Foreword

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No other country in the world so powerfully attracts potential migrants as does the United States. No other country approaches the United States in the number of legal immigrants accepted or refugees permanently resettled. I deeply believe most Americans are very proud of both our reputation and our record as truly being a land of opportunity and refuge—and I believe that reputation and that record have generally been very good for this country.

However, existing immigration policy is no longer adequate to deal with the growing immigration pressure on the United States. Immigration to the United States is out of control and it is so perceived at all levels of government and by the American people, and indeed by people all over the world.

Reform is imperative. This does not mean shutting ourselves off from the rest of the world. Immigration to America has been limited in various ways for more than a century and has been subject to various forms of numerical limitation for over sixty years. Immigration will continue to benefit the United States if the law is reasonably amended to be appropriate for contemporary conditions—and if the law can be enforced.

Last year in his Foreword to this annual issue on immigration Senator Edward M. Kennedy said: "Today we are at a watershed in our Nation's effort to establish fair, humane and enforceable immigration and refugee policies. At no time in recent years has the opportunity for action on immigration proposals been more hopeful, or the consequences of inaction more dangerous."

I agree with these sentiments and I am pleased that the legislation which Congressman Romano Mazzoli (D-Ky.) and I co-sponsored in the Congress and introduced on March 17, 1982, was characterized as "not nativist, not racist, not mean" in the press. This is a major accomplishment. I am pleased also that for the first time in our history an immigration debate is taking place which is not wallowing in emotionalism, racism and guilt. This is not an accident. It is a tribute to the many witnesses who testified before the Senate Subcommittee on Immigration and Refugee Policy and the interest groups which have lobbied their positions before us. The press has also maintained a lofty tone. And finally, I am very proud of the manner in which the debate on these sensitive issues was conducted among my colleagues in the Senate. All were conscious of the past history in connection with immigration legislation and were determined not to duplicate in our deliberations the racism which characterized the 1880, 1924, or 1952 legislative enactments.

I was also conscious of the need both to make immigration a bipartisan issue and to balance two conflicting traditions within the United States: on the one hand, a desire to continue our tradition of immigration, of welcoming newcomers; and on the other hand, the need to control the influx of persons entering the United States. My counterpart in the House, Romano Mazzoli, chairman of the Subcommittee on Immigration, Refugees, and International Law, agreed with the bipartisan approach and viewed the issue in the same focus as I did. We met frequently and as a result an identical bill was introduced by a progressive Democrat in the House and by a progressive Republican in the Senate. In both Houses the members of the minority party endorsed the bill since we had submitted a balanced program permitting this country to once more control its borders and to still maintain its immigrant tradition.

As this is written, the bill has passed the Senate and has been reported out of the House Committee on the Judiciary. The bill is now awaiting action on the floor of the House. It is appropriate therefore to discuss in this Foreword the policy behind the bill, and the balance that I mentioned which led to the New York Times characterization.

The bill has three critical and distinct reform proposals: 1) increased control of illegal entrants accomplished in the bill

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through (a) employer sanctions, to inhibit future flows, (b) legalization, to regularize the undocumented aliens presently in the country, and (c) facilitating the entrance of temporary workers to reduce any employer dislocation that might occur as a result of employer sanctions and legalization; 2) reform of the asylum adjudication system by limiting the number of appeals available to the asylee applicant and increasing the stature and independence of the adjudicators; and 3) establishment of a numerical limit on legal immigration to the United States and, within that limit, some restructuring of the preference system in order to clarify the purposes of our immigration policy.

**CONTROL OF ILLEGAL ALIENS**

**Employer Sanctions**

The primary motivation for aliens illegally coming to the United States is economic opportunity. Following the practice of other developed nations (Canada, France and West Germany) the Simpson-Mazzoli bill establishes for the first time as a matter of federal law that it is illegal to hire an illegal alien.

I think few would object to that policy. Given the difficult economic conditions in this country at present, it is more important than ever that we give priority in our economic system to persons who are legally here.

As recommended by the Select Commission on Immigration and Refugee Policy, the bill imposes civil penalties—fines—on employers who hire illegal aliens. This issue has been explored in considerable detail in this *Review* and other learned journals, and I shall only sketch out the basic issues of the debate.

Employers and employees, both citizens and others legally resident in the United States, are entitled to a system that can establish legality easily. Employers need a verification system which will permit them to obey the law without fear of being prosecuted for inadvertently hiring an illegal alien. Employees need a system which will permit them to establish employment eligibility without discrimination.

At present, unfortunately, most documents that are used in our society to establish identity are not “secure.” Birth certificates, social security cards, driver's licenses and other identification documents are counterfeited on both sides of the border and are
readily available to illegal aliens seeking documentation. We ap-
proached this portion of the legislation cautiously. Hispanics, es-
pecially, are concerned that a new verification system may result
in discrimination against them or others who "look or sound for-
eign." As a matter of practice, most persons seeking a job are re-
quired to have a social security number, and for a variety of other
reasons in our society, identification is required for such things as
driving a car, cashing checks and establishing the right to receive
certain benefits from the government such as food stamps. Forty-
one states now have a system of issuing identification cards, pri-
arily because of the need for identification by persons who do
not have a driver's license. There is increasing pressure on all of
these systems to make this identification more secure.

The Simpson-Mazzoli bill, therefore, does not preclude the op-
portunity to utilize new identifiers that are being developed—
while at the same time pressing the federal government to estab-
lish an employment verification system which is secure. The bill
provides that for the first three years after the passage of the Act,
the identifiers used shall be existing ones: a document first to es-
tablish one's right to work in the United States, and second, an
identifier to establish one's identity. The first may be accom-
plished by a birth certificate or social security card and the sec-
ond by an alien identification card, or driver's license, or other
identity document. The passport which provides evidence of both
may be used without other documentation.

The bill requires the Executive to study the use of the existing
identification system and within three years either modify the ex-
isting identifiers or come up with a new one so as to "establish a
secure system for determining employment eligibility in the
United States."4 This was a compromise between the desire of
the Congress for a new identifier—counterfeit and tamper resis-
tant—and the preference of the Executive to use existing
 identifiers.

The bill provides for a report to the Congress every six months
during the first three years on what type of system the Executive
is developing and what is being learned from the operation of the
existing system. A report is also required on the impact of em-
ployer sanctions in two other areas: the paperwork and record
keeping burden on employers and the possible discriminatory im-
 pact of employer sanctions.

This latter concern—discriminatory impact—is most important
since I am aware of the possibility of employment discrimination

4. S. 2222, supra note 2, § 101(a)(1).
arising from use of employer sanctions both in hiring and in the process of employment verification. I was, therefore, quite pleased that various representatives of civil liberties organizations who testified before us indicated that, if an employer sanctions system were to be established, the identification system in the bill was as fair as one could devise. The key is that the verification system is required of all persons. Regardless of how well an employer may know a potential employee, the employer must examine the documents and attest that those documents have indeed been examined, and the employee must attest s/he is legally able to be employed in the United States. Failure to follow this procedure is a violation under the bill.\(^5\)

Finally, any new documentation or identification system developed under the legislation would only be required for work purposes. It would not be required to be carried on the person and it could not be required for any other use, including non-immigration law enforcement.\(^6\) This is but another safeguard to avoid any possible civil liberties abuses.

**Legalization**

Complementing the employer sanction provision is the legalization provision. We must not only seek to control persons coming to the United States, but also be responsive to the undocumented population that is already here. Many have lived and worked here for long periods of time and have contributed much to their communities. Many are subject to exploitation and the existence of this furtive sub-society erodes our sense of ourselves as law-abiding people.

The legislation provides, as the Select Commission proposed, for the legalization of a portion of the undocumented aliens. The Simpson-Mazzoli bill's legalization provisions are generous but reasonable. We provided permanent resident status for persons who have resided here continuously in unlawful status since 1977.\(^7\) For persons who have been here since 1980, we provided temporary resident status for three years and, after three years,

\(^5\) Id.
\(^6\) Id.
\(^7\) The description of the legislation provisions in the text follow the bill as it passed the Senate and was reported out of the House Judiciary Committee. The bill as it was introduced used the dates 1978 and 1980 and had slightly different conditions for legalization.
an adjustment to permanent resident status. As a condition of both the adjustment to temporary resident status and to permanent resident status, the person must meet the normal exclusion requirements for immigration to the United States. This will exclude those who would present a danger to public health, public safety and those likely to become a "public charge."

In addition, those who obtain temporary resident status must have a minimum competency in the English language or be enrolled in a course of study to learn English before they may adjust to permanent resident status. The purpose of this provision is to encourage naturalization. For example, legal immigrants from Mexico have a very low rate of naturalization. Knowledge of the English language is one of the requirements for naturalization, and providing for a knowledge of English during the three-year temporary residence period may encourage those legalized to embrace this nation as citizens.

We—each Senator and each Representative who supports this bill—are aware that the provisions for legalization are controversial and generate contrary public opinion. But legalization is very much a necessary part of legislation designed to gain any control of our borders. It is not a "reward" for illegal activity.

Temporary Workers

Some American industries, particularly agricultural labor in the southwest and west, have become dependent upon undocumented workers. These employers were concerned that they might not be able to obtain sufficient American workers to harvest their crops after employer sanctions become law and they therefore requested that we streamline the procedures presently in our laws for obtaining foreign temporary workers.

The role of temporary workers in our economy is hotly debated. The degree to which American workers are willing to take certain jobs under existing conditions or even under changed conditions is difficult to determine. With unemployment—especially among unskilled minority groups—very high at present, we chose to be very cautious. We provided the ability to import temporary workers consistent with the continued protection of American labor. We retained a requirement that a "certification" be requested from the Department of Labor that there are not sufficient workers in the United States capable of performing the job at reasonable wages. We did provide time limits to assure that bureaucratic delay did not bar employers from obtaining needed labor quickly. We also changed the criterion for Department of Labor review to make it more realistic in accordance with market
recruitment. Thus, we focused the definition of available labor on the availability at the intended place of employment, rather than the entire United States.

**ASYLUM**

One of the continuing problems of recent years has involved the question of asylum. The need to clarify the definition of "asylee" and reform the adjudication procedures was dramatized by the entrance of Cubans during the Mariel boatlift and by the large numbers of Haitians who have entered the United States without documents in the last few years.

The asylum adjudication provisions of our current law were tailored to a limited number of rather patent cases. The phenomenon of the United States being a country of mass first asylum swiftly overloaded the system, causing it to collapse under its own ponderous weight.

The provisions of the Simpson-Mazzoli bill are intended to chart a careful course between the concerns of fairness on the one hand and expediency on the other. Both the government and asylum advocates agreed that asylum adjudication was in need of reform. The procedure is wholly convoluted. Presently one can plead asylum at the district director level. If that plea is turned down one can appeal to the Board of Immigration Appeals. If the applicant is once again turned down, the law provides for a petition of habeas corpus with a hearing *de novo* before the federal district court, and if that is turned down there is still another appeal to the circuit court of appeals.

It is hardly a procedure designed for the expeditious handling of large caseloads. When there were 2,000 to 5,000 asylum claims a year such a cumbersome system might have been tolerable. But when we suddenly have over 105,000 cases—the present backlog—then the procedure cries out for change.8

All sides recognized the problems of excessive delay in the procedure. The Executive, recognizing that delay was inherent in the process and that deportation was almost impossible, instituted a procedure of interdiction and detention to deter people from coming to our shores. Asylum advocates felt that the process was un-

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8. It does not console me very much that West Germany has a backlog of over 160,000 asylum cases and the asylum adjudication process there took, until recently, over-seven years. But it does indicate our problems are not unique.
fair, even though lengthy. The District Director, the immigration judge and the Board of Immigration Appeals were all under the umbrella of the Immigration and Naturalization Service and asylum advocates argued that one could not expect a fair review. They argued that even the district judge was bound to side with the Executive because the State Department could, in individual cases, make a finding of conditions in the foreign country which in large measure would be determinative of the factual situation in the case. It appeared that asylum advocates actually diligently sought delay since as long as the case was "pending" their client could remain in this country. If the case ever did reach a final determination, their client could be deported.

The bill was drafted to reform this system. To limit the delay the adjudication steps were reduced—limiting the process to two hearings: one very complete hearing at the trial stage and review at the appellate level. This expedited procedure responded to the government's objections. To address the charges of unfairness, the bill established a statutory United States Immigration Board with specially trained asylum judges. The Board and the immigration judges are outside the scope of control of the Immigration and Naturalization Service and yet within the Justice Department. All judges are given senior civil service status.

These changes are designed to create a fairer and more efficient asylum adjudication process.

LEGAL IMMIGRATION

Finally, let me address the major change we made in the legal immigration system. Perhaps the most important change was an overall numerical cap. To obtain control, we indicate we intended to count all persons who come into our country and then establish a reasonable limit on that number. We chose a limit based on last year's total of 155,000 immediate relatives who entered without any numerical limitation and the 270,000 quota immigrants admitted under current law—a total of 425,000 immigrant visas. Refugees were not included within the cap since present law provides a "consultation" mechanism which I believe constitutes a sufficient control.

The bill established a revised preference system to distribute the 425,000 visas. Present law includes both family reunification preferences and independent preferences. The legislation some-
what reduces the dominance of family reunification in the preference system. We established a family reunification quota of 350,000 and an independent immigrant quota of 75,000.

Regarding the family reunification preferences, we were well aware that the legalization would increase pressure on the "second preference" with many newly permanent residents petitioning for their immediate relatives. To avoid excessive backlogs, we altered that preference somewhat in order to limit it to spouses and minor children, rather than the present spouses and sons and daughters. We also increased substantially the percentage allotted to this preference.

A more significant change is the elimination of the "fifth preference." We felt it important to define the family as we in the United States have defined it, rather than using the "extended family" definition of many societies of older or developing nations. With present backlogs of over 700,000 in the fifth preference we felt that the continuation of this preference for brothers and sisters of adult United States citizens represented a cruel blow to many who may have to patiently wait in line for a decade or more.

The bill increases the number of independent immigrant visas from 54,000 under current law to 75,000. This follows the recommendations of the Select Commission to provide for more "new seed" immigrants. The independent preferences include persons of exceptional merit and ability in the arts, sciences and in business, as well as skilled workers in short supply in the United States. The bill also creates a new investor preference requiring a $250,000 investment and the employment of at least four American workers, not members of the investor's family.

I am pleased with the quality and the results of our work. I feel confident that we are creating a new immigration system which will achieve control of our borders while continuing our finest tradition of receiving immigrants who come to our shores to share our freedom and prosperity.

We feel we honestly address the full spectrum of this tough national issue—hopefully Congress will respond, if not now, then very shortly. It is an issue that will not "go away." It will be with us for the rest of our history.