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INTRODUCTION—REVIEWING IMMIGRATION POLICY: THE SELECT COMMISSION, THE DEBATE OVER SIMPSON-MAZZOLI, AND BEYOND

Lawrence H. Fuchs*

One of the longest and most complex American statutes, the Immigration and Nationality Act, results from basic legislation passed in 1952 and amendments added in 1965, 1976, 1978, and 1980. A little-publicized assignment given by Congress to the Select Commission on Immigration and Refugee Policy was to redraft the INA in its entirety. The legal research staff, under the leadership of Sam Bernsen, former Chief Counsel of the INS, finished the job in slightly under 2,000 manuscript pages, mercifully double-spaced.

Established in August 1979, the legal research staff spent most of the first year reviewing technical or relatively noncontroversial matters. It was not until the fall of 1980, when the general outlines of the Commission's recommendations became clear, that Chairman Theodore Hesburgh asked Commissioner Cruz Reynoso, now a member of the California Supreme Court, to take the special responsibility for chairing a week-long review of the staff's first draft of the revised Immigration and Nationality Act. The work continued to January 1981, when the Select Commission held its last meeting and completed its recommendations — all of which had to be incorporated into the new draft statute.

After reviewing the redrafting of the INA, it is clear to me that it is impossible for any single issue of any law journal to cover more than a fraction of the important immigration questions addressed by the Select Commission. Even major issues are necessarily left out. In the pages which follow, one will find slight discussion of the refugee allocation process and virtually none of the family preference categories for admitting immigrants, and little concerning the American system of exclusions. The last subject was of particular concern to the legal research staff, and to several lawyers on the Select Commission, including Judge Reynoso, Congresswoman Elizabeth Holtzman, and Attorney General Benjamin Civiletti. They agreed that the present thirty-three grounds of exclusion, with the waivers and amendments (as found

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in Section 212) represent a labyrinth to the uninitiated, require considerable time to apply fairly in reviewing the admissibility of would-be immigrants and nonimmigrants, and often result in numerous challenges and even more complaints from persons denied visas or entry. Added to the INA in piecemeal fashion, the grounds of exclusion have not been scrutinized as a group for over fifty years.

Although the Commission unanimously voted that the grounds of exclusion should not be retained in their present form, a majority could not agree on specific proposals to guide staff revisions. But with the overall goal of simplification and clarification, the staff considered several factors by which to exclude persons who would otherwise be admissible: protection of the United States against serious potential public injury; the likelihood that grounds of exclusion will be administered arbitrarily or capriciously; the nature of the potential injury to persons living in the United States and potential beneficiaries; and the costs of administering the exclusionary grounds.

A subcommittee of four commissioners chaired by then-Attorney General Civiletti reached a consensus on the broad framework which guided the legal research staff in drafting new specific grounds in accordance with the first standard — threat to United States security, public safety, public health, and public welfare.

The subject which received highest priority by the Select Commission, illegal immigration, is emphasized here by Senator Alan Simpson (R-Wyo.). He sees the entire system of lawful admissions undermined by a continued flow of illegal aliens, a position he forcefully articulated as a member of the Select Commission and in providing leadership for the Simpson-Mazzoli bill. Acknowledging that "it is beyond any question that immigration itself is good for the United States," Senator Simpson finds that a net growth of 250,000 to 500,000 illegal aliens each year is unacceptable. This is unacceptable not because the aliens are bad people, but because the immigration admissions system should be equitable and orderly as the law intends. In addition, these good people create some bad problems because they are enticed by jobs in the United States where they provide employers with a pool of cheap and docile labor, often depressing standards and wages in the American labor markets, and creating an underclass of persons who live outside the law who are often identified by ethnicity. Thus, the most important reforms, in the view of Senator Simpson, are the extremely controversial employer sanctions against employers who knowingly and willfully hire illegal aliens and for an extensive legalization of aliens who are already in this country unlawfully.

Senator Simpson also sees the need for streamlining our system of asylum adjudication. Simpson follows the arguments of the Select Commission that we need greater fairness and much more efficiency in the

system of asylum adjudications than we now have. The present system seems to cause trouble on many fronts: there are extremely long delays, since asylum requires an individual determination and since the number of asylum claimants has grown so rapidly in recent years; because of the lengthy process, a claim of asylum may lead to de facto immigration, providing a side-door, if not a back door, to circumvent the immigrant admissions process.

Although some worry about delays and the abuse of the system by those who have no basis to claim asylum, others, such as Professor Aleinikoff and Mr. Helton worry about delay and the abuse of the system by the INS and immigration judges who do not follow the strict criteria of the law but are influenced by foreign policy considerations through the advisory opinions given by the State Department which, it turns out, constitute the final decision. Aleinikoff and Simpson are in agreement that there should be an expedited process, but Aleinikoff stresses as equally important "a reformed asylum adjudication process [to] restore faith that the system is not being manipulated for political purposes." Such a system, he points out, would obviate the need for intrusive judicial intervention, a factor which has slowed the process. The answer, he argues, is to have an independent federal agency adjudicate asylum claims.

The Select Commission gave attention to such a proposal, championed by two commissioners from the House of Representatives, Peter Rodino (D-N.J.) and Hamilton Fish (R-N.Y.). The agency would have other important functions too, and, as originally proposed by Rep. Rodino, its main task would be to oversee progress and problems with respect to the immigration system as a whole, making recommendations to Congress for an increase or decrease in the numbers to be admitted, depending on several factors. The idea of a new agency did not win majority support on the Commission, but there was widespread sympathy for the view that until asylum decisions were taken out of a politically charged context — State Department advisory opinions — and administered by people trained to deal specifically with asylum cases, the system would continue to be seen as unfair and encourage the use of layers of judicial review to provide a counterweight to arbitrary decisions.

Like Simpson and the Select Commission, Aleinikoff argues that a fair system of asylum adjudication would make it possible to limit opportunities for review, restricting judicial review to a single appeal, as is done in France and Germany. That was also the view of the Select Commission on Immigration and Refugee Policy. In Aleinikoff's scheme, appeals would go from the federal agency to a special tribunal for asylum appeals made up of designated federal judges, and no appeal beyond the tribunal would be allowed. Habeas corpus would still

be available to challenge the constitutionality of the process. The Select Commission proposed the establishment, under Article One of the Constitution, of a United States Immigration Court which would (1) streamline the adjudication process by eliminating the layering of review; (2) discourage litigation by promoting certainty in the development of immigration decision law; (3) upgrade the status and quality of the adjudicatory officials in judicial review process; and (4) remove judicial decision making from any dependence on the administrative officials whose judgments are being reviewed.

This last point is critical in asylum cases. Foreign policy and domestic politics necessarily affect asylum policy. That is also true of refugee policy, as Mr. Helton shows clearly in his Article. His view is that the present system of asylum claims adjudication has "served to jeopardize the very right of asylum." He contrasts the process of refugee determinations in the United States with that of several European countries, showing how much more nationalistic and politicized our system has become. Of course the numbers for the United States are much greater than for European countries. As Senator Simpson would be quick to point out, the United States, even more than West Germany, has become the recipient of a great many dubious asylum claims. But Helton's main point is clearly correct. The refugee and asylum law have to some extent been trivialized by the political process. The Aleinikoff proposal, or that of the Select Commission for an Article One Immigration Court, probably would serve the cause of efficiency as well as that of fairness. Although it may not be possible to take foreign policy out of asylum and refugee policy, it should be possible to reduce its controlling influence.

Professor Nafziger makes a case that national reforms are not enough. Asserting that "the global community needs a comprehensive international law of migration," he wishes more international lawyers would be involved in the policy-making process. It is true that of the dozens of lawyers who appeared before the Select Commission and participated in the redrafting of the Immigration and Nationality Act, none of them gave international law much consideration, at least to my knowledge. That may be because they were not international lawyers, but it also may be because an international migration law does not appear to exist in the minds of policy makers, although it may exist in the minds of international lawyers.

Under the national origins quota, American policy makers decided that aliens from some countries were more objectionable than others under what appeared to them to be the perfectly rational ground that persons of the same general background, religion, race, and culture are less likely to present serious problems of acculturation than those from very different backgrounds. We now view that attitude as heinous

because we know that in many cases it was inspired by racist feelings. A clear answer to who decides is that each nation decides, and there is no body of international law which can possibly be enforced to overrule those decisions. We should try to codify a humane international code dealing with the right of migration. Although some may argue that an unenforceable right is no right at all, that does not obviate Nafziger's main contention, that we ought to strengthen international law in this area. One little-noticed recommendation of the Select Commission — on which the Reagan Administration has taken no action — was to attempt to negotiate a convention, probably limited to the western hemisphere at first, on the question of forced migration or expulsion. Even though it may not be possible to enforce the alleged right of individuals to migrate, it should be possible to take international action against a nation which forcefully drives out from its borders a portion of its own people.

The question of expulsion is different from that of deportation, which, presumably, is based upon some rational criteria for defining membership in a given nation, as opposed to political, racial, or religious persecution, which is usually the ground for expulsion. Dean Griffith is concerned about the law dealing with deportation and would, as was recommended by the Select Commission, provide a statute of limitations on deportation for all but the most extreme grounds. His detailed discussion of case law regarding deportation makes very clear the need for reform of the law of deportation in the Immigration and Nationality Act.

Although the authors of the Articles which follow could not possibly touch on all aspects of reform, they have highlighted several that are important, giving further stimulus to a discussion which is certain to continue even if the Simpson-Mazzoli bill passes soon. Each of them constitutes an important contribution to that discussion, and Professor Aleinikoff's Article is arguably the single most challenging and constructive to appear on the subject of asylum claims adjudication. The *University of Michigan Journal of Law Reform* should be congratulated for its contributions to the ongoing debate on immigration reform.

