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The author identifies some basic problems with America's immigration policy. Initially he observes that a fair and reasonable policy can only be made at the risk of inflaming local prejudices. Furthermore, the policy is inherently political and inconsistently applied. Finally, the enforcement of immigration law is not effective because the Immigration and Naturalization Service is understaffed and overworked. To remedy these problems, the author suggests that Congress enact legislation that is practical and internally consistent. He also proposes the formation of a review agency that will impartially analyze and recommend immigration policy.

Throughout its history, America's immigration policy has been characterized by ad hoc legislation that does not reflect the imperatives of our national economic and political policies. Since the first Quota Law of 1921,[1] legislation has suffered from political parochialism, while ineffectively addressing our immigration problems. This paper examines the underlying causes of these problems and suggests some solutions.

There are a number of reasons why our immigration policy is a failure. First, it fails to consider the forces that make it a necessity. From one perspective, the policy is a reflection of the humanitarian ideals that gave birth to the Act of October 3, 1965,[2] which abolished the national origins quota system and eliminated the last vestiges of racial discrimination.[3] With the adoption of this Act, one could hope that American policy would be nondiscriminatory,

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1. Ch. 8, 42 Stat. 5, *repealed by* Immigration and Nationality Act of 1952 (INA), ch. 477, 66 Stat. 163, 279 (codified as amended at 8 U.S.C. §§ 1101-1503 (1976)).

2. Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. §§ 1101, 1151-1156, 1181, 1182, 1201-1202, 1204, 1251, 1253-1255, 1259, 1322, 1351 (1976 & Supp. V 1981)).

3. F. AUERBACH, E. HARPER & R. CHASE, IMMIGRATION LAWS OF THE UNITED STATES (3d ed. 1975).

rational, efficient, and effective. Whether these objectives have been realized, however, is questionable.[4]

From another perspective, American immigration policy is a product of practical concerns, and as such is a manifestation of identifiable pressures within our society.[5] For example, the price tag of our policy cannot be so expensive as to be prohibitive. Further, the influx of immigrants into the United States should not be so large as to threaten the job security of those already here.[6] Finally, our policy should not be obscured by a myriad of regulations that ostensibly seek fairness, but actually create confusion. In short, Congress should not formulate immigration policy without reference to the economic, social, and political forces that form the fabric of American society.

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4. Historically, American immigration policy has been characterized by racial discrimination. In 1882, Congress enacted the Act of May 6, 1882, ch. 126, 22 Stat. 58, which placed an absolute ban on the admission of Chinese laborers. Congress passed the Immigration Act of 1917, ch. 29, 39 Stat. 874, over President Wilson's veto and imposed numerous additional restrictions on alien entry. The Act excluded many categories of "undesirables," which included Asians and illiterates. Immigration quotas based on national origin began with the first Quota Law of 1921, ch. 8, 42 Stat. 5, *repealed by* Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, 279. Under the first Quota Law of 1921, immigration was subject to a yearly limit of 3% of those of each nationality already in the United States in 1910. In 1952 a preference system based on family relationships replaced the quota system. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163. Unfortunately, the INA did not end discriminatory practices, as it subjected Orientals to special exclusionary provisions. *Id.* §§ 202(a)(5), 202(b), 66 Stat. 163, 177-78.

The 1965 amendments to the INA abolished the national origins quota system. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 1, 79 Stat. 911, 911 (codified as amended at 8 U.S.C. § 1152 (1976 & Supp. V 1981)). In 1976 amendments to the INA equalized the per country quotas on immigrants from the Eastern and Western Hemispheres. Act of Oct. 20, 1976, Pub. L. No. 94-571, 90 Stat. 2703. In 1978 a single worldwide ceiling replaced the per country quotas. Act of Oct. 5, 1978, Pub. L. No. 95-412, § 1, 92 Stat. 907, 907 (codified as amended at 8 U.S.C. § 1151(a) (Supp. V 1981)). Finally, the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.), adopted the neutral selection process of the United Nations for admitting refugees into the United States. Notwithstanding these legislative strides to eliminate discriminatory practices, as the unjust treatment of the Haitians demonstrates, discrimination still abounds.

5. Since the late nineteenth century, American immigration legislation has reflected concern that poor immigrants would become public charges, that foreign laborers were depriving American workers of jobs, that aliens were importing contagious diseases, and that certain immigrants constituted a threat to national security. SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, 96TH CONG., 2D SESS., SEMIANNUAL REPORT TO CONGRESS 16-20 (Comm. Print 1980) [hereinafter cited as SELECT COMM'N]. As a result of these and other pressures, the Reagan administration has advocated sharp restrictions on the refugee influx. *See* Exec. Order No. 12,324, 3 C.F.R. 180 (1981); Proclamation No. 4865, 3 C.F.R. 50 (1981).

6. American manufacturers once saw immigration as a prime source of cheap labor. *See* SELECT COMM'N, *supra* note 5, at 18. At other times, Americans facing hard economic conditions have clamored to limit immigration regardless of the cause of their problems. *Id.* at 19-20.

A second problem plaguing American immigration policy is its inherently political character.[7] Like most democracies, ours is slow to respond to a problem.[8] When a response is forthcoming, policymakers tend to take the path of least resistance,[9] producing legislation that is often self-serving and palliative. Thus, immigration policy is frequently nothing more than a product of political concessions. The laws enacted by Congress tend to mirror the concerns of special interests and do not address the immigration problems encountered by those most affected. Congress has often avoided making many policy decisions by granting broad discretion to the executive branch under the parole authority.

The Carter administration's response to the Cuban "boatlift" of 1980 offers an excellent example of the government's knee-jerk response to immigration problems. Rather than make an objective assessment of the problems imposed by the Cuban influx,[10] the ad-

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7. The very definition of immigration problems is political. For example, General Leonard F. Chapman, Jr., who served as Commissioner of the INS from 1973 to 1978, originally estimated the number of illegal aliens in the United States at four million. In six months time, he increased this figure to twelve million. Then, realizing that he had tripled the problems of his administration, he reduced the figure back to six million. *The Effects of Proposed Legislation Prohibiting the Employment of Illegal Aliens on Small Business: Hearing Before the Senate Select Comm. on Small Business*, 94th Cong., 2d Sess. 41-44 (1976) (estimates that there are six million illegal aliens in United States); *Immigration and Naturalization Service Oversight: Hearings Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 10 (1974) (estimates that there are approximately four to five million illegal aliens in the United States); 1974 IMMIGRATION AND NATURALIZATION SERV. ANN. REP. iii (estimating at least six to eight million, and possibly ten or twelve million, illegal aliens in the United States).

8. Policy is not made until there is a sense of a real problem. Only then will an identifiable coalition emerge that has sufficient support among the governing and the governed to enact legislation. Until some type of consensus develops, problems remain unresolved.

The problems confronting South Florida are a case in point. *See infra* note 10. The people of Minnesota probably are not concerned with the immigration problems in Miami. Illegal aliens are viewed as a regional problem and, therefore, focusing national attention on the crisis is difficult to accomplish.

9. Stated differently, the policy preferred is the one that alienates the fewest among those voting. Aliens, by definition, are not voters.

10. Although hindsight is twenty-twenty, some problems are predictable. First, the thousands of Cuban immigrants would have to be assimilated into the South Florida community, a region already troubled by racial tensions. Second, if relocation was necessary, where would the relocated Cubans go, and would they be well-received? Third, a segment of the aliens represented an undesirable part of Cuban society—criminals and institutionalized psychiatric patients. *U.S. Refugee Program, 1981: Oversight Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 155-60 (1981) (statement of Florida Governor Robert Graham regarding the impact of Cuban and Haitian refugees on South Florida).

ministration declared an "open arms" policy[11] that exacerbated the socio-economic problems of South Florida. President Carter's policy proved to be only a temporary solution to a problem that recurs each time a disgruntled foreigner walks into a United States Embassy seeking safe passage to our shores.

The third factor contributing to the uncohesive state of American immigration policy is the inconsistent application of the rules themselves. The problem here is that Congress has not been able to agree on a workable set of rules to govern immigration, and it has passed this task on to the Attorney General for refinement through regulation.[12] The Attorney General ordinarily has refused to establish a uniform rule and instead has enforced immigration law on a case-by-case basis. This policy of ad hoc enforcement is superior to formulating and enforcing a comprehensive law, because it gives the Attorney General considerable discretion to create exceptions that might render a uniform rule meaningless.[13] But the present policy of the Justice Department is not without its shortcomings. The case-by-case review process places a premium on expert advocacy, yet aliens are chronically underrepresented. Also, a litigant frequently will not learn that the rule of law governing his lawsuit is against him until after losing his case.

Fourth, the Immigration and Naturalization Service (INS) is neither well-suited nor well-equipped to enforce American immigration policy. The Service typically functions as a police agency, but this is neither necessary nor advisable. In other countries, the enforcement of immigration policy is left to agencies comparable to the United States Department of Labor.[14] Yet in this country, the

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11. President Carter's Remarks to Reporters Announcing Policy Toward Cuban Refugees, 16 WEEKLY COMP. PRES. DOC. 914 (May 19, 1980).

12. The Immigration and Nationality Act of 1952 gives the Attorney General the authority to prescribe rules relating to the immigration and naturalization of aliens. INA § 103, 8 U.S.C. § 1103 (1976).

13. A uniform rule with many exceptions becomes highly nominalistic and the results obtained often are inconsistent with the relevant statute. The decision of the United States Court of Appeals for the Second Circuit in Francis v. INS, 532 F.2d 268 (2d Cir. 1976), offers a case in point. In *Francis* a permanent resident alien subject to deportation for a criminal conviction unsuccessfully sought discretionary review of the deportation order by the Board of Immigration Appeals. The Second Circuit reversed, holding that section 212(c) of the INA, 8 U.S.C. § 1182(c) (1976), entitled the alien to discretionary relief by the Attorney General. This result, however, is facially inconsistent with the language of section 212(c).

14. The administration of the immigration law was the duty of the Treasury Department until 1903, when Congress created the Department of Labor and delegated to it the responsibility for overseeing immigration policy. Act of Feb. 14, 1903, ch. 552, § 4, 32 Stat. 825, 826. The Immigration and Naturalization Service remained part of the Labor Depart-

INS functions as the "weak sister" of the Federal Bureau of Investigation and the Federal Bureau of Prisons.[15] As such, the INS is given neither the money nor the staffing to be a truly effective police agency.

The understaffing of the INS is legendary. Traditionally, Congress cuts back on the Service's manpower whenever a budget balancing concession is necessary to placate potential foes. Even when staffing is increased, it rarely grows commensurately with the workload. For example, in the 1970's the staff of the INS increased by forty-five percent, yet the Service's workload rose—depending upon the statistics analyzed—anywhere from 100 to 900 percent. In short, the INS cannot possibly satisfy its policy objectives when it is chronically understaffed and underfunded. Under such conditions, it is not surprising that the agency spends much of its time and resources on combating crises rather than creating effective administrative procedures and practices. There is, however, cause for hope as new and proposed laws[16] promise budget and staff increases in the future.

Remedial steps to correct America's incoherent immigration policy must begin with legislation that sensibly addresses refugee problems. The Simpson-Mazzoli bill[17] is a case in point. The bill's stated objectives are to limit legal immigration[18] and deter illegal immigration by making it a crime to employ illegal aliens.[19] In order to achieve these purposes, the bill also limits the availability of family reunification visas and prohibits the immediate adjustment of an alien student's status to permanent resident upon gradua-

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ment until 1940, when an administrative reorganization placed it in the Justice Department. Reorg. Plan No. 5 of 1940, 3 C.F.R. 1304, *reprinted in* 54 Stat. 1238 (1940).

15. SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 238-42 (1981).

16. *See, e.g.*, Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.); Proposed Immigration Reform and Control Act of 1982 (Simpson-Mazzoli bill), S. 2222, 97th Cong., 2d Sess., 128 CONG. REC. S10,619-31 (daily ed. Aug. 17, 1982), H.R. 7357, 97th Cong., 2d Sess., 128 CONG. REC. H10,320-26 (daily ed. Dec. 18, 1982).

17. Proposed Immigration Reform and Control Act of 1982 (Simpson-Mazzoli bill), S. 2222, 97th Cong., 2d Sess., 128 CONG. REC. S10,619-31 (daily ed. Aug. 17, 1982), H.R. 7357, 97th Cong., 2d Sess., 128 CONG. REC. H10,320-26 (daily ed. Dec. 18, 1982). The bill passed the Senate, but its companion measure failed to win approval because the House of Representatives did not complete action on the bill before adjournment. Senator Simpson and Congressman Mazzoli plan to resubmit the bill in the 98th Congress. *See* Cohodas, *Immigration Reform Measure Dies in House*, 40 CONG. Q. 3097, 3097-98 (1982).

18. S. REP. No. 485, 97th Cong., 2d Sess. 1-2 (1982).

19. Proposed Immigration Reform and Control Act of 1982, § 101.

tion.[20] Close examination of the bill, however, reveals that it is plagued by the same types of internal inconsistencies that have become a familiar characteristic of immigration law. For example, the bill's provisions on students require aliens to return to their own countries for two years after graduation before becoming eligible for permanent visas.[21] By the end of the two-year period, many of these students will have already found employment in their homeland. This represents a significant loss to American industry, which has helped to train these students and, presumably, would gain from their services. Although the student visa provision may reduce the workload of the INS, a more sensible approach would be to increase the filing fees for students seeking to adjust their status to permanent resident. In this manner, industry effectively would be paying a user fee, and thereby generating revenues to support INS operations.

Another way to help establish a coherent immigration policy is to create an ongoing task force that could serve in an advisory capacity to government. This task force, to be known as the Immigration Policy Research Institute (IPRI),[22] should be an independent, nonpartisan body,[23] composed of scholars and practitioners from a variety of disciplines who would discuss the problems confronting American immigration policy and its implementation. The IPRI could centralize data collection of immigration statistics and thereby provide its analysts with a substantial data base with which to study the cost-effectiveness of INS policy. The IPRI also

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20. *Id.* §§ 202(a)(1), 212(a).

21. Senator Kennedy proposed an amendment to the bill that provides for 6,000 annual waivers of the two-year foreign residency requirement for graduates in the fields of natural and computer science, mathematics, and engineering. The Attorney General would have the discretionary authority to grant these waivers. *See* 128 CONG. REC. S10,500-02 (daily ed. Aug. 13, 1982) (debate on the Kennedy amendment to Simpson-Mazzoli bill).

22. Congress already has taken some remedial steps in this direction. Congressman Eilberg has sponsored comprehensive changes in the immigration laws, including a 1978 amendment to the Immigration and Nationality Act that established a single worldwide ceiling for the admission of immigrants. The amendment also created a sixteen-member Select Commission on Immigration and Refugee Policy to study and evaluate existing laws, policies, and procedures governing the admission of immigrants and refugees to the United States. Act of Oct. 5, 1978, Pub. L. No. 95-412, 92 Stat. 907 (codified as amended at 8 U.S.C. §§ 1151-1153 (Supp. V 1981)).

23. A member of the IPRI should be able to contribute to the discussion without fear of jeopardizing his job. The problem with organizing a group designed to criticize government policy or operations is that management might decide that those who participate are expendable. The INS has been no exception. General Joseph Swing, who served as INS Commissioner under President Eisenhower, was fond of transferring without notice INS staff members whom he did not like. Consequently, some of the people who were best equipped to produce good technical solutions to immigration problems never made any suggestions.

could serve as a school to train asylum officers and immigration judges.

The IPRI would add a new dimension to the formulation of immigration policy. At present, the government is not capable of designing and enforcing a consistent policy; political pressures, insufficient funds, and an overworked INS staff make it all but impossible. There is an urgent need for the development of an independent, policy-suggesting body that is free of the political pressures that often distort Congress's perception of immigration problems. Only then will there be a chance for Congress to meet the nation's need for a coherent and rational immigration policy.