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The Two Yawning Gaps of U.S. Immigration Policy

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Immigration policy in the United States is one of the most fractious and controversial issues on the national agenda. While it is highly political, in the past it has not been primarily a partisan party political issue. Recent developments suggest this may be in the process of changing, although it still is correct to say that on the key issues surrounding immigration policy both the Democratic and Republican parties are houses divided among themselves. The deepest fissures on US immigration policy lie along the lines of region, industry, economic interest, ideology, and ethnic/religious/national identity.

The debate is driven by active interest groups on all sides. As one result, there has been political stalemate for many years. This is true even though the ongoing system of immigration law is generally agreed to be dysfunctional. Indeed a succession of U.S. Presidents, including both Barack Obama and George W. Bush, have described the US immigration system as “broken”.

The core sources of this legislative and political failure can be found in two yawning gaps: the gap between immigration law and practice; and the gap between elite and public opinion.

The gap between immigration law and practice: There are credible estimates of over 10 million migrants resident in the United States with no legal authorization— a number that was growing rapidly until the onset of the current deep recession. Of these 10+ million, some 8 million are estimated to be working unlawfully.¹ Such estimates should suffice to demonstrate that there is a wide gap between official US law and policy on immigration and the actual situation. Moreover the increasing numbers of such unauthorized migrants over the past 2-3 decades suggest that this gap may if anything have been widening, at least until the recent economic crisis. As might be expected, there are as many explanations of this gap between law and practice as there are philosophical perspectives about international migration.

For some, the complex rights, preferences, and procedures embodied in official US immigration law are simply incompatible with current conditions of an increasingly global economy. From this perspective, international flows of people across national borders simply cannot be controlled by governments barring the use of tactics tantamount to those of a police state. The drivers of these migration flows are overpowering macro-forces: globalization and the operations of multi-national corporations in the global economy; large and increasing economic and demographic inequalities around the world; and US employers’ need for labor. From this perspective, the best thing for the US Government to do is to get out of the way. Such views can be found on both the left and right, among “progressives” and “libertarians”, and among both Democrats and Republicans. Their worldviews may be worlds apart, but on these issues they often work in concert as truly strange bedfellows, sometimes with funding from the same sources.

For others, unauthorized immigration is akin to the trafficking and use of illegal drugs. They see unauthorized migrants and their employers both as willful lawbreakers – the migrants as taking

¹ Jeffrey S. Passel and D’Vera Cohn, “Unauthorized Immigrant Population: National and State Trends, 2010,” Washington, DC: Pew Hispanic Center, February 1, 2011. <http://pewhispanic.org/files/reports/133.pdf>

advantage of weak law enforcement to for higher-paying jobs and publicly-financed health and education benefits, and their employers taking advantage of weak law enforcement to increase their profits. They note that many such migrants use the services of smuggler networks to gain unauthorized entry, and that many of these smuggler networks also are involved in illegal drug trafficking, the sex trade, corruption of officials, and in some cases extreme violence (as in northern Mexico in recent years). The failure of US immigration policy, from this perspective, is similar to that of the failure of US drug policy: attractive economic returns reward those who abuse weakly-enforced laws, and knowing law-abusers face only feckless enforcement. Proponents argue that effective control is entirely feasible, but those in charge are unwilling even to try.

Others see all human beings as entitled to a basic human right to migrate and to seek work in other countries. In this perspective national boundaries are morally and ethically unsupportable if they limit this fundamental human right. A broad version of this view is urged by representatives of some organized religions, who argue that all human beings are God's children and entitled to migrate to further themselves and their families. A more limited version ascribes such rights primarily to people living in desperate poverty or in conditions of generalized violence, or sometimes only to those subject to persecution (the latter qualify under the special cases of refugees and asylees).

These perspectives on immigration policy, and many others that cannot be described in this brief paper, are promoted by groups representing or funded by a variety of interests, some of which are described later in this paper.

The gap between elite and public opinion: A second major gap yawns between the views about immigration (both lawful and unlawful) held by U.S. economic and political elites as compared with the views of apparently large majorities of the population. All objective surveys of US public opinion (i.e. excluding those framed by interest groups to provide support for their positions) show only small minorities --- commonly about 10-20 percent---favoring increases in even *legal* immigration. The March 2006 survey by the Pew Center for the People and the Press is typical, reporting 17% of its respondents holding this view. Meanwhile numerous groups and politicians seek to increase legal immigration and to legalize large numbers of unauthorized migrants. Such efforts have continued even after the onset of a major recession in late 2007.

Similar gaps between elite and public opinion are apparent in other countries. A general finding is that economic and political elites tend to be far more open to expanded legal immigration and to lax enforcement of immigration laws than are the broader publics. Anecdotal indications of this gap abound in many countries, but in the US case there actually are credible quantitative data as well.

In particular, in 2002 and again in 2004 the Chicago Council on Foreign Relations (now the Chicago Council on Global Affairs) undertook quantitative comparisons of elite and public opinion on numerous topics touching upon foreign relations. The same questionnaire about these issues was administered to two distinct samples -- a representative sample of the entire US population, i.e. "public opinion"; and a second selected sample of 450 opinion "leaders" on foreign policy issues, including 100 Congressional members and senior staff, numerous

Executive branch officials, university administrators and professors, senior journalists, and leaders of corporations, unions, religious organizations, and interest groups.

With respect to unauthorized/illegal migration, the 2002 report concluded that:

The foreign policy goal of reducing illegal immigration is a far higher public priority by a 48 point margin. The public is substantially more alarmed by immigrants and refugees coming into the United States as a critical threat to U.S. interests by a 46 point margin (60% of the public versus only 14% of leaders). By large, 39 point gaps, the public is more favorable to decreasing legal immigration (57% vs. 18%) and to combating international terrorism by restricting immigration from Arab and Muslim countries (79% vs. 40%).²

The 2004 report by the Chicago Council shows that such negative perceptions of immigration among the public declined somewhat from those 2002, which the reports suggests might be attributable in part to lessened public concern about terrorism. Nonetheless a large gap remained in 2004 between the opinions held by the public and leaders, as illustrated by the figure below:

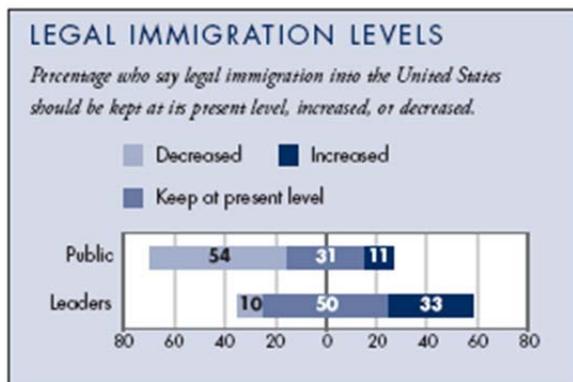


Figure 4-10

Source: Chicago Council on Foreign Relations, Global Views 2004: American Public Opinion and Foreign Policy (Chicago: Chicago Council on Foreign Relations, 2004), p. 47.

http://www.cfr.org/globalviews2004/sub/pdf/Global_Views_2004_US.pdf.

The Chicago Council summarizes the comparison in a single clear sentence: “Immigration--- widely seen as a threat to low-wage American workers and as a possible source of terrorism--- draws remarkably stronger reactions from the public than from leaders.” In the 2004 surveys only 11% of the public opinion sample wanted to increase legal immigration; the comparable figure for the “leaders” group was 33%. Meanwhile 54% of the public opinion sample wished to decrease the level of legal immigration, vs. only 10% of the “leaders” group.

² Chicago Council on Foreign Relations, Worldviews 2002: American Public Opinion and Foreign Policy (Chicago: Chicago Council on Foreign Relations, 2002), p. 72.) <http://www.worldviews.org/detailreports/usreport.pdf>

The stalemated politics of US immigration policy:

The first yawning gap -- between official US immigration law and policy and actual practice -- is no accident. To the contrary it is in part a reflection of the second gap, that between elite and public opinion, as they relate to Congressional action on immigration law, policy, and practice. Under US Constitutional law and practice, it is (almost) universally accepted that regulation of immigration falls under the “plenary power” of the U.S. Government at the Federal level and, more precisely, of the U.S. Congress. Under this “plenary power” doctrine, only Congress has the power “To establish a uniform Rule of Naturalization,”³ and hence only Congress can pass laws regulating immigration. (The doctrine also means that Congress can if it wishes pass laws with respect to non-citizens that would be unconstitutional if applied to US citizens.) A minority of legal scholars has challenged the doctrine of plenary power in general. However even a recent article that is sharply critical of the doctrine concludes that:

Typically, although Congress’s legislative power over many areas (e.g., patents, interstate commerce) is described by courts as “plenary,” it is still subject to normal constitutional limitations. In contrast, courts have traditionally considered the power of the federal government over immigration to be nearly unlimited and the constitutional rights of immigrants to be extremely limited—in many cases, virtually nonexistent.⁴

Other critics argue that based on their interpretations of the principles of international human rights, no government entity has the right to exercise such plenary power. Still others argue that the Executive branch agencies share such plenary power with the Congress.⁵

Whatever the relative merits of such arguments, both the Judicial and Executive branches traditionally have deferred to the Legislative branch with respect to immigration law and policy. This may be contrasted with most parliamentary democracies, in which the “Government” is led by a prime minister or premier, who is elected by the parliament and empowered to propose most legislation and to exercise substantial administrative discretion on such matters.

The role of the Congress in US immigration policy is one critical explanation of the gap between formal law and policy vs. actual practice, and provides the primary arena in which divergent public and elite opinions are reflected. The dynamics of campaign finance, interest group activities, and the growth of professional lobbying activities over the past decades have greatly increased the impacts upon Congress of interest groups of many types—economic, political, geographic, racial/ethnic/religious, ideological, etc. Issues related to unauthorized immigration have attracted a large volume of such lobbying, led by usually small but energetic groups. Many interests are involved in supporting such groups, but the most prominent include:

³ US Constitution, Article I, Section 8, clause 4.

⁴ Slocum, Brian G., “Canons, the Plenary Power Doctrine and Immigration Law.” *Florida State University Law Review*, Vol. 34, Winter 2007, p. 3. Available at SSRN: <http://ssrn.com/abstract=933372>.

⁵ In the interest of balance it is worth noting that the U.S. Constitution grants similarly “plenary powers” to the President, e.g. the power to grant pardons, under Article II, Section 2. Such actions by the President are not reviewable or reversible by Congress or the courts. This Constitutional grant of plenary power too has been criticized, most recently following the controversial pardons granted by President Clinton as he left office, but it remains well established nonetheless.

- employers, employer associations, and some unions concentrated in industries that employ large numbers of unlawful migrants (notable examples include fruit and vegetable agriculture,⁶ residential construction, hotels⁷ and restaurants⁸ (collectively “the hospitality industry”), cleaning and janitorial services, nurseries and landscaping);
 - local political organizations, especially though not exclusively in regions with high proportions of interest groups and/or politically-active constituents who oppose policies to control unauthorized migration -- often these are regions in which industries employing such migrants represent prominent economic and political forces;
 - religious/ethnic/national groups that see such migrants as brethren or otherwise worthy of defense and empowerment;
 - those with ideological commitments to: international migration as a fundamental human right; to limitation of government intervention in international labor flows; or to extremist beliefs of a nationalist or anti-foreigner character;
 - some environmental groups and others concerned about rapid demographic increase
 - liberal/progressive groups concerned about widening income gaps driven by relatively deteriorating conditions for those with low levels of education and skills;
 - those directly engaged in legal advocacy regarding immigration (prominent examples include the American Immigration Lawyers Association (AILA) and its several offshoots).
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Notwithstanding their energy and commitment, none of the coalitions of interest groups that promote or oppose Congressional action to control unauthorized migration have been able to prevail legislatively over their opponents. The result is policy stalemate – by no means the first choice of any of the groups, but a tolerable second choice for all in that stalemate means that they have successfully blocked their opponents efforts to weaken or to strengthen laws and policies related to unauthorized migration.

Most of the groups engaged actively in this policy confrontation have direct and significant economic or political interests in the nature of immigration law and enforcement. However there are also groups of a more ideological complexion, for whom immigration policies do not relate primarily to revenues or profits or votes, but instead to such matters as the rights of individuals vis-à-vis government or the acceptability of government involvement in labor markets. Here one can find very strange bedfellows – a common cause among “libertarians” of both the right and the left (e.g. the Cato Institute and the *Wall Street Journal’s* editorial page to the right, the American Civil Liberties Union and the *New York Times* editorial board to the left), among some traditional conservatives and liberals, and so on.

⁶ Examples include the California Avocado Commission (<http://www.avocado.org/>); the California Grape and Tree Fruit League (<http://www.cgftl.com/Main.asp>); and many others.

⁷ See, for example, the lobbying positions on immigration promoted by the American Hotel and Lodging Association. This industry association describes itself as the “leading voice of the lodging industry for 100 years” and as “Uniting 11,000 hospitality executives, AH&LA is the only national organization dedicated to serving the interests of hoteliers on the front line, behind the scenes, and on Capitol Hill.” <http://www.ahla.com/issuebrief.aspx?id=18190>

⁸ See lobbying positions of the National Restaurant Association, self-described as “the leading business association for the restaurant industry.” <http://www.restaurant.org/government/Issues/Issue.cfm?Issue=immigration>

Finally, though the empirical evidence shows that the politics of immigration do not predictably follow partisan lines, it is also the case that claims of partisan advantage have been frequently invoked in recent years --- and in rather puzzling ways. During the passionate and ultimately unsuccessful legislative campaign to pass the “Comprehensive Immigration Reform” proposals initiated by the bipartisan pair of Senators John McCain and Edward Kennedy in 2006 and 2007, political strategists from both parties were claiming that their party would gain politically from the very substantial expansion of immigration embodied in this bill. The argument on each side was that its party would capture disproportionate support from those voters who support expanded immigration, and also from the increased numbers of grateful immigrants once they were naturalized, yet would not lose support from other voters.

Those making such claims of partisan advantage apparently were either unaware or dismissive of public opinion polls indicating that most voters did not support expanded immigration at the macro level. In reality, no one knew then, nor could they have known, how these electoral politics would have played out over the years. Yet one thing is certain: logically, both parties could not have achieved the partisan gains they were being promised by their own strategists.

Many Members of Congress may be forgiven if they conclude that on the volatile issues of unauthorized immigration, they face a lose-lose situation. While the interest groups level lobby actively on all sides, public opinion appears to be substantially negative. The unhappy choice for politicians seems to be: 1) antagonize organized groups and well-funded organizations that provide substantial sources of the campaign finance now needed for re-election (TV, radio, etc.); or 2) antagonize large numbers of voters whose support they need for re-election. The choice often comes down to the balance of such elements in a particular Member’s district and among other sources of support.

Given the lobbying dissonance and lose-lose game they face, Congressional responses have often taken on the contradictory character of what might be described as *symbolic toughness accompanied by disguised unenforceability*. A politically popular symbol of “toughness” on unauthorized migration is a so-called “border fence” along the 2000-mile (3000-km) US-Mexico border – actually not a fence but instead a set of physical and virtual barriers, with greatest concentration in high-density border regions where US and Mexican cities are essentially contiguous (as in San Diego/Tijuana; El Paso/Ciudad Juarez; Laredo/Nueva Laredo; etc). Some of the same US politicians most vigorously demanding such border “hardening” have also more privately supported measures that make immigration laws unenforceable. Others publicly call for vigorous enforcement, while privately criticizing enforcement agencies in response to complaints from interest groups in their Congressional districts or among their other supporters.

The ambiguity of such behaviors mirrors a more general ambivalence that pervades the US perspectives about the process called immigration as compared with the people called immigrants.⁹ As noted earlier, there appears to be rather little support among the public for expansionary immigration policies. A common view is that expanding immigration presents unfair competition for employment and housing or poses threats to the coherence and unity of an American society that is already turbulent enough; some go further and claim that expansive

⁹ For a more detailed discussion, see Michael S. Teitelbaum, “Advocacy, Ambivalence, Ambiguity: Immigration Policies and Prospects in the United States,” Proceedings of the American Philosophical Society, Vol. 136, No. 2, 1992, pp. 208-225.

immigration policies pose threats to national security by facilitating residence of terrorist operatives. On the other hand, many holding such views also share in the numerous American narratives that paint a highly positive and sometimes even romantic picture of immigrants to the US --- hard-working, family-oriented, salt-of-the-earth --- evoking collective memories of ancestral migrants that are part of the family lore of nearly all Americans.¹⁰

The apparent contradiction between such views appears to be the distinction between macro and micro levels: At the macro level Americans appear generally opposed to policies favoring large-scale immigration, with more opposition to unauthorized flows than to legal immigration. Yet at the micro level the same respondents often are favorably disposed to individual immigrants and their families, and sympathetic to the struggles they face.

This ambivalence leads to a well-known strategy among immigration activist groups and among some journalists who cover the subject. Those seeking to restrain immigration tend to emphasize aggregate numbers, and their alleged negative impacts on wages, unemployment, housing, criminality, education, even terrorism. Meanwhile those seeking more expansive immigration numbers tend to focus more on individual migrants and their families, emphasizing both the struggles they face and the successes they achieve. These strategies of emphasis stretch even to the framing of questions for public opinion surveys on the subject---on this subject, the authorship and funding sources of such surveys often seems to determine their outcomes.

In summary: the longstanding policy stalemate on US immigration policy is closely related to two large gaps --- the first between law and practice, the second between elite and public opinion. As it plays out in the Congress, the debate about unauthorized migration is entirely surrounded by coalitions of committed but opposing interest groups. Many of these groups take advantage of the ambivalence inherent in American perspectives on the macro process of immigration vs. the individual level of immigrants and their families. The current policy stalemate on unauthorized migration is not the first choice of most of these interests, but is second-best when compared to allowing their opponents to achieve success. Some Members of Congress, facing what they see as a lose-lose situation in a highly-lobbied and emotional domain, find themselves supporting actions that offer the symbolism but not the reality of effective enforcement.

¹⁰Even the ancestors of Native Americans (or American Indians, depending upon one's usage preferences) appear to have migrated to the North American continent from Asia.