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THE IMMIGRATION REFORM AND CONTROL ACT: IMMIGRATION POLICY AND THE NATIONAL INTEREST

Senator Alan K. Simpson*

Today more than ever the United States is a target for international migration. Population growth and economic stagnation in the Third World are increasing the pressures for emigration, and current United States immigration law is incapable of responding to the growing flow of illegal immigrants. The number of illegal aliens apprehended in the United States increased forty percent in 1983, and reached 1.4 million by the year's end.¹ The backlog of applications for political asylum is over 165,000,² and many of these claims are frivolous. Polls by Roper, Gallup, NBC, and others have shown that ninety percent of the American public demands immigration reform,³ and yet we as a nation have been distinctly unwilling or unable to respond to this overwhelming public sentiment. This Article will discuss the history and philosophy of United States immigration policy, the causes and extent of illegal immigration, the related issue of political asylum, and the legislative response to the current need for immigration reform: the Immigration Reform and Control Act, known as the Simpson-Mazzoli Bill.

I. THE HISTORICAL FOUNDATIONS OF UNITED STATES IMMIGRATION POLICY

The earliest colonists came from Europe, primarily from Great Britain, France, and the Netherlands. In 1790, the year of the first census, seventy-five percent of the country was of English, Scotch, or Scotch-Irish descent, eight percent was of German descent, and the rest was mostly from the Netherlands, France, Sweden, and Spain.⁴

During this time the country stood as a haven for the oppressed

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1. Immigration and Naturalization Service, Enforcement Statistics (Sept. 1983).

2. Immigration and Naturalization Service, Statistical Analysis Branch (Dec. 1983) [hereinafter cited as INS].

3. Memorandum from Patrick Burns, Federation for American Immigration Reform, Public Opinion Polls on Immigration (undated) [hereinafter cited as Memorandum from Patrick Burns].

4. J. VIALET, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, A BRIEF HISTORY OF U.S. IMMIGRATION POLICY 4 (Dec. 22, 1980).

and those seeking freedom. George Washington stated that “[t]he bosom of America is open to receive not only the opulent and respectable stranger, but the oppressed and persecuted of all Nations and Religions.”⁵ Indeed, most had come and would continue to come to America for religious, political, or economic reasons. The flight from religious persecution was most often understood as a Protestant flight from Catholic and Anglican dominance. This became more obvious when large numbers of Catholics immigrated to the United States in the late 1800’s and met fierce religious resistance. Analogously, although our forefathers described the United States as a land of freedom to which all could come, over 700,000 Black Americans lived as slaves.⁶ During the early days of the nation, immigration policy was generous and technically unrestricted, but not quite as pure in practice as it was in ideal.

From 1820 to 1880 over ten million people immigrated to the United States.⁷ Germany, the United Kingdom, and Ireland sent the majority of these new Americans and from 1840 to 1860 they accounted for nearly ninety percent of all immigration.⁸ The United States was expanding its borders toward the West at this time, and immigrants were needed “to push back the frontier, to build the railways, to defend unstable boundaries, and to populate new States.”⁹ One author notes that, “[t]he belief in America as a land of asylum for the oppressed was reinforced by the commitment to the philosophy of manifest destiny.”¹⁰ Abe Lincoln’s Republican Party stated in 1864 that “[f]oreign immigration which in the past has added so much to the wealth, resources, and increase of power to this nation — the asylum of the oppressed of all nations — should be fostered and encouraged by a liberal and just policy.”¹¹ It was obvious that the growth of the nation and large-scale immigration complemented each other.

Immigration continued at even higher levels from 1880 to 1920, but the ethnic composition of the new immigrants changed perceptibly.¹² Immigration from Germany, England, and Ireland declined to just under half of the total, and immigration from Italy, Austria-Hungary, and Russia increased significantly.¹³ Twenty-three and one-half million im-

5. 27 WRITINGS OF GEORGE WASHINGTON 254 (J. Fitzpatrick ed. 1938).

6. F. SCOTT, THE PEOPLING OF AMERICA: PERSPECTIVES OF IMMIGRATION 18 (American Historical Association 1972) (quoting United States Census of 1790).

7. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, PART 1, at 106 (1976) [hereinafter cited as CENSUS].

8. *Id.*

9. J. VIALET, *supra* note 4, at 7.

10. *Id.*

11. W. BERNARD, AMERICAN IMMIGRATION POLICY 6 (1950).

12. CENSUS, *supra* note 7, at 105-10.

13. *Id.* at 105-06.

migrants entered between 1880 and 1920,¹⁴ and most came from Southern and Eastern Europe¹⁵ for the same reasons that their northern and western neighbors had come earlier: the collapse of old agrarian orders, the creation of a large class of landless peasants, and the political and economic turmoil that resulted. Their function in America, however, had changed by the late 1800's. The 1890 census officially announced the closing of the frontier, and now, instead of being used to populate the nation from coast to coast, the new immigrants were viewed as important labor sources to fuel America's industrial revolution. The new immigrants concentrated in urban areas, and some factories relied almost exclusively on immigrant labor. By 1890, sixty-two percent of all foreign-born people lived in cities, as opposed to only twenty-six percent of the native-born population.¹⁶

There was also a new reaction to these immigrants. Many Americans began to feel that the land was full and that immigrants were now deriving more benefits than they were contributing.¹⁷ They were believed to be lowering the wages and working conditions of United States natives, and some people associated immigrants with crime and poverty of the large cities. Many Americans also believed that the new immigrants — the majority Catholics and Jews from Eastern and Southern Europe — were physically and culturally inferior and thus a detriment to American society.¹⁸ In 1882, the Chinese Exclusion Act, barring most Oriental immigration, became the first restrictive immigration law passed by Congress.¹⁹ The outbreak of World War I contributed to this growing sentiment of restrictionism as the nation became more isolationist and more nationalist.

The Immigration Act of 1917 codified existing restrictions on immigration, added new bars to the entry of Orientals, and established a literacy-test requirement for aliens over sixteen²⁰ — a test many from Eastern and Southern Europe could not pass. Congress imposed numerical limitations in 1921,²¹ and implemented the national origin quotas in 1924.²² These quotas sought to perpetuate the essentially Anglo-Saxon ethnic stock of mid-nineteenth century America. The days of unrestricted immigration were over, and the idea of America as an asylum for the

14. *Id.*

15. *Id.*

16. J. VIALET, *supra* note 4, at 14.

17. *Id.*

18. The Native American movement emerged in the 1830's in response to the large number of Catholics arriving from Ireland. S. REP. No. 1515, 81st Cong., 2d Sess. 46-47 (1950). The Know Nothing Party, later the American Protective Association, of the late nineteenth century, believed that immigrants weakened the country's democratic institutions. *Id.* at 52.

19. Act of Aug. 3, 1882, ch. 376, 22 Stat. 214.

20. See Act of Feb. 5, 1917, ch. 29, 39 Stat. 874; see also U.S. COMMISSION ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR 9 (1980) (explaining literacy provisions).

21. Act of May 19, 1921, ch. 8, 42 Stat. 5.

22. Immigration Act of 1924, ch. 190, 43 Stat. 153.

world's oppressed was less in vogue. Some of these laws were the result of a racist and nativist backlash from an American public that had just experienced forty years of unprecedented immigration. Others came about from the instability that World War I, the inter-war years, and the Great Depression created.²³ Some of these changes were also due to a rational recognition that America's frontiers were settled and its factory jobs were nearly filled.²⁴ Uncontrolled immigration no longer made economic sense.

The Immigration and Nationality Act of 1952 (INA) codified the essential elements of the 1917 and 1924 Acts, and added provisions that related to the exclusion of Communists.²⁵ A distant predecessor of the current immigrant preference system was installed, but the key provisions remained the numerical restrictions and national origin quotas.

The 1965 Amendments to the INA greatly improved the fairness of United States immigration policy by deleting restrictions based on race or country, although it continued to limit numerically the immigration of those who were not the immediate relatives of United States citizens.²⁶ In the Committee Report on these changes, the House Committee on the Judiciary noted that "the basic objective of this bill [is] to choose fairly among the applicants for admission to this country without proposing any substantial change in the number of authorized immigration. The significance of immigration to the United States will depend less on the number than on the quality of immigrants."²⁷ The Report went on to say that "the new selection system . . . is based upon first come, first served, without regard to place of birth, within the preference categories and subject to specified limitations designed to prevent an unreasonable allocation of numbers to any one foreign state."²⁸ The 1965 Amendments emphasized the reunification of families, and that continues to be the emphasis of our immigration statutes.

II. THE PHILOSOPHICAL FOUNDATIONS OF UNITED STATES IMMIGRATION POLICY

A number of observations can be made concerning the philosophy of United States immigration policy. First, the practice of unrestricted immigration was logical and beneficial during the years of westward

23. See S. REP. NO. 1515, 81st Cong., 2d Sess. 57 (1950) (Rep. Sabath's minority report on the Quota Law of 1921).

24. See *id.* at 56.

25. See generally Immigration and Nationality Act of 1952 (INA), ch. 477, 66 Stat. 166 (codified as amended at 8 U.S.C. §§ 1101-1503 (1982)).

26. See Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified in various sections of 8 U.S.C. §§ 1101-1503 (1982)).

27. H.R. REP. NO. 745, 89th Cong., 1st Sess. 13 (1965).

28. *Id.* at 12.

expansion and industrialization. The United States needed people and Europe was willing to send them. The popular image of America during this time as an asylum for the oppressed from all countries is not, however, completely accurate. The majority of the immigrants in the 1800's were of British or German extraction, and the "new" immigrants of the late 1800's met with significant discrimination.

Second, United States immigration policy followed a distinctly restrictive and discriminatory pattern from World War I until 1965. Literacy tests, national origin quotas, and specific bars on Asian immigration evinced a nativist and racist sentiment that was reflected in United States immigration laws during this period. These laws perpetuated the racial composition of America and carefully restricted its growth through immigration. Nevertheless, although the discriminatory aspects were abhorrent, the policies of this period did reflect one fundamental reality: after World War I, America no longer required huge numbers of new immigrants to populate the country or fuel industrialization. Therefore, many people felt that immigration must be numerically restricted.

It is beyond question that immigration itself is good for the United States. In this sense the philosophy of United States immigration policy is clear: immigrants benefit this nation. The Select Commission on Immigration and Refugee Policy (Select Commission) noted in its Final Report to the Congress and the President that:

Immigrants, refugees and their children work hard and contribute to the economic well-being of our society; strengthen our social security system and manpower capability; strengthen our ties with other nations; increase our language and cultural resources and powerfully demonstrate to the world that the United States is an open and free society.²⁹

One of our democracy's strongest traits is that it is capable of accepting large numbers of people from foreign lands, absorbing their different cultural characteristics, and becoming a richer nation during the process of assimilation. Immigration is at once both a test of American democratic values and a reaffirmation of our democratic resilience.

It is not clear, however, whether such immigration should be unrestricted. There is much evidence today that the current version of unrestricted migration — illegal immigration — may be one of the greatest threats to America's historical willingness to accept immigration. *Illegal* immigration portends much potential harm to American

29. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, FINAL REPORT, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 6 (1981) [hereinafter cited as FINAL REPORT].

values, traditions, institutions, and our very way of life. More specific to the immigration problem, illegal immigration threatens to dilute public support for our present generous policy of *legal* immigration, refugee resettlement, and political asylum. Recent history shows that the American public can react in a severe manner to what it perceives as an overly high level of immigration.³⁰ There are many indications today that such a restrictive mood is burgeoning again, largely because our present immigration law and enforcement procedures no longer promote the well-being of the majority of the American people. Controlled immigration can still greatly benefit America, but only if it is limited to an appropriate world-wide number and subject to selection criteria that serve the national interest. Today, illegal immigration endangers a fair and generous policy of legal immigration: a refugee policy that over the past eight years has accepted more refugees for *permanent* resettlement than the rest of the world combined, and a right to declare political asylum that is modeled on the most objective standards existing in current international law. America as a nation philosophically supports a generous immigration policy, but current trends threaten to diminish this generosity.

III. THE THREAT OF ILLEGAL IMMIGRATION

It is difficult to estimate the size of a population that avoids detection. Nonetheless, the Select Commission learned in 1978 that there are 3.5 to 6 million illegal aliens in the United States.³¹ It is also difficult to gauge the growth since 1978, but most reasonable studies estimate a net growth of 250,000 to 600,000 illegal aliens each year.³²

The effects of illegal immigration on the United States are myriad:

30. A backlash is evident in the immigration laws passed after World War I. The first 15 years of the twentieth century saw immigration average 900,000 people per year. The American public became increasingly concerned over this level, and passed a literacy test requirement in 1917, a numerical limit of 350,000 immigrants per year in 1921, and finally the 1924 Quota Act. This Act limited immigration to 150,000 people per year and ensured that all but a few would come from Western Europe. See generally S. REP. NO. 1515, 81st Cong., 2d Sess. 55-65 (1950).

Today a backlash seems possible in polls that show Americans favoring a reduction of legal immigration. Eighty percent favor such a move, according to a 1980 Roper poll. Memorandum from Patrick Burns, *supra* note 3, at 4. One recent proposal reflecting this sentiment, the Immigration Ceilings Act of 1983, would set an annual ceiling on legal immigration of 475,000 (including refugees) for three years, and then reduce that ceiling to 100,000 per year plus the number of those who emigrate. Another indication of a potential backlash is the tremendous volume of mail that the Subcommittee on Immigration receives suggesting that we halt *all* immigration and deploy the United States Army on the southern border.

31. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, STAFF REPORT, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 482-83 (1981) [hereinafter cited as STAFF REPORT].

32. See, e.g., Teitelbaum, *Right versus Right: Immigration and Refugee Policy in the United States*, 59 FOREIGN AFF. 20, 24-25 (1980) (estimating a net inflow of illegal aliens equal to that of legal immigrants, i.e., over 600,000 in 1978).

wages and working conditions are depressed; certain geographic areas and certain social groups suffer job displacement; the widespread violation of immigration law leads to the flouting of other laws; and the United States is unable to perform the first duty of a sovereign nation — control its own borders.

Numerous studies have shown that, although most illegal aliens make more than the minimum wage, many make less than the prevailing wage.³³ This wage differential depresses wages throughout the particular industry and affects those American workers who are also employed in the industry. In addition, health benefits are almost nonexistent for illegal aliens, and the working conditions of businesses that employ a large percentage of illegal aliens are often worse because such an alien is unlikely to report safety violations to OSHA or state agencies. American workers are being affected by this influx because illegal aliens no longer work solely in agriculture. The Immigration and Naturalization Service (INS) makes less than fifteen percent of its total interior apprehensions in the agricultural sector,³⁴ and it is generally acknowledged that large numbers of illegal aliens are employed in the service sector.

In areas of high illegal alien concentration, some American workers are directly displaced. A study by Professor Donald Huddle of Rice University found that illegal aliens in the construction industry in the Houston, Texas area displace American workers at a rate of seventy percent.³⁵ A similar study by Joseph Nalven of the Community Research Associates determined that illegal aliens displaced United States workers in San Diego County at a rate of fifty to ninety percent.³⁶ Illegal aliens also most directly affect minority and disadvantaged Americans. A third study, by Professor Vernon Briggs of Cornell University, found that illegal aliens take away jobs in urban centers from recently legal Latin American immigrants and from disadvantaged Black citizens.³⁷ A representative of the NAACP testified before the Senate Subcommittee on Immigration and Refugee Policy that “[b]ecause illegal alien

33. See, e.g., D. NORTH & M. HOUSTON, *THE CHARACTERISTICS AND ROLE OF ILLEGAL ALIENS IN THE U.S. LABOR MARKET: AN EXPLORATORY STUDY 10-12* (March 1976), reprinted in CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, 96TH CONG., 2D SESS., *SELECTED READINGS ON U.S. IMMIGRATION POLICY AND LAW 87-89* (Comm. Print 1980).

34. INS, *supra* note 2. In 1982, 11.5% of all people apprehended by the INS were judged to be in the agricultural sector.

35. D. Huddle, *Undocumented Workers in Houston Non-Residential and Highway Construction: Local and National Implications of a Field Survey* (Rice University June 1, 1982) (unpublished manuscript).

36. J. Nalven & C. Frederickson, *Undocumented Immigrants: Their Impact on the County of San Diego 51* (Community Research Associates 1980) (unpublished study). The study centered on the work force in the agriculture, service, retail, manufacturing, and construction industries.

37. Briggs, *Labor Market Aspects of Mexican Migration to the United States in the 1970's*, in *VIEWS ACROSS THE BORDER: THE UNITED STATES AND MEXICO 217* (S. Ross ed. 1978).

employees can be exploited without fear of sanctions, they are preferred employees for many jobs traditionally held by blacks, while black residents remain unemployed in alarmingly high percentages."³⁸

Finally, illegal immigration leads to a greater overall disrespect for our nation's laws. A criminal is more likely to victimize an illegal alien because the alien is unlikely to report the crime to the police for fear of detection.³⁹ In areas of heavy illegal alien concentration, local police report a general unwillingness of residents to report crimes of any sort. Illegal immigration promotes illicit alien smuggling and the production of fraudulent documents used to legitimize United States residency or gain access to public benefits. It is common knowledge that the United States cannot control its own borders, and that once an alien is in the United States, the chances of detection become relatively slight. This widespread disregard for the law is a pernicious problem for American society.

Illegal immigration occurs because of conditions that exist both in the sending countries and the United States. The main United States "pull factor" is the aberration in current law known as the "Texas Proviso," which provides that it is illegal to harbor, conceal, or transport an alien, but that "employment" shall not constitute harboring.⁴⁰ In effect, present immigration law declares that it is illegal to be an undocumented alien, but it is not illegal for an employer to hire such a person. Only in America! Employers are thus encouraged to hire this cheaper, more docile labor force, and potential migrants are encouraged to come to the United States to work for wages far higher than they could expect to earn in their homelands. Coupled with this tacit encouragement is the underfunding of immigration enforcement agencies.⁴¹ The INS traditionally has been one of the most underfunded agencies in the government, and it is unlikely that it apprehends more than a fraction of the illegal aliens who attempt to enter the United States. Thus, the "pull factors" are twofold: statutory encouragement and weak enforcement.

The "push factors" in the Third World are equally important components of the illegal immigration equation, and they will become increasingly influential in the next twenty years. The countries of the

38. *Immigration Reform and Control Act: Hearings on S. 529 Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 238 (1983) (prepared statement of Althea Simmons).

39. The relationship between local law enforcement officers and undocumented aliens is not well documented, but an example of this tendency may be found in Boyles, *Wary Salvadorans Find Help on L.I.*, N.Y. Times, Nov. 20, 1983, § 21, at 27, cols. 2-3.

For other incidents of illegal behavior, see M. MORRIS & A. MAYIO, *CURBING ILLEGAL IMMIGRATION* 23 (1982).

40. INA § 274(a)(4), 8 U.S.C. § 1324(a)(4) (1982).

41. Teitelbaum, *supra* note 32, at 54-55.

Third World face the dim prospect of having to create between 600 and 700 million new jobs by the year 2000 just to accommodate the equivalent number of new labor force entrants. To put that number in perspective, there are only 600 million jobs today in all of the industrialized world.⁴² In Mexico and Central America, the number of new labor force entrants may *double* between 1980 and 2000,⁴³ and Mexico must create 700,000 new jobs each year just to hold its already high unemployment rate at current levels. The largest number of jobs the Mexican economy has ever been able to create in one year without adverse economic reactions is 350,000. Last year, Mexico's GNP declined because of economic difficulties, and the country experienced a net *loss* of jobs for that year. In addition, the devaluation of the Mexican peso increased the United States-Mexican wage differential from 7 to 1 up to 15 to 1. With such chronic economic and employment problems in the Third World — and the probability of more to come — the migration pressures on the United States in the near future can only increase.

Some countries have recently responded to the likelihood of increased Third World emigration. Canada now fines employers who knowingly hire illegal aliens the sum of \$4,000 per violation and may also sentence them to prison terms of up to two years. Canada also requires that new job applicants present their Social Insurance Number card to prove their citizenship or permanent residence.⁴⁴ The Federal Republic of Germany is now penalizing employers of illegal aliens up to \$40,000, depending on the number of illegal aliens employed and how often the offense has been committed. Alien workers in Germany must submit work permits to their employers, who then photocopy the documents. In addition, all German citizens must present a tax card to their employers which establishes their employment eligibility.⁴⁵ France is assessing fines of up to \$3,000 per violation to employers who hire illegal aliens. Employers are required to record and retain the work and residency permits of aliens.⁴⁶ Denmark penalizes employers who knowingly hire illegal aliens according to the length of time the alien has worked. Typical fines are \$67 per alien for the first month and \$27 for each additional month. Employers must check the documents of all aliens and ensure their admissions were valid.⁴⁷ Switzerland targets its enforcement of immigration law at landlords, imposing a fine of

42. *Id.* at 27.

43. IV INTERNATIONAL LABOUR OFFICE, *LABOUR FORCE ESTIMATES AND PROJECTIONS, 1950-2000*, at 94 (2d ed. 1977).

44. GENERAL ACCOUNTING OFFICE, *INFORMATION ON THE ENFORCEMENT OF LAWS REGARDING EMPLOYMENT OF ALIENS IN SELECTED COUNTRIES 2* (1982).

45. *Id.* at 12-13.

46. *Id.* at 22-23.

47. *Id.* at 42.

up to \$4,650 and a six-month prison sentence on anyone who facilitates the residence of an illegal alien. Providing a job to an illegal alien is considered illegal, but fines against employers are lower, only up to \$225, plus the cost of the alien's repatriation. Employers of aliens must check a foreigner's identification papers or check with the Cantonal Alien Police.⁴⁸

It is unlikely that the United States would adopt all of the procedures mentioned above. European countries are socially more homogenous, and aliens are more readily apparent. A recent United States government survey questioned the effectiveness of employer sanctions in Europe,⁴⁹ but high-level government officials from these countries recently stated that employer sanctions are the *sine qua non* of controlling illegal immigration.⁵⁰ Canada, France, and West Germany have all taken serious steps to strengthen employer sanctions.

The European experience is illustrative in that all of the above countries are "receiving" countries like the United States, and each one has taken specific measures to reduce the "pull factors" that draw illegal migrants to their countries. Overall, the United States is experiencing a large influx of illegal aliens that is having a negative effect on American society. Other countries of the developed world have responded to the growing migration pressures in the Third World, but the United States has yet to do so.

IV. POLITICAL ASYLUM

In conjunction with a high level of illegal immigration, the number of applicants seeking political asylum in the United States has increased dramatically. The Refugee Act of 1980 codified the conditions under which a person may be granted refugee or asylum status in the United States⁵¹ Its language was derived from the United Nations Convention relating to the Status of Refugees, signed in 1951.⁵² To qualify, an applicant must demonstrate a "well-founded fear of persecution, on account of race, religion, nationality, membership in a particular social group, or political opinion."⁵³ This new definition rescinded the old

48. *Id.* at 31-35.

49. *See generally id.*

50. Summary of Remarks at the German Marshall Fund of the United States, International Conference on Common Problems in Administering Immigration and Refugee Policies 11-12 (June 8, 1983) [hereinafter cited as German Marshall Fund].

51. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

52. Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137. A later protocol expressly incorporated many of the terms of the Convention. Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267. The Protocol was ratified by the United States on October 4, 1968. 114 CONG. REC. 29,607 (1968).

53. INA § 201(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1982).

practice of granting refugee or asylum status only to people fleeing Communist countries or the Middle East.⁵⁴

Increasing evidence suggests, however, that a large portion of asylum applicants since 1980 are not fleeing persecution. In 1978, fewer than 5,000 people applied for political asylum.⁵⁵ In 1981, the *backlog* of cases was 105,000, and today that backlog is over 166,000.⁵⁶ The INS now receives about 26,000⁵⁷ new applications each year, and through administrative improvements is now able to process about 20,000 cases each year. Many of the recently processed cases were found to be wholly without merit, and the INS suspects that many of the pending applications are similarly spurious.⁵⁸ Declaring asylum is attractive to frivolous applicants or those seeking economic opportunity for two reasons: an application may take two years or more to be decided if all routes of appeal are taken, and work authority is granted to most applicants while their cases are pending. Many applicants declare asylum and pursue every avenue of appeal even though fully aware that their case has no merit.

The current system of asylum adjudication is cumbersome by any standard and plays a large role in creating lengthy delays between application and final decision. The District Director of the INS office where the application is made first reviews the case. If he decides against the applicant, the case may then be brought before an Immigration Judge. If the Immigration Judge decides against the applicant, the case may be appealed to the Board of Immigration Appeals (BIA). If the BIA affirms the Immigration Judge, the applicant may then seek relief through a habeas corpus petition to the District Court, and from there to the United States Courts of Appeals. If a case is pursued through the Appeals Court level, two years could easily pass from the time of initial application.⁵⁹ The length of the decision process, the many layers of appeal, and the attractiveness of working at United States wages during the appeals process have all become common knowledge in the major "sending" countries.⁶⁰

This abuse of the system endangers the concept of political asylum.

54. INA § 207(a)(7), 8 U.S.C. § 1153(a)(7), *repealed* by Refugee Act of 1980, Pub. L. No. 96-212, §§ 211, 208, 94 Stat. 102, 102, 105.

55. *Asylum Adjudication, Hearings Before the Senate Subcomm. on Immigration and Refugee Policy of the Senate Comm. of the Judiciary, 97th Cong., 1st Sess. (1981)* (testimony of Doris Meissner, Acting Commissioner, INS) [hereinafter cited as Testimony of Doris Meissner].

56. INS, *supra* note 2.

57. *Id.*

58. See Testimony of Doris Meissner, *supra* note 55.

59. See Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. MICH. J.L. REF. 183 (1984).

60. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 180-81 (1983); Teitelbaum, *Asylum as Dilemma*, PUBLIC INTEREST (forthcoming 1984).

If the American public continues to witness growing backlogs and manifestly unfounded claims of persecution, then a backlash may occur that would restrict our traditional role of providing political asylum. Such a backlash could also jeopardize the United States refugee program, which, as previously stated, in the last eight years has accepted more refugees for permanent resettlement than the rest of the world combined. Legislation has already been introduced in the Senate to place an overall limit on the number of legal immigrants, refugees, and asylees.⁶¹ A leading analyst of refugee and asylum issues has suggested that we apply the refugee definition in the Refugee Act of 1980 more strictly to those claiming asylum in the United States than to those applying for refugee status overseas.⁶² These suggestions have all been made in light of the tremendous surge in asylum applications and the widespread perception that many applicants are declaring political asylum only as a backdoor immigration strategy. If the abuse of the system continues, restrictive asylum policies will become increasingly popular and acceptable.

West Germany also faced the problem of large numbers of spurious applications for political asylum. In 1980 alone it confronted a backlog of over 108,000 applications, many from nationals of Turkey and Pakistan seeking to remain in Germany and work for wages significantly higher than those at home.⁶³ In response to this problem, the German government denied *all* appeals of cases found to be "manifestly unmeritorious," limited the administrative and judicial appeals of all cases, and denied asylum applicants the right to work for the duration of their case (they were supported by noncash welfare services). As a result of these policies, the German asylum backlog dropped to 49,000 in 1981, 33,000 in 1982, and a projected 20,000 for 1983.⁶⁴ A government official noted that the mere mention of the government's intention to stop granting work authority reduced the number of asylum applications.⁶⁵

The United States may not wish to enact, or be able to enact all of the reforms that West Germany initiated to reduce its asylum backlog — particularly the prohibition of work authority. The German social welfare system is much more extensive, and the United States may not be capable of politically or logistically supporting asylum applicants for the duration of their cases. The administrative reforms of West

61. The Immigration and National Security Act of 1981, S. 776, 97th Cong., 1st Sess., 127 CONG. REC. S2581 (daily ed. Mar. 24, 1981) (introduced by Senators Huddleston, Chiles, Randolph, Johnston (La.), Ford (Ky.), Pryor, Sasser, and Cochran).

62. Martin, *The Refugee Act of 1980: Its Past and Future*, 3 MICH. Y.B. INT'L LEGAL STUD., TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 91, 101-04 (1982).

63. German Marshall Fund, *supra* note 50.

64. *Id.*

65. *Id.*

Germany are both relevant and applicable, however, as is a stricter initial review of asylum cases. In any case, the effect of inaction in the area of political asylum would almost certainly endanger the United States commitment to grant refuge and asylum to those who truly face persecution.

V. THE SIMPSON-MAZZOLI BILL

The Simpson-Mazzoli bill⁶⁶ is the legislative response to an overwhelming desire of the American public to reform United States immigration laws.⁶⁷ Taking as its foundation the 1981 recommendations of President Carter's Select Commission on Immigration and Refugee Policy, the bill seeks both to control illegal immigration and to reform legal immigration. Illegal immigration is addressed by three measures: employer sanctions, a worker verification system, and increased enforcement of existing immigration laws. In conjunction with this "three-pronged" approach is a reform of asylum adjudication procedures and a legalization program. The Senate bill revises legal immigration as well by limiting admissions to 425,000 people per year and moderately restructuring the immigrant preference system.

The Select Commission, the Ford, Carter, and Reagan Administrations, and the majority of experts who testified before the Senate Immigration Subcommittee⁶⁸ emphasize the need for employer sanctions in combating illegal immigration. If such immigration is to be slowed, the United States must remove the main incentive — the magnet of jobs — that draws most illegal migrants to the United States. Employer sanctions would achieve this by penalizing employers who *knowingly* hire undocumented aliens. It would repeal the Texas Proviso, and also would prohibit the knowing recruitment or referral for employment of an undocumented alien. The penalty for knowingly hiring an illegal alien would be a \$1000 civil fine per alien for the first violation, \$2,000 for the second. Moreover, in the case of a finding of a pattern or practice of violation, the employer would be subject to a criminal penalty of \$1,000, six months in jail or both, and the Attorney General could issue an injunction or restraining order against the employer. There would be a six-month "education period" after the enactment of the bill, during which no fines or penalties would be assessed, and a subsequent six-month "warning period," during which no penalties would be assessed before a warning is first issued.

66. The Immigration Reform and Control Act of 1983, S. 529, 98th Cong., 1st Sess., 129 CONG. REC. S6969-70 (May 18, 1983) [hereinafter cited as S. 529].

67. Seventy-nine percent of those surveyed in a Gallup Poll conducted from October 7 to October 10, 1983 favored employer sanctions. *Stronger Policies on Aliens Favored*, N.Y. Times, Nov. 15, 1983, at A17, col. 1.

68. See STAFF REPORT, *supra* note 31, at 61-71.

A provision for a secure worker verification system complements these employer sanctions. This would allow employers to be confident that the new employees they are hiring — and the corresponding documentation these people present to prove employment eligibility — are valid and legal. The verification system would also prevent employers from refusing to hire legally resident minorities for fear of the employer penalties. For the first three years the bill will use existing documents to prove employment eligibility. A United States passport would serve this purpose, as would a combination of a United States birth certificate or Social Security card with a driver's license, or alien registration card. If at the end of this period current documents have not performed adequately, the President is directed to devise a "more secure" system to determine employment eligibility. The details of such a system, if required, have not been determined, but a common suggestion is a counterfeit-resistant Social Security card issued on banknote paper.⁶⁹

Employers of four or more persons will be required to keep a record of the documents examined of *all* new employees — citizen and alien alike — and to retain the records for five years or for one year after the termination of employment. The penalty for not following this procedure is a \$500 civil fine per violation. If the employer follows the verification procedure in good faith, he will have an affirmative defense against any later prosecution under the employer sanctions statute. It should be noted that, if a more secure card is necessary, it will be used for the purpose of determining employment eligibility only; it will not be withheld for any reason other than employment ineligibility, and it will not be required to be carried on one's person. The legislative history is clear: "The Committee is most emphatically not requiring or permitting the development of an 'internal passport' or 'national I.D. card.'"⁷⁰

Increased enforcement of existing immigration laws is the final leg of the enforcement triad. Border enforcement alone will not cure the problem of illegal immigration. For example, border officials could not apprehend the alien who enters legally on a nonimmigrant visa but later overstays that visa to work in this country. It is important, however, to have a strong border patrol and a sufficiently funded INS enforcement division. The bill therefore states the sense of Congress that "an essential element of the program of immigration control and reform established by this Act is an increase in border patrol and other enforcement activities of the Immigration and Naturalization Service in order to prevent and deter the illegal entry of aliens into the United States."⁷¹ To reinforce this commitment, the bill provides an additional

69. *Id.* at 61-72.

70. S. REP. NO. 62, 98th Cong., 1st Sess. 10-11 (1983).

71. S. 529, *supra* note 66, § 111(a).

\$200 million to carry out the purposes of enforcing the bill. A supplemental appropriation of \$94.5 million for existing enforcement duties is also being considered pending the passage of the legislation.

The Senate version of the bill contains a legalization provision that would grant permanent residence to all those in the United States in an illegal status since before January 1, 1977, and temporary residence to all those here in an illegal status since before January 1, 1980. Those in temporary status could apply for permanent status in three years. The bill requires that applicants be physically present in this country from the date of enactment and places the burden of proof of residence on the applicant. It has been assumed that the materials used to prove residence will be, among others, rent receipts, tax or employment records, and employer attestations. All applicants will be subject to most of the present immigrant exclusions such as prior criminal records,⁷² likelihood of becoming a public charge,⁷³ moral turpitude,⁷⁴ and prior participation in the persecution of others.⁷⁵ Newly legalized aliens will be ineligible to receive federal public assistance benefits for a period of three to six years. The legalization program has three main objectives: to preserve the scarce enforcement resources of the INS for use in preventing new illegal entries; to provide employers with a pool of labor from which to continue hiring; and to eliminate a fearful, easily exploited subclass from our society. It is a pragmatic solution to a serious national problem. If the government could not find these people when they entered, how can we expect to find them now to remove them? In addition, mass deportation would involve excessively expensive and intrusive procedures.⁷⁶

The reforms in the area of asylum adjudication attempt to accelerate the decision process and streamline the review mechanism, while retaining fundamental fairness and objectivity. The bill operates under the assumption that valid asylum claims should be approved as soon as possible, and invalid claims should not be encouraged by a system allowing extensive delays and endless opportunities for appeal. As mentioned earlier, the present review process — District Director to Immigration Judge to BIA to Federal District Court to Appeals Court — can delay a decision for up to two years and encourage claims from applicants who merely seek employment authorization for the duration of the delay.

72. INA § 212(a)(10), 8 U.S.C. § 1182(a)(10) (1982).

73. INA § 212(a)(15), 8 U.S.C. § 1182(a)(15) (1982).

74. INA § 212(a)(9), 8 U.S.C. § 1182(a)(9) (1982).

75. INA § 212(a)(33), 8 U.S.C. § 1182(a)(33) (1982).

76. Mass deportation was last used as a policy tool during "Operation Wetback" in 1954. While deporting over 100,000 illegal aliens — most of them from Mexico — many of the INS's tactics were criticized and some Mexican-Americans were removed by mistake. See generally J. GARCIA, OPERATION WETBACK (1980).

The Senate version of the Simpson-Mazzoli bill has revised the adjudication system in the following manner. An asylum application will first be made to an Immigration Judge, who will conduct a full, on the record (unless the applicant requests otherwise), due process hearing concerning the claim. The applicant will have the right to counsel and to present evidence, to call witnesses, and to cross-examine those giving testimony. The Immigration Judges hearing the cases will remain within the Justice Department but will be independent of the INS. They will be upgraded in status and will receive special training in international law and international relations. If an Immigration Judge rejects an asylum claim, the applicant may appeal to the United States Immigration Board, a newly created panel of nine judges who would be appointed to six-year terms by the Attorney General. If the Immigration Judge's decision is not supported by substantial evidence, the Board may reverse his decision.

If the Board decides negatively on a case, the applicant may request a review from the appropriate Circuit Court of Appeals. This judicial review is limited to four possible issues: (a) whether the jurisdiction of the Immigration Judge or Board was properly exercised; (b) whether the asylum determination was in accordance with applicable laws and regulations; (c) the constitutionality of the applicable laws and regulations; and (d) whether the decision was arbitrary or capricious. There is then no further opportunity for review. Asylum applicants would still be eligible for employment authorization. In addition, no applicant could be held in continuous detention if his initial hearing is not timely, he has not unreasonably delayed the proceedings, and he poses no danger to the community.

Finally, the bill would reform legal immigration by setting an overall limit of 425,000 new immigrants per year — excluding refugees — and by modifying the immigrant preference system. Four hundred and twenty-five thousand represents the present level of legal immigration.⁷⁷ By eliminating the growth inherent in our current system, we respond to the desires of the majority of the American public,⁷⁸ and we allow ourselves the opportunity to decide what the ideal level of growth through immigration in the United States should be. The Subcommittee was perplexed to discover that the United States had no population policy. It felt that, until a policy is perfected, the rate of population growth through immigration should be held constant.

The restructuring of the preference system is necessary within the

77. INS, *supra* note 2.

78. American attitudes toward *legal* immigration were most recently surveyed by the Tarance/Hart poll on Black and Hispanic Opinion on Immigration, August 1983; the Field Institute Poll of California Opinion, 1982; and an NBC/AP poll in August, 1981. Memorandum of Patrick Burns, *supra* note 3.

context of a cap of 425,000 on legal immigration and the recommendation of the Select Commission to promote "new seed" — independent immigrants who are chosen not solely for the purposes of family reunification but for particular skills which would benefit the United States.⁷⁹ The bill would reserve 75,000 of the 425,000 annual visas for these independent immigrants, and would allot the remaining 350,000 to those seeking family reunification. Immediate relatives of United States citizens would continue to enter numerically unrestricted, but would be counted against the 350,000 person limit. The adult sons and daughters of permanent resident aliens would find it necessary to wait for their parents to obtain citizenship before they could immigrate. The *married* brothers and sisters of adult United States citizens would no longer be granted an immigration preference. It is a sad but salient fact that the United States cannot accept all persons of the world who wish to come here to live. Given this fact, and recognizing that the American public favors an appropriate limit on legal immigration, the finite number of visas available should be preserved for the closest of family members, under our nation's definition of the family unit.

CONCLUSION

The United States is a nation defined by the people that have arrived on its shores. During the 1800's and early 1900's immigration to the United States was effectively unlimited. The over 30 million people who entered between 1820 and 1920 greatly assisted the United States in its drive to settle the country from coast to coast and to forge its own industrial revolution. They immeasurably enriched us culturally and socially and demonstrated the special resilience of an open and free society. Many of the immigration restrictions imposed in the 1920's exposed a nativist and racist tendency — especially the national origin quotas and the literacy tests — but a fundamental reality influenced these misguided restrictions: post-World War I America no longer needed or desired unlimited immigration. The 1965 Amendments to the Immigration and Nationality Act effectively eliminated racial discrimination in our immigration laws, but retained the numerical restrictions. Today, the United States practices both the most generous and one of the fairest — and ironically most abused and vulnerable — immigration policies in the world.

The magnitude of the problem of illegal immigration today threatens the generosity of the present United States policy of legal immigration. History shows that the American responses to uncontrolled immigration can be severe, and it is the duty and obligation of those who would continue a generous policy of immigration to prevent a

79. FINAL REPORT, *supra* note 29, at 127-28.

backlash from occurring. Undoubtedly, record illegal entries, large-scale nonimmigrant visa abuse, and a great number of spurious claims of political asylum threaten the system. Present laws are inadequate to contend with the growing tide of illegal immigration, and some actually encourage it. We do not control our own borders — the first duty of a sovereign nation. The Simpson-Mazzoli bill attempts to end the abuse of immigration laws, control illegal immigration, and reform the system of legal immigration. It would sustain the most generous policy and heritage of legal immigration that exists anywhere in the world today. It is this policy that we intend to preserve.