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**THE REPORT OF THE U.S. SELECT COMMISSION
ON IMMIGRATION AND REFUGEE POLICY:
A CRITICAL ANALYSIS**

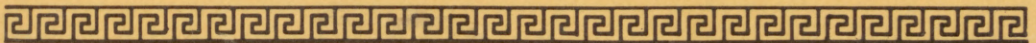
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THE SELECT COMMISSION'S FINAL REPORT: LEGAL IMPLICATIONS

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The Select Commission on Immigration and Refugee Policy was created by Congress precisely to bypass the immigration proposals of the Carter administration, particularly on the issues of amnesty and guest workers. Like others that went before it, this national commission should be taken quite seriously as a prelude to specific legislative changes in the Immigration and Nationality Act (INA), regardless of the changes that the Reagan administration, the new Republican majority in the Senate, and the increased conservative representation in the House might want to make in the Commission's recommendations. Its proposals will not, incidentally, produce great discomfort to conservatives on immigration issues. But while its political prospects look good and it might well "hang together" as a set of policy recommendations, the report's discussion of legal issues is inadequate, its supporting argumentation poor, and its consideration of long-term consequences incomplete.

General Observations

One overall omission of the report should be noted at the outset. This is its failure to explain even briefly recent legislative and judicial developments as they have affected the rights of aliens (legal and illegal) in all sectors of society: employment, political participation, ownership of private property, health and welfare benefits, education at all levels, and the criminal justice system. The Commission's report repeatedly states its concern regarding the creation of an "underclass" of illegal aliens subject to exploitation, a situation which "breeds disrespect for the law." All manner of specific recommendations, including limited legalization for aliens already here, flow from this concern. But the report gives little attention to the present legal status of aliens with regard to their participation in the private and public activities mentioned above, nor does it adequately address problems such as the enforceability of employer sanctions laws. Pol-

icy proposals affecting the admission of aliens should be at least partially influenced or informed by the status and condition of aliens already here.

Specific Legal Issues

The Commissioners' proposals present a plethora of difficulties when considered in light of legislative and judicial precedent. This presentation will examine several key issues of concern, which fall into three broad areas: changes in law-enforcement structures and procedures; proposed alterations in the system for litigating immigration matters; and suggested modifications in our method for deciding who will and will not be allowed to enter and/or remain in the United States as an immigrant.

Law Enforcement

One of the most important recommendations of the Select Commission's report is that employers who hire illegal aliens and those who violate wage and safety codes be subject to criminal penalties. Yet a report issued by the office of the Comptroller General recently indicated that the Immigration and Naturalization Service (INS) probably does not have the administrative capability to carry out such a policy, even if given increased funding.¹ Furthermore, the political costs of prosecuting large numbers of businessmen in the United States would seem overwhelming. (In this regard, we should note that up to the date of the Select Commission's report, only one conviction had resulted from the employer sanctions laws on the books in eleven states.) Finally, we should also remain cognizant of the enormous costs of implementing an "improved" employee-identification system — which the Commission recommended as an essential element of an employer sanctions law, but the form of which it failed to specify.

Regarding another aspect of the control of undocumented migration, the Commission recommended increasing enforcement efforts to deport and remove illegal migrants so as "to discourage early return."² Furthermore, their proposal would require aliens to pay their own transportation costs of deportation or removal "when able to do so" and "under adequate safeguards."³ However, as the Comptroller General pointed out, the

1. Comptroller General, *Report to the Congress: Prospects Dim for Effectively Enforcing Immigration Laws* (Nov. 5, 1980).

2. *U.S. Immigration Policy and the National Interest*, p. 55.

3. *Ibid.*

INS and other agencies would have their hands full if Congress were to follow the Commission's recommendations regarding employer sanctions and the system for verifying eligibility to work. Furthermore, the proposal that aliens pay their own deportation expenses would entail defining terms such as "able to do so" and "adequate safeguards." The bureaucratic criteria and procedures required to make such determinations seem staggering.

In order to assist enforcement activities in non-border areas, the Commission recommended that statutes "clearly provide that INS officers may temporarily detain a person for interrogation or a brief investigation upon a reasonable cause to believe . . . that the person is unlawfully present in the United States." This recommendation addresses the problems of enforcement in areas where a host of recent court decisions have constrained the search-and-seizure conduct of the INS on the grounds of Fourth Amendment protections.⁴ These rulings have held that interrogation of an individual based solely on race or ethnic appearance is unconstitutional,⁵ and that enforcement officials may not detain individuals without reasonable suspicion based on specific, articulable facts (except at fixed checkpoints located within reasonable proximity to the border⁶). The Commission recommends extending the "reasonable suspicion" standard to areas outside the border zone. But what grounds other than race or nationality will the INS use to establish "reasonable suspicion" in areas removed from the border? Recent federal court decisions have frequently enjoined INS activity because the agency could show no specific criterion other than race for its decisions to conduct "area control operations" (sweeps) in neighborhoods and businesses in the interior of the United States.⁷

A fourth area in which the Select Commission recommended changes in policy and procedures for enforcing

4. See, for example, *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (1976), rehearing and modification, 548 F.2d (1977); and *Blackie's House of Beef v. Castillo*, 467 F. Supp. 110, 480 F. Supp. 1978 (1979).

5. See *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), especially the concurring opinion by Justice William O. Douglas.

6. See *United States v. Martinez-Fuerte*, 96 S.Ct. 3074 (1976), and *Almeida-Sanchez v. United States* 413 U.S. 206 (1973).

7. See *United States v. Brignoni-Ponce*, *supra* and *United States v. Cortez* (U.S. Sup. Ct. 79-404, Bull. 834, 1981), which permit vehicular stops when agents can state "specific articulable facts" based on observations made *before* detention and interrogation.

immigration law concerns arrests and searches. The Commission's report recommends authorizing INS supervisors to issue arrest warrants without judicial authority and further permits warrantless arrests on likelihood of escape. This recommendation would enable INS officers to determine "probable cause" for arrest and would elevate their discretion in this matter to the high level of federal statute. The Commission also proposed to permit INS searches of persons and property *anywhere* (not just near the border) without judicial warrants, so long as officers could state probable cause. However, given recent judicial precedent, this procedure would probably not withstand the scrutiny of the courts.

Litigation

In the area of judicial policy regarding immigration, the Commission recommended that Congress create a special Immigration Court, which would parallel in standing the U.S. Tax Court, the Court of Customs and Patent Appeals, the U.S. Court of Claims, and the U.S. Court of Military Appeals. This body would serve as a buffer and a conduit between the INS and Federal District Courts on petitions for injunctive relief, and between the INS and the Courts of Appeals, which presently review final decisions of certain administrative agencies on matters of legal interpretation. Although the Federal District Courts would retain their basic civil rights jurisdiction, the creation of an Immigration Court could restrict the independent, *de novo* fact-finding function which under current law characterizes District Court review of INS actions in the field.

In further discussion of the litigation issue, the Commission ultimately refused to provide the right to counsel to persons detained, investigated, and arrested as deportable aliens except "at the time of exclusion and deportation hearings" or when benefit petitions under INS are being tried. Yet the INS already informs all deportees of their right to consult a lawyer and request a hearing. The agency had initiated this operating rule in response to lower federal court decisions granting restraining orders and injunctions when INS officers had failed to advise detainees of their right to counsel during factory sweeps. However, in contrast to the urgency which the Commissioners expressed for incorporating the recommendations of law-enforcement agencies into federal statute, they were reluctant to accord this practiced right the same level of formal legality. The Commission clearly feared the administrative costs involved with educating the alien public about this right, which might well have extended into a right to obtain government-paid counsel.⁸

8. *U.S. Immigration Policy and the National Interest*, pp. 271-273.

Admission and Legal Status of Immigrants

The final area of concern to be examined in this presentation concerns the Commission's approach to rules and procedures for granting immigrant status to foreigners — specifically, its proposal to grant amnesty to undocumented migrants and its recommendation to amend the rules for excluding prospective immigrants. Regarding the amnesty question, the Commission's report makes quite clear that *effective law enforcement must precede effective legalization*. The Commissioners felt strongly that their recommendations on police activities, employer sanctions, a worker-identification system, and enforcement of laws governing wages and working conditions must be in place before the government attempts to legalize the undocumented. But how will the undocumented alien view the credibility of such a system of legalization, especially with the span of residence left undefined and not inclusive of temporary or seasonal migrants? The plethora of law-enforcement activity recommended by the Commission will doubtlessly heighten the suspicion that the system is intended to purge the country of foreigners, especially given that all aliens failing to qualify will be immediately "subject to the penalties of the INA . . ."⁹

To encourage the undocumented to participate in the program, the Commission recommended operating it for at least one year and using private organizations for purposes of educating the undocumented public. But at the same time, it recommended a cutoff date of January 1, 1980 for eligibility, without specifying a minimum length of residence; it thus left the whole legalization proposal in limbo. By the Commission's own estimate, a residence requirement of two years would disqualify 40 per cent of illegals from the amnesty program; a three-year requirement would disqualify some 55 per cent.

The failure of the Commission to agree on what grounds might suffice to exclude an alien casts even further doubt on the credibility of the legalization program as proposed. The Commission criticized as archaic, ambiguous, and difficult-to-enforce the thirty-three existing grounds for exclusion, and it urged Congress to "reexamine" these categories to eliminate some of them. However, the Commission was itself unrealistic and ambiguous in failing to specify which of the thirty-three should be eliminated or how they should be rewritten. Without such precise direction, Congress is unlikely to agree on streamlining and equitable language. Among other problems, lack of reform on this portion of the INA will continue to pit State Department Visa Office interpretations against those of the INS, resulting in a serious enforcement problem.

9. Ibid., p. 83.

