NATIONAL FOUNDATION FOR AMERICAN POLICY

NFAP POLICY BRIEF » MAY 2009

A COMMISSSION TO REGULATE IMMIGRATION? A BAD IDEA WHOSE TIME SHOULD NOT COME

EXECUTIVE SUMMARY

U.S. employers should oppose any immigration legislation that includes a commission to regulate the future flow of high and low-skilled foreign workers. Such a commission is likely to harm U.S. competitiveness, push more work outside the United States, fail to reduce illegal immigration and will increase the number of immigrants who die each year at the border due to a lack of legal avenues to work in America.

As described in a short book by former Carter Labor Secretary Ray Marshall – and endorsed by the AFL-CIO and Change to Win in a press release – the commission would include 9 members, appointed by the president and members of Congress for 9-year terms, and would possess the authority to set the conditions and annual limits for both high and low-skilled temporary visas and green cards, including the power to eliminate entire visa categories. Its findings and recommendations would become law unless blocked by Congress.

In addition to all current requirements, the commission model endorsed by the AFL-CIO and Change to Win in their press statement would set a new and formidable threshold for admitting foreign workers – a finding of a "certified labor shortage" in an occupation – that its own architect (Ray Marshall) says has not existed in America at any time in recent memory. Therefore, one could conclude if the commission had been functioning over the past two decades, few if any skilled immigrants who have come here to America in the past 25 years would have been allowed into the country.

The labor market is global, not only domestic, a fact ignored in any commission proposal. A key reason a "labor shortage" may not show up in any government data is that employers find "work arounds" and take creative action, such as offshoring, to address an inability to hire people they need. In the technology field, if companies cannot find the individuals they need in the United States they can send the work to be done elsewhere, such as China, or hire people in other countries and expand their labor force abroad. In agriculture, one reason it is difficult to document a labor shortage in agricultural workers is that analyses do not distinguish between legal and illegal workers. Most farm workers are here illegally, according to the Department of Labor. Therefore, a commission would ratify and encourage what many see as undesirable outcomes.

Under the notion that foreign nationals would not be admitted for employment purposes unless "certified labor shortages" are identified by a commission, there appears no room for an employer to hire someone because that individual would make an important and measurable impact on the company. The commission would prevent talented people from being hired *in the United States*. Even if an individual cleared this first hurdle established by the commission, he or she would still have to contend with existing requirements in current law (and potentially new and more restrictive ones) before being admitted to the country.

In addition to its other problems, the commission as proposed by Ray Marshall is likely unconstitutional. Under *Buckley v. Valeo*, the U.S. Supreme Court ruled that a legislative appointee cannot exercise executive branch authority. Another case that may bear on the constitutionality of the Commission proposal is *Bowsher v. Synar*. A number of constitutional law experts consulted confirmed that the commission proposal as described in Ray Marshall's book is unlikely to be upheld as constitutional given the Supreme Court precedents.

One argument offered for a commission is it would keep politics out of immigration policy. A non-political commission in Washington, D.C. is an oxymoron. Elected officeholders would choose all of the members. Lobbying from all sides of the issue would move to these commission members. Employers would be forced to go "hat in hand" to ask if the commission could please certify certain types of employees, while others will lobby the commission to oppose the entry of any workers. A commission won't end lobbying, but simply shift its focus to this new, unelected body of bureaucratic officials. It is ironic to label a commission as nonpolitical when, in fact, the imposition of a commission of this type would be perhaps the most overtly political act in the history of immigration policy – gaining the acquiescence of the AFL-CIO to legalize the status of millions of illegal immigrants in exchange for a new stranglehold on employment-based immigration into the United States.

The Migration Policy Institute (MPI), a Washington, D.C. think tank, has presented an alternative vision of a commission. While the MPI proposal does not come from the purely restrictive framework of the commission proposed by Ray Marshall, it suffers from a number of the same problems. In truth, no advocate of a commission can be confident how it would work in practice. The mandates given to the commission in the MPI report are general enough that commission members would be able to recommend anything they wish based upon personal preference, citing whatever data they desire to conform to their opinions. At best, everything would rest upon who is appointed, a dangerous "roll of the dice" for employers, immigrants and their families.

An earlier commission on immigration, chaired by Congresswoman Barbara Jordan, produced a series of proposals that many family, business, and religious groups viewed as ill conceived and highly political. The Jordan Commission's recommendations to reduce family and employment-based immigration conformed to the views of the then-chairmen of the House and Senate immigration subcommittees and were ultimately rejected by Congress. The commission proposed by Ray Marshall (and the Migration Policy Institute) is far more powerful and represents a far greater threat, since its powers are contemplated to be both operational and permanent.

BACKGROUND

In April 2009, the AFL-CIO and Change to Win announced "The Labor Movement's Framework for Comprehensive Immigration Reform." This announcement was viewed as part of a political compromise – the AFL-CIO would agree not to oppose legalization for up to 12 million illegal immigrants in the United States if it achieved one of the union's long-standing objectives – virtually eliminating employment-based immigration into the United States.

The method chosen to achieve this objective is to establish a commission that would radically redesign employment-based immigration – driving it away from specific employers primarily showing they are paying the appropriate wage to an individual foreign worker – and moving it to broad, difficult-to-achieve findings of "certified labor shortages" so as to prevent low and high-skilled foreign workers and professionals from being hired to work in the United States.

The press release announcing "The Labor Movement's Framework for Comprehensive Immigration Reform" stated that the proposal for a commission to regulate the future flow of workers "was developed in consultation with Former Secretary of Labor Ray Marshall and the Economic Policy Institute."[1] Since the press release contains little substantive information on how the commission is intended to operate, it is necessary to examine the short book *Immigration for Shared Prosperity*, authored by Ray Marshall and released by the Economic Policy Institute, a Washington, D.C. think tank.

DESCRIPTION OF COMMISSION

In the book *Immigration for Shared Prosperity*, Ray Marshall describes the commission as follows: "The United States should create an independent Foreign Worker Adjustment Commission [FWAC] to assess labor shortages and determine the number and characteristics of foreign workers to be admitted for employment purposes. The commission should be led by members appointed to long, non-renewable terms. They should oversee an expert staff of economists, demographers, statisticians, and immigration experts who would work with other agencies as appropriate to determine the need for foreign labor based on analyses of domestic labor supply and demand of workers with appropriate skills and training. The FWAC would recommend employment-based immigration levels, which would become law if Congress did not reject them. . . . Flexibility could be achieved by authorizing the commission to adjust labor supplies to demand within broad limits set by Congress. . . Congress would retain oversight and control, but give the FWAC the flexibility to identify shortages and admit foreign workers within broad limits set by Congress."[2]

In describing the structure of the commission, Marshall writes, “There should be an uneven number of members. The chair and four other members would be chosen by the president, and remaining members would be chosen one each by House and Senate Democratic and Republican leaders. Members would serve for nine years . . . The legislation would require that a report containing the future flow recommendations be submitted to the Congress by a date certain (12 months after enactment) and Congress would be required to act on these recommendations (within one year), otherwise the President would be authorized to implement such recommendations.”

The powers contemplated for the commission are far-reaching and unprecedented: “The FWAC’s determination of the need for short-term foreign workers will set the conditions and numbers for the various visa categories, but the Commission could decide to eliminate these categories altogether.”[3]

Purpose of the Commission is to Redefine Out of Existence the Circumstances Under Which Foreign Nationals Would Be Allowed to Work in the United States

It is clear the goal of the commission is to define out of existence the circumstances under which foreign nationals would be permitted to enter the United States for employment purposes. If someone understands nothing else about the commission proposal it should be this.

It is untrue the commission is intended simply to “set the number” of employment visas. Rather it would fundamentally change employment-based immigration by shifting the focus away from ensuring individual temporary visa holders are paid wages comparable to an American or, conducting individual labor-market tests, such as advertising, in the case of sponsoring a foreign national for permanent residence (a green card).

Instead, in addition to current requirements, employer-sponsored visas would only be issued – even potentially – when an occupation is found to be experiencing a “certified labor shortage” in the United States. As discussed below, this is a new standard that will rarely, if ever, be met. Current rules and regulations (or tighter versions of them) would serve as a last line of defense to prevent the entry of a foreign worker should other means not succeed.

No one should be confused or convinced the commission could be “made to work” for employers. As described in Ray Marshall’s book, the purpose of the commission is *not* to work for U.S. employers. And this would be not only for temporary visas but also for green cards for skilled immigrants.

As described in the Marshall book, the commission would also be authorized to set the number of green cards each year for skilled immigrants. The current quota of 140,000 is so inadequate that waits of 6 to 10 years are the norm. However, given the proposed method the commission would expect to utilize, it is likely skilled green card quotas would be reduced for certain preference categories. Marshall writes, “There is a strong case for strict limits on the number of temporary workers but for an expanded number of legal permanent residents or “green card” visas for occupations that the FWAC [the commission] determines *to be in short supply*.”[4]

However, there is the rub. Unless the commission determines an occupation “to be in short supply” or, in other words, finds a “certified labor shortage” for an occupation, both the potential immigrant and the U.S. employer will be out of luck. It is evident from Marshall’s book that skilled immigrants and employers in general will almost always be out of luck at the hands of the commission.

Marshall and his supporters would like to establish a threshold for the admission of immigrants and temporary visa holders that Marshall himself says has not been met during the past 25 to 30 years. He goes through example after example of instances where there have been no “labor shortages” but can’t seem to find any cases where such shortages actually happened.

Although Marshall states the commission would need to find “certified labor shortages” to admit people, he argues there is no evidence there have been any shortages of science and engineering professionals over the past 25 years.[5] “Numerous predictions of ‘severe shortages’ of these workers have proved wrong, even those made during the 1980s by the highly respected National Science Foundation,” he writes. “However, neither earnings nor unemployment patterns indicated a science and engineering shortage.”[6]

In citing how the quota on H-1B visas has frequently been used up within the first week of the visas becoming available, Marshall writes, “However, this mismatch only tells us there is a high demand for indentured labor, not that there is a real shortage of qualified workers.”[7]

In short, Marshall sets a standard for admitting foreign nationals that, at least according to him, has not existed in America at any time in recent memory. Therefore, one could conclude if the commission had been functioning over the past two decades, few if any skilled immigrants who have come here to America in the past 25 years would have been allowed into the country.

America would have been poorer and unlikely to have maintained its competitive edge as a technology leader in the world if such a commission had previously existed. There is no reason to think its existence going forward would do anything but harm American competitiveness and drive more work outside the United States. Half the

technology companies in Silicon Valley were started by immigrants, as well 1 in 4 venture-backed public companies since 1990.[8] It is hard to see how such numbers would have been replicated if the highly restrictive regime proposed by Marshall had governed the admission of skilled immigrants.

If the standard of "certified labor shortages" has not been met for high-skilled immigrants, there is no evidence Marshall believes we have seen such shortages for lesser-skilled workers.

As noted earlier, finding that a "labor shortage" exists before a foreign national can be hired to work in the United States is not the current standard under immigration law. And for good reason. Such a standard would be extremely difficult to achieve based on available information. Moreover, the market for labor is global, not merely domestic, so any analysis focused only on what is happening inside the country ignores the reality of the global economy.

Government data are not good for determining shortages. Marshall even concedes this, writing at one point, "Assessments of labor shortages are plagued by the paucity of reliable data and realistic definitions of labor shortages."[9] He also states, "Objection: There are no accurate and timely data to enable the FWAC to measure labor shortages and no definitions and measures suitable for this purpose. Response: This is a valid concern."[10]

In a rather extraordinary passage, Marshall goes on to state that Congress, U.S. employers and the American economy should put their faith in the commission to eventually come up with something that might be workable. In other words, the stated purpose of the commission is supposed to revolve around concepts that Marshall himself cannot define, nor can anyone be sure how they will be defined or carried out but nevertheless we should place the fate of U.S. competitiveness, U.S. immigration policy and hundreds of thousands of future workers into this commission's hands. He writes, "Even though there are no generally accepted measures, economists have developed concepts that could be refined for this purpose. We therefore could proceed in two stages with the FWAC: a) an adequate period of time to develop and refine concepts and measures and b) an implementation stage. Congress could authorize the FWAC, allow it to develop concepts and measures as well as operating procedures, and then authorize it to begin operations."[11] Imposing a commission on U.S. employers and the economy would represent the blindest leaps of faith.

When one ventures into the real world of business and employment numerous questions arise. To cite just two: If a technology company needs to hire an individual with special expertise in quantum cryptography, how would it document a shortage in a profession where there may only be a dozen or so individuals in the world the employer would consider viable candidates? For lesser skilled jobs, would companies in Maryland be able to document a shortage of crab pickers when it is the type of job that is difficult to fill precisely because of its seasonal nature?

As many questions as there are types of employers in the United States can be raised as to how any definition of labor shortages would function.

CONCEPT OF "CERTIFIED LABOR SHORTAGES" OVERLOOKS OUTSTANDING AND DESIRABLE PERSONNEL

Under the notion that foreign nationals would not be admitted for employment purposes unless "certified labor shortages" are identified for their occupation by a commission, there appears no room for an employer to hire someone because that individual would make an important and measurable impact on the company. The commission would prevent talented people from being hired *in the United States* unless the theoretical standard of a "certified labor shortage" in an entire occupation is met. Of course, that does not mean U.S. employers cannot hire such individuals and place them in other countries. Larger employers will do that if possible, moving other work with those talented people. Smaller employers, or those in industries not amenable to work being done outside the United States will be forced to do without such talented people, harming growth and competitiveness. If U.S. companies are in a global war for talent, then allowing this commission to become law would signal a surrender in that war.

"Even if, despite all practical odds, a commission could come up with the 'magic data' it will be two to three years old by the time it is formulated and, potentially, Congress votes on it," said Lynn Shotwell, executive director, American Council on International Personnel (ACIP), in Washington, D.C. " We have many examples of where this would miss the market, e.g., the dot com boom and bust, all of the new occupations created by the Internet, bioinformatics, green energy, etc. How do you begin to document shortages in emerging or quickly changing occupations? It's not possible and will encourage companies to hire people with cutting edge skills outside the United States, where hiring decisions won't need to pass through the commission's gauntlet."[12]

ANOTHER KEY PROBLEM WITH COMMISSION: EMPLOYERS "WORK AROUND" THE UNAVAILABILITY OF WORKERS IN WAYS THAT WILL NOT APPEAR IN GOVERNMENT DATA

The commission would ratify and encourage what many see as undesirable outcomes. A key reason a "labor shortage" may not show up in any government data is that employers take creative action to address an inability to hire people they need. For example, in the technology field, if companies cannot find the individuals they need in the United States they can send the work to be done in another country or hire people and place them outside the U.S. A commission would continually determine no "certified labor shortage" exists because companies have made the decision to expand abroad rather than in America due to restrictive visa policies.

At the lower end, one reason it is difficult to document a labor shortage in agricultural workers is that analyses do not distinguish between legal and illegal workers. Most farm workers are here illegally, according to the Department of Labor. Therefore, a commission would likely conclude there is no need for a better visa system for agricultural workers because it cannot document a shortage, creating a situation that encourages even more illegal immigration.

Employers can find ways to work out difficulties presented by restrictive U.S. laws. For example, some U.S. farmers have dealt with the difficulty of finding workers by leasing farm land in Mexico and hiring Mexicans in that country, another type of "work around" that would not show up in government data. At the high end, more work will be transferred to India, China and Europe.

The bottom line: the commission would create a cycle that will encourage illegal immigration and move more work offshore.

LOADED LANGUAGE, LOADED RESULTS

The loaded language in Marshall's book makes it evident the author holds any use of temporary visas in disdain. All those who use a temporary visa are "indentured," according to Marshall. This is far from the truth. "Indentured servants" in the American colonies worked for four years or more without pay in exchange for passage to a new land. Nothing like that takes place in any temporary visa category today, where wages comparable to U.S. workers are required and people are free to leave their employer or the country at any time. Ironically it is the absence of legal visas that forces some people into indentured status at the hands of human smuggling rings.

Marshall displays an unfamiliarity with certain aspects of U.S. immigration law, writing at one point, "H-1B visa holders should be allowed to change employers after 18 months…"[13] In fact, H-1B professionals are allowed to change employers anytime they wish. They do not need to wait 18 months. An H-1B visa holder can change employers so long as another employer wants to hire him and files the proper paperwork. Such changes of employer are common and belie the notions perpetuated about H-1B visa holders.

Overall, the tone of Marshall's book makes it seem as if people born outside the United States offer no value to an American employer unless he or she is underpaid or virtually enslaved as an "indentured servant." This is both offensive and factually wrong. "I was an H-1B visa holder for many years and I never felt like an indentured servant and I haven't found anyone on an H-1B who feels he is indentured," said Aman Kapoor, president of Immigration Voice. "An H-1B can always go home and can always change employers. It may take a few weeks

but it happens all the time. Placing a label like 'indentured servant' is done deliberately to attach a negative label to a visa category, making it appear evil or bad. But it doesn't conform with the real world."[14]

MARSHALL MISDIAGNOSES PROBLEM WITH 1986 IRCA LEGISLATION

Ray Marshall misdiagnoses the problem with the 1986 Immigration Reform and Control Act (IRCA) by failing to mention that the legislation's lack of temporary visas was the main reason it did not reduce illegal immigration. "IRCA's main technical defect was the lack of a secure worker identity and work authorization system, without which all other control measures were less effective and often counterproductive," according to Marshall.[15] By reducing the use of temporary visas not only would the commission fail to limit illegal immigration, it will actually make the problem worse.

Marshall ignores certain facts in making his commission proposal. For example, at one point, Marshall approvingly quotes Princeton University's Douglas Massey as pointing out immigration enforcement alone has been ineffective, but then fails to mention that Massey advocates more temporary visas for Mexican workers as the real solution to illegal immigration.

Marshall writes, "So far, however, border enforcement has not been very effective, and, according to some experts, has even been counterproductive. For example, immigration specialist Douglas Massey (2005) argues that as Border Patrol budgets went up, apprehension declined. As fences are built in urban areas, people cross at more remote and physically hazardous places. Stronger enforcement causes undocumented immigrants to stay longer. He concludes, 'A border policy that relies solely on enforcement is bound to fail.'"[16]

However, Marshall fails to include Massey's next sentence. Here is the complete passage from Massey: "A border policy that relies solely on enforcement is bound to fail. *Congress should build on President Bush's immigration initiative to enact a temporary visa program that would allow workers from Canada, Mexico, and other countries to work in the United States without restriction for a certain limited time.*"[17]

COMMISSION PROMISES MORE DEATHS AT THE BORDER AND NO REDUCTION IN ILLEGAL IMMIGRATION

There is no question making fewer temporary visas available for low-skilled workers will perpetuate the current deadly situation for immigrants crossing the U.S.-Mexico border. Those who oppose increased legal avenues for low-skilled workers from Mexico and Central America should do so knowing full well their proposals will increase misery, not alleviate it.

A crucial flaw in the commission's setup is the desire to reduce or eliminate temporary visas when, in the context of lesser skilled workers, they hold the best prospect for saving lives and reducing illegal immigration. By making it even more difficult for lower skilled workers to come to America legally, the plan is likely to increase the number of migrant deaths each year.

FATAL CONCEIT

The belief that a small group of wise men and women can divine the labor needs for employers in a country with over 300 million people is contradicted by human history. This form of central planning is no more likely to succeed at choosing workers for America than Gosplan could choose shoes for Soviet consumers. The commission will lack the information necessary because, among other things, hiring decisions are unique to individual employers.

No group of appointed individuals will be capable of setting annual numbers that reflect the labor needs of employers, which is why a market-based approach is preferable. While current visa limits for categories such as H-1B and H-2B (seasonal, non-agricultural workers) have been set so low by statute that employers have used up the quotas before or during most fiscal years in recent memory, Ray Marshall expects the commission to at most maintain if not significantly lower these current quotas.

A current temporary visa category, L-1, is used by employers to transfer into the United States from abroad managers, executives and professionals, and currently has no annual quota. How could a commission decide how many employees even a single U.S. company should transfer into the United States in a given year, let alone all of the companies that make up the entire U.S. economy?

A FAUSTIAN BARGAIN THAT THREATENS FAMILY IMMIGRATION?

Supporters of family immigration may unintentionally enter into a Faustian bargain if they support a commission out of a belief it will help ease the way for the legalization of current illegal immigrants. While Ray Marshall has written primarily about the commission deciding on employment-based immigration, it is perhaps naïve to think that family preference categories will not be placed on the chopping block by this commission. If Congressional and other supporters of the commission are arguing (incorrectly) that it is simply a non-political, objective group of experts setting numbers, then how could these commission supporters oppose an amendment to allow such ongoing, non-political and objective analysis on the impact of family immigration levels on U.S. workers?

COMMISSION LIKELY UNCONSTITUTIONAL

On top of all its other problems, the commission as proposed by Ray Marshall is likely unconstitutional. Under *Buckley v. Valeo*, the U.S. Supreme Court ruled that a legislative appointee cannot exercise executive branch authority. But that is what is envisioned for the commission proposed by Marshall. As noted, according to the book, *Immigration for Shared Prosperity*, "The chair and four other members would be chosen by the President, and remaining members would be chosen one each by House and Senate Democratic and Republican leaders."[18] Among the duties of these commission members would be to "set the conditions and numbers of the various visa categories" and potentially eliminate entire categories of visas.[19] Elsewhere, Marshall writes, "The FWAC would recommend employment-based immigration levels, which would become law if Congress did not reject them."

In *Buckley v. Valeo* (1976), the U.S. Supreme Court struck down as unconstitutional the powers of the Federal Election Commission due, in part, to its members being appointed by Members of Congress. The decision cited the District Court's finding:

> The Commission's composition as to all but its investigative and informative powers violates Art. II, 2, cl. 2. With respect to the Commission's powers, all of which are ripe for review, to enforce the Act, including primary responsibility for bringing civil actions against violators, to make rules for carrying out the Act, to temporarily disqualify federal candidates for failing to file required reports, and to authorize convention expenditures in excess of the specified limits, the provisions of the Act vesting such powers in the Commission and the prescribed method of appointment of members of the Commission to the extent that a majority of the voting members are appointed by the President pro tempore of the Senate and the Speaker of the House, violate the Appointments Clause, which provides in pertinent part that the President shall nominate, and with the Senate's advice and consent appoint, all "Officers of the United States," whose appointments are not otherwise provided for, but that Congress may vest the appointment of such inferior officers, as it deems proper, in the President alone, in the courts, or in the heads of departments. Hence . . . the Commission, as presently constituted, may not because of that Clause exercise such powers, which can be exercised only by "Officers of the United States" appointed in conformity with the Appointments Clause, although it may exercise such investigative and informative powers as are in the same category as those powers that Congress might delegate to one of its own committees.[20]

Another case that may bear on the constitutionality of the Commission proposal is *Bowsher v. Synar*. A number of constitutional law experts consulted confirmed that the commission proposal as described in Ray Marshall's book is unlikely to be upheld as constitutional given the Supreme Court precedents.

ALTERNATIVE COMMISSION MODEL CARRIES MANY OF THE SAME RISKS

The Migration Policy Institute (MPI), a Washington, D.C. think tank, has presented an alternative vision of a commission. While the MPI proposal does not come from the purely restrictive framework of the commission proposed by Ray Marshall, it suffers from a number of the same problems. The MPI authors concede that it would be a bad idea to rely on "shortage analysis" to set visa levels, writing, "This is because, in brief, a shortage

analysis assumes that at any given point in time, the United States' labor market 'needs' are identifiable and static. Both assumptions are highly questionable. Shortage analysis is also fraught with methodological difficulties and fails to account for the fundamentally dynamic process by which the labor market adjusts to changes in labor supply."[21]

In pointing out the limitations of a "shortage analysis," the MPI authors state it "should not form the basis for setting visa limits." On the other hand, the MPI authors also write that such analysis "will have a place in the process of creating an overall assessment of immigration's role in the labor market."[22] In the end, the methodology likely used to set immigration levels would be whatever the appointed commissioners and their staffs want it to be.

Under the MPI model, a commission would still wield enormous and largely unaccountable power. It would not simply issue recommendations that Congress could ignore, accept or reject, so it is not true Congress will retain its current authority on immigration policy. Rather, under the MPI proposal, after the commission submits an annual report and recommendations, "unless Congress acted to maintain existing statutory baseline labor market immigration levels, the president would issue a formal Determination of New Levels, adjusting employment-based green-card quotas and preferences and temporary worker visa limits for the coming fiscal year."[23]

It is difficult to force a vote on legislation in Congress. To allow recommendations to become law unless they are rejected provides enormous power to a commission. If the much-maligned Jordan Commission, which proposed restrictive measures on family, refugee and employment-based immigration, had possessed such power, then it's much more likely its recommendations would have become law.

In truth, no advocate of a commission can be confident how it would work in practice. The mandates given to the commission in the MPI report are general enough that commission members would be able to recommend anything they wish based upon personal preference, citing whatever data they desire to conform to their opinions.

Even though the Migration Policy Institute is approaching the commission concept in more of a good faith model than other advocates of a commission, its proposal still presents many of the same risks. It still assumes that with sufficient data, a well-staffed group of public-spirited individuals can make a form of central planning work successfully for the nation. It also assumes that politics will not play a role in the appointment of commission members (the AFL-CIO and other unions spent $300 million on the 2008 elections) or that intense lobbying will not shift to the commission.[24] Without relying on a market-based approach, blind faith is required the commission will come up with methods or standards for something difficult, if not impossible to measure, particularly given we

live in a world where the demand for goods, services and labor is global, not purely domestic. And there is no assurance that family immigration will not be placed at risk in the hands of an unaccountable commission.

If the Migration Policy Institute or any other nongovernmental research group wishes to form a commission and send recommendations to Congress on the annual level of employment-based immigration that would be fine. However, to give a commission the immense authority to have such recommendations become law unless Congress could pass a bill within a certain timeframe provides the unelected and unaccountable too much power.

Conclusion: "De-Politicized" Commission is Only About Politics

While a commission is being marketed as a de-politicized body, in fact, the imposition of a commission of this type would be perhaps the most overtly political act in the history of immigration policy – gaining the acquiescence of the AFL-CIO to legalize the status of millions of illegal immigrants in exchange for a new stranglehold on employment-based immigration into the United States.

A non-political commission in Washington, D.C. is an oxymoron. Elected officeholders would choose all of the members. Lobbying from all sides of the issue would move to these commission members. Employers would be forced to go "hat in hand" to ask if the commission could please certify certain types of employees, while others will lobby the commission to oppose the entry of any workers. A commission won't end lobbying, but simply shift its focus to this new, unelected body of bureaucratic officials.

An earlier commission on immigration, chaired by Congresswoman Barbara Jordan, produced a series of proposals that many family, business, and religious groups viewed as ill conceived and highly political. The Jordan Commission's recommendations to reduce family and employment-based immigration conformed to the views of the then-chairmen of the House and Senate immigration subcommittees and were ultimately rejected by Congress. The commission proposed by Ray Marshall (and MPI) is far more powerful and represents a far greater threat, since its powers are contemplated to be both operational and permanent.

A commission to regulate employment-based temporary and permanent visas cannot be made to "work." U.S. employers should oppose any immigration legislation that includes a commission to regulate the future flow of high and low-skilled foreign workers. Such a commission will likely harm U.S. competitiveness, push more work outside the United States, fail to reduce illegal immigration and will increase the number of immigrants who die each year at the border due to a lack of legal avenues to work in America.

END NOTES

[1] "Change to Win And AFL-CIO Unveil Unified Immigration Reform Framework," Press Release, Change to Win and AFL-CIO, April 14, 2009.

[2] Ray Marshall, *Immigration for Shared Prosperity*, Economic Policy Institute, Washington, D.C., 2009, pp. 22-23, 25.

[3] Ibid., p. 39.

[4] Ibid., p. 45. Emphasis added.

[5] Ibid. p. 25

[6] Ibid., p. 25.

[7] Ibid., p. 23.

[8] Vivek Wadhwa, AnnaLee Saxenian, Ben Rissing, and Gary Gereffi, "Skilled Immigration and Economic Growth," *Applied Research in Economic Development*, vol. 5, issue 1, May 2008, p. 7; Stuart Anderson and Michaela Platzer, *American Made: The Impact of Immigrant Entrepreneurs and Professionals on U.S. Competitiveness*, National Venture Capital Association, November 2006, p. 6.

[9] Marshall, p. 23.

[10] Ibid., p. 25

[11] Ibid., p. 25.

[12] Interview with Lynn Shotwell, ACIP.

[13] Marshall, p. 43.

[14] Interview with Aman Kapoor, President, Immigration Voice.

[15] Ibid., p. 10.

[16] Ibid., pp. 28-29.

[17] Emphasis added. Douglas Massey, *Backfire at the Border: Why Enforcement Without Legalization Cannot Stop Illegal Immigration*, Cato Institute, Center for Trade Policy Studies, Trade Briefing Paper No. 29, June 13, 2005, p. 1. Massey's proposal differs slightly in detail from that presented in this paper but the thrust is similar. Instead of a 5-year visa that could be renewed after a year out of the country, Massey proposes a 2-year visa, with a renewal once in a lifetime. But Massey seems to compensate for the shorter visa time by emphasizing a significant increase in green cards for Mexicans to enable them to stay permanently in the U.S.

[18] Ray Marshall, Immigration for Shared Prosperity, Economic Policy Institute, Washington, D.C., 2009, p. 28.

[19] Ibid., p. 39. "The FWAC's [Foreign Worker Adjustment Commission] determination of the need for short-term foreign workers will set the conditions and numbers for the various visa categories, but the Commission could decide to eliminate these categories altogether." Elsewhere, Marshall writes, "The FWAC would recommend employment-based immigration levels, which would become law if Congress did not reject them."

[20] *Buckley V. Valeo*, 424 U.S. 1 (1976).

[21] Demtrios G. Papademetriou, Doris Meissner, Marc R. Rosenblum, and Madeleine Sumption, *Harnessing the Advantages of Immigration for a 21st-Century Economy: A Standing Commission on Labor Markets*, Economic Competitiveness, and Immigration, Migration Policy Institute, Washington, D.C., May 2009, pp. 12-13.

[22] Ibid., p. 12.

[23] Ibid., p. 16.

[24] Kris Maher, "AFL-CIO to Endorse Obama, Start Spending," *Wall Street Journal*, June 25, 2008.

ABOUT THE NATIONAL FOUNDATION FOR AMERICAN POLICY

Established in the Fall 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Virginia focusing on trade, immigration and related issues. The Advisory Board members include Columbia University economist Jagdish Bhagwati, Ohio University economist Richard Vedder and other prominent individuals. Over the past 24 months, NFAP's research has been written about in the *Wall Street Journal*, the *New York Times*, the *Washington Post*, and other major media outlets. The organization's reports can be found at www.nfap.com.