

Foreword

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Immigration policy should be generous; it should be fair; it should be flexible. With such a policy we can turn to the world, and to our own past, with clean hands and a clear conscience. Such a policy would be but a reaffirmation of old principles. It would be an expression of our agreement with George Washington that "the bosom of America is open to receive not only the opulent and respectable stranger, but the oppressed and persecuted of all nations and religions; whom we shall welcome to a participation of all our rights and privileges, if by decency and propriety of conduct they appear to merit the enjoyment."¹

When John F. Kennedy became President in January 1961, he pledged to the American people that he would earnestly work for immigration reform, and his leadership in this area contributed significantly to the passage of the 1965 Immigration Act.²

This Act abolished the discriminatory national-origins quota system from the statute books and substituted a new system for distributing visas on a first-come, first-served basis. Exclusive of immediate relative and other "special immigrant visas," 120,000

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1. J. KENNEDY, *A NATION OF IMMIGRANTS* 82-83 (rev. ed. 1964).
2. 79 Stat. 911-22 (codified in scattered sections of 8 U.S.C.).

visas were made available annually for applicants in the Western Hemisphere and 170,000 visas for applicants in the Eastern Hemisphere.

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. The Act broadened equality of opportunity, a central theme in American history. And it stands with other legislation of the 1960's in the field of civil rights, poverty, education, and health as a reaffirmation of our nation's continuing pursuit of justice and fair play.

More than a decade has passed since the Act of 1965 became effective, and, in the main, it has served our country and its traditions well. However, 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.

In 1965 there was a general recognition that new legislation would soon be needed. But the continuing reform effort was quickly stalled, and it has remained so until this day, despite a good deal of legislative activity in Congress and growing pressures from the private sector. The only important exception is the Immigration and Nationality Act Amendments of 1976,³ which passed the Senate and House of Representatives during the waning hours of the 94th Congress, and was only recently signed into law. The principal provisions of this new law involve Western Hemisphere immigration. Among other things, the law extends to the Western Hemisphere the seven preference categories and the annual 20,000 per country visa limit, currently applicable to the Eastern Hemisphere. It also extends to natives of Western Hemisphere countries the opportunity to adjust their status in the United States on the same basis as natives of Eastern Hemisphere countries. Finally, the new law provides that Cuban refugees in the United States who adjust their status to permanent resident aliens under the Adjustment Act of 1966⁴ will not be charged to any numerical ceiling. The provision on Cuban refugees merely confirms legisla-

3. Pub. L. No. 94-571, 90 Stat. 20703 (Oct. 20, 1976).

4. Cuban Refugee Act of November 2, 1966, 80 Stat. 1161.

tively a long overdue administrative action taken by the Attorney General in September of this year.

Although the Act of 1976 was rushed through Congress with little debate or consultation and with no opportunity for amendments, its principle provisions are clearly an effort to help fulfill the intent of the 1965 Immigration Act. No expert observer objects to bringing visa applicants in both the Eastern and Western Hemispheres under the same system and set of rules. Nevertheless, the Act of 1976 is not as noncontroversial as its authors and supporters suggest. For example, contrary to the House report on the legislation, there is no "general consensus" that the annual limit of 20,000 visas per country should be imposed on Mexico, or even on Canada. Legitimate concern has been expressed by some members of Congress and many private immigration experts over the possible ramifications of this provision.

Some concern also exists over other provisions of the new law. The modifications in the labor certification procedure in section 212(a)(14)⁵ of the present law is one such provision. And another is what some observers are calling the "punitive" language in the adjustment of status provisions. This language bars from adjustment of status those aliens in nonimmigrant status, other than immediate relatives, who accept "unauthorized employment." And widespread congressional and public concern has been demonstrated over the new law's failure to make any changes in the refugee provisions of the current statute.

Reforming the immigration and naturalization laws has always been a slow and difficult process. Hopefully the Immigration and Nationality Act Amendments of 1976 will contribute to this reforming process in terms of both the Act's limited and controversial contents and what it portends for the tremendous task that remains.

This task involves several matters of public concern: first, refining the new policy and system established in 1965, including the treatment of refugees; second, reviewing and reforming all other provisions of the basic immigration statute, including those dealing with nationality and naturalization; third, finding more feasible alternatives for dealing with the problem of undocumented and out-of-status aliens; fourth, humanizing the administrative

5. 8 U.S.C. § 1182(a)(14) (1970).

practices and procedures of the immigration and naturalization law; and fifth, bringing more order into the structure and decision-making process of the scattered bureaucracy which interprets and implements the law.

In refining the new policy and system established in 1965 and further developed through the Immigration and Nationality Act Amendments of 1976, Congress should consider at least these items: allocating up to 35,000 or 40,000 visas annually to both Mexico and Canada on a temporary, if not permanent, basis; modifying the definition of various preference categories, including, for example, granting preference status to the parents of permanent resident aliens; restructuring the preference system by changing the percentage allocation of visas to each preference category, by better utilizing the unused visas in any one category to meet excessive demands in other categories, by rearranging the order of the various preferences, and, perhaps, by combining some existing preference categories; and removing the distinction between the Eastern and the Western Hemisphere by establishing a worldwide immigration ceiling and preference system after a transition period of perhaps three years.

In this connection, one of the most glaring deficiencies of the existing preference system and law—a deficiency which is contrary to our international commitments and to our national traditions and interests—concerns the admission of refugees. Of fundamental importance is a new definition of a refugee. Present law and practice emphasize the plight of people who “have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general areas of the Middle East.”⁶ A new definition is suggested in legislation I introduced in the last Congress:

The term “alien refugee” means (i) any alien (I) who is outside the country of his nationality or who, not having a nationality, is outside the country of his habitual residence, and who is unable or unwilling to return to such country because of persecution or well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group or political opinion, or (II) who has been uprooted by catastrophic natural calamity or military operations and who is unable to return to his usual place of abode, and (ii) the spouse and children of any such alien, if accompanying or following to join him.

A definition along these lines not only conforms with the traditional humanitarian concerns of the American people but also gives

6. The Immigration and Nationality Act § 203(a) (7), 8 U.S.C. § 1153 (a) (7) (1970).

meaning to our country's 1968 accession, with two reservations, to the United Nations Protocol Relating to the Status of Refugees. If such a definition was the law, admitting refugees from Chile, for example, would become a simple matter of humanitarian practice, instead of an issue for heated debate.

A legislative change in the definition of a refugee should also include the granting of immigrant visas to eligible applicants, instead of according them "conditional entry" status. There should also be a substantial increase in the number of visas allocated for refugee admissions within the preference system. In accordance with a new policy stressing flexibility in dealing with the homeless, the Attorney General should be specifically authorized, following consultations with Congress, to exercise his parole power in section 212(d) (5) of the basic immigration statute to bring into the United States additional refugees "for emergent reasons or for reasons deemed strictly in the public interest." He should also be authorized to adjust the status of such refugees to that of permanent resident aliens. This change would avoid the need for special legislation such as that which was previously enacted for Hungarian and Cuban parolees and which is currently required for the more than 140,000 new arrivals from the Indochina Peninsula.

Legislation to refine the new immigration policy and system established in 1965 must be a matter of early priority after the 95th Congress convenes on January 4, 1977. And serious legislative considerations must also begin over *all* other aspects of the basic immigration statute.

The basic statute's provisions on nationality and naturalization, for example, have been largely ignored by the executive branch and Congress since the 1952 codification and amendment of the immigration laws. Many of these provisions, as well as others in the basic statute are products of a harsher period in our country's history and have no place in the public policy of a free society. Moreover, for various reasons, including judicial decisions which have significantly altered the basic statute over the years, many provisions are either inoperable or no longer invoked. Certain provisions dealing with deportation are a good example. It is not surprising, therefore, that in 1976 an overwhelming number of experts view the basic immigration and nationality statute—the

Act of June 27, 1952⁷—as an anachronism in the public policy of the United States. They strongly believe that legislative clarifications of the basic statute, and serious efforts to update and overhaul it, are long past due.

A serious and comprehensive review of the basic immigration statute, with the goal of legislative reform, is not an easy task. Given the history of legislation in this area and the complexity of the issues involved, revision will require much time and deliberation. Nevertheless some modest but important amendments are undoubtedly possible in the months ahead. An amendment to liberalize the English language requirements for citizenship, a generally recognized need, is a good example. Also possible is some truly meaningful and compassionate legislation to deal with the problem of undocumented aliens. And perhaps progress can be made even in meeting some less recognized needs, such as enacting a meaningful statute of limitation on deportation and establishing a board of appeals, especially for denial cases involving the family members of United States citizens and permanent resident aliens. These two objectives, among others, are important elements in an equitable policy. They were once a part of the law, and they should be restored.

However, despite the potential for piecemeal review and reform, the fact remains that a truly serious and comprehensive review is needed. Nothing really has approached such an effort since the congressional hearings and public debate which accompanied the passage of the Immigration and Nationality Act of 1952 and the subsequent work of President Truman's Commission on Immigration and Naturalization.⁸

Expert views expressed in the *San Diego Law Review* and elsewhere have justifiably sought to encourage a new effort, and the process should begin in the next Congress with the full cooperation of the executive branch. In this regard, the Judiciary Committees of Congress and the appropriate offices in the executive branch probably can do a great deal. But serious consideration should also be given the creation of a special commission to make a complete study of all matters pertaining to American immigration and naturalization policy and practice and to make findings and

7. 8 U.S.C. § 1101 *et seq.* (1970).

8. The Commission was established by Executive Order after Congress failed to sustain President Truman's veto of the Immigration and Nationality Act of 1952. The Commission's report of its study and recommendations, *Whom We Shall Welcome*, was sent to the President on January 1, 1953.

recommendations for accomplishing the long sought goal of general reform. The composition and structure of the Select Commission on Western Hemisphere Immigration, which was established by the Immigration Act of 1965, suggest a pattern for creating a new commission on general policy and reform.

Immediate and longer-term legislative reform is of fundamental importance in updating our national immigration and naturalization policy. We must not lose sight of this goal. But early remedies are also needed to meet the growing deficiencies in current administrative practices and procedures. In addition greater order in the structure and decisionmaking process of the scattered bureaucracy which interprets and implements the law is called for. Many problems which have been addressed in this *Law Review*, and the kinds of problems recently associated with establishing and implementing special measures for victims of the conflict in Lebanon, underscore the urgent needs in this area of public concern. And the need for some immediate action is generally recognized by a broad segment of people involved in immigration and naturalization matters.

To humanize the administration of the law, to bring a greater sense of understanding and compassion for those affected by the law, and to bring a better balance between the police and service functions of the Immigration and Naturalization Service are some immediate goals.

Immigration is deeply ingrained in the American tradition; it is one of the oldest themes of our history. Today, as in the past, the pressures for immigration to the United States are greater than those for any other country. To many thousands of families and individuals in all parts of the world the United States remains a beacon of hope, opportunity, and freedom.

Americans recognize the importance of our immigrant heritage, and its contributions to the building of our country and the sustaining of our free society. There is little doubt that in 1976 the overwhelming number of our citizens accept immigration as a continuing part of our Nation's historical process—for humanitarian, cultural, economic, and personal reasons.

Although we must have laws and limitations, we must also maximize equal opportunity for everyone. And we must remain "gen-

erous," "fair," and "flexible" in the implementation of our laws and in the treatment accorded new arrivals in our land.

Through its symposia on immigration law, the *San Diego Law Review* is providing a valuable forum for discussing important matters of public policy and concern. The editors deserve our appreciation, our thanks, and our encouragement for continuing their service to the American people.