

Foreword

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In December 1976, I was privileged to write a Foreword to the *San Diego Law Review* on immigration and refugee issues, and to discuss some of the issues arising after the landmark reforms of the 1965 Immigration Act. Since that time we have made major advances toward immigration reform. And 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. Unless we are vigilant, the reforms of the past may be eroded by the anti-immigration sentiment spreading across the land.

In 1976, the issue was how to obtain action on immigration issues. We had experienced a decade of neglect following the 1965 Act. No immigration legislation of any consequence had been before Congress for a decade, and the Senate Judiciary Committee had not held a single hearing or meeting on immigration issues during this period. The unfinished agenda from 1965 was simply ignored, and there was no sign of progress. As I wrote in my Foreword in 1976:

The Act of 1965, clearly a benchmark in the history of American immigration policy, was a victory for the forces of common sense and decency . . . (But) the Act was only the beginning of an important task. It failed to resolve issues relating to immigration from Western Hemisphere countries. It did not include a comprehensive policy for admitting refugees. It did not deal with needed reform in areas such as deportation, naturalization, and citizenship. And in many respects the Act fell short of the desired flexibility in immigration policy and practice recommended by the Executive Branch and supported by many members of Congress.

By neglecting immigration for so many years, Congress was allowing one of our country's oldest traditions to become one of our

most controversial and misunderstood issues. Instead of embracing our immigrant heritage, many Americans were coming to fear it.

To some extent this trend reflected the mood of the times and the growing preoccupation with stubborn and increasingly critical challenges at home and abroad. But part of the problem derived as well from the immigration law, which was—and still is—inadequate to meet modern needs or to cope with the migration pressures of our time. This was particularly so in our inability to deal effectively with refugee crises, such as the Indochinese refugee problem.

To restore faith in our immigration policies—to establish an immigration law that is in America's long run interests and faithful to our humanitarian traditions—I urged in 1976 that we should follow the precedent established by President Truman and create a high-level Commission on Immigration and Naturalization. The work of the Truman Commission had laid the basis for the 1965 reforms, and a new commission could provide the serious and comprehensive review of our immigration law that was so long overdue.

I also called for urgent action to reform the refugee provisions of our law and to establish a flexible and humane procedure for the admission and resettlement of refugees in the United States.

Since those suggestions and others were made in 1976, we have made considerable progress. Yet, as this issue of the *Law Review* suggests, much remains to be done to achieve the immigration reforms that are needed.

Select Commission on Immigration and Refugee Policy

The Carter Administration in early 1978, formed an Inter-Agency Task Force on Immigration. This step followed the cool reception given to the Administration's hastily prepared immigration proposals of 1977.¹ The stature and composition of this Task Force did not, however, command the respect of Congress or the attention of the American people that was needed to deal with the complex immigration issues we faced. Therefore, in late 1978, Congress approved legislation I moved through the Senate, (H.R. 12443),² establishing the Select Commission on Immigration and Refugee Policy.

In debate on the Senate floor, I emphasized the need for a high-level commission to make a comprehensive review of our immi-

1. S. 2252, 95th Cong., 1st Sess. (1977).

2. See H.R. 12443, 95th Cong., 2d Sess. (1978).

gration laws and policies—"a review that is beyond the capacity and scope of a single agency of the Executive Branch or a committee of Congress, and which must involve a broad spectrum of opinion and groups concerned with immigration reform." President Carter signed the bill into law on October 5, 1978 (Public Law No. 95-412).

The Commission's membership assured the broad and high-level review of the issue that was needed. Sixteen members were drawn from the following areas: Four members were selected from each of the Judiciary Committees of Congress (which have jurisdiction over immigration legislation); four cabinet members; the Secretary of State, the Attorney-General, the Secretary of Health and Human Services, and the Secretary of Labor; and four public members appointed by the President, including the Chairman, who was Father Theodore M. Hesburgh, president of the University of Notre Dame.

After two years' work, twelve regional hearings through-out the country, scores of expert consultations, and extensive research, the Commission submitted its report to the Congress and the President on March 1, 1981.³ As hoped, the report became a catalyst for action. The new Administration of President Reagan rapidly became involved in immigration questions. It formed a Cabinet level Task-Force under the Attorney General to review the Commission's findings and recommendations. After considerable debate, the Administration has proposed legislation.⁴ Rare joint congressional hearings have been convened by the Senate and House Judiciary Subcommittees on Immigration to review the Commission's work and the Administration's bill. And throughout the country, organizations and constituencies have focused their attention on the critical immigration issues before us.

Although the Commission attempted to chart a new course to reform, it did not succeed in finding answers to all questions, or reaching consensus in all areas. To the contrary, its study and report raised new questions as it wrestled with old dilemmas. Nevertheless, the Commission's success can be measured as much by what it rejected as by what it endorsed.

3. Comms. on the Judiciary, House of Reps. and Senate, 97th CONG., first SESS., FINAL REPORT OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY (COMM. PRINT 1981).

4. S. 1765, 97th Cong., 1st Sess. (1981).

First, it recommended an increase in immigration levels, despite the prevailing anti-immigration climate. It reaffirmed and extended the principle of family reunion as a goal of our immigration policy. It also recommended lifting the per-country ceilings for second preference and expanding second preference numbers. In addition it firmly rejected a rigid ceiling on total immigration.

Second, the Commission voted unanimously for a flexible program to adjust the status of undocumented aliens who are leading productive lives in the United States. Despite a certain vagueness in the report, the Commission's votes and discussions indicate a clear recognition that for any amnesty program to work, it must be comprehensive, reach out to as many undocumented aliens as possible, and have as few exclusions as possible. Only in this way will an amnesty work and undocumented aliens come forward.

A serious omission by the Commission was the failure to set a specific period of continuous residence for undocumented aliens to qualify for the amnesty. However, the Commission's discussions and straw ballots clearly indicate that most Commissioners favored a two year period of residence, and none called for more than four years. This is in sharp contrast to the Reagan Administration's ten year residency requirement, which follows a three-year period as a "temporary resident" without the same benefits of permanent residents.

To work, the residency requirement should be no more than one or two years prior to a cut-off date, perhaps January 1, 1981. In addition, we should not attempt to deport those whose only ground for exclusion from the amnesty program is that they do not meet the residence requirement. A special category should be authorized for them, to allow them to adjust their status at some future date.

Third, the Commission voted overwhelmingly against creating a vastly expanded temporary worker program. It strongly rejected calls to resurrect the old "bracero" program.

Fourth, the Commission voted to expand bilateral consultations to promote cooperation in the Western Hemisphere—especially with our neighbors, Mexico and Canada. These nations deserve special considerations in our immigration policy. Both the Commission and the Reagan Administration now support higher quotas for each nation, as well as efforts to expand and facilitate the movement of non-immigrants across the Canadian and Mexico borders. Obviously, the past teaches us that barbed wire fences do not make good neighbors. If we are to achieve greater cooperation with Canada and Mexico, we must consult with them and agree in advance, before our policies are set. Immigration is not

solely a domestic issue. It is a bilateral and international concern as well—and the Commission's report gives proper emphasis to this point.

Finally, the Commission made recommendations to protect the rights of aliens, eliminate the ideological and moral exclusions in the law, facilitate the naturalization process, and enhance the professionalization of the Immigration Service. All of these proposals and others represent essentially unanimous victories for reform.

But there were also some areas of sharp disagreement. One of the strongest concerns involved the Commission's preoccupation with enforcement issues—of closing our borders rather than facilitating entry. We must be scrupulous in our sensitivity to the fundamental civil rights of immigrants and asylum applicants. This is especially so as we consider new enforcement programs. Although we need new measures to cope with the flow of migrants, new immigration controls and their enforcement must be fair and humane.

Major disagreement also arose over the issue of sanctions against employers who knowingly hire undocumented aliens. A majority voted for such sanctions as a matter of principle, because sanctions under current law fall solely on undocumented aliens—not on employers who exploit them. Employers should be penalized if they engage in a pattern-and-practice hiring of undocumented aliens. The government needs this enforcement tool to cope with the serious problem of exploitation by employers.

Hispanics and other minorities understandably fear that employer sanctions will lead to denial of equal employment opportunities. That result can, however, be avoided by limiting sanctions to employers who engage in pattern-and-practice hiring of undocumented aliens—and by allowing employers to utilize readily available documents, such as a Social Security card to identify eligible employees.

Sanctions alone are not enough. The incentives for employers to hire undocumented aliens must be reduced. Part of the incentive is the willingness of such aliens to accept substandard wages and poor working conditions. The enforcement of existing laws must be intensified, including the minimum wage, Occupational Safety and Health Act, the Fair Labor Standards Act, Social Se-

curity insurance, unemployment insurance, and the equal employment provisions of the civil rights laws.

In general, the Select Commission's report has established a firm foundation for future progress on immigration policy. It reaffirmed the historic goals of America's immigrant heritage. It advocated increased immigration, not reduced flows. And it presents important alternatives to the Reagan Administration's proposals. Now it is up to Congress to act.

Refugee Policy

Over the past two years, we have also seen the first comprehensive effort to establish a permanent and generous authority in our law for the admission and resettlement of refugees. The Refugee Act of 1980 was a major reform and a giant step forward in our ability to meet the resettlement needs of refugees. It was the culmination of a long congressional effort—as Deborah Anker's and Michael Posner's article, which leads this issue of the *Law Review*, documents so well. There is no need to review this history again;⁵ instead, we should focus on some of the refugee and asylum issues we will face in these areas as we attempt to implement the Refugee Act in the years ahead.

There is no question that the Refugee Act will form the basis for our refugee policies and programs for many years to come. The Select Commission, as well as the Reagan Administration, have both endorsed the Act, and both recognize the need for the United States to join in cooperative international efforts on refugees and other international migration problems.

A key issue that has emerged in recent days is the growing number of first asylum claims the United States now faces. In the past, we have largely admitted and resettled refugees from abroad, on our own terms and at our choosing. However, today we are once again becoming a nation of first asylum for large numbers of refugees. And, in the case of the Cuban boat exodus of 1980 and the continuing flow of Haitian boat people, we face growing "mass first asylum" problems.

The ink was barely dry on the Refugee Act when the Cuban boat flow began in April 1980. The chaos surrounding the flight of these people, the uncontrolled character of their movement, and the accurate public perception that no one was in charge, generated a public backlash against Cubans and refugees generally. In turn, it has stimulated some extraordinarily harsh, perhaps unconstitutional, special immigration emergency powers requested

5. See Kennedy, *The Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141 (1981).

by President Reagan, as well as other proposals that clearly threaten the protection and due process we have traditionally accorded asylum applicants in the United States.

Although the Cuban boat flow could have been handled under the Refugee Act,⁶ its characteristics underscore the need to review the procedures for both mass first asylum emergencies and individual asylum claims. The Select Commission's findings in this area help point the way. In affirming the provisions of the Refugee Act, the Commission agreed that the United States must remain a country of asylum for those fleeing oppression. It made the following recommendations:

- An interagency body should be established to develop procedures, including contingency plans for opening and managing federal processing centers;
- Asylum applicants should continue to be required to bear an individualized burden of proof, but group profiles or other techniques should be developed and used by officials to determine the legitimacy of individual claims in an expeditious manner;
- The United States Coordinator for Refugee Affairs should have the responsibility for developing these procedures and a specially trained corps of Asylum Admissions Officers be created within the Immigration and Naturalization Service; and
- Asylum applicants should have a single right to appeal, perhaps an independent immigration judge or board.⁷

These and other proposals—including the creation of an independent asylum board to oversee the entire asylum process, as well as the greater involvement of representatives of the UN High Commissioner for refugees—all have merit. Even if we manage to avoid another first asylum emergency, we will still face an escalating number of asylum cases. Ten years ago, there were only 440 asylum applications pending in the United States; two years ago, there were 5,800; but this year over 60,000 are pending, even after excluding the Cuban and Haitian cases. We must seek ways to process asylum applicants more expeditiously, yet with full regard to due process and the right to counsel and appeal. The current process is simply not working.

The articles in this issue of the *San Diego Law Review* represent an important contribution to the effort to strengthen our refugee and asylum laws. Through the *Review's* continuing attention to refugee and immigration issues, it is providing a

6. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 8 U.S.C. §§ 1157-1159 (1980).

7. See *supra* note 3.

unique forum for all who are concerned over our Nation's ability to respond to international migration and refugee problems. These problems pose important foreign policy issues for the United States and the international community. We know from recent history that massive movements of people can unbalance peace and stability. We know they can be a threat to peace as much as an arms race or a political or military confrontation. An effective response is therefore more than just a reflection of our humanitarian concern. It is critical for peaceful and stable international relations.

The editors and contributors to the *San Diego Law Review* deserve our appreciation for their contribution to this essential national dialogue on immigration.