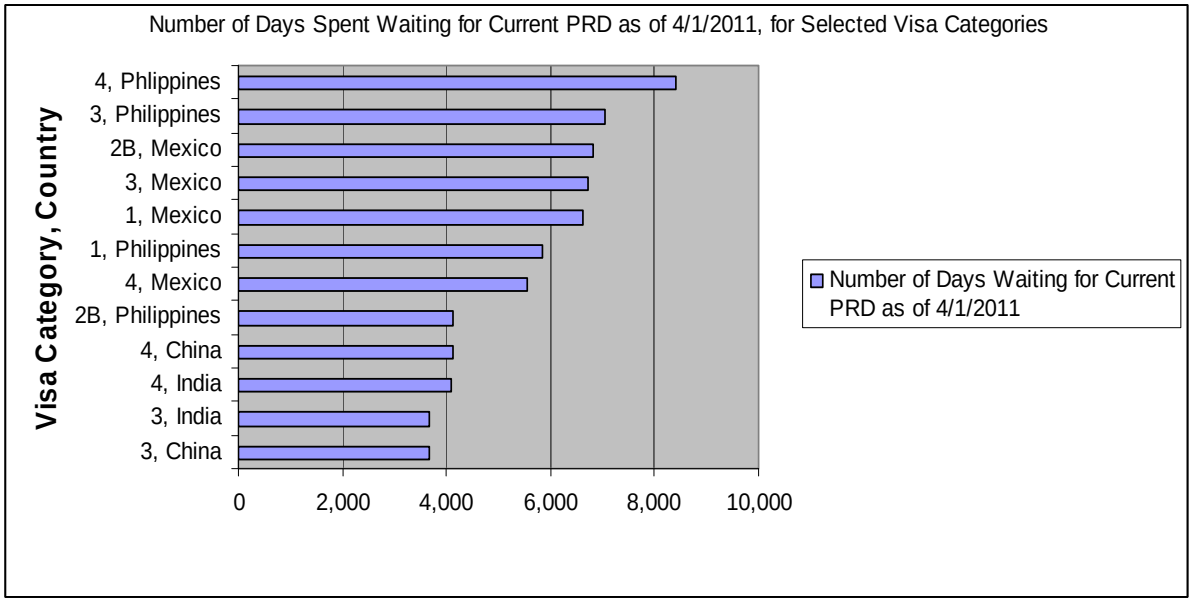


Source: Migration Policy Institute, "More Than IRCA: US Legalization Programs and the Current Policy Debate," http://www.migrationpolicy.org/pubs/legalization-historical.pdf.

While "earned legalization" legislation will not pass in the near term, there may be some receptivity to legalizing particularly meritorious or sympathetic groups. Possibilities include very long-term residents (by moving up the registry date), persons brought to the United States as children (revisiting the DREAM Act), and the beneficiaries of approved family-based visas (by advancing the visa priority cut-off date for in-country adjustment of status). Congress might also consider legislation to "recapture" lost visas.

Tens of thousands of US unauthorized immigrants are the beneficiaries of approved family-based immigration petitions. As a result, they are *prima facie* eligible for immigrant visas and admission as legal immigrants. However, most must wait for years for an immigrant visa to become available (Figure 4).

Figure 4: Number of Days Spent Waiting for a Visa -- for Selected Visa Categories with a Current Priority Date in the April 2011 Visa Bulletin

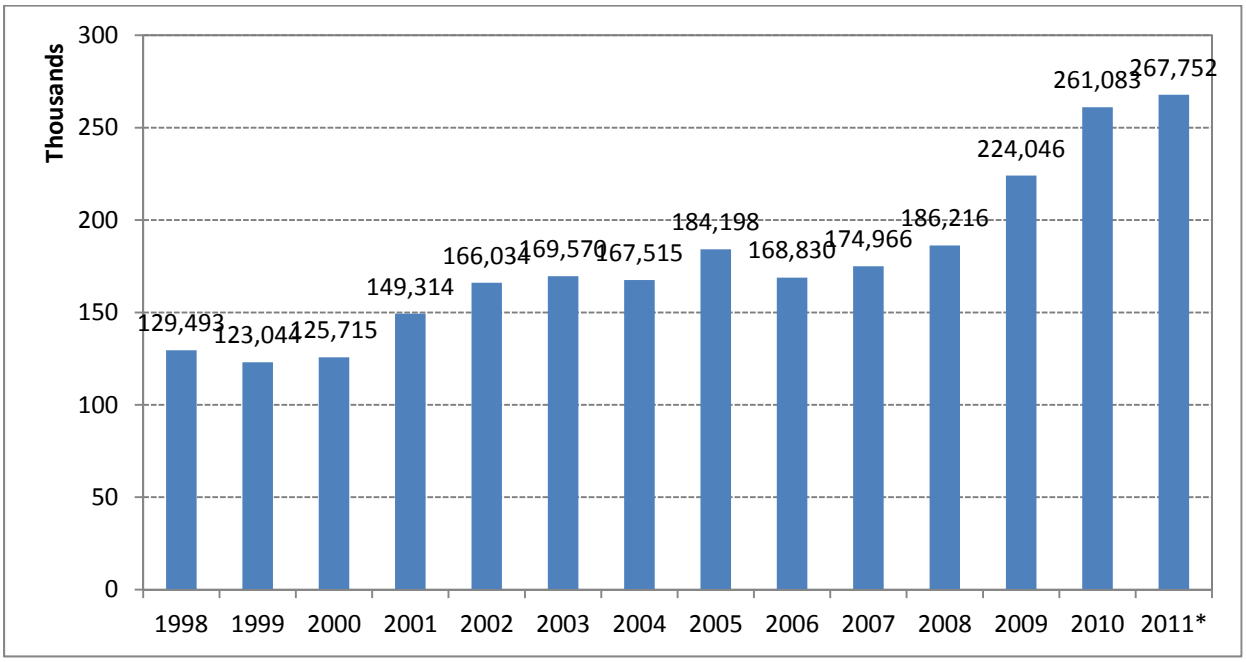


Source: United States Department of State, April 2011 Visa Bulletin

Once a visa becomes available, the overwhelming majority must leave the country to apply for their immigrant visas at consulate offices abroad. When they do, they become subject to the three and 10-year bars to admissibility (to readmission) based on unlawful presence. The bars can be waived, but waiver applications are often rejected and can take months to adjudicate. For these reasons, many unauthorized persons do not come forward to apply for their visas, giving up the possibility of legal status in the United States. Others forego the family-based immigration system entirely. Procedures that build greater certainty into the waiver process could help thousands who have approved family petitions, or who might qualify for a family-based immigrant visa.

INS/DHS have established a strong body of guidance related to the exercise of prosecutorial discretion. However, existing standards are not consistently applied across the removal adjudication system. The need to exercise discretion is based on: (1) the limited resources of the law enforcement agencies which require them to pursue the most serious and consequential cases; (2) the need to cultivate sources and secure cooperation by minor offenders in investigating and prosecuting serious criminal cases; and (3) equities and extenuating circumstances in particular cases that make full enforcement of the law untenable. The failure to exercise discretion can be seen most clearly in the Immigration Court system. According to Transactional Records Access Clearinghouse at Syracuse University, the number of pending removal cases reached a record 267,752 by the end of 2010, with cases pending an average of 467 days (Figure 5).

Figure 5: Cases Pending Before the Immigration Courts, FY 1998 to FY 2011*



*FY 2011 cases as of December 30, 2010.

Source: Executive Office for Immigration Review data obtained by Transactional Records Access Clearinghouse (TRAC) at Syracuse University. MPI presentation of data obtained through the TRAC Immigration Court Backlog Tool.

The result has been increased detention costs, delayed removal of dangerous criminals, and prolonged proceedings for asylum-seekers and others eligible for relief from removal. Meanwhile, the court system and ICE trial attorneys must devote their limited resources to categories of cases in which removal is not possible or desirable, and that would have been better handled by an exercise of discretion at an earlier stage in the enforcement process.