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An Agenda for the Commission on Immigration Reform

CARLOS ORTIZ MIRANDA*

This Article offers agenda topics for the members of the Commission on Immigration Reform (Commission) to consider in their deliberations. The topics discussed in the Article cover those that Congress specifically requested the Commission to evaluate, as well as other topics that the Commission may find within its authority to evaluate. Final recommendations made by the Commission to the Congress in its final report due in 1997 have the potential to shape legislative policy choices in the area of immigration reform during the first part of the twenty-first century.

I. INTRODUCTION

Immigration law and policy is often a reflection of social, demographic, political, and economic realities. These forces influence United States regulation of immigration through laws enacted by Congress and administrative actions of the executive branch of the federal government.¹ The twentieth century experienced numerous legislative enactments covering many aspects of immigration.² An

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The views expressed in this Article are those of the author and do not necessarily reflect the views of the United States Catholic Conference.

1. See generally THOMAS A. ALENIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 39-75 (West 1991) (discussing the history of immigration into the United States and theories of migration).

2. See U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, AN IMMIGRATION NATION: UNITED STATES REGULATION 1798-1991 (June 1991).

important and recent legislative measure was the Immigration Act of 1990 (1990 Act).³ A result of a long and difficult process, the 1990 Act became the most comprehensive overhaul of “legal” immigration since the basic statute governing immigration matters, the Immigration and Nationality Act (INA), was passed in 1952.⁴ The 1990 Act endeavored to complement major changes on illegal immigration made by the Immigration Reform and Control Act of 1986 (IRCA).⁵ Congress designed the IRCA to close the back door on “illegal” immigration, while the 1990 Act aimed to open more securely the front door on “legal” immigration.⁶

Historical derivation of current efforts regulating immigration can be traced to the Select Commission on Immigration and Refugee Policy (Select Commission) established by Congress in 1978.⁷ The Select Commission was mandated to study and evaluate immigration and refugee laws, policies, and procedures.⁸ It issued a final report both to the President and to Congress on March 1, 1981.⁹ Some of the recommendations contained in the final report were incorporated into the IRCA, and others were embodied in the 1990 Act.¹⁰ Whether all of the stated goals of the two complementary legislative enactments have been accomplished is not certain.¹¹ For example,

3. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

4. Immigration and Nationality Act of 1952 (INA) §§ 101-414, 8 U.S.C. §§ 1101-1525 (1992).

5. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986).

6.

Immigration reform began in 1986 with an effort to close the “back door” on illegal immigration through enactment of the 1986 Immigration Reform and Control Act (IRCA). Now, as we open the “front door” to increase legal immigration, I am pleased that this Act also provides needed enforcement authority.

SIGNING STATEMENT BY PRESIDENT GEORGE BUSH, *reprinted in* 1990 U.S.C.C.A.N. 6801-1, 6801-1.

7. Act of Oct. 5, 1978, Pub. L. No. 95-412, 92 Stat. 907 (1978).

8. See H.R. Rep. No. 95-1206, 95th Cong., 2nd Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 2261, 2263-64 (legislative history describing reasons, duties, and other aspects of the Select Commission).

9. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY TO THE CONGRESS AND THE PRESIDENT OF THE UNITED STATES (March 1, 1981) [hereinafter SELECT COMMISSION FINAL REPORT].

10. The IRCA recommendations covered aspects of illegal immigration (*i.e.*, employer sanctions and the legalization program). The 1990 Act covered aspects of legal immigration.

11. For example, one of the main features of the IRCA was the establishment of employer sanctions. These provisions made it illegal to knowingly hire undocumented workers. Employers now have to comply with verification requirements and record retention under threat of civil or criminal penalties. Some members of Congress who originally went along with employer sanctions want them repealed. See *infra* note 263 and accompanying text.

the 1990 Act, although principally aimed at changes in the legal immigration system, also contained provisions amending the IRCA provisions relating to illegal immigration.¹² This is understandable because legal and illegal immigration are but two sides to the migration phenomenon. Separating legal and illegal immigration may be convenient for legislative purposes; however, a facile differentiation may sometimes be difficult to sustain.¹³

The 1990 Act established a successor commission to the Select Commission, the Commission on Legal Immigration Reform (Commission).¹⁴ As the title suggests, the Commission would limit itself to legal immigration reform. Congress changed its intentions and removed the word "legal" from the Commission's title in the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991.¹⁵ This Article will offer an agenda for the Commission to consider in its deliberations. I do not claim to exhaust the subjects that the Commission might consider and offer recommendations on; nonetheless, the chosen issues should provide the Commission an ample agenda with which to begin its work.

II. THE COMMISSION

A. Composition

The Commission is composed of nine members, whose Chairman is appointed by the President.¹⁶ Two members are appointed by the Speaker of the House of Representatives from a list submitted by the Chairman of the Subcommittee on Immigration, Refugees and

12. In addition to changes made concerning employer sanctions, the 1990 Act strengthened provisions relating to IRCA's anti-discrimination law. Immigration Act of 1990 § 531-39 (the changes called for greater public education, the inclusion of certain seasonal agricultural workers within the purview of the anti-discrimination law, the elimination of the need to declare intent to gain citizenship before charges can be filed, new anti-retaliation provisions were added, civil penalties were conformed to those for employer sanctions, and the Special Counsel was given the authority to access the employment verification forms).

13. *Id.*

14. *Id.* § 141 (Subtitle C-Commission and Information).

15. Pub. L. No. 102-232, § 302(e)(1), 105 Stat. 1744 (1991).

16. Immigration Act of 1990 § 141(a)(1)(A). Bernard Cardinal Law, Archbishop of Boston, was appointed by President Bush to be the Chairman; the Senate passed legislation to expand the Commission by four members to thirteen; no action was taken on expanding the members of the Commission by the House of Representatives. *See* S.3090, 102nd Cong., 2d Sess. (1992), reprinted in 138 CONG. REC. S10498 (daily ed. July 28, 1992) (per Sen. Kennedy); *see also* 69 INTERPRETER RELEASES 1233-34 (Oct. 5, 1992) (discussion of unenacted immigration legislation toward the end of the 102nd Congress).

International Law of the Judiciary Committee.¹⁷ Another two members are appointed by the House Minority Leader from a list submitted by the ranking minority member of the House Subcommittee mentioned above.¹⁸ The remaining four members are appointed in the same manner from the Senate.¹⁹ All members are appointed for the life of the Commission except the Chairman.²⁰ His first term expires on January 20, 1993, the presidential inauguration day. The President reappoints a Chairman for the duration of the Commission's term.²¹

B. Functions and Reports to Congress

Congress directed the Commission to review and to evaluate the impact of the 1990 Act and its amendments on particular considerations discussed in this Article.²² A progress and first report is expected no later than September 30, 1994.²³ The 1990 Act leaves the door open for the Commission to include other recommendations on subjects in addition to those topics of particular interest to Congress in its final report: "not later than September 30, 1997, a final report setting forth the Commission's findings and recommendations, *including such recommendations for additional changes . . . as the Commission deems appropriate.*"²⁴

C. Approaching the Agenda

The prevailing jurisprudence relating to immigration and nationality revolves around the plenary power theory. Under this jurisprudential construct, Congress's authority to legislate in the area of immigration is plenary or near absolute.²⁵ Federal courts have been

17. Immigration Act of 1990 § 141(a)(1)(B).

18. *Id.* § 141(a)(1)(C).

19. *Id.* § 141(a)(1)(D), (E).

20. *Id.* § 141(a)(3).

21. *Id.* In addition to Bernard Cardinal Law (Chairman), other Commission members include: Lawrence Fuchs, former Executive Director of the Select Commission; Harold Ezell, former Immigration and Naturalization Service (INS) Regional Commissioner; Bruce Morrison, Immigration Attorney, former Congressman and former Chairman of the House Subcommittee on Immigration, Refugees and International Law of the Judiciary Committee; Warren Leiden, Executive Director of the American Immigration Lawyers Association; Richard Estrada, Columnist for the Dallas Morning News; Michael Teitelbaum, Alfred P. Sloan Foundation; Robert C. Hill, Immigration Attorney, Grahman & James; and Nelson Merced, Massachusetts State Legislator.

22. *Id.* §§ 141(b)(1), 141(c) (family-based visas; employment-based visas; the impact of immigration reform on social, demographic, and natural resources; foreign policy and national security; per country levels on family-sponsored immigration; adjustment of status and asylees; numerical limitations on certain nonimmigrants; and diversity immigration).

23. *Id.* § 141(b)(2)(A).

24. *Id.* § 141(b)(2)(B).

25. See generally *Fiallo v. Bell*, 430 U.S. 787 (1977). However, the government's

generally supportive of this position and advanced it in a line of cases reaching back to the late nineteenth century.²⁶ An important departure from judicial reluctance to interfere with Congress's plenary power over immigration matters occurs when certain constitutional guarantees are affected by acts of Congress, particularly due process under the Fifth Amendment and more recently the First Amendment.²⁷ Even within the recognized plenary authority of Congress to legislate immigration affairs, it must enact laws that are rational and related to legitimate governmental interests. This is especially crucial when due process considerations are evident.

In reviewing the various agenda items, the Commission may want to distinguish legislation defining substantive categories of aliens and legislation establishing the procedures that are aimed at enforcing the different categories of aliens.²⁸ Procedural provisions, such as those concerning detention, *in absentia* deportation proceedings, and even summary exclusions to be discussed below, ought to be analyzed with heightened scrutiny for the purpose of ensuring fundamental fairness, so characteristic of the American legal system. In this context, the private interest affected and the risk of erroneous deprivation should be balanced against the efficacy of the law in securing the government's interest.²⁹ When the private interest is substantial and the risk of erroneous deprivation is great, the Commission should analyze the effect of the statutory provision using procedural due process scrutiny.

Further, in those agenda items that affect First Amendment guarantees of free speech and association, such as the revised ideological exclusion grounds discussed below, the Commission should approach the subject matter with an understanding that some federal courts are willing to strike down acts of Congress that unduly burden First Amendment protections extending to both citizens and aliens.³⁰

The Commission will no doubt be subject to trends that have historically influenced the development of immigration laws in this

political power in this area is not completely immune from judicial review. *Id.* at 793 n.5.

26. See *Chinese Exclusion Case*, 130 U.S. 581 (1889), and its progeny.

27. For Fifth Amendment procedural due process in exclusion proceedings to returning resident aliens, see *Landon v. Plasencia*, 459 U.S. 21 (1982); for First Amendment protected speech and association, see *Allende v. Shultz*, 605 F. Supp. 1220 (D. Mass. 1985); see also *Rafeedie v. Immigration and Naturalization Serv.*, 1992 WL 11902 (D.D.C. 1992).

28. See *Azizi v. Thornburgh*, 908 F.2d 1130, 1138 (2d Cir. 1990) (Cardamone, J., dissenting).

29. See *Mathews v. Eldridge*, 424 U.S. 319, 332-35 (1976).

30. See *infra* note 153 and accompanying text.

country. On the one hand, there is a trend toward more open admission symbolized by the Statue of Liberty. On the other hand, there is the nativist or more restrictive historical trend tending to be exclusive. This last trend is perhaps more evident during times of economic difficulties. It will be a formidable task for the Commission to balance these historical trends in its deliberations.

Finally, the Commission should consider whether it will take a minimalist approach on immigration reform by tampering with the legal system already in place or whether it wants to delve deeply in certain areas under a more structuralist approach. It might also consider approaching its task by taking a unified approach of studying certain topics, knowing it will not recommend fundamental changes, and treating other topics on a more radical basis.

III. IMMIGRATION REFORM

The 1980s experienced a dramatic increase in immigration unparalleled since the early decades of the twentieth century.³¹ Press coverage of immigration-related issues was frequently in mass communication print and television media. Such headlines as "Immigrant Tide Surges in '80s" found themselves in national newspapers.³² Major newspapers wrote about "[a] vast, uneven wave of immigration" that has redefined the United States, particularly in certain urban areas.³³ Statistics from the 1990 census confirmed this trend.³⁴ Given this social and demographic reality, immigration reform by Congress was inevitable.

Immigration reform focused on the number of individuals entering the country, the formal categories and qualifications of those seeking to enter, as well as the procedures for enforcing the law. Before an alien can enter the United States legally, he or she must generally possess a visa and comply with formal qualifications under a specific visa category. There are two general type of visas: immigrant and nonimmigrant. Immigrant visas are given to aliens who are admitted on a permanent residency basis under preference categories. There are four visa preference categories for family-sponsored visas and five preference categories for employment-based visas.³⁵ In addition

31. See 1990 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 21 (INS Centennial Year ed. 1991) [hereinafter 1990 STATISTICAL YEARBOOK] (table on immigrants admitted to the United States: 1901-1990).

32. Margaret L. Usdansky, *Immigrant Tide Surges in '80s*, USA TODAY, May 29, 1992 at 1A ("The USA's largest 10-year wave of immigration in 200 years - almost 9 million people - arrived during the 1980s").

33. Barbara Vobejda, *A Nation in Transition*, WASH. POST, May 29, 1992, at A1. The major urban centers are Los Angeles, Chicago, Miami, and the District of Columbia. *Id.* at A19.

34. *Id.* at A1.

35. See generally 2 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW

to the preference system, permanent immigration under United States laws is allowed for immediate relatives of citizens and under the refugee program.³⁶ Nonimmigrant visas are valid for temporary periods of admissions.³⁷

The 1990 Act establishes a new worldwide ceiling on immigrant visas.³⁸ For fiscal years 1992 through 1994 the ceiling stands at 700,000, after which it will be 675,000.³⁹ Immediate family members will have their visa numbers subtracted from family preference visas, but in no case will they fall below a floor of 226,000 visas.⁴⁰ The overall level should be sufficient to satisfy the immediate future needs of legal immigration based upon the experience of the 1980s decade. According to statistics available for that decade, the worldwide level of legal immigrants, excluding IRCA-related adjustments to permanent residency, was slightly higher than 500,000.⁴¹ Another creation of the 1990 Act was the creation of a two-track preference system for family-sponsored visas.⁴² This aspect of the 1990 Act will be discussed below.

AND PROCEDURE § 31 (rev. ed. 1992) (immigrants: overview of classification, restrictions, and procedures for admission).

36. In 1980 the Congress enacted the Refugee Act for the primary purpose of bringing United States domestic law into conformity with certain international obligations. More specifically, the new statutory definition of refugee under United States law mirrors the international definition of refugee. In addition, the Refugee Act added new sections to the INA concerning overseas and emergency refugee admissions, as well as asylum procedures for refugees who are physically present in the United States or at a port of entry or land border. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (amending INA §§ 101(a)(42), 207-08); see also 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Nov. 1, 1968), reprinted in INT'L HUMAN RIGHTS INSTRUMENTS 110.1 (Richard B. Lillich 2d ed. 1990).

37. See generally GORDON & MAILMAN, *supra* note 35, § 12 (nonimmigrants: classification, terms of admissions, and procedures).

38. JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP. NO. 101-955, 101st Cong., 2nd Sess. 119, reprinted in 1990 U.S.C.C.A.N. 6784 [hereinafter JOINT EXPLANATORY STATEMENT].

39. *Id.*

40. INA § 201(c)(B)(ii), 8 U.S.C. § 1151 (c)(B)(ii) (1992), amended by Immigration Act of 1990.

41. See U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 9 (1991). IRCA's legalization program allowed for several million undocumented aliens to become temporary residents and subsequently adjust to permanent residents. See STEPHEN H. LEGOMSKY, IMMIGRATION LAW AND POLICY 547-52 (1992) (general explication of IRCA's legalization program).

42. JOINT EXPLANATORY STATEMENT, *supra* note 38, at 6785-86.

A. *Impact on Social, Demographic, and Natural Resources*

The impact of immigration on social, demographic, and natural resources is another topic that the Commission is charged with studying.⁴³ Given the dramatic increase in immigration during the 1980s, this subject will be of sure importance to the Commission.⁴⁴ The demographic dimension of legal immigration must be put into a meaningful perspective. Because the native United States population has been aging and has a low rate of fertility, the Commission will no doubt come across those who compare the proportion of immigration as it relates to the overall population growth in the country.⁴⁵ According to some commentators, if one were to use this demographic measure, the Commission will be confronted with statistics indicating that between the year 2000 and 2035 most, if not all, population growth will stem from immigration.⁴⁶ Other commentators will assert that the demographic dimension of immigration should be analyzed in the context of native fertility, as well as on the proportion of the yearly resident population.⁴⁷ Using these measurements, the demographic impact of immigration would not seem nearly as great.⁴⁸ The demographic aspect of legal immigration has become an important factor in immigration policy decisions. The Commission should be mindful that scholars have questioned the validity of population stabilization for demographic or economic purposes.⁴⁹ Under this analysis, the impact of the number of immigrants on the environment is not necessarily different than that of natives.⁵⁰

Legal immigration's impact on the natural resources and the environment is another consideration for the Commission to deliberate.

43. Immigration Act of 1990 § 141(c)(1)(C).

44. See *supra* notes 31-34 and accompanying text.

45. See generally JULIAN SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* 23-52 (1989) (chapter on the demographic dimensions of immigration into the United States).

46. *Id.* at 26 (quoting an immigration historian who is also a Director of the Federation for American Immigration Reform, a conservative think-tank).

47. *Id.* at 27.

48. *Id.*

49. See SIMON, *supra* note 45, at 188. According to statistics available for 1989, there were 1,090,924 new immigrant arrivals of which 478,814 became permanent residents as a result of the IRCA. Without the IRCA numbers, migration trends during the 1980s showed the decade began with 530,639 new arrivals, increased to a high of 643,025 in 1988, and ended with 512,110 arrivals. This statistical evidence points out that legal immigration, without the extraordinary IRCA legalization program, remained at slightly higher than the 500,000 figure. See U.S. DEPARTMENT OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 9 (1991).

50. *Id.* at 188-89 (this theory states that the long term trends indicate "lower prices and increasing availability" of resources, and that it is only the "very short term" that experiences greater scarcity, costs, and prices associated with additional immigrants).

The common notion is that new immigrants reduce the natural resources available to the native population.⁵¹ Adherents to this theory point out that natural resources, especially food and water supplies, are finite. Any increased burden caused by immigration, legal or otherwise, will take these environmental resources away from the native population.⁵² On the other hand, others argue that the impact of immigrants on natural resources and energy supplies is not significant and that the burden of immigrants upon natural resources and the environment in the past supports this contention.⁵³ Possible questions for the Commission to ask in this area are what have been the long-term trends relating to the price of raw materials and their availability and how does this long-term projection compare with the short-term reality that added people produce higher costs, prices, and scarcity.⁵⁴

B. Visa Categories

1. Family-Based Visas

The 1990 Act continues the tradition of family unity as a cornerstone of United States immigration law:

The reunification of families serves the national interest not only through the humaneness of the policy itself, but also through the promotion of the public order and well being of the nation. Psychologically and socially, the reunion of family members with their close relatives promotes the health and welfare of the United States.⁵⁵

Further, the 1990 Act establishes a two-track system to be used in the second preference visa category, which is comprised of spouses, minor children, and unmarried adult children of immigrants.⁵⁶ The first track covers spouses and minor children, which are allocated not

51. See SIMON, *supra* note 45, at 187-93 (immigration impact on natural resources).

52. *Id.* at 188 (low population density brings benefits related to cleaner air, reduced traffic congestion, more water, and decreased levels of anxiety).

53. *Id.* at 188-91.

54. It would be useful for the Commission to consult with the annual reports of the Council on Environmental Quality. This is an excellent source of the environmental quality trends in agriculture, air quality, biodiversity, coasts and oceans, economics, education, and energy. See COUNCIL ON ENVIRONMENT QUALITY, ENVIRONMENTAL QUALITY: TWENTY-SECOND ANNUAL REPORT (1991).

55. H.R. Rep. No. 101-723(I), 101st Cong., 2d Sess. 38 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6717 (quoting from the Final Report of the Select Commission on Immigration and Refugee Policy at 112).

56. *Id.* at 6785 (explication of the two-track system).

less than seventy-seven percent of the available visa numbers for immigrants.⁵⁷ The second track covers unmarried adult children.⁵⁸ Additional visa numbers were allocated, especially for the first track, in order to reduce the significant backlogs affecting the second preference. An important consideration for the Commission to address will be how the backlogs have been affected under the revised second preference. Continued backlogs work against the principle of family unity and possibly add fuel to illegal immigration.⁵⁹

Some members of Congress have attempted to solve the problem of second preference backlogs by introducing legislation that would establish a new nonimmigrant classification.⁶⁰ The proposed bill would amend the INA by permitting spouses and minor children of immigrants to enter the country as nonimmigrants. They would not be able to work and would have to report to the Immigration and Naturalization Service (INS).⁶¹ Under the proposed bill, the nonimmigrant status of individuals would be terminated if the underlying marriage serving as the basis for the status is terminated.⁶² Supporters of the measure claim that it advances the principle of family unity while keeping the balance on immigration that Congress strived for in the 1990 Act.⁶³ Opponents of the proposed legislation argue that it would upset the world-wide ceiling of 480,000 family-based visas that Congress mandated under the 1990 Act to take effect during the 1995 fiscal year.⁶⁴ The INS estimates that close to 600,000 individuals would potentially qualify for the new nonimmigrant classification if the bill was enacted.⁶⁵ In addition, opponents allege that the proposed bill would significantly increase the enforcement workload for both the INS and the State Department.⁶⁶ Another important concern in opposition to the creation of the

57. INA § 202(a)(4)(A)(ii), amended by Immigration Act of 1990 § 102.

58. *Id.* § 202(a)(4)(C), amended by Immigration Act of 1990 § 102. A child is defined as an unmarried person under 21 years of age. *See id.* § 101(b)(1), 8 U.S.C. § 1101(b)(1) (1988).

59. *See* H.R. Rep. No. 101-723[5], 101st Cong., 2d Sess. 39 (1990), reprinted in 1990 U.S.C.C.A.N. 6719.

60. H.R. 4275, 102nd Cong., 2d Sess. (1992) (introduced into the House by Mr. Vander Jagt).

61. H.R. 4275, 102nd Cong., 2d Sess. (1992) (the bill would allow for enrollment in courses of study).

62. *Id.*

63. *Nonimmigrant Status for the Spouses of Aliens Lawfully Admitted for Permanent Residence, 1992: Hearings on H.R. 4275 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary, 102nd Cong., 2d Sess. 1* (1992) (statement of Congressman Guy Vander Jagt).

64. *Id.* at 2 (statement of James A. Puleo, Associate INS Commissioner for Examinations).

65. *Id.* at 1.

66. *Id.* at 2.

nonimmigrant classification for spouses and minor children of immigrants is that it would be a disincentive for immigrants to naturalize. Because naturalized citizens are allowed to bring in immediate relatives outside of numerical limitations, the proposed bill would make naturalization less attractive.⁶⁷ Congress has expressed support for the naturalization of as many immigrants as possible in order to integrate them fully into the body politic of the country.⁶⁸

2. Employment-Based Visas

The single most important change in federal immigration laws under the 1990 Act is the establishment of comprehensive employment-based visas. Under the old law, only two of six visa categories were based on offers of permanent employment.⁶⁹ There are now 5 visa categories totalling 150,000 visa numbers covering employment-based immigration.⁷⁰ The Commission is charged with the responsibility to evaluate the impact of the employment-based visas on labor needs, employment, and other domestic and economic conditions of the country.⁷¹ The Commission is charged with the responsibility to

67. *Id.* at 3.

68. Immigration Act of 1990 § 406 ("in order to promote the opportunities and responsibilities of United States citizenship, the Attorney General shall broadly distribute information concerning the benefits" of naturalization).

69.

Visas shall next be made available . . . to qualified immigrants 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 in the professions, sciences or arts are sought by an employer in the United States.

INA § 203(a)(3), 8 U.S.C. § 1153(a)(3) (1988).

Visas shall next be made available . . . to qualified immigrants who are capable of performing specified 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.

Id. § 203(a)(6), 8 U.S.C. § 1153(a)(6) (1988).

70. INA § 203(b), 8 U.S.C.A. § 1153(b) (West Supp. 1992) (preference allocation for employment-based visas), amended by Immigration Act of 1990 § 121:

EMPLOYMENT-BASED PREFERENCE CATEGORIES

- (1)40,000 visas for priority workers (extraordinary ability, managers and university professors);
- (2)40,000 visas for exceptional ability and advanced degrees or the equivalent;
- (3)40,000 for skilled and unskilled workers with 10,000 limit on unskilled workers;
- (4)10,000 visas for special immigrants;
- (5)10,000 visas for investors.

71. Immigration Act of 1990 § 141(c)(1)(B).

project labor shortages in the United States.⁷² Here, the Commission should consider intensity and duration of the labor shortages, the supply and demand of workers, industrial and geographic shortages, wages if decreased by twenty percent, and the need for positive recruitment.⁷³ A good place to begin its evaluation in this area would be the annual labor shortage studies that the Secretary of Labor must issue and distribute widely.⁷⁴ These annual lists could be evaluated in conjunction with a yearly report that the Secretary of Labor must submit to appropriate congressional committees containing efforts to reduce labor shortages.⁷⁵

The President's Council of Economic Advisors strongly recommended the increase in employment-based visas. In its February 1990 report, the Council noted that only ten percent of immigrants under the old visa category system were admitted because of their skills.⁷⁶ The report went on to state that although less skilled immigrants will continue to have an important role for United States employers, the critical demand will be for more skilled workers, who will make the "greatest contributions" to the economy.⁷⁷ In studying this part of legal immigration, the Commission may want to confer with members of the Council on Economic Advisors.

In addition, the Commission should evaluate those employment-based visas under the 1990 Act that have a termination date, particularly the special immigrant visas for religious workers under the fourth preference category.⁷⁸ The 1990 Act provides for the permanent immigration of religious workers who meet certain eligibility criteria.⁷⁹ There are three categories of religious workers. The first category is the foreign-born religious worker who enters the country "solely for the purpose of carrying on the vocation of a minister."⁸⁰ This provision mirrors the previous law covering the admission of priests as special immigrants. The second category is the foreign-born religious worker who is admitted "to work for the organization . . . in a professional capacity in a religious vocation or occupation"

72. JOINT EXPLANATORY STATEMENT, *supra* note 38, at 6788.

73. *Id.*

74. *Id.* at 6800.

75. *Id.* The report must contain a plan of action to ensure that "federally funded employment, education, and training agencies reduce national labor shortages that have been identified."

76. 1990 ECONOMIC REPORT OF THE PRESIDENT 165.

77. *Id.* "Immigrants with more education or training will likely make the greatest contributions to the U.S. economy, suggesting that basic skill levels could be one guide to admitting new immigrants under a skill-based criteria." *Id.*

78. INA § 101(a)(27)(C), 8 U.S.C.A. § 1101(a)(27)(C) (West Supp. 1992), amended by Immigration Act of 1990 § 151.

79. Immigration Act of 1990 § 151 (amending INA § 101(a)(27)(C), 8 U.S.C.A. 1101(a)(27)(C) (West Supp. 1992)).

80. INA § 101(a)(27)(C)(ii)(B), 8 U.S.C.A. § 1101(a)(27)(C)(ii)(I) (West 1990).

before October 1, 1994.⁸¹ This category affects "professionals" and is intended to cover teachers, but may also be used by others who possess the credentials of a profession.⁸² The final category includes an immigrant who is admitted under a request by a religious organization to work for it or an organization affiliated with the religious denomination in a religious vocation or occupation before October 1, 1994.⁸³ The last two categories are automatically eliminated in 1994.

In imposing termination dates on the special immigrant religious worker categories, Congress was perhaps demonstrating concern regarding the potential for abuse of these visas based on some negative experience during the 1980s.⁸⁴ Of particular concern to Congress were factors such as no numerical limitations on special immigrants, procedural mechanisms against fraud, and a possible negative effect on the domestic labor market.⁸⁵ The first concern has been addressed in the 1990 Act, which establishes a numerical limitation of 10,000 visas on special immigrant visas including religious workers, with an additional limitation of 5,000 visas on those categories scheduled for termination.⁸⁶ The substantive requirements for eligibility criteria should ferret out possible fraudulent cases,⁸⁷ and Congress has specified that only traditional religious functions would qualify. Legislative history actually contains certain occupations that would be

81. INA § 101(a)(27)(C)(ii)(II), 8 U.S.C.A. § 1101(a)(27)(C)(ii)(II) (West 1990).

82. H.R. Rep. No. 101-723(I), 101st Cong., 2d Sess. 75 (1990), *reprinted in* 1990 U.S.C.A.N. 6710, 6755. A professional is defined by INS regulation as a person who possesses at least a baccalaureate degree. *See* Nonimmigrant Classes, 8 C.F.R. § 214.2(h)(4)(ii)(A) (1992).

83. INA § 101(a)(27)(C)(ii)(III), 8 U.S.C.A. § 1101(a)(27)(C) (West 1990).

84. Fresh on Congress' mind was the case of the Bhagwan Shree Rajneesh who used his religious community, Rajneeshpuram, to circumvent immigration laws. *See* William E. Schmidt, *U.S. Indicts Oregon Guru and Says He Tried to Flee Country*, N.Y. TIMES, Oct. 29, 1985, at A16 (the federal government handed down a 35 count indictment that included sham marriages involving Indian nationals and other attempts to circumvent federal immigration laws). *See also* 132 CONG. REC. H8782-85 (daily ed. Sept. 29, 1986) (statement of Mr. Sensenbrenner) (specific reference was made to the Bhagwan's case during a 1986 congressional debate on the creation of new religious workers provisions).

85. *See* 132 CONG. REC. H8584 (daily ed. Sept. 29, 1986).

86. "[N]ot more than 5,000 [visas] may be made available in any fiscal year to special immigrants described in subclause (II) or (III) of section 101(a)(27)(C)(ii)" INA § 203(b)(4), 8 U.S.C.A. § 1153(b)(4) (West 1990).

87. Eligibility criteria includes at least a two-year membership in the religious denomination and two years of experience immediately preceding the time of admission in the religious occupation or vocation in which the alien will be employed while in the United States. Further, the INS has promulgated rules for processing the religious worker visas that include the submission of certain documentation: (1) the INS Form I-360, (2) a qualifying letter from an authorized official of the religious organization, (3)

prohibited under these categories.⁸⁸

Terminating the religious worker visas would have a very negative affect on bona fide religious organizations relying on foreign born workers to fulfill their denominational missions. The Commission should evaluate how these visas have been used. If the congressional concerns expressed above are satisfied, the Commission should consider recommending to Congress that they be kept as a permanent part of the immigration laws.

3. Diversity Immigrants

The 1990 Act created a special program to diversify immigration.⁸⁹ This program provides that 55,000 visas will be made available beginning in fiscal year 1994 to natives of foreign countries from which fewer than 50,000 immigrants came to the United States in the previous five year period.⁹⁰ Diversity immigrants would be eligible to participate in the program if they possess at least a high school degree (or its equivalent) or have two years work experience in an occupation that requires at least two years training (or experience). The latter requirement must be met within a five year period before the immigrant application is made.⁹¹ Congress charged the Secretary of State with maintaining information on the age, occupation, education level, and other relevant traits of immigrants admitted under the diversity program.⁹² The Commission is expected to analyze the information collected by the Secretary of State with specific focus on the characteristics of immigrants admitted under the diversity program and how the characteristics compare to family-sponsored and employment-based immigrants.⁹³ The Commission is further expected to submit an assessment of the education or work experience, which are the substantive requirements of the diversity program.⁹⁴

an affidavit of membership, (4) evidence that the sponsoring organization is a bona fide religious denomination, (5) evidence that the religious organization is exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code. See 8 C.F.R. §204.5(l)(3) (1992).

88. Specifically excluded by legislative history are janitors, maintenance workers, and clerks. H.R. Rep. No. 101-723(I), 101st Cong., 2d Sess. 75 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6755.

89. Immigration Act of 1990 § 131, 8 U.S.C.A. § 1153(c)(1) (West Supp. 1992).

90. See Immigration Act of 1990 § 131(c)(1)(A), (B), 8 U.S.C.A. § 1153(c)(1)(A), (B) (West Supp. 1992).

91. *Id.* § 131(a)(2).

92. *Id.* § 131(a)(3).

93. *Id.* § 141(c)(2), 104 Stat. 5003 (1990).

94. *Id.*

4. *Adjustment of Status and Asylees*

The Commission is expected to evaluate the impact of numerical limitations on adjustment of the status of aliens who have been granted asylum.⁹⁵ Asylum is an immigration benefit permitting aliens to remain in the United States if they are unable or unwilling to return to their home country because of past persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁹⁶ Once an individual has been granted asylum, he or she qualifies for adjustment of status to permanent resident after one year as an asylee.⁹⁷ The 1990 Act increased the numbers of asylum-related adjustments from 5,000 to 10,000 per year.⁹⁸ In an effort to clear up the existing backlog, the 1990 Act waived any numerical limitations on adjustments of certain former asylees. In particular, anyone who was granted asylum before the 1990 Act was enacted or who had not been physically present in the United States for the requisite one year period or who was a bona fide refugee would be allowed to adjust status.⁹⁹ The increase in asylee adjustments beginning in fiscal year 1991 to 10,000 per year should lower the pool of approved asylees as well as the waiting period for asylees to adjust status to immigrants. An important question for the Commission to study is whether the 10,000 number figure is sufficient to prevent the pool of

95. *Id.* § 141(c)(1)(F), 104 Stat. 5003 (1990).

96. INA § 208, 8 U.S.C.A. § 1158 (West Supp. 1992). To qualify for asylum, the person has to meet the statutory definition of refugee. *Id.* § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A) (West Supp. 1992).

97.

Not more than 10,000 of the refugee admissions authorized under section 1157(a) of this title in any fiscal year may be made available . . . to adjust to the status of an alien lawfully admitted for permanent residence status of any alien granted asylum who-

- (1) applies for adjustment,
- (2) has been physically present in the United States for at least one year after being granted asylum,
- (3) continues to be a refugee within the meaning of section 1101(a)(42)(A) of this title or a spouse or child of such a refugee,
- (4) is not firmly resettled in any foreign country, and
- (5) is admissible . . . as an immigrant under this Chapter at the time of examination for adjustment of such alien.

INA § 209(b), 8 U.S.C.A. 1159(b) (West Supp. 1992).

98. Immigration Act of 1990 § 104(a)(1) (asylee adjustments), *amending* 8 U.S.C.A. § 1157(b).

99. *Id.* § 104(c),(d), 104 Stat. 4985-86 (1990) (waiver of numerical limitation for certain current asylees and adjustment of certain former asylees).

approved asylees from increasing significantly over the years.¹⁰⁰

5. Numerical Limitations on Certain Nonimmigrants

Congress wants the Commission to study the impact of the numerical limitations of nonimmigrants under section 214(g) of the INA.¹⁰¹ The nonimmigrant visa categories affected include the H(i)(b) specialty occupations and the H(ii)(b) nonagricultural temporary workers.¹⁰² The 1990 Act imposes a numerical limitation of 65,000 visas for the specialty occupations and 66,000 visas for the nonagricultural temporary workers during a given fiscal year.¹⁰³ Congress imposed the numerical restrictions due to a concern that there was no domestic labor market test applicable to those visas and the admission numbers were escalating significantly.¹⁰⁴

The 1990 Act drastically changed the requirements for nonimmigrant professional workers under the previous H-1 program. Statutory changes included the insertion of "specialty occupation" in lieu of "distinguished merit and ability."¹⁰⁵ To meet its concern about the domestic labor test, the 1990 Act creates a labor attestation mechanism.¹⁰⁶ Another change is the codification of the INS rule recognizing that work experience may be the equivalent to a degree for specialty occupations.¹⁰⁷ The 1990 Act also codifies the administrative doctrine of dual intent. Temporary workers under these categories are no longer required to possess an unabandoned foreign residence to which they plan to return upon the termination of their temporary visas.¹⁰⁸

The Commission should review admissions under H(i)(b) and H(ii)(b) to ascertain if backlogs occur or will occur in the future. Statistics for the 1980s showed a steady increase in admissions under the H-1 program. Congress noted that the decade started with

100. 4,937 asylees were adjusted to permanent residence for the fiscal year 1990, just below the 5,000 pre-1990 Act limit. However, the pool of asylees waiting for adjustment for the same period was 21,700. See U.S. IMMIGRATION AND NATURALIZATION SERVICE, 1990 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE (Jan. 1992).

101. Immigration Act of 1990 § 141(c)(G).

102. INA § 101(a)(15)(H)(i), 8 U.S.C. 1101(a)(15)(H)(i) (1988); *id.* § 101(a)(15)(H)(ii), 8 U.S.C. 1101(a)(15)(H)(ii) (1988).

103. *Id.* § 214(g), 8 U.S.C. 1184(g) (1988).

104. JOINT EXPLANATORY STATEMENT, *supra* note 38, at 6722.

105. Immigration Act of 1990 § 205(c).

106. *Id.* § 205(c)(3). The labor attestation includes a petition submitted by the employer stating wages and working conditions, the establishment of a grievance procedure before the Department of Labor to challenge representations made by the employer, and setting forth penalties assessed against the employer if the representations made are found false. *Id.*

107. *Id.* § 205(c)(2).

108. *Id.* § 205(e).

45,000 entries in 1981 and reached 78,000 by 1988.¹⁰⁹ The INS commissioned management consultants to prepare a report on the characteristics and labor market impact of the H-1 program in 1988.¹¹⁰ The report found that there were well over 50,000 total admissions under the H-1 program for the fiscal years 1986 and 1987.¹¹¹ Because these numbers included nurses, entertainers, and athletes, all of whom now have their own visa categories, the likelihood that a backlog will exist during the first or second year is improbable.¹¹² Furthermore, because the labor attestation may prove burdensome to some employers, the Commission may find a decrease in the use of these visa categories.

C. Admission and Exclusion

1. Consular Reviewability

A topic of great interest is the question of formal review of visa denials made by consular officers. United States consulates abroad are responsible for issuing or denying visas to foreigners who enter the country as nonimmigrants or immigrants.¹¹³ Under current law, the Secretary of State has the responsibility to administer and to enforce the immigration laws regarding "the powers, duties and functions of diplomatic and consular officers of the United States, *except those powers, duties and functions conferred upon consular officers relating to the granting or refusal of visas.*"¹¹⁴ This is an important governmental power affecting the interest of noncitizens who want to enter the United States.

The problem with consular decisions is that no formal administrative or judicial review is possible if there has been a visa denial.¹¹⁵

109. H.R. Rep. No. 723(I), 101st Cong., 2nd Sess. (1990), *reprinted in* 1990 U.S.C.A.N. 6724.

110. BOOZ, ALLEN & HAMILTON, INC., CHARACTERISTICS AND LABOR MARKET IMPACT OF PERSONS ADMITTED UNDER THE H-1 PROGRAM, FINAL REPORT (1988).

111. *Id.* at II-1.

112. *See generally* *Immigration and the Labor Market, Nonimmigrant Alien Workers in the United States*, GAO/PEMD-92-17, April 1992.

113. *See generally* GORDON & MAILMAN, *supra* note 35, at § 1.04 (role of the State Department including visa offices). Specific statutory authority conferring power to the Secretary of State and consular officers over the issuance of visas is found at INA § 104, 8 U.S.C. 1104 (1990).

114. INA § 104, 8 U.S.C. 1104(a) (1990) (emphasis added).

115. The Select Commission appeared somewhat divided over this issue. Although it recommended enhanced informal review, some commissioners called for establishing formal and independent review mechanisms. *See* SELECT COMMISSION FINAL REPORT, *supra* note 9, at 253-55.

The applicant may request the Visa Office, located in Washington, D.C., to review the denial.¹¹⁶ Such a review, however, comes in the form of an advisory opinion and is not binding on the consular officer who issued the denial.¹¹⁷ Attempts at having federal courts review visa denials have met with little success.¹¹⁸ Even though there is nothing in the INA statute or regulations precluding judicial review of visa denials, the federal courts have refused to review the denials in the absence of positive authority. Judicial reasoning for precluding review also rests upon broad discretionary authority that Congress has vested with consular officers coupled with the fact that there is no specific mandate to review visa denials.¹¹⁹

The lack of administrative and judicial review has led to charges of "consular absolutism."¹²⁰ Members of the immigration bar, the Administrative Conference of the United States, and scholars have called for the end of "consular absolutism."¹²¹ Critics have put forth numerous problems associated with nonreviewability of consular decisions. Consular officers do not record explanations for denials. There is no general review of denials within the actual consulate itself. Further, attorneys are not permitted to participate in a meaningful way in the visa denial process and the Visa Office in Washington, D.C. does not disclose advisory opinions to applicants who have been denied a visa.¹²² In recognition of these problems, the Administrative Conference of the United States recommended several changes related to consular processing and review. First, it recommended that the State Department permit visa applicants to be accompanied by representatives during the visa interview. Second,

116. See 22 C.F.R. § 42.130(c) (1991).

117. *Id.*

118. There has been a slight fissure in the doctrine of consular nonreviewability. A federal district court in California recently held that a consular officer improperly revoked a nonimmigrant visa. The court found that the Administrative Procedure Act gives federal courts sufficient jurisdiction to review consular decisions. The case, *Shimizu v. Department of State*, No. CV 89-2741-WMB (C.D. Cal. May 31, 1990), is unreported. See Peter Shey, *Cracking the Doctrine of Non-Reviewability of Consular Decisions*, AILA 1992 WASHINGTON POLICY CONFERENCE MATERIALS 33-41 (1992).

119. The judicial doctrine of consular nonreviewability began with two cases: *United States ex rel. Ulrich v. Kellog*, 30 F.2d 984 (D.C. Cir.), *cert. denied*, 279 U.S. 868 (1929); *United States ex. rel. London v. Phelps*, 22 F.2d 288 (2d Cir. 1927), *cert. denied*, 276 U.S. 630 (1928).

120. For a comprehensive discussion of consular reviewability, see James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1 (1991).

121. *Id.*; see also Note, *Judicial Review of Visa Denials: Reexamining Consular Reviewability*, 52 N.Y.U. L. REV. 1137 (1977); Harry N. Rosenfield, *Consular Non-Reviewability: A Case Study in Administrative Absolutism*, 41 A.B.A. J. 1109 (1955); Leon Wildes, *Consular Nonreviewability: A Reexamination*, 64 INTERPRETER RELEASES 1012 (1987).

122. See LEGOMKSY, *supra* note 41, at 372-74; see generally PROCEEDINGS OF THE 1992 AILA WASHINGTON POLICY CONFERENCE (March 1992).

consular officers should provide written statements of factual and legal bases for denying a visa application.¹²³ Third, the Visa Office in Washington, D.C. should make the advisory opinion available to the applicant and the designated representative.¹²⁴ Fourth, the State Department should comply with its own regulations requiring review of denials within the consulate.¹²⁵ The Department of State should, in the alternative, examine other systems to review denials at consular posts. Finally, the Administrative Conference recommended that the Department of State study, evaluate, and submit to Congress a proposal for changes in the review of consular visa actions.¹²⁶

The immigration bar through the American Immigration Lawyers Association (AILA) has been active on this issue. AILA dedicated most of its 1992 Washington Policy Conference on a lobbying campaign to convince Congress of the need for formal review of consular decisions.¹²⁷ As part of its campaign, a Consular Review Act was unveiled. The legislative bill would establish a Board of Consular Review within the Department of State.¹²⁸ The Board would have five members appointed by the Secretary of State, who would name the Chairman.¹²⁹ In addition, the Visa Review Board would have jurisdiction to review visa denials or revocations of immigrant visas, nonimmigrant visas excluding temporary visitors, and applications for waivers of excludability when the alien is outside of the United States.¹³⁰ The bill also provides for legal representation at no expense to the government and establishes that decisions by the Board are of precedential value. The bill provides for judicial review in a court of appeals.¹³¹ In previous years, members of Congress have unsuccessfully introduced legislation to provide for review of consular

123. An exception exists for visa denials made on account of national security or those that have a potential adverse effect on the conduct of foreign policy.

124. An exception exists when the denials are on account of national security or have an adverse affect on the conduct of foreign policy.

125. 22 C.F.R. § 41.121(c) (1991).

126. Recommendation 89-9, PROCESSING AND REVIEW OF VISA DENIALS (December 15, 1989), reproduced in AILA WASHINGTON POLICY CONFERENCE MATERIALS 49-50 (March 1992).

127. The policy conference was held on March 26-27, 1992, at the Hyatt Regency on Capitol Hill, Washington, D.C. For a review of the highlights of the Policy Conference, see 11 AILA MONTHLY MAILING 364 (May 1992).

128. 11 AILA MONTHLY MAILING 412-13 (Exhibit 1) (May 1992).

129. Consular Review Act of 1992 § 2, reprinted in 11 AILA MONTHLY MAILING 412 (Exhibit 1).

130. *Id.*

131. *Id.* A new section would be added to the INA, § 225 under Chapter 3 of Title II.

decisions.¹³²

The continued call for reforming the visa denial review system makes it an appropriate topic for the Commission to evaluate and possibly offer recommendations to Congress. The present system is outdated under the current United States system of justice.¹³³

2. *Per Country Levels on Family-Sponsored Immigration*

The Commission is further entrusted with the task of evaluating the impact of per country immigration levels on family-sponsored immigration.¹³⁴ The 1990 Act establishes a per country limit on preference immigrants, including family-sponsored and employment-sponsored visas, at seven percent of the total preference limits.¹³⁵ At the same time, the 1990 Act places a minimum world-wide family preference limit at 226,000, while an employment-sponsored limit is set at 140,000. These two figures total 366,000, 7% of which is 25,620.¹³⁶ Therefore, the minimum per country limit is 25,620 compared to the 20,000 per country limit under the old law.¹³⁷ Although there is an increase of 5,620 available numbers over the old law, the new law has added more employment-based preference visas. Accordingly, the Commission should study how the new limits affect family-sponsored immigration in light of increased availability of employment visas on a per country basis.

3. *Foreign Policy and National Security*

The impact of immigration on the foreign policy and national security of the United States is another topic the Commission must study.¹³⁸ An area that is important for both foreign policy and national security is the government's policy toward displaced Haitians. This is a current controversy with a potential for repeating itself in the future given that country's track record on democracy. Given the deterioration of Cuba's present regime, the problem of Cuban boatpeople or "balseros" also looms in the future.¹³⁹ The present

132. See H.R. 2567, 100th Cong., 1st Sess. (1987) (per Rep. Gonzalez). A similar bill was introduced in 1969, S. 3202, 91st Cong., 1st Sess. § 3 (1969), reprinted in 115 CONG. REC. 36965-67 (daily ed. Dec. 4, 1969) (per Sen. Kennedy).

133. Other reasons advanced for reforming the visa review system include that formal administrative review of denials would have the positive effect of fomenting greater uniformity and more fair decisions, thus enhancing overall fairness and legitimacy in the system. See Nafziger, *supra* note 120, at 2.

134. Immigration Act of 1990 § 141(c)(E).

135. *Id.* § 202 (a)(2).

136. See DEP'T OF STATE, VISA BULLETIN, No. 41A, Vol VI (Nov. 12, 1990).

137. *Id.*

138. Immigration Act of 1990 § 141(c)(1)(D).

139. Paul Anderson, *Critics: U.S. Unready for Alien Flux*, MIAMI HERALD,

problem involves Haitian boatpeople who fled the country after the military *coup d'état* ousting the democratically elected regime of President Jean Bertrand Aristide on September 30, 1991.¹⁴⁰ Ever since the 1980s, official United States policy was to repatriate forcibly those Haitians interdicted at sea under the theory that Haitians were overwhelmingly economic immigrants.¹⁴¹ United States foreign and immigration policy toward Haiti has varied throughout the period following the *coup d'état*. In the aftermath of the *coup d'état*, the interdiction and forcible repatriation policy was changed. Those Haitians interdicted at sea were taken to the United States naval station at Guantanamo Bay, Cuba. There they were prescreened for initial determinations of having plausible asylum claims. Haitians with plausible claims were paroled into the United States to pursue formal asylum applications.¹⁴² However, the United States decided to close the refugee camp at Guantanamo Bay because it was acting as a magnet enticing Haitians to leave their politically troubled and economically embargoed country.¹⁴³ The new policy, announced on May 24, 1992, is to immediately return all Haitians intercepted at sea and allow them to apply for political asylum at the American Embassy at Port-au-Prince.¹⁴⁴

The Commission should review the government's handling of displaced Haitians with an eye toward developing recommendations on future refugee emergency situations that arise in close proximity to the United States. A good place to start might be the proceedings of

March 26, 1992, at A1 ("[G]iven the recent Haitian exodus and anxiety over deteriorating conditions in Cuba, state officials say federal planners aren't taking the threat of refugee emergency seriously enough.").

140. *Haiti's Military Assumes Power After Troops Arrest the President*, N.Y. TIMES, Oct. 1, 1991, at A1, A6 ("President Jean-Bertrand Aristide, Haiti's first freely elected President, was ousted . . . after seven months of democratic experience.").

141. See ALEINKOFF & MARTIN, *supra* note 1, at 836-38; see also Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981); Executive Order No. 12,324, 46 Fed. Reg. 48,109 (1981). Opponents of the interdiction program and forced repatriation allege that the program is intended to deter would-be asylum seekers from reaching the United States, while supporters of the program claim that the program saves the lives of Haitians who travel in unsafe boats and who are exploited by both smugglers and boat captains.

142. Cathy Booth, *Send 'Em Back! Washington Says That U.S. Doors Are Still Open, but Haitian Refugees Are Not Its Huddled Masses*, TIME, June 8, 1992, at 43. Between the time of the military coup and the end of May 1992, the Coast Guard had intercepted more than 35,000 Haitians of which 9,000 were allowed to pursue their asylum claims in the United States.

143. Al Kamen, *U.S. Phasing Out Tent City for Haitian Refugees at Guantanamo Bay*, WASH. POST, May 29, 1992, at A24.

144. *Id.* Refugee advocates criticized the new policy as unrealistic because of general fear and mounting political violence in Haiti.

a hearing on United States policy affecting Haitians held by the House Committee on Government Operation's Legislation and National Security.¹⁴⁵ An evaluation of the in-country processing is important, especially because charges that it has been "woefully inadequate" have been made.¹⁴⁶ The Commission should further evaluate why the regional attempt to deal with the Haitian refugee crisis failed. The United States is without doubt the most important country in the region in terms of its size and economy; however, solving refugee problems should be a regional endeavor. In this regard, the Commission may want to study efforts made in Central America to deal with the refugee and displaced persons problem that region experienced throughout the 1980s.¹⁴⁷

Another area in which the Commission should review the impact of the 1990 Act in the area of foreign policy and national security relates to how the government is implementing the revised ideological exclusion grounds.¹⁴⁸ Known collectively as the "ideological exclusion" provisions of the INA, these provisions have been used to deny admission of noncitizens to the United States on account of membership in certain organizations and espousal of forbidden ideologies.¹⁴⁹ Under the revised political and national security exclusion grounds, membership in communist or other totalitarian parties is no longer a bar to admission as nonimmigrants. However, membership or affiliation in a totalitarian or communist party continues to be an exclusion ground for immigrants.¹⁵⁰ This ideological exclusion ground is very troubling under First Amendment jurisprudence. Even though the government may have a legitimate national security interest in the regulation of subversive activities, it may not broadly forbid association with organizations that may advocate proscribed ideologies.¹⁵¹ The main exception is when "such advocacy is directed

145. See 138 CONG. REC. D443 (daily ed. April 9, 1992); see also 69 INTERPRETER RELEASES 449-50 (April 13, 1992) (description of presentations made at the hearing).

146. Eric Schmidt, *Haitian Exodus Has Slowed to a Trickle, U.S. Says*, N.Y. TIMES, July 2, 1992, at A9.

147. See *Declaration and Concerted Plan of Action in Favor of Central American Refugees, Returnees and Displaced Persons*, reprinted in 4 INT'L J. REFUGEE L. 583-96 (1989).

148. See generally LEGOMSKY, *supra* note 41, at 330-46 (discussion of both the old ideological exclusion grounds and the revised grounds under the Immigration Act of 1990).

149. See generally C. Ortiz Miranda, *Rethinking the Role of Politics in United States Immigration Law: The Helsinki Accords and Ideological Exclusion of Aliens*, 25 SAN DIEGO L. REV. 301-26 (1988).

150.

"[A]ny immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is excludable."

Immigration Act of 1990 § 601(a)(3)(D).

151. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

to inciting or producing imminent lawless action and is likely to produce such action."¹⁵² These laws are vulnerable to overbreadth challenges under First Amendment analysis.

The government has advanced the argument that protection under the Free Speech Clause of the First Amendment protections does not extend to aliens lawfully admitted as permanent residents and that the overbreadth doctrine does not apply in the exclusion or deportation context. However, at least one federal district court has rejected this contention.¹⁵³ The Commission should consider reviewing this ideological exclusion ground and possibly recommend changes to Congress consistent with recognized First Amendment freedoms that apply to citizens and aliens alike.

In addition, the 1990 Act clarifies the government's authority to exclude aliens on foreign policy grounds.¹⁵⁴ The government may bar admission to an alien if the Secretary of State has reasonable ground to believe that the entry or proposed activities of the alien in the United States "would have potentially serious adverse foreign policy consequences for the United States."¹⁵⁵ There are two exceptions to the foreign policy bar. First, officials of foreign governments, purported governments, or candidates for election to foreign governments are not barred under the foreign policy exclusion ground.¹⁵⁶ Second, if the alien's previous, current, or expected beliefs, statements, or associations would be lawful in the United States, the alien is not excludable unless such admission would compromise a compelling foreign policy interest as determined by the Secretary of State.¹⁵⁷ The exceptions were created because of congressional apprehension that the foreign policy exclusion ground might operate to deny admission of aliens on account of beliefs, associations, or statements.¹⁵⁸ Because of the potential for problems in applying the foreign policy exclusion ground, it might be opportune for the

152. *Id.*

153. *See* Rafeedie v. Immigration and Naturalization Serv., 1992 WL 119026 (D.D.C. 1992).

154. Immigration Act of 1990 § 601(a)(3)(C).

155. *Id.* § 601(a)(3)(C)(i).

156. *Id.* § 601(a)(3)(C)(ii).

157. *Id.* § 601(a)(3)(C)(iii). The House gave some guidance concerning the circumstances under which the second exception may apply: when an alien's mere entry into the United States could result in imminent harm to the lives or property of United States persons abroad or to property of the United States government abroad (as occurred with the former Shah of Iran), or when an alien's entry would violate a treaty or international agreement to which the United States is a party. *See* H. CONF. REP. NO. 101-955, 101st Cong., 2d Sess. 119 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6784, 6795.

158. *Id.* at 6794-95.

Commission to review its use to ascertain whether Congress' objectives have been met. For example, how are the standards of "potentially serious adverse foreign policy consequences" of the basic exclusion ground and the compromising of a "compelling United States foreign policy interest" under the second exception applied? The Congress intended that the latter standard be higher than the former.¹⁵⁹ Has this been the reality in its application?

4. *Airport Inspection, Prescreening, and Summary Exclusions*

There has been a growing problem during the past year or two with foreign travelers arriving at international airports without proper travel documentation.¹⁶⁰ It was recorded that in 1990 43,458 aliens traveled into United States airports with invalid documentation.¹⁶¹ The INS estimates that 10,000 undocumented aliens will arrive at John F. Kennedy Airport this year alone.¹⁶² In December 1991, a record 1,250 entered the country in this manner.¹⁶³ According to the INS, the *modus operandi* is to board airplanes, usually with fraudulent documents, that are destroyed en route. If they are assisted by smugglers, the smuggler takes back the documents for future use.¹⁶⁴ Because the INS has detention space for only 190 prisoners, this situation has caused logistical problems regarding where to keep the unauthorized entrants and scheduling for proceedings to deport the aliens.

Because the problem has continued to grow in magnitude, there has been some discussion within the government over solutions. One possible solution would provide for the summary exclusion of the undocumented entrants. Under this scenario, border inspectors would be authorized to return those undocumented entrants without any exclusion proceedings.¹⁶⁵ The problem with this approach is that it might unduly hurt those aliens who are bona fide asylum seekers. It has been recommended that the INS should have properly trained asylum officers to mitigate the possibility of returning people whose life or freedom would be threatened if they were forced to return.¹⁶⁶

159. *Id.* at 6794.

160. Al Kamen, *INS's Unofficial Open Door; Illegal Aliens Swamp NY Holding Capacity*, WASH. POST, Jan. 27, 1992, at A1, A7.

161. *INS Drafts Summary Deportation Bill*, WASH. POST, Feb. 19, 1992 at A6.

162. *Id.* John F. Kennedy Airport receives approximately 10 million passengers annually with 5 million being United States citizens and the remaining 5 million being foreigners.

163. *Id.*

164. *Id.* at A7.

165. *INS Drafts Summary Deportation Bill*, WASH. POST, Feb. 19, 1992, at A6.

166. *Id.*; see also Barbara Crosette, *U.S. Weighs New Limits on Asylum*, N.Y. TIMES, Feb. 19, 1992, at A18 (reporting on draft document circulating in the Justice

Another possibility is for increased preinspections at foreign airports. Indeed, certain members of Congress have recently introduced legislation that would establish additional preinspection stations at foreign airports.¹⁶⁷ The proposed bill would require the Attorney General, in consultation with the Secretary of State, to establish preinspection stations in at least five airports of the ten foreign airports with the heaviest air traffic into the United States.¹⁶⁸ Further, the proposed legislation would require the Attorney General to report to Congress on which foreign airports served as the last points of entry for those aliens arriving without proper travel documentation.¹⁶⁹ Finally, the proposed bill would require the Attorney General to implement an expedited process for inspecting citizens upon their

Department).

167. "To provide for increased preinspection at foreign airports, to make permanent the visa waiver pilot program, and to provide for expedited airport immigration processing." H.R. 5555, 102d Cong., 2d Sess. (1992) (section 1, preinspection at foreign airports; section 2, visa waiver program; and section 3, expediting airport immigration inspection).

168.

Not later than 2 years after the enactment of this Act, the Attorney General, in consultation with the Secretary of State, shall establish and maintain preinspection stations in at least 5 of the foreign airports which the Attorney General identifies as serving as last points of departure for the greater numbers of passengers who arrive from abroad by air at ports of entry within the United States. Such preinspection stations shall be in addition to any preinspection stations established or authorized to be established prior to the date of the enactment of this Act.

Id. § 1(a).

169. *Id.* § 1(b) (Establishment of Additional Preinspeciton Stations at Certain Foreign Airports from Which Undocumented Aliens Depart for the United States).

(1) Reports to Congress. Not later than November 1, 1993, and each subsequent November 1, the Attorney General shall compile and submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report identifying the foreign airports which served as last points of departure for aliens who arrived by air at United States ports of entry without valid documentation during the preceding fiscal year. Such report shall indicate the number and nationality of such aliens arriving from each such foreign airport.

(2) Establishment of additional preinspection stations. Not later than November 1, 1995, the Attorney General, in consultation with the Secretary of State, shall establish preinspection stations in at least 5 of the foreign airports that are among the 10 foreign airports identified in the first report submitted under paragraph (1) as serving as the last points of departure for the greatest number of aliens who arrive from abroad by air at points of entry within the United States without proper documentation. Such preinspection stations shall be in addition to any preinspection stations established or authorized to be established either under subsection (a) or prior to the date of the enactment of this Act.

Id.

arrival from abroad.¹⁷⁰

The Commission might want to review the proposals on summary exclusion in the context of the procedural requirements of the Fifth Amendment. With regard to the preinspection stations at foreign airports, the Commission should review such proposals with an eye toward determining the feasibility of preinspection stations, as well as potential foreign policy problems that such stations might present.

5. Health-Related Exclusions

All immigrants admitted into the United States are required to take medical examinations. These examinations respond to health-related exclusion grounds.¹⁷¹ The 1990 Act eliminated an actual list of diseases that functioned as a bar to admission and set forth a general standard of excluding an alien who has “a communicable disease of public health significance.”¹⁷² Congress intended that this exclusion apply only to those diseases that would pose a public health risk to the United States.¹⁷³ The 1990 Act provides for waivers of this health exclusion ground¹⁷⁴ and left it up to the Secretary of Health and Human Services (HHS) to promulgate regulations implementing the new standard. Congress intended that the implementing regulations should adhere to “current epidemiological principles and medical standards.”¹⁷⁵

The HHS issued a proposed rule on January 23, 1991 with request for comments.¹⁷⁶ Under the proposed rule only active tuberculosis was listed as a communicable disease of public health significance. During the comment period, the HHS received more than 40,000 comments to the proposed rule and in view of the volume and concerns expressed in those comments it was withdrawn. An interim rule with request for comments was issued on May 31, 1991.¹⁷⁷ The most controversial inclusion in the interim rule is exclusion based on

170. *Id.* § 3(d) (Expedited Process for the Inspection of Citizens). Not later than 90 days after the date of the enactment of this Act, the Attorney General shall implement an expedited process (such as citizen bypass) for the inspection of United States citizens upon arrival from abroad by air at ports of entry within the United States. *Id.*

171. GORDON & MAILMAN, *supra* note 35, at § 31.03[2][c].

172. Immigration Act of 1990 § 601(a)(1)(A)(i). The Act also excluded those aliens with a physical or mental disorder and behavior related to such disorder that pose “a threat to the property, safety or welfare of the alien or others.” *Id.* § 601(a)(1)(A)(ii)(I). The Act further excludes those aliens with the above disorder whose “behavior is likely to recur or lead to other harmful behavior.” *Id.* § 601(a)(1)(A)(ii)(II).

173. JOINT EXPLANATORY STATEMENT, *supra* note 38, at 6793.

174. Immigration Act of 1990 § 601(h) (waivers can generally be obtained by the spouse and unmarried son or daughter of United States citizens or immigrants, as well as immigrants who apply for adjustment of status).

175. JOINT EXPLANATORY STATEMENT, *supra* note 38, at 6793.

176. 56 Fed. Reg. 2484 (1991) (to be codified at 48 C.F.R. § 34).

177. 56 Fed. Reg. 25000 (1991) (to be codified at 48 C.F.R. § 34).

exposure to the HIV virus.¹⁷⁸ Certain commentators believe that inclusion of HIV infection as an exclusion ground would have the effect of penalizing long-time lawful permanent residents who would apply for naturalization. These individuals may have built up equities in the United States and may have contracted the infection in the United States. In addition, there are serious concerns that the interim rule, as written, would have a negative impact on refugee family reunification. Refugee families today have some members who are immigrants and some who are parolees.¹⁷⁹ Should a parolee in this type of "refugee family" want to adjust immigration status, an HIV-positive serological result might preclude adjustment and subject the parolee to exclusion.¹⁸⁰ Inclusion of HIV infection on the list of excludable medical conditions is antithetical to the importance of the family and to the principles of fairness and family values upon which this country and its immigration and refugee policy is based.

Another important issue in the interim rule with broad implications for the future are the procedures regarding medical examinations.¹⁸¹ Of particular concern is the breadth and scope of the medical examination, which entails notification of "any other physical abnormality, disease, or disability serious in degree or permanent in nature amounting to a substantial departure from normal well-being."¹⁸² The standard of "any other physical abnormality . . . depart[ing] from normal well-being" is ill-defined and ambiguous. Furthermore, this medical notification requirement appears to go beyond the bounds of the statutory health-related exclusion ground based on aliens with communicable diseases of public health significance and aliens who have a physical or mental disorder and behavior that would result in a threat to property, safety, or welfare of people or behavior that is likely to harm or to lead to other harmful

178. 42 C.F.R. § 34.3 (1991) (scope of examination for HIV testing covers applicants for immigrant visas, students, exchange visitors, refugees, and applicants for adjustment of status; others, such as ordinary travelers, are not subject to HIV testing, but may be excluded if their condition becomes known to consular officers or INS inspectors); see also Malcom Gladwell, *Virus Mystery Overshadows World Conference on AIDS*, WASH. POST, July 24, 1992, at A1, A18 (AIDS activists attending world conference plan to challenge restrictions on people with HIV infection who are forbidden to enter the United States).

179. See INA § 212(d)(5), 8 U.S.C. § 1182 (1988) (specific statutory reference to refugee parolees).

180. 42 C.F.R. § 34.1(d) (1991) (applicability of medical examination to aliens applying for adjustment of status).

181. 42 C.F.R. § 34 (1991) (medical examination of aliens).

182. 42 C.F.R. § 34.2(1)(4) (1991).

conduct.¹⁸³ The standard of “departure from well-being” is less applicable to health-related standards intended by Congress and more directly related to statutory exclusions based on public charge.¹⁸⁴

The Commission should evaluate the expansion of the public charge exclusion ground as it interfaces with health-related exclusion grounds. Statutory authority over public charge rests with the Justice Department and the State Department.¹⁸⁵ Thus, HHS’s authority to expand the medical examination in the context of the public charge ground is questionable. Further, the very nature of the public charge ground is ambiguous, especially because there is no law or regulation that defines with specificity what actually constitutes public charge.¹⁸⁶ Does HHS’s medical notification signify that such diseases as sickle cell anemia, heart disease, cancer, exposure to Agent Orange, and renal disease are to be included within the scope of the medical examination?

In the refugee context, the law exempts refugees from the public charge exclusion ground, but not the health-related exclusion ground for which a waiver may be obtained.¹⁸⁷ It is very troubling that refugees will now be subject to the “departure from well-being” test. This development is particularly troublesome because experience in refugee admission demonstrates that the INS presently uses medical conditions of certain refugees to deny them entry on what are ostensibly public charge grounds. Refugee advocate groups allege that obtaining medical waivers for refugees has proven very difficult and the interim rule would make refugee admissions all the more problematic.

The Commission should study this present state of affairs. Fishing for diseases not on the exclusion list does not seem to be authorized by law. In addition, there is a significant difference between determining a condition that bars earning a livelihood and a condition that will be costly to treat. The public charge exclusion ground has been used historically in connection with the alien’s ability to become gainfully employed.¹⁸⁸ Thus, determining public charge on the basis of an expensive medical ailment constitutes a substantial change in federal immigration policy.

183. Immigration Act of 1990 § 212(a)(1)(A)(i), (ii), 8 U.S.C.A. § 1182(a) (West Supp. 1992).

184. HHS acknowledges this in its introductory remarks entitled, “Public Charge Exclusion on Health Grounds.” See 56 Fed. Reg. 25001, 25002 (1991).

185. “Any alien who, in the opinion of the *consular officer* at the time of application for a visa, or in the opinion of the *Attorney General* at the time of application for admission or adjustment of status, is likely at any time to become a public charge is excludable.” Immigration Act of 1990 § 212(a)(4).

186. See GORDON & MAILMAN, *supra* note 35, at § 61.05[4].

187. See *infra* note 189.

188. See GORDON & MAILMAN, *supra* note 35, at § 61.05[4].

Further, arbitrary determinations of public charge exclusion grounds would needlessly open an area of litigation for the federal government. The Attorney General may waive the public charge exclusion ground, in his discretion, by accepting bonds.¹⁸⁹ Moreover, the United States could find itself in the situation of allowing only the wealthy to enter the country and excluding those aliens who are poor and sick.

D. Enforcement and Deportation

1. Detention

According to INS estimates, from 1988 to 1990, 489,000 aliens were subject to detention on account of their criminal status or because they were subject to deportation.¹⁹⁰ The INS projects that 88,000 criminal aliens alone will be subject to detention in 1996.¹⁹¹ The problem is that INS detention facilities can presently accommodate only 99,000 aliens per year for an average stay of 23 days.¹⁹² Thus, the federal agency is confronted with handling hundreds of thousands of detainable aliens with limited detention space. In 1991 the INS established a national detention policy in its enforcement of the immigration and nationality laws. A priority system was created under which district directors may exercise discretion in custody determinations.¹⁹³ Given the increased demand for detention and procedural requirements affecting the rights of aliens subject to detention, the Commission may want to study the question of detention and enforcement as it relates to border control and deportation for possible recommendations to Congress.¹⁹⁴ The Article will focus

189. INA § 213, 8 U.S.C. § 1183 (1988) (admission of aliens on giving bond or cash deposit by Attorney General to overcome Immigration Act of 1990 § 212(a)(4) (public charge)).

190. GAO Immigration Control, *Immigration Policies Affect INS Detention Efforts*, GAO/GGD-92-85, June 1992, at 3 [hereinafter GAO Immigration Control].

191. *Id.* at 4.

192. *Id.* at 3.

193. *Id.* at 14. Group 1 consists of aliens convicted for aggravated felonies, convicted for other crimes, or aliens identified through the Alien Smuggler Identification and Deportation Project; Group 2 includes aliens who have a criminal or terrorist history, who attempt to enter without proper documentation or without any documents and are otherwise inadmissible (seek to work without authorization); Group 3 includes aliens who have committed fraud against the INS; Group 4 consists of aliens who have failed to appear for their hearings or who have been ordered deported; Group 5 includes aliens apprehended as they tried to enter the country illegally; and Group 6 consists of aliens who have violated the law or INS regulations.

194. *Id.* at 34-43. The INS policy of using detention as a deterrent may also be of interest to the Commission. This policy was used against Central Americans entering

on two specific areas: the detention of minors and asylum seekers.

a. Minors

A very emotional issue for immigrant advocates has been the INS's policy on the detention of unaccompanied minors under eighteen years of age. This policy was first implemented in the INS Western Region and allowed for the release of unaccompanied minors only to a parent, guardian, or relative adult. The policy was officially codified as regulation in 1988.¹⁹⁵ The detention policy was challenged in the federal courts in 1985.¹⁹⁶ The case has remained in the judicial system since that time with the most significant decision being an *en banc* reversal by the Ninth Circuit of a panel decision by the district court upholding the detention policy.¹⁹⁷ The Ninth Circuit held that the INS blanket detention policy as applied to alien minors is unconstitutional because it violates the due process guarantees of detained children.¹⁹⁸ The government appealed the Ninth Circuit's decision and the Supreme Court granted certiorari.¹⁹⁹

Meanwhile, the INS held meetings with various organizations in order to establish a revised policy for detaining and releasing unaccompanied alien juveniles.²⁰⁰ On December 31, 1991, the INS issued the new policy that would be applied in a uniform fashion nationwide relating to the detention, release, and treatment of unaccompanied minors in INS custody.²⁰¹ The new policy instructs that no alien minor may be detained under INS custody longer than seventy-two hours with certain exceptions.²⁰² Further, the policy allows for the

through the Rio Grande Valley during 1988-1989, against Haitians entering through Miami throughout the 1980s, and against Chinese entering through New York City.

195. 8 C.F.R. § 242.24 (1992). The regulation allows for the release of minors to other adults in unusual and compelling circumstances. Here, an agreement must be executed to ensure the juveniles' well-being and their presence at all future proceedings before the INS or an immigration judge. 8 C.F.R. § 242.24(b)(4) (1992).

196. See generally Jim Morales, *Appellate Court Limits Rights of Undocumented Children*, YOUTH LAW NEWS, May-June 1990, at 17-19.

197. Flores v. Meese, 942 F.2d 1352 (9th Cir. 1991).

198. See 68 INTERPRETER RELEASES 1010, 1011 (August 12, 1991).

199. Flores *ex. rel.* Galvez-Maldonado v. Meese, 942 F.2d 1352 (9th Cir. 1991), *cert. granted sub nom.* Barr v. Flores, 112 S. Ct. 1261 (1992); see 69 INTERPRETER RELEASES 296-97 (March 9, 1992).

200. The more prominent organizations include the Child Welfare League of America, the Lutheran Immigration and Refugee Services, the National Council of La Raza, and the United States Catholic Conference.

201. Office of the Commissioner, Memorandum on National Policy Regarding Detention and Release of Unaccompanied Alien Minors (Dec. 13, 1991), *in* 69 INTERPRETER RELEASES 205 (Appendix I) (Feb. 10, 1992).

202. The exceptions are if the minor:

(a) is charged with or convicted of a criminal offense, other than entry without inspection;

(b) is adjudicated a delinquent, or is the subject of a pending delinquency proceeding;

release of alien minors to a parent, legal guardian, a relative adult,²⁰³ a responsible adult designated by a parent or legal guardian, or a licensed child-care facility.²⁰⁴ The release to any of the above must be preceded by a signed agreement that stipulates that the minor must be properly cared for, to ensure appearances at deportation proceedings, notification to the INS of address changes, and the prohibition of custody transfer without receiving permission from the District Director or Chief Patrol Agent.²⁰⁵

Immigrant rights groups generally praised the new policy. However, there is some concern that facilities that enter into child care service contracts with the INS meet acceptable child welfare standards. The Commission should evaluate the implementation of the revised policy on the detention of unaccompanied alien juveniles. If the national policy falters, the Commission may consider recommending to Congress statutory changes aimed at ensuring proper implementation by the INS.

b. Parole Program for Asylum Seekers

In May 1990 the INS implemented a pilot program for excludable asylum-seekers. The program would release from detention excludable aliens having strong asylum claims.²⁰⁶ The pilot program lasted

(c) has engaged in violent or extremely disruptive conduct which requires that he or she be held in a secure facility for the safety of himself or herself and/or others;

(d) is an escapee from another facility;

(e) is an unrepresented Salvadoran and an alternative placement is unavailable in the district where the juvenile came into INS custody (in which case the alien minor may not be transferred from the district for at least seven days); or

(f) cannot be moved for other extraordinary and compelling reasons. In this case, permission from the Juvenile Coordinator or Assistant Commissioner for Detention and Deportation must be obtained before detaining the alien minor for longer than 72 hours.

Id. at 206 (Appendix I) (Feb. 10, 1992).

203. *See id.* at 206 (adult relatives are defined as a brother, sister, aunt, uncle, or grandparent).

204. *Id.* at 206 n.3. Child-care facilities include state-licensed facilities that provide "care, training, education, custody, treatment or supervision" for minors.

205. *Id.* at 207.

206. The pilot program was comprised of 200 asylum-seekers who were under exclusion proceedings. To participate in the program, asylum seekers needed to present a strong claim, be represented by an attorney, post a bond, have employment and housing, present themselves at the asylum hearings, report monthly to the INS, and report for deportation if their asylum applications were denied. 69 INTERPRETER RELEASES 252-53 (March 2, 1992).

for eighteen months and was evaluated in early 1992.²⁰⁷ The INS's evaluation was mixed; nonetheless, it decided to expand the pilot program into a national policy on April 20, 1992.²⁰⁸ Because the INS recognizes that it has limited detention space, it hopes to now detain only those asylum-seekers who are most likely to abscond or who pose a threat to public safety.²⁰⁹ Under the national policy, pre-screening will take place at major airports and other ports of entry as well as at all INS detention facilities.²¹⁰

Criteria for release include the following: a reasonable determination of the person's true identity; a predetermination that the asylum claim is plausible; that the asylum-seeker is eligible for asylum as a matter of discretion,²¹¹ that the person either has legal representation or has a place to live and employment; and that the person agrees to report monthly to the INS, appear for deportation, and report to detention, if necessary.²¹² The Commission should invite the INS to offer its review of the pilot program for asylum-seekers and offer recommendations to Congress as deemed appropriate.²¹³

2. In Absentia Deportation Proceedings

An area for the Commission to evaluate that may have a serious adverse impact on due process is the new provision of the 1990 Act permitting a deportation order *in absentia* if an alien fails to appear at the deportation proceeding.²¹⁴ Under this new section, the *in absentia* deportation order shall be authorized if the alien or counsel

207. The evaluation showed that 104 of the 200 cases were pending before immigration judges or had been appealed to the Board of Immigration Appeals (BIA). There were 36 closed cases of which 14 were granted asylum, 2 received relief from deportation under other programs, 6 had absconded, and 14 had left the country. The INS could not account for the other 66 participants in the program. The INS evaluation further found that while 100% of the participants showed up at hearings before immigration judges, those aliens whose claims were denied and whose appeals failed either absconded or went to Canada for possible resettlement instead of surrendering for eventual deportation. See Susan Freinkel, *INS Moves for Quick Review of Asylum Claims*, LEGAL TIMES, Feb. 10, 1992, at 6.

208. Office of the Commissioner, *Memorandum on Parole Project for Asylum Seekers at Ports of Entry and in INS Detention* (April 20, 1992), in 69 INTERPRETER RELEASES 526 (April 27, 1992).

209. *Id.*

210. *Id.* at 527. The asylum prescreening officers are members of the asylum corps or INS officers (or inspectors) who have special training in asylum law and in asylum interviewing techniques. *Id.*

211. *Id.* at 527-28. No person may be released under this project if he or she ordered, incited, assisted, or otherwise participated in the persecution of anyone on account of race, religion, nationality, membership in a particular social group or political opinion, has been convicted of an aggravated felony, has been convicted of a particularly serious crime in the United States that constitutes a danger to the community, has been firmly resettled, or is considered a danger to the security of the United States. *Id.*

212. *Id.* at 528.

213. See GAO Immigration Control, *supra* note 190, at 54-56.

214. Immigration Act of 1990 § 545 (adding new INA § 242B).

has been given required notice and the Immigration Court determines by clear, unequivocal, and convincing evidence that the required notice was properly provided and the alien is deportable.²¹⁵ An *in absentia* deportation order may be recinded upon a motion to open filed within 180 days of the deportation order when the alien is able to prove that failure to appear was due to "exceptional circumstances."²¹⁶

The term "exceptional circumstances" is an important concept defined as the "serious illness of the alien or death of an immediate relative but not including less compelling circumstances beyond the control of the alien."²¹⁷ Compared to the previous standard of "reasonable cause for failure to appear" at the deportation proceeding, the new standard appears very severe.²¹⁸ The Commission may want to review the effects that the new standard might create in the overall fairness of the deportation process. It will certainly require the attorney or representative to inform the client, in writing, of the importance of appearing at the hearings. Failure to appear due to transportation problems, natural catastrophies, or other considerations beyond the control of the alien might not constitute "exceptional circumstances." Clearly, to use the new standard when absence is not intended and is beyond the control of the alien raises serious due process concerns. Such a draconian provision resulting in unfair deportation orders will no doubt be subject to future court challenges.²¹⁹

The collateral consequences of final orders under *in absentia* deportation proceedings are equally disturbing. Should an alien fail to appear under these circumstances, the 1990 Act places considerable

215. INA § 242B(c), 8 U.S.C.A. § 1252b(c) (West Supp. 1992) (this section sets forth the consequences of the failure to appear); *see also* INA § 242B(a)(2), 8 U.S.C.A. § 1252b(a)(2) (West Supp. 1992) (the required notice is a written notice through personal service, or by certified mail, or to the counsel of record where personal service is not practicable, stating the time and place of the proceedings and the consequences of failure to appear).

216. INA § 242B(c)(3), 8 U.S.C.A. § 1252b(c)(3) (West Supp. 1992).

217. INA § 242B(f)(2), 8 U.S.C.A. § 1252b(f)(2) (West Supp. 1992) (parenthesis omitted).

218. *See In re Ruiz*, Interior Dec. No. 3116 (BIA 1989). The Board of Immigration Appeals held that "[w]hen the basis for a motion to reopen is that the immigration judge held an *in absentia* hearing, the alien must establish that he has reasonable cause for his absence from the proceedings." The Board further found that once the immigration judge finds a reasonable cause for failure to appear, the applicants retains the statutory right to present his case and does not need to establish *prima facie* eligibility for the requested asylum relief. *Id.* at 3.

219. *See GORDON & MAILMAN*, *supra* note 35, at § 72.04(11)(e).

limits on certain forms of discretionary relief for a period of five years. For example, the alien may not benefit from section 212(c) relief,²²⁰ adjustment of status,²²¹ voluntary departure,²²² suspension of deportation,²²³ or from registry.²²⁴

It is important to note that the 1990 Act limits the discretionary relief described above to other matters as well. Discretionary relief is forbidden by statute if the alien has been granted voluntary departure but does not leave as required,²²⁵ if the alien does not show up for deportation,²²⁶ and if the alien does not appear at an asylum hearing.²²⁷ Given the serious consequences of these measures, it behooves the Commission to review and evaluate how these provisions have been enforced and whether they are fundamentally fair under the United States system of justice.

3. *Administrative Sanctions for Attorneys and Representatives*

Another agenda topic suggested for the Commission to consider is the new section of the 1990 Act that allows for the sanctioning of attorneys and accredited representatives who engage in frivolous behavior in administrative procedures before appellate bodies or immigration judges.²²⁸ The 1990 Act directed the Attorney General to

220. INA § 242B(e)(5)(A), 8 U.S.C.A. § 1252b(e)(5)(A) (West Supp. 1992). This is a waiver for returning permanent residents who traveled abroad voluntarily and not under an order of deportation; the Immigration Act of 1990 bars the use of the waiver to aggravated felons who have served a term of incarceration of at least five years. See INA § 212(c), amended by Immigration Act of 1990 §§ 511, 601(d).

221. INA § 242B(e)(5)(D), 8 U.S.C.A. § 1252b(e)(5)(D) (West Supp. 1992) (adjustment of status occurs when an alien is residing in the United States and becomes a permanent resident while in the country).

222. *Id.* § 242B(e)(2)(B), 8 U.S.C.A. § 1252b(e)(B) (West Supp. 1992) (voluntary departure is a discretionary relief under § 244 of the INA, which allows the alien to leave the country on his or her own volition and at no expense to the government).

223. *Id.* § 242B(e)(5)(C), 8 U.S.C.A. § 1252b(e)(5)(C) (West Supp. 1992) (suspension of deportation relief under § 244 of the INA is a relief from deportation when the alien lived continuously for at least seven consecutive years in the country, is of good moral character, and whose deportation would create extreme hardship to the alien, or to the spouse, parent, or child of a citizen or permanent resident).

224. *Id.* § 242B(e)(5)(D), 8 U.S.C.A. § 1252b(e)(5)(D) (West Supp. 1992) (registry under § 249 of the INA permits the government to adjust to permanent residency aliens who have been in the country since before January 1, 1972, have resided continuously since that time in the United States, are of good moral character, and are eligible for citizenship).

225. *Id.* § 242B(e)(2), 8 U.S.C.A. § 1252b(e)(2) (West Supp. 1992).

226. *Id.* § 242B(e)(3), 8 U.S.C.A. § 1252b(e)(3) (West Supp. 1992).

227. *Id.* § 242b(e)(4), 8 U.S.C.A. § 1252b(e)(4) (West Supp. 1992).

228. Immigration Act of 1990 § 545(d)(3) (creating new INA § 242B). Nothing in the new subsection affects the power of the Board of Immigration Appeals to impose its own sanctions for inappropriate behavior. *Id.*

define what constitutes frivolous behavior and to specify the circumstances under which an administrative appeal is regarded as frivolous and thus subject to summary dismissal.²²⁹ Interim regulations were promulgated on April 6, 1992.²³⁰ Those aspects of the rule pertaining to frivolous behavior became effective on the same date in which it was issued although the INS did request comments on the rule.²³¹

The regulation defines frivolous behavior as actions taken by either an attorney or representative²³² that "lack an arguable basis in law or in fact" or actions taken for improper purposes such as unnecessary delays.²³³ Improper actions may subject representatives or attorneys to discipline.²³⁴ Of particular concern are the grounds stated in the interim rule for the summary dismissal of appeals. These include: (1) failure to specify reasons for appeal on documents included with notices of appeal,²³⁵ (2) the sole reason for appeal lies in a fact conceded by the party at an earlier proceeding,²³⁶ (3) the appeal is from an order that granted the relief requested,²³⁷ (4) the appeal lacks an arguable basis in fact or law, or for improper delay,²³⁸ (5) the notice of appeal states that a brief will be filed, but is not filed,²³⁹ and (6) the appeal lacks merit under basic statutory or regulatory requirements.²⁴⁰

229. *Id.* § 545(d)(1)-(2).

230. *See* 57 Fed. Reg. 11574 (1992).

231. *Id.*

232. For regulations governing accredited representatives, see 8 C.F.R. § 292.2 (1992).

233. 57 Fed. Reg. 11574 (1992) (amending 8 C.F.R. § 292.3 (a)(15) (1992)) (knowledge is defined as either actual or constructive).

234.

Actions that, if taken improperly, may be subject to discipline include, but are not limited to, the making of an argument on any factual or legal question, the submission of an application for discretionary relief, the filing of a motion, or the filing of an appeal. The signature of an attorney or an accredited representative on any filing, application, motion, appeal, brief, or other paper constitutes certification by the signer that the signer has read the filing, application, motion, appeal, brief, or other paper, and that, to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, the document is well grounded in fact, is warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law, and is not interposed for any improper purpose.

8 C.F.R. § 292.3(15) (1992).

235. 57 Fed. Reg. 11570 (1992) (to be codified at 8 C.F.R. § 3.1(d)(1-a)(i)(A)).

236. *Id.* (to be codified at 8 C.F.R. § 3.1(d)(1-a)(i)(B)).

237. *Id.* (to be codified at 8 C.F.R. § 3.1(d)(1-a)(i)(B)).

238. *Id.* (to be codified at 8 C.F.R. § 3.1(d)(1-a)(i)(D)).

239. *Id.* (to be codified at 8 C.F.R. § 3.1(d)(1-a)(i)(E)).

240. *Id.* (to be codified at 8 C.F.R. § 3.1(d)(1-a)(i)(F)).

The interim rule also sets forth the process for investigating and the filing of charges aimed at imposing disciplinary actions after a hearing before an immigration judge.²⁴¹ Appeals may be made to the Board of Immigration Appeals, whose decision is final.²⁴² Although the interim rule characterizes the Board's decision as final, an appeal to a federal district court is likely. The INS has admitted this possibility.²⁴³ Curiously, frivolous behavior by INS attorneys is not subject to the same procedures. Rather, complaints against INS attorneys are referred to the Office of Professional Responsibility of the Department of Justice.²⁴⁴

Some commentators have noted that the imposition of sanctions for "frivolous behavior" is a first in administrative law.²⁴⁵ Others have criticized the interim rule because it "stacks the odds against one side - those representing aliens in deportation proceedings."²⁴⁶ Clearly, the immigration bar is not happy with either the law or the interim rule.²⁴⁷ Concerns expressed by the immigration bar include that such an important regulation should have come out in the form of a proposed rule, not an interim rule.²⁴⁸ Furthermore, the interim rule incorrectly expands the authority of the Board of Immigration Appeals to summarily dismiss appeals, as well as discouraging the zealous representation of clients by putting obstacles against making novel arguments.²⁴⁹ Another concern is that the sanctions for frivolous behavior are overbroad and do not apply to government attorneys.²⁵⁰

Whether the Justice Department will actively use the power contained in the interim rule remains to be seen. A critical question for the Commission to consider is the chilling effect that the statutory provision, coupled with the interim rule, might have in client representation in the immigration context.

241. 57 Fed. Reg. 11574 (1992) (to be codified at 8 C.F.R. § 292.3(b)(1)).

242. 8 C.F.R. § 292.3(a)(15)(vi) (1992).

243. See Fred Strasser, *Lawyer Sanctions Extend to Immigration Courts*, THE NATIONAL LAW JOURNAL, June 1, 1992, at 22.

244. 57 Fed. Reg. 11574 (1992) (to be codified at 8 C.F.R. § 292.3(b)(2)).

245. Strasser, *supra* note 243. "The only place I'm aware of administrative courts getting sanction power of this type was in the 1990 immigration law." Statement by Carl W. Tobias, Professor, University of Montana, School of Law.

246. Strasser, *supra* note 243. Statement by Edwin R. Rubin, Former President of the American Immigration Lawyers Association.

247. See Noreen Marcus & Susan Freinkel, *Will Advocacy Be Chilled? Immigration Lawyers Balk at New INS Sanctions*, LEGAL TIMES, June 1, 1992, at 2. Some immigration practitioners believe that the new rules make practice before the Board of Immigration Appeals more professional and are thus welcomed. *Id.* at 17.

248. See AILA MONTHLY MAILING 469-70 (June 1992).

249. *Id.*

250. *Id.*

4. *Employer Sanctions*

One of the most hotly contested issues in immigration reform is the repeal of the employer sanctions provisions established by the IRCA.²⁵¹ The employer sanctions provisions were recommended by the Select Commission as a mechanism to control illegal immigration by turning off the economic magnet that produces it.²⁵² The provisions went into effect on June 1, 1987 and impose penalties on employers who knowingly hire workers illegally in the United States.²⁵³ The law and implementing regulations require all employers to verify the citizenship or immigration status and employment authorization of all employees hired after November 6, 1986. This is done by completing the verification requirements of Form I-9.²⁵⁴ Failure to follow the verification requirements and record retention provisions of the law may subject the employer to civil and criminal penalties.²⁵⁵ The law applies to all employers.²⁵⁶

Congress recognized that employer sanctions might cause discrimination against foreign-looking or foreign-sounding workers. In order to prevent such discrimination, it included employment-related anti-discrimination provisions in the IRCA.²⁵⁷ The IRCA created an

251. IRCA § 101 (adding INA § 274A, 8 U.S.C. 1324(a) (1988 & Supp. II 1990)).

252. INA § 274A, 8 U.S.C. § 1324a(a) (1988 & Supp. II 1990) (making employment of unauthorized workers unlawful). For the recommendations of the Select Commission, see SELECT COMMISSION FINAL REPORT, *supra* note 9, at 61-69.

253. Employment authorization verification is performed by presenting either one document establishing both employment authorization and identity (e.g., passport), or two documents, one establishing employment authorization (e.g., social security card) and the other establishing identity of the individual (e.g., drivers license); see INA § 274A(b), 8 U.S.C. § 1324a(b) (1988 & Supp. II 1990) (employment verification system); see also 8 C.F.R. § 274a.2 (1992) (implementing regulations on the verification of employment eligibility).

254. INS Form I-9, Employment Eligibility Verification Form, *reprinted in* FEDERAL IMMIGRATION LAWS, REGULATIONS & FORMS 954-55 (West 1992).

255. Civil monetary penalties may be assessed for hiring violations. INA § 274A(e)(4), 8 U.S.C. § 1324a(e)(4) (1988). Civil monetary penalties can also be asserted for paperwork violations. INA § 274A(e)(5), 8 U.S.C. § 1324a(e)(5) (1988). Criminal penalties may be assessed for pattern or practice violations. INA § 274A(f), 8 U.S.C. § 1324a(f) (1988).

256. The law provides for three exemptions: (1) grandfathered workers or those workers who were hired on or before November 6, 1986; see 8 C.F.R. § 274a.2(a) (1992) ("[e]mployers need only complete the Form I-9 for individuals hired after November 6, 1986"); (2) casual domestic employment; see 8 C.F.R. § 274a.1(h) (1992) ("'employment' does not include casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent"); and (3) to independent contractors; see 8 C.F.R. § 274a.1(f) (1992) (special rules apply to independent contractors).

257. INA § 274B, 8 U.S.C. § 1324b (1988 & Supp. II 1990) (unfair immigration-

Office of Special Counsel separate from the INS and within the Department of Justice that is responsible for investigating and bringing discrimination cases against employers.²⁵⁸ These provisions were strengthened by the 1990 Act.²⁵⁹ Under the IRCA, Congress entrusted the Government Accounting Office (GAO) with the task of issuing three reports on the issue of discrimination within the context of employer sanctions.²⁶⁰ In its third and final report, the GAO found that “national origin discrimination resulting from IRCA, while not pervasive, does exist at levels that [constitute] ‘a serious pattern of discrimination.’ ”²⁶¹

The GAO’s findings fueled the call for repeal of employer sanctions.²⁶² The call found receptive ears in some members of Congress who introduced bipartisan supported legislation that would repeal sanctions.²⁶³ The Senate subcommittee with oversight responsibility over immigration affairs held two hearings on the question in April

related employment practices).

258. INA § 274B(c), 8 U.S.C. 1324b(c) (1988). The Office of Special Counsel cannot file charges against an employer if the same set of facts has been included in a complaint to the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964. INA § 274B(b)(2), 8 U.S.C. 1324b(b)(2) (1988).

259. Immigration Act of 1990 §§ 531-38 (amending 8 U.S.C. § 1324b(e) (Supp. II 1990)). Among the improvements are an education campaign, including certain seasonal agricultural workers within the protected class, deleting the requirement that citizens or intending citizens qualifying to bring claims, including new anti-retaliation protections, providing against document abuses, conforming civil money penalties to those for employer sanctions, and providing that the Special Counsel has the authority to review employment eligibility verification forms. *Id.*

260. IRCA § 274A(j), 8 U.S.C. § 1324a(j) (1988). If any of the reports concluded that there was a pattern of widespread discrimination, mechanisms were written into the law for expedited consideration by Congress of recommended legislation designed to deter or remedy the dissemination. In spite of the findings, Congress failed to terminate the law.

261. GAO Immigration Reform, *Employer Sanctions and the Question of Discrimination*, GAO/GGD-90-62, March 1990, at 6.

262. There was an effort by religious individuals and religious organizations to have employer sanctions declared unconstitutional under the First Amendment. The main argument advanced by the religious individuals and organizations was that employer sanctions violated their free exercise of religion because it forbade them to provide employment to any who seek it without any discrimination in accordance with their religious beliefs. The challenges came from the American Friends Service Committee (Quakers) and Roman Catholic religious orders. *See American Friends Serv. Comm. v. INS*, 961 F.2d 1405 (9th Cir. 1991); *Intercommunity Center for Justice and Peace v. INS*, 910 F.2d 42 (2d Cir. 1990).

263. 137 CONG. REC. S13418 (daily ed. Sept. 20, 1991) (introducing S1734, Employer Sanctions Repeal Act); 137 CONG. REC. H6690 (daily ed. Sept. 19, 1991) (introducing H.R.3366, a companion bill). Supporters of repeal expressed their reasons for the legislative measure as follows: “[T]he experience of the last 5 years has convinced me that the employer sanctions scheme simply does not work. Placing businessmen and women under the draconian threat of criminal and civil penalties in order to enforce extraordinarily complex immigration laws can only lead to discrimination, however innocent.” *See* 137 CONG. REC. S13420 (daily ed. Sept. 20, 1991) (statement by Mr. Specter).

1992.²⁶⁴ Should the Commission decide to take up the issue of employer sanctions, the transcripts of those hearings is a good place to begin. Those calling for a repeal of sanctions argue that while levels of discrimination against lawfully admitted workers and United States citizens have increased, employer sanctions have failed in their attempt to turn off the economic magnet.²⁶⁵ Those who want employer sanctions to remain argue that they are the key to any illegal immigration reform.²⁶⁶ Supporters of sanctions further state that their effectiveness is being hampered by an increase in document fraud and that this can be cured through greater INS enforcement of new provisions of the 1990 Act covering civil penalties for document fraud.²⁶⁷

The Commission will be faced with a highly charged issue should it decide to study and evaluate employer sanctions for possible recommendations to the Congress. Among the related issues that the Commission might want to consider include what can be done to decrease the incidence of document fraud. An enhanced role for social security cards will no doubt be brought to the Commission's attention. Here, the Commission will be faced with the controversial topic concerning a national identification card.²⁶⁸ In addition, the Commission should study an increased role for the Department of Labor in investigations of employer sanctions and the establishment of more regional offices for the Office of Special Counsel.

IV. CONCLUDING OBSERVATIONS

The 1990 Act stipulates that within ninety days of receiving the final report, the respective Committees on the Judiciary are to hold

264. See generally 69 INTERPRETER RELEASES 408-10 (April 6, 1992); 60 INTERPRETER RELEASES 477-79 (April 20, 1992).

265. 69 INTERPRETER RELEASES 408 (April 6, 1992) (remarks of Sen. Edward Kennedy).

266. *Id.* (remarks of Sen. Alan Simpson).

267. *Id.*; see also Testimony of Gene McNary, INS Commissioner, 10-13 (April 13, 1992) (on file with author).

268. See GAO Immigration Control, *A New Role for the Social Security Card*, GAO/HRD-88-4 (March 1988) (principal findings of the GAO report are that social security cards can be obtained by fraud, that the cards are used for employment purposes, and that the IRCA documentation requirements can be strengthened; the principal recommendation of the report is that the Attorney General should consider reducing the number of employment eligibility documents and making the social security card the only authorized document for employment purposes).

hearings relating to the findings and recommendations of the Commission.²⁶⁹ The oversight reports may also contain proposed legislation for Congress to consider.²⁷⁰ As stated in the introduction, this Article does not intend to cover all possible areas in which immigration reform might be needed. For example, the 1990 Act set aside 10,000 employment-creation visas for immigrants who engaged in new commercial enterprises in which capital investment of one million dollars occurred and at least ten full-time jobs were created for authorized workers.²⁷¹ Not much interest has been generated by the employment-creation investment visas. The Commission may want to study the reasons for the lack of interest and recommend ways that would make these visas more appealing to would-be investors.

The question of the privatization of refugee resettlement is absent from discussion in the Article. It will be an important topic in the near future. Furthermore, there is no detailed discussion of Temporary Protected Status under the 1990 Act.²⁷² Temporary Protected Status establishes a generic safe-haven law for the first time in United States history. It grants the Attorney General authority to permit nationals of designated countries who are otherwise admissible into the United States temporary protected status for an initial period not to exceed eighteen months.²⁷³ This status may be granted to eligible persons in the United States if their return to the designated country is deemed unsafe on account of ongoing armed conflict, natural disaster, or other extraordinary circumstances.²⁷⁴ The INS is forbidden to deport persons registered in the program and must provide participants work authorization. The 1990 Act instructed the INS to grant Temporary Protected Status to Salvadorans.²⁷⁵ Although the INS complied with the law, it refused to extend the status to Salvadorans. Instead it granted them "deferred enforced departure," an administrative remedy against deportation.²⁷⁶ The Commission might want to review the implementation of Temporary Protected Status and focus on its application to Salvadorans.

In addition, some members of the Central American community in the United States have called for another legalization program similar to IRCA's general amnesty program. While a legalization

269. Immigration Act of 1990 § 141(h)(1).

270. *Id.* § 141(h)(2).

271. *Id.* § 121(a) (or in which 500,000 dollars were invested in special targeted areas of high unemployment).

272. Immigration Act of 1990 § 302 (creating a new INA § 244A).

273. INA § 244A(b)(2), 8 U.S.C. § 1254a(b)(2) (Supp. II 1990) (the law permits additional extensions).

274. INA § 244A(b)(1), 8 U.S.C. § 1254a(b)(1) (Supp. II 1990).

275. Immigration Act of 1990 § 303.

276. See 69 INTERPRETER RELEASES 600 (May 18, 1992).

program may seem unlikely in today's political and economic climate, it is certainly not inconceivable in the future. This is especially true if large numbers of undocumented aliens continue to enter the country becoming an invisible underclass in the society. To demonstrate the dimension of the problem, in the Washington metropolitan area there are an estimated 200,000 Salvadorans of which only 50,000 are in a legal immigration status.²⁷⁷ The IRCA has not prevented those seeking better employment opportunities from entering the country. This is especially the case with the national group that, due to its geographic proximity to the United States, has provided large numbers of undocumented entrants. Not only are Mexicans continuing to enter the country surreptitiously, but the gender of the undocumented entrants is changing. Sociological data reveals that more Mexican women are joining the illegal exodus into the United States.²⁷⁸ Border apprehensions by the San Diego Sector of the United States Border Patrol, representing approximately half of all apprehensions at the Mexican border, demonstrate that in 1991 women accounted for fifteen percent of the arrests. This is an increase from approximately eight percent in 1987.²⁷⁹ Border Patrol statistics further indicate that apprehensions along the Mexican border were slightly greater than one million.²⁸⁰ Even if the one million figure is lower than pre-employer sanctions apprehensions, someone has forgotten to tell Mexicans in search of better economic opportunities that they are not permitted to work and someone has forgotten to tell United States employers that they cannot hire workers who are not authorized to work. In this regard, it would be very timely for the Commission to study and evaluate the immigration impact of the proposed North American Free Trade Agreement between the United States and Mexico.

In reviewing the various laws, the Commission should ascertain if the particular provision is rationally related to legitimate government interests, not just whether the law musters a minimal rationality test.

277. Charles Sanchez, *4 Charged in Bribery Case at INS*, WASH. POST, July 9, 1992, at B1 (the suspects are former INS employees who sold work permits to a visa consulting firm).

278. Tim Golden, *Mexican Women, Doffing Old Ways, Join Exodus*, N.Y. TIMES, June 7, 1992, at A1 (article discusses how migration is affecting the age-old customs of Mexican rural society).

279. *Id.* at A18.

280. *Id.* These figures are extrapolated from the arrests at the San Diego Sector, which comprise one-half of all arrests at the Mexican border.

In those areas in which the interest of the alien is affected by constitutional guarantees, the law should be scrutinized even more so. Although the federal courts acknowledge the plenary power of Congress over immigration matters, they have not abdicated their judicial role completely.²⁸¹ Of course, the Commission ought to give the laws extralegal review. Economic differences between the United States and other countries, especially Mexico, must be taken into account. Humanitarian concerns are equally important, especially in the case of asylum seekers.

Trends in immigration law and policy toward the end of the twentieth century maintain the traditional family reunification system, while at the same time expand substantially in the direction of attracting skilled workers. Another important trend, shown by the diversity program, is to reach out to those geographic regions that historically provided immigrants to this country and offer opportunities for increased migration to balance the overwhelming admissions from Asia and Latin America. In reviewing the two most important legislative enactments in immigration during the 1980s, in particular the IRCA and the 1990 Act, it is hoped that the Commission will take a carefully balanced approach to guide the United States immigration policies well into the twenty-first century.

281. A relevant example of the willingness of federal courts to strike down immigration laws as unconstitutional was the recent line of cases concerning § 5 of the Immigration Marriage Fraud Amendments of 1986 (IMFA), Pub. L. No. 99-639, 100 Stat. 3537 (8 U.S.C. §§ 1154(h), 1255(c) (1988)). The IMFA was enacted by Congress in order to satisfy the legislative policy of preventing and detecting marriage fraud as a way to circumvent the immigration laws. Among other provisions, § 5 applies to aliens who are subject to deportation or exclusion proceedings. If the alien marries during those proceedings, he or she cannot obtain an immigrant visa based on the marriage until they have resided abroad for two years. The IMFA's statutory scheme under § 5 did not even allow for the approval of an immediate relative or preference petition until the two years foreign residency requirement was completed. Section 5 opened a conflict between recognized constitutional rights of United States citizens (e.g., the fundamental right to marry) and Congress' plenary authority to legislate in the area of immigration. Although the majority of cases found that § 5 was constitutional, there were two minority decisions that struck down § 5 as impinging the procedural due process guarantees of the Fifth Amendment. In the midst of litigation, Congress amended § 5 in the Immigration Act of 1990 by allowing for exceptions to the forced foreign residency when there is clear and convincing evidence that the marriage is bona fide. See *Escobar v. Immigration and Naturalization Serv.*, 700 F. Supp. 609 (D.C.C. 1988), *appeal dismissed* 925 F.2d 488 (1991); *Manwani v. United States Dep't of Justice*, 736 F. Supp. 1367 (W.D.N.C. 1990); see also *Azizi v. Thornburgh*, 908 F.2d 1130, 1136-42 (Cardamone, J., dissenting).