AMERICA'S NEW IMMIGRATION LAW: ORIGINS, RATIONALES, AND POTENTIAL CONSEQUENCES

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APPENDIX A

EDITED COMMENTS OF SELECTED SPEAKERS AT THE 1982 EARL WARREN COLLEGE SYMPOSIUM*

David Hiller**

This is a critical time in our nation's history of dealing with the issue of immigration. I hope that this historical juncture will produce a major reform of our immigration laws as proposed in the Simpson-Mazzoli Bill. The Reagan administration is continuing its support for this bill and remains very hopeful about its passage. Differences have emerged between the administration's original proposal and those proposals now under consideration by Congress, but I believe that the Simpson-Mazzoli legislation reflects as good a political balance and presents as clear a vision regarding U.S. immigration law as we are likely to see in the near future. The Attorney General has therefore made the passage of Simpson-Mazzoli a top legislative priority, and the administration as a whole considers the bill a very important measure.

The administration owes a very large debt of gratitude to the Select Commission on Immigration and Refugee Policy. That commission made a monumental effort over the two years of its existence and ultimately achieved a consensus on a wide range of measures for dealing with the immigration problem. It delivered its recommendations to the administration during a time when the issue of immigration had aroused a considerable amount of political agitation. Only six months or so prior

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**Editors' note:* This appendix comprises edited versions of the oral presentations of selected participants in the Warren College Symposium who did not submit written works for inclusion in this volume.

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to the Commission's report, the Mariel boat lift had shocked the entire country by revealing our susceptibility to sudden and uncertain migration flows. At the same time, the U.S. was struggling with extraordinarily high levels of refugee admissions. Many Americans had the sense that our legal admissions of refugees had joined illegal immigration as a problem which had got out of control.

The administration decided very early that it would, to the extent possible, set its face against the very popular restrictionist sentiment favoring substantial cutbacks on legal immigration and on refugee admissions. President Reagan's instincts, based on his experience in California and his friendship with Mexican President José López Portillo, are to be very generous in the area of migration. During an interview with Walter Cronkite around election time, President Reagan noted that he was intrigued by the idea of substantially opening the border between Mexico and the United States, a notion which fit within his concept of a North American accord including both Mexico and Canada. In sum, the President and the Cabinet decided early that, in terms of legal immigration, we would preserve the hospitality that for many years had distinguished America's immigration policy.

Partly because of the short time remaining before the Congressional elections, the administration decided in 1982 to focus its efforts in the area of immigration on the pressing problem of illegal migration and on the proposal for mass asylum. Having chosen to address these issues, the administration had to make a fundamental decision about whether to maintain the limits of our current legal immigration program or to expand that program so as to regularize and accommodate the undocumented flows that had been arriving since at least the mid-1960s. We decided to do some of both, but by and large to retain the legal admissions and the refugee admissions programs as written in the current law. We decided to attempt to build an enforcement policy, moreover, that would bring the reality of migration into line with the law. In that regard, we decided to support the employer sanctions proposal.

Most of the Cabinet were initially, if not entirely opposed, at least very skeptical of the feasibility and wisdom of instituting a regime of employer sanctions. Moreover, the plan ran against the grain of the administration, which had been elected in part on the proposition that the government was already "too much with us," that it

imposed too many regulations, and that these regulations constituted a drag on business. However, the more that the Attorney General studied the issue of undocumented migration, the closer he came to the conclusion that a workable and credible strategy for dealing with the issue would have to rely on the requirement that employers not hire undocumented workers. Gradually the Select Commission's judgment about employer sanctions also came to prevail within the Cabinet, although not without substantial discussion and debate.

The same held true about the second major element of the administration's focus, the issue of legalization. The proposal that we grant amnesty to the millions of illegal aliens who came into this country while our laws were not being seriously enforced also ran against the grain, at least initially, of many in the administration. They argued that such a proposal would reward wrongdoers, that it would be unfair to the prospective immigrants who have waited patiently and legally for the right to enter, that it could be a substantial burden on Americans who would have to foot the bill, and that any wholesale amnesty would encourage many more aliens to enter illegally in the hope that the amnesty would continue. Nevertheless, the logic and humanity of a proposal for legalizing the status of illegal aliens already in the U.S. persuaded the administration. In our recommendations on this proposal, we departed somewhat from the views of the Select Commission. We proposed that candidates for amnesty receive temporary legal status before assuming all of the benefits and rights of legal residents (such as bringing their families or qualifying for welfare benefits) out of a sense of fairness, both to those who have immigrated legally and to those who would bear some part of the cost. We also recognized that a large-scale legalization program would represent a major political undertaking and would be controversial. We can expect to see an effort to make the legalization proposal much more restrictive or to delete it entirely, which the administration feels would be most regrettable. The amnesty proposal is an essential part of this legislative package, which loses its logic if any of its elements is removed.

On the matter of refugee admissions, our current system and the litigation that it has generated have paralyzed the admission process. Not many years ago, the United States received two to three thousand petitions for

political asylum per year, a number which has recently risen to 40 to 60 thousand. We currently have a backlog of some 123,000 such petitions, and this volume of requests has created procedural and administrative problems for the agencies involved. The Simpson-Mazzoli Bill attempts to simplify somewhat the process for deciding asylum cases while preserving the fairness of the hearing procedures for exclusions and deportation.

Finally, the proposed legislative provisions for admitting temporary workers into the United States when insufficient numbers of American workers are willing to fill certain jobs has become one of the most contentious issues in the debate. The Select Commission had declined to propose an expansion of the H-2 temporary-worker program, although it did suggest that the program might be streamlined. Many analysts have proposed the creation of very large guest-worker programs on the premise that such a plan could channel most of what is now undocumented migration into a legal channel, but we in the administration decided that we could not responsibly go the route of endorsing such a proposal. However, the arguments of many employers, particularly in agriculture in the West and Southwest, persuaded us that the introduction of employer sanctions could substantially reduce the size of their available work force. We therefore have worked very hard on revisions in the current H-2 program which can guarantee access to temporary foreign workers to employers with a genuine need. At the same time, we have given special attention to retaining the safeguards in that program which protect American workers from deteriorating working conditions and diminishing wages as a result of the importation of foreign workers.

The administration feels that Simpson-Mazzoli is as good a bill as this country is going to see, possibly for years, and we think that it would be tragic to lose the work of the Select Commission and that of previous administrations.

Jerry Tinker*

This presentation will go back to the roots of the Simpson-Mazzoli Bill in an attempt to explain the political forces behind the legislation as we see it. This bill originated in the unfinished agenda left from the 1965 reforms of U.S. immigration policy. In that year, Congress completed the first real overhaul of our immigration law since 1924 by striking out the racist basis of that law, the national-origin quota system. But the 1965 reform left many issues unresolved — how to treat migration from the Western Hemisphere, how to process refugees, and how to operate the preference system — issues which the reformers assumed would be taken up during the late 1960s and early 1970s. For a variety of reasons, these issues remained unaddressed, and we entered a period of almost total neglect that lasted for nearly a decade. Some members of Congress did address the issues, and members of the House even introduced reform legislation, but the bills died in the Senate due to the indifference of Senate Judiciary Committee Chairman James O. Eastland of Mississippi.

The failure to produce reforms during this era did not, however, indicate a total lack of movement on the issue. The concept of employer sanctions emerged during this time, as voluntary agencies, church groups, and labor organizations expressed their concern about the exploitation of undocumented workers by certain employers and protested the fact that the sanction of law fell only on the undocumented person. Certain groups also raised the issue of abuses of commuter aliens and the need to protect these migrants. Again, members of Congress introduced bills in these areas, but without results. Presidents Ford and Carter established interagency task forces that reviewed some of these issues and proposals, but they were unable to muster enough support in the Senate to force Senator Eastland to move. When in 1978 Eastland announced his retirement and Edward Kennedy succeeded him as Judiciary Committee Chairman, the opportunity to address immigration reform finally came.

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Senator Kennedy felt that we should learn from the lessons of the 1965 reform act, which had emerged from the recommendations of a major investigation commission, the Truman Commission of 1952. The creation of such an investigative body had raised the issue above the parochial swirls of Congress and gave it a more thoughtful airing and review. For that reason, Kennedy and the Senate embraced the 1978 House bill which created the Select Commission on Immigration and Refugee Policy and gave it a two-year mandate. From Senator Kennedy's point of view, the goal in this effort was not only to assess migration in a more objective way, but also to show that immigration is not really a problem that we must solve, but rather a phenomenon that we must cope with, regulate, and legalize. Congress has a terrible tendency, which probably reflects the American character, to identify something as a problem, roll up its sleeves, and take action toward a solution. Migration is simply not a "problem" to be "solved" with this kind of approach.

While the Select Commission did not find any magic formulas, it did develop a comprehensive approach. It enhanced our understanding of the international dimensions of the phenomenon, gave us new parameters within which to estimate the size of contemporary migratory flows, advanced our understanding of the pressures that lead to migration, and moved the issue from the back burner to the forefront of national attention. As Lawrence Fuchs has indicated, we can trace the lineage of the Simpson-Mazzoli Bill directly to the Select Commission. So why did Senator Kennedy depart and dissent from the bill as it emerged?

Kennedy opposed the Simpson-Mazzoli proposal partly because the bills that came to Congress, both from the Reagan administration and from Senator Simpson and Congressman Mazzoli, lacked the kind of vision contained in the Select Commission's report. What had started under the Commission as immigration reform had simply become immigration restriction. Five specific concerns prompted Kennedy to oppose the Simpson bill in 1982 and to attempt to amend it on the Senate floor.

One of his concerns centered around the issue of international cooperation. No one claims that we are suddenly going to achieve international cooperation on migration, but we must begin to work in that direction. While Senator Simpson has traveled to Mexico and other

countries to discuss the issue, the Reagan administration has not demonstrated similar concern for dealing systematically with this issue. Senator Kennedy feels strongly that we must develop a systematic and long-term strategy for achieving international cooperation on immigration, through both bilateral and multilateral efforts.

On the issue of employer sanctions, Kennedy has in the past endorsed the concept as a principle of equity and continues to support it on those grounds, but he saw serious flaws in the proposal as presented in the Simpson-Mazzoli Bill. The legislation did not adequately address the possible discriminatory impacts of an employer sanctions program, and Kennedy saw evidence that the program would receive insufficient resources for implementation. This set of circumstances would likely lead to a situation in which all available resources would be allocated to enforcing the law and none to protecting citizens and legal residents against its discriminatory effects. He therefore proposed an automatic "sunset" provision in the bill, a provision which would stipulate that if after three years the President could not certify to Congress that the bill had resulted in no pattern of discrimination, then the employer sanctions provision would terminate until Congress provided remedial action.

Senator Kennedy and his staff were also concerned over the changes that the bill introduced into the temporary-worker program. The Select Commission had voted unanimously that the evidence at hand did not in any way justify establishing a large-scale program for admitting temporary foreign workers. If the amnesty program and the changes in the immigration system which would allow for additional legal immigration do not result in sufficient labor for certain markets, we can then consider an expansion of the temporary-worker program. But we should not draw the conclusion in advance of the evidence.

That issue led to another concern, a concern about the legalization proposal as it has evolved. Amnesty is indeed a controversial political issue; but if we are going to bite the bullet and take the political heat, we should pay attention to the Select Commission's review of such programs in other countries, which revealed that legalization programs work only if they are generous. Only a generous, flexible program will persuade undocumented aliens to emerge from their subclass and show themselves to

immigration authorities. A limited or constricted program will not work, and we would have taken the political heat for nothing. In a rather surprising move, the Senate Judiciary Committee adopted Senator Kennedy's amendment to move the "legalization date"* from January 1, 1980 to January 1, 1982, but we lost that amendment on the Senate floor. As passed by the Senate, the bill's provisions for amnesty were simply too narrow and would not have worked.

Finally, Senator Kennedy has deep concerns about the issue of judicial review. All of us agree that the delays in the current process by which we exclude, deport, and judge asylum claims are costly and probably unfair, even to the people whom the system should serve. The system needs streamlining, and Senator Kennedy agrees with much in the bill that addresses this need, but he does not agree that we should remove the judiciary from the process entirely. No evidence suggests that judicial review would be abused under the new system, and until we see whether the new system works, we surely should not take such an arbitrary step as to limit the role of the judiciary in the immigration system.

In conclusion, I think that the Simpson-Mazzoli Bill has advanced the level of debate about immigration in a very important way. There is still room for compromise, and there is still room to improve and perfect. Even if the bill were passed tomorrow, our government probably would not be able to implement it for several years, given the rate at which the Immigration Service currently handles this work. So for many reasons, we should not plunge headlong into passage of this bill but rather engage in further, thoughtful review of the issues.

Arnold Leibowitz**

This presentation will deal with one of the more difficult aspects of the Simpson-Mazzoli Bill, namely, its

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*Undocumented persons would qualify for amnesty only if they entered the U.S. prior to this date — *editors' note.*

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implementation. We who are working on the bill had not thought much about implementation because we regarded that issue as a second stage, a matter of concern following the bill's passage. However, the prediction of many observers that the bill will pass in the 98th Congress has led us to think about implementation a bit more carefully. We find several reasons to be optimistic about the prospects for successful implementation of the bill.

The first is history. "Don't worry about implementation," an old hand in immigration policy recently told me; "immigration always works out in this country." We as a nation have long accepted large numbers of immigrants into American life, and we have developed from that experience a certain confidence that we can admit people of different religions and races and successfully incorporate them into our society. The Simpson-Mazzoli Bill may include more far-reaching provisions than we have ever introduced before, particularly the amnesty proposal. As some detractors have alleged, this provision may indeed represent a major regulation of the marketplace, but we have regulated the labor market before with the Social Security system and other similar intrusions, and we have survived.

Secondly, certain international activities in the developed world give us reason for optimism. Regardless of the debate over particular provisions of Simpson-Mazzoli, its approach is by now conventional wisdom for dealing with immigration; it emerged not only from studies and inquiries conducted by other administrations, but also from an examination of policies in other countries of the developed world. Almost all such countries have enacted employer sanctions laws and have legalized undocumented immigrants. We discussed these laws with immigration officials in a number of these countries, and they explained why their statutes either did not work or were not working as well as they should and what changes they are making to improve their effectiveness. In designing the law, we took into account the experience of countries such as France, Germany, Venezuela, and Hong Kong, not only in terms of employer sanctions and legalization provisions, but also in such specific areas as asylum adjudication and guest-worker systems. We are not, in short, reinventing the wheel.

Another reason for our optimism lies in the history of bipartisanship and cooperation out of which the Simpson-

Mazzoli Bill emerged. Community groups, scholars, lawyers, and many others participated in the Select Commission hearings from which the bill developed, and when the Reagan administration put forward its proposals, they too went through a hearing process. Finally, when Senator Simpson introduced the bill, he gained a large measure of bipartisan support for it through his willingness to compromise. The design and drafting of this bill have thus involved broad segments of the community — an involvement without which implementation could not go forward, because the success of this legislation will depend on community support and co-operative effort. We do not envision simply handing the statute over to the INS for that agency to work out the details of enforcement. The implementation provisions of the bill do give the lead to the INS and the Justice Department, but the bill's proponents also anticipate the active participation of other parts of our society.

Furthermore, the allegation that no one has planned for implementation is simply not true. The INS and the Justice Department have successfully engaged in a major effort to design an implementation plan. They have met with voluntary agencies in the community and have set up internal task forces to plan the implementation of each of the bill's provisions. With regard to legalization, for example, the INS has set about designing a plan which would allow this program to go forward without any disruption of regular INS activities. The agency's plan relies heavily upon community outreach and the participation of voluntary organizations, which the INS would contract to perform certain tasks, such as initial screening, interviewing, legal-rights counseling, and completion of paperwork. Since an undocumented person could visit one of these agencies without risking deportation, the INS hopes that the program will improve on the dismal record of only 10-20% participation in the legalization programs of other countries. After completing the functions of screening and counseling, the voluntary organizations would pass amnesty documentation along to a central office for processing. This office, which would be removed from the rest of INS to avoid disruption, would emphasize fairness and efficiency. The plan would thus allow officials to make decisions about amnesty without involving them in the political tension that surrounds this issue. Finally, the

implementation scheme provides for automatic appeal and administrative review in cases of unfavorable decisions.

On the matter of employer sanctions, the government has done less planning for enforcement, partly because of the nature of the task and partly because of the somewhat unpredictable role of the marketplace. In general, our enforcement agencies assume that most employers will obey the law. Since the legislation, at least the Senate version, provides no exemption from sanctions against employers of illegal aliens — not even for private households or very small businesses — the community will have to cooperate and respond to the law in a way that distributes its risks and burdens fairly. The law provides for a large-scale, six-month effort to educate the community about the statute, about the obligations of employers under it, and about its benefits to undocumented aliens. This educational effort will make employers aware that they must look at two identification documents verifying a person's legal right to work in this country, that they must do so for everyone, and that they must keep on file an attestation that they have examined these documents. Failure to do so would result in a penalty. Once this educational period has passed, the government expects to place new enforcement resources in the community, with specific enforcement efforts concentrated in those geographic regions which have large populations of illegal aliens.

With regard to the H-2 temporary-worker program, the Simpson-Mazzoli Bill addresses the specific needs of agriculture by separating agricultural labor from the rest of the program. The bill establishes a series of deadlines so that a grower seeking temporary foreign workers can be assured that bureaucratic delay alone will not force him to forego his crop. The bill also provides additional funding, to be raised primarily out of user fees, to assist the Department of Labor in its certification work and to speed processing.

The implementation of the bill's adjudication provisions, we hope, will produce a better program of appeal and review than we have had in the past. Both the House and Senate versions of the bill provide for a new asylum adjudication force, efficiently managed and with sufficient clerical and administrative resources. Even now, the executive branch is conducting a reorganization to overcome past administrative weaknesses. This reorganization will

transfer the immigration judges, along with the Board of Immigration Appeals, from the INS to the Department of Justice. Both will operate under an executive board which will provide training for immigration judges, deploy personnel where they are needed, and provide clerical and administrative support for each judge.

Finally, the accusation that Simpson-Mazzoli is a restrictive bill with respect to legal immigration simply is not fair. It is, without question, a control bill. But in selecting the number 425,000 as the level of annual immigration, the bill's drafters set a very high limit. That number reflects the most recent levels of legal immigration to this country, which have increased continuously over the past few years. The bill could have set the level much lower by computing averages over time or through other means, as many people proposed. That did not happen.

In all fairness, I admit that the bill does prevent increases in immigration levels by subjecting to numerical restriction those categories which have been exempt. Since Simpson-Mazzoli does not provide for a rising level of legal immigration, it in effect restrains that growth. But the bill does not reduce the level below what it has been, and taking into consideration that it provides for a legalization program of somewhere around 2.5 million persons, one cannot call the proposal overly restrictive. In fact, many people fear that the generosity of the bill will create a sea change in terms of political involvement and participation in this country.

The Honorable Cruz Reynoso*

The Simpson-Mazzoli Bill is likely to fail for the same reason that American immigration policy has failed throughout history: we have always lacked clear statements of policy goals which mesh with the mechanics necessary to implement those goals. That failure, however, has not always been accidental. Let me begin with an historical example.

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When I began practicing law in 1959, the Bracero Program, which brought thousands of Mexican guest workers (*braceros*) to the United States, was in full swing. The law under which that program operated, Public Law 78, dictated that those workers could be brought to this country to work in agriculture only when willing and able domestic workers could not be found. The regulations further stated that the *braceros* had to receive the prevailing wage for the work that they performed. All of that seems to make sense. But even before I point out the problems that I saw in the implementation of the law, I would like to point out an internal contradiction in its conceptualization.

Our basic understanding of economics tells us that if an employer cannot find willing workers for a specific job at a certain wage, then that employer must raise the wage or improve working conditions or both in order to attract laborers. When we think about the notion of a prevailing wage, we think about those kinds of economic factors. But in El Centro, California, where I had established my law practice, such factors had not determined the prevailing wage. Government bureaucrats had simply decided that the prevailing wage would be 65 cents per hour, and guest workers so dominated the agricultural labor market that local agricultural laborers worked for 65 cents per hour or not at all. When farmworker advocates and labor unions mounted a huge campaign in opposition to the program, the government decided that the prevailing wage had suddenly changed to 70 cents per hour.

Moreover, when I asked why agriculturalists were importing labor in an area of persistently high unemployment, employers responded that local workers simply would not go out to the fields to work. When I asked why, they answered that it is too hot in the Imperial Valley. As I was having that discussion, on a day in which the temperature easily exceeded 100 degrees, I saw some workers retarring a roof, and I could see steam rising from the tar. I pointed to them and said, "Gee, those workers are willing to work in hot weather. I wonder why?" Those workers, of course, received about $10 per hour, and that wage persuaded them to work in a place where the temperature rises to 130 degrees and even higher. Others allegedly refused to work in the fields because the temperature reaches 100 or 110 degrees. Of course, if the

employers would pay the wage necessary to get those workers, they would get them. What, then, is the prevailing wage?

Even more important than this internal contradiction, however, was how the program worked — or rather, failed to work. When local workers wanted to take jobs in the fields, employers would not hire them because they preferred contract laborers, who were more malleable and worked harder, since a *bracero's* invitation to return the following year depended on his good behavior. Furthermore, the program quite obviously depressed wages, and many of those who refused work in the fields did so simply because they could not support their families on 65 or 70 cents per hour. Finally, I saw much suffering among the contract laborers themselves. I represented literally hundreds of them in workers' compensation cases that arose out of job-related injuries, and I heard from others who had been injured and sent back to Mexico without having received medical treatment. I saw the suffering that occurred when the reduced income from workers' compensation left them without enough money to send to their families in Mexico. As an American I was not proud of the Bracero Program, and as a human being I found it disgusting. I was pleased when we terminated it.

Interestingly, every commentator who came before the Select Commission agreed that the Bracero Program had failed miserably; but when I lived in Imperial County in the heyday of the program, not one public figure took exception to it. Decision-makers, public officials, the editor of the paper — all of the "nice people" in town — supported the Bracero Program as the "economic lifeline of the Valley" where we lived. But when the program came to an end, life in Imperial County and its rural agricultural economy continued.

I bring up this historical example because I want to point out that in Imperial County at the time of the Bracero Program, the influential people of the community seemed to agree that P.L. 78 was absolutely marvelous, and now everybody agrees that it was a terrible law. By the time it ended, of course, the contract workers had learned that they could work at jobs in the United States, and their employers had learned that Mexicans would take those jobs. So the *braceros* began to come to the U.S. as undocumented workers, and their number has increased so dramatically that we now have a political problem. Polls

show that Americans do not want large numbers of undocumented workers in this country, and I agree that we should not have a large population of individuals who cannot avail themselves of the protection of the law because of their undocumented status.

The Simpson-Mazzoli approach to this political problem supports the allegation that undocumented workers take jobs from legal residents and citizens and that their presence in this country implies that we have lost control over our borders. The bill proposes to resolve these dilemmas by imposing sanctions on the employers of the undocumented and by expanding the temporary-worker program. But the Simpson-Mazzoli legislation will not work. If we want to reduce the large number of undocumented persons in this country, the worst thing that we can do is to create a new pool of future undocumented workers. By increasing the number of temporary foreign workers, either under an increased H-2 program or under some kind of "mini-Bracero" program, we will be importing large numbers of workers who will enter this country without documents when they can no longer get contracts. Secondly, when we understand that employers want *braceros* and undocumented workers because they work for lower wages and do not seek the protections that legal residents do, one means of solving the problem becomes evident immediately. We can insist that employers pay the minimum wage or a truly prevailing wage for each particular industry and that officials vigorously enforce health and safety regulations and other labor-standards laws. I have heard testimony from state officials to the effect that they do not vigorously enforce these laws so as not to give marginal industries an incentive to leave the area. We clearly have not tried to make existing legislation work as it should, and yet we are telling the American people that we will solve this problem with a new law. But whether or not enforcing the laws governing labor standards would solve the problem, I am convinced that the Simpson-Mazzoli Bill simply continues the sins of the Bracero Program and of the last 10 or 20 years of immigration law.

When I was a member of the Select Commission, I wrote a separate opinion dissenting from the commission's conclusions. In it, I argued that although our immigration laws are unjust and inefficient, I prefer them to the Select Commission's recommendations. When the Senate began working those recommendations into a legislative proposal

in 1982, that body began to make changes, and every alteration worsened the package. The debate that took place in the House, moreover, appeared to move in the direction of making the proposal even worse than what had emerged from the Senate. If Simpson-Mazzoli eventually passes, the American people will ultimately realize that Congress has not dealt squarely with the issue; the answer, as Charles Keely has suggested, is to take a hard look at the issue, define the problems, come up with solutions that really make sense, then devote the necessary resources to their implementation.

Dale Frederick Schwartz*

Due to historical precedent and the way that our electoral political system functions, we in the United States tend to focus on domestic issues when debating immigration policy. That focus helps to explain why the President designates the Attorney General and not the Secretary of State as chairman of an interagency task force on immigration; why Congress has jurisdiction over the issue; and why relevant bills go through the judiciary committees rather than through foreign affairs. These kinds of particulars have a significant impact on the development of immigration law. The policymakers dealing with the issues addressed in Simpson-Mazzoli will certainly be influenced by popular concern about rising unemployment and growing economic uncertainty, as well as by the general historical tendency to blame immigrants and refugees for these ills.

Fortunately, the political rhetoric surrounding consideration of the Simpson-Mazzoli debate has been more civilized than past immigration debates, in large part because of the leadership represented at this conference. But irrespective of that leadership, political movement on the issue of immigration reform has been very difficult to achieve. To realize political movement on an issue, particularly one of this importance, requires a consensus about the fundamental underlying facts. In large measure, the dispute surrounding the Simpson-Mazzoli Bill arises from

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uncertainty about the extent to which undocumented workers displace American workers, about the number of foreigners residing illegally in this country, and about the forces that cause people to leave their homelands. This lack of information has complicated efforts to formulate long-range foreign policy approaches to the problem. If the research community, the academic community, and the "experts" on economic development, political stability, etc. could have worked together with policymakers and interest groups to determine the facts, the national debate and the policy proposals emerging from it might have taken a different direction.

The way that the debate did develop reflected both uncertainty about the facts and the politicians' concern about the state of the economy. For example, the proposal for a greatly expanded guest-worker program received strong initial support from the administration. Many staffers in the White House felt that a relatively low-wage labor pool might in the short and the long term help the economy move, and western agricultural interests that have been friendly to the President would benefit from such a program. But rising unemployment turned the concept of a guest-worker program into a political liability, and the administration backed off. Yet the bill now contains a series of technical changes in the current H-2 program, which may well result in a guest-worker program much larger than that which the administration originally proposed. These modifications are too technical to explain to the public at large — probably not more than 15 people in Washington understand them — and as a result, labor unions, representatives of migrant workers, and others have had a difficult time gaining allies and mounting an effective lobbying strategy. Also, the politically relevant issue of numbers has not been part of this debate, so the absence of hard facts about the proposal — whether we will import 100,000, 200,000, or 300,000 guest workers — has hampered efforts to bring the issue into focus.

The legalization proposal presents even more thorny political questions. Proponents have made a strong argument that legalizing the undocumented would benefit the unemployed or underemployed in the United States. The argument asserts that, to the extent that undocumented workers are subject to exploitation, they are more attractive to certain kinds of employers, and Americans find competing for those jobs very difficult. If we bring the

undocumented within the protection of the law, however, they can defend their rights for minimum wages, fair working conditions, unionization, etc. They will in effect have a less advantageous competitive position with respect to American workers. Legalization thus could very well benefit minority groups in this country who are concerned about unemployment, but making that argument in a way that will "sell" politically is very difficult. The counter-argument emphasizes that amnesty will reward lawbreakers and that it will cost billions of dollars: the $10.2 billion cost estimate produced by the Office of Management and Budget in the summer of 1982, coming as it did in a period of budgetary crisis, was almost a kiss of death. Many have questioned the merits of that five-year estimate, which seems to have had the political purpose of weakening support for legalization.

On the issue of employer sanctions, those who argue that they will not prove effective have a strong case. Looking behind the language used by the proponents of employer sanctions, we can see that the resources proposed to enforce employer sanctions will be inadequate to do the job. Money talks as loudly through its absence as through its presence.

And money has many voices. Some of the interest groups involved in the debate over Simpson-Mazzoli have the resources to buy advertising, to conduct massive direct-mail campaigns, and even to hire professional lobbyists. Their spending has made a great deal of difference in the evolution of the debate, while those who have the most immediately at stake — the immigrant refugee community — do not have those kinds of resources. Getting their message across has thus been very difficult, particularly because many Americans feel that these communities have been responsible for our worsening economic situation. And those interest groups which one would expect to support the immigrant communities — particularly the churches — have not done all that they should. One reason that Senator Kennedy had so little success in making amendments to the bill was that the pro-immigrant interest groups did not support him with hard lobbying. The church community very effectively lobbied against efforts to include refugees within an overall immigrant ceiling but failed to come through on some other issues. That failure has created tension between some church communities and ethnic organizations, who wonder why the churches

have not more vigorously supported legalization. Implementation of the legalization proposal will require cooperation between ethnic organizations, churches, and unions; the developing tension among these groups could quite possibly hinder the process.

Finally, I would like to add a word about the restrictions of judicial review contained in Simpson-Mazzoli. The courtroom successes achieved by Haitians and Salvadorans during the past couple of years have created a backlash against judicial review. But if Congress responds to this backlash by enacting restrictions of judicial review, we will in the long run find such restrictions impractical and unprincipled. The executive branch need not fear the courts, as long as it obeys the laws enacted by Congress and acts in accord with Constitutional principle.

John Huerta*

In 1896 the Supreme Court estabilshed, in the case of *Lung Wing* vs. *United States,* that undocumented aliens are entitled to due process. Not until 1982, however, did the Court address the issue of equal protection for the undocumented, when it also decided in favor of immigrants in the landmark case *Plyler* vs. *Doe.* These precedents, however, leave unresolved the issue of Fourth Amendment protections against unreasonable search and seizure, for citizens and non-citizens alike, with respect to the issue of undocumented immigration. That is, to what extent can the INS stop and question people to determine whether they are lawfully present in the United States?

The INS relies upon Section 287A of the Immigration and Nationality Act for its authority to detain individuals for the purpose of determining legal residence. That law allows INS agents to interrogate any person *believed* to be an alien regarding his or her right to be in the United States, even a citizen or lawfully resident alien.

The Supreme Court has addressed this issue on a couple of occasions. In one of the most important cases

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regarding Fourth Amendment protections and the enforcement functions of the INS, the Supreme Court ruled that fixed checkpoints operated by the immigration service constitute a legitimate exercise of authority and a minimal intrusion on privacy interests. The Court decided the case, *Martinez Fuerte* vs. *United States,* in 1976, ruling that at such checkpoints the INS need not specify any individualized basis for having singled out a particular vehicle to search. In effect, the decision says that the enforcement interests of the state outweigh the small violation of privacy entailed in the procedure. But the opinion issued in this case carefully specified that the INS has this right only at fixed checkpoints. The decision cited the case of *United States* vs. *Brignoni-Ponce,* a 1975 case in which the Court ruled that a roving patrol had violated Fourth Amendment protections when it apprehended some people who looked like Mexicans. The Court insisted that the INS must be able to articulate specific facts in addition to rational inferences from those facts, which together reasonably warrant suspicion that a person or persons may be in the country *illegally,* and not merely that they be aliens.

These cases provide the legal background for an important issue that relates to the Simpson-Mazzoli proposal: workplace raids. In a typical raid, the INS may receive an anonymous tip about the employment of undocumented workers at a given location. The agency then usually sends a plainclothesman to assess from outside the establishment whether or not the employees seem to be aliens. If so, the INS then usually contacts the employer to seek permission to talk to the workers. If the employer refuses, the agency must get a search warrant. When the raid actually takes place, the immigration service places agents at all entrances and exits of the raided establishment. Those agents usually wear a uniform, have a badge and handcuffs, and occasionally carry a weapon. Then other agents enter the plant to question the employees.

These raids have set off a spate of litigation all over the country. In the most important of these cases, the Ninth Circuit Court of Appeals recently held that the execution of a factory raid under these circumstances constitutes an unconstitutional seizure of the work force within the meaning of the Fourth Amendment. In this ruling, the court stated that the INS must be able to articulate

objective facts and rational inferences from those facts that warrant a reasonable suspicion that each person detained is an alien unlawfully present in the country. The seizure thus must meet two conditions in order to comply with constitutional requirements: the INS must first believe that everyone that they seize in the raided establishment is an alien illegally present in the country; and secondly, the agency must be able to articulate reasons for suspecting the illegal status of each individual seized. In the case in question, the INS relied both on the testimony of individuals that the employer had hired undocumented workers and on the fact that the industry involved — the garment industry — has a reputation for hiring large numbers of workers without legal-residence papers. The court held that this reasoning did not justify seizing everyone in the plant. In effect, the ruling held that the sudden seizure of the plant violates Fourth Amendment protections because such a tactic, like a roving patrol, creates fear among the populace of arbitrary detention by law-enforcement authorities. The INS can still apprehend undocumented aliens in a factory, but it must now have information about particular individuals and cannot use that specific information as grounds for executing generalized raids.

This ruling has important implications for the implementation of the employer sanctions scheme proposed in the Simpson-Mazzoli Bill. The bill would require employers to examine two identification documents for each employee, complete a certificate attesting to that inspection, and keep the certificate on file for five years. The enforcement scenario envisioned by the designers of this proposal probably consisted of inspections of those records by enforcement personnel who would target particular employers. Such a strategy, however, will leave the INS vulnerable to the charge of discriminatory law enforcement, and some employer will certainly take that issue to court. Even setting that question aside, we may ask how the INS will know whether an employee has a certificate on file. Will the agency count the number of certificates and compare that to the number of employees? Since the agents will have access only to the file, an employer could pay employees on a cash basis and keep no records on them. How will the INS verify the accuracy of the employer's files? I would question whether the Simpson-Mazzoli Bill can depend on any effective

enforcement mechanisms other than simple, good-faith compliance on the part of employers.

The Honorable William Wayne Justice*

The treatment of undocumented workers under the legal doctrine of equal protection presents a complex constitutional puzzle. The federal government has reserved the right to discriminate against foreign nationals by denying them, for example, the right to federal Civil Service employment and to coverage under the federal Medicare program. The states, on the other hand, may not discriminate in this way, with limited exceptions, such as excluding aliens from sensitive state political offices. Last year, in the case of *Plyler* vs. *Doe,* the puzzle took on new intricacy as the Supreme Court for the first time addressed the rights of undocumented aliens under the Constitution's equal-protection clause. By a five-to-four vote, the Court declared unconstitutional a Texas statute which permitted local school boards to exclude school-age undocumented aliens from the public schools. But while the Court decided that the statute in question violated the Fourteenth Amendment, I will argue in this presentation that the ruling did not resolve the Constitutional puzzle.

Writing for the majority, Justice William Brennan faulted the Texas law in two respects. First, he noted, the law directed the onus of a parent's misconduct against his or her children and reflected the unjustified belief that the children of members of a disfavored group do not deserve equal treatment. Second, he found that the total denial of education to these children would burden them with an enduring disability. Because the Texas statute generated these recurring constitutional difficulties, the court applied the technique of intermediate scrutiny and demanded that the law advance some substantial goal of the state in order to be upheld. Rejecting all justification advanced for the statute by the state, the majority held that whatever savings the state might achieve by denying these children an education were wholly insubstantial in light of the cost involved to the children, the state, and the nation.

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In deciding to apply the technique of intermediate scrutiny, Justice Brennan considered the effects of both a total deprivation of education and the state's discrimination on innocent alien children. Therefore, his opinion does not make clear whether either of these factors alone would have been sufficient to trigger heightened review. Moreover, even if the State of Texas had met its burden under intermediate scrutiny, the Court implied that it might nonetheless have subjected the law to strict scrutiny. While Justice Lewis Powell wrote separately to emphasize the Court's conclusion that strict scrutiny would not be appropriately applied to this classification, Justice Harry Blackmun claimed that the Court never reached the question of strict scrutiny, and Justice Brennan's opinion appears to leave open the possibility.

Justice Brennan's carefully-worded opinion never rejects the possibility that some undocumented aliens might be viewed as a suspect class. His dictum concerning illegal aliens may have merely reaffirmed the court's reluctance to afford constitutional protections to aliens who have "entered the country clandestinely and have been here for too brief a period to have become in any real sense a part of our population," as described in the Japanese immigrant case of 1903. The decision thus left open the question of whether discrimination against illegal aliens with a permanent attachment to the nation would trigger strict scrutiny. Similarly, Justice Brennan stated that education is not a fundamental right; but he then suggested that the only consequence of this fact is that it frees the state from having to justify every variation in the manner in which it provides education to its population. In light of these ambiguities, it is impossible to determine whether the equal-protection analysis in the case of *Plyler* vs. *Doe* will have far-reaching implications. The dissenters from the decision claim that it will stand for little beyond the results in these particular cases.

Justice Brennan appeared to regard the equal-protection doctrine as the proper context for resolving the constitutionality of the Texas school law. However, this approach ignored two major doctrines implicated by equal-protection challenges to laws discriminating against aliens, namely, the political question and Congressional preemption. The Court, we should note, expressly reserved judgment on the issue of preemption. If Congress had explicitly authorized discrimination against

illegal aliens in state law, then the Court's review of the Texas statute would have violated the political-question doctrine. Furthermore, Congressional authorization of the Texas law would have transformed the Court's ordinary review of a state statute into a potential clash with Congress's plenary power for regulating immigration and naturalization. Although the Supreme Court has never held equal-protection challenges to federal immigration law non-justiciable on the basis of the political-question doctrine, it has on several occasions admitted that the prudential policies underlying that doctrine prevent more than a limited judicial review of such statutes. Under such a toothless standard, virtually any justification for the statute would protect these laws from equal-protection challenges. Federal authorization for the Texas statute would thus have rendered presumptively groundless an equal-protection challenge to the school law.

Conversely, the Court has held that the treatment of aliens is a matter of national moment. Therefore, federal immigration statutes preempt discrimination against aliens, and the supremacy clause renders void any such discriminatory state law, unless Congress has explicitly permitted concurrent state legislation on the subject covered by the challenged law. In the absence of such explicit intent, the Court suggested that even federal *regulation* on the same subject would trigger federal preemption. Hence, either silence or disapproval on the part of Congress would have rendered the Texas law unconstitutional under the supremacy clause.

Although seemingly unrelated to the issue of equal protection, the political-question and preemption doctrines solve the equal-protection enigma raised in *Plyler* vs. *Doe.* The conflict arises between the Court's commitment to a unified equal-protection analysis and its willingness to defer to Congress when statutes burdening aliens come up for judicial review. The Court recognizes that Congressional power in foreign policy matters must often operate outside the constraints of equal protection, so it must seek a solution in a doctrinal framework which maximizes the values of equal protection without implicating itself in Congress's sometimes questionable decisions. The political-question doctrine aims at such a solution by allowing the Court to accommodate political decisions without endorsing them and to avoid taking a position on equal protection which Congress might override in foreign

policy matters. The political-question solution forces Congress to assume sole responsibility for overriding the norm of equality, and the Court has held that the law requires a clear statement to that effect.

The affirmative evidence preemption standard also achieves the Court's equal-protection goals by erecting federal obstacles to discrimination against aliens in state law. The Court's decisions which use the preemption doctrine to strike down state statutes which discriminate against legal aliens explicitly mention no equal-protection principles, but statutory language does not support the conclusion that Congress empowered the states to impose any further burdens on such aliens. Rather, the Court has presumed that law-abiding aliens should not be singled out. Furthermore, the affirmative evidence standard transforms Congressional silence into an effective ouster of discriminatory state law. The preemption doctrine, like political-question treatment, can safeguard the Court's role in enforcing equal protection by forcing Congress to take responsibility for foreign-policy decisions that lie beyond the Court's reach.

In *Plyler* vs. *Doe,* Justice Brennan acknowledged that pursuit of Congressionally authorized objectives would outweigh the equal-protection interests that give rise to intermediate scrutiny. But he concluded that the Texas statute neither corresponds to any identifiable Congressional policy nor operates harmoniously within the federal program. Finding no clear statement of Congressional intent, the majority for which he wrote refused to ascribe to Congress a decision to override what they saw as the children's weighty equal-protection interests. In effect, Justice Brennan answered the question of Congressional intent raised by the political-question and preemption doctrines, but his framework for addressing this issue raises several problems.

First, to address Congressional intent well after the equal-protection inquiry is underway may force the Court to address the merits of a claim which it is incompetent to hear. Although in the Plyler case an ambiguous legislative record forced Justice Brennan to divine Congressional intent by deciding the level of equal-protection scrutiny, federal law will not always be unclear. When it is clear and in the states' favor, the decision on the appropriate level of equal-protection scrutiny will be wholly advisory.

Second, Justice Brennan's analysis points out the dangers inherent in the Court's attempt to reconcile the policies underlying the political-question doctrine with its commitment to judicial review. Under the Court's quasi-political-question ruling in the Plyler case, federal authorization of state legislation in the area would not lead to political-question abstention; it would imply only deferential review of discriminatory state law. While the decision to adopt deferential review is motivated by prudential concerns, it is easily confused with the judgment that normally accompanies deferential review in equal-protection cases: that the plaintiff has no cognizable equal-protection interests. The move to deferential review, motivated by prudential concerns, puts the Court in the troublesome position of appearing to claim that stigmatic interests suddenly disappear when Congress, not the state, does the discriminating.

Finally, having concluded that Congress did not authorize Texas to deny the Plyler children access to public school and therefore finding no basis for deference, Justice Brennan also found a lack of affirmative evidence for authorizing the state to legislate in the area. Yet, since the Court did not rule the Texas law preempted, its disposition of the case on equal-protection grounds seems compelled. Buried within Justice Brennan's equal-protection analysis are hints that, to avoid preemption, the Texas statute need not have been backed by affirmative evidence of Congressional authority. Even when no national policy supports the state, he concluded, deterring unlawful immigration which impinges upon traditional state concerns is a proper state objective. This retreat from the affirmative evidence standard suggested the abandonment of one of the Court's most powerful tools for enforcing equal-protection values in the realm of foreign affairs. However, less than two weeks after it decided the Plyler case, the Court reaffirmed the affirmative evidence standard as it applies to state laws which burden lawfully resident aliens.

The ultimate difficulty with the Plyler case is not that the Court's substantive value judgments do not realize the underlying purpose of equal protection; rather, the opinion fails to appreciate the role of the seemingly neutral judicial doctrines of political-question abstention and preemption. There can be no question that the Court is the final arbiter of the Constitution; but when it takes on the difficult task

of enforcing the Constitution in an area fraught with the exigencies of foreign policy, it may be well advised to employ its passive mechanisms for achieving equality.