Indirect Immigration Policy Making in the U.S. *Always Opens Our Borders*

By David North,
Center for Immigration Studies,
Washington, D.C.

A paper presented at a conference on the

**DYNAMICS OF THE SCIENCE AND ENGINEERING LABOR MARKET AND IMMIGRATION MANAGEMENT**

**JULY 12-13, 2012**

Institute for the Study of International Migration
Georgetown University, Washington, D.C.

Co-Organized with the Comparative Immigration & Integration Program, UCD

Funded by the Alfred P. Sloan Foundation
History indicates that whenever the Congress of the United States farms out its immigration policy powers to other entities there is only one result: U.S. borders are opened still further to admit more migrants into the U.S.\textsuperscript{1}

This admittedly obscure bit of American history should be borne in mind as we hear the various siren calls “leave it to the experts,” “let’s create a commission,” “let’s let the local officials decide” or “let’s work it out with the other nations of the world” regarding decision-making mechanisms on admissions decisions.

This is the case because the decision-making entities other than Congress have always been easily swayed by skilled and powerful political interests that rally around the more-migration banner. Why should the future be different from the past?

Before we surrender to the blandishments of arguments about the need for “expert opinion” and “administrative flexibility” that supposedly come with proposals to delegate decision-making to other bodies, it is useful to see how these experiments have worked in the past, and to speculate a little on how these patterns might play out in the future.

There are four sets of entities to which Congress has delegated its immigration control authority in the recent past:

The Office of the Trade Representative that has negotiated irrevocable trade treaties, with immigration provision, with other nations;

Domestic agencies, more in proposals than in actuality, but the latter does include the U.S. Sentencing Commission;

U.S. possessions, notably the Commonwealth of the Northern Mariana Islands, once the location of numerous sweatshops; and

Strangely, under some circumstances, other nations.

Once the treaties are approved, Congress, for all practical purposes, loses all control of the matter; with the last three sets of listed delegations Congress nominally retains some control but rarely exercises it, as Table One indicates (on the next page).

Both the Executive and the Judicial Branches play major roles in the administration of our immigration policies, but those roles — breathtaking as they have been in the summer of 2012\textsuperscript{2} — are beyond the scope of this paper. Here we are only concerned with powers that routinely belong to the Congress of the United States that it either has given away, or that it is thinking about giving away.

\textit{Table One}
Some Examples of Indirect Immigration Policy Making in the U.S.
(see text for more detailed information)

<table>
<thead>
<tr>
<th>Category</th>
<th>Example</th>
<th>Congressional Role</th>
<th>Consequences or Potential Consequences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Treaties</td>
<td>NAFTA</td>
<td>None, now that NAFTA is in place</td>
<td>Creation of new visa classes (TN and TD), which causes about 100,000 nonimmigrant admissions a year on average</td>
</tr>
<tr>
<td></td>
<td>GATS</td>
<td>None, now that GATS is in place</td>
<td>The agreement may freeze some U.S. rules on current guestworker programs, thus eliminating the prospect of changes in levels or qualifications</td>
</tr>
<tr>
<td>Domestic Entities</td>
<td>Proposed HR 4321</td>
<td>Congress may decide</td>
<td>Includes a proposed Commission that would make admissions level recommendations which Congress could alter, but only if it acted quickly The bill was introduced in 111th Congress</td>
</tr>
<tr>
<td>Territories</td>
<td>American Samoa out of INA; but could reverse that decision</td>
<td>Congress defined</td>
<td>Territory vulnerable to guestworker abuse and trafficking, and has experienced one dramatic case of that decision</td>
</tr>
<tr>
<td></td>
<td>CNMI</td>
<td>It excluded CNMI from INA, but later reversed that decision</td>
<td>CNMI used its immigration powers to import masses of guestworkers, treated them badly, and hired Jack Abramoff to lobby for the preservation of that system</td>
</tr>
<tr>
<td>Other Nations (unilateral)</td>
<td>Hungary Congress could over-ride but probably won’t</td>
<td>Hungary expanded definition of its citizens to include ethnic Hungarians living outside its borders, thus granting them VWP status</td>
<td></td>
</tr>
<tr>
<td></td>
<td>UK</td>
<td>Congress could have over-ridden but did not</td>
<td>The UK granted independence to its former colonies, thus increasing the potential migration from them to the US, a comparatively minor matter</td>
</tr>
</tbody>
</table>

Abbreviations used, in the order they appear: NAFTA, North American Free Trade Agreement; TN, Trade NAFTA visa; TD, Trade dependents visa; GATS, the General Agreement on Trade in Services; INA, the Immigration and Naturalization Act; CNMI, Commonwealth of the Northern Mariana Islands; VWP, Visa Waiver Program; and UK, United Kingdom.

Source of table: Center for Immigration Studies, Washington, DC
There follows a quick overview of the four different situations in which Congress lets someone else make immigration policy decisions: treaties, domestic commissions, and its deference to territorial governments and to policies of other nations. These other entities virtually always push—successfully—for more migration to the U.S.

**Treaties.** Probably the most significant—if not the most dramatic—delegation came when Congress surrendered some authority over some temporary foreign worker programs to the World Trade Organization as a part of the General Agreement on Trade in Services (GATS) in 2004.³

This was done as a small part of a multi-national trade deal, negotiated for (some say against) the U.S. by the Office of United States Trade Representative, which is an arm of the White House totally insulated from any migration policy concerns, but under constant and heavy pressure from employer interests and from other nations in the world.

According to one law firm that has been carefully, even gleefully, watching this process for its corporate clients:

> “A number of provisions in legislation proposed [by restrictionists] to change U.S. law on H-1B and L-1 visas present a significant likelihood of being found to be inconsistent with U.S. commitments under GATS . . .”⁴

The Senate earlier approved the NAFTA treaty that created special nonimmigrant worker programs for some skilled residents of Canada and Mexico, which encouraged and facilitated greater migration to the U.S. in the newly-created nonimmigrant categories. Canadians entering under NAFTA do not even need to obtain visas to come to the U.S. and work.

Later trade treaties with Chile and Singapore, happily nations that send us few migrants, made easy-migration provisions for some residents of those nations; once approved by the Senate (not the whole Congress) these arrangements are beyond Congressional review.

The only international document I know about, and this is not my specialty, that reduced migration, was the odious, ethnocentric “Gentlemen’s Agreement” with Japan more than 100 years ago in which the Japanese government agreed to prohibit its own people from migrating to the U.S.⁵ Otherwise all the treaties run the other way, always leading to more migration to the U.S.

**Commissions.** My concern here is what has been done, on a very minor scale to immigration policy making by an existing commission, and what might be done, on a truly massive scale, by a commission proposed by a major player in immigration policy, Congressman Luis Gutierrez (D IL).⁶

Both of these commissions, the existing one and the proposed one, make binding policy recommendations that have the force of law, if Congress does not overturn them. This is a different concept from that of a long series of advisory commissions, including the grand-daddy
of them all, the Dillingham Commission, of President Taft’s day, and the more recent, and more commendable Jordan Commission. These advisory commissions made detailed suggestions to Congress, but Congress must act on the advice. I have nothing against such bodies.

The existing entity that sometimes makes changes in the law that relate to immigration is the U.S. Sentencing Commission. It has nothing to do with immigration per se but it does make suggested policy changes, for sentencing certain federal crimes. Sometimes these new sentencing policies mean that groups of aliens, previously bound to be deported, do not face that fate because their crimes are no longer viewed as automatic tickets out of the country, or vice-versa.7

What is of interest here is not so much how the Commission’s actions impact alien deportations, which I think is rather minimal, but how Congress reacts to the body’s recommendations: it almost always passively accepts them.

The most fully developed proposed immigration policy commission was in the Chicago Congressman’s Comprehensive Immigration Reform Act for America’s Security and Prosperity Act of 2009 (CIR ASAP, HR 4321). It calls for the establishment of a presidentially-appointed Commission on Immigration and Labor Markets that would make annual recommendations regarding the levels of immigrant and non-immigrant admissions for employment purposes.

Congress would then have 90 days to consider the recommendations; if it does not veto these recommendations, they would be implemented at the start of the next year.8 There does not appear to be any Congressional option to modify the recommendations, it could say yes, it could say no, but it could not amend.

The Migration Policy Institute has pressed for the adoption of a similar approach, though the exact nature of Congressional involvement is less clear than in Gutierrez’ bill; it is very much a “let the experts decided” approach.

My objections to these proposals are two-fold: first, a presidential commission is highly likely to be tilted toward elite opinion, and thus those chosen to serve on it would be, on balance, prone to the more-migration option; secondly, giving Congress ninety days to make a major decision, early in the year as HR 4321 stipulates, is a little like getting the household teenager out of bed at 6:00 a.m. Saturday morning for piano practice.

It can be done, but not easily. Congress, like the teenager, would much rather stay in bed, and staying in bed allows the experts’ recommendations to go into effect.

Territories. The most obviously disastrous delegations of immigration policy relate to careless Congressional decisions to let both the Commonwealth of the Northern Mariana Islands and American Samoa handle their own immigration policies. While this was clearly a mistake in both places, only in the dramatic CNMI case, where notorious garment sweatshops proliferated and were the subject of heavy media coverage, did Congress eventually see the non-wisdom of its action, and extend the INA to Saipan and the nearby islands.9
The population of CNMI increased by a multiple of seven, by close to 700%, in thirty years, as a direct result of this delegation of congressional authority. More migration policies rarely get more massive than this.

I do not argue that any Congressionally-created commission would be as irresponsible, as corrupt, or as ethnocentric as these islands’ politicians proved to be, but their actions are ominous precedents for letting some entity other than the Congress make immigration policy decisions.

**Other Nations.** To round out this set of delegations of authority, Congress has, from time to time allowed other nations to, in effect, expand migration to the U.S.

For example, the U.S., under Visa Waiver Program, decided that citizens of Hungary could come to the U.S. under its lenient provisions; subsequently, Hungary decided that 3.5 million ethnic Hungarians living outside its border, many in nations that did not qualify for VWP, were full-fledged citizens of Hungary, thus eligible for visa waivers.

Congress could have changed the statute to bar such use of VWP, but did not do so. Similarly, a few years ago, some islands that had been British colonies became independent nations and the immigrant admission ceilings under the INA for those ex-colonies shot upwards; again Congress could have done something but did not.

The Hungarian maneuver and the liberation of the one-time island colonies may be minor matters in themselves, but they are additional examples of how indirect policy making and Congressional lethergy play into the hands of the more-migration forces.

---

**End Notes**

1. This paper is based on a longer one by the same author, a Center for Immigration Studies Backgrounder, *Beware of Indirect Immigration Policy Making* CIS, Washington, August 2010; it can be seen at [http://www.cis.org/articles/2010/north-indirect.pdf]; it has a full set of references.

2. I am alluding to the Supreme Court’s decision, largely against state enforcement of federal immigration laws in the Arizona SB 1070 case, and the President’s proclamation on the massive extension of deferred action, once a sparingly used case-by-case mechanism, to large numbers of illegal aliens who came to the U.S. before the age of 16.

3. For a brief summary of these arrangements, see pp. 3-4 of the previously-cited CIS Backgrounder; for a more thorough analysis, see the paper by my CIS colleague, Jessica Vaughan, “Be Our Guest: Trade Agreements and Visas,” Center for Immigration Studies,


5. As I recall, Japan preferred, at the time to limit the movements of its own people to having them barred from the U.S., as was done with the Chinese Exclusion Acts to the Chinese; it is hard to imagine any nation currently agreeing to such an arrangement.

6. This section is based on pp. 5-8 of the CIS Backgrounder.

7. I have no understanding that the Sentencing Commission seeks to change its guidelines to influence immigration outcomes; but recently the State of Washington’s legislature reduced the penalties for some crimes, from, I think, a year to something like 360 days, so that the criminals involved would not be deported.

8. For the full text of the bill and a number of CIS comments on it, see http://cis.org/Amnesty2010/CIRASAP-HR4321

9. See pp. 8-12 of the CIS Backgrounder. Most of the population of the CNMI is on Saipan, the main island; Tinian and Rota are the only other islands with more than a handful of people.

The Samoan tendencies on migration policies are similar to those on Saipan; aliens are regarded, to put it bluntly, as non-equals who are fair game for exploitation. The Civil Rights Revolution never reached these islands, as I learned during a tour of duty with the Department of the Interior’s Office of Insular Affairs in the late 1990's.

10. See pp 12-13 of the CIS Backgrounder.

#  #  #