1983

The Immigration Challenge and the Congressional Response

Arnold Liebowitz

Follow this and additional works at: https://scholarship.law.berkeley.edu/blrlj

Part of the Law Commons

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38CM0N

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley La Raza Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
The Immigration Challenge and 
the Congressional Response

Arnold Liebowitz*

The basic thrust of the immigration bills that have been introduced in the Congress by Senator Simpson and Representative Mazzoli and by the Administration is to establish greater control over the immigration process. If there is any consensus in the immigration field—and it is a field where consensus is difficult—it is the finding of the Select Commission on Immigration and Refugee Policy ("Select Commission") that "U.S. immigration policy is out of control." Once one begins to discuss how to gain greater control, the consensus rapidly splinters.

One should begin with the consensus. A sovereign country has the right—must have the right—to protect its borders, to determine who enters, and to regulate when. Thus, the first major change in the current law would be directed at the illegal alien and the mass asylee, both of whom represent, in different ways, an unauthorized violation of the border. Indeed, the Administration proposals were directed almost solely to these issues. The Congressional bills, however, are broader in scope.

* Special Counsel, United States Senate Subcommittee on Immigration and Refugee Policy; formerly Special Counsel, Select Commission on Immigration and Refugee Policy. B.A., Columbia University, 1951; LL.B., Yale University, 1956. The views expressed in this paper are his own and do not necessarily represent those of the Subcommittee or the Select Commission.


THE ILLEGAL ALIEN/UNDOCUMENTED WORKER

In discussing the issue of the illegal alien, much time is spent on numbers, such as how many illegal aliens there are and how many come each year. The Select Commission estimated the total number of illegal aliens present in the country at 3.5 to 6 million persons based on 1978 data. Estimates of the annual rate of illegal entries range between 600,000 and one million persons. Even if these estimates are double the "true" figures, the numbers are significant in relation to legal immigrants in the country. People who focus on the illegal alien are clearly concerned with a problem that is not trivial.

Establishing control over the flow of the illegal aliens into the United States involves four different factors: (1) increased enforcement along the border; (2) removal of the incentive for the illegal alien to enter the U.S.; (3) reduction in the number of illegal aliens already in this country; and (4) prevention of undue impact on certain economic areas of the country which in many cases have become dependent upon illegal alien labor.

A. Increased Enforcement Along the Border

The question of enforcement to date has been primarily a budgetary issue, focusing on an increase in the number of border patrol officers along the Mexican border and the development and utilization of advanced technology for detecting people.

Another, although less obvious issue, is the desire to strengthen the powers of the law enforcement officers and obtain support from the judiciary for stronger law enforcement. Stronger judicial support might include expansion of the search and seizure authority of arresting officers when an automobile is involved, an area of the law which is rapidly changing and extremely unclear. The interrogation authority of immigration officials along the border and at fixed checkpoints near the border are issues unique to immigration law. The Sandoval ruling of the Board of Immigration Appeals ("BIA"), permitting unconstitutionally acquired evidence to be introduced in an immigration case, is a result of this effort to increase the powers of law enforcement officers. One should note that the search and seizure issues have so far been contested within the judicial branch without active legislative involvement and no significant change was proposed by the Simpson-Mazzoli bill. A discussion of enforcement must also consider management issues within the Immigration and Naturalization Service ("INS"). Congressional pressures have been

4. Id.
exerted to press for faster computerization and in some cases for specific organizational changes in relation to the Departments of Justice and State. Except in the case of adjudication, the legislation under discussion in this essay did not address these issues but left their resolution to executive discretion.

B. Removal of the Incentive for the Illegal Alien to Enter the United States

The motivation question generally revolves around the issue of relative economic opportunity—the prospects for the immigrant in the United States versus the prospects in the immigrant's native country as the immigrant perceives them. This push/pull model basically states that immigration is a function of push factors in the migrant's country (population growth, population density, urbanization, lack of employment opportunities and uneven income distribution$^6$) and pull forces in the United States (employment opportunities, democratic tradition, and cultural pluralism).

It has become the fashion in some quarters to argue that foreign aid properly delivered will remove the incentive to come to the United States. There is little evidence for this proposition, despite numerous studies attempting to link foreign aid to change in immigration patterns from a lesser developed country ("LDC").$^7$ The reason is obvious. The critical comparison is the perceived long-term opportunities in the United States versus those in the LDC. It is not solely a question of bettering one's immediate status, but also of other push factors in the migrant's country and pull forces in the United States as perceived by the migrant. Increasing the economic opportunities in the native country changes one of the push factors, but is not by itself sufficient to change the immigrant's desire to come to the United States.$^8$

C. Controlling the Presence of Illegal Aliens Who Are Already in This Country

The next issue is whether some changes can be effected in this coun-

---

6. Migration does not seem to relate to per capita gross domestic product ("GDP"). Major sending countries such as the Bahamas and Trinidad and Tobago have a high GDP. See M.D. Morris and A. Mayio, Illegal Immigration and U.S. Foreign Policy, U.S. Dept. of Labor, Table 4-1 (Brookings Institution, 1980).


8. In one study, employment opportunity in the migrant's country was used to finance the migrant's voyage to the United States. SCIRP Staff Report, Appendix B, supra note 7 at 13.
try directed at the illegal alien's economic perspective in order to deter the alien from coming to the United States. This may be achieved by establishing that it is contrary to federal law to hire an illegal alien. This alone may be significant. Most criminal laws are based on the principle that most persons are law abiding and will not consciously disobey the law. However, some enforcement mechanism is necessary if for no other reason than credibility.

Since the incentive for the illegal alien to evade the law is much greater than for the employer, given businesses dependent on alien labor, and since the employer's status in the business community is important to him, the pressure can most effectively be applied to that employer. There is therefore a need for employer sanctions; that is, penalties on employers who hire illegal aliens. Debates about the wisdom of such a policy are very heated, involving such issues as the likelihood of success, the fairness of singling out employers, and the dangers to our civil liberties. The Simpson-Mazzoli bill, like the legislation passed by the House during previous administrations, provides for civil penalties against the employer who knowingly hires an illegal alien. The penalties are progressive, increasing if there is a second offense with criminal penalties possible after the third offense.

The European experience seems to show that the illegal alien does not return to his native country because the labor market abroad is closed. It also seems to show, although not very clearly, that employer sanctions may have some impact on entry into the country. In short, employer sanctions may not cause people who are here to go home, but they will probably affect the decisions of people who are contemplating coming here. Although our society is admittedly quite different from the European one, impact on and deterrence of the illegal alien flow nonetheless appears likely.

Fairness in relation to the burden of enforcement is difficult. It is perhaps unfair to thrust the burden on the employer, but few alternatives are available.

The civil liberties argument centers on the implementation of the employer sanctions program. Merely declaring hiring illegal has a minimal impact on civil liberties. The next step, the proof required of the employee's immigration status, and the interrelationship between the employer and the employee, raises the problems. To avoid the charge of racial discrimination, all persons must be required to undergo the same screening procedure established to enable employers to assure themselves of compliance with the law. The prospective employee must produce

9. The bill as passed in the Senate changed the criminal provisions so that they applied where there was a "pattern or practice". The bill as passed by the House Judiciary Committee permitted criminal penalties upon the fourth offense.
some document, an identifier, establishing that he is eligible to work.

For the first three years of its implementation, the Simpson-Mazzoli bill requires the presentation of two identifiers to the employer. The first will establish legal presence in the country, e.g. social security card or birth certificate. The second will be proof of identity, e.g. INS issued ID card, driver's license, or state ID card. A United States passport which would show both would be sufficient by itself. Under the bill, the President is directed to develop and implement a secure system to verify work eligibility within three years.

The primary concern with the identifier is the danger of increased governmental control over all citizens and the possibility of discriminatory use of the documentary requirements. For example, the employer may only ask persons who look Mexican or persons with Hispanic surnames for the document, or will avoid hiring Mexicans (or persons who look Mexican) regardless of citizenship, to avoid being fooled and thereby being penalized. These risks are clearly present although the Simpson-Mazzoli legislation attempts to respond to them. It requires all persons to provide the document and attempts to limit its use to the workplace by prohibiting its use in police work and stating that it may not be required to be carried on the person. Further, it should be noted that the civil liberties argument is not totally one-sided. The greatest threat to the American immigration tradition is the presence and continued entry of the illegal alien. Obedience to law is the greatest protector of civil liberties.

The next issue is what measures should be undertaken with respect to aliens already illegally present in the country.

Many who have focused on this issue eventually conclude that legalization is desirable. Although the Select Commission members initially voted against legalization, by the end of their two-year effort, they unanimously supported that approach. But legalization is a broad concept. It involves, first, the question of who will be legalized. This issue is usually discussed in terms of time alone. The United States has long had a principle in its law that after a certain period of time an illegal alien may be granted legal status. This principle, the so-called registry provision, is now in Section 249 of the Immigration and Nationality Act ("INA").

The registry provision originated in the "Registry Act" of March 2, 1929, and was intended to naturalize certain aliens who had entered prior to June 3, 1921, and had either lost their records or had never received them. In 1939, the cutoff date was changed to July 1, 1924, in 1958 to June 28, 1940, and in 1965 to June 30, 1948.1 A total of approximately

337,000 aliens were recorded from 1930–1978 under the various registry acts. Additionally, Section 244 of the INA establishes a period of either ten years or seven years residence in the country as grounds for suspension of deportation. In any event, some date of entry must be chosen before which entrants would be legal and after which they would not.

A collateral issue is whether those legalized will have to meet any of the normal exclusion criteria imposed on legal entrants. For example, could felons or persons likely to become public charges be legalized? The higher the standards imposed, the fewer the people who will be legalized. More importantly, the more difficult the criteria are perceived to be, the less likely that people will come forward. The record of legalization in other countries has been very bad. Usually less than ten percent of the populace believed to be illegal comes forward. There is no sense in undergoing the political debate and pain of legalization to accomplish so little.

The second question is, what benefits, if any, should be given to the people who are legalized? The greater the benefit, the more likely that people will come forward. Would those legalized become permanent resident aliens on the road to citizenship? Or should they be given only legal non-immigrant status not leading to citizenship? The latter recommendation would be less disruptive politically.

Once the scope and the benefits of legalization are decided, there remains a third question of whether there should be any restrictions on this newly legalized group. For example, should they be required to work (as the Administration initially proposed)? Or, should there be any limitation on the rights to petition for family reunification to prevent this once-illegal corps from absorbing all the preference visas and preventing others from obtaining them?

A final question is when legalization should take place. For example, it could be given immediate effect or delayed until after control of the border is established, or until after employer sanctions have begun.

The answer to these questions depends upon the purpose of legalization. One can legalize for a number of quite different reasons: (1) because it is the proper thing to do for people who have built up a certain amount of equity and contributed to the United States; (2) because it is unfair and dangerous to keep people as an exploited, hidden underclass; (3) because it will help future enforcement; (4) because there is an economic need which must be met if employer sanctions are utilized and are effective; or (5) because it is the political, pragmatic response to a difficult situation.

Congressional mail and polls show that the sentiment in the United

---

12. For pre-1959 Acts, see S. Bernsen, Acquisition of Lawful Permanent Residence by Aliens in the United States, I&N Reporter, July 1959, at 3. For post-1959 Acts, see Table 4 of the Annual INS reports.
States is overwhelmingly against legalization, a factor which must be considered in selecting any of the above choices. It is to the credit of the Congress that despite this public sentiment it proposed a very generous legalization provision. The Simpson-Mazzoli bill provides permanent resident status for illegal aliens residing continuously in the United States since January 1, 1978, and temporary resident status for two years for illegal aliens residing continuously in the United States since January 1, 1980. After two years these temporary residents may convert to permanent resident status and then proceed to citizenship. Normal exclusions that apply to immigrants—e.g. criminal violations, likelihood of becoming a public charge—would apply to any alien attempting to adjust status to either permanent or temporary residency.

D. Avoiding Undue Impact on United States Industries Which Have Become Dependent Upon the Illegal Alien

If one proceeds with a legalization policy, one must consider the economic needs of the country which require a certain amount of low income labor which is now provided by illegal aliens. This is the focus of a long bitter dispute without clear resolution, and in a time of economic recession, one carried out with increasing intensity. One position argues that these jobs are performed by the illegal alien alone. They will not be performed by legal residents or citizens because of the jobs’ low wage or low status. On the other hand, the position of organized labor and black groups is that American labor will take these jobs, and that it is the employer who is resistant. These groups argue that the employer, generally willing to pay the minimum wage, wants a more docile workforce, less likely to join a union and which does not have to be promoted as readily. They argue further that there is a certain amount of cheating going on where minimum wage is paid, accompanied by deductions and lack of accurate bookkeeping. Some economists have argued most forcefully that the expanded immigration that started in 1965 occurred just as the major civil rights legislations (the Voting Rights Act of 1965 and the Civil Rights Act of 1964) opened up jobs to blacks. Blacks suddenly found themselves in competition with a new immigrant wave which took jobs away. The normal steps up the ladder for blacks, as for other minority groups, were not available because of the new immigrant population which suddenly came upon the United States. Thus, blacks and organized labor argue for a strong enforcement program and believe the

13. The Gallup poll of 1980 showed 37% favored amnesty, 52% opposed amnesty, and 11% didn’t know.
disruptive effect of such a program on American industry is overrated.\textsuperscript{14}

Employers speak with a different voice. Even if they view employer sanctions and stronger enforcement as desirable, (and many do not), their primary concern is with the problem of obtaining labor. It may be true, they say, that in the long run American labor will take these jobs. While conceding that changes in capital technology could make the need for low income and foreign labor less necessary in the future, employers point out that the potential for near-term disruption is very great, and argue that there should be some consideration of their short term need for a work force. They predict that legalization will cause increased mobility among newly legalized employees who will leave for better jobs or bigger cities. Employers maintain that they must have foreign temporary workers to fill these vacancies.

II
THE TEMPORARY WORKER

The available policy options relating to temporary foreign workers in the United States are characterized at one extreme by a policy which would maximize American employment and labor standards with no dependence on foreign labor, and at the other extreme by a policy which would preserve current production operations and costs by filling all vacancies rejected by American workers with foreign workers. The legislative options within these two polar points include improving the current H-2 program, formulating a new temporary foreign worker program, and replacing the formal certification process with a tariff on foreign workers payable by their employers. The Simpson-Mazzoli bill proposed a modification of the existing H-2 agricultural program in order to ease the ability of the agricultural employers to import temporary workers.

Of course, there is at present a provision for temporary workers in the statute; i.e., the H-2 visa (INA §101(a)(15)(H)(ii)). The H-2 visa evolved from two provisions in Section 3 of the Immigration and Nationality Act of 1917. That section set forth a list of inadmissible aliens, including contract laborers. However, the fourth proviso of Section 3 authorized the Attorney General to grant waivers of the exclusion clause for skilled contract laborers upon a finding that “labor of like kind unemployed cannot be found in this country”, and the ninth proviso of section 3 allowed for a waiver of excludability for inadmissible aliens, including contract laborers, for temporary entry. Section 3 was the principle authority for the admission of agricultural workers during the per-

iods before and after the applicability of special legislation for that purpose during World War II. Administrative procedures developed jointly in 1948 by the Commissioner of the INS and the Director of the United States Employment Service required that before such a waiver could be issued, an investigation had to be conducted by INS and certified by the United States Employment Service, showing that the admission of such workers would not displace or otherwise detrimentally affect labor in this country.15

In 1950 the Senate Judiciary Committee considered the admission of temporary agricultural workers and found "that the agricultural labor supply in the United States, particularly in the southwestern states, requires supplementation," and made the following recommendation:

". . . provisions should be made in permanent legislation which would permit the admission of temporary agricultural labor in a nonimmigrant classification when like labor cannot be found in this country. The determination of the necessity for the importation of such labor in any particular instance should be made by the Commissioner of Immigration and Naturalization upon application by the interested employer before the importation and after a full investigation of the facts and consultation with appropriate agencies."16

This recommendation was enacted into law as the H-2 provision of the Immigration and Nationality Act of 1952 and remains in effect today.17

In 1981, approximately 43,000 persons entered under the H-2 classification, of which 18,000 were agricultural workers and 25,000 were non-agricultural workers. The H-2 application process is cumbersome, partly to assure protection of the native United States worker. The Labor Department must find the non-availability of a comparable U.S. worker, and an absence of adverse impact on the United States wage rate. The first finding requires industrial analysis plus a specific review of the job and the employer's efforts to fill it. This may require proof of advertising of the job and can lead to long disputes as to the qualifications set out by the employer. The second finding involves discussion of the wages proffered in addition to any secondary benefits, such as housing and medical care. Further, any significant expansion of the temporary worker program requires either a much larger bureaucratic structure than the present one or a change in statutory standards for obtaining an H-2 visa.

Both United States agribusiness in the southwest and the Mexican government have suggested a more broadly structured program with the benefits of the old "bracero" program—jobs for Mexicans in U.S. indus-

16. Id. at 586.
try and their subsequent return home—without its exploitive aspects.\(^{18}\) They argue that a large scale temporary worker program would maintain the benefits presently obtained from the participation of the illegal aliens in the economy, would cause no widespread disruption of established economic patterns, and would also satisfy those employers which have come to rely upon illegal alien labor.

Diplomatic consideration, especially Mexico-United States relations, have been at the forefront of advocacy for a temporary worker program. Mexico, with its simultaneously burgeoning population and economic difficulties, might welcome the reinstatement of a United States temporary worker program for Mexican nationals. Given the function of emigration as a safety valve reducing Mexico’s unemployment and domestic political tension, the adoption of such a program might serve to enhance Mexican political stability.

Similarly, expansion of the temporary worker policy could be recommended on the grounds that it would serve to improve bilateral relations with other illegal labor-supplying countries from the Caribbean and Central America if the program were to be multinational, instead of exclusively Mexican in nature.

Expansion of the temporary worker program is no guarantee against illegal immigration. As was the case with the bracero program, a new and much larger temporary worker program might serve as a magnet for illegal aliens.\(^{19}\) Further, there is no proven technique to assure repatriation. Even the offer of cash bonuses to temporary workers to facilitate their return—a technique tried by France—has met with only mixed results in securing foreign worker repatriation. Unless the temporary workers are placed under geographical restrictions, (a provision probably impossible to enforce, and which would leave the illegal alien problem unresolved in the areas from which temporary workers are barred), they will locate throughout the country and make enforcement of rotation very difficult and costly.

A major drawback of a temporary worker program is that temporary workers barred from citizenship would create socioeconomic and culturally distinct microcosms wherever they worked in large numbers. Unlike the immigrant enclaves in American history, temporary worker neighborhoods would not be waystations on the road to assimilation into the American way of life.

In its proposal, the Administration sought to change the control point from the employer, as in the H-2 program, to the state, and begin a pilot program—50,000 workers for two years. It also suggested abbrev-

\(^{18}\) As examples of this see the Schmitt, Hayakawa and Goldwater bill anticipating that a large number of guest workers would enter the United States, 2. 1427, 96th Cong., 1st Sess., (1979).

\(^{19}\) S. Weintraub and S. Ross, The Illegal Alien from Mexico, 40 (1980).
iating the present labor certification analysis for third and sixth preferences, by basing this analysis on national market surveys rather than the specific job. The Simpson-Mazzoli bill did not propose any new type of temporary worker program.

III

THE ASYLEE

The mass asylee represents a different type of intrusion across the border. As distinguished from the illegal alien, the asylee may have a legal, albeit unclear, right to remain in the United States. The problem is that large scale first asylum into the United States was never envisioned, and when it occurred, the country was unable to handle it. The courts felt that the existing procedures were inadequate and were frustrated by the inability or unwillingness of the government to respond to the need for new procedures.

Both the government and the asylee advocates share the judiciary's view of the inadequacy of the asylum adjudication procedures. The government feels this way because of the layers of review and the delay inherent in the process which makes it almost impossible to deport anyone. The exclusion process (of which asylum is a part), envisions an application to the District Director of the INS. If rejected, the application is resubmitted to a Special Immigration Officer (an immigration judge), and if denied again, there is a further review by the BIA. If all of these decisionmakers decide against the asylee, there remains a statutory habeas corpus, de novo review in the District Court. If this too is decided against the asylee, there is yet another review by the Circuit Court of Appeals and then finally by the Supreme Court. It is not a system designed for many cases.

On the other hand, from the asylee applicant's viewpoint, it appears that he can never win. The first three reviews—the District Director, the immigration judge, and the BIA—all involve reviews within the executive branch under the Attorney General. In essence, the Attorney General is reviewing his own decisions. The District Court, and the Court of Appeals review (if the applicant gets that far), are similarly uncertain because the fact finding is determined in such a large measure by the executive branch. The question of persecution in the foreign country is a foreign policy determination made in almost all cases by the State Department.

Not unexpectedly, with these factors operating, matters have become worse in recent years. Some Haitian advocates are seeking case-by-case review of their asylum claims, a process likely to take ten to fifteen years if played out under existing rules and personnel. The government has responded with interdiction at sea to avoid the process altogether.

Reform of the system requires an increased independence of the
adjudicatory officials and a shortening of the review process. The Simpson-Mazzoli bill sought to do that by establishing a new U.S. Immigration Board whose members would be appointed by the President. In place of immigration judges within the INS, administrative law judges ("ALJs") would be established who must have special training in international law and foreign affairs to decide asylee cases. No judicial appeal would be permitted from the U.S. Immigration Board, thus creating an independent ALJ and a single independent review.

IV
LEGAL IMMIGRATION

This article has thus far focused on control over nonlegal immigrants. There remains the question of controlling legal immigrants. This involves both an accurate count of everyone admitted, and an established limitation on the number of people admitted. This limit is critical to the determination of immigration policy. Combined with the number of refugees and asylees admitted, it determines the amount of legal immigration into the United States.

Several factors are involved in setting this figure. The overall figure relates to economic impact, population stabilization (basically an ecological question), social impact, and the popular perceptions of appropriate immigration levels. The first three measures can be discussed in terms of hard data. Popular perception, however, is a more subjective judgement.

A. Economic Impact

Based on the analysis of a number of economists, the consensus on economic impact seems to be the following:

(1) In the near term, immigration impacts adversely on native low-income, unskilled or semi-skilled labor in areas where immigrants are concentrated.

(2) Immigration could meet the needs of the United States for a larger labor force in the mid '80s.

1. Adverse Impact on Low-Income, Low Skilled Labor in the Near Term

Some economists view immigrants primarily as low-skilled workers

---

20. Although this discussion focuses on legal immigration, the analysis applies to illegal entrants as well.

willing to work harder for lower wages. As a result of this increased supply of labor, one can expect the incomes of native workers who are close substitutes for immigrant labor, to decline. Unskilled immigrants are likely to be substantial recipients of income transfers and, as a consequence, are less favorable to the general level of population.  

This is not a totally unanimous view. Other economists, most notably John Galbraith, argue that immigrants fill jobs which cannot be filled at any reasonable wage by United States laborers. (This becomes particularly true if one accepts projections that by 1985 the United States will have an excess demand for low-skilled, non-farm labor and service occupations.) An important refinement of this argument is that immigrants fill jobs in our economy which Americans will not, at wages low enough to ensure the competitiveness of certain domestic industries in world markets. If this is true, immigrants become essential for certain kinds of industry as trade expands. Unless we argue for phasing out these unprogressive industries, thus recognizing the undesirability of employing unskilled and lower paid employees, immigration becomes necessary to continue certain domestic industries.

2. Immigration Will Meet the Needs of the United States for a Larger Labor Force

One can analyze labor supply in relation to demand in key occupations. Reynolds estimates a shortage of 3,450,000 workers in "administrative and managerial" categories and a shortage of approximately 1,600,000 more unskilled male workers in the non-farm labor and service industries during the mid '80's and '90's. This shortage of labor at the low and high ends of the labor spectrum can be met by a gradual upgrading of the skills of workers presently in the economy, increased use of female workers, and a substitution of capital for lower skilled labor. New immigrants can substitute for those adjustments.

Another way to examine the issue is to look only at aggregate figures. Projections based on population growth rates estimate the labor supply requirements at approximately 113 million by 1986, 116 million


25. See C.W. Reynolds, Labor Market Projections for the U.S. and Mexico and Their Relevance to Current Migration Controversies, Paper prepared for the Food Research Institute, Stanford University, July 1979 (available at Boalt Hall School of Law, University of California, Berkeley).
by 1990, and 126 million by the year 2000. The demand projection is heavily dependent upon estimates of the growth of the United States economy. A growth of three percent a year would slow excess supply in 1985, but result in labor shortages in 1990 and 2000.

Both of these analyses may be seriously altered by a continuation of our existing recession. If the three percent a year growth rate turns out to be substantially less, then the demand for labor may be much less and not exceed supply. At this point, the economic picture is much more cloudy and less optimistic than it was a few years ago.

B. Population Stability

The issue of population stability is generally framed in terms of United States capacity to accept additional people and maintain a high quality of life. The original thrust of zero population growth was to substantially slow population increase and to hasten population stabilization. The rationale was that no substantial benefits would result from further population growth, and that population planning would permit the United States to better address various social and economic problems. Fertility, the most significant element in population control, has fallen below replacement level (1.8 children per woman at present, below the 2.1 replacement level), thus making immigration the critical element in population growth. Assuming no increase in the fertility rate, and an annual immigration rate of 600,000 a year, population in the United States would level at 277 million people in the year 2030. But, if one assumes a rate of 300,000 immigrants a year, again assuming the present fertility rate, the United States population would reach a peak of 262 million in 2025 and decline after that. On the other hand, an immigrant flow of 850,000 per year (the Select Commission figure) would mean a population of 293 million by the year 2030 with an extremely slow growth after that.

The selection of one or another of these figures from an ecology/population planning point of view is relatively arbitrary. The available literature does not show any significant difference in United States lifestyle based upon population size within the above ranges. The thrust of the literature is towards the lower population ranges but the basic goal is stability and population planning. If this is achieved, the precise target rate is of less concern.

---

26. The estimates usually set forth a range. The figures in this article present the midpoint of the ranges.
27. Reynolds, supra note 25.
C. Social Impact

This issue is particularly difficult since the nature of America's national identity has long been debated, and the question of the capacity of the United States to absorb different ethnic groups is equally controversial.

1. Nature of American Identity

The classic statements of American identity involved a common respect for ideology, (liberty, equality, social mobility, and government by consent), rather than any shared ethnic identity.\(^2^9\) These statements rested on the assumption that Americans shared a common social background with their native country. The foundation of the American national identity, therefore, had to rest on a principle that justified separation from England and migration from the mother country. On the other hand, there was the view that American identity was new, created out of the ethnic identities of the old countries, but fused anew in the crucible of America, i.e., the "melting pot" thesis.

These views were always challenged in theory. With the large-scale Southern European immigration at the end of the nineteenth century (principally Catholic and Jewish), the issue became one of practical importance. This migration raised questions on American identity not only on ideological grounds (Catholics being associated with conservative monarchies and Jews with radical change), but on religious and linguistic ones. Although the force of the popular reaction was translated into the Immigration Law of 1924, the questioning never gained great credibility when translated into philosophical thinking because of its close identification with racist movements. World War II, with its emphasis on universal brotherhood and inalienable human freedom, brought the melting pot thesis to its height and effectively obliterated any intellectual credibility behind the 1924 Congressional action.

The 1960's and the 1970's saw the Thermidorean reaction. The emphasis on ethnic identity, coupled with some research showing that immigrants had maintained their cultural identity to a greater degree than previously acknowledged,\(^3^0\) and the United Nations statements which looked at ethnic conflict on a global scale, caused the United States to question the melting pot theory. Within the United States, the civil rights movement, the Vietnam War and Watergate reinforced the rejection of traditional American ideological justifications for its actions and institutions.

\(^2^9\) See H. Kohn, American Nationalism (1957); See also J. De Crevecoer, Letters from an American Farmer (1782).

\(^3^0\) E.g. D. Moynihan and N. Glazer, Beyond the Melting Pot (1965).
Attempts to redefine American identity have begun to emerge. The best recent definition is Gleason's "a distinctive sense of peoplehood", which includes unique principles of unity, history, and symbols that embody the community's evolving consciousness of self. There is presently no consensus on how ethnic identification—race, nationality, language and religion—fits into our national consciousness and should comprise part of our national identity.

2. United States Capacity to Receive Various Social Groups

On the general question of capacity and desire to absorb new immigrant groups, the experiences of Canada and Australia may be instructive. Canada is usually presented as a horrible example of the danger of ethnicity. There is no doubt that Canada handled its language problem badly. Although the problem did not arise as a result of immigration and was reinforced by an unusual and unfortunate legal structure which established two official languages, it nevertheless shows the difficulty which is always present in ethnically disparate situations. Australia is usually contrasted with Canada. Australia followed a careful immigration policy designed to create an ethnically homogeneous population. This policy has generally resulted in the avoidance of great ethnic strain. It also has been viewed as a limitation on Australia's growth and vitality, although causal connections in this area tend to be weak.

One method of approaching this issue with respect to the United States is to examine the number of foreigners in our society and their rate of increase, in order to judge objectively the ability of the United States to absorb new social groups. The percentage of foreign-born in relation to the total population is presently very low in the United States in comparison with our past historical experience or the experience of other developed countries. If one factors in an estimate for illegal immigrants, then the proportion is similar to that of other countries, but relatively less than what has been our experience in the past.

These generalizations are also true with respect to the number of foreign workers in our society and the percentages of immigrants as a portion of the population as a whole. Even the language question is roughly comparable to our previous experience. During the decade 1967-1976 approximately 32 percent of all legal immigrants to the United States were Spanish-speaking, but in 1881-1890, 28 percent of all immigrants to the United States were German-speaking, and in 1901-1910,


23 percent spoke Italian. The figures are greater at present for a single language group if one takes into account illegal immigration, but the ethnic relationships are somewhat comparable.

Non-English language use has always been a visible symbol of ethnic distinctiveness and of possible strain on American unity. There are at present two literacy provisions in the INA: the general literacy requirement passed in 1917 as a condition of migrating to the United States, and the 1906 requirement of English literacy as a condition of citizenship. The provisions were passed in response to the increased immigration from Southern Europe at the turn of the century. These groups generally seemed to have less knowledge of English and be less literate in any language than the present Hispanic population. The general literacy and English literacy provisions have not been significant as a selection mechanism or as an assimilation device in immigration policy, and thus have become merely symbolic representations of United States attitudes. Extremely few immigrants are prevented from coming to the United States or from becoming citizens as a result of this requirement.

The Hispanic population seems to have a greater ability to maintain its own rate of assimilation as measured by acquisition of citizenship. (This is partially related to proximity since Canada's rate of acquisition of citizenship is also very low.) Insofar as motivation to assimilate is a factor, a recent study for the Select Commission asked the question "What language should American people speak?", and received the following responses: 22.8 percent said English, 61 percent said both English and Spanish, and 15.2 percent said Spanish. On the other hand, data shows that the Hispanic population, like immigrant groups before it, is learning English within a generation.

Historical experience would suggest that the United States is capable of absorbing large numbers of people of different ethnic backgrounds,

---

35. I have estimated 13,679 aliens between 1892-1977 were prevented from migrating to the United States, and less than a hundred a year prevented from being naturalized. See A. Leibowitz, The Official Character of Language in The United States: Literacy Requirements for Immigration, Citizenship and Entrance Into American Life, in Select Commission on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest, 95th Cong., 1st Sess., Appendix A to the Staff Report of the Select Commission on Immigration and Refugee Policy; Papers on Immigration History 442 (1981).
36. J. Garcia, Integration of Mexican Immigrants Into the U.S. Political System, in SCIRP Staff Report, Appendix D, supra note 21 at 454.
although the ethnic and language factors are somewhat more distinctive and greater than in the past. The present debate is more difficult because of recent debates about minority language recognition in the Voting Rights Act and the Bilingual Education Act.

D. The Popular Perception

At this point, a discussion of the popular perception of the social impact issue is necessary. The impact of immigration has been sudden and visible on generations that talked about America as a nation of immigrants but have not known immigration except as a shibboleth (from 1930-1960, immigration was at an all-time low). At a time of economic uncertainty and strained American fabric due to the civil rights movement, it appears to many that what is happening to the United States is unique to its experience, beyond its own capabilities or desire to cope, and dangerous to the nation.

A major factor in the social impact issue and the perception of social impact has been the change in the direction of present immigration. This type of change is not a new phenomenon but each occurrence shocks the existing body politic. Within the last decade all of the major sending countries (China, Taiwan, Korea, Cuba, the Philippines and Mexico) have been non-European, sending immigrants who are generally identifiable by color and the fact that they are non-English speaking. In a country like the United States, which has generally placed itself within the northern European community by lifestyle and cultural tradition, this change in the location of the sending countries has heightened the tension concerning the social impact of the new immigrants. The fact that many of the immigrants come illegally (in the case of mass first asylum openly and perhaps illegally) has not only angered the American people but has also made them more fearful of the consequences of large-scale immigration. The resistance of the American people to the recent wave of immigration is based partly on a general wariness about the future and partly on a perceived incapacity to adjust. The overriding concern is that the new immigrants will change the basic lifestyle or the image of America itself.

Conclusions are not easily drawn from this discussion. One can say that the social and economic concern with respect to immigration is not unfounded. Something significant is happening in the United States that will profoundly affect the body politic. The desire to control the consequences of immigration to assure ourselves knowledge of its impact and perhaps soften it, is not a matter of ideology, it is simply good sense.

The continuation of the country’s immigrant tradition is not threatened by this popular perception. No one in the Congress is attempting to change our role—a unique role in the world—as an immigrant-receiving
country. One can argue about the number of immigrants but it is not unreasonable to try to count them all and to try to fine-tune our immigration policy in relation to economic growth. The Select Commission suggested an Immigration Advisory Council as a continuing body to advise the Congress and the executive branch on the needs of our country in relation to immigration. Congress so far has begun to take only the more limited step of maintaining an accurate count of all immigrants entering the United States.

At present we do not count everyone who comes into the United States. There is a set figure of 270,000 immigrants per year, which is the legal immigration cap. There is, however, a numerically exempt group; immediate relatives of people presently in the United States. In the past their total has remained reasonably stable, but has recently begun to increase rapidly. Last year the total was 155,000. It is becoming a critical element in the size of our immigration policy. The proposed Simpson-Mazzoli bill accepts the 155,000 total, adds it to the 270,000, and thus reaches a total of 425,000 immigrants per year. It assumes, therefore, that the total number of legal immigrants will remain approximately the same.

Maintaining the existing total (since the numerically exempt figure will undoubtedly increase) requires that other preferences decrease. This is the second major change proposed by the bill: a restructuring of the preference system. The bill clearly establishes the nuclear family as the basis for family reunification and increases the independent categories as the basis for entrance into the United States. At present, 54,000 third and sixth preference immigrants, or approximately thirteen percent of the 425,000 yearly immigrant total can enter independently. The bill establishes a new limit of 100,000 third and sixth preference immigrants, or slightly less than twenty percent of the 425,000 total. Both figures are somewhat larger than they appear, as the independent immigrant is often accompanied by his or her immediate family, and that total is counted within the independent preferences.

The reason for the change is to maximize the short-term economic benefit to the United States. With respect to the first independent preference, i.e., the present third preference immigrant, the bill revises the existing statutory language, making entry more difficult for members of the professions, by requiring a showing of skill beyond merely a degree.

38. 3rd Preference: Aliens who are members of the professions, or who because of their exceptional ability in the sciences or the arts, will substantially benefit prospectively the national economy, cultural interests or welfare of the United States, and whose services are needed by a United States employer. 6th Preference: Aliens capable of performing skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States. Immigration and Nationality Act § 203(a)(3) and (6), 8 U.S.C. 1153(a)(3) and (6) (1965).
This was partly in response to the pressure of engineering organizations who argued that the hiring of engineers from abroad was facilitated by the lax implementation of the "professional" standard. They argued that American firms frequently went abroad solely to obtain cheap labor, and that these foreign engineers were not of distinguished merit and ability.

V
CONCLUSION

The time is right for immigration change. Congress has taken a major step in developing a drastic revision of the INA designed to establish greater control over entry into the United States, revise the preference system to emphasize the nuclear family, and increase economic benefit to the United States. This approach, although a sharp break from the past, has the broad support of the Select Commission (with regard to employer sanctions and legalization) and is responsive to the desire of the citizenry for immigration control.