Post-1965 U.S. Immigration Policy:
A Revival of National Origins-Based Discrimination?

NumbersUSA Education and Research Foundation
INTRODUCTION

The 1965 Amendments\(^1\) to the Immigration and Nationality Act of 1952\(^2\) were intended to end to a long history of national origins-based discrimination in United States immigration policy. While it may be argued that the 1965 Act marks the end of national origins-based discrimination as a central feature of this country’s immigration policy, it cannot be said to have ended all such discrimination in our overall immigration system. In fact, this paper posits the view that 1965 marked the beginning of a new form of national origins-based discrimination in immigration policy. This new form is embodied in a plethora of piecemeal immigration laws that base admission to or continued residence in the United States exclusively and explicitly on nationality.\(^3\)

Considerations of national origin unquestionably play an important, and arguably legitimate, role in United States immigration policy. Current U.S. immigration law, for example, imposes a per-country limit of about 26,000\(^4\) on annual admissions of family- and employment-based immigrants. It is difficult to argue that this use of national origin in immigration law is

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\(^3\) Although “national origin” is not necessarily the equivalent of “nationality,” since immigrants may have been born in one nation (their nation of origin), but then become citizens of another (their nationality) prior to immigrating to the United States, the two terms will be used interchangeably in this paper.

\(^4\) The annual per-country limit is equal to seven percent of the total number of preference visas (family-based plus employment-based visas) available in any given year; the maximum number of available visas for any dependent area is two percent of all preference visas. Exceptions to the per-country limits are allowed if unused visas are available. Immigration Act of 1990 § 102, as amended, 8 U.S.C. § 1152(a) (2000).
discriminatory since it applies equally to all countries, and it applies only to voluntary (i.e., family- and employment-based) immigrants and not to involuntary ones such as refugees or asylees. In theory, the per-country limit prevents any particular nationalities from dominating the immigrant flow to the United States to the exclusion of other nationalities, so it is justified as a mechanism that creates a level playing field for would-be immigrants from all nations – at least for preference visas.

Thus, the premise of this paper is not to suggest that national-origin considerations should be prohibited from playing any role in immigration law, but rather to question the judiciousness and to explore the potential implications of immigration laws that grant immigration benefits unequally and explicitly on the basis of national origin. After providing a brief history of national origins-based discrimination in U.S. immigration law prior to 1965, I will examine the main provisions in the 1965 Amendments that were designed to remedy such discrimination. I then will survey the major national origins-based immigration laws that have been enacted since 1965, in order to demonstrate the accelerating trend toward the new form of discrimination that conditions immigration benefits on nationality. I also will explore some of the driving forces behind this legislative trend by taking a more in depth look at two examples of the new form of national origins-based discrimination – the diversity program enacted as part of the 1990 Immigration Act\textsuperscript{5} and the Nicaraguan Adjustment and Central American Relief Act of 1998.\textsuperscript{6} Finally, I will speculate on the future implications of this trend, in terms of its impact on the cohesiveness of U.S. policy, on the legislative system, and on the size of the immigrant flow.


\textsuperscript{6} Pub. L. No. 105-100, 11 Stat. 2160 (codified as amended in scattered sections of 8
to the United States.

**A BRIEF HISTORY OF NATIONAL ORIGINS-BASED EXCLUSION IN U.S. IMMIGRATION LAW PRIOR TO 1965**

At the signing of the Declaration of Independence in 1776, the population of the United States was comprised of three main groups: the white, European settlers and pioneers who had colonized North America; blacks who had been brought to America from Africa as slaves or indentured servants beginning in 1619; and Native Americans. At the time of the first census in 1790, English, Scots and Scotch-Irish accounted for 75 percent and Germans for another eight percent of the total U.S. population of 3,227,000. British, Irish and German immigrants continued to comprise the vast majority of the newcomers to the United States through 1860. Until about that time, most immigrants came from rural farming backgrounds and were drawn to America by the easy availability of land and the dominance of agriculture as the main industry.

Beginning around mid-century, however, the composition of the immigrant flow began to change. A growing share of the new immigrants were unskilled workers from cities who were drawn by the promise of jobs in America’s emerging manufacturing, mining, trade, construction

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8 *Id.* at 581.


10 *Id.* at 52.
and service industries.\textsuperscript{11} And while the majority of immigrants still came from Great Britain, Ireland and Germany, an increasing number came from Southern and Eastern Europe, China and South America.\textsuperscript{12}

During the 1850s, for example, some 45,000 Chinese entered newly established California in response to the discovery of gold in 1848. By the 1860s, Chinese immigrants represented almost one-third of all miners in the western states of America. Chinese immigration to California accelerated in the 1860s due to the demand for Chinese as contract labor for the construction of the transcontinental railroad. By 1870, Chinese represented the largest ethnic component of the foreign-born labor force in that state.\textsuperscript{13} Because Chinese immigrants were viewed as hard workers who were willing to work for low wages and in substandard working conditions, other workers began to object to their employment as a form of unfair labor competition. Anti-Chinese riots in several western cities and the efforts of labor unions protesting the use of Chinese-immigrant workers as strikebreakers brought the issue to national prominence.\textsuperscript{14} The result was the enactment by Congress of the first national immigration law to discriminate against would-be immigrants on the basis of their national origin.

\textsuperscript{11} \textit{Id.} at 59.
\textsuperscript{13} \textsc{Briggs, supra note 9, at 61.}
\textsuperscript{14} \textit{Id.} at 62. \textsc{See also Roy Beck, The Case Against Immigration: The Moral, Economic, Social, and Environmental Reasons for Reducing U.S. Immigration Back to Traditional Levels} 43 (1996).
The Chinese Exclusion Act, originally passed in May 1882, suspended the immigration of Chinese workers for 10 years, authorized the deportation of any Chinese in the United States illegally, and barred Chinese from naturalization. These provisions were extended periodically until their repeal in 1943.

Not long after the Chinese Exclusion Act took effect, the Supreme Court upheld Congress’s ability to discriminate on the basis of national origin in the admission of immigrants into the United States. The Court held that “[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution.”

As industrialization continued in earnest in the late 1800s and early 1900s, immigration from Southern and Eastern Europe and other non-traditional areas increased. More and more native-born workers began to believe that the large number of new immigrants adversely affected their wages and working conditions, and so became increasingly skeptical of the relatively open U.S. immigration policy.

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15  22 Stat. 58.
17  See, e.g., Chae Chan Ping v. United States, 130 U.S. 581 (1889).
18  Id. at 609.
20  BECK, supra note 14, at 43-45.
21  In addition to Chinese immigrants, U.S. immigration law at the time also excluded prostitutes, convicts, paupers and those with certain contagious diseases; see 18 Stat. 477, 22 Stat. 214 and 26 Stat. 1084. Otherwise, however, there were very few restrictions on admission. 1996 STATISTICAL YEARBOOK, supra note 19, at A.1-1 - A.1-5.
In the meantime, sugarcane growers in Hawaii, most of whom were U.S. citizens, had begun recruiting Japanese immigrants to fill the jobs for which Chinese workers were no longer available. By 1898, Japanese immigration to Hawaii had grown so rapidly that the U.S. government, fearing that Japan would take control of the islands, unilaterally annexed them. Japanese immigrants soon began to arrive in large numbers on the U.S. mainland. Like their Chinese predecessors, these Japanese immigrants worked long hours for low wages in poor conditions, and they too were used as strikebreakers. Following several violent labor disputes, the United States and Japan in 1908 reached a diplomatic accord, known as the “Gentlemen’s Agreement,” under which the United States agreed not to pass legislation barring the immigration of Japanese and Japan agreed to stop issuing passports to Japanese seeking to go to the United States to live or work.22

Immigration to the United States from other countries surged during this time, however. The first decade of the 20th Century marked the peak of the “Great Wave” of immigration23 – almost 8.8 million immigrants entered the country during this decade, a record not to be surpassed until the last decade of the 20th Century.24 By 1910, public attitudes toward immigration had soured significantly. In 1911, an Immigration Commission, known as the Dillingham Commission after its chairman, Senator William Dillingham of Vermont, issued a report that affirmed the public’s fears. The Commission, established by Congress in 1907,25

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22 BRIGGS, supra note 9, at 63.

23 1996 STATISTICAL YEARBOOK, supra note 19, at 26-27.


25 Immigration Act of 1907, 34 Stat. 898
found that the huge number of new immigrants had had an adverse impact on wages, employment levels, working conditions and union organizing efforts, and that the country was having an increasingly difficult time assimilating them.26

Six years after the issuance of the Dillingham Commission’s report, in an atmosphere of wartime nationalism, isolationism and economic uncertainty, Congress responded. Asian immigrants were the easiest targets for politicians trying to assuage their constituents’ fears, so the exclusion of Chinese immigrants was expanded to include all other Asian/Pacific Islanders by the Act of 1917,27 which declared inadmissible as immigrants all natives of the Asia-Pacific triangle, referred to as the “barred zone.”

In 1921, Congress passed the first immigration law to set numerical limits on newcomers. These limits were based on national origin. The so-called Quota Law of 192128 set a ceiling of 358,000 on immigration for the following year and provided that the number of new immigrants of any nationality would be limited to three percent of the foreign-born population of that nationality who were in the United States as of the census of 1910. The effect of this law, of course, was to restrict immigration from almost all countries except those of Northern and Western Europe. Certain professionals, artists, ministers, professors and domestic servants were admitted as “non-quota” immigrants, and so were not subject to this restriction.

The Quota Law of 1921 was enacted as a temporary measure designed to insure an end to


28 42 Stat. 5.
the record levels of immigration that the country had recently experienced. In the aftermath of World War I, millions of Europeans had been displaced; poverty, hunger and disease were rampant throughout Europe. Many Americans feared that another “Great Wave” of immigrants would overwhelm this country’s struggling economy and its social fabric if immigration laws were not amended to restrict the number of newcomers. The provisions of the Quota Law were extended for another two years by the Act of May 11, 1922.

Faced with fears that, upon the expiration of this law, “the movement to our shores of the largest migration of peoples in the history of the world may be expected to begin on July 1, 1924,” Congress passed the Immigration Act of May 26, 1924, which permanently established the national origins quota system. Immigrants from Eastern Hemisphere countries would be admitted (if at all) as “quota” immigrants, subject to the national origins quota system; immigrants from Western Hemisphere countries, on the other hand, would be admitted as “non-quota” immigrants not subject to any numerical limitations. For the first three years after it took effect (later extended to five years), the annual quota for each nationality was two percent of the foreign-born population of that nationality enumerated in the 1890 census, with an overall

29 During the peak years of the “Great Wave” – 1903-1914 – 11.8 million immigrants entered the United States; the total population of the United States at the time of the census of 1900 was just under 76 million. 1996 STATISTICAL YEARBOOK, supra note 19, at 25; Campbell J. Gibson & Emily Lennon, Historical Census Statistics on the Foreign-born Population of the United States: 1850-1990, Working Paper 29, U.S. BUREAU OF THE CENSUS, Table 1 (1999).

30 H. REP. NO. 1365, 82nd Cong. (1952) (as published on Westlaw).

31 42 Stat. 540.

32 H. REP. NO. 1365, supra note 30.

annual immigration quota of 164,667. By using the 1890 census instead of the 1910 census (the Quota Law of 1921 used the latter), immigrants from Northern and Western Europe were given an even more decisive advantage, since their predecessors represented a larger portion of the 1890 pre-Great Wave U.S. population. Ironically, by using the 1890 census as the basis of the national-origins quotas, immigrants from Germany were treated more favorably than immigrants from Yugoslavia, Poland, Russia and other countries with which the United States was allied during WWI. This quota system reduced immigration from Southern and Eastern Europe to 15.3 percent of total immigration from 44.6 percent.35

Beginning in 1929, the annual quota for each nationality was the number that had the same relation to 150,000 as the number of the U.S. population claiming that national origin had to the total U.S. population enumerated in the 1920 census, with a minimum quota of 100 for all non-excluded nationalities. Thus, the system was based not on the number of foreign-born residents counted in the census, but rather on the self-identified national origins of all people counted in the census.

This system increased the share of Southern and Eastern European and certain other “non-traditional” immigrants. Would-be immigrants from the Asia-Pacific triangle, however, were still inadmissible to the United States under the 1924 Act because it carried forward the provisions of the Chinese Exclusion Act and the Immigration Act of 1917. The 1924 Act went even further, though, by making inadmissible for immigration any persons who were ineligible for naturalization. Beginning with the very first law providing for the naturalization of aliens in

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34 45 Stat. 400.
35 H. REP. NO. 1365, supra note 30.
1790, the process had been limited to “white persons.” In 1870, following ratification of the Fourteenth Amendment, eligibility for naturalization was extended to aliens of African nativity and to those of African descent. Asians, on the other hand, remained ineligible as they were not considered “white,” and so under this new law, they, along with any other “non-whites,” were excluded from the United States. Japan protested – though without effect – the enactment of this provision of the 1924 Act, saying that by effectively codifying a ban on Japanese immigration, the United States had breached the “Gentlemen’s Agreement” of 1908.

The Immigration Act of 1924 remained in effect until 1952. There were, however, some important modifications in America’s policies of exclusion. In 1943, the Chinese Exclusion Act effectively was repealed by a law making Chinese eligible for naturalization and establishing an annual immigration quota of 105 for Chinese nationals. In 1946, Filipinos and Indians were made admissible as quota immigrants and granted eligibility for naturalization. In 1948, Congress passed the Displaced Persons Act, which, as amended, provided for the admission of more than 400,000 people displaced as a result of World War II. Poles, representing about

36 1 Stat. 103.

37 16 Stat. 254.

38 See, e.g., Ozawa v. United States, 260 U.S. 178 (1922) (holding that a Japanese immigrant, as a non-white, could not naturalize); and United States v. Thind, 261 U.S. 204 (1923) (holding that an Indian immigrant was non-white, and so ineligible for naturalization).

39 H. REP. NO. 1365, supra note 30.

40 57 Stat. 600.

41 60 Stat. 1353.


43 HOUSE COMM. ON THE JUDICIARY, supra note 7, at 586.
one-third of admissions, were the largest group to benefit from the Act, followed by ethnic Germans.

In 1952, Congress passed a comprehensive new immigration law, the Immigration and Nationality Act (INA), which brought immigration and naturalization policies under one statute for the first time, and which serves as the basis of current immigration law. The INA retained many of the substantive features of earlier laws, including the national origins quota system, but it made significant changes to them. Most importantly, the INA eliminated race as a bar to naturalization and immigration. All immigrants were made eligible for naturalization on an equal basis and immigration quotas were established for those nations whose nationals previously had been excluded, including Japan, Korea, Indonesia and others. The national origins quota system was retained as “a rational and logical method of numerically restricting immigration in such a manner as to best preserve the sociological and cultural balance of the United States.”

During the 1950s, a variety of laws were passed in an effort to address the huge numbers of refugees left in Europe as a result of World War II and to provide for the admission of escapees from Communist countries. The last explicitly national origins-based law to be passed before 1965 was a result of this effort: the Act of July 25, 1958 allowed some 30,000

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45 S. REP. NO. 1515, at 455 (1950).


47 72 Stat. 419.
Hungarians who had been paroled into the United States on humanitarian grounds to adjust to permanent resident status.

THE 1965 AMENDMENTS TO THE INA

The 1965 Amendments to the INA\textsuperscript{48} were passed by Congress in the wake of the Civil Rights Act. Despite the justification given for retaining the quota system in the 1952 INA – that it was a “rational and logical” way to restrict immigration numbers\textsuperscript{49} – President John F. Kennedy, in 1963 told Congress that such a system “neither satisfies a national need nor accomplishes an international purpose. In an age of interdependence among nations, such a system is an anachronism for it discriminates among applicants for admission into the United States on the basis of the accident of birth.”\textsuperscript{50}

The 1965 Amendments eliminated the national origins quota system and established a seven-category preference system under which immigrants from Eastern Hemisphere countries would be admitted. The preferences gave priority to: 1) immigrants with relatives residing in the United States; 2) immigrants with occupational skills or training needed in the United States; and 3) refugees. The amendments set an annual cap of 170,000 on total immigration from the Eastern Hemisphere, with a per-country limit of 20,000. Immigration from Western Hemisphere countries also was limited, for the first time, to 120,000 annually, though neither the per-country


\textsuperscript{49} S. REP. NO. 1515, supra note 45.

\textsuperscript{50} John F. Kennedy, PUB. PAPERS 594-597 (1964).
limit nor the preference system initially were applied to these immigrants.51

Recognizing that discrimination could no longer be tolerated in immigration law, Congress not only abolished the quota system, it went a step further and included in the 1965 Amendments a general prohibition against discrimination in what would become the introduction to section 202(a) of the INA: “No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence.”52 The section made clear that this prohibition was to apply to all provisions of immigration law “except as specifically provided” in three sections53 of the INA and provided that the per-country limit of 20,000 could not be exceeded.

It seems clear from the language of this section, then, that immigration laws that give or deny immigrant visas to aliens on the basis of their national origin are impermissible. Even in light of the Supreme Court’s holdings that Congress has the authority to discriminate on the basis of national origin in the admission of immigrants,54 it would seem contradictory, at the very least, for Congress to pass laws that grant or deny immigrant visas explicitly on the basis of national origin after it has passed a general prohibition on this practice. And yet, this is exactly what Congress has done, repeatedly and with no explanation of how such discrimination is to be

51 The Immigration and Nationality Act Amendments of 1976 (Pub. L. No. 94-571, 90 Stat. 2703) made both the per-country limit and the preference system applicable to immigrants from Western Hemisphere countries. The Act of October 5, 1978 (Pub. L. No. 95-412, 92 Stat. 907) combined the ceilings for the Eastern and the Western Hemisphere into one worldwide ceiling of 290,000.


53 INA §§ 101(a)(27), 201(b) and 203, 8 U.S.C. §§ 1101(a)(27), 1151(b) and 1153.

54 See, e.g., Chae Chan Ping v. United States, supra note 17.
justified, in the years since 1965.

**A Survey** of Major Post-1965 Immigration Laws That Discriminate on the Basis of National Origin

The number of national origins-based U.S. immigration laws passed since the 1965 Amendments to the Immigration and Nationality Act has grown steadily. As the table below indicates, Congress seems increasingly disposed toward piecemeal, nationality-specific legislation, rather than the more difficult task of implementing a comprehensive immigration policy with the flexibility for dealing with foreign crises already built into it.

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<th>Period</th>
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<td>1966-69</td>
<td>Cuban Adjustment Act (1966)</td>
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<td></td>
<td>Haitian Refugee Immigration Fairness Act (1999)</td>
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This is not meant to be a comprehensive list of every law that includes a distinction based on national origin, but rather a survey of those laws whose central purpose is to grant or deny an immigration benefit based explicitly on the national origin of the applicant.
CUBANS

Just one year after enactment of the 1965 Amendments, Congress passed the Cuban Adjustment Act.\(^{56}\) It was enacted in response to the influx of Cubans to the United States following the fall of the Batista government in 1959 and to signify U.S. opposition to Fidel Castro’s Communist government. The law established a special rule under which Cuban nationals who had been admitted or paroled into the United States or who had entered illegally could apply for an immigrant visa after residing in the country for one year. Once the application was completed, these Cubans would be given permanent residence retroactively to the date of their arrival, so that even the time they spent here as parolees or illegal immigrants would be counted toward the five years of residence required to qualify for naturalization.

It is estimated that some 700,000 Cubans came to the United States between 1959 and the start of the Mariel boatlift in April 1980.\(^{57}\) Most of these received permanent residence under the terms of the Cuban Adjustment Act. The Mariel boatlift brought another 125,000 Cubans to U.S. shores in the five months beginning in April 1980. Although the Carter Administration refused to recognize them as refugees, beginning in 1984, the Reagan Administration granted the majority of them permanent residence under the Cuban Adjustment Act.\(^{58}\) Congress added its support to this decision by including in the 1986 Immigration Reform and Control Act a specific provision for the adjustment to permanent resident status of Cuban and Haitian nationals\(^{59}\) who

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\(^{57}\) HOUSE COMM. ON THE JUDICIARY, supra note 7, at 588.

\(^{58}\) Id. at 590.

\(^{59}\) Haitians were included in this provision because a significant number of Haitian nationals had arrived on U.S. shores in the late 1970s and 1980, including a number who arrived
had arrived in the United States before January 1, 1982. Beneficiaries of this provision were granted permanent residence retroactively to January 1, 1982, so that their time in the United States since then would count toward the five-year residence requirement for naturalization.

Just over 192,000 Cubans were granted permanent resident status in the United States, most of them under the Cuban Adjustment Act, between 1981 and 1994. Cuba was the tenth largest source of immigrants to the United States between 1981 and 1989.

In August 1994, in response to civil unrest in Havana, Fidel Castro lifted the restrictions on emigration. The result was a dramatic rise in the number of Cubans to set out for U.S. shores on makeshift rafts. The Clinton Administration quickly initiated negotiations with Cuba to prevent another Mariel boatlift. On September 9, 1994, the United States and Cuba reached an agreement on migration under which the United States guaranteed a minimum of 20,000 visas each year for Cubans to migrate legally to this country. This is the first, and thus far only, time that the United States has ever placed a floor on immigration from any country. In addition, the

with the Mariel boatlift. The United States reached an agreement with Haiti in 1981 that permitted U.S. Coast Guard interdiction of Haitian rafters and the return to Haiti of all those found not to qualify for refugee status. Congress decided to legalize those Haitians who had arrived in the United States prior to the agreement. While very few Cubans applied for permanent residence under this 1986 provision, since most of those who would have qualified had already adjusted under the Cuban Adjustment Act, some 28,000 Haitians applied for and received permanent status. Haitian Class Plaintiffs Win Partial Victory, 65 INTERPRETER RELEASES 1234 (1988).


61 1996 STATISTICAL YEARBOOK, supra note 19, at 28.


United States agreed to admit immediately all Cuban immigrants on the visa waiting list. Castro agreed, in exchange, to reimpose exit controls on Cubans seeking to leave the island. The Clinton Administration announced that, henceforth, Cuban rafters interdicted by the U.S. Coast Guard would be taken to safe haven facilities in Guantanamo Bay, Cuba or in Panama, rather than being paroled into the United States. Cuban rafters who make it to U.S. shores, however, still are permitted to remain in the United States and are granted permanent residence under the terms of the Cuban Adjustment Act.

That the Cuban Adjustment Act is considered a foreign policy tool by U.S. lawmakers has been made explicit, most recently in 1996 when Congress amended the Cuban Adjustment Act so as to preclude its repeal except “upon a determination by the President...that a democratically elected government in Cuba is in power.” And while there arguably are legitimate policy justifications for using immigration law as a foreign policy tool and humanitarian justifications for refusing to return aliens to Communist countries they have escaped, the fact is that Cuba is not the only Communist country in the world, but its nationals are the only ones who get this special treatment. In fact, under current law, if a national of any country other than Cuba enters the United States illegally and remains here for one year or more, not only will he be deported, but he also will be barred from receiving legal permission to reenter the United States for a period of 10 years.

**SOUTHEAST ASIANS**

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The next major national origin-specific immigration law passed by Congress after the Cuban Adjustment Act was the Indochina Refugee Adjustment Act of 1977. This law, passed as a result of the refugee situation created by the fall of Vietnam and Cambodia in April 1975, allowed any Vietnamese, Laotians and Cambodians who were paroled or otherwise admitted into the United States on a temporary basis between 1975 and 1978 to adjust to permanent resident status. Like the Cuban Adjustment Act, this law granted permanent residence retroactively to the date of arrival, so that any time spent in the United States in temporary status would count toward the five-year residence requirement for naturalization. Almost 175,000 Southeast Asians were granted legal residence under the provisions of this act between 1978 and 1984.

In 1987, Congress included a provision in the Foreign Operations, Export Financing, and Related Programs Appropriations Act that permits immigration to the United States of “Amerasians,” or Vietnamese children born between 1962 and 1975 to U.S.-citizen fathers, and their immediate families. More than 71,000 immigrants have been admitted since 1988 as a result of this provision. A similar provision was passed by Congress in 1982 for children born in Korea, Vietnam, Laos, Kampuchea and Thailand between 1950 and 1982 to U.S.-citizen mothers.

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69 1996 STATISTICAL YEARBOOK, supra note 19, at 34.
fathers. This latter law, however, required that the U.S.-citizen father or another U.S. citizen who agreed to assume legal custody of the child had to file a petition seeking to sponsor the child for immigration. The Amerasian provision included no such requirement, and instead made beneficiaries eligible for welfare and other cash benefits provided to refugees, even though Amerasians were not counted against the annual refugee quota. As Bill Frelick, senior policy analyst with the U.S. Committee for Refugees, put it, the so-called Amerasian Homecoming Act “consciously provide[d] preferential treatment” to Amerasian children from Vietnam.

Soviets and Southeast Asians

The Foreign Operations, Export Financing, and Related Programs Appropriations Act for 1990, passed by Congress in 1989, contained two major national origin-based immigration provisions. First is the Lautenberg Amendment, named after its congressional sponsor, Sen. Frank Lautenberg (D-N.J.), which creates a presumption of refugee eligibility for nationals of the former Soviet Union, Estonia, Latvia or Lithuania who are Jews, Evangelical Christians, Ukranian Catholics or Ukranian Orthodox and for nationals of Vietnam, Laos or Cambodia. Rather than having to establish a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion,” beneficiaries of the Lautenberg Amendment need only assert “a credible basis for concern about the possibility of


such persecution.” Any aliens who belong to one of the groups listed in the amendment and who were denied refugee status in the year preceding its enactment may reapply. Moreover, in order to deny refugee status to any alien who falls into one of these groups, the interviewing officer must explain, in writing, the reason for such denial.

This provision was added to the law primarily as a result of a change in State Department policy in 1988. The freer emigration policy in the Soviet Union under glasnost led the State Department to the conclusion that a blanket presumption that all Soviets had a well-founded fear of persecution could no longer be justified, so Soviet applicants for refugee status, like those from almost every other country, would have to demonstrate such a fear.\(^\text{74}\) The Lautenberg Amendment reversed this policy as a matter of law. The House-Senate conference report on the new law listed several factors that could establish a “credible basis for concern” about persecution. Among these factors were: that the applicant “was personally subjected to discrimination;” that the applicant “knew of acts of persecution committed against similarly situated individuals in the same locale;” or that the applicant “was subject to persecution or discrimination, such as losing a job after asking to leave his or her homeland.”\(^\text{75}\) As a result, category members routinely were rubber-stamped for refugee status based on “assertions of a single, even minor, incident of discrimination or prejudicial action at any time during his or her life,” according to testimony by a General Accounting Office official before the House Subcommittee on Immigration and Refugees.\(^\text{76}\) INS documents indicate that fewer than one-half

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of one percent of the beneficiaries of the Lautenberg Amendment actually meet the standard definition of a refugee.\footnote{77}

The second major national origin-based immigration provision included in the Foreign Operations, Export Financing, and Related Programs Appropriations Act was a provision authorizing adjustment to permanent resident status for nationals of the independent states of the former Soviet Union, Estonia, Latvia, Lithuania, Vietnam, Laos and Cambodia who were paroled into the United States between 1988 and 1994, but denied refugee status.\footnote{78} As with the Cuban Adjustment Act and the Indochinese Adjustment Act, this provision granted permanent residence retroactively to the date of parole into the United States. Over 51,000 aliens received permanent resident status in the United States under the terms of this provision between 1991 and 1998.\footnote{79}

\textbf{Chinese}

On June 4, 1989, the government of the People’s Republic of China unleashed its military forces against pro-democracy demonstrators in Tiananmen Square, killing hundreds. President Bush responded to the massacre first by directing the Attorney General to offer one-year “deferred enforced departure” (DED) to virtually all nationals of the PRC who were in the

\footnote{76 Center for Immigration Studies, supra note 74.}
\footnote{77 Don Barnett, \textit{The Refugee Loophole}, IMMIGRATION REVIEW, NO. 26, 6 (1996).}
\footnote{79 1996 \textsc{Statistical Yearbook}, supra note 19, at 34; Immigration and Naturalization Service, \textit{Legal Immigration, Fiscal Year 1997}, \textsc{Annual Report}, No. 1 (1999); Immigration and Naturalization Service, \textit{Legal Immigration, Fiscal Year 1998}, \textsc{Annual Report}, No. 2 (1999).}
United States in nonimmigrant status on June 4. 80 Few of the 73,000 students or the 250,000 tourists and temporary business visitors from the PRC who were eligible for DED actually applied because applicants initially had to state that they were “unwilling to return to China,” which could be used against them if they eventually did return, and because once they applied for DED, their nonimmigrant status would be terminated. Nonimmigrants who actually did fear persecution if they returned to China also feared applying for asylum because if their application was denied, they would be subject to deportation. 81

The inadequacy of the Bush Administration’s response led Congress to pass the Emergency Chinese Immigration Relief Act of 1989. 82 This legislation would have waived the requirement that nonimmigrant students return to their home country for at least two years after their stay in the United States, and it would have established that any PRC national with legal status as of June 5, 1989 would retain that status so that he or she could apply for permanent residence.

President Bush in November 1989 pocket vetoed the bill, citing the need to preserve his “ability to manage foreign relations.” 83 A series of administrative measures were ordered instead: the INS was directed to grant an “irrevocable waiver” of the two-year foreign residence


81 Id. at 1114. This INS policy that a nonimmigrant became deportable upon applying for asylum was reversed in 1990.


83 President Vetoes Chinese Student Bill, Offers Administrative Relief Instead, 66 INTERPRETER RELEASES 1313 (1989).
requirement for PRC students until January 1, 1994; PRC nationals in the United States legally in June 1989 were to retain legal status so that they could work and apply for permanent residence; and PRC nationals eligible for DED would be sent “notice of expiration of nonimmigrant status” when their nonimmigrant visas expired, rather than having deportation proceedings instituted against them.84

When Congress returned and tried to override the veto, the PRC government threatened to terminate its participation in all nonimmigrant exchange programs of the United States. As President Bush urged Congress to sustain his veto, Beijing lifted the martial law imposed at the time of the massacre and released several hundred of the protesters who had been imprisoned. The veto was sustained and, to bolster the legal status of his November directive, President Bush issued Executive Order 12,711 on April 13, 1990.85 The executive order basically formalized all the measures taken previously to protect PRC nationals and extended their effectiveness through January 1, 1994.

With the 1994 deadline looming on the horizon, Chinese students in the United States organized a massive lobbying effort to push Congress to provide permanent resettlement.86 Responding both to the pressure generated by the lobbying campaign and to the ideological implications,87 Congress in the fall of 1992 passed the Chinese Student Protection Act.88 The act

84 Id.
86 Griffin, supra note 80, at 1117.
87 Sen. Slade Gorton (R-Wash.), for example, said that, in addition to protecting the students, the act would have “a secondary, but equally important, consequence .... Since that extraordinary year of 1989, when communism failed universally as a serious political experiment, the world’s countries have begun to institute free market policies.... Without [U.S.-
applies to any alien who is a national of the PRC described in Executive Order 12,711, who has resided continuously in the United States since April 11, 1990, and who was not physically present in the PRC for more than 90 days between April 11, 1990 and September 1992. Upon application, such aliens would receive employment-based immigrant visas. Just over 53,000 PRC nationals received immigrant visas under the provisions of the Chinese Student Protection Act between 1993 and 1998.\footnote{1996 STATISTICAL YEARBOOK, supra note 19, at 34; Immigration and Naturalization Service, \textit{Legal Immigration, Fiscal Year 1997}, ANNUAL REPORT, NO. 1 (1999); Immigration and Naturalization Service, \textit{Legal Immigration, Fiscal Year 1998}, ANNUAL REPORT, NO. 2 (1999).}

It seems somewhat ironic that the Chinese students who received the benefits of U.S. “protection” were those who were in the United States at the time of the Tiananmen Square massacre, rather than those who were actually involved in the pro-democracy demonstrations. Undoubtedly, some of the Chinese who benefitted from the Chinese Student Protection Act had been involved in such demonstrations, either in China or abroad, and had legitimate reasons to fear being returned to China. It seems probable that these Chinese would have qualified for asylum in the United States, had they applied.

\textbf{FORMER SOVIETS}

the Chinese Student Protection Act, Congress passed the Soviet Scientists Immigration Act.\textsuperscript{90} The stated purpose of the act was to “prevent former Soviet scientists from using their skills to bolster the weapons programs of unstable or aggressive governments around the world.”\textsuperscript{91} The act created a four-year program under which “scientists or engineers with expertise in nuclear, chemical, biological or other high technology fields or who are working on nuclear, chemical, biological or other high-technology defense projects” and who are nationals of Latvia, Lithuania, Estonia, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine or Uzbekistan, along with their spouses and children, were to be granted employment-based immigrant visas. The normal requirement that aliens applying for such visas have an offer of employment in the United States was to be waived. Data on how many scientists entered the United States under this program are unavailable since INS statistics do not count this group separately from other employment-based immigrants.

Two other major nation origins-based immigration laws were passed during the 1990s – the “diversity visa program” included in the Immigration Act of 1990 and the Nicaraguan Adjustment and Central American Relief Act of 1997, as amended by the Haitian Refugee Immigration Fairness Act of 1998. An in-depth look at the legislative process that produced these laws provides insight not only into how U.S. immigration laws have been manipulated to serve the interests of particular special interests, but also into the potential implications of this trend toward nationality-specific laws for future immigration policy.


\textsuperscript{91}H. REP. NO. 101-881, as published on Westlaw (1992).
THE DIVERSITY VISA PROGRAM OF THE IMMIGRATION ACT OF 1990

In 1978, Congress established a commission with a mandate to “study and evaluate ... existing laws, policies, and procedures governing the admission of immigrants and refugees to the United States.” The Select Commission on Immigration and Refugee Policy released its final report in August 1981. In this report, the Commission suggested that U.S. immigration policy should support three goals: family reunification, economic growth balanced by protection of the U.S. labor market, and cultural diversity “consistent with national unity.” It was this third recommendation that eventually led to the enactment of the “diversity visa program” in the Immigration Act of 1990.

The problem with the concept of diversity was that the Commission did not explain exactly what it meant. Instead, it proposed a new category of “independent immigrants” who would be selected on the basis of their potential contributions to the U.S. labor market. In the congressional debates that followed, there were essentially three different concepts of diversity: 1) historians and other academics suggested that diversity involved the admission of immigrants from countries that had not ever sent significant numbers of their nationals to the United States; Historian John Higham, for example, argued for a “continuing diversity in the sources of immigration” on the ground that migrants coming from diverse origins stimulate innovation.

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94 Id. at 108.
96 SELECT COMM., supra note 93, at 16, 127.
97 Historian John Higham, for example, argued for a “continuing diversity in the sources of immigration” on the ground that migrants coming from diverse origins stimulate innovation.
2) some members of Congress argued that, since Latin American and Asian immigrants had come to dominate the immigration flow since the 1965 Amendments, diversity involved re-opening the immigration doors to European and other “traditional” source countries;98 and 3) various immigrant groups used the concept of diversity to lobby for the maximum number of visas to be made available to nationals of their home countries.99

The 1986 Immigration Reform and Control Act100 contained the first legislative effort to reach a consensus on which concept of diversity would be applied to immigration law. This law included a temporary program under which 5,000 visas would be allocated in 1987 and 1988 to nationals of countries that were “adversely affected by the enactment of” the 1965 Amendments.101 The program, designed by Rep. Brian Donnelly (D-Mass.), left it up to the State Department to determine which countries would qualify. The State Department thus came up with a list of the countries whose average annual rate of immigration to the United States between 1966 and 1985 was less than their average annual rate between 1953 and 1965. The list included most of Europe, North Africa, Argentina, Bermuda, Canada, Guadeloupe, Indonesia,

98 Several Massachusetts legislators, including Sen. Edward Kennedy and Rep. Brian Donnelly, for example, advocated allocating visas to countries that were “adversely affected” by the 1965 Amendments. Walter P. Jacob, Diversity Visas: Muddled Thinking and Pork Barrel Politics, 6 GEO. IMMIGR. L.J. 297, 304-05 (1992).

99 Id. at 298-99.


101 Id. § 314.
Japan, Monaco and New Caledonia. Since the countries of sub-Saharan Africa had sent few immigrants either immediately before or after the 1965 law, they were excluded from the program. The law specified that applications for these visas would be processed on a first-come, first-served basis and it did not restrict the total number of applications each would-be immigrant could submit. The result was that applicants who were in the United States illegally during the application period, and could rely on the U.S. mail service, had an overwhelming advantage. Some forty percent of all the visas made available under the program ended up being issued to illegal Irish immigrants who were already in the United States.

In 1987, after becoming the Chairman of the Senate Subcommittee on Immigration and Refugee Affairs, Sen. Edward Kennedy (D-Mass.) introduced an immigration reform bill that contained a program that combined the recommendations of the Select Commission and the diversity provision from the 1986 law. The Kennedy bill included a separate immigration category for “Independent Immigrants,” with a subcategory for “Nonpreference Aliens.” These Nonpreference Aliens were to be selected through the use of a points system under which applicants would be awarded points for certain attributes, including education, age, English language ability and work experience. The largest individual allocation of points, however, was to be awarded to nationals of countries “adversely affected by the enactment of” the 1965 Amendments.

102 HOUSE COMM. ON THE JUDICIARY, supra note 7, at 409.
103 Jacob, supra note 98, at 305-06.
105 Id. § 4.
The bill was designed specifically to benefit Irish immigrants, as was openly acknowledged during the subcommittee hearings. Rep. Brian Donnelly, the creator of the 1986 diversity program, testified during the hearings about the positive contributions Irish immigrants had made to America and that the 1965 Amendments were discriminatory in much the same way as the National Origins Quota System that preceded them. He stated that “the cumulative effect of the policy of the last 20 years has been to discriminate against many of the peoples who have traditionally made up our immigrant stock. You cannot solve the problems of discrimination by eliminating it for some and creating it for others.”

Ironically, in light of the results of his diversity program, he went on to say that “[w]e must work to formulate a level playing field on which all peoples of the world are treated on a fair and equitable basis.”

The Kennedy bill did not make it into law. Instead, Congress passed the Immigration Amendments of 1988, which extended the diversity program contained in the 1986 Immigration Reform and Control Act for another two years, but increased the number of visas available annually to 15,000 from 5,000. The amendments did not, however, alter the application process, so the Irish immigrants living in the United States illegally retained their advantage.

Senators Kennedy and Alan Simpson (R-Wyo.), the ranking member of the Senate Subcommittee on Immigration and Refugee Affairs, then introduced the Immigration Act of

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106 See, e.g., Legal Immigration Reforms, supra note 97, at 48.
107 Id. at 52.
108 Id. at 53.
1989, which included a category of “Independent Immigrants” for would-be immigrants who could not qualify for admission under the current law because they did not have family members in the United States. This category included a subcategory of “Selected Immigrants,” which would be allocated 55,000 visas. Selected Immigrants would be chosen through a point system much like the one in the original Kennedy bill, except that no extra points would be allocated to nationals of countries “adversely affected” by the 1965 Amendments. The provision to award points for English language ability was removed during the Judiciary Committee markup of the bill, but the rest of the bill was passed by the Senate in July 1989.

In the meantime, Irish immigrants were honing their lobbying skills. Led by its hired Washington lobbyist, the Irish Immigration Reform Movement (IIRM) began working directly with Rep. Charles Schumer (D-N.Y.) and his staff to draft a diversity program that differed significantly from those considered up to that point. The Schumer proposal would have set aside 75,000 visas each year for a new category of “diversity immigrants.” Under this proposal, the world would be separated into “high-admission regions” and “low-admission regions,” within which would be “high-admission states” and “low-admission states.” High-admission states would be those from which at least 25,000 immigrants had come to the United States within the most recent five-year period. While no state would be allocated more than seven percent of available visas, the bulk of visas would go to low-admission states in low-admission regions, with a much smaller number allotted to low-admission states in high-admission regions. Any

111 Jacob, supra note 98, at 311-12.
visas not used by the state to which they were allocated would go to the remaining eligible states.

The regions used in the Schumer proposal were: 1) Africa; 2) Asia; 3) Europe; 4) North America, excluding Mexico; 5) Oceania; and 6) South America, Mexico, Central America and the Caribbean. The largest beneficiaries undoubtedly would be Europe and Africa, since Asia and Latin America would be high-admission regions and Oceania and North America were unlikely to send large numbers of immigrants in any case. Moreover, by lumping together countries that send vastly different numbers of immigrants, the plan seriously disadvantaged some “low-admission states” that fell into a “high-admission region.” Finally, thanks to major pressure from the IIRM, Rep. Schumer agreed that Northern Ireland would be treated as a separate state for purposes of visa allocation. Irish immigrants thus would get 14 percent of the available visas, instead of seven percent.113

However, Rep. Schumer refused to include in his bill a program specifically targeted at legalizing the large numbers of illegal Irish immigrants in the United States, which was a major goal of IIRM. So IIRM went to House Immigration Subcommittee Chairman Rep. Bruce Morrison (D-Conn.) for help.114 In March 1990, Rep. Morrison introduced a bill, H.R. 4300, with a different version of Rep. Schumer’s diversity program. The Morrison bill would have allocated 75,000 visas per year for “Diversity Immigrants,” but only for a period of three years.115 One-third of those visas, however, were to be reserved for illegal immigrants who would have qualified for the diversity program included in the 1986 law. Much to the

113 Jacob, supra note 98, at 319.

114 Id. at 319-20.

disappointment of the IIRM, though, Rep. Morrison refused to treat Northern Ireland as a separate state under his plan.\textsuperscript{116}

The House Immigration Subcommittee adopted a diversity program that represented a compromise between the Schumer and Morrison proposals.\textsuperscript{117} The approved version of H.R. 4300 included a “Diversity Transition Program,” which set aside up to 25,000 visas per year for three years for illegal immigrants who would have qualified for the 1986 diversity program. Beginning in 1994, 55,000 visas would be allocated each year to a new, permanent category of “Diversity Immigrants,” as defined by the Schumer bill.

Several members of the full Judiciary Committee were openly skeptical of a “diversity” program that would mostly benefit Europeans. Rep. John Bryant (D-Tex.) questioned the value of a program that sought specifically to restore immigration from traditional source countries and argued instead that the goal of U.S. immigration policy should be to help the most needy, including refugees and those seeking asylum.\textsuperscript{118} He characterized the Morrison bill as “a patchwork of special-interest pleadings from various nationalities.”\textsuperscript{119}

The full Committee passed H.R. 4300 in August 1990.\textsuperscript{120} Rep. Morrison’s Diversity

\textsuperscript{116} Jacob, supra note 98, at 321.

\textsuperscript{117} SUBCOMM. ON IMMIGRATION, REFUGEES AND INTERNATIONAL LAW, HOUSE COMM. ON THE JUDICIARY, 101\textsuperscript{ST} CONG., 2D SESS., FAMILY UNITY AND EMPLOYMENT OPPORTUNITY IMMIGRATION ACT OF 1990 (Amendment-in-the-Nature of a Substitute to the Comm. Print, May 7, 1990).

\textsuperscript{118} Dick Kirschten, \textit{A Patchwork, Not a Policy}, 1990 NAT’L.J. 1, 980.

\textsuperscript{119} \textit{More on House Legal Immigration Reform Bill}, 67 INTERPRETER RELEASES 918 (1990).

\textsuperscript{120} \textit{House Judiciary Committee Approves Legal Immigration Reform Bill}, 67 INTERPRETER RELEASES 857 (1990).
Transition Program remained intact. Rep. Schumer’s Diversity Immigrants program was retained, as well, but with an important change: a state would only be categorized as high admission if it had sent at least 50,000 (instead of the original 25,000) immigrants to the United States within the most recent five-year period. This meant that the nationals of more countries would be eligible for diversity visas. Northern Ireland, however, would still be treated as a separate state under the program.

Eight of the 12 members of the Committee who voted against the bill voiced strong dissent in the House Report. Their critique argued:

*Instead of fashioning a policy for the national interest of all Americans, H.R. 4300 responds to every special interest group that has made a demand on the U.S. immigration system...Instead of creating an underlying immigration system which is neutral as to race, religion, or national origin, H.R. 4300 grants additional visas to specific countries and regions which, the bill alleges, have been treated unfairly. This is not a rational way to create immigration policy.*

Hoping to get the bill passed by the full House before the close of the 101st Congress, the IIRM turned up the heat. In one day, members of the IIRM visited more than two-thirds of the offices of members of the House of Representatives. Even the Irish Embassy sent staff members to lobby members of Congress. Their efforts paid off. Before floor consideration of H.R. 4300, the House Rules Committee adopted rules to limit the number and subject matter of

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122 Jacob, supra note 98, at 327.

123 Id. at 327-28.
amendments to the bill; amendments to the Diversity Transition Program were among those that were precluded.\textsuperscript{124} The bill passed the House by a vote of 231 to 192, after less than two days of debate, and with both diversity measures intact.\textsuperscript{125}

Sen. Simpson opposed several provisions in H.R. 4300, including the Transition Diversity Program, and he had withdrawn his support of his own bill, S. 358, because it lacked an overall numerical limit on legal immigration.\textsuperscript{126} Since the 101\textsuperscript{st} Congress was close to adjournment, Sen. Simpson decided to block appointment of Senate conferees. In light of this, sponsors of the two bills agreed to hold off on the appointment of a conference committee and instead to conduct informal negotiations.\textsuperscript{127} Once the negotiators had reached an agreement that Sen. Simpson could live with, a conference committee was appointed. Within a four-day period, the conferees met, agreed and issued a report, and both the House and the Senate approved the final report.\textsuperscript{128}

As passed, the Immigration Act of 1990\textsuperscript{129} included a Diversity Transition program that would allocate 40,000 visas per year in 1992, 1993 and 1994 to nationals of “adversely affected” countries, as defined by the 1986 diversity program. In lieu of a specific program to legalize illegal Irish immigrants living in the United States, the IIRM settled for a provision in the


\textsuperscript{125} 136 CONG. REC. H8,720-21 (1990).

\textsuperscript{126} Jacob, supra note 98, at 331.

\textsuperscript{127} Id.

\textsuperscript{128} Id. at 334.

Diversity Transition program that would guarantee Irish nationals at least 40 percent of the 40,000 visas made available each year. Instead of referring specifically to a set-aside for Ireland, however, the law allotted at least 40 percent of the Diversity Transition visas to “the foreign state the natives of which received the greatest number of visas issued under section 314 of the Immigration Reform and Control Act.”

The Diversity Immigrants program would be allocated 55,000 visas per year on a permanent basis beginning in 1995. The countries that would be eligible for diversity visas would be determined as prescribed by H.R. 4300 as passed by the House. The point system in S. 358 was eliminated, and instead, beneficiaries would have to show that they had the equivalent of a high school education or at least two years of job training or experience.

The new law also retained the 1986 program’s first-come, first-served system for processing applications, though it set aside the 40 percent of the visas that were to go to Irish applicants during the first three years. It also failed to set a limit on the number of applications each would-be beneficiary could submit. The result of this system in 1992 was that, while the State Department (which processed the applications) expected to receive five million entries for the 40,000 available visas, in fact it received almost 19 million applications. The State Department estimated that each applicant submitted an average of 10 applications, though some people claimed to have sent more than 1,000. About three-quarters of the beneficiaries of the

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132 Id.
program in 1992 gave U.S. mailing addresses, suggesting that they were already living in the United States illegally. 133

How successful has the 1990 Immigration Act’s diversity program been at bringing “diversity” to the United States? The top five nationalities to benefit from the Diversity Transition program between 1992 and 1994 were: Poles (41,585); Irish (37,946); British (8,977); Japanese (6,416); and Indonesians (2,557). 134 The top five nationalities to benefit from the permanent Diversity Immigrant program between 1995 and 1996 (the only years for which detailed statistics are available) were: former Soviets (10,947); Poles (8,283); Nigerians (6,485); Ethiopians (6,374); and Bangladeshis (5,569). 135 Between 1820 (the first year for which official immigration statistics were recorded) and 1996, the top five immigrant sending countries were: Germany (7.1 million); Mexico (5.5 million); Italy (5.4 million); Great Britain (5.2 million); and Ireland (4.8 million). 136

The table below shows the distribution by region of the beneficiaries of both the 1990 act’s diversity programs and of all immigrants represented in official INS statistics. It seems fairly clear that the Diversity Transition program did not increase diversity in the immigrant flow. The permanent diversity program did a somewhat better job in that African immigrants received 30 percent of available visas, while they have accounted for only 0.8 percent of all

133 Id. at 9.


136 Id.
immigrants to the United States since 1820. The fact that the almost 46 percent of available diversity visas go to Europeans, who represent over 60 percent of all immigrants raises serious questions about the benefits of the program, though. It seems doubtful that the lukewarm results of the program justify the fact that it discriminates on the basis of national origin, especially considering the fact that the Immigration and Nationality Act specifically prohibits such discrimination.137

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<td>1,796</td>
<td>4,423,066</td>
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<tr>
<td>Mexico, Central and South America and the Caribbean</td>
<td>1,958</td>
<td>4,956</td>
<td>11,763,988</td>
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**THE NICARAGUAN ADJUSTMENT AND CENTRAL AMERICAN RELIEF ACT**

Beginning in the mid-1970s, large numbers of Nicaraguans, Salvadorans and Guatemalans began arriving in the United States, having fled political instability, war and economic turmoil in their home countries. The majority entered the United States illegally. This became clear after 1986, when Congress passed an amnesty for illegal immigrants who were

137 INA, supra note 52.
agricultural workers or who had been living in the United States since before January 1, 1982.\textsuperscript{138} Between 1989 and 1991, when the bulk of amnestied aliens were granted legal residence, INS statistics show that a total of 146,383 Salvadorans, 59,863 Guatemalans, and 14,713 Nicaraguans received amnesty.\textsuperscript{139} Only Mexico had a larger number of amnesty beneficiaries than El Salvador and Guatemala.

Those Nicaraguans, Salvadorans and Guatemalans who arrived in the United States after January 1, 1982 were not so fortunate. Many of them applied for asylum, particularly if they were apprehended by the Immigration and Naturalization Service. The filing of an asylum application was a sure way to delay deportation since there were long delays between the time the application was filed and when the case was heard, during which the applicant generally would be released into the community and could disappear before the hearing if he feared his application would be denied. For Nicaraguans, Salvadorans and Guatemalans, that the asylum application would eventually be denied was almost a certainty. In 1990, 21,693 Nicaraguan, 19,929 Salvadoran and 6,287 Guatemalan asylum applications were pending at the start of the year.\textsuperscript{140} Another 18,304 Nicaraguan, 22,271 Salvadoran and 12,234 Guatemalan asylum applications were filed during 1990.\textsuperscript{141} Of the 14,915 Nicaraguan applications processed during the year, only 1,444 (9.7 percent) were approved. Only 226 (1.8 percent) of the 12,414


\textsuperscript{139} 1989, 1990, 1991 \textit{Statistical Yearbooks of the Immigration and Naturalization Service}.

\textsuperscript{140} 1990 \textit{Statistical Yearbook of the Immigration and Naturalization Service} at 106.

\textsuperscript{141} Id.
Salvadoran applications processed during the year were approved. Guatemalans faired even worse, with only 58 (0.8 percent) of the 7,531 applications processed being approved.\textsuperscript{142} By 1996, the situation had improved only slightly. The Nicaraguan asylum approval rate had risen to 16 percent, the Salvadoran rate to three percent and the Guatemalan rate to nine percent. The average approval rate for all nationalities, however, was 22 percent.\textsuperscript{143} The backlog of pending cases had increased dramatically to 191,309 for Salvadorans and 118,470 for Guatemalans. The Nicaraguan backlog had been reduced slightly to 21,049.\textsuperscript{144}

Politics clearly had played a major role in the disparate approval rates for the three nationalities. Nicaraguans were perceived by many as the victims of Communism; Salvadorans and Guatemalans, on the other hand, received less sympathy since the governments of their home countries had U.S. support. Both Nicaraguans and Salvadorans, however, were granted some form of protection from deportation in the late 1980s and early 1990s. Beginning in 1987, Attorney General Edwin Meese directed that Nicaraguans in the country illegally not be deported unless they had engaged in criminal activity or posed a danger to national security.\textsuperscript{145} This program, called the Nicaraguan Review Process, was terminated in 1995 upon a determination by the INS that both the political situation in Nicaragua and the U.S. asylum process had improved sufficiently that it was no longer necessary to provide special protections

\textsuperscript{142} Id.

\textsuperscript{143} 1996 \textsc{Statistical Yearbook of the Immigration and Naturalization Service} at 90.

\textsuperscript{144} Id.

to Nicaraguans subject to deportation orders.\footnote{\textit{Discontinuation of the Nicaraguan Review Process}, 60 Fed. Reg. 31,167 (1995).}

Since the Bush Administration was less sympathetic to illegal Salvadoran immigrants, however, they had to rely on Congress. Congress included in the Immigration Act of 1990 a provision under which the Attorney General could designate the nationals of certain unstable countries for “Temporary Protected Status” (TPS), which would prevent them from being deported and allow them to work in the United States.\footnote{\textit{Pub. L. No. 101-649}, § 302, 104 Stat. 4978 (1990) (codified at 8 U.S.C.A. § 1254a (2000)).} The law went on to specify that nationals of El Salvador would be the first to receive TPS for an initial period of 18 months.\footnote{Id. at § 303.} Approximately 180,000 Salvadorans signed up for TPS. The program was extended until 1996, though the Salvadorans’ status was renamed “deferred enforced departure,” presumably in an effort to prepare the beneficiaries for the idea that eventually they would be expected to return to El Salvador.

In that same year, the situation for illegal immigrants changed significantly. Congress passed a series of laws that make life in the United States more difficult for illegal immigrants. The one with the most impact was the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).\footnote{\textit{Pub. L. No. 104-208}, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.).} Under previous law, illegal immigrants who had lived in the United States for seven years and could show that they had “good moral character” and that their deportation would impose an extreme hardship on themselves or their legally resident spouse, parent or
child, were eligible to apply for suspension of deportation, and eventually legal residence. Under IIRIRA, the requisite period of residence for what is now called “cancellation of removal” was extended to 10 years and the alien has to show that his deportation would result in “exceptional and extremely unusual hardship” to his legally resident spouse, parent or child; showing hardship to oneself is insufficient.\textsuperscript{150}

Moreover, under previous law, the period between the date an illegal immigrant was sent a “notice to appear” for a deportation hearing and the date of the actual hearing counted toward the seven-year residence requirement. Thus, if the alien could delay the deportation hearing long enough, he had a chance to qualify for suspension of deportation. Under the new law, however, that period does not count toward the 10-year residence requirement, and the provision was to be applied retroactively to all those awaiting deportation hearings.\textsuperscript{151} The new law also significantly restricts judicial review of removal orders and denials of discretionary relief from deportation.\textsuperscript{152}

Finally, IIRIRA established penalties for aliens who remain in the United States illegally. Those who have been present in the United States illegally for between six months and one year will be barred from legal re-entry for three years; those who have been present illegally for a year or more will be barred from legal re-entry for 10 years.\textsuperscript{153}

The hundreds of thousands of Nicaraguans, Salvadorans and Guatemalans in the United

\textsuperscript{150} Id. at § 304.
\textsuperscript{151} Id.
\textsuperscript{152} Id. at § 306.
\textsuperscript{153} Id. at § 301.
States illegally had until this point maintained the hope that either the U.S. Congress eventually would pass another amnesty like the one enacted in 1986 or that the INS would continue to tolerate their presence, as long as they kept a low profile, until their U.S.-born children or another legally resident relative could petition for legal status for them. Facing the threat of strict penalties for staying here illegally and the new limits on the possibility of being granted relief from deportation, they became increasingly worried. Organizations that represent immigrants, particularly Hispanic groups, increased their lobbying efforts in Congress.

Since there was little national support for another full-scale amnesty, lobbying efforts focused on protections specifically targeted at Central Americans. Two Florida legislators, Sen. Connie Mack and Rep. Lincoln Diaz-Balart, were most receptive to these efforts. They introduced identical bills that would have allowed certain Nicaraguans, Salvadorans and Guatemalans who had been living in the United States since 1990 to apply for cancellation of removal under the pre-IIRIRA rules (i.e., seven years of residence, good moral character and extreme hardship to self or a family member). The bills were referred to the respective Immigration Subcommittees of the Senate and the House, but there was not sufficient support in either chamber to get them passed out of the subcommittee.

As the end of the session approached, Sen. Mack decided to use an increasingly popular method of getting his bill passed – he tried to attach it as a rider to the Interior Department Appropriations bill for 1998. This effort failed when Sen. Phil Gramm (R-Tex.) threatened to

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propose a counter-amendment and keep the Senate in session passed its scheduled departure.\textsuperscript{156}

Sen. Mack tried again, however. In October, he successfully proposed an amendment\textsuperscript{157} to attach his bill as a rider to the Senate appropriations bill for the District of Columbia.\textsuperscript{158} As the House and Senate tried to reconcile their District of Columbia appropriations bills, negotiations concerning the Mack amendment began in earnest.\textsuperscript{159} The category of Nicaraguans who would benefit from the bill was expanded to include all those who had lived in the United States since 1995, and unlike Salvadorans and Guatemalans, these Nicaraguans would get an outright amnesty, rather than just being eligible for cancellation of removal under relaxed rules. To mollify the anti-Communist members of Congress, Cubans were added to the Nicaraguan amnesty and certain Eastern Europeans would be allowed to apply for cancellation of removal under the pre-IIRIRA rules. Opponents of the bill, realizing that the number of illegal immigrants who would benefit had been greatly expanded, tried unsuccessfully to negotiate a requirement that the number of aliens granted legal residence under the bill would be subtracted from legal immigration ceilings.\textsuperscript{160}

The final version, as passed, is called the Nicaraguan Adjustment and Central American Relief Act (NACARA).\textsuperscript{161} It grants an amnesty to all Nicaraguans and Cubans,\textsuperscript{162} along with

\begin{itemize}
  \item \textsuperscript{156} Id.
  \item \textsuperscript{157} 143 CONG. REC. S10,474 (daily ed. October 7, 1997).
  \item \textsuperscript{158} S. 1156, 105\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. (1997).
  \item \textsuperscript{159} Numeric Effects of Legislative Action, Nicaraguan Adjustment and Central American Relief Act (NACARA), <http://www.NumbersUSA.com>.
  \item \textsuperscript{160} Id.
  \item \textsuperscript{161} Pub. L. No. 105-100, 111 Stat. 2160 (1997) (codified as amended in scattered
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their spouses and children, who have lived in the United States since December 1, 1995. Salvadorans and Guatemalans who were class members of a lawsuit that ended in a settlement granting them the right to new asylum hearings, or who applied for asylum on or before April 1, 1990, and Salvadorans who registered for TPS, along with any spouses and children, are eligible to apply for cancellation of removal under the pre-IIRIRA rules. Finally, nationals of the former Soviet Union or any of its republics, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia or any state of the former Yugoslavia who were living in the United States by December 31, 1990 and had applied for asylum by December 31, 1991, along with their spouses and children, also are eligible to apply for cancellation of removal under the relaxed rules. Salvadorans and Guatemalans who fall into one of the categories listed are presumed to be eligible for cancellation of removal and adjustment to permanent resident status; the Eastern Europeans listed above do not benefit from any such presumption, but instead have to demonstrate affirmatively their eligibility.

While the original bills introduced by Sen. Mack and Rep. Diaz-Balart would have benefitted an estimated 540,000 illegal immigrants, NACARA, as enacted, is estimated to benefit just over one million, when the family members of the principal beneficiaries are


162 Since the vast majority of Cubans who would qualify for this amnesty already have received legal residence under the Cuban Adjustment Act, Nicaraguans will be the primary beneficiaries.

included. But even this number will not solve the problem of Nicaraguans, Salvadorans and Guatemalans living illegally in the United States, since all those who have arrived since 1990, or 1996, in the case of Nicaraguans, are left out. And this is to say nothing of the nationals of all the other countries of the world who are living illegally in the United States and may be just as deserving as the beneficiaries of NACARA.

IN THE AFTERMATH OF NACARA

Even as NACARA was being negotiated in Congress, some members were arguing that it was unfair because it left out Haitians. Once NACARA passed, those proposing protection against deportation for illegal Haitian immigrants were able to put even more pressure on other members of Congress by arguing that Haitians were just as deserving as Central Americans, so it could only be racial prejudice that caused Haitians to be excluded from NACARA. It became a simple issue of fairness: if one group was entitled to protection, then surely other similarly situated groups should be entitled as well.

Thus, in 1998, bills were introduced in the House and the Senate to add Haitians to the Nicaraguan/Cuban amnesty provisions of NACARA. When it became apparent that the Immigration Subcommittees were not inclined to move the bills, once again the Senate version

164 Numeric Effects of Legislative Action, supra note 159.
166 Id.
was proposed as an amendment to an omnibus appropriations bill.\textsuperscript{168} As enacted, the Haitian Refugee Immigration Fairness Act (HRIFA)\textsuperscript{169} adds Haitians who were living in the United States and had applied for asylum or who were paroled into the United States by December 31, 1995, along with their spouses and children, to the Nicaraguan/Cuban amnesty provision of NACARA. An estimated 125,000 Haitians, including the family members of the principals, are likely to benefit from this law.\textsuperscript{170}

As HRIFA was being enacted, however, special interests representing Salvadoran and Guatemalan immigrants were complaining that they had received a second-rate form of protection under NACARA, and now, even Haitians were going to be entitled to the first-rate protection that Nicaraguans and Cubans received under that law.\textsuperscript{171} Representatives of Honduran illegal immigrants also began demanding “equal” treatment.\textsuperscript{172}

During the 106\textsuperscript{th} Congress, bills were introduced to make Salvadorans, Guatemalans and Hondurans eligible for amnesty on the same terms as Haitians, Nicaraguans and Cubans.\textsuperscript{173} Other bills were introduced to provide similar protections for Hondurans (only),\textsuperscript{174} Liberians,\textsuperscript{175}

\textsuperscript{168} H.R. 4328, 105\textsuperscript{th} Cong., 2d Sess. (1998).


\textsuperscript{170} \textit{Numeric Effects of Legislative Action, Haitian Refugee Immigration Fairness Act (HRIFA)}, \texttt{<http:www.NumbersUSA.com>}.  

\textsuperscript{171} Aita, supra note 145 at 375.

\textsuperscript{172} Id.

\textsuperscript{173} See, e.g., H.R. 36, 106\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. (1999); S. 1592, 106\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. (1999); and H.R. 2722, 106\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. (1999).

\textsuperscript{174} See, e.g., H.R. 1007, 106\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. (1999).

\textsuperscript{175} See, e.g., H.R. 919, 106\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. (1999).
Columbians and Peruvians, Bangladeshi, and Lebanese. According to counsel for the House Immigration Subcommittee, these groups all are still vying for their own “equal” protection.

This is the problem with nationality-specific immigration laws – there is no principled place to draw the line. There are many countries around the world whose nationals are deserving of protection, whether from persecution, economic privation or environmental destruction. Granting that protection on the basis of which groups have the most political clout in the United States, or which groups come from countries with governments the United States opposes certainly is not a principled way to draw lines. Granting protection to some groups, but not others who are similarly situated also is not fair.

It seems clear that the United States cannot provide a permanent home to all the people of the world who would like to live here, or even to all the people of the world who are deserving of a better life. The goal of U.S. immigration policy, then, should be to establish a race- and nationality-neutral system that can grant admission to those with the most compelling need for resettlement and to those who are most needed by the United States. There is a good argument that current U.S. immigration law has the basic framework to achieve this goal: aliens with close family ties to U.S. residents and citizens are admitted; aliens with extraordinary work skills are admitted; and aliens with a well-founded fear of persecution are admitted. But current

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179 Telephone Interview with Lora Ries, Counsel, House Subcommittee on Immigration and Claims (April 10, 2001).
immigration law also includes a plethora of special interest provisions that benefit some nationalities but not others, without providing adequate explanations for where the lines are drawn.

Some argue that these special programs are needed because U.S. law has discriminated against various nationalities in the past. This argument would seem to imply, however, that the special programs should benefit the people against whom the law has discriminated. It takes only a moment to show that this is not necessarily the case. U.S. law has never discriminated against Cubans, but it has provided them with special treatment since 1966. U.S. law has never discriminated against Irish or other European immigrants, yet it provides them with special treatment through the “diversity” program. U.S. law discriminated most against Asian immigrants, and yet only select Asians have been the beneficiaries of special treatment, including Vietnamese, Laotians, Cambodians and Chinese students.

The criticisms asserted by dissenting members of the House Judiciary Committee of the “diversity” program in the Immigration Act of 1990 can just as easily be applied to immigration law as a whole: U.S. immigration law “responds to every special interest group that has made a demand on the U.S. immigration system...Instead of creating an underlying system which is neutral as to race, religion, or national origin, [U.S. immigration law] grants additional visas to specific countries and regions...This is not a rational way to create immigration policy.”180

If the central promise of the 1965 Amendments to the Immigration and Nationality Act was to remove the last vestige of explicit discrimination from American law, it has been a dismal failure. Whether the various national origins-based immigration laws that have been passed

180 H.R. REP. NO. 101-723, supra note 121.
since those amendments are justifiable is readily debatable. What is not debatable, however, is
that national origins-based discrimination is still very much a part of U.S. immigration law.