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Asian Immigrants and Their Status in the U.S.

Edited by Hungdah Chiu

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ASIAN IMMIGRANTS AND THEIR STATUS IN THE UNITED STATES

Edited by Hungdah Chiu, with the Contribution of Benjamin Gim, Stephen Chang, David Simon, Edwin P. Reubens, Austin Fragomen, E. B. Duarte, Francis P. Murphy, Henry Cushing, Robert DeVechh, John Stafford and Peter Ku.
PREFACE

Since the revision of the Naturalization and Immigration Law in 1965, which removed the discriminatory national origin quota system against Asian and other non-white immigrants, an increasing number of Asian immigrants have entered the United States annually. Despite the growing number of Asian immigrants and the existence of many Asian-American organizations in this country, there have been very few studies on immigration law and policy from Asian-American perspective. In view of this gap, the Asian-American Assembly for Policy Research decided in early 1978 to establish a permanent Immigration Commission to make periodic review of United States immigration law, practice, policy and various other problems concerning Asian immigrants in the United States, and I was appointed as the Commission’s Chairperson.

The papers and discussions contained in this volume were presented at the Panel on Asian Immigrants and Their Status of the Assembly's Second Annual Conference held in New York City on May 12, 1978. The panel was divided into two sessions: the first one contained a critical review of immigration law, procedure and practice by a well-known Asian-American immigration lawyer and scholar, Dr. Benjamin Gim; a survey of recent United States judicial cases concerning immigration law by two practicing attorneys, Mr. Stephen Chang and Mr. David Simon; and a study of the Asian immigration problem from an economic and social perspective by Professor Edwin P. Reubens. Their papers were commented on by Professor Austin Fragomen of New York University Law School, Mr. E. B. Duarte, Director of the Outreach Program of the Immigration and Naturalization Service, and Mr. Francis P. Murphy, Deputy Assistant Commissioner of the Immigration and Naturalization Service.

The second session was a roundtable discussion on Indochinese refugees problems, in which Mr. Henry Cushing, Deputy Director of the Office of Refugee and Migration Affairs of the State Department, and Mr. Robert DeVecchi, Director of Indochina Program of the International Rescue Committee, presented a summary of their agencies' effort in settling the Indochinese refugees.

It is my pleasure to serve as the Chairperson of the Panel and now as editor of this volume. I am grateful to the Henry Luce Foundation for supporting the organization of this panel, and to Mr. Henry Luce III, the Honorable Judge William M. Marutani and Dr. Winberg Chai for their contribution of a forward to this
volume. The views expressed in this volume, however, are those of
the authors and not necessarily those of the Asian-American
Assembly, the Henry Luce Foundation or myself.

Hungdah Chiu

Baltimore, Maryland
March 1, 1979
FOREWORD

The Asian American Assembly for Policy Research is a research project organized under the City College of New York. The goals of the Assembly are: (1) identifying and recommending solutions to the major problems confronting Asian Americans; (2) generating a permanent body of information that may be useful as resource materials; and (3) providing a forum for scholars, community leaders and business executives to meet on a regular basis to bring together both theoretical discipline and practical experience in the Asian American community.

More than 100 distinguished Americans of all ethnic backgrounds have agreed to serve on the National Advisory Council since its founding in 1977. The Advisory Council meets annually to approve topics and agenda for the Assembly and advise in the operation of the Assembly. In Spring, 1977, the Assembly sponsored the first National Conference on April 29-30 under a grant from the field Foundation of New York City. In March, 1978, the Assembly received a grant from the Henry Luce Foundation for a second national conference on problems, opportunities and priorities for Asians in America.

The following papers were presented at the second panel workshop at the second national conference in May 1978 in N.Y.C. chaired by Professor Hungdah Chiu, University of Maryland Law School. The Assembly is grateful to the University of Maryland Law School for its cooperation in the publication of these papers.

Winberg Chai, Chairman
Henry Luce, III, Chairman of
the National Advisory Council
William M. Marutani, co-Chairman of
the National Advisory Council

(v)
SESSION I. ASIAN IMMIGRANTS AND THEIR STATUS IN THE UNITED STATES

IMMIGRATION LAW DEFICIENCIES AND THE NEED FOR REFORM

By Benjamin Gim*

While we have often proclaimed that we are, as President Kennedy once observed, "a nation of immigrants" — and, although we acknowledge the fact that our growth as a nation has been achieved in large measure through the genius and industry of immigrants of every race and creed from every country of the world, a study of our immigration laws as enacted by Congress and as administered by the governmental agencies manifests scant appreciation of these truths. Our immigration laws are unfair, anachronistic, even primitive in their severity. These laws are unworthy of a democratic nation, supposedly secure in its appraisal of its primacy in the family of nations. A brief examination of our immigration statutes and its administration reveal that they fall far short of even the most rudimentary standards of due process of laws as guaranteed by our Constitution.

Denial of Equal Protection of Laws — Racial Discrimination

Ever since the Supreme Court struck down racial segregation in the schools, we have witnessed in all fields of law expanding concern for civil rights and increasing vigilance in prohibiting racial or other types of discrimination.

Immigration statutes and policies, however, have lagged far behind in this area of constitutional concern.

* Lecturer in Law, Columbia University.

(1)
1. As late as 1965, just before the Immigration Reform Act of 1965 was passed, the Second Circuit in *Hitai v. Immigration and Naturalization Service*, 343 F.2d 466 (2nd Cir. 1965), sustained a statutory scheme which undisguisedly charged Asians to the meager immigration quotas of the country of their racial ancestry, regardless of their place of birth or citizenship, while, at the same time, allowing immigrants from other areas of the world the more favorable treatment of being charged to the quota of the country of their birth. The rationale of the court was that immigration statutes, being interwoven with foreign policy, are the exclusive prerogative of the political branches of the government and hence, are insulated from judicial scrutiny.

2. To be sure, the racial origins aspect of our immigration policy was removed by the Immigration Reform Act of 1965. However, there is no question that Congress, in its perception of prevailing moods of the populace, could again on the flimsiest justification reimpose racially discriminatory immigration laws which would be undoubtedy upheld by the Court. Consider these hypothetical examples: (1) Congress decides to ban spouses and children of U.S. citizens of Chinese ancestry coming from the People’s Republic of China on the ground that such a measure is necessary to exert pressure on that country to relax its militant posture on the Taiwan question. (2) All immigration from Israel is banned for a year on the ground that such measure is needed to demonstrate a more even-handed Middle East policy towards the Arab nations. Such facially shocking discrimination would no doubt be permitted by the courts for, as stated in *Dunn v. Immigration and Naturalization Service*, 499 F.2d 856, 858 (9th Cir. 1974), “It is firmly established that Congress has the power to exclude aliens of a particular race from the United States . . .”

3. A most recent example of discriminatory treatment is in the case of foreign medical graduates. In 1976, capitulating to the pressures exerted by the medical doctors’ lobby, fearing competition from foreign educated doctors, Congress enacted a law classifying foreign medical graduates as a class of persons to be excluded from admission to this country in the same manner as diseased persons, communists, homosexuals, criminals, insane persons, prostitutes and alien smugglers.

**Ex Post Facto Laws**

It is axiomatic that the Constitution prohibits retroactive application of a criminal statute to punish an act which was innocent when done. However, this is not so in an immigration
context. In *Harrisiades v. Shaughnessy*, 342 U.S. 580 (1952), a Greek alien was ordered deported who joined the Communist party in 1925, when it was not a deportable offense. In 1940, the Congress passed a law making membership, even though terminated, a ground for deportation. Although Harrisiades had long left the party, he was ordered deported. The Supreme Court upheld the deportation holding that ex post facto laws apply only in criminal cases and that deportation was a civil rather than a criminal proceeding not entitled to the protection of the ex post facto prohibition.

**Double Jeopardy**

A basic constitutional concept is that no one can be twice put to trial for the same offense. Thus, if a person is acquitted of a criminal charge, he cannot be subsequently retried on the same charge even though the government should later discover overwhelming evidence of his guilt. This protection does not apply in a deportation proceeding. *Lehman v. Carson*, 353 U.S. 685 (1957). If the government cannot succeed the first time, there is nothing to prohibit them from trying and trying again, either when the law has been changed more in their favor or when they have been able to obtain additional evidence.

**Statute of Limitations**

We will all recall the famous multi-million dollar Brinks robbery in Boston. The culprits were apprehended and indicted just one week before the six year statute of limitations in Massachusetts had expired. If the State of Massachusetts had not been able to get an indictment within that time, the culprits could have gone scot-free with several million dollars. This shows the value we place on the statute of limitations. The policy on which the statute of limitations is bottomed is that the government should not ever be allowed the advantage of keeping potential criminal indictments hanging over a defendant's head indefinitely. Nor should the government prosecute only when a person is least able to establish his innocence, i.e., when his witnesses are no longer available or when favorable evidence can no longer be obtained. A statute of limitations has no general application in the context of immigration laws. *Lehman v. Carson*, 353 U.S. 685 (1957). Carson entered the country as a stowaway in 1919. Under the 1917 Immigration Act, if no action was taken to deport him within five years, he could not subsequently be lawfully deported. In 1936, Carson was convicted of two crimes involving moral
turpitude. Because of a pardon for one of those acts and because of
the statute of limitations, a government deportation proceeding
against Carson in 1945 terminated in his favor. Seven years later,
the McCarran Immigration Act was enacted, and Congress
repealed the 1917 statute of limitations, providing that aliens who
came in illegally at any time before or after the Act were
deportable. The Supreme Court found no difficulty in sustaining
Carson’s deportation on the grounds that Congress had the power
to repeal the Act and retroactively strip Carson of his previous
status of non-deportability.

Right to Counsel

In the case of Gideon v. Wainwright, 372 U.S. 335 (1963), the
Supreme Court decided that in any type of criminal case, even for
petty crimes, a defendant is entitled to have a lawyer. If he cannot
afford one, the State must hire one for him. This right to counsel
was even extended to non-criminal cases by the Supreme Court,
which held that in a civil case involving juveniles, the State was
obligated to pay for legal counsel when a minor could not afford
such counsel. In re Gault, 387 U.S. 1 (1967). However, this
protection is not available to an alien in deportation proceedings.
Under 8 U.S.C., §1252(b)(2) (1971), an alien may have counsel but
“at no expense to the Government.” Court challenges of deporta-
tion of aliens on the grounds that they were unable to afford legal
counsel have been uniformly unsuccessful. Dunn-Marin v. Immi-
gression and Naturalization Service, 426 F.2d 894 (9th Cir.
1970). However, some courts have expressed concern that failure
to provide legal counsel might deny equal protection to indigent
aliens. Aguilera-Enriquez v. Immigration and Naturalization
Service, 516 F.2d 565 (6th Cir. 1975).

The Privilege Against Self-Incrimination

In various Supreme Court cases, the Supreme Court has ruled
that invocation of the privilege against self-incrimination cannot
result in forfeiture of any rights. Thus, a lawyer applying for
admission to the bar could not be denied enrollment merely
because he refused to answer questions concerning his political
beliefs and his political associations. Konigsberg v. State Bar of
California, 353 U.S. 252 (1957). However, in a deportation
proceeding, Kimm v. Rosenberg, 363 U.S. 405 (1960), a Korean
national who applied for suspension of deportation and perman-
ent residence was denied this privilege and ordered deported
because he refused to answer a question as to whether he had ever been a member of the Communist party.

**Sexual Orientation**

At the present time, there are over 37 cities in our country which have laws or ordinances prohibiting discrimination against homosexuals. Moreover, federal courts have in a series of cases, struck down denials of federal or state employment opportunities in non-sensitive positions solely on the ground of homosexuality. In the immigration context, however, homosexuals are specifically prohibited from entering the United States. See, 8 U.S.C. § 1182(a)(4) (1971). Moreover, if an alien becomes a homosexual after he has come to the United States, he cannot ever leave this country, because if he does, he will be prohibited from coming back. *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967).

**Search and Seizure**

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall [be issued], but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." These explicit protections are largely unavailable when it comes to undocumented aliens. It is well known that the Immigration and Naturalization Service (hereinafter referred to as the INS) stops, questions, and later arrests aliens on no other basis than racial appearance. Thus, an arrest without warrant following the stopping for interrogation of an alien, solely on his Mexican appearance, was sustained by the Supreme Court in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

**The Constitutional Right of Familial Relationship**

The Supreme Court has often stated that preservation of the family and its right to privacy from the intrusion of the State is one of the most carefully guarded Constitutional rights. Yet, this right is minimal in the immigration context. One of the most prevalent ways aliens in this country obtain permanent residence is through marriage to either an American citizen or a permanent resident. To be sure, INS has uncovered many cases of marriages of convenience, that is, marriages in name only, solely to enable
the alien to obtain legal residence. In order to prevent fraud, however, the INS often manifests prurient interest in the sexual habits of married couples if one of the parties is an alien. Even after an alien obtains permanent resident status, there is post marital supervision. Section 241(c) of the Immigration and Naturalization Act contains a curious provision to the effect that an alien is deportable for having obtained his status by fraud if, within two years after the granting of his resident status, he fails to perform his marital obligations — not to the satisfaction of his spouse, but to the satisfaction of the Attorney General. It is also an interesting statistic that under this provision there were many more aliens deported during the regime of Robert Kennedy than John Mitchell.

The Consul's Decision — An Imperial Edict

No one would contend that in even the simplest case, involving the most inconsequential right, an administrative agency could deny us any benefit granted by law without giving a rational, reasoned opinion. Thus, if a utility were denied a rate increase or an applicant denied a liquor license or a real estate license by the State, he would be entitled to know the reasons why and to challenge such a determination in court. Does such a right exist in an immigration context? It does not. Suppose you were a United States citizen with an alien husband who is the father of your two small children. You apply, as you have such a right, to have your spouse issued a permanent immigrant visa. The American Consul denies the visa and refuses to give any reasons, even though the State Department regulations require that in cases of refusals specific reasons must be given. Can you challenge this decision? The answer is no. In *Burrafato v. U.S. Department of State*, 523 F.2d 555 (2d Cir. 1975), the court stated that they did not have jurisdiction to review the actions of an American Consul abroad. See, 8 U.S.C. § 1104(a)(1) (1971).

Conclusion

The failure of the courts and the legal system to afford aliens the full measure of constitutional protection endangers us all. Once discrimination and unconstitutional treatment has been sanctioned against aliens, discrimination inevitably spills over to American citizens of foreign ancestry and then to all Americans. During the McCarthy period, the wholesale onslaught against civil liberties of all persons, citizens and aliens alike, first began with witch hunting and deportation against aliens suspected of communist affiliation.
ASIAN IMMIGRANTS IN THE UNITED STATES: RECENT CASES AND STATUTORY DEVELOPMENTS

By Stephen Chang* and David Simon**

In this paper we will present a thumbnail sketch of significant recent changes in the laws affecting aliens, and specifically Asian aliens, in the United States. We have broken these changes into two categories: statutory and judicial. Accompanying both changes are numerous changes in the federal regulations, which are generally too detailed to be included here. At the outset, this important distinction between statutory enactments and judicial interpretations must be kept in mind: on the one hand, our immigration statutes may and do distinguish among immigrants from different countries, while on the other, judicial glosses generally affect all immigrants alike.

Brief History of the Statutory Treatment of Aliens

To appreciate the current and proposed future treatment of Asian immigrants, one must first have an appreciation of the history of our immigration statutes. Virtually from their inception, U.S. immigration statutes have imposed specific quotas upon Asian, and specifically Chinese, immigrants, and have specifically articulated the Chinese as a class of immigrants deserving special, more restrictive treatment than any other.

It is accepted law that the constitutional authority providing for regulation of foreign and interstate commerce by Congress also gives the Congress exclusive authority over U.S. immigration policies. See Henderson v. Mayor, 92 U.S. 259 (1876). This authority is, in fact, "largely immune from judicial control" and "subject only to narrow judicial review." Fiallo v. Bell, 430 U.S. 787, 792 (1977).

Congress did not exercise its authority over immigration until the Act of March 3, 1875 (18 Stat. 477), which provided for the exclusion of prostitutes and felons. Shortly thereafter, in 1888, Congress expanded the categories of proscribed immigrants to include, among others, certain categories of Chinese laborers

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(Acts of September 13, 1888 (25 Stat. 476) and of October 1, 1888 (25 Stat. 504)). This was the first immigration legislation specifically proscribing immigration by country of origin, and the only country against which an exclusion was made was China.

The Act of February 20, 1907 (34 Stat. 898) added new proscribed categories and gave the president the authority to exclude aliens whose entry would be harmful to American labor. The Immigration Act of February 5, 1917 (39 Stat. 874) proscribed entry of Asians from the "barred zone," while also codifying and expanding the qualitative proscription categories.

It was not until 1921 that quantitative restrictions, i.e., quotas, were established, in the "First Quota Act" (Quota Law of 1921, 42 Stat. 5); an annual quota of some 350,000 was established. This quota was based upon the proportion of country of origin of foreign-born persons in the United States in 1910. Because of the earlier restriction on Chinese immigrants, as well as the occupational mortality rate of those immigrants, the First Quota Act was inherently biased against Chinese, and, in fact, favored immigrants from Western and Northern Europe.

The Immigration Act of 1924 (43 Stat. 153) set quotas according to the country-of-origin distribution of foreign-born persons in the United States in 1920, setting an annual total quota of roughly 150,000. This means of distribution again inherently disfavored Asian immigrants and in fact compounded the disproportion of the First Quota Act by including in its calculations the disproportions introduced by the earlier Act.

The Immigration Act of 1924 was superseded in 1952 by the comprehensive Immigration and Nationality Act (the McCarran-Walter Act). Significantly for our purposes here today, that Act eliminated all racial immigration bars except for numerical restrictions in Asian immigration. It also introduced preference categories for skilled aliens, while continuing the system of quota allocations by national origins, coupled with the principle of quota-free immigration from the Western Hemisphere.

In 1965, limitations by hemisphere replaced the former country-of-origin limitations. An overall limitation of 12,000 immigrants from the Western Hemisphere (the Americas) and of 170,000 for the Eastern Hemisphere (Europe and Asia) was established. A per-country ceiling of 20,000 immigrants was placed on Eastern Hemisphere entrants (P.L. 89-236, 79 Stat. 911).

Our current immigration statute was enacted on October 20, 1976 (P.L. 94-571), the Immigration and Nationality Act amendments of 1976. It provides for the first time a preference system of
Western Hemisphere immigrants and extends the per-country ceiling of 20,000 immigrants to Western hemisphere countries. Briefly, the Act imposes qualitative and quantitative limitations on all persons seeking immigrant resident status in the United States. The 1965 quantitative hemispheric and per-country limitations are retained as to Eastern hemisphere immigrants and are extended to Western hemisphere aliens. These quantitative restrictions are allotted to preference categories according to set percentages as follows:

1. Unmarried sons and daughters of U.S. citizens (20%);
2. Spouses and unmarried sons and daughters of aliens lawfully admitted for permanent residence (20%);
3. Professionals or aliens exceptionally skilled in the arts or sciences (10%) (a sponsoring employer is required);
4. Married sons and daughters of U.S. citizens (10%);
5. Brothers and sisters of U.S. citizens, provided that the petitioning citizen is at least 21 years old (24%);
6. Skilled and unskilled workers in short supply (10%);
7. Refugees (6%);
8. Nonpreference, i.e., all others (any numbers not used by the preceding categories).

If the numbers of a given category are not used up, those numbers may be taken by the next lower preference category.

In addition, under the labor certification requirements of section 212(a)(14), aliens in the third or sixth preference categories and non-preference aliens coming to the United States to work are disqualified unless they first obtain a certification from the Department of Labor that “able, willing, qualified and available” workers are in short supply at the place of the alien’s prospective employment and that the position offered meets prevailing wage standards.

The specific effects of our current Immigration and Nationality Act upon Chinese immigrants need hardly be pointed out. First, the proportion of Eastern and Western hemisphere immigrants is utterly disproportionate to the actual populations of the two hemispheres. Second, the 20,000 per-country limitation accounts for neither national population variations nor for special factors within individual countries that enhance the desirability
of immigration to the United States. Also to be mentioned is the fact that mainland China and Taiwan are treated, for immigration purposes, as one country. Hence, while the anti-Chinese disproportions of the First Quota Act have been lifted with the across-the-board per-country limitation of 20,000, nevertheless, in terms of sheer numbers, Asian immigrants, and specifically Chinese immigrants, remain discriminated against. Indeed, current backlog figures indicate this most dramatically.

The most dramatic recent legislative action concerning immigration and nationality laws is President Carter’s proposed Regulation of Undocumented Aliens, presented to the Senate in August, 1977 (Cong. Rec. S13826) (August 4, 1977). The stated purpose of the proposal is to “help markedly reduce the increasing flow of undocumented aliens in this country and to regulate the presence of the millions of undocumented aliens already here.” The chief features of the president’s proposal, which have been widely reported in the press, are as follows:

1. The hiring of undocumented aliens will be made unlawful, with the Justice Department responsible for bringing civil actions against employers who engage in a pattern or practice of such hiring. Criminal penalties will be available against employers and others who receive compensation for knowingly assisting an undocumented alien to obtain employment.

2. National labor laws will be more stringently enforced, with special emphasis on areas in which heavy hirings of undocumented aliens occur.

3. Permanent resident alien status will be granted to all undocumented aliens who have resided continuously in the United States from before January 1, 1970 to the present. Such aliens may apply for citizenship if they maintain residence for five years after the grant of permanent residence status.

4. Temporary resident alien status will be granted to those undocumented aliens who have resided in the United States on or before January 1, 1977. Such aliens, upon registration with the INS, could remain in the United States legally for five years from the grant of temporary status. During the five-year period, a decision would be made on the final status of these temporary residents,
based upon information received from the registration procedures. These aliens would be ineligible for most Federal social service benefits and would not be entitled to bring members of their families into the United States.

5. No adjustment of status would be made for undocumented aliens entering the United States after January 1, 1977, and immigration laws would continue to be enforced against this class of aliens.

Recent Supreme Court Decisions Affecting the Rights of Aliens in the United States

Judicial decisions affecting the rights of aliens generally affect those rights without regard to national origin; that is, constitutional rights applicable to aliens of one country of origin apply equally to aliens from all countries. However, one must distinguish between constitutional decisions, affecting fundamental rights guaranteed by the constitution, and decisions interpreting federal and state statutes.

A substantial line of Supreme Court cases, culminating most recently in Foley v. Connellie, 435 U.S. 291 (1978), has dealt with the constitutionality of state statutes limiting certain types of employment to U.S. citizens. Foley appears to represent an erosion of the principle stated in Graham v. Richardson, 403 U.S. 365 (1971), that laws singling aliens out for unfavorable treatment are "subject to strict judicial scrutiny," since aliens constitute a "discrete and insular minority."

In Graham v. Richardson, the Supreme Court held unconstitutional an Arizona state statute denying welfare benefits to resident aliens, or to aliens who did not meet a requirement of durational residence in the United States. Invalidity was predicated upon (1) the Equal Protection clause of the Fourteenth Amendment and upon (2) the fact that such state statutes encroach upon the exclusive power of the federal government over the entrance and residence of aliens.

In addition to deciding the direct issue before it, the Court in Graham v. Richardson defined the standard by which to determine the constitutionality of state statutes providing for dissimilar treatment of individuals on the basis of alienage. The Court held such statutes to be "inherently suspect and subject to close judicial scrutiny." 403 U.S. at 372. This standard applies regardless of "whether or not a fundamental right is impaired." Id. at 376. (Note that the strict scrutiny standard applies only to

*Graham v. Richardson*, supra, was the recent culmination of a line of cases concerning alien's rights reaching back at least as far as *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). There, the Court first held that aliens are "persons" within the meaning of the Fourteenth Amendment, hence subject to the protections thereof. Following *Graham v. Richardson*, the Court had applied the strict scrutiny rule in a number of cases concerning state statutes predicated upon alienage. The Court viewed aliens with "heightened judicial solicitude" (403 U.S. at 365) since aliens whose eligibility for citizenship is pending have no direct voice in the law-making process.

Thus, in *In re Griffiths*, 413 U.S. 717 (1973), the Court held unconstitutional a state statute limiting the practice of law to citizens. In *Sugarman v. Dougall*, 413 U.S. 634 (1973), a state statute discriminating against aliens in regard to civil service was overturned; in *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976), an alienage-based discriminatory state law regarding the practice of civil engineering was overturned; and, similarly in *Nyquist v. Mauclet*, 432 U.S. 1 (1977), a New York statute barring certain resident aliens from state financial assistance in higher education was overturned.

In *Nyquist v. Mauclet*, Justice Blackmun, for the Court, noted that the statutory provision under scrutiny was "directed at aliens and that only aliens [were] are harmed by it." 432 U.S. at 9. Nevertheless, "[t]he fact that the statute is not an absolute bar does not mean that it does not discriminate against the class." *Id.* Further supporting the Court's position, Justice Blackmun noted that resident aliens pay a full share of the taxes that support the financial assistance program and swept aside the justification for the statute that its restrictions tend to encourage eligible aliens to become U.S. citizens with the observation that such a justification would suffice for every state statute discriminating against aliens.

Chief Justice Burger, dissenting in *Nyquist*, sought to limit prior cases invalidating state alienage-based statutes to those which involved (1) discrimination regarding employment and (2) denial of welfare benefits essential to sustain the life of aliens (432 U.S. at 12). The Chief Justice premised his view as follows:

"In my view, the Constitution of the United States allows states broad latitudie in carrying out such programs."
Where a fundamental personal interest is not at stake — and higher education is hardly that — the State must be free to exercise its largesse in any reasonable manner.” *Id.* at 14.

Moreover, Justice Rehnquist, also dissenting, noted that the statute under scrutiny did not “discriminate” against all aliens, but gave them the option of joining the favored (i.e., non-alien) class at any time by giving up or announcing an intention to give up foreign citizenship. Justice Rehnquist determined that the availability of this option removed the statute from the strict scrutiny test:

> “Since the New York statute under challenge in this case does *not* create a discrete and insular minority by placing an inevitable disability based on status, the Court's heightened judicial scrutiny is unwarranted. . . . Applying the rational basis test, it is obvious that the statutory scheme in question should be sustained.” 432 U.S. at 21.

In *Foley v. Connellie*, 435 U.S. 291, the *Nyquist* dissenters became the majority when the Court upheld a New York statute limiting employment in the state police force to United States citizens. Interestingly, Mr. Justice Blackmun, who authored the Court’s opinion in *Nyquist*, concurred with the majority in *Foley*, providing the “swing” vote that enabled the Court to uphold the statute.

In *Foley*, the Court held constitutional, in the face of a *Graham*-type equal protection attack, a New York statute restricting employment as a state troopers to U.S. citizens. The contested statute, Executive Law section 215(3), provides:

> “No person shall be appointed to the New York State police force unless he shall be a citizen of the United States.”

The opinion of the Court, by the Chief Justice, first examined the function of the position regulated by the statute, in regard to the degree of power and discretion inherent therein. The Court stated:

> “Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals.” 435 U.S. at 298.
Persons exercising such discretionary power over individuals may be required to be citizens, held the Court, on the authority of Sugarman v. Dougall, supra. The Court stated that “citizenship may be relevant qualification for fulfilling those ‘important nonelective, legislative and judicial positions,’ held by ‘officers who participate directly in the formulation, execution or review of broad public policy.”’ Foley v. Connellie, supra, 435 U.S. at 296, citing Sugarman v. Dougall, supra, 413 U.S. at 647.

Qualifications for persons holding such “important positions” are “matters firmly within a State’s constitutional prerogatives.” Foley, supra at 296 citing Sugarman v. Dougall. As to such matters, furthermore,

“The State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification.” 435 U.S. at 296 (emphasis added).

Finally, the Court distinguished Graham, Nyquist, Sugarman, Flores de Otero and In re Griffiths with the statement:

“The essence of our holdings to date is that although we extend to aliens the right to education and public welfare, along with the ability to learn a livelihood and engage in licensed professions, the right to govern is reserved to citizens.” 435 U.S. at 297.

Mr. Justice Blackmun, concurring, accepted the Court’s finding that the functions of a state trooper place him within the “important nonelective officials” exception to the Graham rule of close scrutiny:

“I agree with the Court’s conclusion that the State of New York has vested its state troopers with powers and duties that are basic to the function of state government.” Id. at 302.

Mr. Justice Stewart, concurring, joined the dissent in believing that the Foley rational basis exception swallowed the Graham close scrutiny rule. He agreed with the majority that the exclusion of aliens from a state trooper position was lawful, however, because he had become “increasingly doubtful about the validity” of the Sugarman line of cases striking down alienage-
based state discriminatory statutes. Mr. Justice Stewart, in other words, would simply have overruled *Graham and its progeny*:

"The dissenting opinions convincingly demonstrate that is difficult if not impossible to reconcile the Court’s judgment in this case with the full sweep of the reasoning and authority of some of our past decisions. It is only because I have become increasingly doubtful about the validity of some of those decisions (in some of which I concurred) that I join the opinion of the Court in this case." 435 U.S. at 300.

As Mr. Justice Stewart states, the dissent relies heavily on the *Graham* decision. Mr. Justice Marshall, dissenting, after reciting the holdings of *Graham* and its progeny, analyzed the functions of a state trooper vis-à-vis the ordinary citizen, stating:

"There is a vast difference between the formulation and execution of broad public policy and the application of that policy to specific factual settings." 435 U.S. at 304.

Mr. Justice Marshall noted that police officer’s judgments are “factual in nature” and constrained by federal and state constitutions, statutes and regulations. *Id.* Furthermore, a New York statute explicitly authorizes “any person” to arrest another in specified circumstances (N.Y. Crim. Proc. Law section 140.30), and to make a search incident thereto. Hence, as Mr. Justice Marshall notes, it is in no way “‘anomalous’ for citizens to be arrested and searched by ‘noncitizen police officers.’” 435 U.S. at 306.

Thus, Mr. Justice Marshall’s dissent was on both factual and theoretic grounds. On the one hand, it is simply not true, he noted, that police officers exercise the sort of discretion envisioned by *Graham* as sufficing to allow the employment of the “rational basis” test. On the other, the majority’s use of that test in *Foley* amounts to a repudiation of the treatment of aliens as a class requiring heightened judicial solicitude.

Mr. Justice Stevens, in a separate dissent, states the basis for objection to the majority as a question:

“What is the group characteristic that justified the unfavorable treatment of an otherwise qualified individual simply because he is an alien?” 435 U.S. at 308.
In answer, Mr. Justice Stevens finds that it can only be doubts concerning the "loyalty and trustworthiness" of aliens who bear a "foreign allegiance." Id. But, he argues, if such doubts are legally insufficient to justify excluding aliens from membership in the bar (Griffiths, supra), they should similarly be insufficient to exclude aliens from serving as state troopers. Id.

Finally, Mr. Justice Stevens points to other branches of constitutional law in which law-enforcement officers have been considered to fall outside the class of policymaking officials. This leads to Mr. Justice Stevens' statement of the "unarticulated premise" of the majority, namely that "the police function is at the heart of representative government." 435 U.S. at 310. According to Mr. Justice Stevens, "to state the premise is to refute it."

The dissenting opinions clearly indicate that Foley is open to attack on two grounds: first, for allowing restrictions on aliens and second for its conception of the role of police in American society. For purposes of the present paper, it is not necessary to belabor these points. All of us at this meeting, I believe, are deeply concerned about the loss or threat of loss of civil liberties or privileges by the alien population of the United States. While Foley may be construed as the harbinger of further discriminations against aliens, there is nevertheless room for hope that the decision reflects not a decreased solicitude for aliens so much as an increased solicitude for police officers. Recent Court of Appeals

Recent Court of Appeals Decisions Affecting The Rights of Aliens in The United States

The Second Circuit in Wong Chung Che v. Immigration and Naturalization Service, 565 F.2d (1977), exhibited a heartening solicitude for the rights of aliens. There, in a case of first impression, the court held that evidence secured in an illegal search is inadmissible in deportation proceedings in spite of the established law that an illegal arrest which results in identifying a person for deportation proceedings does not invalidate those proceedings. Huerta-Cabrera v. Immigration and Naturalization Service, 466 F.2d 759 (7th Cir. 1972).

In Wong Chung Che, two alien nonimmigrant crewmen were arrested and handcuffed in a Massachusetts restaurant by INS investigators. The investigators then took the crewmen to the latters’ apartment and entered it without consent and without a warrant. The crewmen, who understood little or no English,
asserted that they were “in fear”; certain documents were taken from them during the ensuing search. 365 F.2d at 167. The immigration judge held that the circumstances of the crewmen’s arrest were irrelevant to a deportation proceeding and did not deal with the illegal search, although he relied on at least one illegally seized document, admitted over objection, in finding petitioners deportable.

The Second Circuit affirmed the deportability of one crewman on the ground that none of the evidence used against him was tainted by illegality. 565 F.2d at 168. The second crewman, Wong Pui Tong, however, had been held deportable on the evidence of his Crewman’s Landing Permit, which was seized during the illegal search. In a brief opinion, the court vacated Wong’s deportation order because:

"[W]e can think of no justification by necessity for encouraging illegal searches of premises. There is no doubt that, if the landing permit was obtained through an illegal search, its admission into evidence infected the deportation proceeding." 565 F.2d at 169.

Finding dictum and scholarly commentary to support its position and no case law contradicting it, the court remanded the case to the Immigration Board for an evidentiary hearing on petitioner’s motion to suppress. Id.

While this result is heartening to immigration lawyers, the fact remains that it is the law presently only in the one circuit which has considered the question. Furthermore, one doubts whether the result would obtain were the case to reach the Supreme Court. The Wong Chung Che situation, similarly to the Foley situation, requires a balancing of aliens’ rights against police powers. As the Court expressed an indulgence toward the latter in Foley, so it would, one fears, in the Wong Chung Che context. This is especially true in light of the Court’s expressed disenchantment with the exclusionary rule in general.

The final decision which we would like briefly to discuss highlights judicial construction of the Immigration and Nationality Act (INA). In Sherwin-Williams Company v. Regional Manpower Administration, 439 F. Supp. 272 (N.D. Ill. 1976), the Federal District Court held that, under the requirements of the labor certification provisions of the statute, the Regional Manpower Administration (RMA) must affirmatively establish that there is not a shortage of able, willing, and qualified workers
before an immigrant will be denied a labor certification. Under the
INA, skilled and unskilled laborers will be denied entry "unless
the Secretary of Labor has determined and certified . . . that there
are not sufficient workers in the United States who are able,
willing, qualified, and available at the time of application for a
visa and admission to the United States and at the place to which
the alien is destined. . . ." In Sherwin-Williams, the plaintiff was
the employer of a citizen of India, Matthew George. Plaintiff was
denied the employment certification by the RMA on the ground
that the Illinois State Employment Service had 20 qualified
applicants for the job offered to Mr. George. The court held that
this raw datum was not a sufficient basis on which to deny a
labor certification and that the RMA has the burden of proof to
establish that there are not able, willing, qualified and available
workers for the position in question.

The Sherwin-Williams case highlights a difference in statu-
tory construction and interpretation that has divided the Circuit
Courts and rendered even-handed administration of the immigra-
tion statute impossible. For example, in Pesikoff v. Secretary of
Labor, 501 F.2d 757 (D.C. Cir. 1974), the Court of Appeals for the
District of Columbia held that the burden of proof is on the alien
or his employer to demonstrate that labor conditions are such that
a labor certification should be granted. Pesikoff thus relieves the
government of proving that there is a sufficiency of able, willing,
and qualified workers for the position in question.

Few conclusions as to the direction of immigration law can be
drawn from this split among the circuits, which pervades other
niceties of immigration practice as well. One can simply note that
it is necessary for the practitioner to be specialized not only in
immigration law itself, but also in the immigration law of the
circuit in which he or she practices.
ASIAN IMMIGRATION IN ECONOMIC AND SOCIAL PERSPECTIVE

Edwin P. Reubens*

Immigration policy has recently become a prominent public issue in this country. While some discussions reflect considerations of social justice and devotion to human rights, the most impassioned debates usually express some groups' direct interests for and against immigration. The fiercest opposition to aliens commonly charges that they take Americans' jobs and housing, and depress wages and working conditions, and use public services without paying the corresponding taxes, and remit dollars out of this country, and constitute a "brain drain" that benefits this country at the expense of the much poorer countries of origin. Defense of immigration mostly comes from employers seeking to fill job vacancies, also from civil-rights and religious groups, as well as from relatives and some of their countrymen. And both the opponents and defenders of immigration are united in complaining about the present laws and their implementation!

What is commonly lacking in these debates is a solid factual base, or comprehensive picture of migration and its ramifications. Such a picture should include the net flows (not just the gross reported legal immigration); also the real magnitude of the flows and stocks relative to the economy and society of both the receiving countries and the countries of origin; and estimates of the economic and social effects — both good and bad effects — at both ends of the flows.

Within the migratory flows in general, the various national, regional and ethnic groups may be expected to show divergent behavior. Indeed, when we break down the aggregate figures, we find that the Asian migrants are distinctly different in traits and trends from some other groups, and must be particularized accordingly.

To be sure, data are lacking on some of the important items, but surprisingly much information is actually available. Drawing on published reports as well as my own field trips, I will summarize the most relevant features here, in the hope of putting

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the current debates into perspective; and clarifying the costs and benefits of various migratory flows; and illuminating some proposed policies which seek to restrict or expand immigration, or to alter its character, or to pay compensation for it.

The main features of immigration flows

As background for our consideration of Asian aliens, we must note that immigration into the U.S. consists of three main streams: legal permanent admissions, legal temporary admissions, and illegal entries. The first of these, "admissions for permanent residence", has been rising rather slowly, under evolving legal and administrative regulations. From an average of 250,000 persons per year from all countries during the 1950's, this stream has risen to a rather stable level of about 400,000 a year since 1973. (All immigration reports to 1976 use fiscal years, namely twelve months ending June 30). Of this current figure, 60 per cent are "non-occupational" (housewives, children, students, and the like), although some of them may actually take part-time or full-time jobs in this country. Just over 10 per cent are high-level or "brain drain", more exactly PTK ("professional, technical and kindred workers"). The remaining 30 per cent are scattered over the various manual and white-collar occupations.

The second major stream of immigrants consists of "temporary workers", who are particularly qualified persons admitted to work for specified periods (mostly one year or less, seldom exceeding three years). Their numbers, from all countries, are about 63,000 a year (not counting the students, spouses or children).

Third, and largest in numbers, are the rising streams of illegals. Some simply over-stay on their temporary admissions, but most of them slip across the borders surreptitiously. The illegals mostly cross our border from Mexico, while a smaller stream comes from the Caribbean, and still smaller streams flow from other areas, including Asia. According to some estimates, illegal entries may now total more than one million a year from all countries. These are mostly young adults, with little or no skills (other than peasant farming), and eager for jobs.

The total of all legal and illegal entries from all countries is probably about 1.5 million persons a year now, and thus is almost equal to the reported annual increase in our entire population. However, the latter increase is a net figure, while the alien inflow of 1.5 million is a gross figure which must be reduced — by perhaps one-fourth — on account of current return flows.
The Asian immigrants

The rising flow of Asian immigrants has been the dominant feature of U.S. admissions for permanent residence in recent years. From a level of about 21,000 a year in 1964 and 1965, the Asian inflow rose to 150,000 in 1976: a seven-fold rise, contrasting with the mere one-third increase in the total of all immigration to this country. Accordingly, the Asian share of the total rose from 7 per cent in 1964 and 1965, to 37.5 per cent in 1976 (and almost 40 per cent in the first quarter of the next fiscal year). In comparison, the numbers have been steady from Latin America (about 5 per cent of the total in recent years) and from North America (about 40 per cent); while Africa and Oceania show small and slowly rising numbers; and the share of European countries has been falling, so that it is now only one-sixth of the total. In effect, Asians have accounted (and over-accounted) for the whole rise in immigration 1964-76.

All of these entry figures are gross admissions. No deduction has been made for return flows, which may run 20-25 per cent of annual new admissions. Nor has any deduction been made for "adjusted aliens", i.e., permanent-residence visas granted to persons, such as students and temporary workers, who are already living in this country (the students and others trained here rather than in their home countries, should be deducted from the apparent total of "brain drain" of professionals from foreign countries). Adjusted Asians numbered 30,000 in the Asian total of 150,000 in 1976.

Considering the Asian admissions for permanent residence as regards their countries of birth (see table 1), the largest single bloc comes from the Philippines, which accounts for one-fourth of all Asian immigration. Korea is close behind, accounting for one-fifth. India is third, with one-ninth. Immigrants of Chinese stock were 24,000 according to my calculations from I.N.S. data: over 9,000 originating in Mainland China, nearly 9,000 originating in Taiwan, and nearly 6,000 originating in Hong Kong. Next in rank was Thailand with 7,000, and Japan with 4,000. Only 3,000 immigrants in 1976 were ascribed to Vietnam, but this number is apparently aside from the 135,000 Indochinese accepted by the U.S. in 1975-76 as refugees, and the 25,000 per year to be accepted here under the "interim proposal" approved by President Carter in March 1978, and subsequent additions.

When these recent inflows by country of birth are viewed historically, by comparison with the levels in 1964 and 1965 (before the new regulations of 1965 went into effect), it is apparent
that the fastest growth has occurred for Thailand and for India, both of which sent only a few hundred migrants in the mid-1960s. The Philippines and Korea, whose migrants already numbered 2-3,000 in the mid-1960's, increased 12-13 fold to the present. The numbers from Hong Kong rose 8-fold. The numbers from Mainland China and Taiwan combined rose by $3\frac{1}{2}-4\frac{1}{2}$ times, from 4-5,000 in the mid-1960s, to nearly 18,000 for the combined inflow in 1976. Migration from Japan hardly increased at all over the interval considered.

*The PTK among the Asian immigrants*

Particular interest attaches to the category of “Professional, technical, and kindred workers” (PTK) in the whole Asian inflow, partly because the PTK share is so large here, and partly because the “brain drain” is so vexed an issue.

Within the 150,000 total immigration of Asians in 1976, 24,812 persons — or almost one-sixth of the total — were classified as PTK. This proportion has declined slightly over the last several years, while the total Asian immigration has been rising. The countries which show the highest share of PTK among their immigrants are: India with over one-third PTK, the Philippines with over one-fifth, China and Taiwan with one-seventh, while the other Asian source countries show one-tenth or less PTK.

Within the 24,812 gross inflow of Asian PTK, the largest single category was Physicians and Other Medical, numbering over 5,000 persons and constituting over one-fifth of the total PTK. The next largest category was Nurses, Dieticians and Therapists, numbering nearly 5,000. Engineers were next, with over 3,000. All three of these categories originated mainly in the Philippines and India. The fourth largest category was Teachers (not including University teachers), numbering nearly 2,000, or about 8 per cent of the total Asian PTK, and coming mostly from the Philippines, Korea, India and Taiwan.

To indicate the order of magnitude of these inflows relative to the corresponding U.S. labor force, we measure the flow/stock ratio and the flow/flow ratio. The roughly 25,000 annual inflow of Asian PTKs, related to the U.S. stock of about 13.5 million PTK at present, works out to only .2 of 1 per cent. Ten years of this rate of gross admissions — making no deductions for return flows of immigrants, nor for foreign students who are already in the U.S. and are adjusting to permanent residents — would add only 2 per cent to our present stock of PTKs.
Turning to the flow/flow measure, our PTK stock in the U.S. is growing by about 450,000 persons a year. Against this, the 25,000 annual gross immigration of Asian PTKs works out to just over 5.5 per cent. That is an overall measure of the size of the Asian PTK annual gross inflow in relation to our domestic annual graduations and other training of PTK after allowance for the annual withdrawals, emigration, deaths, and other disappearances of PTK here. For some particular professions, the flow/flow ratio runs much higher: in 1972, entries of foreign physicians, two-thirds of them from Asia, made up fully half of the entire increase in our supply of physicians. Subsequently, however, Congress decreed that “the doctor shortage” has ended, and pushed the door almost shut against further immigration of physicians.

*Occupational analysis of other Asian immigrants*

Of the gross total of 150,000 permanent admissions of Asians in 1976, 95,000 or nearly two-thirds are listed as non-workers ("Housewives, children and others", the latter being largely students). No doubt some of these do take jobs after admission, often on a part-time basis. The number of full-time-equivalent workers is not known; an estimate, in what is probably generous terms, might suppose some 30,000 workers here.

Of the 55,000 who are listed as workers, nearly 25,000 were PTKs, analyzed above. The remaining 30,000 were distributed over the whole range of occupations in a moderately descending order: Managers 6,000, Clericals 5,400, Craftsmen 4,000, Service Workers 3,600, Operatives 3,000, Laborers 1,400 on farm and 1,700 non-farm, Sales 1,400, and Others.

Only a small fraction of these, who entered under “occupational preference”, were screened by the U.S. Labor Department as to real vacancies in our economy needing to be filled by immigrants. However, the whole impact on the U.S. labor market is quite small, as the estimated 60,000 Asian non-PTK immigrant workers (30,000 occupationally listed, plus another estimated 30,000 workers from the non-occupationally-listed) comes to bear upon the 80 millions of U.S. non-PTK labor force. The gross inflow here amounts to less than .1 of 1 per cent a year.

*Temporary Workers from Asia*

While temporary workers from all foreign sources (net of students including those students counted in the “Exchange Visitor” category) are running at about 62-64,000 admissions per
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year, Asians make up only a small fraction of this category. Only about 4500-6700 Asians a year have been admitted recently under the three headings of “Distinguished Merit”, “Other Temporary Workers”, and “Industrial Trainees”. Adding in an appropriate fraction of the Asian “Exchange Visitors” (net of Students, who make up two-thirds of the total Exchange Visitors) serves to contribute another 3,000-3,700 temporary workers to the Asian inflow of this kind. These numbers do not represent any major impact on the whole labor force of the U.S.

Illegal Immigrants from Asia

There is, in the nature of the case, little direct information on the number of illegal entrants into this country, whether from Asia or from any other source. The currently preferred method of estimating such inflows is to begin with the I.N.S. reports of “deportable aliens” actually located each year, and apply the ratio of not-apprehended to apprehended, according to the best judgment of experienced agents in the field. In the case of illegal aliens from Mexico, where the observable evasive movements are huge, common estimates are that at least two, and perhaps three, persons succeed in entering this country for every one apprehended. In the case of Asians, who are not in a position to saturate the border crossing points, we will assume a more restrained ratio of one-to-one, but will also allow for the possibility of two-to-one.

In 1973, 15,600 deportable Asian aliens were located; in 1976, the number was just under 20,000. Of the latter total, 4,100 were from China and Taiwan, 4,400 from the Philippines, and 11,300 from Other Asia. Nearly all of these Asians were persons who overstayed their authorizations after entering legally as Visitors, Students, or Crewmen (in contrast, nearly all of the Mexican illegals entered “without inspection”, i.e., covertly).

In terms of the type of entry, it is probable that nearly 12,000 of the Asian illegal settlers in 1976 were educated persons, namely the overstaying Visitors and Students. Many of these — perhaps 10,000 — should be added to the reported legal inflow of Asian PTK, namely 25,000 persons in 1976; but the outflow rate of the PTK illegals is probably high, and the Students who graduated from U.S. universities should not be charged as a simple loss to their home countries.

The remaining Asian illegals — some 8,000 directly listed, plus some 2,000 of the Visitors who are not PTK — are probably manual, unskilled types. These are the types who are commonly
considered to compete with our own unemployed. They may number 10,000 a year — or even 20,000 on the 2:1 ratio. Adding these Asian illegals to the 60,000 estimated above for the legitimate Asian non-PTK immigrant workers does not greatly enlarge the indicated impact on the U.S. labor force.

**Summation of Asians’ impact on U.S. unemployment**

Without doubt, the most intense feelings about immigration centers on the alleged competition of aliens with American workers, particularly the unemployed whose numbers reached a recent peak of 7.8 million in 1975 and still stand at about 6 million today. Relative to this large pool of U.S. unemployment, total gross immigration — from all regions of the world — makes an appreciable increment of about 1 million workers a year (out of the estimated 1.5 million entries, both legal and illegal). However, as shown in Table 2, the Asians alone account for only about 115,000 workers a year — principally because of the apparently small numbers of illegals from Asia — and thus come to add only a few cupfuls to the huge labor pool in this country.

Furthermore, the unemployed who are really threatened here are much less than the 6 million officially reported as idle. As the Humphrey/Hawkins “full employment” bill recognizes, some 4 million of our reported unemployed are probably unavoidable cases (job-changing, closed firms, etc.), and many of these may not be hardship cases. This leaves about 2 million of acute, remedial unemployment; to which must be added an unknown number of “discouraged workers” who have dropped out of the labor force. On the other hand, much of our unemployment is indirectly optional, in the sense of resulting from a strongly expanding supply of labor (mainly by the decisions of more and more women to participate in the labor force) relative to the total jobs which are also growing at a positive but slower rate.

In addition, the Asian impact is still smaller than is indicated by the aggregate figure of 115,000 workers entering each year. First, the return flows and the adjusted students should be deducted. Secondly, the relatively large sub-class of PTK in the Asian aggregate should be treated separately, along lines sketched out above. When the 25,000 annual permanent admissions of PTKs are added to the temporaries and the illegals, the total Asian PTKs at 41,500 entries per year still amount to a quite small addition to our PTK stock (which now is nearly 14 million) and a quite small competition to our annual professional graduations. Furthermore, the professional supply in this country
is not notably excessive or redundant, as indicated by the usually low rates of involuntary unemployment among professionals here (usually around 2.3 per cent, this rate reached a high of 3.2 per cent in 1975, the worst recession year in recent times). When professionals do become unemployed, some will take a job at a level or two lower, and many have resources of their own or have ability to borrow, and can expect soon to offset any hardships out of renewed earnings at good salaries.

**TABLE 2**

*Annual Gross Inflow of Asians into U.S.*

(1975/1976 data, rounded)

<table>
<thead>
<tr>
<th></th>
<th>Total Persons</th>
<th>Workers</th>
<th>Non-Workers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Permanent</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Admissions</td>
<td>150,000</td>
<td>25,000$^1$</td>
<td>30,000$^1$</td>
</tr>
<tr>
<td>Temporary</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Admissions</td>
<td>10,000</td>
<td>3,500$^1$</td>
<td>3,500$^3$</td>
</tr>
<tr>
<td>Illegal Entries</td>
<td>20,000$^6$</td>
<td>10,000$^4$</td>
<td>8,000$^1$</td>
</tr>
<tr>
<td></td>
<td>180,000</td>
<td>41,500</td>
<td>73,500</td>
</tr>
<tr>
<td>Totals</td>
<td>115,000</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Compare estimated inflow from all countries: 1,500,000 1,200,000

$^1$ As reported by I.N.S.
$^2$ Estimated Asian Exchange Visitors who are PTK.
$^3$ Reported non-PTK admissions plus estimated portion of Exchange Visitors not PTK.
$^4$ Estimated PTK portion of overstaying Visitors and Students.
$^5$ Estimated non-PTK overstaying Visitors and Students.
$^6$ Estimated at one not-located for each one located by I.N.S. Doubling these numbers would not greatly alter the labor-market importance of this category.
$^7$ Estimated distribution of 95,000 admissions reported by I.N.S. without occupational listing.

Source: underlying data from Immigration and Naturalization Service, annual reports, fiscal years 1975 and 1976.
This leaves us with the "other" workers from Asia, numbering some 73,500 annual gross inflow (adding together the permanent admissions of non-PTK workers, the admitted dependents who seek jobs after entry, the illegal entries without education, and the unskilled temporaries). This is the whole statistical magnitude of the annual Asian gross inflow that competes more or less directly with the American unemployed as specified above. But in practice, the competition is still less, because many of the Asians are ready to take jobs which many Americans do not want or are able to avoid because they have alternative sources of support. Immigrant absorption today, as in most times and places, is a function of disparities in the structure of the labor market and in the distribution of wealth and income.

**Asians' use of social services**

In regard to the charge that Asians and other aliens make extensive use of our social services (hospitals, public schools, food stamps, welfare, etc.) without adequately paying for them through taxes, there is very little evidence to support this charge for aliens in general and even less support as to aliens from Asia. The fact is that most of the aliens are employed, and are therefore subject to social security withholding, income tax withholding and reporting, and even hospitalization insurance withholding, in addition to paying sales taxes and property taxes through their expenditures. The Asians are still more subject to these levies than other aliens because so high a proportion of the Asians are PTK employed in large institutions which regularly practice withholding (in contrast to many small firms employing aliens).

Another way of making the same point is to note the comparatively small proportion of Illegals among the Asian entrants, since the Illegals are commonly charged with the worst "exploitation" of our social services. Yet the 1976 study of Illegal Aliens, by North and Houstoun for the U.S. Labor Department, found that Illegals make proportionately small use of public services, and make substantial tax and fee payments toward those services. The Asian Illegals in particular were found to make even smaller use of those services than the Mexican or Western Hemisphere Illegals, and to be more extensively involved in paying taxes (of the Asian Illegals who were interviewed, 82 per cent reported withholding of social security contributions, and 55 per cent reported filing income tax returns).

Thus the Asian immigrants, both the legal and the illegal, are largely or wholly paying their way.
Remittances by Asians

One of the notable economic practices of aliens is to save substantial portions of their earnings for remittance to their families in the home country. This practice has raised questions about impact on the U.S. balance of payments as well as contribution to the economy of the home country. Unfortunately, data on this matter are very spotty, and existing estimates vary widely.

A recent report from the Philippines indicates that some one million Filipinos said to be working in the U.S. send home some $70 million or more annually. As the Filipinos are perhaps one-fourth of all Asians living in this country, the total remittances by Asians may run about $280 million a year.

Data on Illegals from various Asian countries, as picked up in the interviews reported by North and Houstoun, indicate much higher volumes of remittances per alien, as may be expected from recent entrants. If these numbers are applied to our estimated Asian gross entrants cumulated over the past five years, we calculate annual remittances by these Asians at about $172 million.

The orders of magnitude of remittances suggested here are clearly minor elements in a U.S. balance of payments that ran a deficit of $18 billion in 1977, and still more in 1978. On the other hand, the remittances make a notable contribution to the Asian countries as to their supplies of foreign exchange and real income. Furthermore, when people in LDCs spend the remittances, they generate effective demand for U.S. goods.

Effects on Asian homelands

If the effects of Asian immigration on the U.S. are, as we have indicated above, a small but mostly positive contribution to our labor force, with important contributions in a few occupations, and no great burdens imposed on our economy and society, the picture from the Asian country standpoint is not necessarily a mirror-image of the U.S. scene.

The most relevant feature is the huge volume of overpopulation and un/under-employment in most Asian lands. If we adopt the estimate by Robert McNamara, President of the World Bank (in his book One Hundred Countries, Two Billion People) that in most L.D.C. about 25 per cent of the labor force is un/under-employed, then India has some 55 million workers in this miserable condition, the Philippines have 4 millions, South Korea has 3 millions, and all Asia (outside of Communist China)
has about 100 million total sub-employed. As against this huge pool, the annual total outflow of about 115,000 workers to the U.S. (less if we allow for return flows) is not only a minor relief; but it even falls far short of the current annual increments to the labor force of Asia, let alone making any reduction in the accumulated arrears of sub-employment. And the U.S. is the only advanced nation willing to accept even those modest inflows at the present time, and would not accept any great enlargement of those inflows.

The importance of emigration of professionals (PTK) from Asian and other L.D.C.s is commonly supposed to be quite different from the emigration of surplus, unskilled persons. That is, it is usually supposed that PTK are scarce, not plentiful, in Asian countries, such that their emigration is a direct loss, perhaps even a crucial sacrifice, to the home country, and therefore is properly to be termed a "brain drain" or even an "exploitation" practiced by the rich countries against the poor ones. The facts, however, do not bear out these suppositions for the world today, although the reality has not yet been widely recognized.

By factual research in recent years, we have found that the principal source countries for PTK migration from LDCs to the U.S. are countries with a distinct surplus of professionals above effective demand in those nations. In Asia, that statement refers to the Philippines, India, South Korea, Taiwan, Thailand. While in earlier decades these countries were considered to be severely lacking in modern technical personnel, the striking fact is that since about 1965 these countries have trained such personnel far in excess of feasible economic opportunities to employ them. The result is the new, substantial, and persistent problem of the "educated unemployed"; and the further consequence is the tendency to seek opportunities abroad. Of course, the individuals who emigrate were not necessarily unemployed in their home countries (indeed, there is evidence that most of them held jobs before emigrating). Rather, these migrants represent withdrawals from a total stock which is more than adequate to meet the total demand at home under prevailing conditions. The evidence for this surplus is the high and rising rates of unemployment of professionals, as measured most thoroughly in India and in the Philippines, for PTK in general and for particular categories such as Engineers (in India, for example, 13 per cent of the Engineers were reported unemployed, while many others were working below their professional skills).
As a matter of fact, the emigration of PTK from these countries is so far from being a real "brain drain" that it is not even an adequate vent for their surplus. The annual gross emigration of PTK — even before deducting return flows and students adjusted abroad — does not provide an outlet for more than a fraction of the annual graduations in those countries, let alone reducing the arrears of professional unemployment.

All this is not to deny that some Asian and other LDCs still have serious shortages of professional personnel. But such countries do not ordinarily have substantial outflows of their trained professionals, who are effectively needed at home and respond to the real opportunities there.

Benefits to U.S., costs to sending countries, and compensation

The benefit to the U.S. from the immigration of mostly adult persons is a gain of productive persons at no cost of rearing and training them here. However, under conditions of unemployment here, part or all of that gain may be nullified, in so far as the aliens are simply displacing American workers. The case is clearer as regards the PTK, who are not believed to displace many American professionals.

The amount of gain from immigration may be measured either in terms of the immigrants' net contribution to output, or in terms of the avoided costs of education in our country. For PTK, we believe that the former measure is irrelevant as such, and really reduces to the second measure; since our country could always have trained up more professionals as needed, by making appropriately larger outlays on educating our own personnel. Our gain from immigration then is our saving in educational outlays.

The cost to the sending countries is their outlays on rearing and training the PTK who emigrate. They do not suffer any loss in output so long as the PTK were surplus in those countries. Their loss is essentially the transfer of an expensive asset, human capital, which is exported without direct compensation.

The question of how much compensation should be paid is moot but negotiable. From one point of view, the receiving country should pay the whole value of its avoided costs of education. From the opposite viewpoint, the sending country is only entitled to its own out-of-pocket costs of rearing and training the emigrants (these costs are ordinarily much lower than in the U.S.). A figure somewhere between those two would give the sending country a profit on the emigrants, while leaving some gain to the country that accepts them.
Simply as an indicator of the magnitudes involved, we can estimate for 1971 that the net immigration of PTK into the U.S. from Asia, valued in terms of the avoided costs of education here, amounted to some $400 million (in the prices of 1971); and this sum came to 1.5 per cent of all U.S. expenditures on higher education in that year, and about 22 per cent of all U.S. official foreign economic aid to Asia in that year. (Note that the 1976 immigration of this group was about 12 per cent below 1971).

Whether such compensation should be paid by way of a surtax on foreign PTK’s incomes, to be transferred to their home country;* or by way of enlarging our foreign aid, or forgiving some of the outstanding foreign debts; or by way of opening our doors wider to foreign students to come for training here; or accepting additional processed goods exported from LDCs: all such administrative devices and choices must be left to another discussion.

* See the papers of the 1975 Bellagio Conference, Taxing the Brain Drain and The Brain Drain and Taxation (1976, North Holland Press, edited by J. Bhagwati).
COMMENTS

Reported by John Stafford, with the assistance of Peter Ku.

Austin Fragomen*: Mr. Fragomen noted that the general structure of immigration laws in force in the United States is deficient and sorely in need of legislative change.

Concerning the discriminatory implementation of the law, he drew attention to the policies practiced by the Immigration & Naturalization Service and the Department of State. What particularly concerned Mr. Fragomen were preconceived racial prejudices manifested in these agency policies.

Mr. Fragomen revealed to the panel that the New York Advisory Committee to the U.S. Civil Rights Commission had recently held hearings in New York City and scheduled hearings in Washington to discuss discrimination in the immigration process.

Criticizing the immigration authorities, Mr. Fragomen observed that if a member of the public approached the authorities for information of any type, he may be treated rudely and in most cases, given virtually no information. To the extent information is given, it is likely to be misinformation.

Despite a Supreme Court ruling that an individual cannot be stopped and interrogated simply because he appears to be of Asian or Latin ancestry, Mr. Fragomen felt that in fact, this is all too frequently how the law is practiced by the Immigration Service and implemented.

Mr. Fragomen outlined a typical Immigration Service procedure: New York City is divided into areas. Immigration officers are assigned to given areas and instructed to enforce the law and apprehend undocumented aliens. These officers go into an Asian restaurant — a Chinese restaurant, a Korean restaurant, a Japanese restaurant — and begin interrogating employees. Mr. Fragomen submitted that arrest statistics reveal that aliens stopped and questioned are predominantly of Asian and Latin extraction. He concluded that racial appearance is the main ingredient in implementing the immigration laws.

Turning to the policies of American Consuls, Mr. Fragomen noted that virtually any Caucasian who enters an American

* Adjunct Professor of Law, New York University
Consul post in Europe and applies for a visitor's visa will be granted a visa. Comparing Consul policies in Europe with those in cities such as Hong Kong and Bombay, Mr. Fragomen questioned the track record of the American Consuls located in major Asian cities. He observed that there, consuls apply a totally different criteria. Totally different because they assume that Asians applying for visas are not bonafide non-immigrants. They are not bonafide visitors. Consular personnel are suspicious that applicants may be lying and actually intend to permanently reside in the United States.

Commenting on Immigration Service and State Department investigations of alleged or suspected fraudulent applications, Mr. Fragomen explained that all foreign letters emanating from Asia attesting to experience and education were, by internal operating instructions of the Immigration Service, subject to field investigation because the presumption is that if a letter or other document originated in Asia, it may be fake. Although the Immigration Service recently issued instructions that such a monolithic policy was no longer to be practiced, Mr. Fragomen considers past policies to continue to be implemented, in fact. This is true despite the change in explicit policy.

Mr. Fragomen concluded his comments by focusing on discrimination against permanent resident aliens in government employment. He recalled a presidential proclamation prohibiting the employment of non-U.S. citizens — authorized by the courts and perfectly legal, so that no foreign nationals can engage in federal employment without a specific exemption from the presidential proclamation. The reason being that they cannot be trusted as government employees.

E. B. Duarte*: Mr. Duarte did not totally disagree with remarks made by Mr. Fragomen, conceding that aberrations in the implementation of immigration laws do exist. However, Mr. Duarte found it difficult to respond to the general arguments advanced by Mr. Fragomen. Officers of the Immigration & Naturalization Service can only respond if they know who is engaged in discriminatory immigration practices and where and when these practices occurred. Mr. Duarte assured the panel that correct disciplinary action would be effected if specifics were

* Director of Outreach Program, United States Immigration and Naturalization Service
known. The Immigration Service can only enforce the law as it exists in statute. Mr. Duarte remarked that he wished the law were more reasonable.

Turning to the impact the New Commissioner of Immigration & Naturalization Services has had on internal policies, Mr. Duarte felt that services were now being administered in a more humane manner. Sensitivity training has been initiated by the Commissioner. The tone set by the Commissioner is one which balances all immigration services. In the past, emphasis may have been law enforcement oriented.

Mr. Duarte felt that strides had been made in providing more complete immigration services. He noted that the Immigration Service had to ensure that the people employed — whether they be investigators, contact representatives, or examiners — understand fully that the United States is a nation of immigrants, so that they can exercise discretion in favor of the alien seeking a benefit.

Francis P. Murphy*: Mr. Murphy first acknowledged that he was an officer in the operations branch of the Immigration & Naturalization Service — the branch which causes many of the problems summarized by Mr. Fragomen.

Mr. Murphy agreed that the operations branch has some problems and has had problems over the years. However, he repeated Mr. Duarte's claim that strides in the right direction have been made. Possibly not far enough noted Mr. Murphy; but he definitely thought the Immigration Services was on the right track.

Turning to the daily operations of his branch, Mr. Murphy observed that he has spent at least part of his day — every day for at least the last year — responding to various complaints and directing the field how to proceed in various cases. He noted that he spends much time slapping wrists; instructing field operators to reopen cases where proper procedure was not followed.

Mr. Murphy concluded that progress had been made and progress will continue to be made in effecting a more tolerant attitude on the part of operations officers.

Mr. Fragomen said that he would like to applaud the attitude of the new Commissioner, but he observed that changing the attitude of all the officials in the service is a time consuming matter.

* Deputy Assistant Commissioner, Inspections, Immigration and Naturalization Service.
QUESTIONS AND ANSWERS

Reported by John Stafford, with the assistance of Peter Ku

Question: In addition to the sensitivity training, are you thinking about doing any kind of field investigations like observation or perhaps even undercover investigation. I mean all you have to do is look non-white, walk into an INS office and you will run into these attitudes . . . this kind of treatment. So that if you’re really anxious to seek out and eliminate discrimination, there can be more vigorous practices than just sensitivity training.

Mr. Duarte: Well, the sensitivity training is intended to bring about the death of those hardened attitudes. Unfortunately, this takes time. Some people will just have to die off.

We are zeroing in on some of our larger offices . . . San Francisco . . . L.A. . . . New York . . . Chicago . . . to make sure people are treated decently, that they are not treated rudely as charged here. I would think that if the Airlines can do it, we can do it too. After all, it’s not our government; it’s the people’s government.

Question: Do you have any statistics on the number of Asian-Americans who are with the INS?

Mr. Duarte: About .5%

Question: Is that bad?

Mr. Duarte: Yes, that’s very bad. It’s just in the past year. Anytime you bring in a reformer like Mr. Custee who focuses on some of the problem areas, it creates an awareness on the part of many ethnic groups which deal with the Service and say . . . hey, how about us? And I think that’s a legitimate type of concern. Recently, we had a discussion with some Asian-American government employees about this very problem. We go around and talk to various ethnic groups and the complaints come . . .

Question: Well, why don’t you have adjudicators or contact representatives in sufficient numbers in areas that have large populations in the U.S.?

Mr. Duarte: Because we haven’t recruited them.

Question: They haven’t been recruited in the past?

(39)
Mr. Duarte: Because the Asian groups haven’t come forth. We have some candidates for consideration. Because of the short time periods there. But I think that because of the awareness and because of the Commissioner’s response in this area, we will make some more strides in this area.

It has only been two or three years ago that hispanics began raising all types of hell with the Immigration Services because of some of those very things that you just articulated. In response to their complaints, minimum height requirements for the Service Academy were lowered. In the last seven or eight classes, thirty percent of the graduates from the Service Academy were Hispanic Americans. It’s a two-way street. The community has to come forth and raise the problem and the Service has to respond affirmatively to problems and investigate problems internally. As for EEO programs — hiring Asian-Americans and putting more Asian-Americans on their advisory committee — I think this will happen. It is happening now, it is going to happen more in the future.

Question: The phone is always busy. Some friends of mine recently went to the office at 3:30. The people there said that it was too late, to come back the next morning at about 8:30 — or even earlier. My friend knows that the office closes at 5:00 and can’t understand why they would tell the people to go home at 3:30.

Question: Why if a letter is sent, is there no reply until people contact their congressman or retain a lawyer?

Mr. Duarte: You state the problem quite mildly. I think it’s a lot worse than that. The Commissioner has been surprised at the total backwardness of this entire agency. A backwardness that has existed for a long time. And the telephone is the primary example. The Commissioner sent out teams to call in and see if they could get the offices — no way possible. We are so backward in the use of modern electronic equipment that this becomes a very serious problem. What I’m trying to say is that responding to people’s concerns was not a priority. It just wasn’t. In other words, the Service dealt only with the resources that were available and if they couldn’t go beyond that, well, they just didn’t.

The priority now is to get to that area. But to develop simple informational computer systems requires time. The built-in terminals require time. The setting up of telephones . . . the hiring of people to answer those telephones takes time. It will probably
be another year before we will be able to get to it because of the inertia that exists in government. Are we addressing it? Yes. Do we recognize the problem? Yes. But will you please give us some time because yes, we know those problems — we’ve investigated them — they are much worse than you describe . . . we are making some progress in some districts. Excepting Los Angeles, New York is probably the busiest district. It’s going to be harder, but we’re working on it. Could somebody do a better job? No, not with the amount of money we are getting from Congress.

And in that program that I’m going to explain — Congress passed a law for us that adjusts 145,000 Indo-Chinese but didn’t give us a penny to work with. So there are a lot of complexities — a lot of variables involved. The complaints that you have are accurate; we are dealing with them to the best of our ability.

Question: Is it typical, in other countries, that non-citizens can have jobs in the Federal Government? For example, in England or in Denmark or Russia or where have you, can a non-citizen have a job at any level in the Federal Government?

Chair: It depends on what country you are talking about. In the Latin American countries in which the population density is not so high, usually they allow a resident alien to take a job. Some countries might even allow aliens to seek a job in government after a certain number of years of residency. But in other countries, typically European countries, this is not permitted.

Mr. Cushing: That’s possible in a number of countries where there is a shortage of a particular skill, aliens are in fact employed by the National Government. But the effort is usually made very quickly to replace them with trained nationals. And in that case, their contracts are terminated. It is a contractual relationship.

Mr. Gim: I would say that our real concern is not how similar problems are handled in other countries. I think our concern should be turned to an appraisal of our own institutions and what the Constitution means. Considering our own values, once we discriminate against aliens we set the stage for eventual discrimination against citizens. You have to look at, in terms of our law, what the rationale is for prohibiting employment of non-U.S. citizens. That to me is what is really important here because the presumption of the law is that something is suspect. It’s not a question of labor market needs, it’s a question of whether aliens can be sufficiently trusted. That is where I have a problem conceptually.
Mr. Cushing: If we attempt to mix certain legal concepts and public policy indiscriminately, we cannot intelligently look at this matter of treatment of aliens. The laws established through representative government from a citizen electorate may determine unwise statutes or statutes that do not meet any one of our individual conceptions of what our society should be like. But I don't think it follows that whatever society does that seems to inconvenience or be at odds with individual conceptions of any one member is thereby contemptible, is thereby discriminatory, or is certainly somehow unconstitutional. The Constitution does place in the Congress power over immigration. It's as simple as that. That's where jurisdiction lies. The Constitution, having given that power to Congress, has embodied public policy in fundamental law. The question is what public policy through new Congressionally originated law can be developed that might suit the aspirations of one group. But remember, that is public policy translated into law for Americans. It doesn't say for white Americans, or black Americans or brown Americans. Just for Americans.

Beneath that we may have individual rudeness. I don't think it is a caucasian peculiarity. It may be, but it's not unique to them.

Mr. Gim: I would like to make some observations on Mr. Cushing's statements. First, the fact that the courts have decided that Congressional power over immigration is largely immune from judicial review doesn't mean that Congressional policies are immune from public discussion. We ought to discuss that and if Congressional policies are at variance with our traditional concepts of fairness, we ought to bring that to light. And that's true not just of immigration, but in all fields. Again, one must consider that some of these cases I mentioned like Kim v. Rosenberg, 363 U.S. 405 (1960), were not decided by a Supreme Court unanimous vote. There were four dissenting votes in that case. The fact that the Supreme Court has upheld an interpretation of the Constitution that delegates authority over immigration matters to Congress does not mean that the concept is ingrained and fossilized into law. We would be in tough shape if that ever happened. I think that the important thing is that if laws or policies strike our conscience as unfair and dangerous, we ought to be able to discuss them — to see that they are changed and even seek to have a court reconsider its opinion. As a matter of fact, there have been instances where the courts have carefully reconsidered problems in this area. I think, as Mr. Duarte said, there have been tremendous changes in the past year. And it
really is — in a way — quite unfair to saddle the present Commissioner with the legacy of the past because there has been a tremendous improvement. And I think anybody that practices immigration law recognizes that.

**Question:** I come from San Francisco. There are many Chinese there — some who have travelled back to the far east and who have return permits from the immigration office. And when they return from Hong Kong, say for example, their green card and their travel documents were retained for examination because they stayed in a foreign country for a few months. The point I’m trying to make is this — they had a return permit that was good for one year and they returned within one year. But still they were retained for questioning. I don’t know whether that would have been a problem in New York. But we do have that problem in San Francisco. Since this is an Asian immigrant problem, if it does happen, what can we do as concerned citizens? We need to do something in San Francisco. Should we go to the Director of Immigration Office for instructions before we travel?

**Mr. Fragomen:** First, it’s a very common problem. And it doesn’t impact exclusively against persons from Asia.

Essentially, I think that the basic problem is one of lack of understanding. Perhaps it could be clarified by information given by the immigration service when they make persons permanent resident aliens or by the consul when they issue immigrant visas. The alien registration card is a document which is valid for entry into the U.S. within the period of one year. The misunderstanding is that that does not mean you will be entered into the States if you return once a year. It means that it is a valid identification card if you are, in fact, a permanent resident alien. The question whether you are a permanent resident alien or whether you don’t really reside in the U.S. is a question of fact. Of course, you know as well as I do that a great number of persons living in countries where there is concern about the political future have become resident aliens of the U.S. by applying for permanent resident status. These people don’t really intend to reside in the U.S. That’s really the heart of the problem.

Obviously, persons from countries where this practice is more prevalent than in other countries tend to be questioned more carefully and more frequently. For instance, if one is from Taiwan or South Africa or some other country where a person is inclined to become a U.S. resident as a hedge against future changes in the political makeup of his government, there is a greater likelihood
that he will be questioned. But I think in large part the question is one of imprecise definition. The people don't understand that this registration card does not guarantee entry.

Part of the problem stems from the words printed on the alien registration card itself. It states on that card that entry is valid within a period of one year. It implies that all you have to do is use the card once a year. But that isn't what it really means at all. I think you are right. I think that possibly greater notification can be given as to a person's obligations when he becomes a permanent resident alien.

\textit{Mr. Duarte:} We've all been exceedingly impressed with the new Commissioner's enthusiasm and willingness to rectify some of these problems which we've been discussing. We think this is a tremendous thing. But, I think that the Immigration Service is really going to have to get into specifics . . . almost "spying internally" to effect a major change. These are very deep seated attitudes. Even the Commissioner has been exposed to these attitudes when he has shown up unexpectedly at offices. Sometimes he has been very rudely told to "shut up and get back in line."

\textit{Question:} Immigration laws are not consistent with traditional concepts of law. Not only aliens, but also lawyers are rudely treated.

Is the American Bar Association sensitive to these problems? Have you been able to bring it to their attention? Have they been able to do anything about it? As you know, the American Medical Association has played a very dominant role in preventing graduates of foreign medical schools from coming to the U.S. Is the American Bar Association or a group with similar interests doing anything with respect to something which involves not only aliens but also members of their own profession?

Ninety percent of Asian immigrants are professionals. My assumption was that there would not be much problem in terms of employment. That is, they will be able to find jobs easily. In my study, I found out that it is not necessarily so — that while they do have employment, the majority of them feel that they are underemployed and there is some amount of discrimination involved in that.

\textit{Mr. Gim:} For the Bar Association — the A.B.A. has never concerned itself much with immigration law. Their interests are more in the corporate tax fields and the commercial field. We do
have a Bar Association of Immigration lawyers. And of course we have made our views known. We have had meetings with the Commissioner and we have made our views known concerning deficiencies and specifically the matter of lack of courtesy. I think the present Commissioner, as contrasted to the previous administration, has been receptive to some of these complaints.
SESSION II. ROUND TABLE DISCUSSION ON INDOCHINESE REFUGEES PROBLEM

Reported by John Stafford, with the Assistance of Peter Ku

Henry Cushing*: It seems evident that refugee immigration is a less exciting topic than simply immigration. But I thought I would review for you the recent immigration of Asian refugees, specifically the Indo-Chinese refugee immigration that has taken place in the last three years. I would also detail the present policies of the administration respecting future immigration and enlarge very briefly on various ideas the administration has proposed to the Congress respecting refugee admissions generally.

Three years ago dramatic changes in Indo-Chinese governments began to occur — first in Cambodia, then in Vietnam and in the latter stages in Laos. It was obvious that no immigration procedures or regular immigration of refugee procedures could accommodate the numbers of people who needed some place to go. The U.S. accepted in the spring and summer of 1975, 130,000 Indo-Chinese refugees; most of them brought directly to the U.S. in the evacuation under what’s called the “parole power” of the Attorney General. Those of you, and there are obviously many of you here who are experts on immigration law, will know that the power is vested in the Attorney General under Section 212D5 of the Immigration Act whereby the Attorney General in the interest of the United States for humanitarian reasons, in an emergency situation, can admit an alien, or more correctly, parole an alien, that otherwise would be inadmissible for whatever reasons he may be inadmissible. And of course, the reasons may be that the alien does not meet one of the preference categories based, as most are, on relationship and labor certifications or professional qualifications. The parole power is, as some people are reminding us, in legislative history in specific language designed for individuals; but, it has historically been interpreted as a means for meeting emergencies involving large groups. And indeed that is what it did in 1975. There were successive waves of Indo-Chinese refugees admitted to the U.S. using the same parole power. Most recently in January of this year, when the latest element of Indo-Chinese refugees were authorized, 7,000 of them were admitted. Those uses of the parole power under Section

* Deputy Director, Office of Refugee and Migration Affairs, Department of State.
212D5 of the Immigration Act have now brought a total of 160,000 Indo-Chinese into the U.S. and authorized the admission of another 12,000. One can see that several months pass between the actual authorization by the inauguration of the Attorney General and the arrival of the refugees in the U.S. By the end of this summer, thanks to appropriations made by Congress for various kinds of assistance by such voluntary agencies as the International Rescue Committee, represented here by Mr. DeVecchi, by the work of Immigration Service officers assisting State Department officers in the field, and by the work of other self-help and public spirited groups such as this one, there will be 172,000 Indo-Chinese refugees here. As you know, immigration for refugees as normally structured in the Immigration Act, under Section 203A7, allows only 10,200 people from the Eastern hemisphere to enter the U.S. annually. Thus, we have built into the existing law an ideological and geographical bias reflecting perceptions of the U.S. in its role in the international community in the past. Neither the number of refugees permitted nor those ideological limitations seem appropriate to the present need and nothing exemplifies the present need in the world so much as the Indo-Chinese situation—though it is by no means a unique refugee situation.

Refugees abound in the world. There are probably around 3,000,000 refugees presently around the world moving from one country to another as racial or religious or tribal or political animosities drive them. The U.S., a nation of immigrants, has not seen itself as the haven for every refugee. However, as it perceived a political situation at any one time, it has been a haven for some. Thus, 10,200 refugee immigrations are permitted under Section 203A7 and occasionally the parole power of the Attorney General is exercised in certain other special cases.

There now are about 102,000 Indo-Chinese refugees in Thailand. 85,000 of them came from Laos—another 15,000 from Cambodia—and about 2,000 from Vietnam reaching Thailand by boat. There are another 10,200, almost all Vietnamese, mainly in other countries of Southeast Asia. Most of those are in Malasia, where the Vietnamese have reached by escaping on boats. And we have already 160,000 Indo-Chinese refugees here—most happen to be Vietnamese. In other countries of resettlement, there are another 64,000-65,000 Indo-Chinese refugees. There is a refugee population in Thailand and elsewhere of monstrous proportions and growing all of the time. Every month, more people escape from Vietnam. Eighteen months ago, 300 or 400 a month were leaving; in the summer of 1977 it rose to 500 a month. In the fall, it
rose to 1,500 a month. In April, 1978 it reached 3,000 and in May, over 5,000. From Laos, the number is about 3,000 a month. It rises a bit, it falls a bit, but it averages out to be about 3,000 a month.

Thailand fears that the rest of the world will not adequately assist it in the problem meeting this inflow. Therefore, they have instituted a practice whereby new refugees — if they can not be discouraged at the actual border — are taken to detention centers where there is an attempt to distinguish political refugees from economic refugees. Nevertheless, the rate seems to sustain itself at about 3,000 a month. In Cambodia, the situation is worse internally, and the numbers of refugees who escape are much less. Some months, only three or four dozen, some months more than 600. But obviously very few escape; the low number being attributed to the way in which that government treats its own people. Those that do get out, if they can persuade those Thai forces at the border that they are refugees and not a raiding party, are then more or less welcomed.

I have described our program. We have other programs that are fairly substantial given the size of the nation attempting to offer refuge to these people. The French are quietly taking about 1,000 refugees a month. Most come from Thailand, but some come from Malaysia, Singapore, the Philippines or elsewhere.

The French wish no great publicity about it, but they go on doing it. Some are even taken directly from Vietnam on repatriation flights — people with less than the full documentation required to enter France are nevertheless allowed to get aboard.

Even Australia, with a population of less than 15 million, now accepts about 8,000 boat refugees a year.

Canada has very recently inaugurated a program to take fifty Indo-Chinese boat cases (family cases) a month. Canada in 1965 took about 6,000 of the people who passed through the U.S. So it has had an Indo-Chinese population since 1975 of about 7,000. Australia now has about 7,500 and France has accepted more than 40,000 since 1975. There are a few other thousands scattered around the world.

The U.S. has been foremost in accepting Indo-Chinese refugees. It is plain that we have both the ability and the obligation to do this. The ability to accept refugees in numbers that in any way recognizes the dimensions of the problem depends upon the exercise of the parole power of the Attorney General.

But, something more needs to be done legislatively. The Administration believes the U.S. immigration policy for refugees
should take the form of amendment to the Immigration Act to admit up to 50,000 refugees annually. The Administration now says that policy should not distinguish between a refugee escaping a communist — dominated homeland and a refugee escaping from tyranny of some other sort.

The Immigration Act should be amended to adopt a new definition of "refugee." But the limitation proposed would be 50,000 under normal expected events. About 25,000 Indo-Chinese would qualify. Perhaps 4,000 to 5,000 Chinese. Perhaps as many as 16,000 from the Soviet Union and Eastern Europe. 2,000 or so from Africa and the Middle East and from Latin America.

American assistance to refugees through United Nations funding for care and feeding in emergencies would continue.

The Attorney General's parole power should be retained in the law — not for refugees but for people who are not in refugee status, i.e., someone still in his homeland, to take people who are being persecuted but can not reach the status of refugee by having fled.

A provision for special emergency provisions should be retained in the law so the administration could consult with Congress and take as many as 20,000 from any one group of refugees.

This policy was laid out before the subcommittee on Immigration, Nationality and International Law in early April after the President agreed on the policy. Both the Commissioner of Immigration and Mrs. Derian, who is Assistant Secretary for Human Rights and Humanitarian Affairs, spelled this out. Until the law is changed to permit the dimension of refugee admission the Administration is contemplating another exercise under the parole power of Section 212D5 for as many as 25,000 Indo-Chinese and 12,000 Russians during the course of a year.

Mr. Robert DeVucci*: The role of the private voluntary agencies is to assist refugees in their resettlement in the United States. This is a responsibility voluntary agencies have assumed since before the second World War. The largest number of refugees resettled to date came from Cuba, where over a period of 10 years, some 600,000 to 700,000 refugees were resettled.

The International Rescue Committee recently assisted in the creation of a Citizens Commission on Indochinese Refugees. The Commission includes distinguished private citizens from the

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* Director, Indochina Program, International Rescue Committee.
business, trade union, religious and other communities who share a common concern. The commission visited Southeast Asia in February, 1977, and presented its conclusion and recommendations to the Administration, the Congress and the American public. The results have been beneficial, in that the majority of the Commission’s recommendations have been incorporated into U.S. policy.

Mr. Duarte: By developing the Indo-Chinese outreach program, we can help 100,000 Indo-Chinese adjust their status by the end of this current fiscal year. A series of planning meetings have been held in order to design new forms for adjustment. And, training programs have been held across the country — twenty of them attracted over 500 participants. About 200 centers have been designated across the country to work directly with the Service offices.

These outreach centers are staffed with indigenous Indo-Chinese groups themselves. They have revised the forms for adjustment. They arrange for mass interviews and send out letters stating that these people will soon be receiving their residency cards.

The voluntary agencies have been paying for the sites used for the interviews. They have designed how-to-do books explaining what the law is and how to apply it. The booklets also show step-by-step how to fill out the forms. The voluntary agencies also aid in medical examinations.

Question: Contrast and compare Hungarian and Cuban refugees with Vietnamese refugees in terms of your offices’ problems, in terms of the government policies — in treating them.

Mr. Cushing: Well, I don’t think I can describe what the United States did with the Hungarians — that was much before my time . . .

Mr. Murphy: I might be able to make some comparisons between 95-145 and the Cuban Act. I think the biggest problem resulting from 95-145 is something Mr. DeVerci touched on. As the time element just hit us all at once, we had very little preparation time. In contrast, Cuba fell in 1959-60, but it wasn’t until 1966 that the Cuban bill was passed. By this time, many Cubans had been relocated. Many of them had already acquired permanent residence — I think that’s the big difference. And, of course, the manner in which they came here — just one of timing. One month
we had no problem — the next month we had 130-140,000 refugees to contend with. And even though it was approximately two years later that the law was passed, we had a problem there too, because the law did not give us any lead time at all.

This was a problem. Most of the laws will be signed on one day and take effect three or four months later. This gives us service time to work out regulations, forms and so on. This bill, on the contrary, was effective the day of signature. We were without forms, without regulations. Timing and the urgency of this refugee problem can be contrasted with the others.

We might note that 95-145 permits permanent alien resident status so that delay in the actual processing of conversion in fact, is not a disadvantage. There may be some disadvantages in terms of licensing in certain professions where you must be a resident alien before you take a certain job of professional or semi-professional status. But in any event, the refugee who will benefit from 95-145 will be a resident alien from date of entry into the U.S. We have people who are in the States for six months before they accomplish the paper work. New refugees arriving this year will benefit provided they arrive before the 31st of December of 1978, after they've been physically present for two years.

**Question:** You mentioned that 12,000 Indo-Chinese are authorized. Assuming that by the end of the summer, those 12,000 have been admitted in the country, would there be some admitted after the summer and would they need an authorization?

**Mr. Cushing:** The 12,000 due to arrive are already authorized by determinations of the Attorney General; in fact, last summer, in August of 1977 and in January of 1978. The selection process is rather time consuming. Voluntary agencies take time to locate sponsors because we don't now have any refugees in reception camps here as we did in 1975. They are brought here directly from their first asylum; that is, their temporary safe haven, Thailand, Malaysia, the Philippines, Indonesia, wherever their boat reached — some from as far as Africa. They go directly to individuals who sponsor them, a relative, social organization, a church group, an individual of generous heart. Searching for the sponsor willing to take the individual refugee or his family is time consuming. Sometimes the refugees have medical delays. The law requires that active tuberculosis must be brought to inactive or non-communicable for travel stage. That takes a little time.

**Question:** I just read in the paper the other day that many of the Chinese in Vietnam whose property has been taken have
applied for admission to Communist China and Communist China has agreed to take some of them in. Their thinking is probably that if one country is communist then they might as well go back to their own homeland. I was just wondering if you have any information on that?

My second question concerns your 50,000 refugee ceiling proposal for Congress. Being a layman, would you interpret that as being more restrictive or more liberal?

Mr. Cushing: Certainly more liberal than the present law which, as I said, is limited first world-wide to only 17,200 numbers. But many of those 17,200 numbers cannot be used because there is also a geographical restriction; specifically the refugee must be fleeing from a communist-dominated country. Thus, 7,200 numbers available to the Western hemisphere really can only be relief for Cubans.

They are the only ones from the Western hemisphere who meet that definition of leaving a communist dominated country and not very many do now. Perhaps a couple thousand conditional entry numbers are used a year for Cubans. 5,000 are unused spaces, but they are not transferrable under the law to the Eastern hemisphere. So if one looks at the Eastern hemisphere there are only 10,200 spaces, some of which have to be used to convert the status of people who come here as tourists or students or jumped ship and say they can't go back to their homeland, because it is communist-dominated or they will suffer because they belong to a certain tribe, which tribe is persecuted by the dominate tribe of the country. In fact, only about 9,000 numbers have been available in the last few years in the Eastern hemisphere for people outside. We have, thus, the chance to be much more liberal. We are also proposing that the law contain a provision that permits emergency refugee admissions over and above 50,000.

After consultations with Congress, the numerical limit we are asking Congress to consider is 20,000 per consultation. No annual restrictions or anything else. Whether Congress will enact that proposal remains to be seen. I think people concerned about immigration, which includes everyone at this discussion, can see the importance of a liberal refugee policy. Nothing is more compelling than the situation of refugees.

Question: Did you mention earlier that you have a program for foreigners that come to this country to get a permanent card?
Mr. Cushing: We have a program working with the voluntary agencies. Indo-Chinese refugees who are eligible for adjustment participate.

Question: How about the wealthy? Suppose I invest one-half million dollars in my own business in the United States and I can hire at least five permanent residents. Would that be a good program?

Mr. Cushing: I don't think they would want a refugee policy based on the wealth of the refugee. The practice of the United States lately in dealing with the Indo-Chinese refugees is the most compelling kind of situation because some of them would drown unless someone offers them a place.

We will let the other countries see who they will admit and encourage their acceptance of as many refugees as possible. We will take what remains, be he fisherman, or private soldier. No one wants a refugee policy based on the admission of those who can afford it. Beyond that the provision for the immigration of people based on the availability of what they can invest is closed, not because people are against people who are coming to invest, but because the higher preferences based on relationships have exhausted all available numbers.

Question: How successful is the voluntary agency's role in refugee programs?

Mr. Cushing: Each refugee is approved by the United States and comes to this country through a voluntary agency. The voluntary agency accepts the moral responsibility for that refugee or for the family for an indefinite period — ideally until that refugee is self-sufficient or has attained some measure of self-support.

Consider the refugees who arrived in 1975. Given the conditions under which they arrived — the conditions of the U.S. economy at the time — the political climate and so on, their adjustment and adaptation to American society has been nothing short of phenomenal. It's all to their credit.
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