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Immigration Law Reform: Proposals in the 98th Congress

WILLIAM FRENCH SMITH*

Recent years have brought a growing concern that national immigration policy is outdated and incapable of addressing the rising pressures of international migration. This article examines currently pending legislation to reform immigration law. The author briefly describes the need for reform, principles which should govern any reform, and recent attempts by the legislative and executive branches to bring about change. He then analyzes the major provisions of the Immigration Reform and Control Act of 1983. The author concludes that the legislation is an appropriate and needed answer to a growing problem.

INTRODUCTION

One of our most cherished American traditions is a willingness to provide opportunities and refuge to those who come to this country seeking a better life. Our reputation as an immigrant-receiving nation is unsurpassed. This tradition of open and fair immigration practices, however, is now threatened. Recent policies have proved incapable of meeting increasing immigration pressures while maintaining an orderly, just system of admittance. We must reform our immigration laws. Legislative proposals introduced in the 98th Congress, which this article will describe, are clearly our nation's best hope for averting an immigration problem which is already assuming overwhelming dimensions. The circumstances we face, which are characterized in general by widespread abuses of immigration law, have been aptly described by Theodore H. White:

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One starts with the obvious: that the United States has lost one of the cardinal attributes of sovereignty—it no longer controls its own borders. Its immigration laws are flouted by aliens and citizens alike, as no system of laws has been flouted since Prohibition. And the impending transformation of our nation, its culture, and its ethnic heritage could become one of the central debates of the politics of the 1980's.

Immigration reform is a complex endeavor. New policies cannot entirely solve old problems and will most certainly raise cries of alarm from one quarter or another. Nevertheless, exigencies now dictate that we reject the status quo. To cling to past policies would constitute carelessness in the face of a mounting national crisis and an unwillingness to enforce the law. This would be intolerable. A great country should be able to maintain the integrity of its borders.

Recent opinion polls indicate that ninety-one percent of the American people want an "all-out effort" to reduce illegal immigration. Many would like to see legal immigration curtailed as well. Surely this sentiment is due in part to the abrupt arrival of 125,000 Cubans during the Mariel Boatlift of 1980, the relentless flow of illegal Haitian entrants which reached a high of 15,093 in 1980, and the growing numbers of nationals from Mexico and Central America crossing our southern border in search of jobs. But the immigration problem cannot be dismissed as an issue of fleeting public interest. International conditions that have stirred global migrations will continue, and pressures for immigration to the United States will build. The more time we permit to elapse before reshaping our laws, the more difficult the solution will become.

The United States now absorbs as many or more immigrants and refugees than at any time in its history, including that period in the early part of this century when immigration was almost unrestricted. The approximately 800,000 people admitted in 1980 is not only the largest number taken in by any country that year, but it is perhaps twice as much as the rest of the world combined. This astounding sum does not even begin to include the estimated 1.5 million persons who cross our borders illegally each year or overstay their visas and remain in the United States. Many of these undocumented aliens

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2. Survey by the Roper Organization; Roper Rep. No. 80-6, Question No. 20, (June 5-12, 1980) (available from the Roper Center, University of Conn., Storrs, Conn.).
5. Task Force on Immigration and Refugee Policy, Report of the President's Task
eventually leave the United States, but the net effect of the influx is that our illegal population may grow by as much as 500,000 annually. It is estimated that 3 to 6 million illegal aliens live here now. One-half of our annual population growth is due to legal and illegal immigration.

The pressures for international migration will increase during the closing decades of this century. The world population will grow from 4.5 to over 6 billion during the 1980's and 1990's, an increase larger than the total world population in 1930. The International Labor Organization has projected that in order to sustain current employment rates, the developing world in the next twenty years would have to provide more new jobs than currently exist in the entire industrialized world. The population of Mexico, which may be the source of one-half of all illegal immigration to this country, will double in the next generation. As much as forty percent of Mexico's work force may be unemployed or underemployed. Political refugees, whose numbers now total almost 14 million worldwide, will continue to create strong humanitarian obligations for the free world. The United States' position is unique among immigrant-receiving countries. Its strong traditions of political freedom and economic opportunity for the less fortunate have created a historic attraction. Modern communication has ensured that these traditions are well known, and cheaper transportation allows large numbers of people to travel here. The United States shares a long, essentially

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6. Teitelbaum, supra note 4, at 25. See also Hewlett, Coping with Illegal Immigrants, 60 FOREIGN AFF. 358, 358-60 (1981-1982).
8. Teitelbaum, supra note 4, at 25.
10. 5 INT'L LAB. ORG., LAB. FORCE ESTIMATES AND PROJECTIONS, 1950-2000, Table 6 (2d ed. 1977).
open border with a highly populated, developing country, and our shores can be reached relatively easily in small boats from poorer island nations.\(^5\)

All of these pressures pose a serious dilemma for the United States: it must preserve its historic openness to individuals who are fleeing oppression or seeking a better life, yet it must also find an orderly process to ensure that immigration is fair and maintained within realistic limits. Obviously, policies of the recent past will not provide the solution. Our responsibility is to conceive new strategies which will strike the necessary balance between our tradition as a "nation of immigrants" and present day realities.

**PRINCIPLES OF IMMIGRATION REFORM**

The history of immigration policy in the United States is an evolution marked by efforts which have been guided at times by the noblest of ideals and at others by notions less than admirable. Discernible in the progression are three principles which have shaped the best of our reform achievements and which should continue to govern any legislative efforts. First, there must be limits to immigration. The United States cannot alone provide a place for every person who seeks a better life. Second, these limits must be fair and applied without discrimination. Third, they must be enforced firmly with due regard for procedural fairness and values of individual freedom and privacy.

During most of our history the laws set no numerical limits on immigration and made no distinctions among those seeking entry. Although the early states established laws to discourage the arrival of paupers and other "undesirable" individuals,\(^6\) it was not until 1875 that the federal government excluded a class of persons by passing legislation prohibiting the admission of convicts and prostitutes.\(^7\) Congress first set a general limit on the number of immigrants entering the country in 1921.\(^8\) This century's rapidly growing and increasingly mobile world population has necessitated such limits. Selecting the right number and the appropriate criteria, of course, are matters of somewhat greater complexity. One fact, however, is clear: the appropriate level of immigration should reflect the political approval of the American people, an approval shaped by a

15. *Select Comm'n Staff Report, supra* note 4, at 2.
18. Quota Act of 1921, ch. 8, § 2(a), 42 Stat. 5. The Act limited the number of aliens of any nationality who could be admitted to the United States in any fiscal year to three percent of the number of foreign-born persons of such nationality resident in the United States in 1910.
broad spectrum of economic and cultural circumstances. The current level of legal and illegal immigration threatens to break with the popular consensus of what is right and fair.

The second principle, evenhandedness in restricting immigration, has not always characterized national policy. Early restrictive measures, such as the prohibition of the naturalization of Chinese aliens in 1882, were blatantly discriminatory. During the 1920's, quota laws favored immigrants from northern and western Europe and the Western Hemisphere while consciously discriminating against persons from southern and eastern Europe and Asia. These quotas were finally replaced in 1965 with equal limits on annual immigrants of all origins. Numerically equal ceilings for all countries may not be a perfect solution, but the 1965 reforms significantly mitigated the partiality of quotas.

The third principle, a firm enforcement of immigration limits, is based on a conviction that ours is a country governed by the rule of law. Unfortunately, history reveals a lack of commitment to uphold this principle in the area of immigration law. In 1964, approximately 86,000 illegal aliens were apprehended in this country. By 1977, the number had risen to more than one million, and that level persists to the present day. These figures speak for themselves in implicating a growing failure to deal with a dramatically larger illegal immigration problem. Any true effort to regain control over the immigration process must be based on a recommitment to the fair and firm enforcement of our immigration laws.

RECENT LEGISLATIVE HISTORY

During the last decade, the mounting perception that immigration controls are sadly lacking led to a series of activities in both the legislative and executive branches. Immigration bills passed the House of Representatives in the 92nd and 93rd Congresses, but no Senate action was taken. Reform attempts in the 94th and 95th Congresses failed to reach the floor of either house. In 1975 Presi-
dent Ford created the Domestic Council Committee on Illegal Aliens to recommend reform measures. Its proposals included penalties for employers who knowingly hired illegal aliens, legalization of aliens who had been in the United States for a certain length of time, and increased funds for enforcement. Two years later the Carter administration drafted legislation which also included employer sanctions, legalization, and increased enforcement provisions, but the bill expired during the 95th Congress.

Because previous proposals were alleged by some to be based on insufficient factual information, a bipartisan Select Commission on Immigration and Refugee Policy was established during the 95th Congress. After two years of extensive research, hearings, and study, the Commission made several recommendations regarding both illegal and legal immigration. In early 1981, President Reagan appointed a cabinet-level task force to study the findings of the Select Commission and develop an immigration reform strategy. Like the Select Commission and previous executive branch study groups, the task force's recommendations included employer sanctions, legalization, and increased enforcement programs. It also proposed a two-year pilot temporary worker program to allow foreign workers to perform jobs not filled by Americans. Legislation containing these other proposals was introduced in October 1981 as the Omnibus Immigration Control Act and extensive hearings were held thereon.

In March 1982, Senator Alan K. Simpson introduced the Immigration Reform and Control Act of 1982. An essentially identical bill, sponsored by Representative Romano L. Mazzoli, was also introduced to the House of Representatives. Generally similar to administration proposals, the bills were crafted from findings of the Select Commission and the President's task force as well as from the Congressional hearings. With the full support of the Reagan administration, the Senate bill passed the Senate on August 12, 1982, by a vote of eighty to nineteen. The House bill was debated on the floor at

H.R. Rep.]

the end of the 97th Congress but was not brought to a vote.

The legislation which this article will describe represents the current effort to accomplish comprehensive immigration reform during the 98th Congress. The specific bills, S. 529 and H.R. 1510, were introduced on February 17, 1983, by Senator Simpson and Congressman Mazzoli, respectively, and were entitled the Immigration Reform and Control Act of 1983. Although different in some particulars, both bills reflect the consensus which has been reached through several past administrations as to the core elements of any immigration reform effort. As of this writing, the Senate has already passed its version of the legislation, again on an impressive, bipartisan vote of seventy-six to eighteen, and House floor action on H.R. 1510 is anticipated in the second session of the 98th Congress.

**THE IMMIGRATION REFORM AND CONTROL ACT OF 1983**

The exhaustive efforts to bring about immigration reform during the last decade have been disappointing in that the legislation has yet to be signed into law. Yet the extended debate has produced the beneficial result that we are now well informed on the myriad issues involved. The Immigration Reform and Control Act of 1983 successfully reflects a widespread consensus regarding what must be done to regain immigration control. It contains four major elements. First, employers must be prohibited from *knowingly* hiring illegal aliens if we are to dramatically reduce the attraction created by the United States job market. Second, in order to deal realistically and humanely with the illegal population already in the United States, we must accord legal status to those who are law-abiding and who have been here for a period of years. Third, we must provide a legal and workable mechanism to fill the special labor needs in some sectors of our economy that will not be met by American workers. Finally, administrative and judicial procedures for administering our immigration laws must be simplified and reformed to provide swift, fair enforcement of the law.

**Employer Sanctions**

The principal forces which have led to increased illegal immigration are economic.\(^3\) Disparities between employment opportunities

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31. Certainly there are other motivations for illegal migration, including family reunification. In that regard, the Omnibus Immigration Control Act introduced by the Reagan Administration in 1981 and the successor immigration reform proposals, S. 529 and H.R. 1510, provide for 20,000 additional immigrant visa numbers for natives of
in the United States and Third World nations have created pressures which draw aliens to American job markets. Illegal aliens usually come from countries with high rates of population growth and unemployment. The promise of jobs and wages several times higher than those available at home brings them here. Needless to say, the United States must continue to help Third World countries develop economies capable of accommodating their own populations. Nevertheless, differences in employment rates, wages, living and working conditions, and currency strengths are imbalances which will remain well beyond the near future. As long as the perception persists that American jobs are available to illegal aliens, thousands will continue to endure the risks of unlawful entry, the costs of smuggling, and the possibility of arrest and deportation. As former Associate Attorney General Rudolph Giuliani stated during hearings on immigration reform:

As long as no credible deterrent exists, those from countries where work is not available will spend a lifetime of savings and take great personal risk to find jobs in the United States. Their success in finding such jobs will result in some job displacement and depressing of wage and working standards for American workers. They will lead fugitive lives as members of an underclass, with negative consequences for American society as a whole.

Without removal of the powerful incentive of jobs for illegal aliens, the United States' back door will remain open as a result of an ambiguous im-

contiguous countries (Canada and Mexico) in recognition of our special relationship with our neighboring countries and in response to the problem of illegal migration motivated by family reunification concerns. For example, our preference system for the admission of immigrants to the U.S. from Mexico is seriously backlogged. As of September 1983 the 2nd preference category (spouses and unmarried sons and daughters of permanent residents) was backlogged to July 1972; the 4th preference category (married sons and daughters of U.S. citizens) was backlogged to January 1977. U.S. Department of State, Bureau of Consular Affairs, Immigrant Numbers of September 1983, at 2 (July 13, 1983).


33. Some members of Congress and various advocacy groups have asserted that the United States should not address its immigration problems by adopting immigration law reforms but, rather, by fostering economic development in sending countries so that employment opportunities at home would reduce incentives to emigrate. As Michael S. Teitelbaum, senior associate of the Carnegie Endowment for International Peace, has stated, this argument is seriously flawed for two main reasons:

First, no matter how successful, economic development cannot be expected to be a major restraining factor on emigration pressures in this century. Development is a notoriously difficult, uncertain and slow process. Success or failure is assessed over the decades rather than years. Indeed, it seems that the earlier stages of such development may tend to stimulate rather than restrain migration both internal and international.

Second, and ironically, substantial emigration is now an implicit component of the development strategies of many sending countries. They see this emigration as a means of limiting unemployment, maximizing foreign-currency earnings and providing an outlet for dissidence.

migration policy which says yes in its actions and no in its rhetoric. 

The success of any new effort to stem illegal immigration depends on economic deterrents. The core of the reform legislation is a provision which prohibits employers from knowingly hiring undocumented, illegal aliens. As previously noted, the concept of employer sanctions is not new. It has been supported by the last four administrations and recommended by several expert commissions appointed to study the immigration problem. Legislation providing employer sanctions passed the House of Representatives in 1972 and 1973 by wide margins, although it failed to receive action in the Senate. 

Federal law currently makes no provision for the prosecution of employers who knowingly hire illegal aliens. While some state laws do exist, they are seldom enforced. In the absence of real penalties, the employer has no incentive to make sure that his work force is composed of legal residents. Even if found to be employing illegal aliens, his only fine at present is the cost of training replacements, and he is still free to hire more undocumented workers.

This problem has been recognized and corrected by statutes penalizing the employers of illegal aliens in almost every major industrial nation, including France, West Germany, and Canada. The lesson learned in these countries is that if employer sanctions are to work, they must be strictly enforced and offending employers sufficiently penalized. The Simpson-Mazzoli legislation therefore provides civil fines of one to two thousand dollars for those who knowingly hire illegal aliens and criminal penalties for those who persist in such employment practices. In addition, the legislation authorizes injunctive actions against repeat offenders.

If employer sanctions are to be successful, a system must exist by which employers can quickly and easily verify the legality of prospective employees. It must be a system which is nondiscriminatory.

36. Select Comm’n Final Report, supra note 26, at 61. The so-called “Texas Proviso” of the 1952 Immigration and Nationality Act specifically exempts employers of illegal aliens from prosecution for violating section 274 of the Act, which makes the importation, transportation, or harboring of illegal aliens a felony. The exemption states that the employment of such aliens does not constitute harboring. Immigration and Nationality Act, § 274(a), 8 U.S.C. § 1324(a) (1982).  
37. Select Comm’n Staff Report, supra note 4, at 566.  
toward job candidates and provides security for employers. If employers are not given protection from penalties when they inadvertently hire illegal aliens while attempting to follow the law in good faith, they may feel reluctant to hire anyone who appears to "look or sound foreign." Finally, the verification system must be one that is consistent with our traditional values of individual liberty and privacy.

The legislation addresses all these legitimate concerns. During the first three years following enactment, the law will require employers to examine existing identification such as a United States passport or a social security card together with a driver's license, alien registration card, or similar document. The employer must sign and keep a statement that he has made the required examination. Similarly, the employee must attest on the same form that he is a citizen or permanent resident or that he is otherwise authorized to be employed. The legislation does not require the employer to authenticate documents presented, only that he conduct a reasonable inspection to verify identification and eligibility for employment. This “good faith” inspection creates an affirmative defense that the law has been followed, effectively precluding, in the absence of other facts, an employer sanction prosecution. The administrative and bookkeeping requirements would be minor, and the actual verification procedure would take only two or three minutes.

The legislation is also designed to protect those seeking employment from possible discrimination. Every prospective employee must provide evidence of employment eligibility, and the employer is not permitted to substitute his own judgment with regard to work authorization. Because the employer has been given the affirmative defense, any motivation to discriminate in hiring because of a fear of sanctions is removed. Furthermore, the legislation requires the President and various executive and legislative branch agencies to monitor the implementation of employer sanctions for evidence of unlawful discrimination and provide periodic reports to Congress. Employers who attempt to use the verification program as a justification for discrimination against individuals because of their national origin will be subject to prosecution under federal and state employment discrimination laws.40

Those who criticize employer sanctions on grounds of "discrimination" ignore the fact that illegal immigration is itself inhumane and

discriminatory. It discriminates against American minorities and the young, who are displaced from their jobs by illegal aliens.\textsuperscript{41} It results in discrimination against the alien himself, who may be subjected to exploitation and lives hidden in fear of deportation. It also discriminates against those who follow legal procedures by applying to our consulates abroad and wait their turn at home to immigrate here.

The proposed employment eligibility verification system is carefully crafted to reflect our equally strong concern that privacy rights and civil liberties not be compromised by the legislation. Following the three-year transition period during which commonly available identifiers are utilized to establish work authorization, the President is required to report to Congress on the need for and the cost of modifications in the verification process. Under the House bill the reporting requirement satisfies the Executive’s obligation and returns the responsibility to Congress to determine the specifics of any improved eligibility verification system. The Senate version takes a more direct approach and requires implementation of any necessary changes to establish a secure system, but only after Congress has an opportunity to evaluate the proposed process. Most importantly, the three-year transition period contained in both bills provides an appropriate period of time to evaluate the effectiveness of relying on existing documentation.

Any new verification system would \textit{not} involve the creation of a national identity card. A new system or document would only be used for ascertaining employment eligibility at the time of new hire and not for any other law enforcement purpose. People would not be required to carry an identification card. Some cite the utilization of a tamper-proof social security card, such as currently mandated for adoption by the Social Security Administration,\textsuperscript{42} as one example of an improved yet non-intrusive system. Another possibility, which the House bill requires be considered, is a telephone verification system, such as those presently used to confirm credit transactions.\textsuperscript{43} Whatever modifications are proposed, they cannot be implemented without the full concurrence of the American people through their


\textsuperscript{43} H.R. Rep., \textit{supra} note 23, at 46.
Legalization

As a complement to the enactment of an employer sanctions law, the legislation proposes a program to legalize the status of eligible aliens who have been living and working in the United States for a number of years. The issue of how to respond to the reality of a substantial illegal population is a difficult one which has caused considerable debate. There is, however, a consensus that the status quo is unacceptable. The United States cannot tolerate the continued existence of an exploited subclass of people who are afraid to report crimes which endanger the public safety or illnesses which threaten the public health. Failure to act will only result in the problem growing, adding perhaps half a million new illegal aliens per year to a hidden, fugitive population which lies outside the protections of our laws.

The proposed legalization program has been criticized by some as a reward for lawbreakers. In fact it represents a practical decision that is consistent with effective law enforcement. We have neither the resources nor inclination to locate and deport those illegal aliens who, in effect, have become members of their communities through continuous residence in the United States for a number of years. Longer term illegal residents would be the ones most likely to resist deportation successfully by relying on procedural safeguards and administrative relief available under existing law. A massive deportation effort would divert important resources of the Immigration and Naturalization Service (INS) at precisely the time when its enforcement priority should be effective implementation of employer sanctions.

The only realistic way to deal with this growing class of undocumented workers is to grant a limited legal status to its productive and law-abiding members in a manner which will enable them to enter into the American mainstream. By permitting long-time residents who have demonstrated a commitment to this country to work their way into citizenship, we can reach a fair and humane solution to a regrettable situation that we intend never to allow to recur. By eliminating the second-class status of the undocumented population, a one-time legalization program would allow millions of hardworking individuals who already contribute their labor to this country’s economic life to participate fully in American society.

Legalization would have other beneficial effects. It would allow employers who have come to rely on a migratory workforce to hire lawfully many of those same laborers in accordance with the em-

44. See Teitelbaum, supra note 4, at 25. See also Hewlett, supra note 6.
ployer sanctions provision of the legislation. Because qualifying aliens would come under the protection of the law, they would no longer be subject to unconscionable exploitation and their employment would not lead to the depression of wages and working conditions in the United States.\textsuperscript{45} Equally important, legalization would allow the INS to devote its limited resources to stopping future arrivals and implementing employer sanctions. Finally, through the legalization process, immigration authorities would gain invaluable information about concentrations and movements of undocumented persons, which would help deter more illegal immigration.

The terms of any legalization program, however, must not encourage future illegal migration by establishing an eligibility date which attracts aliens anxious to take advantage of the program or those hoping for repeated “amnesties.” Additionally, in fairness to American citizens, legal residents, and would-be immigrants waiting patiently to come here legally, the program cannot provide unduly generous legalization criteria or excessive social welfare benefits.

At the time this article is being written, the Senate bill, S. 529, provides for two categories of legal status. Illegal aliens who entered the United States before January 1, 1977, and have since resided here continuously may apply for permanent resident status. Those who came on or after January 1, 1977, but before January 1, 1980, may apply for new legal status, that of aliens lawfully admitted for temporary residence, which may be adjusted to permanent resident status after three years. An exception is made for aliens from Cuba or Haiti, who may apply for temporary resident status if they were in the United States before January 1, 1981. The House bill, H.R. 1510, as introduced, contained the same two-tiered legalization program. The House Immigration Subcommittee, however, substituted a one-tier schedule with January 1, 1981, as the eligibility date for permanent resident status. The House Judiciary Committee, by a 15 to 14 vote, later advanced the date even further so that aliens who have resided here since January 1, 1982, would be entitled to apply for permanent resident status.

In the judgment of the Reagan administration, the two-tier 1977-1980 approach utilized by the Senate bill more appropriately reflects the principles which should govern any legalization program. The 1980 eligibility date contained in the Senate bill is also consistent

\textsuperscript{45} Various studies indicate that illegal aliens have adverse affects on the U.S. labor market. See, e.g., SELECT COMM’N APPENDIX E, supra note 7, at 229-32. See also Teitelbaum, supra note 4, at 35.
with the recommendation of the Select Commission, which by unani-
mos vote concluded that aliens not in the country before January 1,
1980, should be ineligible for legalization.

In setting a cut-off date of January 1, 1980, the Commission has selected
a date that will be near enough to the enactment of legislation to ensure
that a substantial portion of the undocumented/illegal alien population will
be eligible, but that predates public discussion of the likelihood of a Com-
mission recommendation in favor of legalization. The Commission does not
want to reward undocumented/illegal aliens who may have come to the
United States, in part at least, because of recent discussions about legaliza-

The rationale for legalization is not to provide legal status for all
illegal aliens but to grant legal status to those who have demon-
strated a commitment to this country by long-term continuous resi-
dence as contributing, self-sufficient members of their communities.
The House bill's January 1, 1982, eligibility date and elimination of
the two-tier approach would provide the benefits of permanent resi-
dence status (including the right to petition for the admission of
family members and, after the five years, to apply for citizenship)
to some who have been here only two years — substantially before
the requisite commitment to this country has been demonstrated. A
two-tier legalization appropriately permits a more gradual adjust-
ment of illegal aliens to permanent residence status.

It is important to note that both bills require that applicants for
legalization be otherwise admissible as immigrants to the United
States. In general, they will be subject to most of the thirty-three
grounds of excludability or inadmissibility provided by the Immigra-
tion and Nationality Act. Those who have been convicted of a fel-
ony or three or more misdemeanors while in the United States will
be ineligible. This test would also exclude the mentally ill, drug traf-
fickers, persons who would not be able to sustain themselves above
the poverty level, and those who would be a threat to public safety or
national security. Also ineligible would be those who have assisted in
the persecution of any person on account of race, religion, national-
ity, political opinion, or membership in a social group. Some grounds
of exclusion may be waived by the Attorney General for humanita-
rian purposes or in the public interest.

The legislation provides that aliens may apply for legalization dur-
ing a one-year period beginning three months after enactment. Given
these time restraints, as INS Commissioner Alan C. Nelson stressed
during Congressional testimony, it is especially important that im-
plementation of the program be orderly and efficient.

46. SELECT COMM'N FINAL REPORT, supra note 26, at 77.
Assuming that this legislation is enacted, the INS will be responsible for legalizing a great number of aliens in a short period of time. Extensive planning has been done since the Administration's Omnibus Immigration Bill was introduced in 1981. Our planning has been based on a number of goals. We believe that the program should not disrupt the normal business of the INS. The program should provide a simple, non-threatening method for aliens to obtain information concerning their eligibility and to file applications. Applications should be processed to completion as quickly as possible. Finally, we [must] work to ensure that the procedures guarantee that only eligible aliens receive benefits under the law.49

The implementation plan, based on the current legislative language and the House and Senate bill reports, contains four basic components. First, an extensive public awareness program using the media, voluntary organizations, an INS telephone system, and printed brochures will provide information concerning legalization eligibility and procedures. Because research has shown that misunderstanding, suspicion of authority, and fear of apprehension have led to unexpectedly low numbers of applicants in the legalization programs of other countries,50 the information will stress that enforcement actions will not be based on nonfraudulent legalization inquiries.

Second, to further encourage participation among undocumented aliens, voluntary agencies and other public and private organizations will provide facilities and personnel trained by the INS to advise applicants and assist in preparing applications. Third, INS employees will be available at many facilities to review applications and conduct personal interviews if necessary. Finally, a computerized processing center will be established to complete the processing of applications received from facilities located around the country.

Aliens granted residence will not be eligible initially for federal entitlement programs. The Senate bill provides that those granted permanent residence will be ineligible for three years. Those granted temporary residence will be ineligible for the three years of temporary residency in addition to three years following adjustment to permanent resident status. Block grant assistance to the states would offset state and local welfare program costs associated with legalized residents.

The House bill, while making legalized aliens ineligible for federal benefits for five years, authorizes the federal government to fully reimburse the states for the costs of public assistance during this pe-

50. SELECT COMM'N FINAL REPORT, supra note 26, at 80.
period. It also requires the Secretary of Education to assist state educational agencies in providing educational services to legalized aliens. The Reagan administration opposes the benefit and reimbursement provisions in the House bill. The proposed transfer to the federal government of unlimited financial responsibility for state programs, without mechanisms to discourage their unnecessary use, cannot be justified in this time of budget austerity. A block grant program, such as contained in the Senate bill, to assist states in providing medical and other services to legalized aliens more appropriately reflects shared federal, state, and local responsibilities while discouraging welfare dependence.

**H-2 and Transitional Worker Programs**

Some American employers have become dependent upon undocumented workers, particularly farmers and ranchers in the Southwest and West, where an estimated 300,000 to 500,000 illegal aliens work each year.\(^{51}\) Agricultural employers generally support a return to a legal and orderly method of obtaining workers. It is critically important, however, that employer sanctions be accompanied by adequate legal procedures to fill agricultural labor needs if they cannot be met by American workers. As A. James Barnes, General Counsel to the Department of Agriculture, testified before the House Judiciary Committee:

> As a matter of fundamental fairness, if it will be illegal to hire undocumented workers, then access to a legal workforce should be provided when needed. At that same time, failure to provide access to an adequate legal workforce would doubtless result in continued use of undocumented workers, which would undermine our overall objective of improved immigration control. Furthermore, failure to provide access to an adequate legal workforce could result in loss of production of some crops to other countries, reducing the nation's self-sufficiency in fresh fruit and vegetable food production and the positive contribution agriculture makes to our balance of payments.\(^{52}\)

Parts of the agricultural sector have utilized alien workers throughout much of this century. The nation's first temporary worker program, running from 1917 to 1921 and involving approximately 80,000 Mexican, West Indian, and Canadian workers, was designed to meet labor shortages caused by both World War I and immigration restrictions of the Immigration Act of 1917.\(^{53}\) From  

\(^{51}\) *Joint Hearings before the Subcommittee on Immigration, Refugees, and International Law of the Committee on the Judiciary, House of Representatives and Subcommittee on Immigration and Refugee Policy of the Committee on the Judiciary, United States Senate, 97th Cong., 2nd Sess. 384 (April 1 and 20, 1982) (Statement of A. James Barnes, General Counsel, U.S. Department of Agriculture) [hereinafter cited as *Joint Hearings on H.R. 5872 and S. 2222*].

\(^{52}\) *H.R. Rep.*, *supra* note 23, at 97.

\(^{53}\) *Select Comm'n Staff Report*, *supra* note 4, at 669-70.
World War II until 1964, the United States relied upon the *bracero* program for many of its seasonal harvest workers, employing between four and five million Mexicans over a twenty-two year period. When the program ended, American agricultural employers turned increasingly to illegal aliens.

Although the United States has not used a sizable temporary worker program since 1964, a much smaller number of temporary workers can enter the country as H-2 nonimmigrants. At present, the H-2 program is defined almost completely by regulations promulgated by the INS and Department of Labor. An H-2 worker is defined as a nonimmigrant alien resident of a foreign country who temporarily enters the United States to perform temporary labor. Petitions for workers are reviewed by the Department of Labor, which can permit the entry of foreign labor only when domestic workers are not available and the employment of aliens would not adversely affect the wages and working conditions of Americans. H-2 workers are certified to work up to eleven months, with provisions that visas may be renewed for a maximum of three years in certain cases. Between 1973 and 1978, approximately 30,000 aliens worked as H-2 laborers annually. About 12,000 of these were agricultural workers, mostly British West Indians who harvested apple crops and sugar cane in the eastern United States.

While the H-2 program is working fairly well in the East, it has received some criticism from both employers and laborers, particularly in the West. The certification process has sometimes led to delays, leaving agricultural employers unsure whether they will be able to hire certified laborers until it is too late. Furthermore, the question has arisen whether the present regulatory program is suitable for use on a broader scale in the West and Southwest, where crop seasons overlap and a greater flexibility for workers to move from one farm to another is necessary to meet changing labor needs. Considerably larger numbers of workers are needed in the West than the 12,000 H-2 workers currently certified to fill some 18,000 agricultural jobs on the East Coast.

In view of these considerations, the reform legislation revises, streamlines, and codifies the existing H-2 program to ensure that it is responsive to the needs of agricultural employers. The program

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54. Id. at 672.
56. SELECT COMM’N STAFF REPORT, supra note 4, at 684.
will ensure that where American workers are not available to fill jobs, a legal, workable avenue to admit foreign workers will exist. At the same time, the program will not provide incentive to hire foreign rather than resident laborers.\textsuperscript{57}

In order to lessen the short-term impact of the employer sanctions program on agricultural employers, the legislation also contains a transitional nonimmigrant agricultural worker program. This three-year program is designed to allow agricultural employers to shift gradually from the employment of undocumented aliens to the employment of American or H-2 workers. During the first year of the program, employers may hire illegal aliens for one hundred percent of their labor needs. Authorizations for employment of illegal aliens would drop to sixty-seven percent in the second year and thirty-three percent in the third year. After the third year, the transition program would end. Employers wishing to participate must submit a request to the Attorney General during the first year of the transitional period and supply information on past seasonal labor needs. The Attorney General may approve certification to employ specified numbers of illegal aliens after considering the needs of the employer and the availability of domestic labor.

The statutory authorization of an H-2 program, coupled with the three-year transitional program, should provide a reasonable and practical mechanism for protecting the interests of American laborers and agricultural employers as well as the rights of foreign workers. By codifying regulations which have proved effective in the past, as well as new rules designed to avoid delays, the proposed law should accommodate the legitimate needs of the agricultural community.

\textit{Adjudication Procedures}

Experts generally agree that our procedures for adjudicating immigration cases are cumbersome to the point of being unworkable.\textsuperscript{58} Legal precedents which were adopted during a time of relatively modest illegal migration are inadequate to respond to present-day

\textsuperscript{57} An alternative proposal, endorsed by the President's Task Force on Immigration and Refugee Policy, provided for a two-year pilot temporary worker program. The program would admit up to 50,000 workers annually for stays of 9 to 12 months in states where the governor had certified a shortage of U.S. labor for specified occupations. Since this proposal is not included in the reform legislation currently under consideration, the Reagan Administration supports a statutory authorization of an H-2 temporary worker program in the belief that it can provide a streamlined means for the legal entry of needed temporary foreign workers while protecting domestic workers from adverse impacts.

\textsuperscript{58} See Joint Hearings on H.R. 5872 and S. 2222, supra note 51, at 90, 91 (Statement of Benjamin R. Civiletti); 133, 144 (Statement of R. Conner); 151, 165 (Statement of J. Shattuck).
realities of dramatically increased illegal entries and mass asylum. Immigration judges currently hear and decide approximately 120,000 deportation, exclusion, and bond cases annually, one hundred percent more than the number heard in 1981. Similarly, asylum cases have burgeoned in number and complexity. Until the end of the last decade, the United States generally received only infrequent asylum applications from persons whose admission seldom attracted great public attention. As recently as fiscal year 1978, less than 3,800 asylum applications were received. The number of pending applications now exceeds 169,000, and new applications are filed at the rate of 2,200 per month.

The current appeals process, by allowing multiple opportunities for administrative and judicial review, has resulted in unconscionable backlogs that seriously threaten enforcement of immigration laws. This congestion has become part of a system which actually encourages aliens to seek delays through frivolous claims since they are entitled to remain in the country during the pendency of their action. Meanwhile, clogged dockets prevent truly meritorious claims from being heard in a timely fashion. A system overcome by so many unresolved cases is one which cries out for reform. The pending legislation responds by streamlining the adjudication procedures.

60. *Asylum Adjudication: Hearings before the Subcommittee on Immigration and Refugee Policy of the Committee on the Judiciary, United States Senate on How Do We Determine Who is Entitled to Asylum in the United States and Who is Not?* 97th Cong., 1st Sess. 7 (October 14 and 16, 1981) (Statement of D. Meissner).
63. For example, under 8 C.F.R. § 208.1 (1983), an asylum applicant not yet in formal exclusion or deportation proceedings may file an application with an INS district director. If denied, this application may be renewed before an immigration judge in exclusion or deportation proceedings, 8 C.F.R. § 208.9 (1983). If denied by the immigration judge, an appeal may be taken to the Board of Immigration Appeals, 8 C.F.R. § 3.1(b)(1), (2) (1983). A final Board order in exclusion may be reviewed in U.S. District Court, 8 U.S.C. § 1105a(b) (1982); while a final deportation order may be reviewed directly in a Court of Appeals, 8 U.S.C. § 1105a(a) (1982). Review may proceed to the Supreme Court level. In addition, at least two Circuits have ruled that an alien claiming procedural defects in the hearing process affecting asylum applications may not need to exhaust administrative remedies and may proceed directly in U.S. District Court in some circumstances. Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982); Jean v. Nelson, 711 F.2d 1455, *reh'g en banc granted*, 714 F.2d 96 (11th Cir. 1983).
One of the most important reforms establishes an expedited exclusion proceeding whereby aliens may be summarily excluded if they are attempting to enter the United States without documentation or legal basis for entry and are not seeking asylum. This summary exclusion would be similar to current procedures regarding expulsion of stowaways or crewmen of foreign vessels. It is a thorough process. If an immigration inspector determines an alien to be summarily excludable, he does not act independently. The alien is referred to a second inspector who examines the case and, if the decision to exclude is upheld, it is examined again by the supervisory inspector on duty before the actual expulsion occurs.

At the time of this writing, the House bill qualifies the expedited exclusion procedure by requiring that no alien may be summarily excluded without first being notified of his right to counsel and a review of his case by an Administrative Law Judge. The Senate bill, which does not provide for such notification, more appropriately reflects the original basis for expedited exclusion— that aliens who can offer no justification for their presence in the United States should be subject to prompt expulsion.

Another adjudication reform addresses the oft-repeated complaint that the agency which enforces the immigration law should not also be responsible for administrative review of enforcement actions. Specifically, the legislation provides that upon enactment immigration cases will be adjudicated by immigration judges and a United States Immigration Board, within the Department of Justice but outside the INS. Several significant organizational differences exist between the Senate and House bills. The Senate bill provides that the immigration judges and Board members be appointed by the Attorney General. Board members would have staggered terms of six years to provide appropriate independence and stature. The House bill, on the other hand, stipulates that the United States Immigration Board would be an independent agency within the Department of Justice. Its members would be appointed by the President for six-year terms with the advice and consent of the Senate, and its chairperson would in turn appoint Administrative Law Judges in accordance with the competitive merit system used by the Office of Personnel Management. The Reagan administration prefers that the Board remain under the administrative direction of the Attorney

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65. The substance of this proposal has already been accomplished by regulation, with the creation of the Executive Office for Immigration Review on January 9, 1983, consisting of the Board of Immigration Appeals and the Office of the Chief Immigration Judge, and all immigration judges. See 48 Fed. Reg. 8038 (1983).
General, as is the case with the present Board of Immigration Appeals. The existence of the Board as an independent agency within the Department of Justice would disrupt the Executive's authority to administer what should be an integrated, unified body of immigration law and would lessen accountability and the management control necessary to respond to an ever increasing immigration caseload.

Both the House and the Senate bills seek to deter the violation of our immigration laws by prohibiting repetitious judicial review of exclusion, deportation, or asylum administrative determinations. Under current law aliens not legally entitled to be in this country are capable of delaying their expulsion literally for years by taking advantage of myriad avenues of judicial review. In general terms, the proposed reforms are three. First, summary exclusion decisions are not subject to appellate review even, as in the House bill, where an Administrative Law Judge redetermination has been requested and received. This inability could be particularly important in a mass immigration emergency situation where the aliens have neither reasonable claims for entry nor colorable asylum claims.

The second improvement over the current system involves judicial appeals from final orders of exclusion or deportation and asylum claims arising thereunder. The legislation provides that such appeals must be brought in the circuit court of appeals and the issues for review combined thereunder. Deportation cases are currently reviewable by the circuit court, but the courts have permitted numerous alternate methods of obtaining review of all forms of immigration administrative decisions. Habeas corpus review is also preserved but both the House and Senate bills seek to reinforce the extraordinary nature of this remedy.

Finally, the legislation prohibits judicial review of Board or immigration judge decisions with respect to motions to reopen, reconsider, or stay administrative proceedings. The failure to preclude such review in the past has clearly encouraged the filing of meritless mo-

68. See United States ex. rel. Marcello v. District Director, INS, 634 F.2d 965 (5th Cir. 1981) (habeas corpus an alternative to a petition for review of administrative deportation order). Matters outside exclusion and deportation proceedings can be reviewed under 8 U.S.C. § 1329 (1982).
69. H.R. REP., supra note 23, at 54. "The Committee believes that habeas corpus should be used only as an extraordinary remedy, in keeping with its historical function of testing not mere irregularities, but instances 'where the processes of justice are actually subverted.' Fay v. Noia, 372 U.S. 391, 411 (1962)." See also S. 529, § 123(b)(2), 98th Cong., 1st Sess. (1983) (permitting constitutional, but not statutory, habeas corpus).
tions to delay expulsion from the United States. 70

In summary, the adjudication section of the Immigration Reform and Control Act reflects the tension between our need to ensure that administrative and judicial review of immigration enforcement actions meet the requirements of fundamental fairness and the reality of a seriously backlogged system.

CONCLUSION

The immigration reforms discussed in this article have stimulated a level of interest and scrutiny seldom witnessed on the national scene. The intensity of the debate is not surprising given the fact that we are, after all, a nation of immigrants, born of the ideals of those who came here seeking a better life. At an INS naturalization ceremony in 1982, President Reagan restated that vision in welcoming the new citizens:

[It has] long been my belief that America is a chosen land, placed by some Divine Providence here between the two oceans to be sought out and found only by those with a special yearning for freedom. This nation is a refuge for all those people on earth who long to breathe free. 71

While America has and will continue to offer great, new opportunities to people around the world, it has become increasingly obvious that we cannot, by ourselves, accommodate all those who seek a better life or flee persecution. At the same time, however, we must not allow the problems posed by international migration to erode our traditional abilities to accept those from other lands legally and fairly. We must not wait to formulate a new national policy on immigration. The Immigration Reform and Control Act of 1983, the product of a decade of deliberation, is legislation which offers timely answers. Improved mechanisms, reformed policies, and proven, time-worthy principles have gone into its making. It will preserve our immigrant tradition while restoring order to our immigration process.

70. See 129 Cong. Rec. S6938 (daily ed. May 18, 1983) regarding the chronology of motion filings in a typical immigration case which has reached the Circuit Court of Appeals. See also, Muigai v. INS, 682 F.2d 334 (2nd Cir. 1982), (a recent decision imposing $2,000 in double costs jointly against alien and counsel for repeated dilatory tactics).