

U.S. IMMIGRATION POLICY: THE GHOSTS OF PAST, PRESENT, AND FUTURE

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“In no other realm of our national life are we so hampered and stultified by the dead hand of the past, as we are in this field of immigration.”

HARRY TRUMAN, VETO MESSAGE
OF THE McCARRAN-WALTER ACT, 1952

Meaningful reform of the U.S. immigration system is long overdue, but rather than deal with such a divisive issue, politicians in both parties have allowed chaos in the “broken system” to fester for many years. A recent Gallup poll revealed that twenty-seven percent of U.S. Americans now believe that immigration is the main problem facing the United States, but Congress has failed to grasp the urgency of this topic. It has offered only weak and ambivalent proposals and allowed recent administrations to make policy with executive orders of dubious legality. The United States is a nation of immigrants *and* a nation of laws. There is no need to choose between them, but we must make difficult choices if those laws are to be humane, effective, and beneficial to both U.S. society and immigrants.

Before we attempt to create a third system, we should first understand key elements of the two previous immigration systems in U.S. history, how they addressed the needs of their respective ages, how global forces created and destroyed both of them, and how domestic factors hastened the demise of the second system.

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Spirits of Immigration Past: The Capitalist Immigration System, 1620-1920

The movement of people across the Atlantic that began in the fifteenth century was a major component of an expanding capitalist world economy, in which migration was regulated by laws of economics rather than laws of government. In 1620, an English religious community created the template for three centuries of *liberal* capitalist migration to North America. The Pilgrims began their travels as refugees from religious persecution in England and later as refugees from conflict when the Dutch Republic entered the Thirty Years' War. Half of the colony died within eight months of their departure, but rather than a tale of suffering, their legacy was a blueprint for economic development. The Plymouth Colony built towns, farms, and a new society based on free labor and democratic institutions and, despite current mythology, maintained peaceful, mutually profitable commercial relations with the indigenous population. The Mayflower Compact, the first written constitution for self-government in the Western Hemisphere, established the rule of law in the colony and later helped to shape the U.S. Constitution.

A competing *illiberal* immigration system in the Americas, built on un-free labor, characterized slave societies of the Caribbean and Portuguese Empires and resembled in many respects the labor systems of the Spanish Empire. Governance was based on feudal concepts of social organization that discouraged the migration of free labor and entrepreneurs. Large-scale migration to Brazil, for example, occurred only after the abolition of slavery in 1888. Southern states in the United States maintained a hybrid of both systems for over two and a half centuries, while northern states grew more rapidly.

Government attempts to limit immigration in the capitalist era were largely ineffective because such regulation would have prevented economic growth. The Proclamation Line of 1763, enacted by the British government to stop colonial migration beyond the Appalachians, did not prevent western settlement, but became a factor that contributed to the U.S. American Revolution.

In 1798, a Federalist Congress and president enacted the Alien and Sedition Acts. Ostensibly created to prevent ideological contagion from the French Revolution, but also to prevent the arrival of Jeffersonian voters, the laws sparked hostile reactions. Jefferson proposed nullification, a doctrine that

haunted U.S. history for seven decades. Madison proposed interposition, which would give states the right to intercede between the federal authority and citizens, an idea at the heart of the current debate over the role of states and cities in immigration enforcement. These laws destroyed the Federalist Party. Most of their provisions would lapse during the Jefferson administration, although the Alien Enemy Act survived. It provided the statutory basis for Japanese internment during World War II and the recent Muslim travel ban.

The development of U.S. legal doctrine in the capitalist era likewise encouraged immigration. In 1898, in *United States v. Wong Kim Ark*, the Supreme Court interpreted the Fourteenth Amendment to embrace the doctrine of *jus soli*, and with it the idea that citizenship was conferred by birth on U.S. soil. The amendment's authors did not intend this result. Rather, the Fourteenth Amendment overruled *Dred Scott v. Sandford*, an 1857 Supreme Court decision that denied citizenship to slaves born on U.S. soil. The current debate is whether *Wong Kim Ark* protects children born in the United States to undocumented parents.

In the capitalist era, U.S. policy rarely attempted to distinguish between desirable and undesirable immigrants. Except for intermittent and ineffective anti-Catholic policies and anti-Asian laws in an era that ended in the early twentieth century, the country took what it got because it needed workers. To illustrate how this lack of regulation had future consequences, I select an example at random. In 1885, to avoid conscription into the German army, Friedrich Drumpf—which he anglicized to Fred Trump—came to the United States, where he prospered through entrepreneurship in questionable real estate deals and brothel-keeping. He tried to return to Germany, but because of his evasion of military service he had lost German citizenship. He resumed his “business activities” in the United States and died during the influenza pandemic of 1918-1919. He would be deported today.

Spirits of Immigration Present: The Corporatist Immigration System since 1920

The engines of capitalism were shattered by a second Thirty Years' War of 1914-1945, global economic disasters, and, anomalously, rapid population growth. Governments were the only institutions able to restore order. Post-

capitalist settlements in Europe, the Americas, East Asia, and elsewhere created neo-corporatist states with mixed economies, where, in Lenin's memorable phrase, the "commanding heights" of their economies were controlled by government. Government policies now shaped domestic economies, and politics reflected class competition for economic benefits. Like capitalism, corporatism came in two forms. Liberal corporatism defined the political economy of North America and Western Europe. Illiberal corporatism characterized the regimes in Nazi Germany, Soviet Russia, Southern and Eastern Europe, Japan, much of Latin America, and elsewhere.

A national security state and a welfare state became the principal institutions of U.S. corporatism and still dominate government spending. These new aspects of U.S. politics resulted in closer regulation of many hitherto public and private features of U.S. American life, including immigration. After World War I, business also had less interest in promoting immigration because of increased mechanization in industry and agriculture and the arrival of unskilled workers from southern states and Appalachia. The 1929 Wall Street crash and massive unemployment further reduced demand for foreign workers.

Corporatist Immigration and The National Security State

U.S. Americans feared political contagion from Europe in the years following World War I. Lenin launched military intervention in Europe, which ended with the defeat of the Red Army at the Battle of Warsaw in 1920. In 1919, Hungary and Slovakia established short-lived Soviet Republics, and in 1918-1919, Germany experienced communist uprisings in Berlin and Munich. Beginning with Gabriele D'Annunzio's seizure of Fiume in 1919, Fascist activists were equally busy. In 1920, Miklós Horthy established a Fascist dictatorship in Hungary. Following the *Biennio Rosso* of 1919-20, Benito Mussolini organized his March on Rome and a Fascist coup in 1922. Later, the Nazi seizure of power in Germany and the triumph of Fascism in the Spanish Civil War sounded new alarms in many quarters that had defended liberal immigration policies. The Mexican Revolution produced relatively few ideologies, which threatened only Mexicans.

Established by laws in 1920 and 1924, quotas destroyed European migration networks and replaced them with legal and illegal networks from Mexico, an early—but by no means the last—example of unintended consequences in corporatist immigration policies. Like the Alien and Sedition Acts, the quotas were based on fears of subversion and foreign-born voters, but the responses were different. In the capitalist era, Federalist politicians who sponsored the Alien and Sedition Acts were defeated, their party destroyed, and immigration continued. In the corporatist era, anti-immigrant politics and politicians flourished, at least temporarily.

If fears of subversion led to quotas, wartime economics created the need for Mexican labor. The Bracero Program began as a wartime measure in 1942 when Mexico became a U.S. ally. Mexican workers replaced U.S. Americans serving in the armed forces and defense industries. The program brought five million workers from Mexico over two decades. It was renewed in 1951 and continued until 1964 because of pressure from agricultural interests and because the State Department believed the program diminished the appeal of communism in Mexico. The program also led to major unintended consequences in the form of undocumented migration networks and corruption in Mexico.

The pendulum would swing again in 1952, when Congress enacted the McCarran-Walter Act over President Truman's veto. The law maintained quotas and reflected additional Cold War concerns regarding Communist subversion. Its principal author, Pat McCarran, a right-wing Democrat senator from Nevada, was an enthusiastic supporter of right-wing regimes, especially Francisco Franco's Fascist government. Although frequently amended, the Immigration and Nationality Act of 1952 remains the basic U.S. immigration statute.

Corporatist Immigration and the Welfare State

It was not until the corporatist era that welfare and immigration politics became entangled. The first major example at the federal level of public welfare affecting immigration law was the Literacy Act of 1917, passed by overriding President Woodrow Wilson's veto. It excluded populations that might become dependent on charity or introduce foreign vices. In addition

to illiterates, the law excluded a long list of “undesirables,” including what it termed idiots, imbeciles, whores, vagrants, alcoholics, “psychopathic inferiors,” criminals, insane persons, and others.

Politicians continued to link welfare and immigration for political gain. In 1994, Republican Governor Pete Wilson of California, who wanted to become President Pete Wilson, promoted Proposition 187, a state-wide initiative that would have denied public services, including public education, to undocumented residents of California. Many of its provisions were inconsistent with federal law, in particular, *Plyler v. Doe*, a 1982 U.S. Supreme Court decision that invalidated a Texas statute that would have denied public education to undocumented children. The proposition passed 59 percent to 41 percent. Wilson launched his campaign, which lasted one month.

Sensing a shift in political winds because of Proposition 187, Democratic President Bill Clinton formed a commission in 1994, headed by former Representative Barbara Jordan, to recommend immigration policies. The commission proposed reduced levels of immigration and stricter enforcement. Its findings led to the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, which continues to create confusion in immigration enforcement by expanding vaguely-defined criminal activities to include “crimes of moral turpitude.”

Flawed Administration of the Second System

Immigration law and administration evolved in the corporatist era in response to politics rather than economic needs. A Balkanized bureaucracy could not enforce laws, while lawmakers enacted laws that could not be enforced. Immigration functions in the government were hopelessly decentralized and lines of authority and accountability blurred, which inevitably led to ineffective enforcement. Lawmaking, oversight, and budgeting were divided among many committees and subcommittees in both Houses of Congress. The immigration bureaucracy has been housed in various cabinet departments over the years: Treasury, Justice, State, Labor, Agriculture, Health and Human Services, and now, the Department of Homeland Security.

The U.S. immigration courts and the Board of Immigration Appeals (BIA) were administrative bodies in the Justice Department. They reported to the

attorney general and their independence was limited. The appellate process from the BIA to the individual circuits was an invitation to split decisions among the circuits because the Supreme Court only rarely reviewed immigration decisions. The backlog of cases in immigration courts ran into many years, while appellate court dockets became similarly clogged with immigration cases.

There was a fourth “branch” of government, larger than the federal bureaucracy, about which little was known, but which implemented immigration policies at federal, state, local, and international levels. This “branch” of government included government contractors working in the United States and abroad. They ran immigrant detention centers where abuses and failures to satisfy health and safety standards were routine. Courts rarely intervened in their operation.

Like immigration courts, the benefits and enforcement bureaucracies were overwhelmed by their workload. The principal benefits agency, Citizenship and Immigration Services, lacked the resources needed to investigate adequately the millions of petitions it received annually. Enforcement functions were divided between Customs and Border Protection, which included the Border Patrol, and Immigration and Customs Enforcement, which was responsible for interior enforcement and the oversight of detention centers. Difficult working conditions caused rapid employee turnover and poor morale, which increased the likelihood of mistakes.

Decline of the Second System

By the 1980s, the second system had entered into rapid decline. Vastly increased irregular migration was the principal cause, the result of a perfect storm of global factors outside the United States: wars, failed states unable to control crime or create economic growth, persecution by repressive regimes and non-state actors, and disruptions in traditional agriculture caused by changing trade relations, climate change, and environmental disasters.

The single most important contributing factor to irregular migration was demographic. Global population increased four and one-half times during the corporatist century. The population of Mexico increased eight times. High fertility rates and lower infant mortality in many developing countries created

large surplus populations that could no longer be supported by subsistence agriculture or economic systems managed by corrupt governments. At the same time, fertility rates in much of the developed world fell below replacement levels. These trends created strong push-pull factors in global labor markets.

Domestic factors, in which many were complicit, hastened the end of the second system. The liberal corporatist model upon which U.S. immigration policies had been based began to crumble under the weight of a changing world economy and populist anger. Many blamed free trade ideology and the presence of low-wage workers at home and abroad for economic problems in the United States. In particular, the “American Heartland,” with its economy dominated by heavy industry and agriculture, failed to match the income levels of service economies on the Atlantic and Pacific Coasts. The region provided fertile ground for anti-immigration narratives.

Legal institutions that regulated immigration in the corporatist era likewise failed to meet new challenges. The Byzantine laws and regulations of the second system had become unintelligible even to immigration lawyers, many of whom were only marginally competent. Notaries engaged in the unauthorized practice of law that defrauded immigrants with false promises of legal relief. Migrants came to believe they could ignore the law in the United States with the same impunity as in their own—frequently lawless—societies.

Other once-venerable institutions fared no better. The U.S. foreign policy establishment, with little understanding of emerging forces in world politics, failed to deal effectively with the political, military, demographic, and environmental factors that caused migration. Anti-immigrant organizations invented “spin” with industrial efficiency, while many NGOs and international organizations that “advocated” for immigrants wallowed in intellectual anorexia and failed to proffer credible rationales for immigration.

The chattering classes generated platitudes rather than solutions. An increasingly moribund media, relied primarily on “cut and paste” reportage, and, because of its relentless search for “color,” alternated between sob stories and xenophobia rather than undertaking serious analyses. Immigration scholars conducted research that only rarely addressed the problems faced by the immigration bar and immigration courts or the needs of the U.S. economy. Policy-makers and the public ignored their opinions.

Spirits of Immigration Yet to Come

From this witches' brew, the Republican Party, like a modern Witch of Endor, summoned a Spirit of Immigration Future in the form of a television huckster peddling a carnival act of anti-immigrant lies to the credulous. The grandson of Friedrich Drumpf was aided in this project by “news” outlets that specialized in distortions and political propaganda, provided on occasion by foreign intelligence services. Unwilling to work with Congress to craft rational policies, Trump issued executive orders of doubtful legality—a practice that began in the Obama years—that were immediately challenged in federal courts. They served only to exacerbate the chaos in an already broken system.

At the same time, a Coven of Immigration Future offered equally divisive policies and unrealistic projects, distilled from yet another cauldron containing a toxic stew of victimhood, fantasy economics, anti-white racism, and Marxist rhetoric. Professing socialist ideals, they failed to grasp that socialism has succeeded only in the homogeneous societies and cartelized economies of Northern Europe, where it was born, and where recent African and Islamic immigration revealed societies unable to accommodate cultural diversity.

The Final Collapse: The Role of Asylum Claims

In the capitalist era, persecuted populations received the same welcome as other immigrants. Many of the earliest English settlers (Pilgrims, Puritans, and Baptists in New England; Quakers in Pennsylvania; and Catholics in Maryland) began their peregrinations because of religious persecution. In the corporatist era, U.S. policy first tried to exclude persecuted populations, but because of the mass slaughter of civilians during World War II and the enormous refugee flows after it, the government created asylum policies that addressed the specific circumstances of mid-twentieth century Europe. Persons who have suffered past persecution or have a well-founded fear of future persecution must prove that they have been singled out *personally* because of their race, religion, nationality, political opinion, and/or membership in a social group as defined by the Board of Immigration Appeals. If they can satisfy these requirements, they are permitted to reside and work in the United States.

Central American migrants have recently organized large caravans of men, women, and children who arrived at the U.S. border claiming persecution. Only rarely will they be able to satisfy the legal requirements for asylum despite appalling conditions in their home countries. Few will possess the documentation need to validate their claims. Endemic violence, poverty, the absence of the rule of law, and the collapse of state authority do not provide sufficient legal bases for grants of asylum under existing U.S. law. No U.S. government would have approved their petitions, least of all the Trump administration.

U.S. support of repressive regimes in Central America for many years contributed to conditions that created additional push factors in the Northern Triangle. More recently, and with an uncanny sense for creating the worst possible policies, the Trump administration bullied weak Central American governments into accepting huge refugee populations that will further destabilize the region. This will, in turn, reinforce conditions that propel undocumented migration. In Mexico, Trump's migrant protocols, recently introduced at ports of entry, have created even more violent conditions on the U.S.-Mexican border than previously existed. These actions clearly demonstrate, however, that the consequences of U.S. policies reach well beyond its borders, and that reliance on domestic law alone, the central concept of corporatist immigration, is insufficient to ensure the rule of law. Transnational problems demand transnational solutions.

Conclusion: Toward a Third Immigration System

The second immigration system is dead. We must either devise a new system or continue to live with the lawless, violent conditions into which the second system had sunk. To date, politicians' evasive responses to these choices have been an embarrassment to U.S. democracy. What is worse, Trump's contempt for U.S. law will make the creation of a new immigration system much harder to realize. Immigration policies and their implementation must be based on respect for the rule of law by all parties if they are to function effectively. Before we proceed along this destructive path, we would do well to understand the place of immigrants in our past as well as their role in our future.

This essay is a plea for an alternate future based on such an understanding. Our spectral visitors provided unambiguous warnings that we cannot

permit the rot to continue indefinitely. Trump's success in the 2016 Electoral College will embolden clones from "right" and "left," who—however difficult it is to imagine such people—are even less fit to hold public office than Trump. Root and branch reform by the next administration demands more than rescission of executive orders that the courts have not already found illegal. It will require consensus, compromise, expenditure of political capital, bureaucratic restructuring, and a focus on economic aspects of migration. Just as the second immigration system addressed shortcomings in the first, a third system will concentrate on failures of the second, and *begin* a process of remediation with:

- *Immigration policies that contribute to economic growth in the United States.* We cannot return to the unregulated immigration of the capitalist era, but we can institute policies and practices that promote rather than hinder growth. The third system will selectively welcome skilled and unskilled immigrants needed in the U.S. economy and discard immigration categories that no longer serve the national interest (for example, some preference categories for distant family members and diversity visas, relics of the quota system). A third system will create services that *directly* assist U.S. business, agriculture, health care, business incubation programs, and others, and use targeted, lawful immigration to further their objectives, especially in economically distressed regions of the American Heartland.
- *Global operations.* Professional overseas legal resources will provide reliable information, adjudicate some issues outside the United States, facilitate lawful business immigration, and authenticate documentation offered in support of immigrant applications. The United States will collaborate with governments and NGOs in the main sending societies to devise systems of governance that will bring irregular migration under the rule of law. U.S. development assistance programs in sending societies will focus on push-pull factors that cause irregular migration and on channeling remittances into productive uses.
- *Increased authority for immigration courts and the Board of Immigration Appeals.* The immigration court system now adjudicates a limited range of cases that deal primarily with persecution claims and removal defenses. In the best traditions of common law, the third system

will permit independent judges to balance equities and fashion legal doctrines and remedies that address evolving forms of persecution by state and non-state actors as well as the needs of families, communities, businesses, and the criminal justice system. They have already performed this function responsibly in cases involving genital mutilation, sexual orientation, battered women, and other once-contentious issues. Such a reform would take these matters from politically paralyzed lawmakers unable to resolve complex legal questions, and place them in the hands of competent judges capable of rational decisions.

- *Reorganization of the bureaucracy, new implementation procedures, and clarification of inter-governmental relations.* The bureaucracy and courts will have the resources, clear lines of authority, and professional leadership they need to enforce and adjudicate immigration laws effectively. Mechanisms will be created to ensure accountability and adherence to the highest ethical standards among lawyers, NGOs, and other service providers in the private sector. The third system will define clearly the role of state and local government in immigration enforcement. More effective methods will be developed to identify criminals and terrorists seeking entry to the United States.

U.S. immigration policies and practices have traditionally been among the most liberal in the world because they conformed to economic and social change and respect for the rule of law. The United States now has —by far— the largest foreign-born population in the world. Immigrants have contributed enormously to U.S. well-being and prosperity. In recent years, however, the U.S. immigration system has become detached from both domestic and global forces. Will the next administration build a new system based on this understanding? Without meaningful, systemic reform, Truman’s “dead hand of the past” will continue to haunt U.S. life, the U.S. economy, U.S. security, and U.S. American democracy itself.