ADVANCE SHEET- July 9, 2021

In this issue

President's Letter

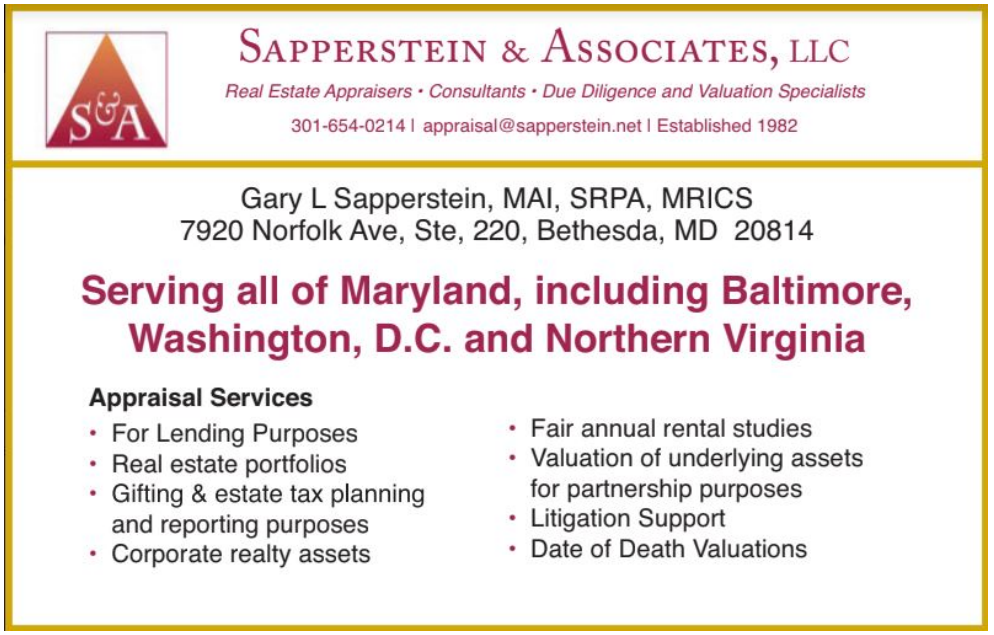
In this issue, we present the usual two documents and one judicial opinion.

The first document is the key portions of the neglected 1994 Report of the Dunlop Commission on Labor-Management Relations appointed during the Clinton Administration by Secretary of Labor Robert Reich and Secretary of Commerce Ronald Brown which recommended relaxation of the ban on company unions to allow building level employee associations meeting on employer premises to negotiate local productivity deals. A bill, the TEAM Act, embodying the Commission's recommendations was vetoed by President Clinton at the behest of the Commission's dissenting member, Douglas Fraser of the United Auto Workers. Neither President Clinton nor Secretary Reich discuss this episode in their respective memoirs.

The second document is the substantive portions of a Report of a Clinton-appointed Commission on Immigration presided over until her death by Congresswoman Barbara Jordan which was likewise cast into the discard by the administration, but whose recommendations remain of interest.

The last issue referred to the occasionally provocative separate opinions of Justice Clarence Thomas, in that case an opinion relating to concentration of control over mass media. We here tender an equally provocative opinion, rendered on June 27, on the marijuana laws.

George W. Liebmann



A Special Kind Of Independence Day

There are times when events make special days all the more meaningful, whether it be that first Christmas with a new child or perhaps the Fourth of July during a time of war. This year the Fourth fell at a time when we are (I and all of us so fervently hope), in the waning days of a most pernicious war, the war against Covid-19.

One day last week, on the same day, two old friends (for me that has come to mean having known each other for at least a quarter of a century), dropped by to say hello. The one was trying a case and the other had business in the clerk's office. It felt like old times, it felt amazingly nice.

With more restrictions coming off the books, such as the vaccinated no longer being required to wear face masks while in the Courthouse (effective July 1), and trials, hearings and other proceedings increasing with greater frequency, there has been a marked increase in those coming to the Library. It is much nicer to welcome people into the Library than at one of the doors of the Courthouse as you hand them a book. As I have said, during the dark days we might not have invented curbside pick-up, but I am pretty sure we came close to perfecting it, even making a few house calls along the way. We are proud as to what we were able to do as an institution, providing our services and collections at a time when literally nothing could be obtained anywhere else.

I hope that this Independence Day was a special one for you, one imbued with hope. As we have been for the last 181 years, we are here ready, willing and may I humbly say, most able to help you with your legal research needs. As all of us recalibrate from what we have been through, think not just about what the Library has to offer, but how you can save copious amounts of money by taking advantage of it. Don't just say you'll think about it, really think about it. It makes a whole lot of sense, and would I lie to a friend?

Take care and I look forward to seeing you soon.

Joe Bennett

Thurgood Marshall, Charles H. Houston and the Maryland Professional School Legal Battle that Changed the Nation

Before the dawn of *Brown v. Board of Education,* Maryland became "Ground Zero" for a courtroom drama that would determine whether the nation would stay separate and unequal. In the late 1940s Maryland, like many states, was confronting an expected transition about access to public higher education for all people. Thurgood Marshall of the NAACP, along with his mentor Charles Hamilton Houston, were at the forefront of that change. A group of southern states led by University of Maryland President Harry C. "Curly" Byrd were creating a sinister mechanism to help assure that southern universities would stay segregated forever by creating a racial compact. In a story from his provocative forthcoming book: *Genius for Justice: Charles Hamilton Houston in the Reform of American Law* (Carolina Academic Press 2021), Professor Jose Anderson of the University of Baltimore School of Law tells about the battle for access to education at Maryland's professional school located in downtown Baltimore. Hear about the brave students that took on a powerful academic institution and thereby changed the United States forever.

Biography of Professor Jose' F. Anderson-

Jose' Felipe' Anderson is a Professor of Law at the University of Baltimore School of Law. He also has taught, since 2003, at the University of Pennsylvania as an Adjunct Professor of Legal Studies and Business Ethics at the Wharton School and has served as a faculty member of the National Judicial College. He is a graduate the University of Maryland Francis Carey King Law School, where he served as Editor-in Chief of the Maryland Law Forum. He was elected to the prestigious American Law Institute in 2002.

Place: Mitchell Courthouse - 100 North Calvert Street - Main Reading Room of the Bar Library (Room 618, Mitchell Courthouse).

Time: 5:00 p.m., Wednesday, July 21, 2021.

Reception: ***It's Back!*** Catering by DiPasquale's featuring their prosciutto, cod fish, fruits and cheeses.

Invitees: All are welcome to this **free event**. *We ask that those attending in person be fully vaccinated.*

R.S.V.P.: If you would like to attend in-person or by way of **Zoom**, telephone the Library at 410-727-0280 or reply by e-mail to jwbennett@barlib.org. Please remember to designate how you will be attending. If you are going to be Zooming, I will forward the **Zoom Link** to you the week of the program. If technology is not your cup of tea, do not let that stop you. Zoom is incredibly easy to use and we will send you the very simple instructions to use Zoom should you need them. We hope to see you with us on July 21.

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The Dunlop Commission
on the
Future of Worker-Management Relations

Final Report

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The Dunlop Commission On the Future of Worker-Management Relations: Final Report

Table of Contents

Preface

The Commission on the Future of Worker-Management Relations was announced by Secretary of Labor Robert B. Reich and Secretary of Commerce Ronald H. Brown on March 24, 1993 to report on the following questions:

1. What (if any) new methods or institutions should be encouraged, or required, to enhance work-place productivity through labor-management cooperation and employee participation?

2. What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay?

3. What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and government regulatory bodies?"

On June 2, 1994 the Secretaries of Labor and Commerce released the Fact Finding Report of the Commission and an Executive Summary.

After release of the Fact Finding Report, the Commission consulted widely through public hearings, working parties comprised of several members of the Commission, and it received a variety of views in correspondence, studies and articles from representatives of business groups, labor organizations, professional associations, academics, women's organizations, civil rights and other interested groups, and individuals. This material is included in the public record of the Commission which was closed on November 14, 1994 by notice in the Federal Register. By this consultative process the Commission has sought to receive the widest possible comments on its Fact Finding Report as well as proposals for its conclusions and recommendations for this, its final report.

The Commission held four additional national hearings after the issuance of its Fact Finding Report in Washington, D.C., making a total of 21 public hearings, including the 11 national and six public hearings in various cities around the country held previously. In the four most recent public hearings, the Commission followed the practices developed in It's regional hearings to encourage representatives of organizations or individuals to volunteer to make

presentations or to file written statements, should adequate time for all not be available. The agenda of each of these four sessions and a listing of those who testified and their affiliations are presented in Appendix B.

The Commission appreciates the assistance of the various organizations and individuals that helped to organize and make presentations to the Commission and it's working parties.

A total of 57 persons testified before the Commission in its four hearings in July to September 1994, making a total of 411 witnesses in the 21 public hearings.
The transcripts of the four hearings after the Fact Finding report run to 823 pages, making a total of 4,681 pages for all public hearings before the Commission.

The Commission has received since May 1994 a number of studies and presentations outside of public hearings that provide additional information to its fact-finding phase. More than 160 statements have been received since the Fact Finding Report that have been entered in the public record of the Commission. Among these items are the following:

(1) United States General Accounting Office, Workplace Regulations, Information on Selected Employer and Union Experiences, Vols. I and II, June 1994.

(2) Industrial Relations Counselors, Inc., Report on the IRC Survey of Employee Involvement, August 1994, and Results of the ORC Survey on the Use of Alternative Dispute Resolution (ADR) in Employment Related Disputes, November 1994.

(3) Princeton Survey Research Associates, Worker Representation and Participation Survey, Top-Line Results, October, 1994.

(4) U.S. Department of Labor, Report on the American Workforce, 1994; Women's Bureau, Working Women Count, A Report to the Nation, 1994.

(5) American Civil Liberties Union, The Private Arbitration of Employment Disputes, November 1994.

A working party of the Commission has continued to meet with a designated committee of the Small Business Council of the Chamber of Commerce to receive views and perspectives on the Fact Finding Report. Another working party met with

representatives of ten organizations reflecting the interests of low-wage workers and received a statement of potential Administrative and Regulatory Initiatives to Protect Contingent Workers, October 1994.

A further working party of the Commission met on several occasions to receive the further views of a group of women's organizations that had also testified before the Commission. Representatives of labor and management organizations under the Railway Labor Act have met on occasions with still another working party of the Commission. Meetings have also been held with a number of representatives of the civil rights community.

The Chair of the Commission had held a series of meetings with the Enforcement Council of the Department of Labor and a number of its component agencies to secure data on staffing, and on the flow and volume of investigations, complaints, cases and litigation in the administration of employment laws within the purview of these agencies with reference to the third mission statement of the Commission. The National Labor Relations Board and its General Counsel has provided similar data. Discussions have been held also with the Chairman of the Equal Employment Opportunity Commission and the EEOC ADR Task Force. The cooperation of these agencies is appreciated.

The Commission has received a further letter from the Republican members of the House Committee on Education and Labor dated September 29, 1994. (See p. 111, note 5, of the Fact Finding Report for reference to the first letter.)

The Commission deliberated on all the above information from a variety of perspectives, the Commission reached broad agreement on the issues it was charged to address. A separate perspective by Commissioner Fraser on some aspects of employee involvement is included in Section II.

This report of the Commission is focused on the three questions of its Mission Statement, considering each question separately but also recognizing that these issues and the Commission's recommendations constitute a highly interdependent whole.

In making its legislative recommendations, the Commission has not proposed explicit statutory language. Similarly, in recommendations to administrative agencies and to private parties it has proposed specific approaches rather than the language of a regulation.

A number of more specialized issues were raised in testimony and statements to the Commission that it has not had the time nor specialized information to consider fully. These are significant issues to the workers and managers involved and deserve more detailed attention and conclusions than the Commission has had the time or resources to provide. Among these questions are the status of agricultural workers under the National Labor Relations Act, as amended, and the system of labor-management relations in the building and construction industry under these statutes and subsequent NLRB and court decisions. Further, the Commission has considered only in Section VII some of the issues raised by worker-management relations in a few types of relationships among those popularly designated as contingent. The Commission reports this unfinished business that deserves further and ongoing consideration.

The Commission has sought the views of a wide range of employers and employer associations, representatives of unions, professional associations, women's groups, civil rights organizations and academics regarding how to deal with the problems and challenges of the modern workplace. In addition, the Commission believes it is also significant to hear how workers themselves and their supervisors view their workplace beyond the reports of their attitudes from managers or unions. Thus, the Commission welcomes the findings of the Worker Representation and Participation Survey. This survey provides a detailed and in-depth analysis of workplace practices and the attitudes and views in workplaces on many issues pertinent to the Commission's charges. Appendix A presents a brief summary of the survey procedures and highlights of its findings.

The Department of Commerce provided assistance to the Commission through Under Secretary for Economic Affairs Everett Ehrlich. Within the Department of Labor, Roland Droitsch, Deputy Assistant Secretary, Office of Policy and Budget, coordinated a portion of the Commission's work. Assistance was also provided by Seth Harris, Executive Director of the Department's Enforcement Council, on matters related to this area. Legal research support was given to the Commission by Andrew Levin and Janet Herold. The Commission received comprehensive administrative and related support from staff of the Office of Small Business and Minority Affairs. Ms. Artrella Mack and Mrs. Betty Cooper-Gibson provided effective service in the technical preparation of this report. The Commission is deeply appreciative.

Report and Recommendations: Executive Summary

The Commission on the Future of Worker-Management Relations was appointed by Secretary of Commerce Ronald H. Brown and Secretary of Labor Robert B. Reich to address three questions:

1. What (if any) new methods or institutions should be encouraged, or required, to enhance work-place productivity through labor-management cooperation and employee participation?

2. What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay?

3. What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and governmental bodies?"

Over its twenty months of work, the Commission heard testimony and evaluated the experiences of many employers and employees, and received advice for answering its charge from many groups and individuals. This testimony, and various survey and other evidence, guides the recommendations and suggestions that we offer to the Secretaries, and to the nation.

As reported in the Commission's May 1994 Fact-Finding Report, there is a solid base of experience on which to build more cooperative and productive workplace relations in the United States -- the innovative partnerships in collective bargaining and the array of employee involvement programs operating in many workplaces across the country. There are also disconcerting patterns -- increased earning inequality, difficulties for contingent workers, increased litigation, rigid and complex regulations, and conflict in union organizing campaigns.

Our recommendations build on the positive experiences with productive and cooperative worker-management relations, support their adoption in additional employment settings, and encourage further experimentation and learning. At the same time we face squarely and propose remedies for the problems of too much conflict, litigation, inequality, and regulatory complexity.

We take an integrated approach to modernizing American labor and employment law and administration for the future. Taken together, these recommendations give workers and managers the tools and flexibility to do what they say they want to do and are capable of doing to improve workplace performance. We recommend flexibility in employee participation while insuring respect for workers' rights to choose unions, if desired. We encourage the development and use of fair systems for resolving disputes quickly closest to their source without going to court or to a government agency. We propose to modernize labor law to deliver through a prompt and simplified process what the law promises: a free choice for workers on whether or not to join a union of their choosing. Our proposals define employees and employers in ways consistent with economic reality. We encourage continued learning and dialogue among private and public sector leaders to improve the quality of policy making on employment issues.

The Commission could not address all the problems or proposed solutions presented to us. This does not imply that those left out are unimportant or not valid. Instead, some need to be left to other groups and to further discussion. Moreover, the recommendations we offer here are presented as starting points for improving the workplace experiences and results for all Americans.

The full set of recommendations are contained in the separate sections of this report. Here we present fifteen key conclusions and recommendations as they relate to each of our three charges.

1. New Methods or Institutions to Enhance Workplace Productivity

The evidence presented to the Commission is overwhelming that employee participation and labor-management partnerships are good for workers, firms, and the national economy. All parties want to encourage expansion and growth of these developments. To do so requires removing the legal uncertainties affecting some forms of employee participation while safeguarding and strengthening employees' rights to choose whether or not they wish to be represented at the workplace by a union or professional organization. Accordingly we recommend:

(1) Clarifying the National Labor Relations Act (NLRA) and its interpretation by the National Labor Relations Board (NLRB) to insure nonunion employee participation programs are not found to be unlawful simply because they involve

discussion of "terms and conditions" of work or compensation as long as such discussion is incidental to the broad purposes of these programs. At the same time, the Commission reaffirms the basic principle that these programs are not a substitute for independent unions. The law should continue to make it illegal to set up or operate company-dominated forms of employee representation.

(2) Updating the definitions of supervisor and manager to insure that only those with full supervisory or managerial authority and responsibility are excluded from coverage of the law. We further recommend that no individual or group of individuals should be excluded from coverage under the statute because of participation in joint problem-solving teams, self-managing work groups, or internal self-governance or dispute resolution processes.

(3) Reaffirming and extending protections of individuals against discrimination for participating in employee involvement processes and for joining or drawing on the services of an outside labor or professional organization.

These recommendations are linked to those that follow in important ways. In addition to eliminating the legal uncertainties associated with many of the forms of employee participation underway today, these changes allow and encourage use of worker-management participation in applying government regulations to the workplace and resolving disputes through private resolution procedures. Moreover, these changes remove the threat that workers might lose the protections of collective bargaining by taking on supervisory or managerial responsibilities. These changes, therefore, should open up workplaces to a variety of new experiments with employee participation and labor-management partnerships and bring the benefits of these innovations to more workers and workplaces.

2. Changes in Collective Bargaining to Enhance Cooperation and Reduce Conflict and Delay

The evidence reviewed by the Commission demonstrated conclusively that current labor law is not achieving its stated intent of encouraging collective bargaining and protecting workers' rights to choose whether or not to be represented at their workplace. Rectifying this situation is important to insure that these rights are realized for the workers who wish to exercise them, to de-escalate workplace conflicts, and to create an overall climate of trust and cooperation at the workplace and in the broader

labor and management community. Accordingly, the Commission recommends:

(4) Providing for prompt elections after the NLRB determines that sufficient employees have expressed a desire to be represented by a union. Such elections should generally be held within two weeks. To accomplish this objective we propose that challenges to bargaining units and other legal disputes be resolved after the elections are held.

Beyond the reversal of the Supreme Court's decision in Lechmere so that employees may have access to union organizers in privately-owned but publicly-used spaces such as shopping malls, access questions are best left to the NLRB. The Commission urges the Board to strive to afford employees the most equal and democratic dialogue possible.

(5) Requiring by statute that the NLRB obtain prompt injunctions to remedy discriminatory actions against employees that occur during an organizing campaign or negotiations for a first contract.

(6) Assisting employers and newly certified unions in achieving first contracts through an upgraded dispute resolution system which provides for mediation and empowers a tripartite advisory board to use a variety of options to resolve disputes ranging from self-help (strike or lockout) to binding arbitration for relatively few disputes.

(7) Encouraging railroad and airline labor and management representatives to implement their stated willingness to seek their own solutions for improving the performance of collective bargaining in their industries.

These changes are essential to de-escalating the level of conflict, fear, and delays that now too often surround the process by which workers decide whether or not to be represented on their jobs. We distilled our recommendations down to these basic and simplified changes in the law and procedures from an extensive array of proposals offered to the Commission in this area. Therefore, it is vitally important to monitor the effects of these recommendations over time to see if they are adequate to achieve the goals stated in our national labor law and shared by the American public.

3. Increase the Extent to which Workplace Problems are Resolved by the Parties.

The Commission's findings and recommendations regarding workplace regulations, litigation, and dispute resolution fall into three categories: (1) encouraging development of high quality private dispute resolution procedures, (2) encouraging experimentation with workplace self-regulation procedures in general and with specific reference to workplace safety and health, and (3) protecting the employment rights and standards of contingent workers.

The Commission endorses and encourages the development of high quality alternative dispute resolution (ADR) systems to promote fair, speedy, and efficient resolution of workplace disputes. These systems must be based on the voluntary acceptance of the parties involved. The courts and regulatory agencies should hold these systems accountable for meeting high quality standards for fairness, due process, and accountability to the goals and remedies established in the relevant law. The Commission also encourages experimentation with internal responsibility systems for adapting workplace regulations to fit different work settings. Accordingly, we recommend:

(8) Encouraging regulatory agencies to expand the use of negotiated rule making, mediation, and alternative dispute resolution (ADR) procedures for resolving cases that would otherwise require formal adjudication by the agency and/or the courts.

(9) Encouraging experimentation and use of private dispute resolution systems that meet high quality standards for fairness, provided these are not imposed unilaterally by employers as a condition of employment.

(10) Encouraging individual regulatory agencies (e.g., OSHA, Wage and Hour Division, EEOC, etc.) to develop guidelines for internal responsibility systems in which parties at the workplace are allowed to apply regulations to their circumstances.

America's workplaces must be made safer and more healthful and workers' compensation costs need to be reduced. Workplace safety and health is an ideal starting point for experimenting with internal responsibility systems for meeting public policy objectives, given the long-standing and widespread experience with employee participation and labor-management committees in safety and health matters and the shared interests all parties have in improving safety

and health outcomes. Evidence presented to the Commission shows that properly structured joint committees and participation plans can significantly improve safety and health protection. Accordingly, we recommend:

(11) Developing safety and health programs in each workplace that provide for employee participation. Those workplaces that demonstrate such a program is in place with a record of high safety and health performance would receive preferential status in OSHA's inspection and enforcement activities.

The growth of various forms of contingent work poses opportunities for good job matches between workers with differing labor force attachments and employers needing flexibility in response to changing market conditions. At the same time, some contingent work arrangements relegate workers to a second class status of low wages, inadequate fringe benefits, lack of training and, most importantly, loss of protection of labor and employment laws and standards. This is a very complex set of developments for which adequate data are not yet available to do more than address the most obvious problems. Our recommendations are therefore cautious in this area, recognizing the need to continue to monitor and evaluate the labor market experiences of all forms of contingent work and to derive policy recommendations as these data and analyses become available. Accordingly, we recommend:

(12) Adopting a single definition of employer for all workplace laws based on the economic realities of the employment relationship. Furthermore, we encourage the NLRB to use its rule-making authority to develop an appropriate doctrine governing joint employers in settings where the use of contract arrangements might otherwise serve as a subterfuge for avoiding collective bargaining or evading other responsibilities under labor law.

(13) Adopting a single definition of employee for all workplace laws based on the economic realities of the employment relationship. The law should confer independent contractor status only on those for whom it is appropriate -- entrepreneurs who bear the risk of loss, serve multiple clients, hold themselves out to the public as an independent business, and so forth. The law should not provide incentives for misclassification of employees as independent contractors, which costs federal and state treasuries large sums in uncollected social security, unemployment, personal income, and other taxes.

Implementing the recommendations in this report would open up employment policy and practice to a period of experimentation and opportunities for further learning. To channel this learning into constructive policy making we recommend:

(14) Creating a National Forum on the Workplace involving leaders of business, labor, women's, and civil rights groups to continue discussing workplace issues and public policies. In addition, we recommend establishment of a national Labor-Management Committee to discuss issues of special concern to the future of collective bargaining and worker-management relations. We encourage development of similar forums in communities, states, and industries to further promote grass roots experimentation and learning.

(15) Improving the data base for policy analysis of workplace developments, evaluation of labor-management experiments in the private sector, and for assessment of the economic condition of contingent workers. This requires amalgamation of existing data sets within the NLRB and Department of Labor, and among these and other agencies as well as coordination of research on workplace topics for the National Forum and other interested parties.

The Challenges Ahead

From the views presented to us emerged a vision of the Workplace of the 21st Century that is shared widely across all sectors of society and the workforce. These goals appear at the end of this Executive Summary. Achieving some of them requires updating and modernizing labor and employment law; others can be addressed through changes in administrative processes to give more power and flexibility to the parties at the workplace to govern their relationships and solve problems closest to the source. All will require leadership and sustained commitment to learning and experimentation on the part of individual workers and the labor and management leaders who shape employment practices. We urge that progress toward achievement of these goals be assessed systematically on a continuous basis and the results shared widely with the American public.

We can summarize the challenges facing America to improve the quality and performance of workplace relations quite simply. They are to sustain the momentum underway in the most innovative workplaces, to bring these innovations to and share their benefits among more workers and managers,

and to overcome the countervailing forces that stand in the way of achieving the goals of the 21st Century workplace. We see three such countervailing forces, two of which are reflected directly in the charges to this Commission and in our recommendations.

The first of these countervailing forces is the high level of conflict and tension surrounding the process by which workers decide whether or not to be represented by a union for the purpose of collective bargaining. Our recommendations should result in a significant de-escalation of these conflicts and a restoration of workers' promised rights in this area, and thereby improve the overall climate for cooperative labor-management relations.

The second countervailing force is the frustration that managers experience in trying to respond to complex workplace regulations and mounting litigation, and that workers experience in trying to enforce their legal rights on the job. Our recommendations provide workers and managers with the tools and flexibility to replace the command and control system of regulation and the litigious system for enforcing rights with opportunities for greater self-governance and private, high quality, dispute resolution.

The third force limiting the momentum toward higher quality workplaces was highlighted in our Fact Finding Report but its solution lies well beyond the mandate of this Commission. We refer here to the widening earnings inequality and stagnant real earnings that have characterized the American labor market over the past ten to fifteen years. While the Commission makes no direct recommendations focused on this serious problem, a number of our recommendations should contribute to reducing this growing disparity. Among these recommendations are our support for increased training at the workplace; increased opportunities for employee participation to enhance productivity, quality, and worker development; protections against the use of contractors or contingent workers to evade responsibilities under labor and employment law; and changes to provide workers the opportunity for representation and collective bargaining if they want it.

The recommendations of this Report are designed to contribute to the achievement of the goals and relationships required for the 21st Century workplace.

Goals for the 21st Century Workplace

1. Expand coverage of employee participation and labor-management partnerships to more workers and more workplaces and to a broader array of decisions.

2. Provide workers an uncoerced opportunity to choose, or not to choose, a bargaining representative and to engage in collective bargaining.

3. Improve resolution of violations of workplace rights.

4. Decentralize and internalize responsibility for workplace regulations.

5. Improve workplace safety and health .

6. Enhance the growth of productivity in the economy as a whole.

7. Increase training and learning at the workplace and related institutions.

8. Reduce inequality by raising the earnings and benefits of workers in the lower part of the wage distribution.

9. Upgrade the economic position of contingent workers.

10. Increase dialogue and learning at the national and local levels.

I. Introduction: The Workplace and Society

1. SOCIETAL DEMANDS ON THE WORKPLACE

The workplace has become the central institution in American society. A higher proportion of the population than ever before is in the workplace, as women have taken jobs to support their families as principal breadwinners or as part of dual-earner households. Workplaces reflect the racial and ethnic diversity of the population more than any other institution. The workplace distributes earned income to most of the population. In contrast with many other advanced countries, where the state provides benefits for citizens paid from general taxation, the U.S. relies on private decision-making in the workplace to furnish a disparate range of benefits, most notably health insurance and vacations with pay. The U.S. also places on the workplace the obligation to provide an increasing list of individual rights enforceable in the courts. Americans spend more time at the workplace than the citizens of any other advanced country, save for Japan. Far more Americans work than vote.

Economic Performance. The workplace is a centerpiece of the nation's economic performance, concern with productivity, quality, and competitiveness. Our main national asset is a skilled and hard-working workforce. In an ever more global economy, the quality of the workplace affects not only the individual enterprise and its employees, but also national economic growth and productivity performance.

Training. The workplace is also the locus of vital training of the workforce and even of considerable formal educational programs, illustrated by instruction in math, language and basic skills, apprenticeship, military programs, interns and residents in the medical profession, and executive training. Continuous learning on the job and in teamwork with multiple job tasks characterizes our most productive work environments. This training is often best provided on the job, learning from peers as needed or in new delivery modes that enable a self-paced learning such as interactive media. Training in health and safety, quality, and problem-solving are critical for the workplace to fulfill its social role. In the world of the future, the significance of training and education in the workplace may be expected to be even greater than at present.<Footnote: See, Workforce Training and Development for U.S. Competitiveness, The Business Roundtable, August 1993; Labor's Key Role in Training, AFL-

CIO Report of Training, September 1994.>

New Forms of Work Organization. As these societal demands on the workplace increase, a number of changes in the nature and location of work, and in relations among workers and supervisors, make the attainment of these objectives more complex and difficult. Indeed, the traditional distinctions between worker and supervisor are often without meaning in many current workplaces. New forms of organizing work, new workplaces (including work at home), new work relations (including with customers), new work hours, and new legal forms have emerged and become more common in which there is ambiguity and often no clear responsibility for training, health and safety, benefits, legal obligations, and the other societal demands on the workplace.<Footnote: Reflecting the surrounding community, moreover, the workplace now reports an increased incidence of homicide, violence, and verbal abuse destructive of morale, quality, and productivity. Drug and alcohol abuse also create problems at work. One in six violent crimes -- almost a million a year -- occur at the workplace. In 1992 more than 500,000 employees were victims of violent crime at their workplace.> These new and more diverse relations raise questions about the definitions of employee and employer, supervisor and professional used in labor relations and employment law.

Workplace Regulations. Starting in the early 1900s, with concern over accidents, a vastly expanded array of standards has been required of workplaces by the political process. The old common law covering worker-management relations has been replaced in many areas by state and federal regulations that give workers an increasing body of legal entitlements and rights enforceable against the employer in the courts that largely places obligations on the employer. Legislation in Democratic and Republican administrations alike as well as court decisions regulate the terms of employment in the workplace, and many states have specified their own rules and definitions.<Footnote: The Commission facilitated the first comprehensive survey of the vast complex of legal statutes and regulations and the reactions of employers and union representatives to the regulations and to the regulatory and enforcement processes. General Accounting Office, Workplace Regulation, Information on Selected Employer and Union Experiences, Vols. I and II. June 1994. See, Fact Finding Report, pp. 129-133.>

Some federal interventions have been designed, as in the case of statutes dealing with discrimination and harassment,

to change the mores or customs prevailing in many workplaces apart from providing redress to affected individuals. One of the earliest pieces of New Deal era legislation was the Wagner Act (modified by 1947 and 1959 statutes) that sought to assure workers the right to choose freely whether or not to join a union and to encourage the practice of collective bargaining over terms and conditions of employment. The procedures were designed to ascertain whether or not workers wanted democratically chosen representation at the workplace. It is to be observed that the labor movement often provided the impetus and political support for many of the workplace entitlements enacted by regulatory legislation for all workers. In recent years civil rights groups, women's groups, and religious groups have also played a role in expanding the protection provided for workers. At their volition or through collective bargaining, companies have also introduced numerous policies designed to improve worker well-being as well as to raise workplace efficiency. For instance, most large firms now have employee assistance programs to help employees with alcohol, drug, mental health or other problems.

The Need for Cooperation. An increasing number of employers and unions have found that the best way to compete in the marketplace and secure both profits for the firm and good jobs for workers is through cooperative worker-management relations. As Americans obtain more education, and with the changing nature of some work, employers increasingly find it appropriate to rearrange responsibilities and tasks to employees, who work sometimes as teams and other times as individuals. For their part, more highly educated employees express greater desire to participate in workplace decisions and have the knowledge and competence to undertake more tasks at the workplace. It is clearer now than in the past that creating value at the workplace is the joint responsibility of management and labor.

The Commission also recognizes that there is great diversity in the seven million workplaces in the country -- variations by industry, community, number of employees, demographic mix of workers, and union status, with a correspondingly wide disparity in relations among workers and management that ranges from hostility to open collaborative partnerships.

The ability of workplaces to carry out their critical social and economic functions is, however, diminished by the continuing conflict that exists in some workplaces between employees who seek independent representation and to engage

in collective bargaining and some employers who seek to prevent this outcome. The polarization between employees and management in union representation campaigns, and the unfair labor practices committed in some of these campaigns, poison the attitudes in many other workplaces and detract from the attainment of cooperative arrangements and the rational assessment of workplace problems and mutually beneficial solutions.

The achievement of prescribed standards of protection and regulation -- in health and safety at workplaces, freedom from discrimination or sexual harassment, payment of minimum wages -- all too often is equally confrontational and litigious in many workplaces. Our courts and regulatory agencies are burdened with employment disputes that would better be resolved at the workplace. Many workers who lack the resources to go to court and many firms who fear the expense of lawsuits do not get the just resolution of workplace problems that they deserve. Hence, the attention to improved methods of dispute resolution.

It is time to turn down the decibel count, the adversarial and hostility quotient that all too often mars discussion of worker-management relations. We must -come and reason together- to devise the best ways to assure that workers have their legislatively proscribed and socially agreed upon rights and employment norms, without burdening the economy with excessive litigation and extended administrative proceedings. We must develop institutions and practices that will allow employees and firms to cooperate at the workplace in ways that will contribute optimally to economic growth and competitive performance and to the fulfillment of social norms.

The Commission recognizes, of course, that the interests of workers and management are not identical: they will differ in some areas. In a market economy buyers and sellers have different perspectives on the terms of sale. But there are numerous ways to resolve disputes cooperatively, or, if need be, through limited conflict such as strikes or lockouts rather than open warfare. And there are many leaders in business and in the labor movement to provide advice and role models for dealing with disagreements by finding efficacious solutions to problems.

In Chapter I of its Fact Finding Report, the Commission documented places in which the American economy has not successfully met the challenge of recent economic developments -- the rise in income inequality and fall in earnings for many less skilled workers that threatens to

turn a predominantly middle-class society into a two-tier society; sluggish growth in productivity outside of manufacturing; the inability of the job market to offer many employees work that pays more than crime -- as well as areas where we have outperformed other advanced nations. To improve our national economic performance in the areas in which we have problems and to maintain into the 21st century our success in the areas in which we have done well requires that we modernize our labor-management relations, bringing the best practices to more and more firms and workers.

The workplaces that we have inherited are far too adversarial in tone and substance for the good of the American economy. Changes must be made in the way firms, employees, and unions interact, and in workplace laws and regulations, to enable them to carry out successfully the vital tasks society places on them.

This Report specifies some of those changes in the form of suggestions and recommendations. They are a starting point on a necessary road to adjusting the workplace to the realities of a changing social and economic environment and to the vision of a better future. The future of the American economy and society is vitally dependent on the American workplace. It is important that we begin the task of making the workplace a better and more productive place for firms and employees alike.

2. GOALS FOR THE 21st CENTURY AMERICAN WORKPLACE

Given the changing role of the workplace in society, and the views expressed to the Commission by managers, employees, union leaders, and other experts, we believe it is essential to state a vision and a set of goals for the workplace of the future. We present ten integrated objectives that, taken together, position the American workforce and the economy for the 21st Century.

(1) Expand coverage of employee participation and labor-management partnerships to more workers, more workplaces, and to more issues and decisions.

Employee participation and labor-management partnerships are essential to improved productivity, enhanced quality and economic performance, and an increased voice and higher living standards for American workers. It is in the national interest to see participation and partnerships sustained and expanded to cover a larger proportion of the

American workforce and workplaces, and to address the full range of issues critical to improving workplace performance and advancing workers - economic positions and quality of working lives. It is also in the national interest to experiment with alternative forms of participation and cooperative labor-management relations to meet workers - varied needs and circumstances.

Provide workers with a readily accessible opportunity to choose, or not to choose, union representation and to engage in collective bargaining.

Reduced hostility is essential in the full process -- from initial expression of interest to the signing of a first agreement -- if workers are to have a free and accessible choice about whether or not to be represented by a union, so that those who want collective bargaining can exercise that right and so that managers do not feel they are under attack whenever employees decide union representation is in their best interest.

(3) Improve resolution of disputes about workplace rights.

All American workers need to achieve the promised objectives of freedom from discrimination, unfair treatment, and fulfillment of their statutory rights.

All those who feel they have been unjustly treated should have access to rapid resolution processes that are inexpensive, fair, and that serve as effective deterrents to unfair behavior or employment practices.

(4) Decentralize and internalize responsibility for workplace regulations.

Command and control- government regulations at the workplace should be reduced in favor of greater internal responsibility systems and private resolution of disputes by firms and workers themselves, with the assistance of neutrals when necessary. Regulatory resources could then be focused on the more serious miscreants and on encouragement of work-level dispute resolution.

(5) Improve workplace safety and health.

America's workplaces must be made safer, reducing workers - injury and occupational disease and workers - compensation costs. Each workplace must be encouraged to develop an

appropriate system to improve safety and health. Regulatory bodies should help in the process and provide workers and firms with advanced scientific knowledge on safety and health. The most dangerous worksites should be targeted for particular attention.

(6) Enhance the growth of productivity in the economy as a whole.

It is critical for the well-being of the American people that productivity grow at a sufficiently fast pace to improve the living standards of all citizens. Labor-management relation's policies and practices should contribute to this goal.

(7) Increase training and learning at the workplace and in related institutions.

Additional training and opportunities for learning on-the-job are needed to enhance the performance of enterprises, improve the rate of productivity growth, and permit higher wages and benefits. Workers in the service sector need particular attention since this sector has experienced a slow rate of productivity growth, and it employs the largest number of low-skilled young workers with inadequate education and access to training opportunities.

(8) Reduce inequality that has increased in the American labor market over the past ten to fifteen years by raising the earnings and benefits of workers in the lower part of the wage distribution.

A number of recommendations of the Commission should make a contribution toward the goal of reducing growing earnings disparities -- in particular the emphasis on training, employee participation to enhance worker development, productivity and quality, and, if workers choose, the opportunity for representation and collective bargaining.

(9) Upgrade the economic position of contingent workers.

A variety of arrangements are required to assist low-wage workers in temporary or contingent employment relationships to receive the protections of labor relations and employment laws. The country needs to arrest the growing disparity between the labor conditions of full-time workers in stable career-oriented jobs and those of contingent workers who desire but are not able to obtain these types of jobs,

earnings and benefits.

(10) Increase dialogue at the national level and local level.

Arrangements need to be developed for regular dialogue among the leaders of business, labor, civil rights and women's organizations, and the government. In a dynamic market economy, workplace problems and solutions continually change, and it is important for national, sectoral and local leaders to monitor these changes to learn systematically from experience, and quickly to develop strategies and policies that meet new challenges at the workplace.

We now turn our attention to the changes in public policy and private practice that are needed if we are to achieve the goals for the workplace of the 21st century.

II. Employee Involvement

1. INTRODUCTION

The Commission's Fact Finding Report noted (pp. 29-61) that a variety of employee participation processes and committees have been established in America's workplaces. Many larger firms report using some form of employee participation in their organizations. Information received by the Commission since the Report confirms the diffusion of employee involvement. Fifty-two percent of employees in the Workplace Representation and Participation Survey reported that some form of employee participation program operates in their workplace and 31 percent indicate that they participate in an employee involvement program.

Employee involvement programs have diverse forms, ranging from teams that deal with specific problems for short periods to groups that meet for more extended periods. Many employers and union leaders testified before the Commission that the programs enhance productivity, though their effectiveness surely differs in different settings. Thirty-two percent of workers involved in these programs view them as very effective while 55 percent view them as somewhat effective. Seventy-nine percent report that the programs have given them greater say in their jobs. By a two-to-one majority, employees at workplaces without employee involvement programs say they would like a program of this sort at their workplace.

On the basis of the evidence, the Commission believes that it is in the national interest to promote expansion of employee participation in a variety of forms provided it does not impede employee choice of whether or not to be represented by an independent labor organization. At its best, employee involvement makes industry more productive and improves the working lives of employees.

The evidence presented also shows that as practiced today some employee participation programs may be in violation of Section 8(a)(2) of the NLRA. The problem is that some programs designed to improve productivity and quality also end up discussing interrelated issues of working conditions and of how to share the gains produced by employee involvement. A related problem is that some programs blur the traditional distinction between supervisors or managers and workers, raising questions about the coverage of employees under the NLRA. Indicative of the extent of this blurring of traditional boss/worker lines, in the Workplace

Representation and Participation Survey 35 percent of workers said they perform some supervisory duties as an official part of their job.

In view of the role of employee involvement plans in American industry, the Commission supports some clarification of Section 8(a)(2) so that employee involvement programs such as those relating to production, quality, safety and health, training or voluntary dispute resolution are legal as long as they do not allow for a rebirth of the company unions the section was designed to outlaw. We want workers and managers participating in these programs to be able to do so effectively, with gains for both, without skirting or breaking the law.

In light of the increased supervisory and managerial role of employees in American industry, the Commission also supports reducing the exclusion of supervisors and managers from the coverage and protection of the NLRA. We want to guarantee that workers engaged in collective bargaining or considering unionization do not lose the protection of the law for their union activity because of their involvement in supervisory or managerial activities.

These considerations motivate the recommendations in this section.

2. RECOMMENDATIONS

(1) Facilitate the Growth of Employee Involvement

The Commission recommends that nonunion employee participation programs should not be unlawful simply because they involve discussion of terms and conditions of work or compensation where such discussion is incidental to the broad purposes of these programs.

We believe that programs of the types referrred to above, which are proliferating in the U.S. today, do not violate the basic purposes of Section 8(a)(2). Therefore we recommend that Congress clarify Section 8(a)(2) and that the NLRB interpret it in such a way that employee participation programs operating in this fashion are legal.

The Commission is concerned that in encouraging employee participation in nonunion settings, it does not adversely affect employees' ability to select union representation, if they so desire.

Thus, the Commission reaffirms the basic principle that

employer-sponsored programs should not substitute for independent unions. Employee participation programs are a means for employees to be involved in some workplace issues. They are not a form of independent representation for employees, and thus should not be legally permitted to deal with the full scope of issues normally covered by collective bargaining. <Footnote: The law should continue to prohibit commmittees like the one Polaroid Corp. disbanded in June, l992 after the Labor Department suggested that it was -labor organization.- Such joint groups are representative in character and count among their primary functions handling employee grievances and advising senior management about pay, work rules and benefits. They so well beyond incidental involvement in issues traditionally reserved to independent labor organizations. See Fact Finding Report, pp. 42, 60>

.

(2) Continue to Ban Company Unions

The law should continue to prohibit companies from setting up company dominated labor organizations. It should be an unfair labor practice under NLRA Section 8(a)(1) for an employer to establish a new participation program or to use or manipulate an existing one with the purpose of frustrating employee efforts to obtain independent representation.

We believe this recommendation is consistent with current law.<Footnote: See NLRB v. Exchange Parts Co., 375 U.S. 405 (1964).>

Employees involved in employee participation committees or processes should have the same protections in law from retaliation for expressing their opinions on workplace issues as workers involved in union activity under the NLRA. They should have the right to communicate their views to employers or co-workers and be able to seek outside expertise on issues, if they so desire. The Commission believes that current law provides protection against reprisals for such -concerted activities for the purpose of ... mutual aid or protection-, as the NLRA calls it.<Footnote: See NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).> But to the extent that doubts exist about its scope, the Commission believes this protection should cover a worker's activities related to an employee participation program.

Employee involvement systems are somewhat more frequent under collective bargaining than in other settings. In the Workplace Representation and Participation Survey, 33

percent of unionized employees reported that they were involved in a participation program, compared to 28 percent of nonunion employees. In its Fact Finding phase, the Commission heard testimony that employee participation is most effective in a union setting when union and management work together as joint partners. All who testified agreed that it is important for union and management representatives to continue to work together in this fashion to extend the scope, coverage, and effectiveness of employee participation in the future.

In view of this experience, in organized workplaces it is important that employers not be permitted to bypass collective bargaining representatives to institute employee involvement committees or processes. Issues normally dealt with in collective bargaining should not be discussed in employee involvement programs without the consent of the elected labor organization. The Commission recommends that it should be an unfair labor practice under NLRA Section 8(a)(1) for an employer to bypass the union or to introduce or manipulate an employee participation program to subvert the collective bargaining process. We believe this recommendation is consistent with current law.

The recommendations clarifying Section 8(a)(2), the distinction between employee involvement programs and unions, the protections afforded workers in participation programs, and the functions of these programs compared to unions will by themselves improve the climate for these programs to proliferate. The safeguards against company-dominated unions under Section 8(a)(2), and the recommendations obtained in Section III for reducing conflict and delay in establishing unions where employees so desire should mutually reinforce one another, so that the law eases the creation of employee involvement programs without harming employee freedom to unionize. This balance is essential.

(3) Reduce the Scope of the Supervisory and Managerial Exclusions

Congress should simplify and restrict the supervisory and managerial employee exclusions of the NLRA to ensure that the vast numbers of professionals and other workers who wish to participate in decision-making at work are not stripped of their right to do so through collective bargaining if they so choose.

Each of the two exclusions embodies a core principle that must be preserved. Employees whose primary function is to

carry out the employer's labor relations policy by hiring, firing, and disciplining employees are clearly supervisors and should continue to be excluded from the Act. Employees near the top of the firm's managerial structure who have substantial, individual discretion to set major company policy and whose primary function is to develop such policy are clearly managerial employees and should also continue to be excluded.

These two principles should be incorporated into a single, simplified -managerial employee- definition that includes statutory supervisors and managers but not (1) members of work teams and joint committees to whom managerial and/or personnel decision-making authority is delegated or (2) professionals and para-professionals who direct their less skilled co-workers.

One aspect of employee involvement is the diffusion of supervisory and managerial decision-making power throughout the workforce. Both work teams and joint committees often decide matters traditionally left to full-time supervisors or managers. The Commission believes that this development should be encouraged.

Unfortunately, the labor law has not accommodated this change in the real world of work. The law continues to draw rigid distinctions between supervisors and managers on the one hand, and -employees- covered by the NLRA on the other. Supreme Court jurisprudence has contributed to this problem.<Footnote: See NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); NLRB v. Yeshiva University, 444 U.S. 672 (1980); NLRB v. Health Care & Retirement Corp. of America, 114 S.Ct. 1778 (1994).>

The Court created the managerial employee exclusion, which is not found in the Act itself, and applied it not only to senior managers but also to buyers of parts and materials. <Footnote: NLRB v. Bell Aerospace Co., 416 U.S. 267 (l974> Then, in NLRB v. Yeshiva University, <Footnote: 44 U.S. 672, (l980)> the Court greatly expanded the scope of this managerial employee exclusion by holding that the faculty of Yeshiva University could not be an appropriate bargaining unit because the professors (or at least the bulk of them who participated in faculty decisions) were all managers. Since, like many university and college faculties, they voted on matters such as curriculum, class size, and academic standards, the professors exercised -authority which in any other context unquestionably would be manageri al.- <Footnote:444 U.S. at 686.> The case means that rank and file employees who participate in work teams or joint

committees can lose their right to form an independent union. Indeed, the NLRB interpreted Yeshiva so as to strip union members of their collective bargaining rights þ and their union because they negotiated an employee participation agreement with their employer. <Footnote:College of Osteopathic Medicine & Surgery, 265 N.L.R.B. 295 (1982).>

More recently, in NLRB v. Health Care & Retirement Corp. of America, <Footnote:__ U.S. __, 114 S.Ct. 1778 (1994).> the Supreme Court expanded the statute's supervisory employee exclusion. The Court effectively read out of the Act a requirement that, in order to be deemed a supervisor, an employee must carry out one of several functions -in the interest of the employer.- The NLRB had used the statute's -in the interest of the employer- test to separate out workers who direct others based on superior skill, experience and the like from true supervisors those whose main function is to direct the work of others (or hire, fire, and so forth) for the employer. The Court declared that all -acts within the scope of employment or on the authorized business of the employer are in the interest of the employer.- <Footnote: 114 S.Ct. at 1782.> In practice, this could mean that any employee who responsibly directs co-workers is a supervisor denied protection of the labor law.

The Health Care case could adversely affect professionals in particular. Congress has specified that professionals are to enjoy the protections of the NLRA. Yet, as Judge Richard Posner has pointed out, -most professionals have some supervisory responsibilities in the sense of directing another's work þ the lawyer his secretary, the teacher his teacher's aide, the doctor his nurses, the registered nurse her nurse's aide, and so on..- <Footnote:NLRB v. Res-Care, Inc., 705 F.2d 1461, 1465 (7th Cir. 1983).> In the Supreme Court's view, incidental direction of co-workers would appear to make one a -supervisor- who lacks collective bargaining rights. As Justice Ginsburg noted in dissent, -[i]f any person who may use independent judgment to assign tasks to others or direct their work is a supervisor, then few professionals employed by organizations subject to the Act will receive its protections.-<Footnote:114 U.S. at 1792-93.>

These Supreme Court cases fail to take into account the degree to which supervisory and managerial tasks have been diffused throughout the workforce in many American firms. As a result of the Court's interpretations, thousands of rank-and-file employees have lost or may lose their

collective bargaining rights. The Commission believes the law can and should accommodate the desires of professionals and other employees to participate at work þ whether they desire to do so via independent representation or otherwise. <Footnote: The Commission also advocates relaxing the restrictions placed on the ability of plant guards to participate in collective bargaining by Section 9(b)(3) of the NLRA, which precludes guards or a local union of guards from affiliating -directly or indirectly with an organization which admits to membership ... employees other than guards.- While separate bargaining units and locals are appropriate, preventing affiliation with an established international union or federation of unions is an unnecessary limitation.

Another problem is that the scope of the -guard- definition has grown in NLRB jurisprudence over the years, to the point that elevator operators, concierges, and doormen are often held to be guards.>

(4) Authorize Pre-hire Agreements

When an employer wants to move or open new operations, it should be allowed to negotiate a contract with a union interested in representing those who will work at the new operations, as long as the negotiations are conducted at arm's length. The employer should be allowed to recognize the union. In order to ensure that the employees covered under the new agreement support it, the union should be required to demonstrate majority support by the end of the first year of the new operations, or else the agreement and the union's status as representative would expire at that time. The parties would be allowed to verify the union's majority status either by card check or representation election. The agreement should not serve as a contract bar.

Section 8(a)(2) continues to serve the vital function of precluding -sweetheart- deals between employers and unions that do not represent a majority of employees. Such deals frustrate employee free choice by taking out of workers' hands the decision about whether to have independent representation. The policy of generally disallowing employer recognition and support of non-majority unions remains valid.

However, the Commission is concerned that this policy may operate in an unduly mechanical way. The problem is that the rule against employer support of non-majority unions limits the ability of an employer and a union to cooperate

when the employer plans to move or open new operations. The occasion of new or relocated operations often presents an opportunity for innovative cooperation between employers and unions around issues of work organization, employee compensation and productive efficiency.

Such agreements not only improve labor-management relations, they also help all of us by facilitating the diffusion of high-performance work techniques. In addition, advance negotiations can increase rather than decrease the quality of employee choice about collective bargaining. In effect, a pre-negotiated contract between the employer and an independent union gives the employees an opportunity to try out the union's representation before voting on whether to accept or reject it.

Unfortunately, this kind of cooperative advance planning is severely restricted by Section 8(a)(2). The NLRB has interpreted the measure as prohibiting employer recognition of a union as part of prospective bargaining in most circumstances. What is more, the Board's interpretation forbids advance negotiation of contract terms altogether even without recognition if the employer and union have no previous relationship.<Footnote: Majestic Weaving Co. of N.Y., 147 N.L.R.B. 859 (1964).> We urge the Board to reconsider its approach here, and we recommend that Congress address this issue as part of its next effort to reform our labor laws.

3. CONCLUSION

Employee participation will have to expand to more workplaces if the American economy is to be competitive at high standards of living in the 21st century. Participation must also expand to include more workers and a broader array of issues if it is to meet the expectations and address the vital concerns of the nation's work force. The recommendations presented in this section could modernize labor law to encourage continued innovation in employee participation.

While the proposals in this Section and those that follow are needed in their own right, they are also closely interrelated. This is because the increased flexibility for employee participation proposed here poses both new risks and new opportunities for workers and employers. The risks of reducing employee opportunity to choose independent representation are addressed by the changes presented in Section III. The increased flexibility for employee participation should be accompanied by corresponding changes in the law needed to ensure that workers have ready access

to independent representation and collective bargaining. Expanding the issues open to employee participation also opens possibilities for greater experimentation with employee involvement in alternative dispute resolution and self-governance processes on issues now subject to -command and control- regulation and court litigation. We turn, then, to these issues.

STATEMENT OF DOUGLAS A. FRASER

Section 8(a)(2) stands as a bulwark against forms of representation which are inherently illegitimate because they deny workers the right to a voice through the independent representatives of their own choosing and put the employer on -both sides of the table,- to quote Senator Wagner's words from l935.* Thus, I place great importance on the fact that the Commission has not proposed any wholesale revision or exemption to Section 8(a)(2).

Nonetheless, I cannot join the majority's recommendation that -Congress clarify Section 8(a)(2)- by somehow providing that -employee participation programs should not be unlawful simply because they involve discussion of terms and conditions of work or compensation where such discussion is incidental to the broad purposes of these program.-

The prudent course would be to allow the administrative and judicial processes to address the issue of -incidental discussion- in the first instance. If problems were to develop if, in fact, the law in practice were shown to substantially interfere with the kind of incidental discussions the majority seeks to protect þ Congress could then take up the subject against a far clearer legal and factual background.

In dissenting from the recommendation to amend Section 8(a)(2), I wish to make clear that I do not minimize the value of encouraging -employee participation- and -labor-management cooperation.- But to my mind, the kind of -participation- and -cooperation- that should be encouraged is democratic participation and cooperation between equals. I agree with Peter Pestillo, the Executive Vice President of Ford Motor Company, that -A strong alliance requires two strong members. There should be no quibbling about that.- And I likewise agree with Morton Bahr, the President of the Communication Workers of America, that:

to effectively participate in workplace decision-making, front-line workers must first have their own organizations,

educated leadership, and significant resources in order to have the confidence and preparation to participate as equals and without fear. {Sept. l5, l993 Tr. at 63}

Because I am deeply committed to the principal of work place democracy, I cannot join in any statement that proclaims that you can have fully effective worker management cooperation programs without having a truly equal partnership based upon workers having an independent voice. I must therefore dissent.

DISSENTING OPINION OF DOUGLAS A. FRASER

(January 3, 1995)
Section 8(a)(2) stands as a bulwark against forms of representation which are inherently illegitimate because they deny workers the right to a voice through the independent representatives of their own choosing and put the employer on -both sides of the table,- to quote Senator Wagner's words from l935.* Thus, I cannot join in the majority's recommendation that "Congress clarify Section 8(a)(2)" by somehow providing that "employee participation programs should not be unlawful simply because they involve discussion of terms and conditions of work or compensation where such discussion is incidental to the broad purposes of these programs."

Given the legal and factual uncertainties that exist as to the scope of 8(a)(2), and the danger that any statutorily-created exception would be an invitation to abuse, at the very least the prudent course would be to allow the administrative and judicial processes to address the issue of "incidental discussion" in the first instance. If problems were to develop -- if, in fact, the law in practice were shown to substantially interfere with incidental discussions of terms of employment -- Congress could then take up the subject against a far clearer legal and factual background.

In no event, should employer-dominated employee representation plans be permitted merely because they are limited to dealing with specified subjects such as safety and health or training. Employer-dominated representation is undemocratic regardless of the particular subjects with which the employer-controlled representative deals.

In dissenting from the recommendation to amend Section 8(a)(2), I wish to make clear that I do not minimize the value of encouraging -employee participation- and -labor-management cooperation.- But to my mind, the kind of -

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Because I am deeply committed to the principal of work place democracy, I cannot join in any statement that proclaims that you can have fully effective worker management cooperation programs without having a truly equal partnership based upon workers having an independent voice. I must therefore dissent.

III. Worker Representation and Collective Bargaining

1. GENERAL OBSERVATIONS

(1) The Role of Unions in Society

The preamble to the National Labor Relations Act declares it to be the policy of the United States to `encourage the practices and procedure of collective bargaining and [to] protect ... the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and condition of their employment or other mutual aid or protection.'

The Collective Bargaining Forum, a group of leading corporate chief executives and national labor leaders, reflecting on this policy, has stated:

"The institution of collective bargaining is an integral part of American economic life and has proved capable of helping our society adjust through periods of prosperity and recession. A democratic society must provide workers with effective rights to join and be represented by unions of their own choosing."<Footnote: New Directions for Labor and Management, The Collective Bargaining Forum, Washington, D.C.: U.S. Department of Labor, 1988.>

Unions contribute to the economic health of the nation by `leveling the field between labor and management,' as Senator Orrin Hatch has stated. `If you didn't have unions,' Senator Hatch continued," it would be very difficult for even enlightened employers to not take advantage of workers on wages and working conditions because of rivals."<Footnote: Business Week, May 23, l994, p.70.> Indeed, as we noted in the Fact Finding Report, and as the President's Council of Economic Advisors also has concluded, the recent decline in the proportion of workers represented by unions has `contributed to the rise in inequality' in the United States.

Unions likewise contribute to the political health of the nation by providing a legitimate and consistent voice to working people in the broader society. As former Secretary of State George P. Shultz has stated, `free societies and free trade unions go together.' Societies that lack a vibrant labor movement which will `really get up on its hind legs and fight about freedom' are sorely wanting.<Footnote: Quoted in Leonard Silk, New York Times, Dec. 13, 1992, p.

D2. >

The import of the worst features of political campaigns into the workplaces by managers and unions creates confrontation and is not conducive to achieving the goals outlined in Section I. The Commission remains persuaded that, as we said in our Fact Finding Report, `All participants -- employees, management, and unions - would benefit from reduction in illegal activity and de-escalation of a conflictual process that seems out of place with the demands of many modern workplaces and the need of workers, their unions, and their employers.' (p. 141)

The Commission cannot hope to do more than propose first steps on the necessary road to achieving a new direction and approach to labor-management relations. The process of change will require a long, sustained effort. But we believe that American society -- management, labor, and the general public -- does support the principle that workers have the right to make a free, uncoerced and informed choice as to whether to join a union and to engage in collective bargaining. Our recommendations seek to, as we said at the outset, `turn down the decibel count' and to effectuate this fundamental principle of our democracy.

(2) Established Collective Bargaining Relationships

Not all aspects of collective bargaining are in need of repair. The Fact Finding Report concluded that `In most workplaces with collective bargaining, the system of labor-management negotiations works well' (p.64). Mr. Howard Knicely, speaking for the Labor Policy Association, would elevate this observation to a principal finding: `collective bargaining where it exists, is working very well.'

The majority of managers and workers with experience under collective bargaining agree with this assessment. Both the Worker Representation and Participation Survey and others before it report that about 90 percent of union members would vote to retain their membership if asked. Approximately 70 percent rate their experience with their union as good or very good. Sixty-four percent of the managers surveyed agreed that the union in their companies makes the work lives of its members better. When asked how the union relationship affects their companies, managers' views vary considerably. Twenty-seven percent believe the union helps their company's performance; 38 percent believe it hurts performance, and 29 percent believe the union neither helps nor hurts organizational performance. By a

two to one margin (32 to 16 percent) managers report that in recent years their relations with unions have become more cooperative rather than confrontational.

In general, though there are notable exceptions, collective bargaining appears to be adapting to its changing economic and social setting. Work stoppages have declined significantly, many grievance procedures are experiencing more settlements through informal discussions or mediation without resort to arbitration. The AFL-CIO's February 1994 report, The New American Workplace: A Labor Perspective,<Footnote: The New American Workplace: A Labor Perspective, AFL-CIO, Washington, D.C., February, 1994.> is a significant statement endorsing workplace cooperation and labor-management partnerships.

A number of collective bargaining agreements in 1994 extend the frontiers of labor-management partnerships to new issues, new levels of decision-making, and new workers. Among the more notable recent examples are the Levi-Strauss and Amalgamated Clothing and Textile Worker agreement governing manufacturing innovations in union and non-union facilities, the Bath Iron Works and International Association of Machinists agreement providing for significant restructuring of jobs, training, and pay systems among multiple trades, and the NYNEX and Communications Workers of America agreement that provides for voluntary procedures governing the organizing of new work units and the negotiation and arbitration of initial contracts.

Innovations such as these need to be encouraged and extended to more bargaining relationships. But additional changes will be needed in the attitudes and policies of many labor organizations and managers if the goals of the workplace of the future outlined in Section I are to be achieved. One area in need of greater focus is the responsiveness of workplace practices to the needs of working women. A large scale survey of working women published by the Women's Bureau of the Department of Labor in October 1994 reported that, while most women are breadwinners and many are the sole support of their households, `they are not getting the pay and benefits commensurate with the work they do, the level of responsibility they hold, or the societal contribution they make.'<Footnote: Working Women Count, The Women's Bureau, U.S. Department of Labor, 1994, p. 5.See, the testimony of Susan Bianchi-Sands and associates on July 25, 1994, and Judith L. Lichtman and a panel of women's organizations and Gloria Johnson for the AFL-CIO and the Coalition of Union Women on September 29, 1994.>

Collective bargaining will need to continue to evolve and adapt in the future as the diversity of the workforce increases in terms of gender, race, ethnic background, education, and location of work. The Women's Bureau Survey, the Worker Representation and Participation Survey, and many others document the desire of workers for more say over a wide range of workplace issues as well as a desire for cooperative rather than conflictual processes for addressing their concerns.

It is in the national interest to encourage continued growth in the range of issues and workplaces governed by cooperative labor-management partnerships. The Commission believes that existing collective bargaining relationships are progressing in this direction, and considers it important that new bargaining relationships achieve this same level of cooperation and effectiveness as soon as possible.

(3) New Collective Bargaining Relationships<Footnote: For the detailed policy proposals of representatives of labor organizations and managements, see the transcript of September 8, l994 including the statement, `Recommendations of the AFL-CIO to the Commission on the Future of Worker-Management Relations Concerning Changes in the National Labor Relations Act and Related Laws,' (28 pages).>

The Fact Finding Report of the Commission documented the findings of the Commission (pp. 77-79) with respect to new organizing situations.

1. American society -- management, labor, and the general public -- supports the principle that workers have the right to join a union and to engage in collective bargaining if a majority of workers so desire.

2. Representation elections as currently constituted are highly conflictual for workers, unions, and firms. This means that many new collective bargaining relationships start off in an environment that is highly adversarial.

3. The probability that a worker will be discharged or otherwise unfairly discriminated against for exercising legal rights under the NLRA has increased over time. Unions as well as firms have engaged in unfair labor practices under the NLRA. The bulk of meritorious charges are for employer unfair practices.

4. Consistent with other surveys reported earlier, the

Worker Representation and Participation Survey found that 32 percent of unorganized workers would vote to join a union if an election were held at their workplace. Eighty-two percent of those favoring unionization (and 33 percent of all non-union workers) believe a majority of their fellow employees would vote to unionize.

5. Roughly a third of workplaces that vote to be represented by a union do not obtain a collective bargaining contract with their employer.

Together these facts document the need to improve the process by which workers decide whether or not to be represented at the workplace and engage in collective bargaining.<Footnote: The Commission considered a proposal to increase the NLRA's jurisdictional floors in view of the substantial increase in wages and prices since the floors were set in the statute in 1959. The Commission raised this issue by letter with each major business organization and the AFL-CIO. Most of the organizations that responded opposed increasing the jurisdictional amounts.>

2. RECOMMENDATIONS

The Commission believes that several revisions in the laws governing the representation process will render employee decisions about whether to engage in collective bargaining simpler, more timely, and less conflictual, thus making this institution more accessible to those employees who want it. Here is what we recommend:

1. Representation elections should be held before rather than after legal hearings about issues such as the scope of the bargaining unit. The elections should be conducted as promptly as administratively feasible, typically within two weeks.

2. The injunctions provided for in section 10(l) of the Act should be used to remedy discriminatory actions against employees that occur in organizing campaigns and first contract negotiations.

3. Employers and newly certified unions should be assisted in achieving first contracts by a substantially upgraded dispute resolution program. The program should feature mediation and a tripartite advisory board empowered to implement options ranging from self-help (strikes or lockouts) to binding arbitration for the relatively few disputes that warrant it.

(1) Prompt Certification Elections

The Commission's Fact Finding Report confirmed that the process by which workers decide whether or not to engage in collective bargaining is among the most contentious aspects of American labor relations. In order to have a union certified as their representative, American workers must seek an NLRB election to determine whether a majority of an appropriate bargaining unit wishes to be represented by the union. Before holding an election, the Board must address legal issues raised by the employer and union, most importantly, the scope of the bargaining unit, and inclusion or exclusion of particular employees therein. Either party has a right to a formal hearing on these matters, which causes a substantial delay. NLRB General Counsel Frederick Feinstein told the Commission that the automatic available it of such hearing procedures means that a party seeking delay `can safely assume' that it will be able to push an election back three to six months. In practice, it takes an average of seven weeks for workers to secure a vote from the time their petition is filed.

During this time, the union and employer typically face off in a heated campaign. The government has been hesitant to regulate the two sides too closely during these contests in order to preserve the parties' freedom of speech. Both sides often hurl allegations, distortions, and promises that poison the relationship and make it difficult to achieve a collective bargaining agreement in cases where the workers vote to unionize. The Fact Finding Report revealed that in recent decade's employer unfair labor practices during these campaigns have risen: both in terms of the ratio of unfair labor practice charges against employers to the number of elections and the percentage of such charges found to have merit. In particular, discharges of union activists are up: the data show that improper dismissals occur in one of every four elections. American workers are afraid of this prospect: 79 percent say it is likely that employees who seek union representation will lose their jobs, and 41 percent of nonunion workers say they think they might lose their own jobs if they tried to organize. This fear is no doubt one cause of the persistent unsatisfied demand for union representation on the part of a substantial minority of American workers. The Worker Representation and Participation Survey reported that 32 percent of nonunion workers would vote for a union and think their co-workers would too.

The Commission believes the NLRB should conduct representation elections as promptly as administratively feasible. A lengthy, political-style election campaign serves no useful purpose in the labor-management context. Each side would continue to have ample time to express its views if the process were much shorter. Furthermore, much of the conflict that mars the election process would be eliminated if the process was shortened, which would set the stage for a more cooperative employer-union relationship if the employees voted in favor of collective bargaining.

The requirement that the Board hold pre-election legal hearings prevents it from expediting the election process in a significant way. General Counsel Feinstein, who has initiated a major effort to conduct elections more promptly, testified that the best he can hope for under current law is to hold most elections within seven weeks and all elections within eight weeks. The Commission considers this inadequate. We conclude that the Board should conduct elections as promptly as administratively feasible, typically no later than two weeks after a petition is filed. To accomplish this, the Board must hold inquiries and hearings on contested issues after the election (with any disputed ballots sealed in the interim). The Commission has been assured by the NLRB that it would be perfectly feasible as a logistical matter to conduct the vast majority of elections in less than two weeks, as long as the appropriate changes are made in the governing law and the Board reorganizes its staff and resources to undertake this important task.<Footnote: The NLRB is in the process of deciding whether it may conduct pre-hearing elections on its own authority. The Commission takes no position on this legal question of the Board's authority.>

Such a change would not only facilitate prompt elections and eliminate a major locus of labor-management conflict, it would also afford substantial administrative savings. Currently, many Board hearings are held despite the absence of significant legal issues, simply because one of the parties seeks a tactical advantage. There are two principal tactical reasons why parties demand hearings. The first is to give one party an advantage in the election by excluding or including particular employees based on how they are likely to vote. The need for such hearings would be reduced under our proposal because a party that would seek a pre-vote hearing under the current system in order to gain a bargaining unit more likely to vote its way would not be interested in a post-election hearing as long as it either (1) won the election or (2) lost it by a margin greater than the number of disputed voters it had hoped to include.

The second tactical reason parties seek hearings is to delay the election in order to increase their chances of a favorable outcome. The Commission believes that a system is poorly designed if it gives parties an incentive and opportunity to seek delay for its own sake. Hearings motivated by a desire to delay the election would obviously be eliminated altogether in a system that allowed hearings only after the election had taken place.

The simple design change of holding prompt elections, before rather than after certification hearings, is pivotal to our recommendations for improving the representation process. In addition to reducing delay and conflict, this reform would diminish the need for government regulation of the labor-management relationship and make the government more customer-friendly. The NLRB would be more customer-friendly because employees seeking elections would get them quickly, without a spate of confusing litigation, and usually with much less conflict between the union and the employer. As for regulation, in addition to eliminating the need for many hearings, as described above, pre-hearing elections would reduce the need for oversight of the parties' conduct during the election campaign. Such regulation has always been extremely controversial because it involves property and speech rights. The need for it is diminished to the extent that a protracted election campaign and concomitant pitched battle between the antagonists are cut down to a reasonable size.

We encourage employers and unions who desire a cooperative relationship to agree to determine the employees' majority preference via a `card check.' Card checks are particularly appropriate vehicles for enhancing worker-management cooperation when a union already represents part of an employer's workforce and the parties seek a non-conflictual way to determine whether additional employees want that same form of representation. Card check agreements build trust between union and employer and avoid expending public and private resources on unnecessary election campaigns. Such agreements are a classic example of potential or former adversaries creating a win-win situation for themselves. The opportunity to gain representation rights via a simple majority sign-up gives the union an incentive to cooperate with the employer to make the workplace more efficient. In return, the employer gains the cooperation of the employee representative as partner in efforts to improve productivity and flexibility, and often improved morale and reduced turnover as well.

(2) Timely Injunctive Relief for Discriminatory Actions

The Fact Finding Report identified several areas of concern about the tools available to the NLRB to remedy violations of the Act. The Board can obtain injunctions against unions (for organizational or secondary boycotts) far more easily and swiftly than it can against employers, particularly for discriminatory discharges of union supporters. In general, the remedies the Board may prescribe against employers are remedial and reparative rather than deterrent, and the sanctions against employers for violating labor law are far weaker than analogous penalties for breaking other federal employment statutes. The increase in discriminatory discharges documented in the Fact Finding Report indicates that the remedies available to the Board do not provide a strong enough disincentive to deter unfair labor practices of some employers during certification elections and first contract campaigns.

The Commission believes expedited injunctive relief offers a first step toward improving compliance with the Act. In our judgment, this is not only the most effective, least litigious, and least costly path, it will also complement the holding of representation elections as promptly as administratively feasible. The combination of prompt elections and immediate injunctive relief against discriminatory actions would eliminate much of the incentive for engaging in discriminatory behavior. An injunction not only undoes the harm caused by the illegal act, but also weakens the position of the discriminator by making it look bad and the other side look effective in the eyes of the employees. The Commission believes this `backfire' effect would provide the greatest disincentive for wrongdoing.

Under current law the Board has two principal sources of authority for seeking injunctions: NLRA sections 10(j) and (l). Only the slower and weaker of these two provisions, section 10(j), is available to remedy the general range of employer and union unfair labor practices. The swift, automatic, and thus more effective section 10(l) applies only to certain union-side violations. Section 10(l) is the more powerful instrument for two principal reasons: (1) it is mandatory, whereas section 10(j) is discretionary; (2) it is faster, both because it is triggered by an unfair labor practice charge whereas section 10(j) requires a formal unfair labor practice complaint, and because the Board must give section 10(l) cases `priority over all other cases.' As a result of these differences, NLRB General Counsel Feinstein told the Commission that section 10(l) cases take the Board five days to process, whereas section 10(j) cases

take 65 days or more just to get into court, let alone to secure an injunction from the judge.

The Commission recommends that Congress make section 10(l) injunctive relief available not only to employers harmed by union secondary boycotts, but also to employees who are victims of employer discriminatory actions from the beginning of an organizing effort to the signing of a first contract. The timely use of injunctions in these situations will help abate many of the problems the Commission was instructed to address. Most obviously, injunctions that can be obtained within days rather than months will reduce delay. Quick resolution of unfair labor practice charges during the crucial election and first contract period will also increase labor-management cooperation by preventing disputes from starting and then festering. Prompt injunctive relief will remove the coercive effect on employee free choice. The increased efficacy of this remedy will deter discriminatory behavior as well as rectify it, and will increase respect for the NLRB among the general public and its primary constituency -- American workers.

(3) Resolution of First Contract Disputes

The Commission believes that once a majority of workers has voted for independent union representation for purposes of collective bargaining, the debate about whether a bargaining relationship is to be established should be over. At this point, the parties' energies and the public's resources should turn to creating an effective ongoing relationship that is suited to the needs of their workplace. Every effort should be made to ensure that a satisfactory agreement is concluded and that the process used to reach that agreement leads to the development of a cooperative bargaining relationship.

The Fact Finding Report noted that one-third or more of certified units fail to reach a first contract, and that strikes taking place in first contract negotiations tend to be longer and to result in fewer settlements than strikes occurring in established bargaining relationships. Moreover, evidence from studies presented to the Commission document that the probability of achieving a first contract is reduced in settings where unfair labor practices or other hard bargaining tactics are carried over from the election campaign into the contract negotiation process. Clearly, improvements in the effectiveness of the first contract negotiation process are called for.

However, in developing a proposal one must guard against

reducing the parties' incentives to negotiate a realistic agreement. Care should be taken to avoid any chance that unworkable or harmful terms are imposed on the parties by a neutral who is uninformed about the issues or unaccountable to the parties or the public. Several witnesses pointed out to the Commission that negotiations sometimes fail because one side or the other holds out for numerous, unrealistic proposals. The process must encourage parties to reach their own agreements, accept the possibility that a strike or lockout may be the most appropriate way to address unrealistic expectations or demands, and allow for the use of arbitration if in the judgment of experienced and respected professionals this is the best way to assure that an initial agreement will be achieved.

The Commission received a number of proposals for improving the first contract negotiation process. Some witnesses suggested that arbitration be required of all first contract disputes that remain unresolved after a specified period of time. Others proposed requiring arbitration if the NLRB finds one of the parties to be bargaining in bad faith or engaged in other unfair labor practices. The Commission finds both of these options unsatisfactory. The first would reduce the incentives of the parties to negotiate on their own. The second suffers from severe administrative difficulties, because NLRB procedures for determining whether or not bad faith bargaining has occurred are already time consuming and would be newly taxed if arbitration became available as a remedy. Moreover, it is often difficult to determine whether a violation of good faith bargaining law has occurred, as opposed to permissible hard bargaining about the issues. Most important, the Commission believes that if worker-management cooperation is to be increased, the focus must shift from determining blame and assessing punishment to facilitating agreement wherever possible.

The Commission offers the following as a first contract dispute resolution system that meets the above objectives. An employer and newly certified union would have early access to the services of the Federal Mediation and Conciliation Service or private mediation. A tripartite First Contract Advisory Board would be established to review disputes not settled by negotiations or mediation. The Advisory Board would be empowered to use a wide range of options to resolve disputes, including referring them back to the parties to negotiate with the right to strike or lockout, further mediation or fact finding, or use of arbitration in the form that is judged to be best suited to the circumstances of the particular case. The

`certification year' (in which the union's majority status is presumed) would begin when the Advisory Board decides which course to take.

Making arbitration available in first contract cases is crucial to the overall representation system. The Commission believes it will be necessary to invoke arbitration only rarely, but the prospect of its use in situations where one side or the other has been recalcitrant in negotiations will motivate the parties to reach mutually acceptable compromises. Maximizing the number of such voluntary agreements is the goal of any dispute resolution system, and is vitally important at this stage in the development of an enduring and cooperative labor-management relationship.

(4) Employee Access to Employer and Union Views on Independent Representation

The Commission received many proposals to modify current rules governing employee access to employer and union views on collective bargaining. We affirm the important role such access plays in employee decision-making about collective bargaining. It is a central tenet of U.S. labor policy that employees should be free to make an informed and uncoerced choice as to whether or not they wish independent representation at work. The `effectiveness' of that right, as the Supreme Court has stated, `depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others."<Footnote: Central Hardware Co. v. NLRB, 407 U.S. 539, 543 (l972).>

The Commission is aware that there is an imbalance in this area. The ability of employers to present their views to employees is assured at the workplace. Employers have daily contact with employees and are free to express their views from the date of hire. Employers may distribute written material to their employees and post materials in the workplace. Employers also may require employee attendance at so called `captive audience' meetings to hear the employer's point of view. In addition, the employer may devote as much work time as it desires to supervisory activity advising employees about the employer's position, including one-on-one or small group meetings between supervisors and employees. Indeed, supervisors who refuse to participate in the company's campaign against union representation for the employees may be discharged for their refusal.

By contrast, employees have little access to the union at

work -- the one place where employees naturally congregate. Union representatives are typically excluded from the worksite altogether and are all but uniformly excluded from the meetings held by the employer. Even non-working areas which are accessible to the general public -- such as parking lots or cafeterias -- are off-limits to the union organizer.

In order to make up for these restrictions, the union is given a list of employee names and addresses so it can contact workers at home. But the names of the constituents the union seeks to represent become available only if the union is able to achieve the 30 percent level of support necessary to secure an election, and then only 10-20 days before the election (in what typically is a fifty-day campaign). Efforts to communicate with workers when they leave the worksite and disperse into the community are far more costly and far less likely to succeed in reaching the workforce than worksite communications. As the Supreme Court has stated, the workplace is `a particularly appropriate place' for work-related communications `because it is the place where employees clearly share common interest and where they additionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.' <Footnote: Eastex, Inc. v. NLRB, 437 U.S. 556, 574 (l978).>

The Commission has come to the conclusion that, as Professor Matthew Finkin testified, `the law should allow the widest practicable dissemination to employees of their statutory rights and of the availability of representation. It does not.' However, we are also cognizant of the difficulty of regulating the access issue.

As a first step, Congress should reverse the Supreme Court's decision in Lechmere v. NLRB<Footnote: 112 S.Ct. 841 (1992).> so that employees may have access to union organizers in privately-owned but publicly-used spaces such as shopping malls. It runs counter to our democratic traditions to bar advocates of independent union representation from these areas. What is more, in practice Lechmere harms not only advocates for unions but also those of other causes, because of the way this decision interacts with the other legal requirement that the employer can not have discriminatory solicitation rules. This means that, in order to keep union representatives from having contact with employees, many mall owners have barred groups like the Salvation Army and the Girl Scouts as well. Congress should make it clear that labor groups and others have a right of

access to this form of `public-private' space, which has taken over the role of Main Street in so many American communities.

Further revisions of the rules relating to access are best left to the considered judgment of the NLRB. We note that the Board has significant leeway in this area, and has not visited it in a fundamental way in three decades.<Footnote: See General Electric Co., 156 N.L.R.B. 1222 (1966).> We encourage the Board to examine its current practice carefully to determine the extent to which it provides employees a fair opportunity to hear a balanced discussion of the relevant issues. Should the prompt election system we recommend be enacted, the Board may need to tailor the access rules to fit new circumstances. In any event, we urge the Board to strive to afford employees the most equal and democratic dialogue possible.

(5) Conclusion

Employee freedom of choice about whether to have independent union representation for purposes of collective bargaining remains one of the cornerstones of a flexible system of worker-management cooperation in our democratic society, whatever portion of the workforce decides to avail itself of this form of participation. A labor relations environment marked by prompt, pre-hearing elections, effective injunctive relief for discriminatory reprisals in the representation process, and flexible dispute resolution of first contract negotiations, including arbitration where necessary, will provide American workers greater freedom to choose collective bargaining if that is what they want. Taking these steps is an integral part of an effort to reduce conflictual relations and to reform the regime governing workplace participation. Employee free choice about independent union representation serves both as guarantor of the integrity of employee involvement plans in non-union facilities and as a voluntary worker-management alternative to direct federal regulation of the employment relationship.

Commission on the Future of Worker-Management Relations

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SUPREME COURT OF THE UNITED STATES

STANDING AKIMBO, LLC, ET AL., *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 20-645. Decided June 28, 2021

The petition for a writ of certiorari is denied.

Statement of JUSTICE THOMAS respecting the denial of certiorari.

Sixteen years ago, this Court held that Congress' power to regulate interstate commerce authorized it "to prohibit the local cultivation and use of marijuana." *Gonzales* v. *Raich*, 545 U. S. 1, 5 (2005). The reason, the Court explained, was that Congress had "enacted comprehensive legislation to regulate the interstate market in a fungible commodity" and that "exemption[s]" for local use could undermine this "comprehensive" regime. *Id.*, at 22-29. The Court stressed that Congress had decided "to prohibit *entirely* the possession or use of [marijuana]" and had "designate[d] marijuana as contraband for *any* purpose." *Id.,* at 24-27 (first emphasis added). Prohibiting any intrastate use was thus, according to the Court, "'necessary and proper'" to avoid a "gaping hole" in Congress' "closed regulatory system." *Id.,* at 13, 22 (citing U. S. Const., Art. I, §8).

Whatever the merits of *Raich* when it was decided, federal policies of the past 16 years have greatly undermined its reasoning. Once comprehensive, the Federal Government's current approach is a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana. This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary.

This case is a prime example. Petitioners operate a med-

ical-marijuana dispensary in Colorado, as state law permits. And, though federal law still flatly forbids the intrastate possession, cultivation, or distribution of marijuana, Controlled Substances Act, 84 Stat. 1242, 1247, 1260, 1264, 21 U. S. C. §§802(22), 812(c), 841(a), 844(a),[1] the Government, post-*Raich*, has sent mixed signals on its views. In 2009 and 2013, the Department of Justice issued memorandums outlining a policy against intruding on state legalization schemes or prosecuting certain individuals who comply with state law.[2] In 2009, Congress enabled Washington D. C.'s government to decriminalize medical marijuana under local ordinance.[3] Moreover, in every fiscal year since 2015, Congress has prohibited the Department of Justice from "spending funds to prevent states' implementation of their own medical marijuana laws." *United States* v.

McIntosh, 833 F. 3d 1163, 1168, 1175-1177 (CA9 2016) (interpreting the rider to prevent expenditures on the prosecution of individuals who comply with state law).[4] That policy

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[1]A narrow exception to federal law exists for Government-approved research projects, but that exception does not apply here. 84 Stat. 1271, 21 U. S. C. §872(e).

[2]See Memorandum from Dep. Atty. Gen. to Selected U. S. Attys., Investigations and Prosecutions in States Authorizing the Medical Use ofMarijuana (Oct. 19, 2009); Memorandum from Dep. Atty. Gen. to All U. S. Attys., Guidance Regarding Marijuana Enforcement (Aug. 29, 2013). In 2018, however, the Department of Justice rescinded those and three other memorandums related to federal marijuana laws. Memorandum from U. S. Atty. Gen. to All U. S. Attys., Marijuana Enforcement (Jan. 4, 2018). Despite that rescission, in 2019 the Attorney General stated that he was " 'accepting the [2013] Memorandum for now.' " Somerset, Attorney General Barr Favors a More Lenient Approach to Cannabis Prohibition, Forbes, Apr. 15, 2019.

[3]See Congress Lifts Ban on Medical Marijuana for Nation's Capitol, Americans for Safe Access, Dec. 13, 2009.

[4]Despite the Federal Government's recent pro-marijuana actions, the Attorney General has declined to use his authority to reschedule marijuana to permit legal, medicinal use. *E.g., Krumm* v. *Holder*, 594 Fed. Appx. 497, 498-499 (CA10 2014) (citing §811(a)); Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53688

has broad ramifications given that 36 States allow medicinal marijuana use and 18 of those States also allow recreational use.[5]

Given all these developments, one can certainly understand why an ordinary person might think that the Federal Government has retreated from its once-absolute ban on marijuana. See, *e.g.,* Halper, Congress Quietly Ends Federal Government's Ban on Medical Marijuana, L. A. Times, Dec. 16, 2014. One can also perhaps understand why business owners in Colorado, like petitioners, may think that their intrastate marijuana operations will be treated like any other enterprise that is legal under state law.

Yet, as petitioners recently discovered, legality under state law and the absence of federal criminal enforcement do not ensure equal treatment. At issue here is a provision of the Tax Code that allows most businesses to calculate their taxable income by subtracting from their gross revenue the cost of goods sold *and* other ordinary and necessary business expenses, such as rent and employee salaries. See 26 U. S. C. §162(a); 26 CFR. 1.61-3(a) (2020). But because of a public-policy provision in the Tax Code, companies that deal in controlled substances prohibited by federal law may subtract only the cost of goods sold, not the other ordinaryand necessary business expenses. See 26 U. S. C. §280E. Under this rule, a business that is still in the red after it pays its workers and keeps the lights on might nonetheless owe substantial federal income tax.

As things currently stand, the Internal Revenue Serviceis investigating whether petitioners deducted business expenses in violation of §280E, and petitioners are trying to

(2016).

[5]Hartman, Cannabis Overview, Nat. Conference of State Legislatures (June 22, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx. The state recreational use number does not include South Dakota, where a state court overturned a ballot measure legalizing marijuana. *Ibid.*

prevent disclosure of relevant records held by the State.[6] In other words, petitioners have found that the Government's willingness to often look the other way on marijuana is more episodic than coherent.

This disjuncture between the Government's recent laissez-faire policies on marijuana and the actual operation of specific laws is not limited to the tax context. Many marijuana-related businesses operate entirely in cash because federal law prohibits certain financial institutions from knowingly accepting deposits from or providing other bank services to businesses that violate federal law. Black & Galeazzi, Cannabis Banking: Proceed With Caution, American Bar Assn., Feb. 6, 2020. Cash-based operations are understandably enticing to burglars and robbers. But, if marijuana-related businesses, in recognition of this, hire armed guards for protection, the owners and the guards might run afoul of a federal law that imposes harsh penalties for using a firearm in furtherance of a "drug trafficking crime." 18
U. S. C. §924(c)(1)(A). A marijuana user similarly can find himself a federal felon if he just possesses a firearm. §922(g)(3). Or petitioners and similar businesses may find themselves on the wrong side of a civil suit under the Racketeer Influenced and Corrupt Organizations Act. See, *e.g., Safe Streets Alliance* v. *Hickenlooper*, 859 F. 3d 865, 876-877 (CA10 2017) (permitting such a suit to proceed).

I could go on. Suffice it to say, the Federal Government's current approach to marijuana bears little resemblance to

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[6]In their petition for a writ of certiorari, petitioners contend that the lack of a deduction for ordinary business expenses causes the tax to fall outside the Sixteenth Amendment's authorization of "taxes on incomes." Therefore, they contend the tax is unconstitutional. That argument implicates several difficult questions, including the differences between "direct" and "indirect" taxes and how to interpret the Sixteenth Amendment. Cf. *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 570-571 (2012); *Taft* v. *Bowers*, 278 U. S.

470, 481-482 (1929). In light of the still-developing nature of the dispute below, I agree with the Court's decision not to delve into these questions.

the watertight nationwide prohibition that a closely divided Court found necessary to justify the Government's blanket prohibition in *Raich*. If the Government is now content to allow States to act "as laboratories" "'and try novel social and economic experiments,'" *Raich*, 545 U. S., at 42 (O'Connor, J., dissenting), then it might no longer have authority to intrude on "[t]he States' core police powers . . . to define criminal law and to protect the health, safety, and welfare of their citizens." *Ibid.* A prohibition on intrastate use or cultivation of marijuana may no longer be necessary *or* proper to support the Federal Government's piecemeal approach.

All Aboard

In past issues of the *Advance Sheet,* we have featured material from *The Prisoner At The Bar* (1907), written by Arthur Cheney Train, who was at the time an Assistant District Attorney in New York City. Featured have been chapters on "What Is Crime?", "Who Are The Real Criminals?" and "The Arrest." In this issue we shall take a look at "The Trial Of Misdemeanors."

Arthur Cheney Train was born in Boston in 1875. He was a lawyer and writer of legal thrillers, perhaps best known for his creation of the fictional lawyer Mr. Ephain Tutt. Tutt was featured in a dozen or so novels and roughly twice that many articles in the "Saturday Evening Post." Train wrote both fiction and non-fiction. We thought that you might find it interesting to hear the musings on the subject of the original John Grisham of his times. We hope you enjoy. Please let us know what you think about this or any other material in the *Advance Sheet*.

CHAPTER V

THE TRIAL OF MISDEMEANORS

One of the most efficient, effective, and important criminal courts in the civilized world is that established for the trial of misdemeanors in New York County. Three judges, each having an equal voice, act as arbiters of both law and fact. Originally this bench was filled by three regular police magistrates sitting in rotation, and in many cases the same judge before whom the prisoner had been arraigned in the first instance assisted in determining the final question of his guilt or innocence. But the old Court of Special Sessions acquired a very unsavory reputation for many reasons, the chief among them being its alleged susceptibility to political influence and the looseness with which its funds were handled, and it was finally legislated out of existence in 1895. Then a new court was created composed of three justices who, while they had the powers of police magistrates, did not sit in magistrates' courts, but devoted their entire time to the trial of misdemeanors. In the last six years this court disposed of 41,008 cases, in which 26,567 persons were convicted of crime, either by trial or by plea of guilty. During the year 1905 alone 10,081 cases were disposed of, in which there were 5,666 convictions. The judges in this huge mill of justice rarely make mistakes, and few appeals are ever taken from their decisions.

They have become, by virtue of long experience, experts in fact, and the training thus received has qualified several of them for higher office.*

As the reader is already aware, a defendant charged in a magistrate's court with the commission of a misdemeanor, say that of petit larceny, is given an immediate hearing, and, if there be reasonable ground to believe him guilty, is held for trial in the Special Sessions. The information or affidavit, to which the complaining witness has sworn and which contains a more or less succinct account of the facts alleged against the prisoner, is thereupon forwarded to the clerk of the court and in due course the defendant appears, if he be on bail, or is brought from prison, if he be in confinement, to "plead." This information, which is the basis of the proceedings against him and which is practically the only record in the case, is commonly called the "complaint" and corresponds with the indictment found by the grand jury where the defendant is charged with the commission of a felony.

After the prisoner has entered his plea, if he be in prison, he is given a trial almost immediately; if not, his case will probably come up within a week or two. The offences over which these three judges have jurisdiction are as many and as diversified as human ingenuity and the demands of modern civi-

* Misdemeanors Disposed of During the Year 1905.

Convicted	1,869
Acquitted	1,110
Plead Guilty	3,797
Discharged	580
Demurrers allowed	0
Forfeited	279
Actions dismissed	2,446
Total	10,081

lized life, qualified by ineffective legislation, have combined to make them.

As might be expected, petty larcenies and assaults furnish together more than thirty-five per cent of the cases tried. The following table will show the more numerous and important offences for which defendants were held in 1905 for the Special Sessions and their relative proportions:

Petit larceny	2,459
Assault, third degree	1,559
Maintaining a disorderly house	948
Carry concealed pistol	436
Cruelty to animals	376
Failure to provide for minor	152
Possessing obscene prints	56
Indecent exposure	54
Malicious mischief	50
Unlawful entry	38
Illegal sale of transfer tickets (619a P. C.)	24
Possessing burglars' implements	18
Offences against trade-marks (364 P. C.)	9
Violation Liquor Tax Law	2,345
Violation Motor Vehicle Law	562
Violation Sanitary Code	844
Violation Labor Law	165
Violation Medical Law	61
Violation Dental Law	29
Violation Barber Law	26
Violation Election Law	18
Miscellaneous	806
Total	11,035

A spectator may in the course of a morning hear thirty or forty cases actually tried in which the charges cover almost every conceivable kind of sin, wrong, or prohibition. One prisoner is being prosecuted for assaulting a non-union workman, another for maintaining a public nuisance, another for a

violation of the Liquor Tax Law, another for practising medicine without a license; a dozen cases will be rapidly disposed of wherein the defendants are charged with shoplifting or "illegal entry" (a charge frequently lodged against a suspected burglar who has made an entry without a "break" and has been caught before he has accomplished his purpose); others still will be tried for carrying concealed weapons, publishing or possessing indecent literature, violating trade-mark laws, breaking speed ordinances, or "malicious mischief"; while, if the student of institutions be patient, he may be rewarded by the exciting spectacle of one who is defending himself against the charge of selling skimmed milk, holding a mock auction, driving a spavined horse, writing a threatening letter, making a fraudulent assignment, pawning borrowed property, using a false weight, opening another's letter, keeping a cow in an unhealthy place, running a cock-fight, misrepresenting the circulation of a newspaper, divulging the contents of a telegram, impersonating a policeman, adulterating food; or, provided he be exceptionally fortunate, may hear the trial of a celebrated actress for her impersonation of "Sappho," or of Mr. Arnold Daly for producing "Mrs. Warren's Profession."

He will see every conceivable type of man, woman, and child, either as defendant or witness, and he may also study every variety of human failing or weakness. No mock defence or prepared lie can deceive these argus-eyed judges; short shrift is made of the guilty, while the "reasonable doubt" is recognized the instant it puts in the most furtive appearance. In fact defendants are often found guilty

or acquitted almost before they are aware they are on trial,—and this with no detriment to them or to their cause.

The advocates of the abandonment of the jury system point to this court as their strongest argument. No time is lost in the selection of a jury,—a matter often of hours in the General Sessions in cases of no greater importance. There is no opening address on the part of the district attorney or counsel for the defendant,—the written statement or information sworn to by the complainant being entirely sufficient for the court. Cross-examination is cut down to its essentials and tests of "credibility" are almost unnecessary. At the conclusion of the case there are no harangues from either side, and the judges almost immediately announce their decision and generally impose sentence on the spot.

Of course in nine cases out of ten the evidence is conclusive and the merest glance at the complainant and his or her witnesses is enough to satisfy the onlooker that their claim is honest and the charge substantial. In such cases the trials proceed with lightning-like celerity. The owner of the stolen property is sworn while the defendant and his lawyer are pushing their way through the crowd to the bar.

"Mr. Blickendecker, are you a grocer, fifty-five years of age, residing at 1000-A-rear, First Avenue, and having a store at 666½ Catharine Street?" rapidly articulates the deputy assistant district attorney.

"Ya; I vas," answers Blickendecker heavily, trying helplessly to catch up.

"Did you, about 4:49 P.M., on Tuesday, the 17th of April, observe the defendant near your place of business?"

"Ya; I vas—I mean, ya, I did."

"What did you see him do?"

Blickendecker wipes his forehead and turns towards the court:

"Your honors, gentlemens, I see dot feller dere——"

"The defendant?" interrupts the presiding judge, patiently.

"Ya—the defender, I see dot defender mit a leetle vagon on two wheels, py mein store mit anoder feller, unt dey catch up ein crate of eggs unt put him in de vagon unt skip mit him, unt I hollers 'Tief!' unt runs, unt de officer——"

"That's enough. Any cross-examination? No? Call the officer."

The officer is sworn.

"Are you a member of the Municipal Police force of the city and county of New York, attached to the —— Precinct, and were you so attached on the 17th of April last, and did you see the defendant on that day near the premises 666½ Catharine Street?"

"Shure I seen him. Him and another feller. They were makin' off wid old 'Delicatessen's' eggs. I catched this young feller——"

"That's enough. Any cross-examination? No? Leave the stand."

"The People rest," announces the assistant.

"Take the stand," directs the lawyer, and his client shambles into the chair.

"Did you steal Mr. Blickendecker's eggs?"

"No, your honor; Cully Fagan asked me to go round and help him deliver some eggs. He said he'd gimme a drink. So I went along wid him. All of a sudden out comes this old guy and yells 'thief.' I gets scared and runs. I didn't mean no harm."

"That is our case," says the lawyer.

"No cross-examination," says the assistant.

The judges consult for a moment.

"We find the defendant guilty," announces the presiding judge, dipping his pen into the ink.

"Now, young man, have you ever been convicted?"

"No, your honor."

"I advise you not to steal any more eggs. One month in the penitentiary. Next case!"

Now here is a defendant given a perfectly fair, if not a very full, trial in less than three minutes. Of course it is in such a case practically a mere formality. Two witnesses who have had no previous acquaintance with the prisoner, whose eyesight is perfect, and who have no motive to swear falsely, identify him as caught *in flagrante delicto*. The defendant has merely put in his defence "on the chance." His sentence would be about the same in either case. The only disadvantage of so active a court is the fact that the multitude of the defendants render it almost impossible to make any very exhaustive study of the majority of them before sentence. However, as the sentences are all light, the defendant always gets the benefit of the doubt, and the court resolves all doubts in his favor.

Sometimes in such a case a criminal conspiracy between the complainant and the officer is disclosed to "do" a mischievous, but not criminal, youth who

has fallen into their disfavor. Then the witnesses are subjected to such a fire of questions that they wilt and wither in the blast, the defendant is acquitted and the prosecution's witnesses sometimes held for the action of the grand jury on a charge of perjury. Many a *cause célèbre* has originated in the Special Sessions through the perspicacity of some member of that bench during a petty trial, and defendants there convicted often divulge in their confessions evidence which for a time sets the newspaper world by the ears. This is especially true of cases where some civil officer is accused of taking a bribe to influence his action or to make an appointment. He may be convicted, confess, and for a day or two the papers are full of the unearthing of a far-reaching conspiracy to debauch the city government, barter offices at wholesale, and deliver the city to a coterie of criminals. The next step in the proceeding is the unfortunate discovery that the defendant's confession, since it cannot be corroborated, is entirely worthless. Yet, as he has apparently done all he could to atone for his offence, he receives a mitigated sentence, while the uproar occasioned by his sensational disclosures subsides as suddenly as it began.

The bane of the Court of Special Sessions in New York County and very likely the bane of all similar courts, are the so-called "Liquor Tax cases." As one of the officers of this court recently said: "In this class of cases the court knows that it is being 'flim-flammed,' and, in addition, that it is helpless. We convict in about sixty per cent of the cases, but the judges know perfectly well that a considerable number of those convicted are men who, while not

honest enough not to violate the law, are too honest to pay corruption money."

The possibilities for blackmail and the arbitrary and unequal way in which the law is enforced in different parts of the city (one section being allowed to be "wide open" while an adjacent district is "dry") render the judges loath to convict even in "straight" cases. When Liquor Tax cases are transferred, by order of the judge presiding in Part I, for trial in the General Sessions, the juries before which they are prosecuted will not convict at all.*

In the same way the court looks with grave suspicion on most cases where a defendant is arraigned charged with "assault" on an officer. They expect to see arraigned at the bar (and are usually not disappointed) a small man covered with bandages, while a burly officer without a scratch upon his rosy countenance takes the stand and swears that the defendant assaulted him. The policeman always has plenty of corroboration—the defendant none at all. The chances are that the relative sizes of the two men are such that if the officer coughed the defendant would drop dead. The proper charge in such a case would be, not attempted assault on an officer, but *attempted suicide*. The truth of the matter probably is that the small man, having done or said something to irritate the officer, has been pounded to a pulp and then ignominiously haled away to the station house, while his terrified companions, knowing full well that if they interfered theirs would be a similar fate, have retired to their homes privately to execrate a state of civilization where humble citizens can be subjected to such persecution.

* See note, infra, p. 210.

Practically the Special Sessions is the final court of disposition for most misdemeanors. Except in automobile, theatrical, health, copyright, and trade-mark cases and a few others, a majority of the defendants do not have enough money even to hire a lawyer, to say nothing of taking an appeal. They are disposed of then and there just as in certain cases they are disposed of in the magistrates' courts. For them a sentence once imposed is final.

Occasionally the Special Sessions is the scene of a great trial, as celebrated as those fought out in the "Parts" upstairs or in the criminal trial term of the Supreme Court across the hall. A prominent druggist may have been accused of refilling bottles with spurious or diluted contents. He is being prosecuted by the owners of the trade-mark or label. They retain distinguished counsel to prepare the case for the prosecution. The accused engages equally able lawyers to defend him. The crime is highly technical and the evidence almost entirely a matter of chemical analysis and expert opinion. The battle goes on for weeks or even months. A jury would have become hopelessly confused and the issue successfully obscured, but the three judges are expert jurymen, and in due course, if he be guilty, the defendant is inevitably convicted. Such a trial may cost the parties tens of thousands of dollars for expert testimony alone, while the sentence of the defendant will very likely be not more than a two-hundred-and-fifty-dollar fine. Even so, the integrity of the trade-mark has been sustained and the swindler stamped as a criminal.

Fifty per cent or more of the work of the Special Sessions is practically amplified police-court busi-

ness, but it is accomplished with an exactitude and efficiency that makes much of that done in the magistrates' courts appear crude indeed. The lesson of this particular court is that police business can be done speedily, effectively, and justly, provided the right men are selected to do it.

Fully seventy-five per cent of the criminals begin with petty infractions of the law. A driver for an iceman may "swipe" his comrade's horse blanket. If he be convicted and sent to the penitentiary he may learn to commit crimes of which he had never dreamed in his driver days, when his highest ambition was to get a ticket to a "chowder" or to a "grand ball." His next appearance may be in the General Sessions charged with burglary, and his last in the Supreme Court under indictment for murder. If, on the other hand, having been found guilty, he be merely reprimanded and paroled under a suspended sentence, he will in all likelihood never appear in court as a defendant again. Hence an opportunity, greater even than that of the police justice, for the exercise of a wise and humane discretion.

The multitude of prisoners who are unable to employ counsel have created a bevy of lawyers, abundantly able to look out for the interests of petty offenders, who stand or sit near the bar and are assigned by the court to the various defendants. A whispered fifteen seconds' conversation with their unfortunate client and they are enabled to take charge of the case. Long experience has made them almost as expert in estimating human nature as the judges themselves, and they are familiar with every trick of the trade which may raise a "reasonable doubt." The leaders among them have skilful

"runners" who haunt the police courts and the corridors of the building, heralding the virtues and successes of their masters, handing cards to prospective clients, and currying business in every conceivable manner. Observing a forlorn person, who timidly responds when his case is called, the runner instantly offers him the services of the "biggest" lawyer in the court for a five-, three-, or two-dollar retainer. If the client escapes conviction he is supposed to pay twenty-five dollars more and is dunned until he does. This may seem petty business and small pickings, but when one considers that ten thousand odd cases are disposed of each year, one sees that at even the modest fee of ten dollars per case there is a hundred thousand dollars a year in the Special Sessions waiting for somebody.

The best of these lawyers earn as much as five thousand dollars per year, including their outside and police-court business. The runner usually gets nearly as much. Sometimes there will be a one-hundred-dollar, a two-hundred-and-fifty-dollar, or even a five-hundred-dollar fee. In reality there is more money to be made in the police court than in the Special Sessions, for it is when the offender has just been caught and is in his first spasm of terror that he is most ready to "give up." Police-court fees are sometimes very high.

The most notable figure of this bar was Tom Cherry, otherwise known as "The Attorney-General of the Special Sessions." When sober he was a most capable, rough-and-ready, catch-as-catch-can, police-court lawyer. His fame extended to every magistrate's court, and his business was so constant that he never sat down, but stood at the bar from

the opening of court to its adjournment, defending almost every prisoner who had money to pay a fee, and being assigned to practically all those who had not. His success was his undoing. Without any knowledge of law, although he presumably had passed the Bar examinations (Heaven knows how!), his judgment of character, his ready wit, and his quick tongue made him no unworthy antagonist for a well-trained youngster. But Cherry never took an unfair advantage, and his statement as to his client's past, and sometimes as to his innocence, was received without question by the court. It was a boon to a new assistant to gain Cherry's confidence; and it was a reproach to many that they did not do so.

Cherry finally succumbed to his closest friend and worst enemy—drink. His periodic absences became more and more frequent, and finally the word was sadly whispered through the building that Cherry had "passed." His memory is still green and his smiling face will never be forgotten by those who knew him. A rival attorney almost immediately succeeded to his practice and his particular place beside the bar, but the Court of Special Sessions is not the same.

The practices of the shysters are the curse of the lower courts, and their enormities are such that a special cycle in Hades should be reserved for their particular retribution. Preying upon ignorance and vice, they become hardened to every appeal of human sympathy and often deserve punishment a thousand times more heavy than the miserable wretches whom they make a pretence of defending. They pervert justice and prostitute a sacred calling,

extorting from their clients the uttermost farthing by fear and false pretence. To show that this charge is not ill-founded, the reader may take as an example the practice of the shyster in dealing with those unfortunate women who are the common prey of the corrupt plain-clothes man and his conscienceless ally—the police-court lawyer.

Let us suppose that a certain section of the town is, as the saying goes, "wide open," and the police are regularly collecting protection money according to the approved method of "the system." The houses which pay up are left undisturbed—and all do pay up. So does the little street walker who plies her trade in the open. Some citizen or newspaper makes a complaint that the police are not doing their duty. There is a bare chance that political capital will be made of it and word is sent to the captain of the precinct to "get busy." He sends for the plain-clothes man, and tells him "there are not arrests enough." The officer answers that "everything is quiet." "Get busy," says the captain. A scapegoat is necessary and so the officer goes out and, leaving the bawdy-houses untroubled, tracks some miserable creature to her lonely room and there arrests her under the pretence that she is violating the "Tenement House Law." Now the worst that would happen to such an unfortunate would be, having "waived examination" before the magistrate, and pleaded guilty in Special Sessions, to be fined twenty-five or fifty dollars. The girl usually does not know this. When she is brought in under arrest the keeper "tips off" the runner for some lawyer, who first frightens her into believing that a long term of imprisonment confronts

her, and then introduces his master. The latter in turn offers to get her out on bail, meantime determining by an expert cross-examination, at which he is a past master, exactly how much money she has in the world. He then proceeds to acquire this by every means at his command. An actual case will illustrate what follows.

A young girl who had fallen into evil ways, but who had never been arrested before, was brought into the Jefferson Market prison. She had saved five hundred dollars with which she intended the following week to return to her native town in New Hampshire and start life anew. The keeper led her to believe that she would be imprisoned in the penitentiary for nearly a year unless she could "beat the case." One of these buzzards learned of her distress and offered to procure bail for her for the sum of fifty dollars. A straw bondsman was produced, and she paid him the money and was liberated. Meanwhile the lawyer had learned of the existence of her five hundred dollars. By terrifying her with all sorts of stories as to what would possibly happen to her, he succeeded in inducing her to pay him three hundred as a retainer to appear for her at the hearing in the magistrate's court. He had guaranteed to get her off then and there, but when her case was called he happened to be engaged in reading a newspaper and, looking up from where he was sitting, merely remarked, "Waives examination, your honor." The girl had only one hundred and fifty dollars left, and as yet had had no defence, but the shyster now demanded and received one hundred dollars more for representing her in the Special Sessions. She now had

but fifty dollars. Immediately after the hearing in the police court the bondsman "surrendered" her and she was locked up in the Tombs pending her trial, for she had not money enough to secure another bail bond. Here she languished three or four days. When at last her case appeared upon the calendar the shyster did not even take the trouble to come to court himself, but telephoned to another harpie that she still had fifty dollars, telling him to "take her on." Abandoned by her counsel, alone and in prison, she gave up the last cent she had, hoping thus still to escape the dreadful fate predicted for her. When she was called to the bar the second lawyer informed her she had no defence and the best thing she could do was to plead guilty. This she did and was fined twenty-five dollars, but, having now no money, was compelled to serve out her time, a day for each dollar, in the City Prison, at the end of which time she was cast penniless upon the streets.

Many an originally honest young fellow who, in a sincere attempt to build up a small practice, has haunted the magistrate's court and secured petty police business has been gradually drawn into the vortex of crime until he is even more tainted than those whom he defends. The Legal Aid Society, which, so far as the writer is aware, is the only bona fide charitable organization existing in New York for the purpose of assisting impoverished persons to secure legal counsel, does not undertake any criminal business. No greater service could be rendered to the community than by some society organized to protect helpless defendants who have fallen victims to the vultures who prey upon the

prison pens. At the present time the official prosecutor himself is the only person to whom one charged with a criminal offence can turn with any hope of relief from his own lawyer, and if the number of cases were known where the prosecutor has befriended the prosecuted the eyes of jurors and of the public would be opened to the real spirit which animates a fair-minded district attorney.

A favorite trick of shysters if they have an imprisoned client who still refuses to "give up," is to plead "not guilty and not ready" and thus have the case adjourned until they squeeze their victim dry. A defendant who has any money is never permitted to go to trial or even to plead guilty before his money is entirely exhausted.

This is not romance, it is practice. The men who do these things can be seen any day in every police court in New York—heartless, cynical, merciless. Lying and deceit are their stock in trade, corruption their daily food. Within three months one of these gentry not only compelled an eighteen-year-old girl to give him a fine Etruscan ring which she had inherited, and which he pawned for five dollars, but stripped her of a new silk petticoat which he carried away in a newspaper as a fee. This woman served ten days because she could not pay her fine. Another woman who had *stolen an umbrella* gave a shyster her watch. He pawned it and then abandoned her, when she came up for trial. Each of these men has a special line of clients which he serves, either because he is supposed to be particularly expert in such cases or because he is regularly retained by the "trust" which they compose. Thus the East Side pickpockets have one attorney, the

"green-goods" men another, the opium sellers a third, the abortionists a fourth, while every "short changing," "thimble rigging," or "flim-flam" case sees the same lawyer for the defence.

It is a fact of considerable significance that most retailers charged with selling adulterated milk are defended by the same lawyers. The large milk companies apparently invite the trade of the small dealer by offering him cheap milk, and a guarantee that if he is caught selling their product they will not only defend him but, if he be found guilty, will pay his fine. Who does the adulterating? The company or the retailer? It is almost impossible to say. Nevertheless, if lack of evidence prevents proceedings against the companies themselves, the next best thing is to punish the dealers who act as their agents, under the guise of doing an independent business. If prison sentences were invariably inflicted in such cases the dealers would soon find their miserable business as unhealthy as do the consumers who buy from them.

Some very disreputable, but, nevertheless, highly amusing tricks are invoked by wily practitioners in the Special Sessions to secure the release of their clients. One of the most adroit is to secure adjournments from day to day on various pretexts until the patience of the complaining witness is nearly exhausted. When the case is at last about to be called for trial the lawyer tells his runner to go into the corridor outside the court-room and send in word that some one desires to see the complainant. The complainant goes out to see what is wanted. In the meantime the case is moved for trial, and when his name is called he naturally fails to respond. The

shyster, in a most aggrieved tone, then informs the court that the defendant "is a hard-working man who has already been dragged down to court four or five times," on each occasion being compelled to lose an entire day's pay; that he is the only support of an invalid wife, an aged mother, six children, and an imbecile brother; that the defence is and always has been ready to proceed with the case; that simply in the interests of justice he requests that the defendant be discharged on his own recognizance or acquitted. In many cases this motion is granted and the complainant hurries back into the court-room just in time to meet the defendant making a triumphal exit.

The tears and laughter of the police courts are the tears and laughter of the Sessions. The *Miserables* of Hugo are the miserables of to-day. Jean Valjean, Fantine, and Cosette haunt the corridors of our courts. As well try to paint the sufferings and experiences of mankind in a single picture as the ten thousand yearly tragedies of the Special Sessions in a single chapter.

1997
REPORT TO CONGRESS

Becoming an American: Immigration and Immigrant Policy

U.S. COMMISSION ON IMMIGRATION REFORM

INTRODUCTION

Immigration and immigrant policy is about immigrants, their families and the rest of us. It is about the meaning of American nationality and the foundation of national unity. It is about uniting persons from all over the world in a common civic culture.

The process of becoming an American is most simply called "Americanization," which must always be a two-way street. All Americans, not just immigrants, should understand the importance of our shared civic culture to our national community. This final report of the U.S. Commission on Immigration Reform makes recommendations to further the goals of Americanization by setting out *immigrant* policies to help orient immigrants and their new communities, to improve educational programs that help immigrants and their children learn English and civics, and to reinforce the integrity of the naturalization process through which immigrants become U.S. citizens.

This report also makes recommendations regarding *immigration* policy. It reiterates and updates the conclusions we reached in three interim reports—on unlawful migration, legal immigration, and refugee and asylum policy—and makes additional recommendations for reforming immigration policies. Further, in this report, the Commission recommends ways to improve the structure and management of the federal agencies responsible for achieving the goals of immigration policy. It is our hope that this final report *Becoming An American: Immigration and Immigrant Policy,* along with our three interim reports, constitutes a full response to the work assigned the Commission by Congress: to assess the national interest in immigration and report how it can best be achieved.

MANDATE AND METHODS

Public Law 101-649, the Immigration Act of 1990 [IMMACT], established this Commission to review and evaluate the impact of immigration policy. More specifically, the Commission must report on immigration's impact on: the need for labor and skills; employment and other aspects of the economy; social, demographic, and environmental conditions; and the foreign policy and national security interests of the United States. The Commission engaged in a wide variety of fact-finding activities to fulfill this mandate. Site visits were conducted throughout the United States. Commission members visited immigrant and refugee communities in California, Texas, Florida, New York, Massachusetts, Illinois, Arizona, Washington, Kansas, Virginia, Washington, DC, Puerto Rico and the Commonwealth of the Northern Mariana Islands. Some Commission and staff members also visited such major source countries as Mexico, the Dominican Republic, Cuba, Haiti, and the Philippines. To increase our understanding of international refugee policy issues, members and staff of the Commission visited Bosnia, Croatia, Germany, and Kenya, and consulted with Geneva-based officials from the U.N. High Commission for Refugees and the International Organization for Migration. We held more than forty public hearings, consultations with government and private sector officials, and expert roundtable discussions.

TODAY'S IMMIGRANTS

The effects of immigration are numerous, complex, and varied. Immigrants contribute in many ways to the United States: to its vibrant and diverse communities; to its lively and participatory democracy; to its vital intellectual and cultural life; to its renowned job-creating entrepreneurship and marketplaces; and to its family values and hard-work ethic. However, there are costs as well as benefits from today's immigration. Those workers most at risk in

Immigrant Admissions by Major Category: FYs 1992-1996

Category of Admission	1992	1993	1994	1995	1996
TOTAL	**810,635**	**880,014**	**798,394**	**716,194**	**909,959**
SUBJECT TO THE NUMERICAL CAP	**655,541**	**719,701**	**662,029**	**593,234**	**771,604**
FAMILY-BASED IMMIGRANTS	**502,995**	**539,209**	**497,682**	**460,653**	**595,540**
Immediate Relatives of U.S. citizens	235,484	255,059	249,764	220,360	350,192
Spouses and children	170,720	192,631	193,394	171,978	283,592
Parents	64,764	62,428	56,370	48,382	66,600
Children born abroad to alien residents	2,116	2,030	1,883	1,894	1,658
Family-sponsored immigrants	213,123	226,776	211,961	238,122	293,751
Unmarried sons/daughters of U.S. citizens	12,486	12,819	13,181	15,182	20,885
Spouses and children of LPRs	90,486	98,604	88,673	110,960	145,990
Sons and daughters of LPRs	27,761	29,704	26,327	33,575	36,559
Married sons/daughters of U.S. citizens	22,195	23,385	22,191	20,876	25,420
Siblings of U.S. citizens	60,195	62,264	61,589	57,529	64,897
Legalization dependents	52,272	55,344	34,074	277	184
EMPLOYMENT-BASED IMMIGRANTS	**116,198**	**147,012**	**123,291**	**85,336**	**117,346**
Priority workers	5,456	21,114	21,053	17,339	27,469
Professionals w/ adv. deg. or of advanced ability	58,401	29,468	14,432	10,475	18,436
Skilled, professionals, other workers, (CSPA)	47,568	87,689	76,956	50,245	62,674
Skilled, professionals, other workers	47,568	60,774	55,659	46,032	62,273
Chinese Student Protection Act (CSPA)	X	26,915	21,297	4,213	401
Special immigrants	4,063	8,158	10,406	6,737	7,831
Investors	59	583	444	540	936
Professionals or highly skilled (Old 3rd)	340	X	X	X	X
Needed skilled or unskilled workers (Old 6th)	311	X	X	X	X
DIVERSITY PROGRAMS	**36,348**	**33,480**	**41,056**	**47,245**	**58,718**
Diversity permanent	X	X	X	40,301	58,174
Diversity transition	33,911	33,468	41,056	6,994	544
Nationals of adversely affected countries	1,557	10	X	X	X
Natives of underrepresented countries	880	2	X	X	X
NOT SUBJECT TO THE NUMERICAL CAP	**155,094**	**160,313**	**136,365**	**122,960**	**138,323**
Amerasians	17,253	11,116	2,822	939	954
Cuban/Haitian Entrants	99	62	47	42	29
Parolees, Soviet and Indochinese	13,661	15,772	8,253	3,120	2,283
Refugees and Asylees	117,037	127,343	121,434	114,632	128,367
Refugee adjustments	106,379	115,539	115,451	106,795	118,345
Asylee adjustments	10,658	11,804	5,983	7,837	10,022
Registered Nurses and their families	3,572	2,178	304	69	16
Registry, entered prior to 1/1/72	1,293	938	667	466	356
Other	2,179	2,904	2,838	3,692	6,318

Note: X = Not Applicable. Excludes persons granted LPR status under the provisions of the Immigration Reform and Control Act of 1986.
Source: Immigration and Naturalization Service, Statistics Division.

our restructuring economy—low-skilled workers in production and service jobs—are those who directly compete with today's low-skilled immigrants. Further, immigration presents special challenges to certain states and local communities that disproportionately bear the fiscal and other costs of incorporating newcomers.

Characteristics of Immigrants

In FY 1996 (the last year for which data are available), more than 900,000 immigrants came to the United States from 206 nations, for a variety of reasons and with a diverse set of personal characteristics. Not surprisingly, the characteristics of immigrants from different sending countries vary, as do their effects on the U.S. There are also differences between immigrants admitted under different classes of admission. These differences generally reflect the statutory provisions that guide admissions. [See Appendix for description of IMMACT's more specific provisions and its effects.]

1996

Top Ten Countries of Origin of Legal Immigrants

Mexico 159,731
Philippines 55,778
India 44,781
Vietnam 42,006
Mainland China 41,662
Dominican Republic 39,516
Cuba 26,415
Ukraine 21,051
Russia 19,646
Jamaica 19,029

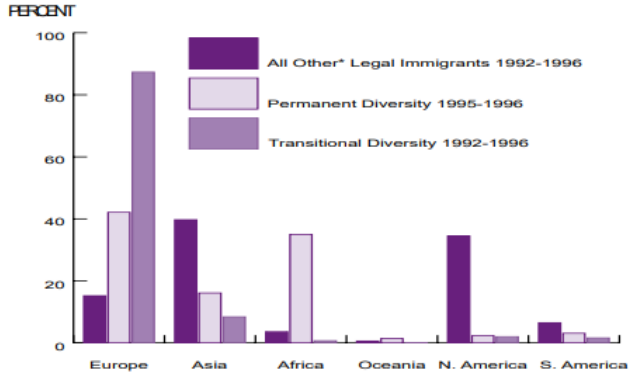
Source: INS FY 1996 Public Use Admissions Data.

Places of Origin. Asia and North America (i.e., Mexico, Canada, the Caribbean, and Central America) remain the sending regions with the largest share of immigrants. Mexico remains the largest sending country and its share of total legal immigrants to the U.S. increased from an average of 12 percent in the 1980s to more than 13 percent in FY 1994 and up to 18 percent in FY 1996. The effects of the Immigration Reform and Control Act of 1986 [IRCA], which resulted in the legalization of about two million formerly illegal Mexican residents, explains this trend. Even though the special admission category for the spouses of legalized aliens' dependents has been discontinued, Mexico benefits from the IMMACT's removal of per- country limits on the numerically limited spouse and children class of admission (FB-2A).

IMMACT established a transitional and a permanent "diversity" category for countries whose admission numbers were adversely

affected by the Immigration Act of 1965. The transitional program was in effect from FY 1992 to 1994, but unused visas were carried over through FY 1996. The permanent program went into effect in FY 1995. European countries benefitted the most from the transitional program, which mandated that as many as 40 percent of the visas could go to nationals of Ireland. Actual Irish admissions reached only 35 percent, with Polish immigrants accounting for an even larger share (38 percent). Under the permanent diversity program, 42 percent of the immigrants came from European countries and 35 percent came from Africa. The effect on African admissions is particularly noteworthy as Africans account for less than 1 percent of immigrants in other admission categories.

Origins of Diversity Immigrants versus All Other* Immigrants



*Other includes immigrants in family, employment, and humanitarian-based categories of admission.
Source: INS Public Use Admissions Data.

1996:

Top Ten Intended States of Residence of Legal Immigrants

California 199,221
New York 153,731
Texas 82,229
Florida 79,067
New Jersey 63,162
Illinois 42,154
Massachusetts 23,017
Virginia 21,329
Maryland 20,683
Washington 18,718

Source: INS FY 1996 Public Use Admissions Data.

Top Ten Intended Metro Areas of Residence of Legal Immigrants

New York 133,168
Los Angeles 64,285
Miami 41,527
Chicago 39,989
Washington DC 34,327
Houston 21,387
Boston 18,726
San Diego 18,226
San Francisco 18,171
Newark 17,939

Source: http:/www.ins.usdoj.gov/stats/annual/fy96/997.html

Intended U.S. Destinations. Immigrants in FY 1996 continue to select just a few states as their destinations. About two-thirds intend to reside in California, New York, Texas, Florida, and New Jersey. One-quarter of admissions are to California alone with another one-seventh to New York. New York City retains its place as the pre-eminent immigrant city with 15 percent of immigrants intending to go there. About 7 percent of immigrants intend to go to Los Angeles, and Miami and Chicago are in third place with about 4.5 percent each of the total. There has been little change in these leading destinations since IMMACT. However, some new destinations have emerged in recent years. For example, during the past decade, such midwestern and southern states as Mississippi, Nebraska, Kansas, Georgia and North Carolina saw more than a doubling of the number of immigrants intending to reside there. Although the numbers are significantly smaller than the more traditional destinations, absorbing more new immigrants can be a challenge for these newer destinations that often do not have the immigration-related infrastructure of the traditional receiving communities.

Age. Immigrants in FY 1996 remain young, with the largest proportion being in their later teens or twenties. A little more than one-fifth are children 15 years of age or younger, and another one-fifth are 45 years or older. More than one-half of family-based immigrants are younger than 30 years of age, reflecting the predominance of spouses and children. Because of beneficiaries, employment-based immigrants have just as many minor dependents age 15 years and younger as other groups, but more than two-fifths of these employment-based immigrants themselves are 30-44 years, the experienced and highly productive working ages. Diversity immigrants have a similar, yet somewhat younger, age distribution than other classes of admission. In contrast, and in large part due to those admitted as refugees from the former Soviet Union, humanitarian admissions tend to be somewhat older than other immigrants.

Age Groups of 1996 Legal Immigrants (Principals and Derivative Beneficiaries)

GROUP	ALL	FAMILY	EMPLOYMENT	DIVERSITY	HUMANITARIAN
15 yrs. & younger	22%	23%	20%	22%	20%
16 through 29 yrs.	31%	34%	23%	33%	27%
30 through 44 yrs.	27%	23%	44%	34%	24%
45 through 60 yrs.	15%	14%	12%	10%	21%
65 years & older	5%	5%	0%	1%	8%

Source: INS FY 1996 Public Use Admissions Data.

Gender. Females were 54 percent of admissions in FY 1996. There had been an essentially even balance of men and women during the decade of the 1980s. The increased share of females in the 1990s parallels the historical tendency toward more female immigrants throughout much of the post-World War II period. It also reflects the admission of the spouses of legalized aliens who were predominantly male. In FY 1996, family-based admissions were predominantly female (57 percent) and employment-based admissions (including beneficiaries) were evenly balanced by gender. Diversity (45 percent female) and humanitarian (48 percent female) admissions, in contrast, had more male immigrants. That a slight majority of FY 1996 humanitarian admissions were male is somewhat surprising given that worldwide refugee populations are disproportionately female.

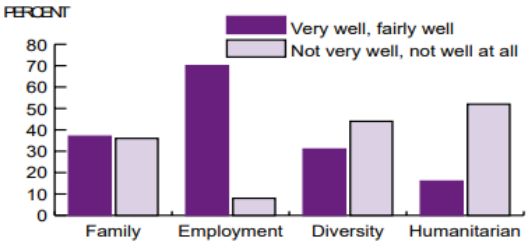
English ability. The Immigration and Naturalization Service [INS] admissions data do not include information on English language ability (or education, as discussed below). The following analysis draws instead on preliminary data from the New Immigrant Survey [NIS],[1] which studied a sample of immigrants admitted in FY 1996. The NIS is a pilot study designed to test the feasibility of a longi-

[1] Jasso, G.; Massey, D.S.; Rosenzweig, M.R.; Smith, J.P. 1997. The New Immigrant Survey [NIS] Pilot Study: Preliminary Results. Paper presented at the Joint Meeting of the Public Health Conference on Records and Statistics and the Data Users Conference, Washington, DC. (July.)

tudinal immigrant survey. Although the data are not yet published, analysis indicates that it offers promise of providing certain information about immigrants that has not previously been available.

The NIS, using the same measure as the U.S. Census, reports on the English language proficiency of adult legal immigrants who are 18 years and older. The initial results show that employment-based immigrants report the greatest English ability—70 percent of employment-based admissions report speaking at least fairly well and less than 10 percent speak very little or no English (the remainder report an "average" speaking ability). About 37 percent of family-based admissions report speaking English at least fairly well and an almost equal proportion report speaking little or no English. The diversity immigrants tend to report even less English ability, despite the requirement that they have at least a high school education. The humanitarian admissions trail the furthest behind in reported English language ability. Only 16 percent report speaking English at least fairly well, while more than 50 percent report speaking little or no English.

English Language Proficiency among New Adult Immigrants (18 years and older): 1996

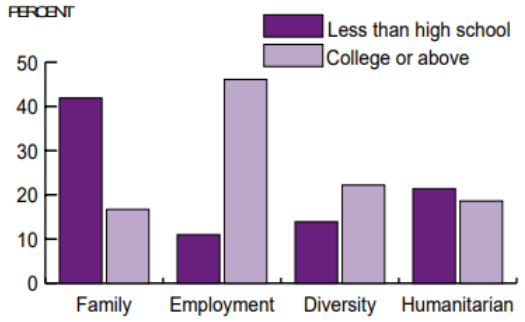


Source: Jasso, G.; et al. 1997. New Immigrant Survey Pilot Study.

Education. The years of schooling completed by immigrants is perhaps one of the most critical measures of skill level. The NIS provides our first indicators of years of education of adult legal immigrants at the time of their admission. As found in studies of foreign-born residents, the immigrants surveyed by the NIS tend to cluster at the higher or lower ends of the educational spectrum and differ significantly in their educational attainment by class of admission. Fully 46 percent of employment-based admissions have completed four years of college or a graduate degree. This figure includes principals and beneficiaries, making it likely that well-educated employment-based immigrants tend to have well-educated spouses. In contrast, just 17 percent of family-based immigrants 25 years and older have completed a college-level education while 42 percent have less than a high school education.

Diversity immigrants are required to have a high school education or two years of skilled work experience. The NIS data show that diversity immigrants tend to be better educated than family-based,

Educational Attainment of Legal Immigrants (25 years and older): 1996



Source: Jasso, G.; et al. 1997. New Immigrant Survey Pilot Study.

but not as well educated as employment-based immigrants. About 14 percent have not completed high school. They may be either principals who meet the work but not the education requirement or the spouses of the principals. Twenty-two percent of diversity immigrants have completed college or done graduate-level education, about the same proportion as among U.S. natives.[2]

The humanitarian classes of admission are less well educated than the employment-based, but are better educated than family admissions. The large number of relatively well-educated persons admitted as refugees from the Soviet Union may partly explain this finding. About 21 percent have less than a high school education, while about 19 percent have college or higher degrees.

Occupation. Ultimately, the English and educational skills that immigrants have are reflected in their occupations. The INS admissions data, which we use here, have only crude occupational classifications. It imperfectly captures the difference between immigrants who adjust into legal permanent resident [LPR] status after working in a U.S. job for several years and those who report an occupation upon admission that tells us more about what the immigrant did at home than what they will do here.

Sixty-five percent of all immigrants in FY 1996 reported no occupation or being a "homemaker," reflecting the fact that children, parents, and spouses are a large share of all admissions and most do not work at the time of entry.

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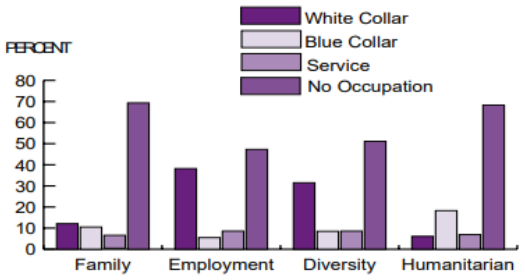
[2] The U.S. Current Population Survey [CPS] permits us to compare directly to the native-born, but the foreign-born data do not distinguish by admission status. The CPS data also include illegal aliens who have extremely low levels of education in the foreign-born category. See: Fix, M.; Passel, J.S. 1994. *Immigration and Immigrants: Setting the Record Straight.* Washington, DC: The Urban Institute. These figures for the diversity class of admission correspond to data on education collected by the U.S. Department of State for diversity immigrants only.

Major Occupational Category by Admission Class: 1996



Source: INS Public Use Admissions Data.

Nevertheless, occupational status faithfully reflects the legal requirements of the admission class—the proportion of all immigrants not reporting an occupation is greater among family and humanitarian admissions, about 70 percent of all immigrants in each category. By way of comparison, only about one-half of all employment and diversity admissions have no reported occupation.[3] The skills which immigrants bring to the United States are reflected in their type of occupations. Family and humanitarian immigrants are primarily blue-collar workers. In contrast, employment-based and permanent diversity immigrants are predominantly white-collar workers. These broad differences between the major classes of admission have changed only slightly over the past three decades.

IMMACT has had an effect on occupational distribution within these broad categories. To gauge its effects, a research paper prepared for

[3] The initial results from the NIS pilot show that about 40 percent of adult nonexempt family immigrants are not employed. Alternatively, more than 95 percent of employment-based principals are employed. The INS admission figures for "no occupation" include children and persons who are unemployed, retired, or for whom no information is given.

FY 1996 Regular Admissions by Occupation: Predicted and Actual

OCCUPATION	PREDICTED (WITHOUT IMMACT)	ACTUAL (WITH IMMACT)	EXCESS OF ACTUAL OVER PREDICTED
WHITE-COLLAR WORKERS			
Professional, Technical, and Kindred			
Health Professionals	10,244	18.986	85%
Other Professionals	9,231	19,477	111%
Technical & Specialty	22,115	33,117	50%
Executives	20,283	30,702	51%
Sales	12,943	13,002	0%
Administrative Support	19,437	19,807	2%
BLUE-COLLAR WORKERS			
Precision Production	21,028	20,116	-4%
Operators, Fabricators, & Laborers	37,702	53,936	43%
FARMING, FORESTRY, AND FISHING	12,251	12,588	3%
SERVICE	48,180	51,797	8%
TOTAL WITH OCCUPATION	165,234	221,731	34%
TOTAL WITHOUT OCCUPATION	261,694	498,583	91%
GRAND TOTAL	426,928	730,314	69%

Note: Predicted numbers in FY 1996 are based on linear projections (from the years between 1972 and 1991), and are kept within numerical limits on nonexempt categories. Humanitarian admissions are not included.

Source: Greenwood, M.; Ziel, F.A. 1997. *The Impact of the Immigration Act of 1990 on U.S. Immigration.* Washington, DC: U.S. Commission on Immigration Reform.

the Commission calculated simple linear projections for all of the admission categories now subject to the worldwide ceiling on admissions. Data from FY 1972-1991 were analyzed and the trends identified, then projected forward to FY 1996. This analysis, therefore, paints a "what-if" picture of what today's immigration might have looked like if past trends had continued unaffected by IMMACT [see table above].

The actual total number of admissions under the worldwide ceiling in FY 1996 was 720,314 which—compared to the projected figure of

426,929—was 69 percent greater than would have been expected without IMMACT. Admissions were greater than the projected figure because IMMACT increased numerically-limited family, employment, and diversity admissions. The numerically-exempt admissions for the immediate relatives of U.S. citizens would have grown between 1992 and 1996 even without IMMACT. This analysis does not include humanitarian admissions.

Of immigrants who reported an occupation, the actual admissions in FY 1996 were 221,731 which—compared to the projected figure of 165,234—was 34 percent greater than would have been expected if IMMACT had not gone into effect. By contrast, nonworking immigrants experienced a 91 percent increase of actual over projected. This finding is not surprising as FY 1996 family admissions were significantly higher than would have been permissible under previous law. In part this was because IMMACT permitted unused FY 1995 employment-based numbers to be transferred to the FY 1996 family categories. In combination with a growth in immediate relatives (including those who would normally have been admitted in FY 1995 but were caught in processing delays), the additional visas meant more spouses and minor children entered. These immigrants are the least likely to be employed.

As might be anticipated, IMMACT's new emphasis on admitting highly-educated and skilled persons led to growth in professional occupations among those who reported an occupation. As stated above, there was an overall 34 percent increase in persons reporting an occupation. This increase was not evenly distributed, however. The number of health professionals, for example, was projected to be 10,244, but at 18,985 was 85 percent greater. The number of executives also shows a higher than expected increase. Interestingly, projections not shown here indicate that within the employment-based category, family members (beneficiaries) of the principals show the greatest growth in professional occupations. This suggests that when principals with more skills are admitted, they

bring with them spouses who are, likewise, more skilled than in the past. Further, projections not shown here indicate that the skill requirement for permanent diversity immigrants makes for more highly-skilled admissions from eligible countries. In short, IMMACT increased both the numbers of more skilled admissions and their share of immigrants admitted.

Most nonprofessional white-collar and blue-collar occupations show very little or no growth over what might have occurred without IMMACT. The one notable exception is a greater-than-expected increase in the number of "Operators, Fabricators, and Laborers." There were 53,936 admissions in these occupations compared to the 37,702 that were projected. As the employment-based access for persons with these occupations is highly limited, it appears that much of this increase is attributable to family-based admissions. It is unclear from the data, however, why this pattern has emerged.

Earnings. According to the NIS survey, the median earnings of all male immigrants admitted in 1996 was $15,600 and for women was $11,960, lower than the median earnings for natives. Compared to the earnings in their last country of residence, male immigrants experienced a 59 percent increase and women a 45 increase in earnings upon admission to the United States. Differences in earnings are, as should be expected, substantial by admission class. Many employment-based immigrants earn a median income of $36,400 on the date of their admission to LPR status, while the sibling or spouse of an LPR earns $11,750 and the spouse of a citizen earns $18,200.

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[4] National Research Council. (Smith, J.P.; Edmonston, B. eds.). 1997. *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration.* Washington, DC: National Academy Press.

Effects on the Economy

An independent evaluation of immigration by a panel of eminent social scientists at the National Research Council [NRC], sponsored by the Commission,[4] found that immigration has a positive economic impact on the national level. However, the NRC panel's findings confirm the by now commonplace conclusion that there are tangible costs to certain sectors of the labor market and certain communities. This reinforces the Commission's conclusions on the need for a well-regulated system of immigrant admissions, as well as the need for attention to means of improving integration and reducing friction between newcomers and established residents.

The NRC panel estimates that immigrants may add $1-10 billion directly to the national economy each year, a small but positive amount in a $7.6 trillion economy. Many consumers, business owners, and investors benefit from the immigrant labor force. Recent newcomers may be willing to work for lower wages than other U.S. workers, although, with the exception of many immigrants with less than a high school education, most immigrants tend to earn as much as natives after a decade. Many others in the economy benefit, particularly those who do work that is complementary to that performed by immigrants. Immigrants provide the labor that has kept viable entire segments of certain labor-intensive industries, such as garment and shoemaking. Many immigrant entrepreneurs expand trade with foreign countries from which they come, and the language and cultural expertise of many immigrant employees are valuable to U.S. companies doing business abroad.

Immigrants also contribute to the economic revitalization of the communities in which they live. As middle-class natives have left the

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[5] Muller, T. 1993. *Immigrants and the American City.* New York: New York University Press. Winnick, L. 1990. *New People in Old Neighborhoods: The Role of New Immigrants in Rejuvenating New York's Communities.* New York: Russell Sage Foundation.

inner cities, immigrant newcomers have settled, established businesses, bought homes, and otherwise invested in these areas. Gateway cities, such as New York and Los Angeles, have benefitted particularly from this urban renewal. At the same time, these cities face new challenges related to immigration. Growing immigrant communities require local school systems (some of which may have otherwise faced declining enrollments) to provide sufficient classroom space and teachers. They must also develop programs to teach children who are without English skills or prior education. Overcrowded housing, drug trafficking, gang violence, sweatshops, and public health problems also may be found in many of these inner-city communities.[5]

Immigration particularly affects certain U.S. workers. The NRC panel finds that workers with less than twelve years of education are the most adversely affected by low-skilled immigrant workers. Immigrants may have reduced substantially the wages of high school dropouts, who are about one-tenth of the workforce, by 5 percent nationwide. This is a sizable impact on a group that was already poorly paid before the loss in real earnings it experienced over the past two decades. Most often it is the foreign-born worker, particularly in labor markets with large numbers of immigrants who experience the greatest competition.[6] While the education and skill level of most U.S. workers differs significantly from those of most immigrants (and therefore they are not competing for the same jobs), the new arrivals are often direct substitutes for immigrants who arrived a short time before them.[7]

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[6] Greenwood, M.; Tienda, M. 1997. U.S. Impacts of Mexican Immigration. Team Report to Mexico/United States Binational Study on Migration. Greenwood, J.; Hunt, G.L. 1995. Economic Effects of Immigrants on Native and Foreign-Born Workers: Complementarity, Sustitutability, and Other Channels of Influence. *Southern Economic Journal.* 61:4 1096.

[7] Waldinger, R. 1996. *Still the Promised City? African Americans and New Immigrants in Postindustrial New York.* Cambridge: Harvard University Press. Waldinger, R.; Bozorgmehr, M. 1996. *Ethnic Los Angeles.* New York: Russell Sage Foundation.

The evidence on the impact of immigration on native-born minorities nationwide is less clear. The NRC concluded that in the aggregate, the economic opportunities of African Americans are not reduced by immigration because African Americans and immigrants tend to be in different labor markets and reside in different cities. Other research finds small, adverse effects on African Americans.[8] These effects are found most strongly when low-skilled minority workers compete with low-skilled immigrant workers in the same industries and the same geographic areas.

The fiscal effects of immigration also are complicated. Generally, the impacts on the federal government are favorable compared to those on state and local governments. Most studies show that at the federal level, the foreign-born pay more in taxes than they receive in services. When spread across all taxpayers, this characteristic represents a very small, but positive, benefit. At the local level, however, immigrants often represent a net fiscal cost, in some cases a substantial one. Research on the resident illegal alien population finds the clearest examples of fiscal costs to states and localities.[9] In general, much of the negative effect is related to school costs that are considerable because of the larger size of many immigrant families. Although funds spent on education may be considered an investment, not just a fiscal burden, the payoff is not realized for many years.

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[8] Hamermesh, D.S.; Bean, F.D. (eds.) 1998 forthcoming. *Help or Hinderance? Immigration and Its Economic Implications for African Americans.* New York: Russell Sage Foundation.

[9] Taylor, E.; Martin, P.; Fix, M. 1997. *Poverty Amidst Prosperity: Immigration and the Changing Face of Rural California.* Washington, DC: The Urban Institute Press. U.S. General Accounting Office. 1995. *Illegal Aliens: National Cost Estimates Vary Widely.* Washington, DC. 6. Clark, R.; Passel, J.S.; Zimmermann, W.N.; Fix, M.E. 1994. *Fiscal Impacts of Undocumented Aliens: Selected Estimates for Seven States.* Washington, DC: The Urban Institute Press.

Education affects fiscal impacts in a second way. Ultimately, the economic success and fiscal contributions of immigrants are determined by their educational level. The NRC panel found that immigrants who complete high school and beyond generally represent a more favorable balance of fiscal costs and contributions than do those with little or no education. Even over their lifetimes, immigrants without education are unlikely to contribute sufficient tax revenues to offset their use of services. Both groups of immigrants tend to use public services in a similar fashion, particularly as related to the schooling of their children, but the more educated immigrants tend to earn more and pay higher taxes.

Educational differences also explain why certain states and localities are more adversely affected by immigration than are others. California immigrants represent a sizeable tax burden (estimated at almost $1,200 per native-headed family per year) while New Jersey immigrants represent a more modest tax burden (estimated to be $232 per native-headed family per year). The difference can be explained largely by the differences in the average educational level of the immigrants residing in these states.[10]

English language ability also affects the economic success and fiscal impacts of immigrants. In the 1990 Census, 47 percent of the foreign-born more than 5 years of age reported not speaking English "very well." Individuals with poor English language skills tend to be confined to the lowest levels of the U.S. job market. By contrast, ability in spoken English markedly improves immigrants' earnings, especially for Hispanic and Asian adult immigrants.[11] English read-

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[10] See: Espenshade, T. 1997. *Keys to Successful Immigration: Implications of the New Jersey Experience.* Washington, DC: The Urban Institute Press.

[11] Chiswick, B.R. (ed.). 1992. *Immigration, Language, and Ethnicity.* Washington, DC: The AEI Press. 229-96.

[12] Rivera-Batiz, F.L. 1992. English Language Proficiency and the Earnings of Young Immigrants in the U.S. Labor Market. *Policy Studies Review* 11:165-75.

ing comprehension also has been found to improve the earnings of young immigrant adults.[12]

Population Growth and Natural Resources

In recent years there have been about 800,000 legal admissions and an additional estimated 200,000 to 300,000 unauthorized entries, but the net annual increase of the foreign-born population is about 700,000 each year due to return migration and mortality.[13] In 1996, the foreign-born population was 24.6 million, 9.3 percent of the U.S. population. Recent arrivals make up a large share of the resident foreign-born population; about 28 percent arrived after 1990, and an additional 35 percent during the 1980s.

It is estimated that international migration makes up somewhere between one-quarter and one-third of net annual population increase. Given current demographic trends and noting that much can happen to alter long-range forecasts, the U.S. Census Bureau projects the population to increase by 50 percent between 1995 and 2050. Immigration is likely to become a larger proportion of the net increase.[14]

The NRC report also presented estimates of population growth. It found that *without* immigration since 1950, the U.S. population would have been 14 percent smaller than its 1995 size of 263 million. The NRC projected the population to the year 2050 after making certain assumptions about mortality, fertility, and rates of group inter-mar-

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[13] National Research Council. 1997. *The New Americans: Economic, Demographic and Fiscal Effects on Immigration.* Washington, DC: National Academy Press.

[14] U.S. Bureau of the Census. 1996. *Current Population Reports.* (Feb.). Edmonston, B.; Passel, J.S. (eds.). 1994. *Immigration and Ethnicity: The Integration of American's Newest Arrivals.* Washington, DC: The Urban Institute Press.

riage. According to the projection based on these assumptions, the U.S. population would increase by 124 million persons to 387 million, with immigration responsible for two-thirds (82 million) of the increase. Of this 82 million, 45 million are immigrants and an additional 37 million increase is due to their higher assumed fertility.

Immigration affects the age structure as well as the overall population. The NRC panel projected that under current immigration policy, kindergarten through grade eight school enrollment in 2050 would be 17 percent higher than it was in 1995. High school enrollment would rise from 14.0 million in 1995 to 20.3 million in 2050. Immigration also has small effects on the proportion of the population that is elderly. No matter which immigration policies are adopted, according to the NRC, the number of persons aged 65 years and older will double between 1995 and 2050. However, the proportion of older people in the total population will be somewhat smaller with immigration.

The NRC panel's projection of the ethnic distribution of the U.S. population in 2050 shows the Hispanic population increasing from 10 to 25 percent and the Asian population from 3 to 8 percent of the population. These projections are dependent on today's rates of group intermarriage and how persons report their ethnicity. It may be that, like children of immigrants who arrived in the last century, descendents of today's immigrants will choose to report their ethnicity as being different from that of their parents, and that today's ethnic categories will not accurately describe tomorrow's populations.

What broader implications do these growth figures have? Some analysts argue that high immigration levels mean an abundant supply of youthful workers who will be a substantial spur to the economy. From this perspective, population growth is an engine for technological progress and the means to solve environmental problems, effectively spawning change out of necessity. Proponents of

this view argue that human resourcefulness has dealt with population growth in the past and the solutions often have left us better off. Adding more people may "cause us more problems, but at the same time there will be more people to solve these problems."[15]

Others are concerned about the negative consequences of population growth, particularly on the environment, infrastructure, and services.[16] They see population growth as imposing pressures on our natural resources and quality of life, raising special concerns in the arid regions of the southwest or sites of industries relocating to the south central states.[17] Those concerned argue that our future well-being depends upon both conservation, and stabilizing population growth.[18]

This debate primarily concerns total U.S. population growth, which is strongly influenced by immigration. Still, there is little or no information about whether immigrants have *differential* impacts distinct from the population increase they produce on the U.S. environment.[19]

The Commission did find that rapid inflows of immigrants can pose difficulties for those who must plan for community growth. Schools sometimes receive large numbers of new immigrant students that had not been planned for. Housing and infrastructure development

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[15] Simon, J. 1994. More People, Greater Wealth, More Resources, Healthier Environment. *Economic Affairs* (April) 22-29.

[16] Beck, R. 1994. *Re-Charting America's Future: Responses to Arguments Against Stabilizing U.S. Population and Limiting Immigration.* Petoskey, MI: The Social Contract Press.

[17] U.S. Commission on Immigration Reform. 1995. Mesa, Arizona U.S. Commission on Immigration Reform roundtable.U.S. Commission on Immigration Reform 1997. Site visit to Garden City, Kansas.

[18] Abernethy, V. 1994. *Population Politics.* New York: Insight Press.

[19] Kraly, E.P. 1995. *U.S. Immigration and the Environment: Scientific Research and Analytic Issues.* Washington, DC: U.S. Commission on Immigration Reform.

may not be adequate in affected urban and rural communities.[20] New immigrant destinations, sometimes to areas that have not had new immigrants for a century or more, can put particular stress on communities that have experienced rapid growth in the past decade.

Foreign Policy and National Security Interests

Immigration matters frequently are intertwined with foreign policy and national security. Today, migration and refugee issues are matters of high international politics engaging the heads of state involved in defense, internal security, and external relations.[21] International migration intersects with foreign policy in two principal ways. The U.N. Security Council has acknowledged that migration can pose threats to international peace and security through economic or social instability or humanitarian disasters. Migration can also build positive relations with other countries and thereby promote national security. As a consequence, migration itself requires bilateral and international attention to help address the causes and consequences of movements of people.

During the Cold War, a foreign policy priority was the destabilizing of Communist regimes. Refugee policy was often a tool to achieve that strategic goal, for instance, by encouraging the flow of migrants from Eastern Europe or Cuba. Elsewhere, political, economic, and military involvement in Southeast Asia and the Dominican Republic had significant migration consequences, as large numbers of Southeast Asians and Dominicans ended up as refugees and immigrants

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[20] Taylor, E.; Martin, P.; Fix, M. 1997. *Poverty Amidst Prosperity: Immigration and the Changing Face of Rural California*. Washington, DC: The Urban Institute Press.

[21] Weiner, M. 1992. Security, Stability, and International Migration. *International Security* 17:3 (Winter) 91-126.

to the U.S. These foreign policy priorities generally have had significant immigration consequences years later.

Alternatively, immigration concerns sometimes have played a significant role in U.S. foreign policy, especially when mass movements to the U.S. are feared. A stated rationale for U.S. Central-American policy in the 1980s was to prevent a mass movement that would occur if anti-American Marxist dictatorships were established in Central America. One of the explicit reasons for the military intervention in Haiti in 1994 was to restrain the flow of migrants onto U.S. shores. And, although the U.S. does not officially maintain relations with Cuba, migration concerns gained priority over diplomatic ones leading to negotiations on the Cuban Migration Agreement and to a reversal of policy regarding the interdiction of Cuban migrants.

Some observers believe that environmental causes now rival economic and political instability as a major source of forced migration throughout the world. There are estimates that as many as one-hundred million people may be displaced, in part, because of degradation of land and natural resources. "That will increase the pressure to migrate to places like the United States."[22] The pervasive deterioration of Mexico's rural drylands may contribute to between 700,000 and 900,000 people a year leaving rural areas.[23] Environmental degradation in Mexico, Haiti, and Central America also are believed to have migration consequences for the U.S. Often environmental problems intersect with other causes. One researcher argues that migrants from Haiti may be considered "environmental refugees" because the root causes of their migrations are land deg-

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[22] Schwartz, M.L.; Notini, J. 1994. *Desertification and Migration: Mexico and the United States.* Washington, DC: U.S. Commission on Immigration Reform.

[23] National Heritage Institute. 1997. *Environmental Degradation and Migration: The U.S./Mexico Case Study.* Report prepared for the U.S. Commission on Immigration Reform.

radation and the Haitian government's unwillingness to act in the interest of the general population."[24]

Stabilizing economic growth and democracy may be an effective means of reducing migration pressures. The Commission for the Study of International Migration and Cooperative Economic Development[25] concluded that, over the long run of a generation or more, trade and investment are likely to reduce migration pressures. Supporters of the North American Free Trade Agreement [NAFTA] argued that NAFTA-related development eventually will reduce unauthorized Mexican migration. The U.S. has provided the reinstalled democratically-elected government of Haiti with a great deal of rehabilitation assistance that should aid the stability of that country.

CONCLUSION

Properly-regulated immigration and immigrant policy serves the national interest by ensuring the entry of those who will contribute most to our society and helping lawful newcomers adjust to life in the United States. It must give due consideration to shifting economic realities. A well-regulated system sets priorities for admission; facilitates nuclear family reunification; gives employers access to a global labor market while protecting U.S. workers; helps to generate jobs and economic growth; and fulfills our commitment to resettle refugees as one of several elements of humanitarian protection of the persecuted.

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[24] Catanese, A. 1990/91. *Haiti's Refugees: Political, Economic, Environmental.* (Paper 17). San Francisco: Natural Heritage Institute; Indianapolis: Universities Field Staff International.

[25] The Commission for the Study of International Migration and Cooperative Economic Development. 1990. *Unauthorized Migration: An Economic Development Response.* Washington, DC.

AMERICANIZATION AND INTEGRATION OF IMMIGRANTS

A DECLARATION OF PRINCIPLES AND VALUES

Immigration to the United States has created one of the world's most successful multiethnic nations. We believe these truths constitute the distinctive characteristics of American nationality:

- American unity depends upon a widely-held belief in the principles and values embodied in the American Constitution and their fulfillment in practice: equal protection and justice under the law; freedom of speech and religion; and representative government;

- Lawfully-admitted newcomers of any ancestral nationality—without regard to race, ethnicity, or religion—truly become Americans when they give allegiance to these principles and values;

- Ethnic and religious diversity based on personal freedom is compatible with national unity; and

- The nation is strengthened when those who live in it communicate effectively with each other in English, even as many persons retain or acquire the ability to communicate in other languages.

As long as we live by these principles and help newcomers to learn and practice them, we will continue to be a nation that benefits from substantial but well-regulated immigration. We must pay attention

to our core values, as we have tried to do in our recommendations throughout this report. Then, we will continue to realize the lofty goal of *E Pluribus Unum*.[1]

The Commission reiterates its call for the Americanization of new immigrants.

AMERICANIZATION

The Commission reiterates its call for the Americanization of new immigrants, that is the cultivation of a shared commitment to the American values of liberty, democracy and equal opportunity. The U.S. has fought for the principles of individual rights and equal protection under the law, notions that now apply to all our residents. We have long recognized that immigrants are entitled to the full protection of our Constitution and laws. The U.S. also has the sovereign right to impose appropriate obligations on immigrants.

In our 1995 report to Congress, the Commission called for a new commitment to Americanization. In a public speech that same year, Barbara Jordan, our late chair, noted: "That word earned a bad reputation when it was stolen by racists and xenophobes in the 1920s. But it is our word, and we are taking it back." Americanization is the process of integration by which immigrants become part of our communities and by which our communities and the nation learn from and adapt to their presence.

This process enhances our unity by focusing on what is important, through acknowledging that the many real differences among us as individuals do not alter our essential character as a nation.

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[1] Our national motto, *E Pluribus Unum*, "from many, one," was originally conceived to denote the union of the thirteen states into one nation. Throughout our history, *E Pluribus Unum* also has come to mean the vital unity of our national community founded on individual freedom and the diversity that flows from it.

This Americanization process depends on a set of expectations that the United States, which chooses to invite legal immigrants, legitimately has of newcomers. It applies equally to the expectations immigrants legitimately have of their new home.

The Commission proposes that the principles of Americanization be made more explicit through the covenant between immigrant and citizens. These principles are not mere abstractions. They can form a covenant between ourselves and immigrant newcomers. As President Johnson eloquently stated in 1965:

> They came here—the exile and the stranger. . . . They made a covenant with this land. Conceived in justice, written in liberty, bound in union, it was meant one day to inspire the hopes of all mankind; and it binds us still. If we keep its terms, we shall flourish.

We have not always abided by its terms, but the ideal of a covenant between immigrant and nation still captures the essence of Americanization. Immigrants become part of us, and we grow and become the stronger for having embraced them. In this spirit, the Commission sees the covenant between immigrants and ourselves as:

> ***Voluntary.*** Immigration to the United States—a benefit to both citizens and immigrants—is not an entitlement and Americanization cannot be forced. We as a nation choose to admit immigrants because we find lawful immigration serves our interests in many ways. Likewise, no one requires immigrants to come here or to become citizens; they choose to come and, if they naturalize, they choose to become a part of our polity.

Mutual and reciprocal. Immigration presents mutual obligations. Immigrants must accept the obligations we impose—to obey our laws, to pay taxes, to respect other cultures and ethnic groups. At the same time, citizens incur obligations to provide an environment in which newcomers can become fully participating members of our society. We must not exclude them from our community nor bar them from the polity after admission. This obligation to immigrants by no means excuses us from our obligations to our own disadvantaged populations. To the extent that immigration poses undue burdens on our communities, our citizenry, or immigrants themselves, we have an obligation to recognize and address them.

Thus the United States assumes an obligation to those it admits, as immigrants assume an obligation to this country they chose. Having affirmatively admitted the newcomer, the federal government necessarily extends civic and societal rights. Unfortunately recent legislative changes effectively have excluded immigrants from the public safety net until such time as they become naturalized citizens. This Commission previously recommended against such action. We believe it is likely that these changes will lead to greater problems both for immigrants and for the communities in which they live. Legislation that leads immigrants to seek citizenship to protect eligibility for social benefits, rather than out of commitment to our polity, provides the wrong incentive. The effect is not to exalt citizenship, but to diminish it.

Individual, not collective. The United States is a nation founded on the proposition that each individual is born with certain rights and that the purpose of government is to secure these rights. The United States admits immigrants as individuals (or individual members of families). As long as the United States continues to emphasize the rights of

individuals over those of groups, we need not fear that the diversity brought by immigration will lead to ethnic division or disunity. Of course, the right to assemble and join with others is a fundamental right of all Americans, immigrants included. However, unlike other countries, including those from which many immigrants come, rights in the United States are not defined by ethnicity, religion, or membership in any group; nor can immigrants be denied rights because they are members of a particular ethnic, religious, or political group.

The Commission believes that the federal government should take the lead and invite states and local governments and the private sector to join in promoting Americanization. For example, "I Am an American Day" was once widely celebrated in public schools and local communities. Recent immigration legislation mandates naturalization ceremonies on the 4th of July. While the federal government cannot and should not be the sole instrument of Americanization, it can provide important leadership in supporting the implementation of programs designed to promote full integration of newcomers.

To help achieve full integration of newcomers, the Commission calls upon federal, state, and local governments to provide renewed leadership and resources to a program to promote Americanization that requires:

- Developing capacities to orient both newcomers and receiving communities;
- Educating newcomers in English language skills and our core civic values; and
- Revisiting the meaning and conferral of citizenship to ensure the integrity of the naturalization process.

The Commission recommends that the federal government take an active role in helping newcomers become self-reliant: orienting immigrants and receiving communities about their mutual rights and responsibilities, providing information they need for successful integration, and encouraging the development of local capacities to mediate when divisions occur between groups.

ORIENTATION

The Commission recommends that the federal, state, and local governments take an active role in helping newcomers become self-reliant: orienting immigrants and receiving communities as to their mutual rights and responsibilities, providing information they need for successful integration, and encouraging the development of local capacities to mediate when divisions occur between groups. Information and orientation must be provided both to immigrants and to their receiving communities. The experience of "newcomer schools" is that providing coordinated information and advice on life in the United States accelerates the integration of newcomers, which, in turn, decreases the negative impacts on communities. Information on expected impacts and successful programs can help localities foster immigrant integration and mediate differences to avoid community conflicts.

More specifically, to integrate into American society, immigrants need information on their legal rights and obligations, on American core civic beliefs, on how to access services, and on immigration-related requirements. Communities require information on the numbers and characteristics of immigrants arriving in their midst, the eligibility of newcomers for various services, the legal responsibilities of state and local government agencies, and similar matters. The Commission believes the federal government should help immigrants and local communities by:

- **Giving orientation materials to legal immigrants upon admission** that include, but are not limited to: a welcoming greeting; a brief discussion of U.S. history, law, and principles of U.S. democracy; tools to help the immigrant locate and use services for which they are eligible; and other immigration-related information and documents. All immigrants would receive the same materials. The packets would

be available in English and the main immigrant languages. It is not the Commission's intent to prescribe all parts of an orientation packet but, rather, to suggest the most important information and key resources that should be included.

Welcoming statement. The Welcoming Statement would congratulate immigrants on their decision to become permanent residents of the United States. It also would summarize the basic principles that all Americans embrace.

Example of a Welcoming Statement

Congratulations on your decision to immigrate to the United States of America. Best wishes for a successful settlement in your new home. This is a proud country of individual freedom, opportunity, and diversity with a long tradition of immigration. Finding success and opportunity in the United States can be difficult. We realize that immigrants face many challenges as they become self-reliant, such as learning a new language and adjusting to new circumstances. The U.S. has learned from its tradition of immigration that patience, tolerance, and adaptability are required from each and every one of us.

Basic American principles that you are asked to embrace include: a commitment to serve the best interests of the United States and the community in which you live; knowledge of and respect for our laws and democratic institutions; respect for freedom of speech and religion; and a commitment not to discriminate against others on the basis of nationality, race, sex, or religion. The excerpts from the U.S. history and law section of your orientation packet should serve to illustrate the meaning of these important principles.

We the people of the United States welcome you.

Example of Documents on the Founding Principles

On July 4, 1776, the Continental Congress adopted a Declaration drafted by Thomas Jefferson that defined the commitment of a new nation to the principles of liberty and justice for all:

> *We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed. . . .*

The greatest contradiction in the new nation's founding was the institution of human slavery, which ended only after a bloody civil war (1860-1864). After the decisive battle at Gettysburg, in 1863, Abraham Lincoln dedicated the cemetery, ending with these words:

> *[W]e here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.*

After the Civil War, the effort to live up to the promises of the founding principles intensified. In 1872, Susan B. Anthony was arrested for attempting to vote in a Presidential election. Her speech on the rights of women was an important step toward gaining women the vote:

> *The preamble of the federal Constitution says . . . It was we, the people; not we, the white male citizens; nor yet we, the male citizens; but we, the whole people, who formed the Union. And we formed it, not to give the blessings of liberty, but to secure them; not the half of ourselves and our posterity; but to the whole people —women as well as men.*

Way into the twentieth century, the founding principles continue to challenge Americans. In 1963, the Reverend Dr. Martin Luther King, Jr. led a peaceful March on Washington, and spoke on the steps of the Lincoln Memorial in the cause of civil rights.

> *When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness . . .*
>
> *I have a dream that one day this nation will rise up and live out the true meaning of its creed: "We hold these truths to be self-evident; that all men are created equal. . . . I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character . . . And if America is to be a great nation this must become true.*

U.S. history, law, and principles of democracy. This would include a brief history of the United States and of the principles listed in the welcoming statement, followed by excerpts from relevant historical documents. It would stress that American civic culture is based on a trust in ordinary people's ability to govern themselves through their elected representatives who are then accountable to the people, on the right of all members of the polity to participate in public life as equals, and on the freedom of individual members of the community to differ from each other in religion and other private matters.

Tools for settlement. This section would emphasize the development of self-reliance. It would include general information and checklists to aid immigrants in finding and using services in their community that may help them in developing economic independence.

Example of Tools for Settlement

What to expect upon immigration: information to orient newcomers on federal policies and services, such as a pre-/ post-arrival checklist on admissions, information for those adjusting status on new rights and responsibilities as permanent residents, reminder to register for military service if necessary, the role of government agencies and service providers; consumer protection and tax policies;

How to secure basic needs: information on housing, employment, education and language training, health, transportation, police and fire protection, managing finances, and cultural adjustment;

Finding assistance and advice: telephone numbers for the local information clearinghouses, government agencies; documents listing weight and measurement conversions, U.S. holidays, instructions in using the telephone and postal systems; a U.S. map;

Getting involved in the community: listings of community organizations (e.g., civic, sports, arts) and volunteer opportunities.

Immigration information and documents. This section would provide necessary immigration forms, information on naturalization, and a card for non-English-speaking immigrants to indicate their need for an interpreter.

- **Encouraging state governments to establish information clearinghouses in major immigrant receiving communities.** The Commission recommends that the federal government provide modest incentive grants to states to encourage them to establish and maintain local resources that would provide information to immigrants and local communities. For example, local information clearinghouses could provide information to immigrants on rights and responsibilities, naturalization, education and training, and the world of work. They could have materials available on tenant law and renter/landlord rights and responsibilities. They could spell out how U.S. family law (regarding marriage and prohibiting spouse and child abuse, polygamy, and female genital mutilation, etc.) may differ from other cultures. They could provide information on public life (driving, insurance, hunting/fishing licences, law enforcement, consumer protection, etc.). They could also provide information to local public and private organizations about immigrants, e.g., documentation, culture/background, eligibility status for programs, work authorization verification.

  The resource centers could develop, translate and disseminate materials; foster partnerships among immigrant interest groups, ethnic churches, and service providers (advisory boards, taskforces, planning boards, coalitions); and develop volunteer networks in immigrant communities to help newly-arriving immigrants. These efforts could help reduce community tensions arising from immigration by providing accurate information and helping communities find ways to mediate these tensions. The resource centers could also

provide information on model programs implemented by businesses, service agencies, and others.

The Office of Refugee Resettlement in the Department of Health and Human Services, which already provides funding for refugee services, could administer this grant program. Each state receiving funds would designate the local structure through which the funding would be administered as part of its application for funds. Some states are likely to designate the state refugee coordinator's office, but others may designate the state education department. States had similar flexibility when they received funds under the State Legalization Impact Assistance Grant [SLIAG] program.

These already-existing structures could easily integrate the proposed services with only modest financial increments. Based on its consultations, the Commission believes that an annual appropriation of $30-35 million would cover development of orientation materials and underwrite services in forty to fifty targeted communities. The monies should be administered flexibly, not as a formula to each state. Targeted areas should include those with historically significant numbers of immigrants as well as communities experiencing a sudden growth in immigrant arrivals. (In Garden City, Kansas, for example, the Commission observed how the arrival of new meatpacking plants changed the population from one with few foreign-born residents a decade ago to one with a sizeable immigrant component today.)

- **Promoting public/private partnerships to orient and assist immigrants in adapting to life in the United States.** The Commission previously has called for a renewed public/private partnership in the Americanization of immigrants. While the federal government makes the decisions about how many and which immigrants will be admitted to the

United States, the actual process of integration takes place in local communities. Local government, schools, businesses, religious institutions, ethnic associations, and other groups play important roles in the Americanization process.

Project Vida in El Paso provides medical services to the Latino border community. Funded by the Presbyterian Church and public/private grants and contracts, Vida developed "one-stop shopping" for primary health care, education, housing, and other social services. It built 20 affordable rental units; and helped to generate an increase in local elementary school reading scores.

The Commission urges the federal government to assemble leaders from the public and private sectors at the federal, state, and local levels to discuss ways to invigorate a public/private partnership to promote Americanization. The participants should include representatives of state and local educational systems, businesses, labor, local governments, and community organizations. The meeting would address ways to enhance resources for instruction in English language acquisition, civic understanding, and workplace skills. The federal grant program described above also could help promote more coordinated efforts at the local level by establishing advisory structures representing the various public and private institutions with interest in immigration matters.

The Fannie Mae Foundation built a model public/private initiative with community-based organizations, public officials, and lenders to facilitate home ownership and naturalization for immigrants.

EDUCATION

Education is the principal tool of Americanization. Local educational institutions have the primary responsibility for educating immigrants. However, there is a federal role in promoting and funding English language acquisition and other academic programs for both immigrant children and adults.

The Commission urges a renewed commitment to the education of immigrant children. The number of school-aged children of immigrants is growing and expected to increase dramatically. These children, mostly young, speak more than 150 different languages; many have difficulty communicating in English. They are enrolled in public schools as well as in secular and religious private schools through the country.

In addition to the problems other students have, immigrant children face particular problems in gaining an education—often because of language difficulties. The 1990 Census shows that 87 percent of immigrant children attended high school as compared to 93 percent of natives. More than one-fourth of Mexican immigrant youth between ages 15 and 17 were not in school in 1990. While some dropped out, others never "dropped in" to school in the first place.

The Commission urges a renewed commitment to the education of immigrant children.

Immigrant children often come from countries with customs, traditions, and social and governmental structures that differ from those they encounter in the U.S.; some have little or no formal education and no understanding of the American school system; some arrive with personal experiences of trauma and war; many older children come from countries where school ends at a younger age; many experience lengthy delays in being mainstreamed into regular English-speaking classes; and some do not receive appropriate-level instruction in other academic subjects while they are learning English.

Immigrant children also bring strengths to American society. For example, their native-language skills contribute to building the future multilingual workforce needed in a global economy; sharing of their cultural heritage will promote the sensitivity of that workforce as it interacts in a worldwide marketplace. Many immigrant children who enroll in school and then remain to graduate do well academically. These immigrant children are more likely than natives to prepare for, attend, and complete college.[2] The key, however, is helping them achieve sufficient English proficiency to be able to participate.

The Commission emphasizes that rapid acquisition of English should be the paramount goal of any immigrant language instruction pro-

[2] Venez, G.; Abrahamse, A. 1996. *How Immigrants Fare in U.S. Education.* Santa Monica: RAND. Rumbaut, R.G.; Cornelius, W.A. 1995. *California's Immigrant Children: Theory, Research, and Implications for Educational Policy.* San Diego: Center for U.S. Mexican Studies.

gram. English is the most critical of basic skills for successful integration. English can be taught to children in many ways. Effective programs share certain common characteristics. Based on a review of these programs, the Commission emphasizes the need to:

The Commission emphasizes that rapid acquisition of English should be the paramount goal of any immigrant language instruction program.

- **Conduct regular evaluations of students' English competence and their ability to apply it to academic subjects.** Such evaluations will ensure placement of immigrant children into regular English-speaking classes as soon as they are prepared. Regular evaluation also will highlight strengths and weaknesses in educational programs and provide insight on improvements that are needed to ensure timely English acquisition.

- **Collect and analyze data regularly on students, their linguistic and academic performance, and the method of instruction.** Presently, federal, state, and local governments fail to collect and analyze adequate, uniform, data on bilingual and other forms of English instruction. Such failure hinders overall evaluation and the responsible allocation of government funds. A 1997 National Research Council report[3] pointed out the need for new systems to support data collection and research in this area. The NRC recommended establishment of a new Department of Education Advisory Committee on Research on English-Language Learners, urged the National Center for Education Statistics to take the lead in collecting data on students and programs, and recommended that the Office of Bilingual Education and Minority Language Affairs take the lead in developing and evaluating programs to enhance teacher development.

[3] National Research Council (August, D; Hakuta, K. eds.). 1997. *Improving Schooling for Language-Minority Children: A Research Agenda.* Washington, DC: National Academy Press.

- **Include appropriate grade-level instruction in other academic disciplines.** Coordination with teachers, curricula, and instruction outside of English acquisition will promote students' mastery of regular subject matter while they learn English.

- **Involve parents of immigrant students in their schooling.** A characteristic of many of the most successful language acquisition programs is the active involvement of parents in the education of their children. Such "family literacy" models include programs that promote frequent parent-teacher conferences and that also encourage non-English-speaking parents to enroll in English as a Second Language [ESL] programs. Some of the adult programs are offered at the local school in the evenings.

Seattle's Sharples Center teaches refugee students with limited or no English proficiency in grades six through twelve. They are grouped by English language ability, not age. Because of high demand, they usually can stay for only six months or less. The program focuses on preventing subsequent low academic perfor-mance and also pre-venting the high dropout rates that occur when students with limited English proficiency are mainstreamed too soon.

The Commission encourages programs that are responsive to the needs of immigrant children and an orientation to United States school systems and the community, such as we have seen in "newcomer schools." Newcomer schools must not isolate immigrant newcomers. Instead, they must be transitional and actively promote the timely integration of students into mainstream schools. Successful programs recognize the special needs of immigrant children, particularly refugees. They share information among resettlement programs and school administrators and among English acquisition and regular classroom teachers. Along with English and other academic subjects, newcomer schools teach basic school survival and living skills (such as how the local transportation system works and how to shop for food) and develop intercultural communications. Some also provide access to a wide range of support services, such as health screenings and immunizations.

The Commission encourages programs that are responsive to immigrant children's needs and an orientation to United States school systems and the community.

The Commission recommends the revival and emphasis on instruction of all kindergarten through grade twelve students in the common civic culture that is essential to citizenship. An understanding

of the history of the United States and the principles and practices of our government are essential for all students, immigrants and natives alike. Americanization requires a renewed emphasis on the common core of civic culture that unites individuals from many ethnic and racial groups. Civics instruction teaches students both the responsibilities and the rights of United States citizenship. Civics education also can help immigrant students turning eighteen to prepare for naturalization. The Commission recommends that local school boards institute civics programs that:

San Francisco's Newcomer High School was the nation's first high school devoted entirely to immigrants. Students with less than six years of education and/or poor English skills may attend for up to a year of intensive instruction based on their English ability rather than on their age. Before they are mainstreamed, students are taken to see their new school and meet their new teachers.

- Teach that the U.S. is united by the constitutional principles of individual rights and equal justice under the law;
- Restore the emphasis on such traditional American leaders as Washington, Jefferson, and Lincoln, who defined the American promise of liberty and equality for all, and incorporate other heroes and heroines, such as Sojourner Truth, Susan B. Anthony, Martin Luther King, Jr., Franklin Roosevelt, and Barbara Jordan, who expanded their promise to all Americans;
- Stress the importance of civic holidays and of American symbols and rituals, for example, the flag and the Pledge of Allegiance.

The Commission recommends the revival and emphasis on instruction of all kindergarten through grade twelve students in the common civic culture that is essential to citizenship.

Civics instruction in public schools should be rooted in the Declaration of Independence, the Constitution—particularly the Preamble, the Bill of Rights, and the Fourteenth Amendment. Emphasizing the ideals in these documents is in no way a distortion of U.S. history. Instruction in the history of the United States, as a unique engine of human liberty notwithstanding its faults, is an indispensable foundation for solid civics training for all Americans.

The Commission emphasizes the urgent need to recruit, train, and provide support to teachers who work with immigrant students.

There is a disturbing shortage of qualified teachers for children with limited English proficiency, of teacher training programs for producing such teachers, and of other support for effective English acquisition instruction. More than 50 percent of teachers in current bilingual education programs have no formal education in teaching students with limited English skills. Teachers are often unprepared and untrained in understanding how the cultural background and experiences of immigrant children may affect their ability to learn. They need to understand that while many students quickly acquire skill in using and understanding English in social situations, acquiring academic proficiency in English takes longer.

All teachers of immigrant students—those who teach English and those who teach other academic subjects—need training to develop the most effective tools for imparting knowledge to students with limited English proficiency. Teachers also need help in understanding how best to involve immigrant parents who may themselves be limited in their command of English. Schools that have been effective in involving immigrant parents in their children's education tend to be more effective in retaining and educating students. To promote such involvement, teachers must be sensitive to differences in language and culture that may impede an immigrant parent's ability to participate in school activities.

The Commission emphasizes the urgent need to recruit, train, and provide support to teachers who work with immigrant students.

The Commission supports immigrant education funding that is based on a more accurate assessment of the impact of immigration on school systems and that is adequate to alleviate these impacts. Urban and rural schools often require federal assistance when confronted with large numbers of immigrant students. Current federal support comes through several unrelated funding streams: some is geared to particular instructional models; some is directed to address impacts of large numbers of new arrivals; however, most comes indirectly through monies targeted to schools with economically disadvantaged children who are performing poorly.

The Commission supports immigrant education funding that is based on a more accurate assessment of the impact of immigration on school systems and that is adequate to alleviate these impacts.

Washington, DC's public Bell Multicultural High School offers secondary and adult day/evening intensive English classes, vocational programs, career development, dropout prevention, technical preparation, and comprehensive math and science. Bell students have high attendance rates, high advanced placement exam scores, and high rates of continuing on to higher education. Last year counselors assisted more than 30 students to become citizens. Many staff are both immigrant and multilingual and, thus, can both empathize with students' transitions and support Bell's strong native language-maintenance program.

There are costs and responsibilities for language acquisition and immigrant education programs that are not now being met. We urge the federal government to do its fair share in meeting this challenge. The long-run costs of failure in terms of dropouts and poorly-educated adults will be far larger for the nation and local communities than the costs of such programs.

More specifically, we urge the federal government to:

- **Provide flexibility in federal funding for the teaching of English to immigrant students to achieve maximum local choice of instructional model.** The federal government should not mandate any one mode of instruction (e.g., bilingual education, English as a Second Language programs, immersion). Research indicates that no one pedagogical model for English instruction works more effectively than any other. What makes for success are: the commitment of the local school system to educate its English learners; well-trained teachers who are adept at English language instruction; involvement of parents; frequent evaluation of student language acquisition; and a plan for timely placements in mainstream programs.

- **Make funding contingent on performance outcomes—that is, English language acquisition and mastery of regular academic subject matter by students served in these programs.** School systems receiving funds because of large numbers of children with limited English proficiency and immigrant children should be held to rigorous performance standards. Incentives should promote—not impede—expeditious placement in regular, English-speaking, classes.

The Commission urges the federal, state, and local governments and private institutions to enhance educational opportunities for adult

immigrants. Education for basic skills and literacy in English is the major vehicle that integrates adult immigrants into American society and participation in its civic activities. Literate adults are more likely to participate in the workforce and twice as likely to participate in our democracy. Literate adults foster literacy in their children, and parents' educational levels positively affect their children's academic performance.

According to the 1990 Census, a total of 5.8 million adults reported that they speak English "not well" or "not at all." This number continues to grow because of the entry of non-English-speaking immigrants. Researchers estimate that 600,000 adults with only limited or no English now enter the United States each year. Immigrants who are illiterate even in their native language or who have only a few years of schooling consequently are confined to employment in dead-end jobs.

Adult education is severely underfunded. Available resources are inadequate to meet the demand for adult immigrant education, particularly for English proficiency and job skills. Enrollment in adult English as a Second Language classes increased 183 percent from 1980 to 1990; neither classes nor funding have kept pace with demand. In Massachusetts, a state widely recognized for its excellent adult education programs, an estimated 11,000 of the 16,000 on the waiting list for adult basic education are waiting for ESL services.

Three principal problems impede the capacity to expand opportunities for adult education. First, funding to subsidize courses is limited. Many adult immigrants are willing and able to pay some tuition for courses, expecting a positive return on this investment. However, given average income levels of uneducated, unskilled immigrants, they are unlikely to be able to cover the total costs of adult education courses.

The Carlos Rosario Adult and Career Center in Washington DC. was for 25 years the only DC public school teaching English to adult foreigners, graduating classes as large as 650 students. Closed due to funding constraints, it reopened with private funding in a church in Chinatown. Courses are offered in computer use, nursing assistance, and GED.

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The Resources Occupational Training Program in Brooklyn, New York, a nonprofit adult vocational training program, operates as an affiliate of the Catholic Migration Office of the Diocese of Brook-lyn. Launched in 1994 with seed money from an Italian businessman, it trains and places 98 percent of its immigrant students in well-paying jobs without government assistance.

Second, teacher training programs are limited, resulting in shortages in the number of qualified teachers. For example, in Massachusetts, there are only two training programs for teachers of ESL to adults and no Masters-level program for teachers of adult basic education. Many schools utilize volunteers to serve as tutors, but there is an insufficient number of trained teachers to provide guidance to these volunteer aides.

The third impediment relates to the general quality of adult education programs. The General Accounting Office [GAO] reported in 1995 that adult education and literacy programs funded by the U.S. Department of Education have no defined objectives, valid assessment instruments, or accurate program data.

In the early part of the twentieth century, state departments of education and local school boards played an active role in the Americanization of immigrants. They committed resources to adult education in evening and weekend classes because they recognized the importance of economic and civic incorporation into their communities. Similarly, many turn-of-the-century businesses participated in the Americanization movement, recognizing the benefits to their operations accruing from a literate, educated workforce.

Responding to requests from its limited English-speaking employees, the United Electric Control Corporation in Watertown, Massachusetts in 1992 launched an educational and vocational skills training program. Em-ployees are given time off from work to take courses in a program that is so successful that it led to the formation of a consortium of Boston area high-technology companies to provide the same services. In this case, the program was given a jump start by a federal workplace literacy program grant.

There has been a shift away from this once widely-held public perception of immigrant adult education as a local responsibility, with its local community- and school-based programs. The source of funding is federal and state (as compared to kindergarten through grade twelve education that is financed primarily through local taxes). While many local school districts continue to provide classrooms and other resources, others do not. In this setting of excess demand for adult education, volunteers and low-cost options do exist. Access to relatively inexpensive classroom space often is a major impediment to program implementation. But—even though publicly-owned classroom space is often available and unused during evening and weekend hours—such limitations persist.

In recognition of the benefits they receive from immigration, the Commission urges leaders from businesses and corporations to participate in skills training, English instruction, and civics education programs for immigrants. Religious schools and institutions, charities, foundations, community organizations, public and private schools, colleges and universities also can contribute resources, facilities, and expertise. All of these sectors benefit from having skilled, English-speaking workers and residents. For example, local school systems could open schools after hours to community groups providing English instruction on a volunteer basis, and businesses could provide employees the opportunity for such classes at the jobsite. Such public/private partnerships can contribute in many ways to a greater range of educational opportunities for immigrants.

The Boeing Company and the International Association of Machinists provide training and skills development to current and laid-off workers that includes English as a Second Language and professional English development. Boeing also provided in-kind production services for a community-based organization naturalization video series in eight languages.

NATURALIZATION

Naturalization is the most important act that a legal immigrant undertakes in the process of becoming an American. Taking this step confers upon the immigrant all the rights and responsibilities of civic and political participation that the United States has to offer (except becoming President). The Commission reiterates its belief that no action should be taken that detracts from the appeal of citizenship as an opportunity to become a member of the polity. The naturalization process must be credible, and it must be accorded the formality and ceremony appropriate to its importance.

The Commission believes that the current legal requirements for naturalization are appropriate, but improvements are needed in the means used to measure that an applicant meets these requirements.

Maid Bess, a contract apparel business in Salem, Virginia provides free on-site English instruction to its refugee employees with the help of a local refugee resettlement agency. Among its more than 400 employees, 17 national and ethnic groups are represented. On its annual "International Day," all employees are encour-aged to dress in the traditional costume of their native country or that of their ancestors.

To naturalize, legal immigrants must meet certain threshold requirements; these have remained remarkably consistent throughout our history. At present, to naturalize, a legal permanent residents must reside in the United States for five years (three years for spouses of

The Commission believes that the current legal requirements for naturalization are appropriate but improvements are needed in the means used to measure* that *an applicant meets these requirements.

The nonprofit Arlington Community Foundation in Virginia funds and organizes grassroots programs to assist immigrants in their transition to American society. It sponsors local community organizations, festivals, and focus groups to identify and address sources of tension be-tween longtime residents and newcomers. It also supports local initiatives to assist immigrant entre-preneurs and parents of school-age children to understand how American institutions work. In 1995, it founded the Washington Partnership for New Americans to encourage naturalization.

U.S. citizens and legal permanent residents who serve in the military); demonstrate the ability to read, write, speak, and understand English; pass a U.S. history and civics exam; be of good moral character; and take an oath of allegiance.

With regard to the specific legal requirements, the Commission supports:

- **Maintaining requirements that legal immigrants must reside in the United States for five years (three years for spouses of U.S. citizens and Lawful Permanent Residents who serve in the military) before naturalizing**. We believe five years is adequate for immigrants to embrace, understand, and demonstrate their knowledge of the principles of American democracy.

- **Improving the mechanisms used to demonstrate knowledge of U.S. history, civics, and English competence.** The Commission believes that the tests used in naturalization should seek to determine if applicants have a meaningful knowledge of U.S. history and civics and are able to communicate in English. The current tests do not adequately assess such understanding or abilities. The civics test, for example, relies on memorization of discrete facts rather than on substantive understanding of the basic concepts of civic participation.

  INS district offices vary significantly from each other in the methods by which they administer the test and in the threshold number of correct answers needed for passage. In some cases, examiners scale the tests to the perceived educational abilities of applicants. The lack of uniform standards governing whether an applicant has satisfactorily fulfilled the

requirements is disturbing. Such inconsistencies pose undue confusion for qualified legal residents and undermine public confidence in the naturalization process.

The Commission believes the tests should be standardized and aim to evaluate a common core of information to be understood by all new citizens. The U.S. history and civics test should assess whether applicants understand the basic principles of U.S. government: for example, what it means to have freedom of speech or the freedom to assemble. The English test should accurately and fairly measure an immigrant's ability to speak, read, and write; the current practice of dictating English sentences for applicants to write is not an effective means of testing English proficiency.

INS is now undertaking a full review of its interview and testing criteria, including the content and format of the English and civics portions of the test. The Commission encourages officials responsible for naturalization to consult and enlist the assistance of professional educators, pedagogical experts, and standardized test providers in the development of new history/civics and English standards and tests. Consideration should be given to separating the English reading, writing, and comprehension components from the personal interview. Often, applicants are nervous about making a mistake during the interview and demonstrate less English proficiency than they may have. This separation also would work to the advantage of those responsible for adjudicating applications as interviews would be reserved for applicants who had fulfilled the English and civics requirements, sparing scheduling and interviewing of unqualified applicants.

The Arlington County, Virginia, Wilson Center provides education and training for immigrants using federal refugee program funds for language and employment services. It offers citizenship and English as a Second Language classes (focusing on child rearing and family violence). As the school registration center for foreign-born children, it can readily inform immi-grants of its services.

The American Telephone and Telegraph Company in India Hill, Illinois, learned the lengthy naturalization process was of major concern for its employees. It worked with the Chicago INS office to distribute naturalization applications and study guides to employees and provided space for officials to conduct interviews and naturalization ceremonies. A total of 400 employees and their family members became citizens.

These new standards will be meaningful only if applied equitably and there is a much greater capacity to monitor the agencies that give the tests. [See below.]

A more predictable and standardized testing process also must include consistent and rational exemptions for elderly legal permanent residents. At present English language exemptions are granted to legal permanent residents aged 50 years or older who have lived in the United States at least twenty years and to those 55 years of age who have resided in the U.S. for at least fifteen years. Special consideration on the civics component is given to naturalization applicants aged 65 or older who have resided in the U.S. for at least twenty years. The Commission supports these exemptions. However, it makes little sense to confer such exemptions on long-term legal residents, yet not on more recent elderly legal residents who have had less time to acquire English proficiency. The Commission calls for a thorough review of the current testing exemptions and urges the Congress to consider additional, narrowly-tailored exemptions to the English requirement for qualified elderly immigrants who have resided in the U.S. for fewer years than required by the current exemptions.

The Voter Education Registration and Action Program of the New England Literacy Resource Center in Boston, Massachusetts promotes adult literacy so that its students can take informed action on issues that concern them. The Center is supported by National Institute for Literacy grants under the 1991 National Literacy Act. In the November 1996 election, 467 out of 550 of the program's adult learners —85%— participated.

- **Expediting swearing-in ceremonies while maintaining their solemnity and dignity.** Approved applicants must take an oath of allegiance before U.S. citizenship is conferred upon them. Generally, the oath is administered in public ceremonies by federal judges. Most such ceremonies are solemn and dignified public affirmations of a mutual obligation that new Americans and their adopted country make to each other. However, in districts where the federal court has exercised sole jurisdiction to conduct the swearing-in cer-

emonies, long delays often result from crowded court calendars.

The Commission believes a more expeditious approach to the swearing-in ceremony should be adopted. Timely ceremonies need not sacrifice the ceremonial and traditional aspects of the ceremony that the Commission strongly believes are essential. The Commission believes the solemnity and pomp of the current judicial ceremonies should be maintained and could be enhanced by the inclusion of distinguished speakers. However, would-be citizens who have passed all requirements for naturalization should not be denied timely citizenship because of processing delays in scheduling swearing-in ceremonies.

Until 1990, the federal judiciary had sole jurisdiction to confer citizenship on an approved naturalization applicant. The Immigration Act of 1990, however, transferred authority to confer citizenship to the INS. Within one year, the Judicial Naturalization Amendments of 1991 reinstated the judiciary, albeit in a somewhat modified role. Consequently, judges who choose to exercise sole jurisdiction are granted forty-five days from notification of eligible applicants in which to perform swearing-in ceremonies. Despite the changes instituted by the 1991 Amendments, immigrants typically wait considerably longer to be sworn in as new citizens.

Such delays can have significant consequences for legal residents; they are unable to apply for particular jobs, travel abroad, vote, or receive certain benefits such as Food Stamps and Supplementary Security Income [SSI]. The Commission is concerned that as the number of newly-approved citizenship applicants increases, along with an increasing caseload

for the federal judiciary, the federal courts' capacity to perform timely ceremonies may be further hampered.

The Commission recommends that to reduce this waiting time Congress restore the Executive Branch's sole jurisdiction for naturalization. The Executive Branch should continue to work with federal judges as well as other qualified institutions and personnel, such as state courts or Immigration Judges, to ensure that swearing-in ceremonies are consistently conducted in a timely, efficient, and dignified manner. Eminent persons who would add dignity to the ceremony could be invited to participate as well. Standards of conduct should be developed for all such participants to assure, for example, that all remarks are free of partisan politics.

- **Revising the naturalization oath to make it comprehensible, solemn, and meaningful.** Taking the oath is a critical legal step in becoming a naturalized citizen. Its words convey the core meaning of becoming an American citizen. Thus, it is imperative that it be understandable by all who take it. We recommend that those naturalizing be given a written copy of the oath that they can read during the swearing-in and that they can keep as a meaningful memento. The current oath is not easy to comprehend. We believe it is not widely understood by new citizens. Its wording includes dated language, archaic form, and convoluted grammar. Although the 1952 statute does not prescribe any particular wording, it does require that the oath contain five elements: (1) support for the Constitution; (2) renunciation of prior allegiance; (3) defense of the Constitution against all

enemies, foreign and domestic; (4) true faith and allegiance; and (5) a commitment to bear arms or perform noncombatant service when required.

The Commission proposes the following revision of the oath as capturing the essence of naturalization.

> ***Solemnly, freely, and***
> ***without any mental reservation,***
> ***I,*** **[name]** ***hereby renounce under oath***
> ***[or upon affirmation]***
> ***all former political allegiances.***
> ***My sole political fidelity***
> ***and allegiance from this day forward***
> ***is to the United States of America.***
> ***I pledge to support and respect***
> ***its Constitution and laws.***
> ***Where and if lawfully required,***
> ***I further commit myself to defend them against all enemies, foreign and domestic, either by military or civilian service.***
> ***This I do solemnly swear [or affirm],***
> ***So help me God.***[4]

The Commission calls for urgently needed reforms to increase the efficiency and integrity of the naturalization process. The vast majority of applicants for naturalization are law-abiding immigrants who contribute to our society. The value of Americanization is eroded whenever unnecessary obstacles prevent eligible immigrants from becoming citizens. Its value also is undermined when the

The Commission calls for urgently needed reforms to increase the efficiency and integrity of the naturalization process.

[4] As is the case under current regulations, when applicants, by reason of religious training and belief or for other reasons of good conscience, cannot swear an oath, they may substitute "solemnly affirm" and delete "so help me God."

process permits the abuse of our laws by naturalizing applicants who are not entitled to citizenship. For the process of Americanization to succeed, it must provide fair and timely service to legal residents applying for citizenship. It must also earn the trust and confidence of the general public.

In August 1995, the INS launched an initiative to address many of the most serious impediments to naturalization, including a backlog in excess of 300,000 persons and processing times that in larger cities approached four years. Consequently, the Service hired more than 1,000 new personnel, opened several additional branch offices, and established direct mail centers.

While these new resources resulted in record numbers of naturalizations, improprieties in granting citizenship to criminal aliens and fraud in the testing process undermined the goals of the program. It is fair to conclude that the new program revealed many of the structural and managerial weaknesses of the overall naturalization process. Subsequent Congressional hearings and independent investigations demonstrate that many of the most serious problems preceded the new initiative and were exacerbated by the increasing number of applications.

The Department of Justice [DOJ] has launched a variety of new initiatives to reengineer naturalization. DOJ named a Director for Naturalization Operations charged with overseeing management and reform of the naturalization program, including quality assurance and field operations. DOJ also contracted with Coopers and Lybrand to conduct a two-year review of the implementation and administration of the INS naturalization program.

Recognizing steps already are underway to reengineer the naturalization process, the Commission supports the following approaches:

- **Instituting efficiencies without sacrificing quality controls.** In the Commission's 1995 report to Congress, we recommended that the Immigration and Naturalization Service and the Congress take steps to expedite the processing of naturalization applications while maintaining rigorous standards. Two years later, the naturalization process still takes too long, and previous efforts to expedite processing resulted in serious violation of the integrity of the system.

  Because of failures in processing that resulted in the naturalization of ineligible applicants, new procedures subsequently were adopted to reduce inadvertent naturalization of criminal aliens. These new procedures, while not foolproof in barring criminals from naturalizing, have led to processing delays. At the same time, adequate staffing remains a problem. Congress has authorized reprogramming of funds to hire additional staff, but the Committees permitted temporary hires for most of the new positions even though the number of applications remain large. An entirely temporary workforce with short contracts lends instability to a process that already has problems. Instituting a system that has sufficient continuity of personnel and that is both credible and efficient therefore remains a pressing need.

- **Improving the integrity and processing of fingerprints.** Before applicants for naturalization can receive citizenship, they must submit fingerprints for FBI review to determine if the applicants have any disqualifying criminal background. Problems that delay thousands of applications have been identified in the operation of private agencies taking the fingerprints of applicants for citizenship. These problems include smudged prints and failure of applicants to sign or properly complete forms. Further, no mechanism now ex-

ists to verify accurately that the individual submitting the prints is the person whose prints are on the application.

To improve this process, the INS placed restrictions on who may qualify to offer fingerprint services. INS now accepts only fingerprints provided by Designated Fingerprint Services [DFS] trained and authorized by INS. These include local law enforcement agencies, nonprofit agencies, and fingerprint convenience stores. These restrictions may improve the quality of the prints, but do nothing to ensure that fingerprint services consistently and competently verify the identity of individuals whose prints are submitted. While law enforcement agencies have a vested interest in preserving the quality of fingerprints, they have heavy workloads and do not always give high priority to naturalization requests. Nonprofit, community-based organizations appear to take clear fingerprints, but there are questions about their competence to assess the validity of identity documents.

The Commission believes than only service providers under direct control of the federal government should be authorized to take fingerprints. If the federal government does not take fingerprints itself but instead contracts with service providers, it must screen and monitor such providers rigorously for their capacity, capability, and integrity. Failure to meet standards would result in termination of the contract.

- **Contracting with a single English and civics testing service.** The Commission urges a fundamental restructuring of the policies and procedures with which private agencies test naturalization applicants for their knowledge of English and civics.

A 1991 regulation authorized the INS to recognize the results of private for-profit and nonprofit testing services. The rationale was that private testing of civics and English would help to adjudicate citizenship applicants more expeditiously. By 1994, six organizations had been authorized by the INS to administer the citizenship exam.

Congressional hearings during the fall of 1996 revealed disturbing weaknesses in the use of private testers that undermined the integrity of the citizenship test. In response to reports that private, for-profit testing services were engaging in price gouging, cheating, and fraud, INS investigated three sites. In April and May of 1996, INS made some changes to improve testing site oversight Local INS offices were directed to conduct unannounced inspections of citizenship-testing affiliate locations if the office did not already have an inspection plan in place. The congressional hearings revealed that private testers continued to be inadequately supervised or disciplined by either INS or their parent company.

The Commission recommends that the federal government contract with one national and respected testing service to develop and give the English and civics tests to naturalization applicants. Having one organization under contract should help the government substantially improve its oversight. Moreover, continuity with a highly-respected and nationally-recognized testing service will help ensure a high quality product.

- **Increasing professionalism**. While many naturalization staff are highly professional in carrying out their duties, reports

from district offices, congressional hearings, and complaints from naturalization applicants demonstrate continued dissatisfaction with the quality of naturalization services. The Commission believes that a culture of customer-oriented service must be developed.

Recent audits point to very high levels of noncompliance with established practices and excessive error rates even in such basic tasks as filling in the proper names and identifying numbers on forms. Mistakes pose two serious problems for the naturalization process. First, legitimate applicants for naturalization face unnecessary delays while clerical and other mistakes are corrected. Second, ineligible applicants, including felons, may be able to obtain citizenship through administrative error. While INS must pursue denaturalization of such improperly naturalized citizens vigorously within legal limits, it is difficult to reverse grants of citizenship once made. Recruitment and training of longer-term staff assigned to adjudicating applications and overseeing quality control would help overcome some of these problems.

- **Improving automation.** According to the INS, the number of naturalization applicants projected for fiscal year 1997 and each of the following few years will exceed 1.8 million. As more and more immigrants apply for naturalization and choose to become part of the American polity, there is a greater need for efficient and accurate recordkeeping. Current systems are inadequate to meet such a demand for service. Both the INS and FBI rely on paper rather than electronic files, which is inefficient and subject to permanent loss or misplacement of documents. The inability of INS to provide accurate data on the number of recently-naturalized citizens who had undergone full background investigations is a particularly glaring example of the present system's

vulnerabilities. The costs to applicants and to INS credibility are significant. The Commission is encouraged by plans to develop linkages among data sources related to naturalization. The Commission recommends continued funding for an up-to-date, advanced, electronic automation system for information entry and recordkeeping.

- **Establishing clear fee and other waiver guidelines and implementing them consistently.** Under current law, the Attorney General is authorized to grant fee waivers to naturalization applicants. The Commission has received accounts of legitimate requests being denied. The prospective increase in naturalization fees may precipitate more fee waiver requests or perhaps discourage applicants. Clear guidelines and consistent implementation are needed to ensure that *bona fide* requests are granted, while guarding against abuse.

  The 1994 Immigration and Nationality Technical Corrections Act provided exceptions to the English proficiency and civics requirements for naturalization for persons with physical or developmental disabilities or with mental impairments. After extensive consideration and opportunities for public comment, the INS published its final rule in March 1997.

  The new rule emphasizes medically determinable standards that promote integrity and fairness. Further, the new rule does not confer a blanket exemption. Hence, judging whether an applicant's disability would bestow a disability waiver is inherently complex.

  The Commission believes that rigorous and equitable interpretation of the new rule will require that adjudicators are properly trained. Further, implementation must be strictly monitored to ensure that exceptions allowed by law are made

available to otherwise qualified legal residents. Finally, to ensure that the qualifications and procedures are understood and adhered to, the Commission recommends a thorough public education effort.

A CREDIBLE FRAMEWORK FOR IMMIGRATION POLICY

In our previous reports, the Commission defined a credible immigration policy "by a simple yardstick: people who should get in do get in, people who should not get in are kept out; and people who are judged deportable are required to leave." By these measures, the U.S. has made substantial, but incomplete, progress. What follows are the Commission's recommendations for comprehensive reform to achieve more fully a credible framework for immigration policy.

LEGAL PERMANENT ADMISSIONS

The Commission reiterates its support for a properly-regulated ***system for admitting legal permanent residents.***[1] Research and analyses conducted since the issuance of the Commission's report on legal immigration support our view that a properly regulated system of legal permanent admissions serves the national interest. We reiterate that such a system enhances the national benefits while protecting against potential harms.

The Commission reiterates its support for a properly-regulated system for admitting legal permanent residents.

This position is supported by a recent report we commissioned from the National Research Council on the impacts of immigration.[2] The panel concluded that "immigration produces net economic gains for domestic residents" in the form of increased productivity and reduced consumer prices. The benefits go well beyond economic ones, however. The panel also identified social and cultural gains

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[1] For a full explanation of the Commission's recommendations see *Legal Immigration: Setting Priorities,* 1995. See Appendix for summary of Commissioner Leiden's dissenting statement.

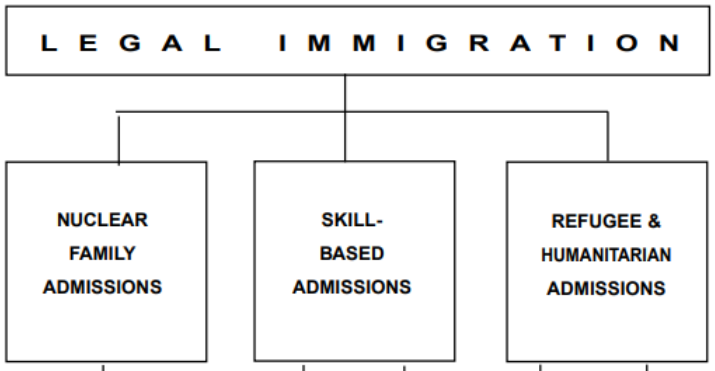
[2] National Research Council. (J.P. Smith, B. Edmonston, eds.). 1997. *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration.* Washington, DC: National Academy Press. 62.

resulting from immigration, particularly through the entry of highly-talented immigrants who choose to live and contribute to the United States. The report continues: "Even when the economy as a whole gains, however, there may be losers as well as gainers among different groups of U.S. residents." The principal "gainers" are the immigrants themselves, owners of capital, higher-skilled workers who are complements to most immigrants (who are themselves lower-skilled) and consumers. The principal "losers" are the low-skilled workers who compete with immigrants and whose wages fall as a result. On a fiscal basis, the panel found national-level net contributions of tax revenues resulting from immigration, but the panel also identified significant net fiscal costs to the taxpayers of states with large number of immigrants. These high fiscal impacts are due, particularly, to the presence of sizeable numbers of lesser-skilled immigrants whose tax payments, even over a lifetime, are insufficient to cover their use of services.

The Commission urges reforms in our legal immigration system to enhance the benefits accruing from the entry of newcomers while guarding against harms, particularly to the most vulnerable of U.S. residents—those who are themselves unskilled and living in poverty. More specifically, the Commission reiterates its support for:

- **A significant redefinition of priorities and reallocation of existing admission numbers to fulfill more effectively the objectives of our immigration policy.** The Commission's more specific recommendations on priorities and procedures for admission stem not only from the above analysis of the effects of immigration but also from our review of the workings of the admission system. We argued in our 1995 report that the current framework for legal immigration—family, skills, and humanitarian admissions—makes sense. However, the statutory and regulatory priorities and procedures for admissions do not support the stated intentions of legal

Proposed Tripartite Immigration System



immigration—to reunify families, to provide employers an opportunity to recruit foreign workers to meet labor needs, and to respond to humanitarian crises around the world. During the two years since our report on legal immigration, the problems in the legal admission system have not been solved. Indeed, some of them have worsened as is discussed below.

We believe current immigration levels should be sustained for the next several years while the U.S. revamps its legal immigration system and shifts the priorities for admissions away from extended family and toward nuclear family and away from unskilled and toward higher skilled immigrants. Thereafter, modest reductions in levels of immigration—to about 550,000 per year, comparable to those of the 1980s—will result from the changing priority system.

The Commission continues to believe that legal admission numbers should be authorized by Congress for a specified time (e.g., three to five years) to ensure regular, periodic review and, if needed, change by Congress. This review should consider the adequacy of admission numbers for accomplishing priorities. It also should consider the economic and other domestic needs and capacities of the United States to absorb newcomers.

- **Family-based admissions that give priority to nuclear family members—spouses and minor children of U.S. citizens, parents of U.S. citizens, and spouses and minor children of legal permanent residents—and include a backlog clearance program to permit the most expeditious entry of the spouses and minor children of LPRs.**

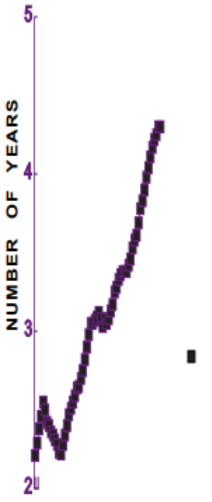
The Commission recommends allocation of 550,000 family-based admission numbers each year until the large backlog

of spouses and minor children is cleared. The backlog, which numbers more than 1 million persons, consists of the nuclear family members of legal immigrants who married after the U.S. spouse became a permanent resident, as well as spouses and minor children of aliens legalized under IRCA (most of whom are now eligible to naturalize). Numbers going to lower priority categories (e.g., adult children, siblings, and diversity immigrants), should be transferred to the nuclear family categories. Thereafter Congress should set sufficient admission numbers to permit all spouses and minor children of citizens and LPRs to enter expeditiously.

Since the Commission first reported its findings on legal admissions, the problems associated with family-based admissions have grown. In 1995, the wait between application and admission of the spouses and minor children of LPRs was about three years. It is now more than four years and still growing.[3]

Various statutory changes enacted in 1996 make it all the more important that Congress take specific action to clear the backlog quickly to regularize the status of the spouses and minor children of legal permanent residents in the United States. In an effort to deter illegal migration, Congress expanded the bases and number of grounds upon which persons may be denied legal status because of a previous illegal entry or overstay of a visa. Most important, a person un-

Waiting Time for Spouses and Minor Children of LPRs (FB-2A)



Source: DOS Visa Office
Visa Bulletin (1992-1997).

[3] It appears that the priority date (i.e., the cut-off date by which an approved petition must have been filed) has moved forward as much as it has only because of delays in processing applications for adjustment of status within the United States. When it became clear that INS could not keep up with the adjustment backlog, the Department of State moved up the priority date to continue processing visas overseas. As many of the adjustment applications are still to be processed, it is likely that there will be very little movement on the priority date during the next several months.

lawfully present for more than six months will be inadmissible for three years, and those unlawfully present for more than one year will be inadmissible for ten years.[4] If Congress decides not to renew the provision [known as Section 245(i)] that permits these individuals to adjust status within the United States, they will be unable to become legal immigrants even if they meet all other admission criteria.

An unknown, but believed to be large, number of spouses and minor children awaiting legal status are unlawfully present in the United States. While the Commission does not condone their illegal presence, we are cognizant of the great difficulties posed by the four-or-more-year waiting period for a family second-preference visa. U.S. immigration policy should not force legal immigrants to choose between family responsibilities and vows and their continued presence in the United States. The Commission believes no spouse or minor child should have to wait more than one year to be reunited with their U.S. petitioner.

The Commission is also concerned with the impact on nuclear family reunification of the provisions adopted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [IIRIRA] to address perceived abuses in the use of parole. We agree that parole should be used only in exceptional circumstances and that Congress should be involved more directly in decisions to parole large numbers of individuals for permanent residence. We further recognize the validity of efforts to count long-term parolees against worldwide numerical ceilings. However, we do not agree with

[4] IIRIRA permits the Attorney General to provide a waiver for spouses and minor children if there is an extreme hardship to the U.S. petitioner. Although standards have not been set for implementing this provision, mere separation from family members generally has not counted as an "extreme hardship" in applying other provisions where extreme hardship is a ground for relief.

the IIRIRA provisions that count parolees against family-based admission numbers. Moreover, the language of IIRIRA requires the counting of those admitted with the intention that they reside permanently *and* those who are paroled for short stays but who are not known to have left one year later. For the first time in U.S. law, persons illegally in the U.S. would be counted against legal admission ceilings. This creates a conflict between policies. Moreover, inadequacies in current entry-exit controls mean that some parolees who leave the country will be determined to have remained and will also be counted against the legal admissions ceiling. Because the parole numbers are deducted from the family preferences, the new provisions hold the potential for delaying still further the already unacceptable delays in admission of nuclear family members.

The Commission believes that the national interest in the entry of nuclear family members outweighs that of more extended family members. We recognize that others disagree; they argue that the bonds to adult children and adult siblings can be as strong as the bond between spouses and with minor children. They also point to the valuable assistance provided by many extended families in setting up and running businesses and providing child care and other supportive services. Whatever the cultural and economic values attached to each family relationship, however, the far stronger responsibilities to one's spouse and minor children are well established in the U.S. We continue to believe that our family reunification system will remain seriously flawed until the spouses and minor children of LPRs are treated as a priority.

An end to extended visa categories is justified even apart from the large nuclear family backlog. The Commission pointed out in its 1995 report that the extraordinarily large

waiting list for siblings of U.S. citizens, and to a lesser extent, adult children undermines the integrity of the legal immigration system.

The backlog for siblings of adult U.S. citizens has stabilized during the past two years, but at a very large level. In January, 1995, there were 1.6 million on the waiting list; as of January 1997, the waiting list was 1.5 million. Except for oversubscribed countries, siblings who applied ten years ago are now eligible to enter. Admissions from the Philippines are of those who applied almost twenty years ago. These extended waiting periods mean that most siblings enter well into their working lives, limiting the time during which they can make a contribution to the U.S. economy. More than one-half of all the siblings and their spouses admitted in FY 1996 were above the age of 45. In other immigration categories, most principals are in their twenties or thirties.

The backlog for adult children is growing. In January 1995, there were about 70,000 unmarried sons and daughters of citizens, 500,000 unmarried sons and daughters of LPRs, and 260,000 married sons and daughters of citizens in the backlog. As of January 1997, the unmarried backlog had grown to more than 90,000 and 575,000, respectively, and the married children backlog is more than 310,000.

A particular concern is the "aging out" of children who were minors at the time of application, but who turned 21 years of age while awaiting their green cards. The Commission proposed in our 1995 report that the Immigration and Nationality Act [INA] be amended so that "a person entitled to status at the time a petition is approved shall continue to be entitled to that status regardless of his or her age."

- **Skill-based admissions policies that enhance opportunities for the entry of highly-skilled immigrants, particularly those with advanced degrees, and eliminate the category for admission of unskilled workers.** The Commission continues to recommend that immigrants be chosen on the basis of the skills they contribute to the U.S. economy. Only if there is a compelling national interest—such as nuclear family reunification or humanitarian admissions—should immigrants be admitted without regard to the economic contributions they can make. The reunification of adult children and siblings of adult citizens solely because of family relationship is not as compelling.

  A number of the NRC report's findings argue for increasing the proportion of immigrants who are highly-skilled and educated so as to maximize fiscal contributions, minimize fiscal impacts, and protect the economic opportunities of unskilled U.S. workers. The NRC research shows that education plays a major role in determining the impacts of immigration. Immigration of unskilled immigrants comes at a cost to unskilled U.S. workers, particularly established immigrants for whom new immigrants are economic substitutes. Further, the difference in estimated fiscal effects of immigrants by education is striking: using the same methodology to estimate net costs and benefits, immigrants with a high school education or more are likely to be net contributors while those without a high school degree are likely to be net costs to taxpayers.

  Shifting priorities to higher skilled employment-based immigrants will have a beneficial multiplier effect. The highly-skilled are, in effect, new seed immigrants who will petition for admission of their family members. The educational

level of the spouses and children of highly-educated persons tends to be in the same range. Hence, our society benefits not only from the entry of highly-skilled immigrants themselves, but also from the entry of their family.

The Commission's framework for legal skill-based admissions includes two broad categories. The first category would cover individuals who are exempt from labor market tests because their entry will generate economic growth and/or significantly enhance U.S. intellectual and cultural strength without undermining the employment prospects and remuneration of U.S. workers: aliens with extraordinary ability, multinational executives and managers, entrepreneurs, and ministers and religious workers. The second category covers individuals subject to labor market tests, including professionals with advanced degrees, professionals with baccalaureate degrees, and skilled workers with specialized work experience.

In our 1995 report, the Commission recommended allocation of 100,000 admission slots to skill-based immigrants. That number represented an increase of about 10 percent over actual usage of these visas, but a decline from the statutory ceiling of 130,000 admission numbers (i.e., 140,000 minus the 10,000 allocated to lesser skilled workers). We further recommended that unused skill-based admissions carry over to the following year's skill-based admissions.

The trend in admission of skill-based immigrants supports our 1995 recommendations, but also indicates the great need to monitor and revise admission numbers as needed. In FY 1995, 85,000 employment-based immigrants were admitted, including 7,900 unskilled workers. This number was artificially low, however, because of INS delays in adjudicating

applications for adjustment of status. In FY 1996, admissions totaled 117,000, including 12,000 unskilled workers. The 100,000 skilled admission numbers recommended by the Commission would have been sufficient to cover the period 1994-1996 (with the carry-over provision). However, if the FY 1996 spike turns out to be real (rather than an artifact of the adjustment of status delays of FY 1995), the number of employment-based visas may need to be revised.

The Commission also continues to recommend changes in the procedures used in testing the labor market impact of employment-based admissions. Rather than use the lengthy, costly, and ineffectual labor certification system, the Commission recommends using market forces as a labor market test. To ensure a level playing field for U.S. workers, employers would attest to having used normal company recruiting procedures that meet industry-wide standards, paying the prevailing wage, and complying with other labor standards. Businesses recruiting foreign workers also would be required to make significant financial investments in certified private sector initiatives dedicated to improving the competitiveness of U.S. workers. These payments should be set at a per-worker amount sufficient to ensure there is no financial incentive to hire a foreign worker over a qualified U.S. worker. Labor certification continues to be a time-consuming, unproductive way to protect U.S. workers from unfair competition from immigrant workers. The Department of Labor has tried to institute reforms that have streamlined the process for certain applications. The result, however, has been to slow down even further other applications that do not meet the streamlining requirements.

- **Refugee admissions based on human rights and humanitarian considerations, as one of several elements of** U.S.

leadership in assisting and protecting the world's **persecuted.**[5] Since its very beginnings, the United States has been a place of refuge. Today, when millions of refugees are displaced because of persecution, human rights violations, or warfare, U.S. leadership in responding to refugee crises is critical. The Commission believes continued admission of refugees sustains our humanitarian commitment to provide safety to the persecuted, enables the U.S. to pursue foreign policy interests in promoting human rights, and encourages international efforts to resettle persons requiring rescue or durable solutions. The Commission also urges the federal government to continue to support international assistance and protection for the majority of the world's refugees for whom resettlement is neither appropriate nor practical.

Admissions to the U.S. should be seen within the context of broader U.S. interests in protecting and assisting refugees worldwide. The Commission believes a comprehensive U.S. refugee policy should be coordinated by an office within the National Security Council [NSC] to serve as the White House focal point for domestic and international refugee and related humanitarian issues: to care for and protect refugees overseas; to resettle the few for whom U.S. resettlement is the only or best option and provide sensible transitional assistance to them; to operate an effective system for protecting *bona fide* asylum seekers in the U.S. while deterring those who are not; and to adopt a humane and effective plan to respond to mass migration emergencies.

The admission of refugees should be divided into two broad priority groups with numbers allocated accordingly. The first priority would be for refugees who are in urgent need

[5] For a full explanation of the Commission's refugee-related recommendations, see ***U.S. Refugee Policy: Taking Leadership,*** 1997.

of rescue and refugees who are the immediate relatives of persons already living legally in the United States. The second priority would include refugees whose admission is of special humanitarian interest to the United States but who are not in imminent danger where they currently reside. Admission numbers would be sufficient each year to guarantee entry to all *bona fide* applicants within the first priority and an agreed-upon number for the second priority Family members and close household members who are dependent on the principal applicant for financial or physical security should also be included among admissions within this priority system.

The United States should set annual numerical targets—but not a statutory limit—for future refugee admissions. The Commission recommends an improved consultation process that will help ensure that admission numbers and allocations meet U.S. national and international interests. The annual consultations should be strengthened by considering projections of admission levels and priorities for at least two years beyond the fiscal year under immediate consideration. Input should be solicited from a wide range of human rights and humanitarian organizations with knowledge of conditions precipitating the need for resettlement.

The United States also should use an active, inclusive process for identifying and making decisions regarding the admissibility of applicants for resettlement, conferring with a broad set of agencies in identifying possible candidates for resettlement. The U.S. government should confer with a broader set of agencies in identifying possible candidates for resettlement, including international and local human rights organizations, relief agencies providing assistance to refugees, and host governments.

The Commission further believes changes are needed to make the administrative processes for admission more flexible and streamlined in determinations of eligibility in order to respond quickly to refugee crises. Also, refugees should be admitted with LPR status except in cases where there has been inadequate opportunity prior to admission for the admitting officer to thoroughly review the case(s).

The Commission supports a continuing program of assistance to refugees after entry. The current array of assistance and services that characterize the resettlement program should be maintained, but with increased attention to services that prepare refugees for rapid economic self-sufficiency and civic participation. In addition, the federal, state, and local agencies involved in resettlement should develop a national plan for streamlining the program to address the complexity of the funding process and reporting requirements, the overlap of programs and responsibilities, and the lack of clear accountability for the outcomes of the program.

The current public/private partnership in the domestic resettlement program should be continued, but for a three-year trial period their division of responsibility should be more explicit, with (1) the public sector assuming responsibility for refugees eligible for the publicly funded public assistance programs and (2) the private sector being responsible for a limited duration program for refugees not eligible for the mainstream public programs.

The mechanisms by which the refugee program is funded should be strengthened through changes to the Refugee Act: (1) to specify a minimum time period of special refugee cash and medical assistance provided to refugees not eligible for Temporary Assistance for Needy Families [TANF] or Supplemental Security Income [SSI]; (2) to permit the appropria-

tion of "no year" money for the cash and medical assistance portion of the Office of Refugee Resettlement [ORR] budget; (3) to broaden the consultation process to ensure greater consistency between admission decisions and appropriation of funds to support refugee assistance and services; and (4) to establish a domestic emergency fund.

The Commission continues to recommend against denying benefits to legal immigrants solely because they are noncitizens. The Commission believes that the denial of safety net programs to immigrants solely because they are noncitizens is not in the national interest. In previous reports, the Commission argued that Congress should address the most significant uses of public benefit programs —particularly, elderly immigrants using Supplementary Security Income—by requiring sponsors to assume full financial responsibility for newly-arriving immigrants who otherwise would be excluded on public charge grounds. In particular, the Commission argued that sponsors of parents who would likely become public charges assume the responsibility for the lifetimes of the immigrants (or until they became eligible for Social Security on the basis of work quarters). We also argued that sponsors of spouses and children should assume responsibility for the duration of the familial relationship or a time-specified period. We continue to believe that this targeted approach makes greater sense than a blanket denial of eligibility for public services solely on the basis of a person's alienage.

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Basing eligibility for assistance on citizenship debases citizenship. We encourage immigrants to become citizens in order to participate fully in the civic life of the country. We do not want immigrants to become citizens solely because the alternative is the serious economic hardship that may result if benefits are lost or unavailable. In some cases, categorical denial of eligibility to legal aliens undermines the very purpose of our immigration policy. For example, the United States admits refugees, as noted above, to provide protection against the dangerous situations they encounter in their home coun-

tries and first-asylum countries. Some of the most vulnerable refugees requiring such protection are the elderly and disabled who will have the greatest difficulty meeting our naturalization standards.

This is not to deny that elderly and disabled immigrants pose a cost to U.S. taxpayers. The NRC report confirms this fact. By contrast, however, immigrants who come during their prime working years generally do not pose a net cost to the taxpayer over their lifetime. Most of the fiscal impact related to the presence of immigrants comes in the area of education, which can be seen as both a cost and an investment as education has long-term benefits to the United States both in a more skilled workforce and in higher income and resulting tax payments.

The Congress did not accept the Commission's recommendations to preserve the safety net. Some eligibility for elderly and disabled immigrants receiving Supplementary Security Income lost as of the enactment of the welfare reform legislation has been restored as a result of budget negotiations. Eligibility for food stamps and other programs designed for the working poor were not restored, however. And, future immigrants will be ineligible for SSI even if they become disabled after entry and have no other means of support.

The Congress did adopt, but in a modified version, the Commission's recommendation for binding affidavits of support. The 1996 legislation framed the requirement in two ways that differ from the Commission's recommendations. First, the legally-binding affidavit, with its more rigorous requirements regarding the income of sponsors, applies to some persons who are not likely to be public charges but not to others who are likely to require assistance. The affidavits apply to *all* family-based immigrants, not just to those who are likely to be public charges. By contrast, the new affidavit will not be used for other admission categories (for example, diversity immigrants) even if an immigrant is likely to be a public charge.

Second, under the new legislation, the same time periods and requirements apply to everyone who signs an affidavit. The affidavits are in force until the immigrant works forty quarters or becomes a U.S. citizen. The Commission believes the period of responsibility should be geared instead to the family relationship and likely period during which the immigrant may require assistance. For example, the sponsors of an elderly parent would be required to assume a longer (even an indefinite) period of support if the parent is of an age that makes it unlikely that he or she would become self-supporting. The responsibility for a spouse, however, would be for a time-limited period or for the duration of the marriage, whichever is longer. Under the new law, the responsibility of petitioners of younger immigrants is so open-ended that it does not provide a realistic or fair set of obligations. For example, if a U.S. citizen marries a foreign student with a professional degree and a job offer, the U.S. citizen must now take on a open-ended obligation to the foreign student, an obligation that carries on even if the marriage ends in divorce. If the immigrant spouse chooses not to work (and therefore doesn't meet the forty quarters requirement) and not to naturalize, the citizen remains responsible for his or her financial support (at 125 percent of the poverty level) indefinitely. The law has no "good cause" exception.

To conclude, the Commission's recommendations on legal admissions are as relevant today as they were in 1995. The Commission urges the Congress to take the measures needed to reform our legal immigration policies so it best serves the national interest in a well-regulated immigration system.

LIMITED DURATION ADMISSIONS

Persons come to the United States for limited duration stays for several principal purposes: representation of a foreign government or other foreign entities; work; study; and short-term visits for commercial or personal purposes, such as tourism or family visits. These individuals are statutorily referred to as "nonimmigrants." In this report, however, we refer to "limited duration admissions [LDAs]", a term that better captures the nature of their admission. When the original admission expires, the alien must either leave the country or meet the criteria for a new LDA or permanent residence. The term "nonimmigrants" is misleading as some LDAs entering the United States are really in transition to permanent residence, and other LDAs enter for temporary stays and become permanent residents based on marriage or skills.[6]

The benefits of a well-regulated system of LDAs are palpable. LDAs represent a considerable boon to the U.S. economy. The tourism and travel industry (domestic and international) is the second largest employer in the United States and generates 6 percent of the nation's Gross Domestic Product [GDP]. International tourism provides a net trade surplus (dollars international visitors spend here minus dollars U.S. visitors spend outside the U.S.) of $18 billion. Worldwide, the U.S. earned the most from international visitors—more than $64 billion.

Foreign students and workers often enrich the cultural, social, and scientific life of the United States. Our universities gain access to many talented students worldwide, thus maintaining the global competitiveness of the U.S. system of higher education. Foreign students give U.S. students the opportunity to learn about foreign

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[6] Certain LDA categories, such as those for fiancé(e)s, intracompany transferees, and specialty workers provide explicit bridges to permanent immigration.

Limited Duration Admissions and Visa Issuances

Class of Admission	Admissions (Entries) 1996	Visa Issuances 1996
All classes*	24,842,503	6,237,870
Foreign government officials (& families) (A)	118,157	78,078
Temporary visitors for business and pleasure (B1, B2)	22,880,270	4,947,899
Transit aliens (C)	325,538	186,556
Treaty traders and investors (& families) (E)	138,568	29,909
Students (F1, M1)	426,903	247,432
Students' spouses/children (F2, M2)	32,485	21,518
Representatives (& families) to international organizations (G)	79,528	30,258
Temporary workers and trainees	227,440	81,531
Specialty occupations (H-1B)	144,458	58,327
Performing services unavailable (H2)	23,980	23,204
Agricultural workers (H-2A)	9,635	11,004
Unskilled workers (H-2B)	14,345	12,200
Workers with extraordinary ability (O1, O2)	9,289	4,359
Internationally recognized athletes or entertainers (P1, P2, P3)	33,633	23,885
Exchange & religious workers (Q1, R1)	11,048	5,946
Spouses/children of temporary workers and trainees (H4, O3, P4, R2)	53,572	38,496
Exchange visitors (J1)	215,475	171,164
Spouses/children of exchange visitors (J2)	41,250	33,068
Intracompany transferees (L1)	140,457	32,098
Spouses/children of transferees (L2)	73,305	37,617

Sources: Admissions: U.S. Immigration and Naturalization Service statistical division. Visa Issuances: U.S. Department of State. 1996. *Report of the Visa Office, 1996.* Washington, DC: DOS, Bureau of Consular Affairs.

*Categories may not equal total because of omitted categories (e.g., fiancé(e)s of U.S. citizens, overlapping Canadian Free Trade Agreement professionals, unknown, NATO officials and professionals, and foreign media).

societies and cultures and, on returning home—often to positions of leadership—share their exposure to our democratic values, constitutional principles, and economic system. Foreign workers give employers timely access to a global labor market when they cannot identify or quickly train U.S. workers with knowledge and expertise required for a specific job. These worker programs also help companies conducting business both in the U.S. and internationally to reassign personnel as needed to maintain their competitiveness. As economies become increasingly integrated, companies are attracting more and more U.S. workers abroad as well.

Yet, LDAs pose problems for U.S. society under two principal circumstances: when the aliens fail to depart at the end of their legal stay; and when they present unfair competition to U.S. workers. The first problem is an enforcement one. Although overstayers represent a minute portion of the LDAs admitted each year, they are a significant part of the illegal immigration problem. The Immigration and Naturalization Service estimates that as many as 40 percent of the illegal aliens currently in the country originally entered with LDAs, many as short-term visitors. An equally pressing problem is the current inability to track the continued presence and whereabouts of many longer-term LDAs, particularly foreign students, after their arrival in the United States. This lack of capacity to monitor their presence exacerbates the problems of overstay and other violations of their legal status.

The second issue arising in limited duration admissions relates to the criteria for admission of foreign workers and the procedures used to determine their impact on U.S. workers. A proper balance must be struck in the LDA system between enhancing the productivity and global competitiveness of the U.S. economy through access to foreign workers and protecting U.S. workers against unfair competition.

The availability of foreign workers may create a dependency on

them. It has been well-documented that reliance on foreign workers in low-wage, low-skill occupations, such as farm work, creates disincentives for employers to improve pay and working conditions for American workers. When employers fail to recruit domestically or to pay wages that meet industry-wide standards, the resulting dependence—even on professionals—may adversely affect both U.S. workers in that occupation and U.S. companies that adhere to appropriate labor standards. For many of the foreign workers, even wages and working conditions that are very poor by U.S. standards are much better than those available at home. In a few egregious cases, businesses have hired temporary foreign workers after laying off their own domestic workforce.

The Immigration Act of 1990 imposed numerical limits on two employment categories where such dependence was feared: H-1B (specialty workers) is capped at 65,000 per year, and H-2B (unskilled workers) is capped at 66,000 per year. While the H-2B category is far from its numerical limits, the statutory cap on annual H-1B admissions was reached for the first time in FY 1997. INS announced in August 1997 the formation of a waiting list because approved workers would be ineligible to enter until the start of the next fiscal year. If the trend in applications continues, the cap is likely to be reached even earlier in FY 1998. Hence, employers petitioning late in the year would be required to wait for the admission of approved workers.

The current business users of the H-1B tend to fall into two distinct categories. One group of employers is clearly unlikely to become dependent on foreign workers but potentially is adversely affected by the numerical limits. These employers tend to hire relatively few foreign workers (for example, measured as a proportion of their overall workforce). Generally, they have identified specific foreign workers whose specialized skills are needed. Often, the company has done extensive recruitment in the United States and has been unable to find qualified workers with the specific skills they seek.

Because foreign workers represent a relatively small proportion of their workforce, there is little risk that foreign hires will cause either job displacement or wage depression for U.S. workers.

A second group of employers includes companies that make extensive use of H-1B professionals (again, as measured by proportion of their workforce). Sometimes, they seek approval in the same application for a large number of foreign workers who share minimal professional qualifications. But even within this more dependent group, there is variation in the risk posed by the importation of foreign workers to U.S. workers. Some employers recruit domestically or take other steps to employ U.S. workers, but they are unable to find sufficient professionals to fill their needs. Other employers recruit exclusively overseas and make no effort to employ qualified U.S. workers. They may utilize the H-1B workers in their own operations or contract the foreign workers to other employers.

Under current law, the numerical limits, and now required waiting time, pertain equally to the employer who has few foreign workers and the employer who has only foreign workers. Similarly, the same provisions apply to the employer who has recruited extensively within the United States and been unable to find a worker with the needed specialized skills and to the employer who does no domestic
recruitment.

The recommendations presented in this report seek to maximize the potential benefits for the U.S. economy and society resulting from the admission of LDAs while minimizing the potential negative effects. They build on—and in some cases reinforce—the Commission's previous recommendations for reforming the permanent legal immigration system. The overarching goal is to maintain the advantages that accrue to American society from entry of LDAs while protecting the legitimate interests of American workers and businesses from unfair competition.

Principles for a Properly-Regulated System

The Commission believes that LDA policy should rest on the following principles:

- **Clear goals and priorities**. LDA policy should clearly differentiate the goals of each set of visa categories, with procedures that reflect the requirements of each type of visa and subsequent admission. With more than forty different LDA visas provided for under current law, as discussed below, it is often difficult to identify how the goals of one category differ from those of others.

- **Systematic and comprehensible organization of LDA categories**. The statutory definitions, criteria, and procedures for visas and admission have developed in an *ad hoc* fashion. There is now accumulation of more than forty different LDA visas (subsumed under nineteen alphabetical headings), including overlapping categories for students, workers, and other visitors, as well as additional visas added to address the concerns of specific interest groups. Simplification of the system would enable businesses, educators, persons with LDAs, government officials, and the general public to understand more clearly the requirements for visa application and admission and the responsibilities of the persons with LDAs and their sponsors. Administration of the LDA system could be simplified, with attendant reduction in cost and confusion.

- **Timeliness, efficiency, and flexibility in implementation**. LDA policy should be implemented in a timely and efficient way with sufficient flexibility in law and regulations to respond to such domestic considerations as changes in the economy and our educational systems. Because of the time-limited nature of the stay, it is imperative that the system

allow admissions decisions to be made expeditiously while retaining a capacity to identify unqualified or fraudulent applications. Similarly, the provisions to protect U.S. workers must allow for timely and efficient mechanisms to investigate complaints and impose appropriate sanctions. While a good part of the LDA system now functions in a timely way, the diffusion of responsibility in foreign worker categories reduces the potential efficiency of that part of the system. The Commission's structural reform recommendations, discussed below, will help address certain inefficiencies.

- **Compliance with conditions for entry and exit and effective mechanisms to monitor and enforce this compliance.** The LDA system should be designed to allow for greater compliance, monitoring, and enforcement. Policies should specify clearly the conditions of entry and the penalties for noncompliance. It is the responsibility of the government, with the cooperation of the private sector where appropriate, to record, track, and report on those entering for limited duration stays. Americans expect that aliens will respect and observe the conditions of their temporary admission, including departure at the end of their lawful stay, and that they will be subject to government enforcement if they fail to comply with the conditions of their admission or if they overstay. Their sponsors (generally, businesses and schools) also bear responsibility for complying with all relevant requirements. Penalties for noncompliance must be commensurate with the offense. The current system does not yet have exit controls in place. In sum, the LDA system should meet a "truth-in-advertising" test.

- **Credible and realistic policies regarding transition from LDA to permanent immigrant status.** Realistic policies should continue to differentiate between LDAs who will

remain only temporarily and those who become permanent. For example, LDAs should continue to be able to transition to immigrant status as expeditiously as possible if they enter *bona fide* marriages with U.S. citizens or meet the justifiably high education, skill standards, and prescribed labor market tests of the permanent skill-based immigration categories.

- **Protection of workers from unfair competition and of foreign workers from exploitation and abuse**. LDA worker categories present special challenges in ensuring that U.S. workers are protected from unfair competition while legitimate foreign workers are protected from exploitation. Any system of LDA admissions must include protections for both U.S. and foreign workers, protections that are commensurate with the risk of unfair competition or abuse that the specific category presents. For example, lesser-skilled workers (whether American or foreign) who are newly entering the workforce and whose skills are easily replaced are generally more vulnerable—both to displacement and exploitation—than are more highly-skilled, specialized workers. Businesses that contract out their foreign workers to other businesses pose a greater risk for labor market violations because of the greater diffusion of employer responsibility. Also, employees of firms whose workforces consist primarily of temporary foreign workers, particularly from low-wage countries, are more vulnerable to exploitation; these foreign workers may be used to displace American workers because of their fear that any complaint about wages and working conditions might lead to deportation.

- **Appropriate attention to limited duration admission policies in trade negotiations**. Important policy decisions on admission of temporary workers occurred during negotiations on the North American Free Trade Agreement [NAFTA] and the General Agreement on Trade in Services [GATS].

Some are concerned that these treaty obligations restrict the capacity to reform our LDA policies by locking current immigration law into place or establishing minimum requirements to which changes in immigration law must adhere. In the future, both the Administration, in negotiating trade agreements, and the Congress, in passing enabling legislation, should assess more carefully the long-term ramifications of trade negotiations for immigration policy. The aim should be to ensure that options for future immigration reform are not unknowingly foreclosed.

The following recommendations aim at maximizing the potential benefits accruing from admission of LDAs while minimizing the potential harmful effects.

The Commission recommends a reorganization of the visa categories for limited duration stays in the United States to make them more coherent and understandable.

Framework

The Commission recommends a reorganization of the visa categories for limited duration stays in the United States to make them more coherent and understandable. The Commission recommends that the current proliferation of visa categories be restructured into five broad groups: official representatives; short-term visitors; foreign workers; students; and transitional family members. Subcat-

[7] The current system includes the J visa for cultural exchange, which is used for a variety of purposes, ranging from short-term visits to study and work. The workers include scholars and researchers, camp counselors, *au pairs*, and various others. Some work activities under the J visa demonstrate a clear cultural or education exchange; other work activities appear only tangentially related to the program's original purposes. Protection of U.S. workers by labor market tests and standards should apply to the latter group in the same manner as similarly situated temporary workers in other LDA categories. The Department of State should assess how better to fulfill the purpose of the Mutual Educational and Cultural Exchange Act of 1961 [Fulbright-Hays Act]. Such an analysis is particularly timely in light of the merger now being implemented between the Department of State and the United States Information Agency, which is responsible for administering the J visa.

egories of these groups may be appropriate in some cases. This reorganization reflects such shared characteristics of different visa categories as entry for like reasons, similarity in testing for eligibility, and similar duration of stay in the United States.

The definitions and objectives of the five limited duration admission groups would be:[7]

- **Official representatives** are diplomats, representatives of or to international organizations, representatives of NATO or NATO forces, and their accompanying family members. The objective of this category is to permit the United States to admit temporarily individuals who represent their governments or international organizations. The presence of official representatives in the United States is based on reciprocity; the United States expects similar treatment for its own persons in similar capacities abroad. Under current law, these individuals are admitted under the A and G visas. For the most part, members of these groups are admitted to the United States for the duration of their status as official representatives.

- **Short-term visitors** come to the United States for commercial or personal purposes. In 1995 alone, an estimated 43.5 million inbound visitors from other countries spent $76 billion on travel to and in the United States (on U.S. flag carriers, lodging, food, gifts, and entertainment).[8] This supports the U.S. national interest in encouraging tourism and business exchange. The majority of short-term visitors enter the United States under the visa waiver program, which is available for nationals of countries demonstrating little visa

[8] The 43.5 million visitors include the admission entries of individuals from countries where a visa or visa waiver is required as well as those from Canada (no visa, visa waiver, or border crossing card required) and Mexico (border crossing card required).

abuse. (For these nationalities, visas are required for all other purposes). "Nonwaiver" nationalities must possess a B visa for tourism or business, or a C visa for transit. Some short-term visitors also enter with the J visa if they are sponsored by the U.S. Information Agency [USIA] or other U.S. government agency. Short-term visitors generally have little or no effect on the U.S. labor market as they are severely limited in what they can do in the United States. Under current law, waiver visitors are admitted for ninety days, with no option for extension; visitors admitted with B visas are normally authorized a six-month stay, with flexibility to apply for another six months. Those in transit with C visas are given up to twenty-nine days' stay. The majority of visitors by their own volition stay for very short periods. This category also includes informants/witnesses (current S classification) whose temporary entry is in the U.S. national interest because their knowledge is needed for criminal prosecutions.

- **Foreign workers** are those who are coming to perform necessary services for prescribed periods of time, at the expiration of which they must either return to their home countries or, if an employer or family member petitions successfully, adjust to permanent residence. This category would serve the labor needs demonstrated by U.S. businesses with appropriate provisions to protect U.S. workers from unfair competition. Under current law, numerous types of foreign workers are admissible under the D visa for crewmembers, E visa for treaty traders and investors, H visa for "specialty workers" and other temporary workers, I visa for foreign journalists, L visa for intracompany transferees, O visa for aliens of extraordinary ability, P visa for performers and entertainers, Q visa for participants in cultural exchange programs, and R visa for religious workers. In addition, certain other workers enter under the TN provisions created

by NAFTA. There is a second, parallel system under which other workers enter with J visas because they are sponsored by an institution approved by the U.S. Information Agency to engage in cultural exchange. Some of these J workers are paid by their own governments or home institutions whereas others receive compensation from the U.S. institutions and businesses employing them. Also included as foreign workers are trainees, that is, individuals receiving on-the-job training by working in U.S. institutions. The present multiplicity of LDA work categories could be rationalized and made to parallel similar immigrant visa categories. [See below for specific recommendations regarding foreign workers.]

- **Students** are persons who are in the United States for the purpose of acquiring either academic or practical knowledge of a subject matter. This category has four major goals: to provide foreign nationals with opportunities to obtain knowledge they can take back to their home countries; to give U.S. schools access to a global pool of talented students; to permit the sharing of U.S. values and institutions with individuals from other countries; and to enhance the education of U.S. students by exposing them to foreign students and cultures. Students now enter under at least three visa categories: F visa for academic students; J visa, also for academic students (but generally including those whose education is paid by their own government or the U.S. government rather than themselves); and M visas for vocational students.

- **Transitional family members** include fiancé(e)s of U.S. citizens. These individuals differ from other LDAs because they are processed for immigrant status, although they do not receive such status until they marry in the U.S. and adjust. The Commission believes another category of transitional family members should be added: spouses of U.S.

citizens whose weddings occur overseas but who subsequently come to the U.S. to reside. At present, a U.S. citizen cannot petition for the admission of a spouse until after the marriage. Months often pass before the foreign spouse can come to the U.S. Under the Commission's plan, the newlywed should be permitted to enter the U.S. under a transitional family visa and then complete the paperwork for legal permanent resident status.

The Commission recommends that the current visa waiver pilot program for short-term business and tourist visits be made permanent upon the implementation of an entry-exit control system capable of measuring overstays.

Short-Term Visitors

The Commission recommends that the current visa waiver pilot program for short-term business and tourist visits be made permanent upon the implementation of an entry-exit control system capable of measuring overstays. A permanent visa waiver system requires appropriate provisions to expand the number of participating countries and clear and timely means for removing those countries that fail to meet the high standards reserved for this privilege. Congress should extend the pilot three years while the control system is implemented.

Most observers recognize that the waiver has been a positive factor in increased tourism and trade and in less processing time for many travelers at ports of entry. More than one-half of the short-term visitors from waivered nationalities come to the U.S. under the waiver, and INS reports little overstay or other immigration violations from these visitors. The Department of State [DOS] has been able to reallocate its relatively high-cost overseas resources to areas that need greater attention, such as increased antifraud efforts, coping with the Diversity Visa workload, and staffing new posts in the former Soviet Union. A key factor in the success of the waiver program is the electronic sharing of "watch list" data of persons ineligible for visas between the Department of State and INS on an almost immediate basis. Being able to screen visitors arriving with-

out visas at ports of entry serves the fundamental purpose of ensuring that statutorily ineligible aliens are not admitted to the United States.

Foreign Workers

Each year, more foreign workers enter the United States as LDAs for temporary work than enter as skill-based immigrants. In FY 1996, the Department of State issued almost 278,000 limited duration worker visas, including those for spouses and children. (Other LDA workers who changed status within the United States are not reflected in these statistics. Also not considered are LDA foreign students working in the United States during their course of study or as part of their practical training, or researchers entering under J visa programs.) By contrast, only 117,000 immigrant visa issuances and domestic adjustments of status in worker categories were recorded in FY 1996, far less than the legislated limit of 140,000.

The Commission recommends that the limited duration admission classification for foreign workers include three principal categories: those who, for significant and specific policy reasons, should be exempt by law from labor market protection standards; those whose admission is governed by treaty obligations; and those whose admission must adhere to specified labor market protection standards. Under this recommendation, LDA worker categories would be organized around the same principles that guide permanent worker categories. LDA workers would be subject to rigorous tests of their impact on the labor market unless they are exempt from these tests because their admission will generate substantial economic growth and/or significantly enhance U.S. intellectual and cultural strength and pose little potential for undermining the employment prospects and remuneration of U.S. workers.

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Within the labor market protection standards group, criteria for admission are consistent with the potential adverse effect of given categories of workers. The Commission believes adverse impact is broadly related to educational and skill level of the affected workers. Although there sometimes is an adverse effect from even the most highly-skilled and experienced foreign workers, the benefits of such workers are usually large to American society as a whole. They are likely to enhance the U.S. national interest through the generation of economic activity, including the creation of jobs. In general, the higher the levels of education and skill required in a given occupation, the more likely U.S. workers will be able to compete successfully with workers from abroad. Even at the very highest levels of skill and education, however, this generalization fits some high-skill occupations, but not others.

Entry-level professionals and lesser-skilled workers pose somewhat greater risk of displacing U.S. workers because their work can more likely substitute for that of U.S. workers. If they accept lower wages and benefits or poorer working conditions, they present unfair competition to U.S. workers and their employers may gain an unfair advantage over other U.S. employers. Similarly, unskilled foreign workers present the greatest potential for adverse impact because they are competing with some of the most vulnerable of American workers. Accordingly, the Commission proposes different sub-categories with labor market protection standards commensurate with the risks we believe are posed by the workers.

- **Those exempt by law from labor market protection standards** because their admission will generate substantial economic growth and/or significantly enhance U.S. intellectual and cultural strength and pose little potential for undermining the employment prospects and remuneration of U.S. workers. These include:

Individuals of extraordinary ability in the sciences, arts, education, business, or athletics, demonstrated through sustained national or international acclaim and recognized for extraordinary achievements in their field of expertise. These individuals now enter under the O visa. This category is comparable to the first priority in our permanent resident system. The U.S. national interest is well served by entry of individuals at the very top of their chosen fields who can contribute during their temporary stay to U.S. economic growth and intellectual and cultural strength.

Managers and executives of international businesses (current L visa), also comparable to the first priority in the legal permanent resident system. The global competitiveness of U.S. businesses is enhanced by the capacity of multinational corporations to move their senior staff around the world as needed. Often, there is only temporary need for a transfer, although permanent relocation may later be required. Under current law, the person with a LDA visa must have been employed by the firm, corporation, affiliate or subsidiary continuously for one year within the three years preceding the application for admission. As discussed below, the Commission believes greater safeguards must be in place to ensure that only *bona fide* international businesses benefit from this policy.

Professors, researchers and scholars whose salary or other compensation is paid by their home government, home institution, or the U.S. government in a special program for foreign professors, researchers, and scholars. Each year, professors, researchers, and scholars enter the United States on sabbatical from their own universities or research institutes, often with a J visa. Also in this category are foreign members of research teams cofunded by the United States and

other countries. These individuals present substantial benefits to the United States in the expertise and resources they bring, and they pose no threat of displacement of U.S. researchers as their salaries are from foreign sources or they enter under a U.S. government-funded program, such as the Fulbright Program, whose resources are earmarked through an appropriation process for foreign researchers and scholars.

Religious workers, including ministers of religion and professionals and other workers employed by religious nonprofit organizations in the U.S. to perform religious vocations and religious occupations. Under current law, religious workers must have had at least two years' prior membership in the religious organization (current R visa).

Members of the foreign media admitted under reciprocal agreements (current I visa). The U.S. benefits from the presence of members of the foreign media who help people in their countries understand events in the United States. Just as we would not want our media to be overly regulated by labor policies of foreign governments, the United States extends the same courtesy to foreign journalists working in the U.S.

- **Foreign workers whose admission is subject to treaty obligations.** This includes treaty traders, treaty investors, and other workers entering under specific treaties between the U.S. and the foreign nation of which the alien is a citizen or national. Under the provisions of NAFTA, for example, Canadian professionals are not subject to numerical limits or labor market testing; Mexican professionals continue to be subject to labor market tests, but will be exempt from numerical limits in 2003.

- **Foreign workers subject by law to labor market protection standards.** These are principally:

  Professionals and other workers who are sought by employers because of their highly-specialized skills or knowledge and/or *extensive experience.* Included in this category are employees of international businesses who have specialized knowledge (now admitted under the L visa) and professionals (now covered by the H-1B visa). A diverse range of individuals may be admitted in this category, including, but not limited to, university faculty and researchers with advanced degrees, accountants and lawyers with specialized knowledge of the tax and legal codes of other countries, and electrical engineers and software systems engineers with specialized knowledge needed for systems design. This category would also cover highly-skilled workers without professional degrees if they have substantial experience in their occupation. This category includes as well aliens now admitted under the H-1B visa who have a bachelor's degree but little specialized expertise or experience.

  Trainees admitted to the United States for practical, on-the-job training in a variety of occupations. They now enter through the H-3 visa, practical training arrangements under the F visa, and the J visa provisions pertaining to physicians seeking graduate medical education and to some researchers with J visas engaged in post-doctoral studies. All of these groups have in common work in U.S. institutions as part of a training program. They are paid U.S. wages and, in many cases, are not readily distinguished from U.S. residents in the same type of on-the-job training activities.

  Institutions petitioning for foreign workers as trainees would be required to demonstrate that the principal purpose of the

program is training by showing a significant educational component to the work experience. Trainees would be paid the actual wages provided to U.S. trainees in similar programs. The trainees would be admitted for the specified duration of the training program. For example, a foreign physician admitted for graduate medical education would be admitted for the period of the specific residency program.

Artists, musicians, entertainers, athletes, fashion models, and participants in international cultural groups that share the history, culture, and traditions of their country. This category includes aliens now admitted under the P visa and Q visa, as well as fashion models admitted under H-1B visa, and athletes, musicians and other performers admitted under the H-2B visa.

Lesser-skilled and unskilled workers coming for seasonal or other short-term employment. Such worker programs warrant strict review, as described below. This category includes aliens now admitted with H-2A and H-2B visas. Requests for admission of unskilled and lesser-skilled workers should be met with heightened scrutiny. Temporary worker programs for lesser-skilled agricultural workers exert particularly harmful effects on the United States. The Commission remains opposed to implementation of a large-scale program for temporary admission of lesser-skilled and unskilled workers along the lines of the *bracero* program. Having examined the issue further during our consultations on LDA issues, we reaffirm our belief that a new guestworker program would be a grievous mistake.

Historically, guestworker programs have depressed the wages and working conditions of U.S. workers. Of particular concern is competition with unskilled American work-

ers, including recent immigrants who may have originally entered to perform the needed labor but who can be displaced by newly entering guestworkers. Foreign guestworkers often are more exploitable than lawful U.S. workers, particularly when an employer threatens deportation if the workers complain about wages or working conditions. The presence of large numbers of guestworkers in particular localities—such as rural counties with agricultural interests—presents substantial costs for housing, health care, social services, schooling, and basic infrastructure that are borne by the broader community and even by the federal government rather than by the employers who benefit from the inexpensive labor.

Despite the claims of their supporters, guestworker programs also fail to reduce unauthorized migration. To the contrary, research consistently shows that they tend to encourage and exacerbate illegal movements by setting up labor recruitment and family networks that persist long after the guestworker programs end. Moreover, guestworkers themselves often remain permanently and illegally in the country in violation of the conditions of their admission.

If new initiatives to reduce illegal migration were at some point to create real labor shortages in agriculture or other low-skill occupations, employers could request foreign workers through the LDA provisions that the Commission proposes for the admission of unskilled workers.

The Commission recommends that the labor market tests used in admitting temporary workers in this category be commensurate with the skill level and experience of the worker.

The Commission recommends that the labor market tests used in admitting temporary workers in this category be commensurate with the skill level and experience of the worker.

- **Employers requesting the admission of temporary workers with highly-specialized skills or extensive experience**

should meet specific requirements. Admission should be contingent on an attestation that:

The employer will pay the greater of actual or prevailing wage and fringe benefits paid by the employer to other employees with similar experience and qualifications for the specific employment in question. Actual wage rates should be defined in a simple and straightforward manner. By this recommendation, we do not intend a complicated, bureaucratically-defined wage analysis. Rather, businesses should be able to use their own compensation systems to determine appropriate wages and benefits for the individual foreign worker hired. The entry of a small number of highly-skilled foreign workers should have minimal effect on these wage scales, which will be determined by the majority of U.S. workers employed by the business. In the absence of a company-wide system that ensures equitable compensation for similarly situated workers, the employer would be required to attest to paying prevailing wages for that job category, wages that are typical of the enterprise or nonprofit company. [See below for recommendations for at-risk employers with a significant proportion of foreign workers.]

The employer has posted notice of the hire, informed coworkers at the principal place of business at which the LDA worker is employed and provided a copy of the attestation to the LDA worker employed.

The employer has paid a reasonable user fee that will be dedicated to facilitating the processing of applications and the costs of auditing compliance with all requirements. Currently no fees are collected by the Department of Labor [DOL] for either processing or monitoring purposes. In effect, this requires taxpayers to subsidize these programs.

To ensure that the employer, and not the foreign worker, pays the user fee, penalties should be imposed upon violators.

There is no strike or lockout in the course of a labor dispute involving the occupational classification at the place of employment.

The employer has not dismissed, except for cause, or otherwise displaced workers in the specific job for which the alien is hired during the previous six months. Further, the employer will not displace or lay off, except for cause, U.S. workers in the specific job during the ninety-day period following the filing of an application or the ninety-day periods preceding or following the filing of any visa petition supported by the application.

The employer will provide working conditions for such temporary workers that are comparable to those provided to similarly situated U.S. workers.

- **Certain at-risk employers of skilled workers [described** below] should be required to attest to having taken significant steps—for example, recruitment or training—to **employ U.S. workers in the jobs for which they are recruiting foreign workers.** The Commission is aware that some companies now petitioning for H-1B workers recruit exclusively in foreign countries. The Commission believes that U.S. recruitment or hiring efforts will help ensure that qualified U.S. citizens and permanent residents have access to these jobs. We do not recommend, however, that current labor certification processes be used to document significant efforts to recruit. These procedures are costly, time consuming, and ultimately ineffective in protecting highly-skilled U.S. workers.

Under the now expired H-1A visa program for the admission of LDA registered nurses, several alternative steps were described as meeting the requirement of timely and significant steps to employ U.S. workers. These alternativesi n - clude: operating a training program for such workers at the facility (or providing participation in a training program elsewhere); providing career development programs and other methods of facilitating workers to become qualified; paying qualified workers at a rate higher than currently paid to other similarly employed workers in the geographic area; and providing reasonable opportunities for meaningful salary advancement. Examples of other steps that might qualify as meeting the timely and significant requirement include monetary incentives, special perquisites, work schedule options, and other training options.

- **Employers requesting the admission of lesser-skilled workers should be required to meet a stricter labor market protection test.** Such employers should continue to be required to demonstrate that they have sought, but were unable to find, sufficient American workers prepared to work under favorable wages, benefits, and working conditions. They also should be required to specify the steps they are taking to recruit and retain U.S. workers, as well as their plans to reduce dependence on foreign labor through hiring of U.S. workers or other means. (For example, sugar cane growers in southern Florida who had petitioned for foreign workers had success in reducing their dependence on H-2A workers through mechanization.) Employers should continue to be required to pay the highest of prevailing, minimum, or adverse wage rates, provide return transportation, and offer decent housing, health care, and other benefits appropriate for seasonal employees.

The Commission recommends that categories of employers who are at special risk of violating labor market protection standards—regardless of the education, skill, or experience level of its employees—be required to obtain regular independently-conducted audits of their compliance with the attestations made about labor market protection standards, with the results of such audit being submitted for Department of Labor review. Certain businesses, as described below, pose greater risk than others of displacing U.S. workers and/or exploiting foreign workers. The risk factors that should be considered in determining whether stricter protection standards must apply include:

The Commission recommends that categories of employers who are at special risk of violating labor market protection standards be required to obtain regular independently-conducted audits of their compliance with the attestations made about labor market protection standards.

- **The employer's extensive use of temporary foreign workers.** Extensive use can be defined by the percentage of the employer's workforce that is comprised of LDA workers. It also can be measured by the duration and frequency of the employer's use of temporary foreign workers.

- **The employer's history of employing temporary foreign workers.** Those employers with a history of serious violations of regular labor market protection standards or specific labor standards related to the employment of LDA workers should be considered as at risk for future violations.

- **The employer's status as a job contracting or employment agency providing temporary foreign labor to other employers.** Risk of labor violations increases as responsibility is divided between a primary and secondary employer.

To ensure adequate protection of labor market standards, such employers should be required to submit an independent audit of their compliance with all statements attested in their application. The independent audits should be done by recognized accounting firms that have the demonstrated capacity to determine, for example, that

wages and fringe benefits were provided as promised in the attestation and conformed to the actual or prevailing wages and fringe benefits provided to similarly situated U.S. workers.

The Commission recommends enhanced monitoring of and enforcement against fraudulent applications and postadmission violations of labor market protection standards.

The Commission recommends enhanced monitoring of and enforcement against fraudulent applications and postadmission violations of labor market protection standards. To function effectively, both the exempt and nonexempt temporary worker programs must provide expeditious access to needed labor. The Commission's recommendations build on the current system of employer attestations that receive expeditious preapproval review but are subject to postapproval enforcement actions against violators. To ensure adequate safeguards for U.S. workers, the government agencies responsible for processing applications and enforcing the law must have adequate capacity to identify and act quickly against fraudulent applicants and to monitor postapproval violations of the terms under which foreign workers enter. More specifically, the Commission recommends:

- **Allocating increased staff and resources to the agencies responsible for adjudicating applications for admission and monitoring and taking appropriate enforcement action against fraudulent applicants and violators of labor market protection standards.** These agencies require additional resources to investigate potential fraud among applicants for temporary worker visas as well as violations of the labor market protection standards. Enhancing this capability has significant resource implications, especially if, as the Commission also recommends, such antifraud investigations are undertaken in a manner that does not delay visa adjudication and issuance. Increased costs required for more efficient adjudication of applications can be covered by applicant fees. However, additional costs incurred for more effective investigations of compliance with labor market standards will require appropriated funds.

Sufficient funds should be appropriated to provide the additional resources needed for adequate enforcement by the Department of Labor. These resources should be targeted at employers and contractors at special risk of violating labor market protection standards. Targeting these employers makes the most sense both in terms of economical use of resources and in protection of workers.

The Department of State also must have the capacity to make a proper investigation of cases in which fraud is suspected. This capacity is particularly needed in applications for admission of LDAs in exempt categories to ensure that use of these categories does not become a means of evading labor market protection standards. For example, the visa for intracompany transfers has been abused by persons setting up sham corporations. To comply with appropriate requirements for timely decisions, the government must have the resources to investigate suspected fraud.

- **Barring the use of LDA workers by any employer who has been found to have committed willful and serious labor standards violations with respect to the employment of LDA workers. Further, upon the recommendation of any federal, state, or local tax agency, barring the use of LDA workers by any employer who has been found to have committed willful and serious payroll tax violations with respect to LDA workers.** The law currently provides for such debarment for failure to meet labor condition attestation provisions or misrepresentation of material facts on the application. Implementation of this recommendation would enable penalties to be assessed for serious labor standards violations that are not also violations of the attestations. This would address an issue that has come to the attention of the Commission: the knowing misclassification of some

LDA workers as independent contractors, with subsequent failure to pay payroll taxes or other legally-required deductions to the appropriate governmental agency.

- **Developing an enforcement strategy to reduce evasion of the LDA labor market protection standards through use of contractors.** U.S. businesses' growth in contracting-out functions has raised questions of employment relationships and ultimate liability for employment-related violations, including those related to temporary foreign workers. A uniform policy for dealing with these situations is desirable for the enforcement agencies involved, as well as for employers, contractors, and workers.

Conclusion

Limited duration admissions are an important part of immigration policy because they are linked closely to the admission of legal permanent immigrants and to our policies for deterring unlawful migration. This report seeks to treat limited duration admission policy in a comprehensive fashion, building on the recommendations made by the Commission on other aspects of immigration policy. The opportunities presented by the admission of limited duration admissions are significant. With the type of regulation recommended herein, the United States will be able to continue to benefit from these admissions while mitigating potential harmful effects, particularly on vulnerable U.S. populations.

CURBING UNLAWFUL MIGRATION

In its first interim report to Congress this Commission recommended a comprehensive strategy to curb unlawful migration into the United States through prevention and removal.[9] That report focused on deterrence—steps that could prevent illegal entry and unauthorized work. The Commission found that curbing unlawful immigration required: (1) better border management; (2) more effective deterrence of the employment of unauthorized workers; (3) a more consistent benefits eligibility policy; (4) cooperative efforts with source countries; (5) improved data collection and analysis; (6) mechanisms to address migration emergencies; (7) and an improved capacity to remove deportable aliens. The Commission presented detailed recommendations on the first five elements of this strategy (border, worksite, benefits, source country, and data). Our report on refugee policy detailed more specific recommendations on the sixth, migration emergencies.[10] This final report provides more detailed recommendations on the seventh, removals.

Since 1994, the immigration system as a whole has undergone almost unprecedented change. As Congress, the public, and the Administration focused more keenly on immigration, the financial resources available to INS grew from $1.5 billion in FY 1994 to a projected $3.6 billion in FY 1998. During the same period, INS staffing is expected to rise 65 percent, from 17,000 in FY 1994 to more than 28,000 in FY 1998. Once in 1994,[11] and three times in 1996,[12] enactment of major legislation made substantive and substantial changes in laws affecting illegal migration. Many of these statutory and administrative actions sought to implement the Commission's 1994 recommendations.

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[9] *U.S. Immigration Policy: Restoring Credibility,* 1994.
[10] *U.S. Refugee Policy: Taking Leadership, 1997.*
[11] Violent Crime Control and Law Enforcement Act of 1994.
[12] Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA], Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [IIRIRA], Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

Deterrence Strategies

The Commission reiterates its 1994 recommendations supporting a comprehensive strategy to deter illegal migration.

The Commission reiterates its 1994 recommendations supporting a comprehensive strategy to deter illegal migration. Despite the additional resources, new policies, and often innovative strategies adopted during the past few years, illegal migration continues to be a problem. In October 1996, INS released its latest estimates of the illegal alien population in the United States: some 5 million undocumented migrants reside in the United States, a number growing by approximately 275,000 annually; 41 percent of these are nonimmigrant overstays; the remaining 59 percent probably entered illegally and without inspection.

The Commission continues to believe that unlawful immigration can be controlled consistent with our traditions, civil rights, and civil liberties. As a nation committed to the rule of law, our immigration policies must conform to the highest standards of integrity and efficiency in the enforcement of the law. We must also respect due process. The Commission believes that the comprehensive strategy we outlined in 1994 continues to hold the best promise for reducing levels of illegal migration. These policies, combined with the structural and management recommendations detailed later in this report, can restore the credibility of our immigration system by both deterring illegal entry and facilitating legal crossings. The Commission emphasizes, however, that no one part of this strategy will, on its own, solve the problem of unauthorized migration.

More specifically, the Commission continues to support implementation of the following deterrence strategies:

- **An effective border management policy that accomplishes the twin goals of preventing illegal entries and facilitating legal ones.** Increased resources for additional Border Patrol officers, inspectors, and operational support, combined with

such new strategies as operations "Hold the Line," "Gatekeeper," and "Safeguard," have improved significantly the management of the border where they are deployed. The very success of these new efforts demonstrates that to gain full control, the same level of resources and prevention strategies must be deployed at all points along the border where significant violations of U.S. immigration law are likely to occur.

Implementing effective prevention strategies. In 1994, "Operation Hold the Line" in El Paso, Texas successfully challenged outmoded border control concepts. This effort then served as the model for efforts to control other parts of the border, particularly in the San Diego area. The result, "Operation Gatekeeper," utilizing a strategy described as "Prevention through Deterrence," began on October 1, 1994, and included the commitment of significant new resources and the implementation of innovative new strategies.

Phase I (1994) of the plan had the greatest impact on the area around Imperial Beach in San Diego County. For many years this area accounted for approximately 25 percent of illegal crossings across the southwest border. Utilization of new equipment led to apprehension of greater numbers, and use of new techniques cracked down on alien smuggling rings. Reinforcement of interior checkpoints helped capture those who made it illegally across the border.

Phase II (begun in June 1995) consisted mainly of reinforcing nearby ports of entry seen as the next likely route for aliens whose illegal entry was disrupted by "Operation Gatekeeper." INS placed additional service inspectors at the border, constructed fencing at strategic locations, installed a fingerprint identification system , and added increased lighting at ports of entry.

Phase III (begun in 1996) is designed to extend control over increasing sections of the southwest border as additional staff and equipment become available. The San Diego Border Patrol Sector now has almost 2,000 agents working along the border.

Where these new initiatives have been instituted, the number of people seeking to cross is significantly reduced. On Commission site visits, residents of El Paso and Imperial Beach, the main beneficiaries to date of the new enforcement efforts, cited reduction in vagrancy and petty crime as evidence of reduced illegal crossings through their communities. Preliminary research data reveal that it now takes longer and costs more to enter the United States illegally. Illegal migrants now must now cross through tougher terrain and need the assistance of smugglers. Migrant smuggling increasingly is becoming specialized and professionalized.

The 1997 Binational Study, *Migration Between Mexico and the United States,* reports that a systematic survey of border crossers indicates fewer actual crossers but longer periods of stay in the United States. Thus, it appears that while new border initiatives may deter some movements, they do not fully reduce either levels or impacts of illegal migration. In other words, border control is a necessary, but not sufficient, response to illegal migration.

Evidence also shows that in response to the new initiatives migrants have shifted their entry patterns. For example, as Imperial Beach and its neighboring communities came under control, the numbers of illegal entries rose in eastern San Diego county, the Imperial Valley, Arizona, and south Texas. As the Commission noted in 1994, the immigration

system must have the capacity to prevent entry across the southern border. Mobile, rapid response teams initially can help plug holes along the border, but eventually, a prevention capacity must be established in every likely crossing area.

Protecting human rights. Effective border management is not without its human toll, increased violence along the border, as well as deaths resulting from exposure to extreme weather in mountain and desert areas. Both border crossers and Border Patrol agents have been victims of this heightened violence.

Since the implementation of the border initiatives, incidents of violence against the Border Patrol have increased. Incidents of rock-throwing, a hazard to Border Patrol agents for years, have risen. Agents now face random gunfire from south of the border. Beginning in May of 1997, six reported sniper shootings in the San Diego sector were directed at Border Patrol agents. Sustained efforts to protect agents from such violence must be at the top of the policy agenda.

Efforts also must continue to warn potential illegal border crossers—while they are still in their countries of origin—of the increased physical dangers and legal consequences of trying to cross illegally. In particular aliens must be warned of the pitfalls of using smugglers, some of whom abandon border crossers and otherwise abuse them.

Site visits in Mexico demonstrate that already widespread knowledge exists about the new difficulties in entering the United States illegally; misinformation continues to abound as well. Residents in new sending regions such as Oaxaca, traditional sending regions such as Jalisco, and border cross-

ing points such as Tijuana, all spoke of the additional costs and dangers encountered in attempting to cross the border illegally.

The Commission continues to support efforts to monitor and reduce human rights violations and potentially violent confrontations between government personnel and those believed to be seeking illegal entry into the United States. The INS formed a Citizens' Advisory Panel [CAP] that met periodically from February 1994 through February 1997, a year beyond its original expiration date. During that time, the CAP discussed ways and means for averting potential human rights abuses and outright violence by INS employees against aliens. As a result, INS adopted a formal complaint procedure for reporting alleged abuses by government employees to their supervisors and for INS to respond to those complaints. At its February 1997 meeting, the CAP decided to disband in its present form. Discussions are now underway on how best to retain the CAP input in the INS decisionmaking processes, in delivering feedback for training and supervising INS border personnel, and in responding to complaints made against employees.

Improving ports of entry. Additional pressure on ports of entry also accompany enhanced border control. The various initiatives already undertaken provide guidance for other border sites. In San Diego, "Operation Gatekeeper II" included enhanced resources for inspectors to identify individuals entering with fraudulent documents or as impostors. A Port Court was established to place these persons into formal exclusion proceedings. Presiding Immigration Judges made clear to those receiving exclusion orders that they would face criminal penalties if they were apprehended attempting to reenter within one year. To ensure that word went out that these were not idle threats, the U.S. Attorney

pledged to prosecute these cases. A relatively small number of persons were apprehended attempting reentry after receiving an exclusion order at the Port Court.

This process has changed somewhat under the new expedited removal procedures mandated by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which took effect on April 1, 1997. Under the new procedures, an alien arriving at a port of entry with fraudulent documents or without documents is referred to secondary inspection, where he or she is advised about expedited removal.[13] If the alien does not indicate a fear of persecution or an intent to apply for asylum, the alien is fingerprinted, photographed and detained until removal, which in San Diego typically takes two processing days. The alien's identity is recorded in the INS IDENT database for immediate and future determination of repeated attempts at unlawful reentry. An immigration officer's determination to remove an alien under the expedited procedures is not subject to administrative or judicial review, except under only very narrow circumstances.

Immigration officials in San Diego report a significant increase in removals as a result of the new expedited removal provisions. These gains in the capacity to remove at the border are no doubt desirable goals for an immigration enforcement agency. However, a more reliable determinant

[13] IIRIRA permits the Attorney General to apply the expedited removal provisions to aliens in the U.S. who have not been admitted or paroled [EWIs] and who have not shown to the satisfaction of the immigration officer that they have been continuously present in the U.S. for the two-year period immediately preceding the date of the determination of inadmissibility. At present, the Attorney General has elected not to apply these provisions to EWIs, although she has reserved through regulation, the option to apply the expedited removal provisions at any time, to any alien specified in that section.

of the extent to which a law actually deters the conduct it seeks to address is the recidivism rate. Thus, the effective communication of the consequences attached to the removal of an alien as a result of the new provisions is a key ingredient of the efficacy of our immigration laws. Without such public education, certain individuals are likely to be undeterred by the type of sanction exacted under the new expedited removal procedures.

Although reliable data on reentry is not yet available, the San Diego district reports an apparent increase in recidivism following implementation of the new law. It appears that an order issued by an immigration inspector does not have the psychological force of an order issued by an Immigration Judge. What is gained in expediting by the new statutory process may be lost in increased recidivism.

To counter this trend, the San Diego district has instituted a three-strike system that corresponds with the changes mandated by the new law. This system was established with the cooperation of the INS, the Executive Office for Immigration Review [EOIR], and the U.S. Attorney's Office in response to reports of apparent recidivism among aliens turned away by the expedited removal process. The first strike occurs once the INS inspector issues an expedited removal order to the alien that carries a penalty of inadmissibility for up to twenty years in some cases and permanently if the offense involves the use of a fraudulent document.

The second strike—appearance before an Immigration Judge in Port Court—occurs once the alien is apprehended after having been removed for a previous immigration or criminal violation. This step provides a critical link to deterrence: personal communication of the consequences of violating an immigration law. At the hearing, the Immigration

Judge advises the alien of the administrative sanction resulting from the attempted illegal reentry after expedited removal (i.e., a bar to admission for some period) and also of the certainty of felony prosecution if the alien attempts reentry during that period. The presence of an Immigration Judge is considered a vital component to the credibility of the San Diego district's border enforcement. The clear, unequivocal notice of the penalty aliens are likely to incur at the third step, coupled with the prospect of time spent in prison, is predicted to have more of a deterrent effect than simply turning aliens away without providing adequate notice of the consequences of their conduct.

The third strike involves felony prosecution by the U.S. Attorney's office under 8 U.S.C. § 1326(a) for illegal reentry following deportation, exclusion, or removal or under § 1326(b) for illegal reentry by certain criminal aliens who likewise have been previously removed. The penalties for a conviction under these sections of Title 8 range from sentences of not more than two years to not more than twenty years and/or a fine.

The INS and the Border Patrol are in the process of linking the IDENT system to all sectors along the southwest U.S.-Mexican border. This is especially important in light of the apparent shift in border movements to the east. Moreover, proper coordination of this system with various other law enforcement agencies to identify criminal aliens and other immigration violators may enhance the cooperation between those agencies and heighten enforcement along the border. For example, within the constraints of privacy limitations, data on criminal aliens entered into the IDENT system and furnished to the U.S. Attorney's Office would allow that office more readily to identify and prepare the criminal alien cases it intends to prosecute under the § 1326 provisions.

San Diego also is a laboratory for initiatives to facilitate legal entries while guarding against the abuses referenced above. The Commission urged in its 1994 report that port of entry operations be improved to reduce long waiting times for legal crossings. We learned in El Paso that some illegal crossers had legal authority to enter, but because of the long waits, chose to use unauthorized avenues to enter. San Diego, along with several northern border sites, has been experimenting with a Dedicated Commuter Lane [DCL] to speed legitimate border traffic. This concept combines upfront screening of the applicant for a commuter pass and use of technology to ensure that the crosser is indeed the person who previously was screened. Another innovation in San Diego is a new working relationship between INS inspections and the Customs Service to open all traffic lanes and to improve the division of responsibility: INS currently runs the port for pedestrian crossing and Customs for cargo inspections. Responsibility for inspections at the vehicle lanes still is shared by INS and Customs.

Reducing visa overstay and abuse. Visa overstay and abuse of visas and Border Crossing Cards [BCCs], particularly through unauthorized work, continue to challenge effective border management. Most of those entering with visas and BCCs come for legitimate purposes, abide by the terms of their entry, and leave when required. Out of the millions of aliens who are inspected each year, only a very small proportion (about 150,000 per year) overstay for significant periods. Any efforts to reduce abuse must also consider the widespread benefits that accrue from most visa and BCC holders. A number of policy changes could help ease legal entry while reducing abuse. The Commission previously recommended, and Congress and the Administration have taken

action for, the development of new entry-exit controls for persons entering with visas, reissuance of Border Crossing Cards to give them greater integrity, and providing significant new resources for inspections.

Monitoring and evaluating new initiatives. The various intended and unintended consequences of the new resources, policies, and initiatives in and between ports of entry make clear the need for careful monitoring. The Commission reiterates its 1994 recommendation that a systematic assessment of the effectiveness of new border strategies be undertaken by internal and external evaluators. IIRIRA mandates a General Accounting Office five-year evaluation of border management. This study should be underwritten with sufficient resources and expertise to ensure that Congress and the Executive Branch gain an independent view of the new policies' effectiveness.

- **Reducing the employment magnet is the linchpin of a comprehensive strategy to deter unlawful immigration.** Economic opportunity and the prospect of employment remain the most important draw for illegal migration to this country. Strategies to deter unlawful entries and visa overstays require both a reliable process for verifying authorization to work and an enforcement capacity to ensure that employers adhere to all immigration-related labor standards. The Commission continues to believe the following areas of worksite regulation and enforcement require improvement:

Employment authorization verification system. In our 1994 report, the Commission concluded that the single most important step that could be taken to reduce unlawful migration was development of a more effective system for verifying work authorization.

A large majority of employers will comply with the law, and they will not knowingly hire illegal aliens. However, the widespread availability of fraudulent documents makes it easy for illegal aliens to obtain jobs because employers generally have no way of determining if the workers are authorized or not. The minority of employers who knowingly hire illegal aliens, often to exploit their labor, find protection from sanctions by going through the motions of compliance while accepting counterfeit documents. The absence of a secure verification process also heightens the potential for discrimination against legally-authorized, foreign-looking or -sounding workers because employers fear that they may be inadvertently hiring illegal aliens.

The Commission concluded that the most promising option for verifying work authorization is a computerized registry based on the social security number; it unanimously recommended that such a system be tested not only for its effectiveness in deterring the employment of illegal aliens, but also for its protections against discrimination and infringements on civil liberties and privacy.[14] The Commission urged the Administration "to initiate and evaluate pilot programs using the proposed, social security-based computerized verification system in at least five states with the highest levels of illegal immigration . . ." In the interim, we recommended that INS should continue to implement pilot programs already underway that permit employers to verify the work authorization of these newly-hired workers who attest to being aliens. The existing pilot, since expanded, was a good mechanism through which INS could develop the data and other systems that would be needed in the more extensive pilots envisioned by the Commission. They continued to

[14] The Concurring Statement of Commissioners Leiden and Merced can be found in the Commission's 1994 report.

have a fatal flaw, however, in that an illegal alien could attest to being a U.S. citizen and thereby escape verification by INS.

The Commission's recommendation for a verification pilot that involved both citizens and aliens was incorporated in modified form in IIRIRA.[15] Congress mandated that the Attorney General establish a pilot confirmation system using a telephone line or other electronic media. The Commissioner of Social Security was mandated to establish a reliable, secure method to verify the social security number provided by a new hire as part of the employment confirmation process. Pilot programs testing the new confirmation process were to be implemented in, at a minimum, five of the seven states with the highest estimated illegal alien population. Participation in the pilot programs is to be voluntary for most employers. The legislation mandated participation by federal agencies and the Congress. Companies violating employer sanctions provisions can also be required to participate. The Attorney General is to report on the pilot programs after three and four years of operation.

The first of these pilot projects was to begin not later than one year from enactment of IIRIRA, or about August 1997. The first pilot project, starting in Chicago, began in late August. Called the "Joint Employment Verification Project" [JEVP], the pilot involves INS and the Social Security Administration. The verification pilot will test many of the requirements of the "Basic Pilot Program" mandated in § 403(a) of IIRIRA.

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[15] IIRIRA, Title IV—Enforcement of Restrictions Against Employment, Subtitle A: Pilot Programs for Employment Eligibility Confirmation, sections 401-405.

The JEVP will have prospective new employees fill out the current INS Form I-9, submit identification documents listed in the legislation, and include a photograph. Employers will then contact the Social Security Administration [SSA] through a touch-tone telephone (being developed under a contract with ATT) that will electronically verify identity and authorization/nonauthorization to work using the employee's social security number. If either of these is not confirmed, the prospective employee must be notified. The employee may then withdraw or contest this tentative nonconfirmation. In this case, the prospective employee has ten days in which to provide additional or corrected information to the employer. If this still does not produce confirmation of employment authorization, the employee will be told to contact SSA [for citizens] or INS [for noncitizens] to correct their record(s) and/or their status. During this confirmation process, employees cannot be terminated. If still unconfirmed at the end of the process, the employee then may be terminated. As mandated by IIRIRA, INS plans to expand implementation of the JEVP into five additional states by the end of September 1997.

In addition, IIRIRA mandates two other pilot projects, a "citizen attestation pilot project" and a "machine readable document pilot project." INS currently is formulating these additional pilot projects. The "citizen attestation pilot project" will be similar to the INS' current Employment Verification Program, while the "machine readable document pilot project" is a variation of the JEVP and the "Basic Pilot Project."

The current pilot programs are a useful step in improving verification, but they do not fully solve the problems we have identified. The Commission reiterates its support for

pilot-testing approaches that do not require employers to use the current I-9 procedure. The I-9 is flawed in several ways. First it is a document system, which is prone to counterfeiting. Second, it requires employees to specify if they are citizens or aliens. This latter requirement increases the potential for discrimination based on alienage or presumed alienage. Third, it presents an added paperwork burden for employers who must keep the I-9 file. The current pilot programs help address the first problem by providing for telephone or computer verification of information provided in the I-9. It does not address the second or third problems, however.

A system based on verification of an employee's social security number, with a match to records on work authorization for aliens, eliminates any determinations by the employer and can be implemented electronically, thus eliminating the need for work authorization documents. The Commission recognizes that the data systems are not yet in place for this preferred process to work. The federal government does not have the capacity to match social security numbers with INS work authorization data without some of the information captured on the I-9. Congress should provide sufficient time, resources, and authorities to permit development of this capability.

The Commission urges the Administration and Congress to monitor closely and evaluate the effects of these various pilot programs. As discussed in our earlier report, the evaluation should assess their effects in reducing fraud, reducing the potential for discrimination, reducing emplyers' time, resources, and amount of paperwork, and protecting privacy and civil liberties. The evaluation should be carried out by nationally-respected outside evaluators. It should be

conceived as a continuing evaluation whose results are used in modifying and improving the pilots as they are implemented.

Counterfeit documents. The Commission recommended action to reduce the availability of counterfeit documents and the fraudulent access to so-called "breeder documents," particularly birth certificates used to establish identity. The Commission is pleased to note progress in the development of new and more tamper-proof basic documents that could serve as verification documents until a general, nationwide verification system is fully in place. The Commission also believes that the federal government should develop a package of incentives and disincentives to encourage states and other localities to develop standards for issuing birth and death certificates and drivers' licenses. The Commission is pleased to note that its 1994 recommendation for imposing additional penalties on those producing and selling counterfeit documents was adopted in the IIRIRA.

Antidiscrimination strategies. In its 1994 report, the Commission expressed its concern regarding the discrimination that occurs against citizens and noncitizens as a result of the current employer sanctions system. To address this issue, the Commission recommended development of a new verification process to deter immigration-related discrimination. We also urged more proactive strategies to identify and combat immigration-related discrimination at the workplace, as well as a new study to document the nature and extent of the problem. Revisiting this issue three years later, the Commission finds that there have been a number of changes that are relevant to the Commission's recommendations.

First, the Office of Special Counsel [OSC] for unfair immi-

gration-related employment practices, formerly housed as an independent agency within the Department of Justice, has been incorporated into the DOJ's Civil Rights Division. This organizational change seems to have been well received within the Department as both the Division and OSC focus on protecting the rights of immigrants and racial and ethnic minorities.

The number of OSC staff, however, has decreased from thirty-six to about twenty-five since FY 1994. This downward trend harms OSC's ability to take the proactive role that the Commission recommended (e.g. increasing independent, targeted investigations and beginning testing programs). The Commission urges attention to this matter, as well as to the long delay in confirming a Special Counsel to head the office.

A significant portion of OSC's efforts have been directed toward the education of employees and employers, and we support these efforts. OSC has awarded 114 grants totaling $2.09 million since FY 1990 and contracted out for a five-year national public affairs/communications strategy. Its attorneys and staff have made 1,000 presentations in the last ten years, and its grantees have averaged 1,700 presentations per year. OSC also has coordinated its educational efforts with the Equal Employment Opportunity Commission, INS, and DOL and has Memoranda of Understanding with these and other agencies.

Despite this apparent coordination, however, OSC has not been involved in designing and monitoring the verification pilot programs. Reducing immigration-related employment discrimination against foreign-looking or -sounding persons was a key goal of the Commission's proposed verification

system. OSC should play a role in monitoring the verification pilots to see if the discrimination is indeed reduced as predicted.

The Commission also reiterates its recommendation for a methodologically-sound study to document the nature and extent of unfair immigration-related employment practices that have occurred since the General Accounting Office's 1990 report. Only through such a study can it be determined whether employer sanctions-related discrimination has increased or decreased and how the pilot programs compare with the current situation on this indicator.

In 1996, IIRIRA changed the INA by requiring that an intent to discriminate must be proven for an employer to be found guilty of violating IRCA's antidiscrimination procedures with respect to document requests. Some believe that the intent standard will be a difficult one to prove and that it provides the employer with a loophole. The actual effect of this provision will be known only as OSC implements the statutory change and should be monitored.

Labor standards enforcement. Protecting authorized workers from employment abuses and substandard conditions and practices remains an essential ingredient of a strategy to combat illegal migration. Employers who hire illegal aliens tend to violate other labor standards and *vice versa.* Recently uncovered examples of exploitation of illegal aliens, including indentured servitude, highlight the necessity of enhanced labor standards enforcement. The Commission recommended in our 1994 report the allocation of increased staff and resources to the Department of Labor for the enforcement of wage and hour and other labor standards. We continue to believe that these additional resources are necessary, and the Commission continues to urge Congress to

authorize and fund additional labor standards investigators whose work should target industries hiring significant numbers of illegal aliens. As described more fully later in this report, we believe that the Department of Labor should have full capacity and authority to sanction employers who fail to verify work authorization as part of the agency's duties in enforcing labor standards.

- **Restricting eligibility of illegal aliens for publicly-funded services or assistance except those made available on an emergency basis or for similar compelling reasons to protect public health and safety or to conform to constitutional requirements.** Although public benefit programs do not appear to be a major magnet for illegal migrants, it is important that U.S. benefit eligibility policies send the same message as immigration policy: Illegal aliens should not be here and, therefore, should not receive public assistance except in unusual circumstances. The Commission recommended drawing a line between illegal aliens and lawfully-resident immigrants with regard to benefits eligibility, in part to reinforce this message. Immigrants are welcome in the country and, therefore, should be eligible for our basic safety nets; illegal aliens are not welcome and should not receive our assistance. We continue to believe that this demarcation between legal and illegal aliens makes sense. The Commission urges the Congress to reconsider the changes in welfare policy enacted in 1996 that blur the distinctions between legal and illegal aliens by treating them similarly for the purposes of many public benefit programs.

- **Strategies for addressing the causes of unlawful migration in source countries.** An effective strategy to curb unauthorized movements includes cooperative efforts with source countries to address the push factors that cause people to seek new lives in the United States. The Commission contin-

ues to urge the United States government to give priority in its foreign policy and international economic policy to long-term reduction in the causes of unauthorized migration. The United States can take many unilateral steps to improve its immigration policies, but U.S. policies alone will not stop unauthorized migration.

Recognizing the complex motivations behind unlawful movements, the Commission advocated the following possible interventions, many of which have indeed occurred. They include: arrangements to facilitate trade and investment in sending countries; support for human rights and democracy building; peacekeeping operations; humanitarian assistance in countries of origin and first asylum; deployment of human rights monitors; human rights training for government officials in potential sending countries; humane treatment of citizens and minorities; and reconstruction programs after civil wars and civil conflicts. In its 1997 report on refugee policy, the Commission recommended that the U.S. government continue demonstrating leadership in international responses to refugee and related humanitarian crises, including concerted diplomatic and other efforts to prevent the emergencies from occurring.

To focus greater attention on the causes of migration, the Commission recommends development of immigration impact analyses of foreign policy and trade decisions with potential migrant sending countries. The Commission also calls for adoption of focused strategies for communities producing large numbers of U.S.-bound migrants and strengthened intelligence gathering to improve early warning of large unauthorized movements. Other efforts to reduce the pressures of migration from the sending countries would be helpful, such as programs to arrest environmental damage

throughout the hemisphere, to restore the environment in such areas as Haiti and Mexico, to improve rural development and agricultural productivity, particularly in those areas where land is becoming marginalized and unlikely to sustain the local population without an intervention strategy, and to address other environmental problems such as clearing land mines in rural Central America.

Given its proximity to the United States and its number of migrants, the Commission believes increased coordination with Mexico is essential to address problems related to migration. The Commission notes with satisfaction the efforts being conducted jointly by the government of Mexico and the United States to improve coordination strategies and actions on their respective sides of the border and encourages the continuation of such important dialogues. In particular, the Commission recognizes the work of the Binational Study on Migration Between Mexico and the United States, the Working Group on Migration and Consular Affairs, the various cross-border liaison groups established along the border, and efforts between the two countries to coordinate antismuggling efforts, regulate the movements of people across land borders, deter third-country nationals transiting Mexico *en route* to the U.S., curtail auto theft and train cargo theft, reduce border violence, and enhance cross-border law enforcement cooperation.

The Commission also notes that action has taken place at the regional level; annual discussions have been convened involving the U.S., Mexico, and Central American countries. Further, the U.S. has held direct discussions with other countries in the region, such as Cuba, with whom it signed an agreement to curb unauthorized migration of its native population.

Despite that program, the need remains for forward looking consultative mechanisms between the U.S. and other countries. These should focus on exploring future policies and their migration implications as well as developing various policy scenarios and options for addressing unauthorized migration. Joint data collection and analysis also would be useful in resolving some of the disagreements surrounding migration, for example joint solutions to address the economic and social costs of the migration.

- **Mechanisms to respond in a timely, effective, and humane manner to migration emergencies.** A credible immigration policy requires the ability to respond effectively and humanely to migration emergencies in which large numbers of people seek entry into the United States. These emergencies generally include *bona fide* refugees, other individuals in need of protection, and persons seeking a better economic life in the U.S. Failure to act appropriately and in a timely manner to determine who should be admitted and who should be returned can have profound humanitarian consequences. Further, an uncontrolled emergency can overwhelm resources and create serious problems that far outlast the emergency.[16]

  Leadership. Past experiences demonstrate that leadership and a chain of command must be established quickly during an unfolding mass migration emergency to ensure an effective response. The proposed National Security Council focal point for refugee issues should assume these responsibilities because of the political nature of the decisions, the need for high Executive Branch access, and the need for credibility that derives from sufficient authority and government experience.

[16] For a fuller discussion of the Commission's recommendation on mass migration emergencies, see *U.S. Refugee Policy: Taking Leadership*, 1997.

Regional advance preparation. Mass migrations are likely to continue within this hemisphere. To respond effectively and humanely to future crises, the U.S. and its regional partners need a plan for a regional temporary protection system. This plan should identify sites, prepare protection guidelines and processing procedures at the primary protection sites and other locations, and create a funding proposal that clarifies financial responsibilities and accounts for marginal additional costs. It also should include measures to avert and resolve crises and develop plans for implementing durable solutions.

Domestic advance preparation. The U.S. must also finalize its own federal contingency planning for migration emergencies that has been under development during the past decade (with review and revision as needed). The presence of a such a contingency plan identifying various scenarios, policy responses, and appropriate steps for implementing them can help avoid both dangerous and costly *ad hoc* decisionmaking and disruption of normal operations. An effective and viable emergency response, however, requires that the agencies have sufficient resources and authorities to carry out their responsibilities. Thus, as part of this process, the U.S. must develop a realistic financing strategy and mechanisms to trigger allocation of funds.

Increased coordination among federal agencies involved in emergency responses—as well as with state and local agencies—also is necessary to ensure that the appropriate participants are identified and involved in the discussions and that as many decisions and responsibilities as possible are agreed upon prior to emergency situations. This would facilitate emergency responses by reducing the reluctance of state and local government to be involved, by clarifying lines of authority, and by increasing trust between the par-

ties. If they had the statutory authority to allow them to respond rapidly and efficiently, agencies with operational responsibility for mass migration emergencies could be more effective. This operational responsibility must include the authority to assign tasks to other agencies as needed.

Removals

A credible immigration system requires the effective and timely removal of aliens determined through constitutionally-sound procedures to have no right to remain in the United States. As the Commission stated in its 1994 Report, if unlawful aliens believe that they can remain indefinitely once they are within our national borders, there will be increased incentives to try to enter or remain illegally.

Our current removal system does not work. Hundreds of thousands of aliens with final removal orders remain in the U.S. The system's ineffectiveness results from a fragmented, uncoordinated approach, rather than flawed legal procedures. The Executive Branch does not have the capacity, resources, or strategy to detain aliens likely to abscond, to monitor the whereabouts of released aliens, or to remove them.

A large number of aliens—more than 250,000 in the past eight years—have been issued removal orders but have never been removed.[17] [See chart: Comparison of Removal Orders and Actual Removals.] In studying how the current system produces such a large number of unexecuted final removal orders, the Commission finds that the removal process is neither conceived of nor managed as an integrated system.

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[17] Prior to IIRIRA, such orders were referred to as "deportation" and "exclusion" orders.

Comparison of Removal Orders and Actual Removals

YEAR	1989	1990	1991	1992	1993	1994	1995	1996	1997 (1st half)
ORDERS	48,000	52,000	60,000	65,000	70,000	84,000	105,000	131,000	64,000
REMOVALS	34,000	30,000	33,000	43,000	43,000	45,000	51,000	69,000	42,000
UNEXECUTED ORDERS	14,000	22,000	27,000	22,000	27,000	39,000	54,000	62,000	22,000
CRIMINAL REMOVALS	8,000	12,000	17,000	24,000	28,000	31,000	33,000	37,000	23,000
NONCRIMINAL ALIEN REMOVALS	26,000	18,000	16,000	19,000	15,000	14,000	18,000	32,000	19,000
INS DISTRICT IN SAN DIEGO REMOVALS	—	7,000	8,000	8,000	8,000	9,000	12,000	23,000	13,000

Sources: INS, EOIR, Administratively Final Removal Order by Month: Summary, July 24, 1997

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In its 1994 report, the Commission recommended that the top enforcement priority should be the removal of criminal aliens from the U.S. in such a way that their potential return to the U.S. will be minimized. The INS has made considerable progress recently in removing larger numbers of criminal aliens. This year, INS is on track to remove 70 percent more criminal aliens than were removed in FY 1993. Despite these advances, the actual number of criminal alien removals still lags behind the total number who should be deported from this country.[18]

INS has been able to increase the number of criminal alien removals by detaining previously incarcerated aliens after they complete serving their sentences, through conclusion of their proceedings, and removal can be effected. More significantly, INS and the Executive Office for Immigration Review developed the Institutional Hearing Program [IHP] through which removal hearings are held in the prisons. When final orders are issued in this setting, criminal aliens can be deported directly from state or federal prisons, alleviating INS' need to detain them during deportation proceedings. The Commission recommended enhanced use of the IHP in its 1994 report. As the recent GAO testimony cited above indicates, improvements are still needed to ensure that INS identifies and deports all removable criminal aliens.

Further, while the INS has increased criminal alien removals over the last several years, noncriminal alien removals remained static

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[18] See, e.g., GAO Testimony, "Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Need to Be Improved," before the Immigration and Claims Subcommittee, Committee on the Judiciary, House of Representatives, July 15, 1997.

until 1996, as the chart comparing removal orders and actual orders indicates. The recent increase in noncriminal removals may be somewhat related to increased detention space and resources authorized by Congress. However, much of the increase appears localized, suggesting that other forces are at work. As the chart further shows, removals from the San Diego District represent much of the increase and are related directly to the establishment of a Port Court in 1995.[19]

Even with these increased removals, the system needs significant improvements before it can be regarded as credible, that is able to deport most of the aliens with final orders of removal. To achieve this goal will require a new approach to correct a fundamental flaw—the fragmentation in the current conception and management of the removal system. Each part of the system—Investigations, Trial Attorneys, and Detention and Deportation—acts independently, impeding the total system's efficiency and leaving no one accountable for growing numbers of unexecuted final orders of removal.

The system starts with INS investigations of potential immigration law violations. When investigators find such violations, they issue notices placing aliens in removal proceedings. At that point, the investigators are finished with their assigned tasks; they are never connected to the results of their work—whether the alien was ultimately ordered removed and actually deported. Nor is their performance evaluated in connection with actual removals or with the priority that policymakers place on the removal of particular catego-

[19] When "Operation Gatekeeper" changed the patterns of how aliens attempted to enter the U.S. illegally and resulted in a significant increase in the number of aliens trying to cross with false documents at the port of entry, the U.S. Attorney worked with INS and EOIR to establish a more expeditious removal process for aliens apprehended at ports of entry. Previously, such aliens were simply turned back to Mexico; under the new system, they were placed in exclusion proceedings at the newly created Port Court. The aliens were detained for a few days, and the exclusion proceedings were expeditious because they were uncontested.

ries of aliens. Investigators do not, as a matter of practice, distinguish among priorities when initiating the formal removal process; both the worst violators and those who may have good claims for relief are placed in the same costly and time-consuming proceedings.

Once the proceedings have commenced, the INS Trial Attorney is responsible for the case. The volume of cases for each Trial Attorney is very large; yet, again there is no considered prioritization about which cases to proceed against and which not. Key policymakers do not provide guidance to Trial Attorneys about prioritizing cases, and, even if such guidance were provided, Trial Attorneys say that they are not given sufficient time to review cases to determine whether a case is worth pursuing. Again, there is no connection to the ultimate aim of the system—removing those who should be deported.

The system suffers further because many aliens are unrepresented and thus do not receive advice on whether to go forward because they have a chance of being granted relief. As the Commission learned in studying the results of the Florence Representation Project [see below], the removal process works much more efficiently when aliens receive advice of counsel. Those with weak cases generally do not pursue relief through proceedings if they understand from counsel that they will be wasting their time. As the late Chief Immigration Judge Robie pointed out, representation generally makes the court system work more efficiently. For example, Immigration Judges often grant continuances to unrepresented aliens to give them time to obtain counsel. In certain types of cases (particularly asylum claims), some judges are hesitant to proceed in the absence of representation. When a final order of removal is issued, another INS office, Detention and Deportation, takes responsibility for the case. This office is charged with managing detention space and effecting removal. The reality is that there will never be enough

space to detain everyone who should be removed. Nonetheless, no plan has been devised to pursue alternatives. The only experiment the INS has launched is the Vera Appearance Assistance Program that plans to test the utility of supervised release on various limited populations [as discussed below]. Unfortunately, due to internal INS problems, that pilot may not gain access to one of the main groups it should test—asylum seekers who meet the credible fear standard. No strategy has been devised for determining when, after the first hearing on the merits, detention is advisable because the likelihood of absconding is higher. Notices ordering removable aliens to report for deportation, known as "run" letters, continue to be issued at a 90+ percent no-show rate. No strategy has been developed for picking up aliens with final orders even when there is a recent address.

Establishing a more effective removal system requires changes in the management of the removal process. More specifically, the Commission recommends:

- **Establishing priorities and numerical targets for the removal of criminal *and* noncriminal aliens.** The Commission encourages headquarters, regional, and local immigration enforcement officials to set these priorities and numerical goals. Based on the above analysis of removal orders and actual removals, it appears that beyond the very highest removal priority—convicted criminals—targeted priorities of particular categories generally have not been developed at the national and local levels. Nor has INS developed numerical targets for the removal of specific categories of noncriminal aliens. This absence of prioritization and performance measures generally precludes serious consideration of what strategies, resources, and training will be needed to effect the desired removals.

Establishing removal of criminal aliens as a priority and setting numerical targets helped identify such new strategies as the IHP. The same process can work with regard to other categories of aliens, as can be seen in San Diego. Aliens who attempted to enter there with fraudulent documents were singled out as a priority for removal with an exclusion order. Formerly, those presenting fraudulent documents were permitted simply to withdraw their application for admission with no penalty. Setting the priority to remove aliens attempting reentry led to the decision to increase Inspection staff, establish a Port Court, identify additional detention space, and gain a commitment from the U.S. Attorney to prosecute those who attempted reentry after exclusion.

Failed asylum seekers [as the Commission recommended in our June 1997 Refugee Report], visa overstayers, unauthorized workers in targeted industries, and those who use false documents are categories that require attention if our removal system is to become credible and deter abuse. Setting priorities and numerical targets will help the government manage what is potentially a huge caseload of removable aliens.

- **Local oversight and accountability for the development and implementation of plans to coordinate apprehensions, detention, hearings, removal, and the prevention of reentry.** With guidance on priorities, local managers in charge of the removal system would be responsible for allocation of resources to ensure that aliens in the prioritized categories are placed in the process and ultimately removed. Local managers also would be responsible and accountable for identifying effective deterrents to reduce the likelihood that removed aliens would attempt to reenter the U.S. Managers need to redesign the system so that resources are balanced from beginning to end. Right now, the system is lopsided

and disconnected. The front end (Investigations) drives the system, and the back end (actual removals) is neglected. That imbalance can be corrected if the local offices develop plans to coordinate apprehensions, detention, hearings, and the removal process in ways that target the particular priorities in different districts. As discussed above, the San Diego district has had some success in focusing on aliens trying to enter with false documents. After identifying this priority, the U.S. Attorney coordinated the key federal government actors to ensure that these aliens were placed into proceedings, either returned to Mexico or detained for several days awaiting the hearing, promptly removed after the issuance of a final order, and prosecuted if they reentered.

As discussed above, the local INS Trial Attorneys, who are part of the General Counsel's Office, currently do not play a significant role in driving the removal system. The Commission believes Trial Attorney offices should function in the same manner that U.S. and District Attorney Offices do. Those offices determine which cases they will prosecute; and these determinations guide detectives as to which cases they bring to the U.S. or District Attorney for prosecution. Congress should provide sufficient resources to support such initiatives. Based on the policy guidance and plans developed by headquarters, regional and local offices, the chief Trial Attorneys [now called District Counsel] should make it clear to investigators which cases they will pursue in proceedings and which cases they will not. Investigators should then target these priority cases. Local heads of Immigration Enforcement Offices should be held accountable for the planning and implementation of this reconceived removal system. To ensure such accountability, these local officials should have authority over both the prosecutorial and police functions.

- **Continued attention to improved means for identifying and removing criminal aliens with a final order of deportation.** The Commission reiterates the importance of removing criminal aliens as a top priority. Our recommendation regarding the importance of removing noncriminal aliens with final orders is not intended to shift the attention of the removal system away from this priority. Rather, both criminal and noncriminal aliens must be removed to protect public safety (in the case of criminals) and to send a deterrent message to *all* who have no permission to be here.

  To improve the effectiveness of the criminal removal system, criminal aliens must be identified as early in the process as possible. The local jail pilot project mandated by § 329 of IIRIRA should be used to help determine how early in the criminal process identification should occur. The Department of Justice and the state and local criminal justice agencies should develop uniform means of identification, and the data systems of these agencies should be linked to identify more effectively criminal aliens who should be removed.

  With respect to the Institutional Hearing Program, the GAO found that the INS (1) failed to identify many removable criminal aliens and initiate IHP proceedings for them before they were released from prison, and (2) did not complete the IHP by the time of prison release for the majority of criminal aliens it did identify. GAO recommended improved data systems to track the IHP status of each foreign-born inmate and the development of a workload analysis model to identify the IHP resources needed in any period to achieve overall program goals. The Commission believes that the development of uniform means of such identification and linked data also will help the program achieve its goals.

The Commission urges the Department of Justice to attend carefully to actual removals in two additional ways. First, we have heard serious complaints from foreign authorities that they are not being notified that the U.S. is returning a criminal alien. DOJ must develop an improved notification process so that appropriate authorities in the countries to which criminal aliens are being returned can plan for such returns and take these individuals into custody if necessary. Second, we also have learned that many criminal aliens are being returned unescorted. For public safety reasons, criminal aliens should be returned by escort.

- **Legal rights and representation.** The Executive Branch should be authorized to develop, provide, and fund programs and services to educate aliens about their legal rights and immigration proceedings. Such programs also should encourage and facilitate legal representation where to do so would be beneficial to the system and the administration of justice. Particular attention should be focused on aliens in detention where release or removal can be expedited through such representation. The alien would not have a right to appointed counsel, but the government could fund services to address some of the barriers to representation.

  Under the provisions of § 292 of the Immigration and Nationality Act, an alien placed in proceedings is guaranteed the privilege of being represented by an attorney or other qualified legal representative, but at no expense to the government. Under this system, the alien is provided with a list of local attorneys and accredited organizations practicing immigration law who might be able to provide legal representation. Studies have shown that the vast majority of aliens in proceedings before Immigration Judges are not represented by counsel. This is accounted for by several

factors including the lack of English proficiency on the part of aliens, a lack of understanding of the legal process and of their legal rights, the lack of funds to hire an attorney, and an inability to find someone available and willing to represent them. Securing the services of an attorney or otherwise qualified legal representative presents a particular challenge for detained aliens whose freedom is constrained, who have limited phone privileges, and who find themselves situated in locales not readily served by or accessible to the legal community.

Experience demonstrates that when aliens are represented in proceedings, cases move more efficiently, economically, and expeditiously through the system. Indeed, represented aliens with little or no chance of prevailing can be more readily weeded out of the system. Aliens who have legal representation are much more likely to appear at their hearings than unrepresented aliens. Fewer continuances are needed or granted in the case of represented aliens. Hearings take less time. Issues presented for decision by the immigration courts and on appeal are more readily narrowed. Applications for relief are better prepared and presented in immigration court. Appeals are more cogently presented and are supported by legal briefs. Simply put, when aliens in proceedings or on appeal have legal representation, the system works better.

The Commission visited the Florence Immigration and Refugee Rights Project in Florence, Arizona, a project that demonstrates the advantages of programs designed to educate aliens about their rights and that provides a triage system to secure representation for those with a likely avenue for relief. The Project screens detainees for eligibility for immigration benefits and relief from deportation, exclusion, or removal, informs aliens about their rights, and directly rep-

resents as many as it can handle, with the overflow referred out to *pro bono* attorneys. The Project has been recognized for its success and assistance in moving cases through the system while affording due process. An evaluation of the Project found that aliens with representation had a better opportunity to become aware of their rights and legal options. Many inside and out of government believe that the Florence Project reduces alien detention time, expedites removal by decreasing necessary immigration court time, and increases court efficiency. Representation also decreases anxiety and behavioral problems among detainees.

The Commission believes that programs like the Florence Project should be facilitated and encouraged. Moreover, the Commission believes that the Executive Branch should be granted the authority to develop, provide, and fund other programs and services that inform aliens about their rights and the proceedings in which they are placed and to otherwise facilitate legal representation where to do so is a benefit to the system. Under this approach, the alien would not have a right to appointed counsel, but the government could fund ancillary services, such as rights presentations, interpreters, transportation, attorney/client meeting places, and training to address some of the barriers to increased legal representation.

- **Prosecutorial discretion to determine whether to proceed with cases.** Guidelines on the use of prosecutorial discretion should be developed; local Trial Attorneys should be trained to exercise discretion and support staff should be provided to ensure that Trial Attorneys have the time needed to screen cases prior to hearings. Discretion should be exercised with the goal of establishing a more efficient and rational hearing system.

In addition to targeting priority cases, the District and U.S. Attorneys decide which of those cases to prosecute based on an assessment of the strength of each case. In contrast, by and large, the INS prosecutes all cases that appear to involve violations of law. The Commission is concerned about the cost of litigating every case, both in terms of the credibility of the system and expenditure of public funds. We have recommended setting priorities as a strategy to establish credibility and to send a deterrent message. Here we urge the development of a system based on a sensible goal: prosecution of those who actually will be removed.

To establish a removal system that operates efficiently by prosecuting appropriate cases and settling those, for example, where relief is likely to be established, guidelines should be developed and issued by the General Counsel. Trial Attorneys should be trained to create and apply these guidelines nationwide. Finally, Trial Attorneys need time to screen cases prior to a removal hearing and to determine whether the alien has a strong claim for relief. To free up their time, support staff should be provided to handle the clerical work that currently burdens the Trial Attorneys. By wisely applying their discretion, the Trial Attorneys could then focus their attention on immigration court cases that are likely to result in the removal of the alien upon completion of the proceedings. This "out-of-court" approach also would assist the Immigration Judges and the private immigration bar by reducing the amount of time all parties spend in immigration court.

- **Strategic use of detention and release decisions.** Detention space, always in limited supply, is in greater demand as the government has focused more on the removal of criminal aliens and as Congress mandates more categories to be detained. IIRIRA requires the Attorney General to detain all

aliens found inadmissible or deportable on criminal or terrorist grounds. The criminal grounds include convictions for certain crimes now categorized as "aggravated felonies" for which a sentence of one year imprisonment or more may be imposed. Congress enacted these changes knowing that current detention space and personnel were insufficient to execute such expanded detention requirements and allowed the Attorney General to waive these requirements for two one-year periods while developing the capacity to handle these developments. The Attorney General notified the Judiciary Committees of the insufficiencies for the first year. IIRIRA also requires the detention of asylum seekers during the credible fear determination process.

Detention needs to be used more strategically if the government is going to target and remove designated categories of aliens determined to be priorities in particular locales. If it appears that asylum abuse is getting out of hand in one locality, for example, detention space would be needed to ensure that failed asylum seekers are removed.

Alternatives to detention should be developed so that detention space is used efficiently and effectively. In 1997, INS initiated a three-year pilot program, created with and implemented by the Vera Institute of Justice, that may help define effective alternatives to detention for specific populations. The Vera Assistance Appearance Program aims to develop and validate with formal research a supervision program that will increase both appearances at immigration court proceedings and compliance with the legal process among those not detained, while ensuring efficient use of detention space. The program thus aims to address important removal problems: The Executive Branch can detain only a fraction of individuals in removal proceedings; those who are not detained often do not appear in court and rarely

comply with removal orders. The pilot will free up valuable detention space by keeping out of detention aliens who may eventually be granted relief. If the Vera pilot demonstrates the utility of supervised release, an assessment of chances for relief and community ties or supervision would assist the Department of Justice in determining more precisely when detention is needed in each case to ensure that aliens who ultimately receive no relief do not abscond. It is hoped that the pilot will provide insight into the use of reporting mechanisms as well as the role of community organizations who take responsibility for maintaining contact with and reminding those released of their responsibilities to the immigration court.

The Commission considers the Vera pilot of great importance to the development of an effective removal system. INS officials at headquarters and in the local offices should work together to see that this pilot serves as a valid test of detention alternatives. In particular, the pilot should be permitted access to those asylum seekers who meet the "credible fear" test for two reasons. First, detaining individuals who have met an initial threshold demonstrating their likelihood of obtaining asylum is not a good use of scarce detention resources. As the Commission stated in its Refugee Report, "credible fear" is an appropriate standard for determining who will be released from detention; it is not appropriate for determining who will gain access to an asylum hearing, except under exceptional circumstances. Second, asylum seekers who have met the credible fear test will enable the pilot to test the utility of supervised release and make recommendations on the role of community ties and sponsors.

Additional alternatives should be developed to address local situations. For example, in border communities, aliens with pending cases could be permitted to return to Mexico and come to Port Court for their hearing in lieu of detention, as occurs in San Diego. The aliens in such proceedings are told the consequence of their failure to appear—that they will be found excludable in absentia and criminally prosecuted if they attempt to reenter.

- **Improved detention conditions and monitoring.** Over the past two decades, INS has taken on significant responsibilities in detaining aliens. INS detains a broad range of aliens of both genders, from criminals to asylum seekers. While short detention periods typically are contemplated for those awaiting removal hearings, the results often are otherwise. The INS has also become the long-term jailer for a significant number of removable aliens from Cuba, Vietnam, and other nations. INS currently operates nine Service Processing Centers and, like the U.S. Marshals, contracts bed space with many state and local jails. In recent years, Congress has increased significantly resources for detention space: total available beds per day totaled 8,600 in 1996; INS is close to reaching its goal of 12,000 by October 1997.

  Serious problems have occurred, the most prominent in 1995 when the ESMOR Contract Facility in Elizabeth, New Jersey, was shut down following an incident in which detainees voiced complaints of physical abuse, stealing, and harassment by guards. INS' own investigation of the facility uncovered serious management problems. More regularly, complaints regarding local jails have included human rights abuses, overcrowding, poor nourishment, mixing of women

and juveniles with men and of asylum seekers with criminals, and lack of access to health care, counsel, family, and recreation.

Detention cannot be used effectively unless and until the conditions of detention are humane and detainees are free from physical abuse and harassment by guards. We have no doubt that appropriate criteria for all facilities can be promulgated, based on sound governmental judgment and consultation with concerned nongovernmental organizations. But most importantly, a system to monitor facilities and publish findings on a regular basis must be developed. Inspections must occur more than once annually.

Further, the Commission recommends that the Department of Justice consider placing administrative responsibility for operating detention centers with the Bureau of Prisons or U.S. Marshals Service. An immigration enforcement agency should not be shouldered with such a significant responsibility that is not part of its mission or expertise.

- **Improved data systems.** The Commission recommends that data systems link apprehensions and removals. Current data systems are unable to link an apprehension to its final disposition (e.g., removal, adjustment of status). In addition, INS statistics relate to events, not individuals. This significantly limits the use of apprehension and removal data for analytical purposes. The Commission urges development of data systems that link apprehensions and removals and provide statistics on individuals. This would foster a better understanding of apprehension as a removal tool and provide better information on recidivism.

- **The redesigned removal system should be managed initially by a Last-In-First-Out [LIFO] strategy to demonstrate**

the credibility of the system. Once a coherent system is organized and appropriate resources are assigned to removing deportable aliens—not simply to put aliens through proceedings—removals should proceed in a Last-In-First-Out mode. In this way, the government can send a credible deterrent message to failed asylum seekers, visa overstayers, users of counterfeit documents, and unauthorized workers, that their presence in the United States will not be tolerated. The LIFO model has worked successfully in the affirmative asylum system, allowing the government to demonstrate control over the current caseload and to quickly establish priorities for dealing with the backlog for enforcement purposes. It can provide both the measure of success for the removal system as well as convey the proper deterrent message.

The Commission urges Congress to clarify that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and the Antiterrorism and Effective Death Penalty Act of 1996 do not apply retroactively to cases pending when the new policies and procedures went into effect. As a matter of policy, the Commission believes that retroactive application of new immigration laws undermines the effectiveness and credibility of the immigration system. Applying newly-enacted laws or rules in an immigration proceeding that is pending results in inefficiency in the administration of the immigration laws. It also can raise troubling issues of fairness.

The Commission urges Congress to clarify that IIRIRA and AEDPA do not apply retroactively to cases pending when the new policies and procedures went into effect.

There is no uniform effective date for the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 in its entirety. Instead, and to the extent it has spoken on the matter, Congress has imposed several different effective dates depending on the provisions involved. Most of the new removal provisions became effective on April 1, 1997. The fact that a statutory provision takes effect upon enactment or upon a future date certain, does not re-

solve the issue of whether the provision applies to cases already pending. When new statutory provisions are applied to such categories of cases, it is generically considered a "retroactive" application of the law.[20]

Although retroactive application of new statutory requirements by Congress is legally permissible (subject to certain constitutional constraints), it does not constitute sound public policy. Ours is a system governed by the rule of law. In our view, retroactively changing the applicable rules once a legal proceeding has commenced not only is manifestly unfair, but also invites confusion, adds uncertainty, and fosters a lack of trust and confidence in the rule of law.

We are concerned as well that retroactively applying new statutory provisions results in inefficiency and simply does not make good sense given the current realities of administering the immigration laws. As fully discussed earlier in this report, hundreds of thousands of outstanding administratively final orders of deportation remained unexecuted long before the enactment of either IIRIRA or

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[20] The analytical model for determining statutory retroactivity, set forth by the Supreme Court of the United States in *Langraf v. U.S.I. Film Products, Inc.*, 511 U.S. 244 (1994), is aptly encapsulated in the following excerpt from *Immigration Law and Procedure*, Gordon and Mailman, Chapter 61, Special Alert, SPA61-1, 2 (1997):

> [T]he first step is to determine whether Congress expressly defined the statute's proper reach. The language of the statute must be examined to determine whether it manifests an intent to apply to cases or conduct that arose before the law's enactment. For the statute to apply retroactively, there must be an "unambiguous directive" or an "express command" from Congress that it intended such application. In the absence of such an unambiguous directive, it must be determined whether the new statute "attaches new legal consequences to events completed before its enactment" or "would impair rights a party possessed when he acted, increase a party's liability for past conduct or impose new duties with respect to transactions already completed." If the statute has this effect, it should not apply retroactively.

AEDPA. Clearly, the system has had little problem in establishing sufficient grounds for deportation and exclusion under prior law. Moreover, although relief from deportation and exclusion under prior law was available, the number of granted applications was proportionally very small compared to the number of aliens in proceedings. The problem, then, has not been in ordering the deportation or exclusion of immigration violators, or in granting relief in a relatively small percentage of cases. The problem has been in actually removing aliens who have been found to be deportable, excludable, or removable following the conclusion of their proceedings.

As noted above, the system is not yet removing anything approaching 100 percent of the existing detained or nondetained criminal alien population for whom an administratively final order of deportation or exclusion already has been entered or who are otherwise deportable or excludable under prior law based on their criminal conduct. Moreover, the system has failed to remove significant numbers of noncriminal aliens against whom orders of deportation or exclusion have been outstanding for several years. Although retroactive application of the 1996 legislation will both significantly increase the numbers of removable aliens and decrease the numbers of aliens who might have otherwise qualified for existing relief, the system does not have the capacity actually to remove these added numbers of individuals. The resulting situation serves only to further erode the effectiveness and credibility of the immigration system as a whole.

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