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

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LEGAL DILEMMAS IN THE AMNESTY PROVISIONS OF THE SIMPSON-MAZZOLI BILL

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Title III of the Immigration Reform and Control Act of 1982\(^1\) would have opened the door for the legalization of certain aliens unlawfully present in the United States by adding a new section (245A) to the Immigration and Nationality Act. The proposed new section would allow the Attorney General, "in his discretion and under such regulations as he shall prescribe," to adjust the status of certain illegal aliens to that of permanent residency or to a newly created status of temporary residency. This latter category itself might potentially lead to permanent residency. While section 245A defined some of the conditions of eligibility for adjustment of status, the Attorney General might still require, under his discretion and regulatory power, supplementary eligibility criteria, evidentiary rules, guidelines for the exercise of discretion, or application procedures. This essay examines the extent to which the bill might require that the Attorney General formulate any such standards through a rulemaking proceeding; second, it explores the question of whether such a rulemaking would be required to comply with the procedural requirements of the Administrative Procedures Act.\(^2\)

The proposed section 245A sets forth several discrete eligibility requirements for undocumented persons who wish to legalize their status. The bill would allow the

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Attorney General to adjust the status of an alien to that of permanent residency only if that alien has unlawfully and continuously resided in the United States since January 1, 1977. Similarly, an alien would qualify for an adjustment of status to the newly created category of temporary residency only if he or she entered the United States before January 1980 and continuously and unlawfully resided in the United States since that time. Both the permanent and the temporary residency provisions require that to qualify for amnesty, an alien who entered the U.S. under a non-immigrant visa must have either overstayed that visa or have been known to the U.S. Government to be in violation of the visa's terms prior to the applicable date.

In addition to these residency criteria, the statute specifically requires that the alien apply for adjustment promptly, not have been convicted of a felony or three or more misdemeanors in the United States, not have participated in racial, social, religious or political persecution, and be otherwise admissible as an immigrant to the United States. Regarding the alien's admissibility as an immigrant, the bill would waive the requirements pertaining to proper entry and documentation, literacy, graduation from unaccredited medical schools and, most importantly, labor certification. The provisions of section 245A would also allow the Attorney General to waive all other requirements for admission except those relating to commission of multiple crimes, crimes of moral turpitude, narcotics violations (other than a single offense of simple possession of 30 grams or less of marijuana), potential subversive activity, and participation in Nazi persecutions.

While section 245A sets forth these fairly detailed statutory requirements, the bill would not automatically entitle an alien fulfilling all of these criteria to an adjustment of status. Under Simpson-Mazzoli, such adjustment would fall entirely within the discretion of the Attorney General, who nonetheless cannot lawfully exercise this discretion in an arbitrary manner. Consequently, Simpson-Mazzoli would require that the Attorney General resolve such issues as instituting the formal procedures for application; imposing additional conditions, if any, for eligibility; establishing methods for applying the statutory

provisions; setting standards to follow in the exercise of discretion; and determining what evidence will be necessary or sufficient to prove various claims. Such determinations would have great practical significance: they would affect decisions by the INS as to who shall obtain permanent or temporary residency, as well as decisions by individual undocumented persons regarding whether or not to risk exposure and deportation by applying for legalization under section 245A.

In formulating these and similar guidelines the Attorney General theoretically would have several procedural options. On the one hand, he might proceed by way of case-by-case determinations, announcing generally applicable standards as they are needed to resolve individual controversies. Alternatively, the Attorney General might issue detailed regulations which set forth, to the degree that issues can possibly be foreseen, precise general rules to be applied to individual circumstances. In addition to the substantive impact of these decisions, the procedure selected by or imposed upon the Attorney General will have significant effects. The choice of procedure will affect the amount of community input, the level of confidence in the predictability of the system, and ultimately the number of the undocumented who choose to apply for legalization. Most importantly, full rulemaking under the Administrative Procedures Act requires notice in the Federal Register of the proposed rule; an opportunity for interested persons to submit written comments; consideration of these comments; and a statement of the basis and purpose of the rule before it can become effective.4

Because the process of setting a rule allows for public commentary, a general rulemaking is much more likely to reflect special knowledge about the realities of the situation of illegal immigrants. The many community groups which possess such knowledge represent undocumented workers, minority permanent residents and citizens, and labor or voluntary agencies; they could contribute both their expertise and their particular views and concerns to the rulemaking process, especially if they are given standing to communicate their positions to the

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4. 5 U.S.C. Section 553 (b), (d). See also 5 U.S.C. Section 552, which requires publication of all rules in the Federal Register.
Attorney General prior to issuance of the regulations. Even disregarding such formal channels of communication, the Attorney General when acting in a rulemaking capacity would more likely take account of general effects and balance the impacts of several factors than if he had to decide only one narrow issue. Second, a rulemaking procedure would be more certain and, importantly (given the short statutory framework), more immediately predictable. A general regulation could cover all of the salient considerations from the start. A case-by-case approach would postpone consideration of some major issues and would leave the entire system open to significant revision in terms of expected chances of a favorable decision. Moreover, regulations could become effective upon promulgation; the results of adjudication would have to await hearings and appeals.

Both of these factors, community input and predictability, would tend to shape the degree to which undocumented persons attempt to take advantage of the legalization program. The greater the community input, the more likely that the standards generated would conform to the concerns and practical situations of presently undocumented persons. Second, the more predictable the system, the more an alien could judge his or her chances of obtaining adjustment of status. Under such a system, many more undocumented persons would risk exposure and possible deportation by applying for adjustment of status. This argument does not assert that a case-by-case approach has no advantages. The method is particularly well suited to deal with unique and varying individual circumstances and novel and unforeseeable problems. Nevertheless, an adjudicatory approach would probably result in lower levels of participation in the program.

As a consequence, those who will represent the interests of undocumented persons may have to confront the question of whether they may legally force the Immigration and Naturalization Service (INS) to behave as a quasi-legislature through prospective rulemaking or as a quasi-judiciary through case-by-case adjudication. This question raises several distinct legal issues which are quite unsettled at the present time. The most important of

these issues concern whether the choice between rulemaking and adjudication is purely a matter of choice for the administrative agency or whether the general nature of the problem or the specific language of the statute may compel the agency to adopt a particular mode of proceeding. Furthermore, if the INS chooses or is forced to promulgate rules, we may inquire whether the agency can be compelled to go through proceedings involving public notice and comment prior to the adoption of valid regulations. 6

The problem of remedies also deserves mention. Regulations which result from a procedurally defective process are null and void and will be invalidated by the courts. 7 As a result an individual successfully challenging a rule on procedural grounds will be put in the same position that he or she would have been in if that rule had never existed. Courts will not speculate on what the regulation would have been had individuals been given the notice and opportunity to comment; thus invalidation of a rule will not necessarily mean that the challenger will achieve his or her ultimate goal. If the challenged regulation merely poses an obstacle prior to the exercise of otherwise valid discretionary powers, then the court will remand the individual's case for a determination of the applicability of additional criteria and the appropriateness of discretionary action. 8 A more difficult problem is posed when the challenged regulation provides not an obstacle, but rather the means with which to bestow an otherwise

6. Interestingly, the answers given to courts in response to key questions about administrative behavior in the immigration sector reveal substantial disparities which seem to follow regional lines. The rulings which impose greater restrictions on agency discretion tend to cluster in the Ninth Judicial Circuit in California. This tendency may have some tactical implications for the location of lawsuits regarding the implementation of Simpson-Mazzoli.

7. See, for example, NRDC vs. EPA, 683 F2d at 767; and Sannon, 460 F. Supp. at 468.

8. See Lewis-Mota, 469 F2d 478, in which the case was remanded to determine whether the applicants were "otherwise admissible"; in Patel 638 F2d 1199, Ruangswang, 591 F2d 39, and Hou Ching Chow, 362 F. Supp. 1268, the cases were remanded for exercise of discretion; but in United States ex rel. Parco, 426 F. Supp. 976, the plaintiff was granted a stay of voluntary departure when the District Director stipulated that the challenged policy was the sole reason for denial.
unavailable benefit. In such instances the “remedy” appears to do no more than to hold the individual’s claim in abeyance until the agency can validly promulgate substantive standards.

The regulatory structure set up under the legalization provisions of Simpson-Mazzoli could take the form of routine adjustments of status, unless the applicant falls within certain enumerated exceptions; but it could also set guidelines which specify when, as a matter of grace, adjustment of status should be granted; or it could do both. An applicant who turns himself or herself in as an illegal alien to apply for legalization would face continued uncertainty if she or he successfully challenged either type of regulatory scheme. An alien who successfully challenges an exception will likely still face a discretionary decision by the INS which is subject to review only for arbitrariness. Two likely outcomes of the law’s regulatory scheme are even more discouraging. A successful challenge to guides on discretion will probably only buy time while the agency properly repromulgates its standards; and the chances are slim that the agency would make favorable changes in response to public comments. Nevertheless, faced with the prospect of losing employment as a result of a national employer sanctions law, an alien might yet be persuaded to petition for legalization and then challenge the regulations applied in the case if the agency initially denies the request for adjustment of status.

In summary, the legalization provisions of Title III of Simpson-Mazzoli rely to a great degree on the actions of the Attorney General to give them form and effect. In the event of Simpson-Mazzoli’s enactment, the Attorney General would very likely be constrained to make a number of the crucial implementation decisions through a rulemaking proceeding rather than by adjudication because of the general applicability of such regulations and the severity of the sanctions they enforce. Furthermore, the procedural requirements of the Administrative Procedures Act may apply to these rulemakings. The technically non-binding nature of some of the regulations and the exigencies of short deadlines may, however, allow the Attorney General to disregard such requirements. One can address the problem only in terms of probabilities and possibilities because the law in these areas is at times muddled and at other times plainly conflicting. The possibilities for
procedural challenges to substantive regulations should be addressed by the Justice Department, community groups, and disappointed applicants.