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The Need to Modernize Our Immigration Laws

CHARLES GORDON*

INTRODUCTION

During its first hundred years the United States imposed no restrictions on immigration. Some federal legislation sought to encourage immigration\(^1\) and to improve conditions on ships bringing immigrants.\(^2\) The national policy during this period was to allow the unrestricted entry of immigrants.\(^3\) Even so, the influx of immigrants was not universally favored. Some states sought to impose

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3. An unsuccessful early effort at restriction was the Alien Act of 1798, ch. 59, 1 Stat. 570, a part of the Alien and Sedition Laws, which authorized the President to expel from the United States any alien deemed dangerous. This legislation was unpopular and expired at the end of its two-year term.
controls, but these efforts were struck down as an invasion of an area of exclusive federal responsibility.  
Continued demands for federal action eventually bore fruit in a 1975 statute barring convicts and prostitutes. Shortly thereafter, the first general immigration law was adopted in 1882. This law imposed a head tax and barred several categories of undesirable aliens. During the subsequent years there were periodic major recodifications of the immigration laws, eventually culminating in the Immigration Act of 1917. A separate statute, enacted in 1924 and known as the National Origins Quota Law, for the first time established numerical restrictions on immigration, superimposed on the qualitative restrictions prescribed by the 1917 Act. All immigration and nationality laws were consolidated in the Immigration and Nationality Act of 1952, also known as the McCarran-Walter Act.

A noteworthy feature of this development was the constant enlargement of the scope and severity of the statutory provisions. In addition, new statutory provisions often were built upon the old structure. The result has been to produce a statutory pattern which in many respects is cumbersome, obscure, and out of harmony with current conceptions. A novice who approaches this edifice often is overwhelmed by its complexities. Even the expert sometimes experiences difficulties and frustrations. It seems evident that a thorough overhaul of the immigration laws is desirable in order to enhance clarity, assure substantive and procedural fairness, and sanction increased administrative flexibility in dealing with hardships and humanitarian concerns.

Each Congress witnesses some legislative efforts to deal with specific imperfections in the immigration laws. But, generally such efforts attract little attention and almost invariably are abortive.

A significant exception occurred in 1965 when legislation was adopted, after insistent advocacy by Presidents Kennedy and Johnson, ending the discriminatory national origins quota system. But this legislation merely modified a portion of the basic 1952 act, leaving the remainder intact. There has been little effective legislative activity since 1965.

Long exposure to the legislative process has convinced me that immigration legislation does not occupy a very high priority among Congressional concerns. Moreover, those who favor statutory revisions often are reluctant to propose them, since past experience has demonstrated to them that stirring the legislative pot may produce a stew even less palatable than that now available. Nevertheless, I believe it will serve a useful purpose to describe and discuss some of the statutory changes I believe desirable. Others doubtless would include additional items, but my enumeration may aid in stimulating further discussion.

STATUTORY STRUCTURE

Any general revision of the immigration law should simplify its structure, eliminating obscure and obsolete provisions which have accumulated over the years. Many such obscurities represent concepts which are no longer meaningful and which have persevered because no one has taken the trouble to eliminate or modify them.

One example of such pointless complexity appears in the various provisions for the exclusion, deportation, and denial of citizenship benefits to subversives. The parallel directives of these various statutes are couched in amazingly detailed verbiage which is today largely meaningless. These statutes were developed and enlarged during successive eras of anti-radical apprehension, such

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as that following the assassination of President McKinley,\textsuperscript{15} the Bolshevik scare of World War I,\textsuperscript{16} the national security concern preceding World War II,\textsuperscript{17} and the McCarthy witchhunt of the 1950's.\textsuperscript{18} They are an anachronism when the United States maintains friendly relations with Communist and other leftist-oriented governments throughout the world. I certainly would not suggest that the United States should not adopt adequate measures to safeguard its national security. But I believe this legitimate concern should be expressed in statutory provisions which are simple, intelligible, and rationally related to current needs.

Another area permeated by obsolete and inconsistent statutory provisions relates to civil liabilities and administrative fines imposed against transportation lines for various infractions. Such obligations have been prescribed by the immigration laws since their inception, and have been designed to promote cooperation by transportation lines in assuring compliance with the law. The authority to impose such penalties has repeatedly been upheld.\textsuperscript{19}

The present statute includes a variety of mandates which announce such civil obligations, including those relating to the failure to furnish proper manifests,\textsuperscript{20} the detention and deportation of excluded aliens,\textsuperscript{21} the failure to deport expelled aliens,\textsuperscript{22} the failure to detain and deport excluded alien crewmen,\textsuperscript{23} the failure to prevent the unauthorized landing of aliens,\textsuperscript{24} the landing of aircraft,\textsuperscript{25} the bringing of diseased aliens\textsuperscript{26} and the unlawful bringing of aliens,\textsuperscript{27} as well as additional provisions for criminal penalties.\textsuperscript{28} But in many respects the statutory provisions dealing with civil obligations are uncoordinated and inconsistent. For no apparent reason, there are differing provisions regarding the company officials, agents, or employees against whom the obligations can be imposed, the amounts of the obligations, and the opportunities to seek amelioration. And there are glaring inadequacies in relation

\textsuperscript{15} Act of March 3, 1903, ch. 1012, §§ 2, 38, 32 Stat. 1213.
\textsuperscript{17} Alien Registration Act of June 28, 1940, ch. 439, § 23, 54 Stat. 673.
\textsuperscript{18} Internal Security Act of 1950, ch. 1024, § 22, 64 Stat. 1006.
\textsuperscript{19} Elting v. North German Lloyd, 287 U.S. 324 (1932); Oceanic Steam
\textsuperscript{21} Id. § 237 (b), 8 U.S.C. § 1227 (b).
\textsuperscript{22} Id. § 243 (e), 8 U.S.C. § 1253 (e).
\textsuperscript{23} Id. § 254 (a), 8 U.S.C. § 1254 (a).
\textsuperscript{24} Id. § 271, 8 U.S.C. § 1321.
\textsuperscript{25} Id. § 239, 8 U.S.C. § 1229.
\textsuperscript{26} Id. § 272, 8 U.S.C. § 1322.
\textsuperscript{27} Id. § 273, 8 U.S.C. § 1323.
\textsuperscript{28} Id. §§ 274-78, 8 U.S.C. §§ 1324–28.
to the procedure for enforcing the penalty. The statute has little
to say about such procedure, and what it does say is not always
clear or consistent. It generally, but not invariably, states that de-
termination of liability is to be made by the Attorney General. In
one instance it declares that his determination shall be final,29 but
this declaration is omitted in other places. In most instances it au-
thorizes a denial of clearance as an auxiliary weapon of enforce-
ment. But other sections, for no apparent reason, make no mention
of denial of clearance.30 Obviously these statutory provisions need
revision to promote clarity and consistency, as well as an assurance
of fair consideration.

The Grounds for Exclusion

The present statute sets forth 31 categories of aliens who are
barred from entry, and many of these categories can be divided
into numerous subcategories.31 Some of these statutory provisions
are out of date and virtually meaningless; some are redundant;
many are excessive. A complete revision of these provisions cer-
tainly is desirable. However, I do not intend to discuss the specifics
of the numerous changes that seem warranted, except that I shall
direct attention to one such necessary change. I would emphasize
primarily two generalized revisions which, if adopted, would repre-
sent a giant step forward in modernizing this phase of the statute.

A Statute of Limitations for Excludability

While some of the grounds for exclusion, particularly those deal-
ing with medical infirmities,32 relate only to those presently suffer-
ing from such disabilities, many other grounds for exclusion are
perpetual and forever bar the affected alien from the United States.
Thus, for example, aliens who have been convicted for certain
criminal offenses,33 who have sought and obtained relief from military
service on the ground of alienage,34 who have been involved in

29. Id. § 239, 8 U.S.C. § 1229.
30. A catchall provision additionally authorizes recovery of such penal-
ties by civil suit, id. § 280, 8 U.S.C. § 1330.
31. Id. § 212(a), 8 U.S.C. § 1182(a).
32. E.g., id. §§ 212(a) (1), (2), (4), (6)-(8), 8 U.S.C. §§ 1182(a) (1), (2),
(4), (6)-(8).
33. Id. §§ 212(a) (9)-(10), 8 U.S.C. §§ 1182(a) (9)-(10).
34. Id. §§ 101(a) (19), 212(a) (22), 8 U.S.C. §§ 1101(a) (19), 1182(a) (22).
specified subversive activities,35 who have had one or more attacks of insanity,36 or who have been convicted for possession of marihuana,37 can never hope to enter the United States.38 These exclusions extend into perpetuity and reject any opportunity for reformation39 or for changed circumstances.40 In practice, they often result in extraordinary inequities and hardships. Thus an alien who once sought relief from military service can never attain lawful permanent residence or citizenship in the United States, even if he is married to an American citizen. An airline hostess who unwittingly brought a package of narcotics is likewise barred as a trafficker in narcotics, even if she cooperated in bringing the real culprits to justice. Examples of such irrationality could be multiplied.

The perpetual bar to entry is irrational and unnecessary. What is needed is a statutory amendment limiting excludability to a designated period after the commission of the debarring offense. I suggest that a five-year limitation would be fully adequate.

**Discretionary Authority to Waive Grounds for Exclusion**

In my estimation, the need to provide for amelioration of the excessive severities of our exclusion laws is manifest. That need will continue even if the substantive changes I have proposed are adopted, since the mandatory exclusions will still cause family separations and other hardships in particular situations.

The present law does sanction a wide range of discretion where temporary entry is sought. Thus, the Attorney General, in conjunction with the Secretary of State, may in his discretion waive virtually any substantive or documentary ground for exclusion.

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35. Id. §§ 212(a) (27)-(29), 8 U.S.C. §§ 1182(2) (27)-(29).
36. Id. § 212(a) (3), 8 U.S.C. § 1182(a) (3).
37. Id.
38. As noted under the next text caption, the Attorney General may grant waiver of any ground for inadmissibility for temporary entrants, except for aggravated subversive categories, and he may also authorize temporary parole for emergent reasons in the public interest.
39. However, excludability for certain criminal offenses committed by juveniles has a time limit of 5 years. I. & N. Act § 212(a) (9), 8 U.S.C. § 1182(a) (9) (1970). Excludability for membership or affiliation in certain subversive organizations may be waived by the Attorney General for defectors who have been “actively opposed” to the program of such organizations for at least 5 years. Id. § 212(a) (28) (I), 8 U.S.C. § 1182(a) (28) (I).
40. However, limited provisions for discretionary waiver of some exclusionary grounds are discussed under the next text caption.
41. Kleindienst v. Mandel, 408 U.S. 753 (1972); I. & N. Act § 212(d) (3), 8 U.S.C. § 1182(d) (3) (1970). Such waivers may be granted by the attorney general after they are recommended by the Secretary of State.
sion in regard to a temporary entrant. The Attorney General is empowered in his discretion to grant temporary parole into the United States for emergent or public interest reasons.\textsuperscript{43}

However, the opportunities to alleviate exclusion grounds for aliens seeking permanent entry are much more circumscribed. The 1917 Act authorized discretionary waiver of exclusion grounds for aliens returning after a temporary absence to an unrelinquished domicile in the United States of seven consecutive years.\textsuperscript{44} The administrative interpretations of this provision of the 1917 Act were generous.\textsuperscript{45} This generosity was criticized by Congress,\textsuperscript{46} and the 1952 Act curtailed the ambit of the statute.\textsuperscript{47} The result is that this remedy is now seldomly invoked.\textsuperscript{48} However, the law authorizes the Attorney General in his discretion to waive the documentary requirements (immigrant visa and passport) for returning resident immigrants.\textsuperscript{49}

The opportunities for waiver of the exclusions inhibiting the establishment of residence in this country by other aliens are even more sparse. As originally enacted, the Immigration and Nationality Act of 1952 offered little comfort to such aliens. In the ensuing years there have been sporadic legislative efforts to deal with specific humanitarian situations. Thus, for aliens with close relatives who are citizens or lawful permanent resident aliens, the law now permits discretionary waivers of excludability for tuberculosis or past mental illness,\textsuperscript{50} for criminal violations or prostitution,\textsuperscript{51} and for fraud in seeking entry.\textsuperscript{52} But in almost every other re-

\begin{thebibliography}{9}
\bibitem{42} I. & N. Act § 212(d) (4), 8 U.S.C. § 1182(d) (4) (1970). The requisite documents for temporary entrants are nonimmigrant visas and passports and they can be waived by the Attorney General and the Secretary of State acting jointly.
\bibitem{43} Id. § 212(d) (5), 8 U.S.C. § 1182(d) (5).
\bibitem{44} Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 878.
\bibitem{45} \textit{See In re B-}, 1 I. & N. Dec. 204 (1942); \textit{In re L-}, 1 I. & N. Dec. 1 (1940).
\bibitem{47} I. & N. Act § 212(c), 8 U.S.C. § 1182(c) (1970).
\bibitem{49} I. & N. Act § 211(b), 8 U.S.C. § 1181(b) (1970).
\bibitem{50} Id. § 212(g), as amended 8 U.S.C. § 1182(g).
\bibitem{51} Id. § 212(h), as amended 8 U.S.C. § 1182(h).
\bibitem{52} Id. § 212(i), as amended 8 U.S.C. § 1182(i).
\end{thebibliography}
spect the exclusionary provisions of the statute cannot be waived, and perpetually bar entry into the United States, irrespective of any hardships or humanitarian considerations that may be involved.

I believe the inflexibility of the provisions of the immigration laws in regard to the exclusion of aliens is undesirable and the opportunities for amelioration are fragmented and inadequate. I would propose an amendment giving the Attorney General authority to waive any ground for exclusion on humanitarian grounds or for any other reason he deems in the public interest.

**Exclusion of Marihuana Violations**

Although there are numerous specific statutory provisions for exclusion that need revision, I shall, as previously indicated, mention only one such provision—the absolute bar to the entry of aliens who have been convicted of possession of marihuana. In its original form, the 1952 Act merely barred violators of the laws relating to narcotic drugs. A 1956 amendment barred those convicted for possession of such drugs. The statute was again amended to reach those convicted for such violations relating to marihuana. A consequence of this legislative development is that an alien convicted for possession of a single marihuana cigarette is forever precluded from entering the United States.

This is an irrational statutory provision, which definitely should be eliminated. I shall deal with the background of this provision more fully in proposing the elimination of a similar provision mandating the expulsion of aliens convicted in this country for possession of marihuana.

**Exclusion Procedure**

Like other aspects of the immigration laws, the statutory provisions dealing with entry procedures are in many respects archaic. Adopted to implement past conceptions they have persevered

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53. Mention should also be made of the authorization for discretionary waiver of the two-year foreign residence requirement for exchange visitors upon request of an interested government agency or a showing of exceptional hardship to close relatives. Id. § 212(e), as amended 8 U.S.C. § 1182(e).

54. Id. § 212(a) (23), 8 U.S.C. § 1182(a) (23).

55. Id.


58. See notes 111-17 infra and accompanying text.
although their underlying conceptions have been discarded or discredited. I invite attention to the following needed revisions.

The Unreviewable Consular Decision Refusing a Visa

The 1952 Act specified that the Secretary of State is charged with responsibility for administering the provisions of the Act relating to the powers, duties, functions of diplomatic and consular offices, except the powers of consular officers relating to the granting or denying of visas. This remarkable provision purports to deny to a Cabinet Officer the authority to control the activities of subordinate officials. While the purpose of this provision is not explained in the legislative reports, I believe its underlying motivations were a desire to preclude judicial review and a belief that the consul would be disposed to act less generously than his superiors. In my view both of these premises are unacceptable. In effect they give to consular officers of the United States all over the world unrestricted authority to determine whether they will issue a visa to aliens who appear before them. I have no doubt that most consular officers seek to act reasonably. But they can be wrong, and in some instances a consular officer doubtless may act arbitrarily. Since the visa is an indispensable document for those who wish to enter the United States, an erroneous or arbitrary refusal of a visa can have a devastating effect on an applicant's aspirations.

The grant of unreviewable authority to the consul has been criticized as inconsistent with American traditions of due process. Apparently in response to these criticisms, the State Department has developed a process of informal review, which is now incorporated in its regulations. Under this system, the Visa Office of the State Department will review the case if requested to do so by a member of Congress, an attorney, or an interested party. If error is found, the Visa Office will issue an "advisory opinion" to the consul. While such an expression suggests rather than directs, and

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60. Id. §§ 211(a), 212(a)(26), 8 U.S.C. §§ 1181(a), 1182(a)(26).
62. 22 C.F.R. § 42.130 (1975).
is not binding on the consul, a consul who receives such an "advisory opinion" generally will abide by it.

But it is evident that this informal procedure does not go far enough. What is needed is an amendment of the statute eliminating the directive making the consul's ruling unreviewable, and establishing a right of appeal to a Board of Visa Appeals. If Congress wishes to limit judicial review in such cases, it can do so by appropriate statutory directives.

**The Double Check on Entries**

Another statutory anachronism is the provision that an entry applicant's qualifications must be passed on by two separate government agencies. This duplication originally appeared in the Immigration Act of 1924, which established for the first time a requirement that entry applicants must obtain visas.\(^63\) Since immigration officers then operated only within the United States, it was natural for Congress to confer the visa-issuing function on American consular officers stationed in foreign countries.\(^64\) This pattern was continued in the 1952 codification.\(^65\) The consular officer has been enjoined not to issue a visa to any alien he found to be inadmissible.\(^66\) At the same time, the prospective entrant has been warned that the issuance of a visa did not guarantee his admission to the United States, since his admissibility would be determined by an immigration officer at the port of arrival.\(^67\)

This repetitive procedure was endorsed by the authors of the 1952 Act as assuring a "double check" of the applicant's qualifications.\(^68\) That conclusion reflected their characteristic suspicion that some government officers might act generously and their efforts to inhibit such generosity.

Insofar as immigrant visas are concerned, this hypothetical double check is meaningless, since immigration officers invariably accredit the consular issuance of a visa. While immigration officers sometimes question the bona fides of an alien seeking to enter as a nonimmigrant, there is no reason why this cannot be done by one officer when the nonimmigrant visa is issued. And the idea

\(^63\) Act of May 26, 1924, ch. 190, § 13(a), 43 Stat. 161.
\(^64\) Id. § 2.
\(^67\) Id. § 2(g) [now I. & N. Act § 221(h), 8 U.S.C. § 1201(h) (1970)].
that immigration officers cannot operate overseas has been refuted by the experience of many years. Immigration officers of the United States are today stationed in many countries. Indeed, there are immigration district directors in Frankfurt, Germany; Hong Kong, B.C.C.; Mexico City, Mexico; and Rome, Italy, as well as other immigration officers in Athens, Greece; Guadalajara, Mexico; Hamilton, Bermuda; Manila, P.I.; Monterrey, Mexico; Montreal, Canada; Naples, Italy; Nassau, Bahamas; Ottawa, Canada; Palermo, Italy; Tijuana, Mexico; Tokyo, Japan; Toronto, Canada; Vancouver, Canada; Victoria, Canada; Vienna, Austria, and Winnipeg, Canada. There is no practical reason why there should be more than a single determination of admissibility and this should be done by immigration officers stationed in the foreign countries, subject to a check of identity upon arrival. The Department of State should be relieved of the visa-issuing burden, except for visas to diplomatic and international organization officials. In isolated areas where it is not feasible to station or send immigration officers, the consuls could exercise delegated authority to determine the applicant's admissibility. Similar delegations are now made with respect to some immigration functions.

The Labor Certification Requirement

The immigration laws of the United States traditionally have been concerned with the protection of American labor. This concern was originally expressed in the Contract Labor Act of 1885, which prohibited the entry of aliens for whom work contracts had been arranged in advance. Changing world and domestic conditions eventually made the contract labor laws obsolete. The growth of the labor unions and the imposition of numerical restrictions on immigration provided assurance against an influx of cheap foreign labor. And it eventually was concluded by Congress that the public interest would best be served if immigrants were free to arrange in advance for employment in this country. Therefore, the Contract Labor Act was repealed by the 1952 Act.

69. 8 C.F.R. § 100.4 (1975).
72. See note 68 supra.
However, Congress believed that some standby protection of American labor should be included in the statute. Therefore the 1952 Act introduced the so-called labor certification requirement, which authorized the Secretary of Labor to preclude the entry of specific immigrants or classes of immigrants if he found that they were coming for employment which would deprive American workers of jobs or undercut their wages or working conditions.

In its original form this sanction rarely was invoked. However, the restrictive pattern was altered by the major amendments of 1965, which directed that specified classes of immigrants could not come to the United States unless they first obtained the requisite labor certification. This converted the labor certification from a passive requirement, to be fulfilled only if the Secretary of Labor demanded it, to an active requirement, which had to be observed by all immigrants, except those with designated close relatives in the United States.

It is my conviction, which is shared by government officials, legislators and legislative staff attorneys, and other knowledgeable observers, that the labor certification requirement in its present form is a failure. In the first place, its impact on the employment situation in the United States, even in this era of high unemployment, is negligible. A substantial segment of prospective immigrants are close relatives of American citizens and resident aliens, and are thus exempt from the labor certification requirement. Another segment are wives and children who will not enter the labor market. The remainder, aggregating less than 100,000 annually, is hardly significant when compared to a work force of 80 million.

In the second place, the procedure to enforce this requirement has been an administrative nightmare. The decisional criteria are obscure and often unrevealed and the administrative officials frequently have been criticized for processes and determinations that are arbitrary and lacking in due process.

Despite the general agreement regarding the labor certification procedure's inadequacies, there has been no serious effort to revise it. The reason seems to be the opposition of organized labor to removal of a protective device. I believe there is no sound reason for the retention of this unsatisfactory and obstructive mandate in

73. Id.
76. See recommendation 73-2 in 3 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1973).
its present version. I would favor an amendment of the statute restoring the labor certification requirement to its original form, to be invoked only upon an affirmative finding of need by the Secretary of Labor. In my view such a standby measure would afford adequate protection to American labor.

Exclusion Without a Hearing

One of the regrettable survivals of a past era is the authority to exclude aliens without a hearing on the basis of confidential information. Originally developed in the absence of statute during World War II, its use blossomed during the Cold War period following that conflict, and its constitutionality was upheld by a bare majority of the Supreme Court.\(^7\) The Supreme Court later ruled that this extraordinary procedure could not be used to captiously deny a hearing to a resident of this country returning from a brief absence abroad.\(^8\) But Congress expressly ratified the exclusion-without-hearing procedure in the McCarran-Walter Act of 1952, and it is still part of the parent statute.\(^9\)

The device of exclusion without a hearing, and its reliance on faceless informers, has been severely criticized as inconsistent with American traditions of fair play.\(^{10}\) As a former government official who observed this system in operation and officially defended it, I believe such criticism is fully justified. During the Cold War period this device was used extensively to bar supposed Communist Party members, often on flimsy and unverified information, without affording them any opportunity to defend themselves. While its use has diminished in recent years,\(^{11}\) the authority still remains on the books and it is still invoked in some cases. Administrative officers sometimes have denied hearings on evidence which is inadequate or which is unavailable for production at a hearing. Unfor-

tunately this is the course of least resistance, since denial of entry on secret information avoids the possibility of public criticism if entry were granted to a person who later proved to be objectionable.

It is clear to me that the present statutory provision authorizing exclusion without hearing is wrong and should be modified or repealed. I do not believe the Republic would collapse if the authorization for denial of a hearing to entry applicants were removed from the statute. However, I would not object to a more limited amendment, which would place stringent limitations on the invocation of this exceptional procedure. In the first place, I would specify that this power could be exercised only during time of war or declared national emergency. Such a limitation appears in other sections of the statute, but was omitted here. Secondly, I would narrowly restrict the authority to invoke this power to situations clearly and directly involving the national security. The present statute is impermissibly broad, e.g., in authorizing its use in cases which merely involve suspected membership in the Communist Party or other subversive groups.

Place of Deportation for Excluded Aliens

The statute directs that an alien arriving in the United States whose exclusion is ordered shall be immediately deported to the country whence he came. “Country whence he came” in this context is a term of art, and normally contemplates that the excluded alien will be restored so far as possible to his situation before arrival in this country. Usually this means the country in which he had a place of abode before coming to this country.

In this statutory provision we confront another survival from a different age, during which immigrants were coming by ship, and an exclusion order meant that they were to be put back on that ship or another ship and returned to their homes. Today most immigrants come by plane, and there is no urgent need to return an excluded alien to his original place of abode, if there are more acceptable alternatives. Indeed, the assumption that an excluded

83. Id. § 237(a), 8 U.S.C. § 1227(a).
84. See United States ex rel. Milanovic v. Murff, 253 F.2d 941 (2d Cir. 1958) (alien could not be sent to native country he had left as a refugee 13 years earlier); Wah v. Shaughnessy, 190 F.2d 488 (2d Cir. 1951); Stacher v. Rosenberg, 216 F. Supp. 511 (S.D. Cal. 1963) (long time resident of U.S. was excluded after temporary absence even though the U.S. was the country from whence he came).
alien will be immediately sent home often is unfounded, in the light of the time-consuming administrative and judicial remedies available to him. In this respect superior procedures are prescribed for the execution of an order for the expulsion of an alien in the United States. An expelled alien may select the country of his destination, if that country will accept him, and if such a selection is not made or is fruitless, the Attorney General may deport the alien to other countries that will accept him, such as the country of his nationality or a number of other designated countries.

It seems to me that similar flexibility in exclusion cases would be beneficial to the alien and the government. I can see no reason why the excluded alien should not be permitted to go to the country of his nationality or any other country that will accept him. And I can see no reason why the government should be restricted to one place where the excluded alien can be sent, if he is a national of another country or if any other appropriate designation can be found. Consequently I would favor an amendment of the statute giving an excluded alien the opportunity to select his own destination, and giving the Attorney General the authority, similar to that conferred by the expulsion statute, to select other appropriate destinations if the excluded alien makes no selection or is not acceptable to the country he selects.

**Quota Provisions**

**The Western Hemisphere Quota**

There were no numerical restrictions on immigration from the Western Hemisphere until 1968. In a gesture of amity, the National Origins Act of 1924 exempted natives of Western Hemisphere countries from quota restrictions, and this exemption was continued by the Act of 1952.


86. Provisions of prior law, no longer in effect, which likewise provided for deportation of an expelled alien to the “country whence they came” were construed to relate to the country of the alien’s citizenship, if he had not acquired a domicile or citizenship elsewhere. United States ex rel. Mensevich v. Tod, 264 U.S. 134 (1924); United States ex rel. Boraca v. Schlotfeldt, 109 F.2d 106 (7th Cir. 1940); United States ex rel. Di Paola v. Reimer, 102 F.2d 40 (2d Cir. 1939).


In its original version, the bill proposing the major statutory amendments which eventually were enacted in 1965 did not include any change in the exempt status of Western Hemisphere aliens. However, this issue was debated during consideration of the measure. A proposal for restriction of Western Hemisphere immigration was rejected by the House of Representatives, but was favored by the Senate. In the end, those who favored restriction prevailed. As enacted, the 1965 Act established a separate quota of 120,000 annually for the Western Hemisphere, to become effective July 1, 1968, unless Congress directed otherwise. The 1965 Act established a Select Commission on Western Hemisphere Immigration, which recommended deferment of the special quota, but this recommendation was not adopted by Congress, and the special Western Hemisphere quota became effective July 1, 1968. Since the provision for a Western Hemisphere quota was a last minute compromise in the legislative deliberations preceding adoption of the 1965 Act, it was not incorporated into the basic statute. The result is that there are two separate and uncoordinated statutes regulating immigration—one for the Western Hemisphere and the other for the rest of the World (designated as the Eastern Hemisphere). Moreover, the Western Hemisphere quota provisions are not well-detailed, and contain none of the preferences prescribed in the basic statute, except the exemption for immediate relatives of American citizens. This places immigrants from the Western Hemisphere at a distinct disadvantage, since there are no preferences within the 120,000 quota for those with various close family ties or with needed skills.

There is no doubt that this discrimination against Western Hemisphere aliens is an historical accident, attributable to the last-minute compromise placing the provisions for the Western Hemisphere quota in the 1965 Act. The Administration has opposed this irrational discrimination, and legislation to end it has been introduced by Representative Rodino for several years but has not yet been enacted.

It is clear that any provisions dealing with the Western Hemisphere quota should be incorporated into the basic statute. I would

94. Id. § 21(a).
95. SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION, FINAL REPORT 9-12 (1968).
favor a single worldwide quota for all immigrants, other than the exempt classes. In my view, the retention of the separate quotas for the Eastern and Western Hemispheres is unnecessary and undesirable. What is more important is that the preferences now fixed by the statute be made applicable to Western Hemisphere immigrants. It is equally important, in my view, that the liberalizing amendments should not actually be restrictive. The basic statute has an annual limitation of 20,000 quota immigrants from any single country.\textsuperscript{97} If applied to the Western Hemisphere countries, this limitation would actually reduce immigration from Mexico to a fraction of its present level of over 50,000 annually.\textsuperscript{98}

It seems to me that the close proximity of Mexico and Canada warrants exceptional treatment. The Administration has urged that the situation of Canada and Mexico, as friendly neighbors, warrants allowing those countries a special annual limitation of 35,000 immigrants each. While this proposal was rejected by a majority of the House Judiciary Committee,\textsuperscript{99} it was supported in a minority report by Chairman Rodino.\textsuperscript{100} In my view this is a situation in which form must yield to substance. Moreover, a reduction in the opportunities for legal immigration from Mexico would inevitably lead to increased pressure for illegal entries. In order to recognize the special situation of Canada and Mexico, and to avoid an actual restrictive impact of a liberalizing measure, I believe a special provision, along the lines urged by Chairman Rodino, should be made to allow immigration allotments for Canada and Mexico which would not substantially reduce their present level of legal immigration.

\textit{Preferences}

The present law establishes seven preferences for the allocation of visas within the world wide quota.\textsuperscript{101} Four of these, the first, second, fourth, and fifth preferences, seek to promote family unity, and are allotted to specified close relatives of American citi-

\begin{footnotes}
\item[98] See 1974 INS ANN. REP.
\item[99] See H.R. REP. No. 461, 93d Cong., 1st Sess. (1973).
\item[100] Id. at 49.
\end{footnotes}
zens or resident aliens. Two, the third and sixth preferences, depend on occupational skills or status, and seek to fulfill national needs. The seventh preference relates to refugees. I believe a number of changes in the preference system are warranted.

The first needed change, already discussed under the preceding caption, would extend to Western Hemisphere aliens the same preference system now available in the Eastern Hemisphere.

Second, the present statute grants the second preference to the spouses and unmarried sons and daughters of lawful resident aliens, but does not mention the parents of such aliens. I believe the principle of family unity fostered elsewhere in the statute would best be served by the extension of this preference to include the parents of such aliens.

Third, the present statute grants exempt immediate relative status to the parents of American citizens, but only if the citizen is at least 21 years of age. The evident purpose of this restriction, whose constitutionality has been upheld by the courts, is to deny benefits to aliens to whom a child is born while they are illegally or temporarily in the United States. Yet the child in such cases undoubtedly is an American citizen entitled to reside in the United States. And in other contexts Congress has granted special benefits, without age limitations, to parents of citizen children. I believe it reasonable under such circumstances to give some preferred status to the parents of a minor citizen so as to facilitate the child’s remaining in the country where he is a citizen.

**Grounds For Deportation**

**Absence of Statute of Limitations**

Early deportation statutes fixed periods of limitations for deportability originally 1 year after entry and then increased to 3 years and eventually to 5 years. However, the 1952 Act eliminated

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102. Id. § 203 (a) (2), 8 U.S.C. § 1153 (a) (2).
103. Id. §§ 201(a), (b), 8 U.S.C. §§ 1151 (a), (b).
104. Faustino v. INS, 432 F.2d 429 (2d Cir. 1970), cert. denied, 401 U.S. 921 (1971); Perdido v. INS, 420 F.2d 1179 (5th Cir. 1969).
105. E.g., I. & N. Act § 212(a) (14), 8 U.S.C. § 1182(a) (14) (1970) (waiver of labor certification for Western Hemisphere immigrants); id. § 212(g), 8 U.S.C. § 1182 (g) (waiver of excludability for tuberculosis or mental defects); id. § 212(h), 8 U.S.C. § 1182 (h) (waiver of excludability for crime and prostitution); id. § 212 (i), 8 U.S.C. § 1182 (i) (waiver of excludability for misrepresentation); id. § 241(f), 8 U.S.C. 1251 (f) (waiver of deportability for misrepresentation).
106. Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 874; Act of March 3, 1903,
all statutes of limitations, and there is now no statute restricting the time during which deportation proceedings may be commenced. And since the statutory provisions for deportation generally are retroactive, they may reach back into the past, subjecting an alien to deportation for conduct which was not then proscribed—even where the period of limitations had long since expired under previous law.\textsuperscript{107}

The absence of a statute of limitations in the deportation law has been severely criticized.\textsuperscript{108} The ancient traditions of our law require provision for repose, after the lapse of specified periods of time, for all civil and criminal infractions, except murder and treason. The removal of time restrictions for deportation in the 1952 Act bespeaks a callous attitude toward aliens as human beings. Apparently the sponsors of that legislation were willing to disregard the need for repose in human affairs, and the compelling humanitarian concerns developed by aliens during long residence in this country, including family ties, economic interests, and deep roots in the community. Moreover, the present statute countenances the shocking consequence of requiring the deportation of an alien who was brought as a child, has been reared in our society, and would be sent to a country in which he would be a stranger.\textsuperscript{109}

It is true that the immigration laws now provide a number of avenues for relief in such situations.\textsuperscript{110} Some of these discretionary remedies, and proposals to expand their scope, will be discussed hereafter. But all of these remedies depend on the exercise of discretion by the Attorney General. What is needed is a statute


\textsuperscript{108} WHOM WE SHALL WELCOME, supra note 61; Maslow, Recasting Our Deportation Laws, 56 COLUM. L. REV. 309, 325 (1956).


granting amnesty from deportation after the lapse of a fixed period of time.

I believe therefore that the deportation law should be amended to provide periods of limitations in the following respects: First, a person who was brought to this country as a child, and has lived here for at least 10 years, is a product of our society and should not be subject to deportation on any ground. In every other case, an alien should not be subject to deportation if 5 years have elapsed since his last involvement in conduct which would have rendered him subject to deportation.

Marihuana Violators

Since 1922\textsuperscript{111} there have been laws providing for the deportation of narcotics offenders. The Act of 1952 codified and expanded those laws.\textsuperscript{112}

In their original form these statutes were found inapplicable to convictions for the possession of marihuana.\textsuperscript{113} However, in 1960 Congress amended the statute to make it specifically applicable to marihuana violations.\textsuperscript{114} Under the present statutory provisions, an alien who is convicted of possessing even a single marihuana cigarette is subject to perpetual exclusion from the United States, and to deportation if he is already a resident of this country.\textsuperscript{115}

In recent years there has been extensive discussion of the excessive severity of federal and state provisions for criminal punishment of persons found guilty of possessing marihuana. Substantial amelioration of the federal criminal provisions was accomplished in 1970.\textsuperscript{116} More recently, the National Commission on Marihuana and Drug Abuse recommended repeal of all criminal provisions for possession of marihuana. Other proposals have urged that the offense be made a civil violation, subject to a small penalty, rather than a criminal offense. Some government officials have stated that they would welcome a change in the marihuana laws, and ameliorating changes have already been adopted by many

\textsuperscript{111}. Act of May 26, 1922, ch. 402, 42 Stat. 596.  
\textsuperscript{113}. Hoy v. Rojas-Gutierrez, 267 F.2d 490 (9th Cir. 1959); Hoy v. Mendoza-Rivera, 267 F.2d 451 (9th Cir. 1959).  
states. And many prosecutors have declined to prosecute for simple possession of marijuana.

Unfortunately, this enlightened attitude in regard to the possession of marihuana has not yet been reflected in the immigration statutes. The inflexible provisions of those statutes still require the exclusion and deportation of any aliens convicted for possession of marihuana. Consequently the immigration authorities have been confronted with many cases in which the statute commands the banishment from the United States of youthful aliens who have been convicted for possessing a few marihuana cigarettes. The enforcement of the statutory mandate often would result in permanent separation of families. It is patent that this is an unconscionable and unreasonable penalty.

Recognizing the disparity between the nature of the offense and the grave impact of its consequence, the Immigration and Naturalization Service has frequently exercised its prosecutive discretion to withhold deportation proceedings or the execution of deportation orders in such cases, particularly when potential separation of families is involved. But this dispensation depends on administrative discretion and the affected alien remains under a perpetual threat of banishment or exclusion from the United States.

It seems manifest that the retention of these irrationally severe provisions in the immigration laws cannot be justified in the light of the apparent national consensus favoring easing or elimination of the sanctions for simple possession of marihuana. Legislation to modify these provisions has been introduced in Congress. Although the objectives of these bills were endorsed by the Department of Justice, they have not yet been acted on by Congress. I urge that Congress take action promptly to eliminate the present provisions requiring exclusion from the United States and deportation of aliens convicted for possession of marihuana.

Clemency Provisions for Criminal Violators

Since 1917 the immigration laws have provided for deportation of certain aliens convicted in the United States for commission of

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crimes involving moral turpitude.\textsuperscript{118} The same laws have also included concomitant provisions expunging deportability when the relevant convictions have been ameliorated by a pardon or a judicial recommendation against deportation.\textsuperscript{119}

In the 58 years since enactment of the 1917 Act, various other types of criminal convictions in the United States have been added to the catalogue of deportable offenses. Thus, under the present statute an alien resident of the United States may incur deportability upon conviction of specified improprieties in relation to alien registration or visa documents,\textsuperscript{120} narcotics,\textsuperscript{121} smuggling of aliens,\textsuperscript{122} unlawful possession of weapons,\textsuperscript{123} certain subversive activities,\textsuperscript{124} and importation of aliens for prostitution or any other immoral purpose.\textsuperscript{125} However, the statute makes no provision for avoidance of deportability in such cases by a pardon or judicial recommendation against deportation.

Since there is no sound basis for differentiation, the failure to make uniform provisions for amelioration appears to be an oversight. Indeed, the present statutory formula sanctions amelioration of deportability for aliens convicted of the more serious offenses involving moral turpitude but not for those convicted of lesser offenses. I believe this is an irrational situation, and I urge that it be corrected by an appropriate amendment of the statute providing that a pardon or judicial recommendation against deportation will expunge deportability based on any criminal offense.

A major 1956 enactment imposing severe penalties against narcotics violators included a provision prohibiting relief from deportation, through a pardon or judicial recommendation against deportation, for aliens convicted of offenses related to narcotics or marihuana.\textsuperscript{126} Under prior law, a pardon or recommendation against deportation precluded deportation for such convictions.\textsuperscript{127} While

\begin{itemize}
\item \textsuperscript{121} Id. § 241(a) (11), 8 U.S.C. § 1251(a) (11).
\item \textsuperscript{122} Id. § 241(a) (13), 8 U.S.C. § 1251(a) (13).
\item \textsuperscript{123} Id. § 241(a) (14), 8 U.S.C. § 1251(a) (14).
\item \textsuperscript{124} Id. §§ 241(a) (15), (16), (17), 8 U.S.C. §§ 1251(a) (15), (16), (17).
\item \textsuperscript{125} Id. § 241(a) (18), 8 U.S.C. § 1251(a) (18).
\item \textsuperscript{126} Act of July 18, 1956, ch. 629, §§ 301(b), (c), amending I. & N. Act §§ 241(a) (11), (b), 8 U.S.C. §§ 1251(a) (11), (b) (1970).
\item \textsuperscript{127} United States ex rel. De Luca v. O'Rourke, 213 F.2d 759 (8th Cir. 1954); DangNam v. Bryan, 74 F.2d 379 (9th Cir. 1934).
\end{itemize}
severe penalties against narcotics traffickers are appropriate, it seems to me that the inflexible preclusion of clemency is unjustified. In practice, this preclusion has been excessively harsh when the offense was minimal, the offender youthful, and when deportation would disrupt family ties. I can perceive no sound justification for precluding the humanitarian exercise of clemency in such situations, and I urge that the statutory preclusion be eliminated.

The statutory provision referred to in the first paragraph of this subsection above, giving effect to a judicial recommendation against deportation for aliens convicted of crimes involving moral turpitude, stipulates that such judicial recommendations will be given effect only if made by the sentencing court “at the time of first imposing sentence or within 30 days thereafter.” The purpose of the provision manifestly is to preclude last-minute efforts to forestall deportation. This legislative objective is fulfilled when the sentencing court is aware of the defendant's amenability to deportation and of its power to make a recommendation which would avoid this additional penalty, resulting from the conviction and sentence. Such awareness generally is present when the sentence is imposed in a federal court. However, the overwhelming preponderance of criminal prosecutions take place in the state courts and such courts frequently are unaware that the convicted defendant is amenable to deportation and that they are empowered to avert this consequence by a timely recommendation against deportation.

Some courts which have inadvertently omitted to make a recommendation against deportation at the time of “first” imposing sentence have later sought to remedy this omission, but such recommendations after the prescribed statutory period have been ineffectual. Likewise disregarded have been nunc pro tunc efforts to correct the original judgment.

The undoubted objective of the statute is to give the sentencing court an opportunity to ameliorate a severe collateral consequence of the conviction, when it deems such a consequence excessive in

130. Velez-Lozano v. INS, 463 F.2d 932 (D.C. Cir. 1972); Marin v. INS, 438 F.2d 932 (9th Cir. 1971); United States ex rel. Piperkoff v. Esperdy, 267 F.2d 72 (2d Cir. 1960).
the light of the particular circumstances. The objective is, in effect, defeated when the sentencing court is unaware of its authority to make such a recommendation. Therefore I believe the statute should be amended by eliminating the restriction on the time when the sentencing court can make its recommendation against deportation.

DISCRETIONARY AUTHORITY TO WAIVE GROUNDS FOR DEPORTATION

During much of their history, the immigration laws were cast in inflexible terms, and afforded little room for the exercise of discretion. Mounting hardships eventually persuaded Congress to allow the amelioration of such hardships. A major breakthrough occurred in the Alien Registration Act of 1940, which authorized the Attorney General to suspend deportation of certain deportable aliens whose deportation would result in hardship to their families. However, their deportability could not be obliterated until the Attorney General’s action was ratified by Congress. In approving this measure, President Roosevelt expressed doubt as to the constitutionality of the provision for congressional veto of administrative action, and similar doubts have since been expressed in scholarly discussions. Yet, provision for congressional veto of the Attorney General’s grant of suspension of deportation has remained in the statutes since 1940.

In the years after 1940 other discretionary remedies have been provided to permit discretionary waiver of deportability in some situations. The principal remedy today is known as adjustment of status, and enables the Attorney General, in his discretion, to grant permanent residence status to certain aliens in the United States whose original temporary entry was lawful and who are otherwise admissible to the United States. Another statutory remedy is known as registry, which authorizes the grant of permanent residence to certain aliens who have resided in the United States since 1948. There is no requirement of congressional approval of

135. Id. § 245, 8 U.S.C. § 1255.
such discretionary actions of the Attorney General. However, few grounds of deportation can be waived in such proceedings.

Some improvement could be made in the present statutory provisions, such as eliminating the need for congressional approval of suspension of deportation, and by advancing the cutoff date to qualify for registry to 1968 or some later date. However, these changes would not offer a complete remedy for the present inadequacies. I believe the inflexibility of the deportation provisions of the immigration law is undesirable and that the opportunities for amelioration are fragmented and inadequate. Indeed, affected persons often have sought intervention by Congress through private relief legislation, an unsatisfactory and usually unattainable device to engage the attention of Congress on individual cases. I recommend, therefore, a complete revision of the provisions of the immigration laws relating to the Attorney General's authority to waive excludability or deportability. The Attorney General should be given discretionary authority to waive any grounds for exclusion or deportation, without the need for soliciting congressional approval.

In this connection, another needed change in the provisions relating to adjustment of status should be mentioned. A 1965 amendment, adopted to meet supposed enforcement problems, denies this remedy to natives of Western Hemisphere countries. The effect of this provision is to deny to all natives of Western Hemisphere countries the opportunity, available to immigrants from all other parts of the world, to attain permanent residence in the United States, even if they are otherwise fully qualified for such status. Legislation to end this discrimination is pending in Congress, and I believe such legislation merits unqualified support.

EXPULSION PROCEDURE

The deportation process was one of the earliest and most potent expressions of administrative justice. Although the procedure in

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deportation cases originally was quite informal, over the years there has been a steady improvement.\textsuperscript{140} In major part, this improvement resulted from corrective action by the courts; in part it was the product of internal administrative development, influenced no doubt by the attitude of the courts, the Bar, the media, and the public. Although some might not share this view, it is my belief that in general, deportation procedures have been developing satisfactorily. I would, however, favor the following changes.

\textit{Applicability of Administrative Procedure Act}

There is a constitutional right to a fair hearing in deportation cases.\textsuperscript{141} However, over the years this right has not always meant the same thing. Due process of law is a developing concept, and this development has been quite notable in deportation proceedings.

For many years, the deportation hearing was conducted by a single immigration officer, known as the presiding inspector, who acted both as prosecutor and judge. This arrangement was criticized, but it continued without change until the enactment of the Administrative Procedure Act of 1946.\textsuperscript{142} This statute dealt generally with all government agencies, and sought to improve the quality of administrative adjudications and to achieve a separation between adjudicating and prosecuting functions. In 1950 the Supreme Court held the Act applicable to deportation hearings.\textsuperscript{143} But Congress quickly repudiated this decision by specifically exempting deportation hearings from the procedural requirements of the Act.\textsuperscript{144} This exemption was thereafter upheld by the Supreme Court.\textsuperscript{145}

In the ensuing years there has been constant improvement in deportation procedures. While the exemption from the Act's procedural requirements remains on the books,\textsuperscript{146} the procedures now in effect are closely analogous to those required by the Act.\textsuperscript{147} The principal difference is that the officers who preside at the hearings are called special inquiry officers (now designated immigration judges) and are selected through normal civil service procedures rather than under the Act.

\textsuperscript{140} See Gordon, \textit{supra} note 81.  
\textsuperscript{141} Yamataya v. Fisher, 189 U.S. 86 (1903) (The Japanese Immigrant Case).  
\textsuperscript{142} Ch. 324, 60 Stat. 237; see Gordon, \textit{supra} note 81.  
\textsuperscript{143} Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).  
\textsuperscript{144} Act of Sept. 27, 1950, ch. 1052, 64 Stat. 1044.  
\textsuperscript{147} See Gordon, \textit{supra} note 81; Maslow, \textit{supra} note 108, at 309.
The exemption of deportation hearings from the Act's requirements is an anachronism, which has no rational meaning and serves no useful purpose. Removal of this exemption would enhance the status of the deportation hearing officers and would provide firmer assurance of fairness in the deportation process. It seems to me that the retention of this exemption is attributable only to inertia, and I urge that it be removed and that the procedural requirements of the Act be made fully applicable to deportation proceedings.

Statutory Recognition of the Board of Immigration Appeals

The Board of Immigration Appeals is an important administrative tribunal, which hears appeals in deportation cases and other matters. However, the Board has never been a statutory body, and it exists only by virtue of the Attorney General's regulations.\textsuperscript{148} The Attorney General has created the Board and has fixed its powers. Thus he can and does modify its powers, and he could, if he wished, abolish the Board. It is true that in practice the Attorney General has never attempted to interfere with the Board's decision-making process,\textsuperscript{149} except to the extent that he retains authority to review its decisions.\textsuperscript{150} Moreover, immigration practitioners are generally quite satisfied with the Board's performance, although they of course reserve the lawyer's right to disagree with individual decisions. Yet the lack of statutory sanction does detract from the Board's stature and may lead to public uncertainty regarding its independence.

I believe there is no reason to continue the Board's tenuous status, and I favor the enactment of legislation making it a statutory body.

Nationality Provisions

The nationality provisions of the statute frequently are confusing and uncoordinated. A complete overhaul of this aspect of the statute is doubtless justified. However, I will deal briefly with only a few proposed changes.

\textsuperscript{148} 8 C.F.R. pt. 3 (1975).
\textsuperscript{150} 8 C.F.R. § 3.1(d) (2) (1975).
Since 1906 there has been statutory authorization for judicial proceedings to revoke naturalizations which were obtained by fraud or illegality. The constitutionality of this remedy has been repeatedly upheld by the Supreme Court.

Recognizing the severity of this sanction and its possible impact on apparently established citizenship rights, the Supreme Court has formulated the rule that naturalizations cannot be revoked unless the government establishes their impropriety by evidence which is clear, unequivocal and convincing, and does not leave the issue in doubt. And the policy of the Department of Justice has been to refrain from bringing denaturalization suits unless the citizenry of the United States would thereby be bettered. The combination of these judicial and administrative policies has led to a reluctance on the part of the Department of Justice to bring denaturalization suits, and few such proceedings have been instituted in recent years.

Yet the authority to revoke naturalizations remains in the statute. Moreover, the statutes have never prescribed a time limitation for bringing a denaturalization suit. Therefore a naturalization theoretically is subject to revocation, upon a charge that it was improperly obtained, at any time after it has been granted. Indeed, there have been numerous instances where the courts have vacated naturalizations granted many years earlier.

The absence of a statute of limitations on denaturalization suits has been criticized as placing the naturalized citizen's status in perpetual jeopardy. However, the courts have rejected contentions that such protracted delay denies due process of law or constitutes laches.

As I have indicated in the previous discussion dealing with de-

\begin{enumerate}
\item \text{152.} Knauer v. United States, 328 U.S. 654 (1946); Luria v. United States, 231 U.S. 9 (1913); Johannessen v. United States, 225 U.S. 227 (1912).
\item \text{153.} Baumgartner v. United States, 322 U.S. 665 (1944); Schneiderman v. United States, 320 U.S. 118 (1943).
\item \text{155.} E.g., Costello v. United States, 365 U.S. 265 (1961) (27 years).
\item \text{156.} \text{WHOM WE SHALL WELCOME, supra note 61; A.B.A. Res. VI-12 (1968).}
\item \text{158.} Id.; United States v. Oddo, 314 F.2d 115 (2d Cir. 1963).
\end{enumerate}
poration, the absence of a statute of limitations is repugnant to American jurisprudence. Moreover, the situation in which a naturalized American citizen is forever fearful of the Sword of Damocles hanging over his head is abhorrent to our traditional concepts of freedom. And it can cogently be contended that this perpetual liability makes the naturalized American a second class citizen.

American citizenship is an invaluable right, and the public interest requires that the citizen enjoy a reasonable security in his status. Consequently it seems to me that a statute of limitations on the bringing of denaturalization suits is needed, and I would favor a statutory amendment outlawing such suits after the lapse of a reasonable period following the naturalization. Because of the difficulty often encountered in discovering evidence of impropriety, a ten-year period of limitations in such cases would not be unreasonable.

Repeal of Unconstitutional Expatriation Statutes

Until 1907 there were no statutes prescribing grounds for expatriation, and the manner in which a person could lose his American citizenship was uncertain. In 1907 Congress passed the first statutory declaration that expatriation would occur if the citizen was naturalized in or took an oath of allegiance to a foreign state. The Nationality Act of 1940 considerably enlarged the grounds for expatriation. And the statutory grounds for expatriation were again expanded in the Immigration and Nationality Act of 1952.

159. See Tsiang, THE QUESTION OF EXPATRIATION IN AMERICA PRIOR TO 1907 (1942); cf. Act of July 28, 1868, R.S. 1999 (recognizing a right of expatriation without defining the manner in which this could take place).
160. Act of March 2, 1907, ch. 2534, § 2, 34 Stat. 1228. The 1907 Act also provided that an American woman would lose her citizenship if she married a foreigner. Id. § 3. See Mackenzie v. Hare, 239 U.S. 299 (1915) (rejecting a constitutional challenge). This portion of the 1907 Act was repealed by the Act of Sept. 22, 1922, ch. 411, § 7, 42 Stat. 1021. Another provision of the 1907 Act, held to relate only to loss of diplomatic protection, declared that if a naturalized citizen resided in a foreign state for certain periods, it was presumed that he had lost his American citizenship. Act of March 2, 1907, ch. 2534, § 2, 34 Stat. 1228. See United States v. Gay, 264 U.S. 353 (1924).
The expatriation grounds set forth in the 1940 and 1952 Acts encompassed many situations in which American citizenship could be lost without the citizen's assent. The constitutionality of such deprivations was soon challenged in the courts, and the courts were receptive. In a series of decisions, the Supreme Court declared unconstitutional various statutes which prescribed expatriation for desertion from the U.S. armed forces during time of war, evasion of military service by absence from the United States, residence abroad by a naturalized citizen, and voting in a foreign political election. Yet Congress has not amended the statute to eliminate these unconstitutional provisions and other statutory provisions dependent on them.

I believe the retention of these unconstitutional provisions as part of the existing statute may be misleading to the public and to members of the bar who are unfamiliar with the development of these adjudications. Therefore it is desirable that the statutory provisions relating to expatriation be recast along the lines projected by the Supreme Court decisions. The revised statute manifestly should repeal the statutory provisions which have been invalidated as unconstitutional.

Elimination of Witnesses in Naturalization Proceedings

The statutes dealing with naturalization, since their inception, have required that the petition for naturalization be verified by two witnesses. The present statute also requires that the witnesses be credible citizens of the United States, that they must have personally known petitioner, and that they endorse the petitioner's character and attachment to the United States.

While witnesses to the naturalization petition may have played a significant role prior to 1906, when there was no administrative supervision of the naturalization process, they serve no useful purpose today. The petitioner selects his own witnesses, and their testimony has little significance in evaluating the petitioner's fitness. The Immigration and Naturalization Service is now given extensive powers to investigate naturalization petitions, and its inquiry invariably includes fingerprint checks and thorough interrogation by a naturalization examiner. In addition, the Service may con-

168. Id. § 335, 8 U.S.C. § 1446 (Instructions on form N-400).
duct a personal investigation of the naturalization petitioner in
the localities of his residence and employment.\textsuperscript{169} The qualifications of the petitioner are assessed on the basis of such official inquiries rather than the endorsements of the petitioner's witnesses.

The requirement for two verifying witnesses to the naturalization proceeding is thus archaic and meaningless. In practice, it produces unnecessary hardships since the witnesses have to take time off from their employment, often imposing a financial burden on them and on the naturalization petitioner, who sometimes must reimburse them for their lost wages. In addition, a petitioner who has lived in several places has the difficult task of locating verifying witnesses who will furnish depositions for each such place.\textsuperscript{170}

It seems clear that we here confront another statutory requirement which has outlived its usefulness and is retained only through sheer inertia.\textsuperscript{171} Elimination of the requirement of two verifying witnesses to the naturalization petition is long overdue.

**Reacquisition of American Citizenship by Expatriates**

To a limited extent our laws have recognized the need to facilitate the return to the United States and reacquisition of American citizenship by those who have lost or relinquished it.\textsuperscript{172} However, in other respects such expatriates are given no special consideration, and are treated like all other aliens.\textsuperscript{173}

The failure to make such special provision often has resulted in separation of families and other hardships, particularly in regard to many young Americans whose opposition to our involvement in Vietnam led them to relinquish American citizenship.\textsuperscript{174} While opinions may differ on the soundness of their actions, it seems to me that a welcome to our prodigal sons is a reasonable and humani-

\textsuperscript{169} Id.

\textsuperscript{170} Id. § 335(f), 8 U.S.C. § 1446(f).

\textsuperscript{171} S. REP. No. 1515, 81st Cong., 2d Sess. 738, 745 (1950).

\textsuperscript{172} See I. & N. Act §§ 101(a) (27) (c), 324(a), 327, 8 U.S.C. §§ 1101 (a)
(27) (c), 1435(a), 1438 (1970).


\textsuperscript{174} See, e.g., Jolley v. INS, 441 F.2d 1245 (5th Cir. 1971), cert. denied, 404 U.S. 946 (1971).
tarian approach to this problem. Therefore, I would favor an extension of present statutory provisions, giving special benefits to expatriates, in order to facilitate return to the United States and reacquisition of American citizenship by those who have previously lost or relinquished it.

Simplification of Conditions for Acquiring Citizenship Derivatively

One of the most confusing and unsatisfactory areas of the law concerns the citizenship status of the foreign-born children of American citizens. Under some conditions the children born abroad to American citizens acquire American citizenship at birth,\textsuperscript{176} subject, in some instances, to fulfillment of prescribed conditions subsequent in order to retain their American citizenship.\textsuperscript{170} In other situations, alien children can acquire American citizenship through the naturalization of their parents.\textsuperscript{177}

In my estimation, the conditions prescribed in the present law are unnecessarily complex. Moreover, in some situations they are irrational, such as those precluding transmission of citizenship to a foreign born child by a native-born American parent under the age of 19 (age 21 under prior law) who has lived in the United States all or most of his life.\textsuperscript{178}

But the greatest difficulties have been presented by the constant changes in the conditions applicable to the acquisition of citizenship in such cases. Different conditions have been prescribed by laws effective prior to May 24, 1934;\textsuperscript{177} between May 24, 1934 and January 12, 1941;\textsuperscript{180} between January 13, 1941 and December 23, 1952;\textsuperscript{181} and on or after December 23, 1952.\textsuperscript{182} Since the acquisition of derivative citizenship status is dependent on the law in effect at the time the decisive occurrences took place, it is necessary to identify dates and consult disparate laws before determining whether there is a valid claim to American citizenship. The result is a confusing jumble which confounds even the experts. At times, the responsible government agencies have prepared complicated charts for the guidance of their officers, but such efforts have not

\textsuperscript{178} Ruiz v. INS, 410 F.2d 382 (6th Cir. 1969); In re S- F-, 2 I. & N. Dec. 182, 195 (1944) (approved by the Atty Gen.).
\textsuperscript{180} Act of May 24, 1884, ch. 344, § 1, 48 Stat. 797.
\textsuperscript{181} Nationality Act of 1940, ch. 876, §§ 201, 313, 314, 54 Stat. 1137.
\textsuperscript{182} See notes 175 & 176 supra.
been entirely satisfactory. Further, they have not been made generally available to the Bar and the public.

The prevailing fog of uncertainty in this area is a source of constant frustration, both to the expert and the novice; a situation hardly consistent with the importance and the dignity of American citizenship. I see no reason why this fog cannot be dispelled by a statute defining, in simple and clearcut terms, the conditions under which derivative citizenship can be acquired in such cases. Moreover, it is important that such conditions be made equally applicable to all past occurrences, without disturbing any citizenship rights already vested. Such legislation would clarify statutory provisions which are unnecessarily complex, and would promote greater certainty in adjudicating citizenship rights.

CONCLUSION

In the foregoing discussion I have outlined a number of necessary amendments to the immigration and nationality laws of the United States. I do not suggest that this is a complete list, since I, myself, could suggest additional changes, and I am certain that others would offer other proposals. For example, I have not discussed the Rodino Bill to penalize the knowing employment of aliens illegally in the United States, pending in the current Congress and strongly supported by the Administration, since I am not fully convinced that this is necessary or desirable legislation. I have attempted, however, to describe a number of deficiencies which urgently need correction. It is my hope that this discussion will be useful at some future date, when an enlightened public awareness will provide the needed stimulus for action.