

A Research Agenda for Immigration Law: A Report to the Administrative Conference of the United States

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INTRODUCTION

In 1986 Congress changed the face of American immigration law. It amended the Immigration and Nationality Act (INA),¹ an already grotesque statute laden with technicality, by introducing strange new concepts like "employer sanctions," "legalization," "special agricultural workers," and a range of others.² All these innovations require new administrative machinery and present new and difficult problems of both law and policy.

As ambitious and far-reaching as the 1986 legislation was, it merely whetted the congressional appetite. Numerous immigration bills, discussed at various points in this Article, recently have been

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1. Immigration and Nationality Act, 8 U.S.C. §§ 1101-1524 (1982) [hereinafter INA].

2. The best known of these enactments was the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered titles and sections) [hereinafter IRCA]. IRCA was followed abruptly by the Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986) and the Immigration and Nationality Act Amendments of 1986 (Consular Efficiency Act), Pub. L. No. 99-653, 100 Stat. 3655 (1986).

introduced. More are inevitable. Together with developments on other fronts, they ensure that interest in immigration reform will remain vibrant for many years to come.

Given both the potential and the likelihood of reform, thoughtful and creative scholarship in the field of immigration is needed now more than ever. It is worth investing some effort to define the agenda. In this vein, one of the principal contributors might well turn out to be the Administrative Conference of the United States. Created by Congress in 1964,³ the Conference functions as a government think tank on matters of administrative law. It is charged with studying problems of administrative procedure and imparting information and making recommendations to Congress, the President, the federal administrative agencies, and the Judicial Conference.⁴

Appreciating the level of interest in immigration and the pressing need for additional research, the Conference set out to identify the specific areas of immigration law in which study of administrative procedures would be especially productive. At the request of the Conference, I have prepared this Report outlining the immigration projects that I recommend for full study. In selecting the topics, I weighed such factors as the practical importance of the issue, the current interests of the immigration law community, the feasibility of the study, and the closeness of the issue to the concerns and responsibilities of the Administrative Conference. The last factor requires emphasis. Given the purpose of the Report, I confined myself to issues of immigration procedure (broadly defined); problems concerned with the substantive criteria for exclusion, deportation and other immigration-related decisions are beyond the scope of the present work.

The Report identifies thirteen studies for the Conference to consider. There were four other possibilities that I examined, but which appeared substantial enough for only very modest projects. They are mentioned in the last section. I wish to stress that my goal has been to provide the Conference with a wide range of options from which to select. Like other federal agencies, the Administrative Conference has limited funds. It also has a finite, though deservedly highly respected, staff and a number of other administrative law priorities removed from immigration. I do not expect, or even urge, the Conference to attempt to take on all the projects described in this Report.

Finally, although I hope that the agenda I have laid out will be of help to those who study immigration procedure, I do not claim to

3. See the Administrative Conference Act, 5 U.S.C. §§ 571-576.

4. See 5 U.S.C. § 574. See generally McGowan, *The Administrative Conference: Guardian and Guide of the Regulatory Process*, 53 GEO. WASH. L. REV. 67 (1985).

have exhausted the field. Others surely will think of topics I have missed and future events will trigger still further problems worthy of scholarly writing. In the meantime, any debate over which immigration issues should command our priorities can only be beneficial.

I. REVIEWABILITY OF CONSULAR OFFICERS' DENIALS OF VISA APPLICATIONS

Almost all aliens who wish to enter the United States must first secure visas,⁵ which are issued by consular officers at the various United States consulates abroad.⁶ When a visa is denied, the applicant may ask the Visa Office in Washington, D.C. to review the decision. But the opinion of the Visa Office is purely advisory (except for its interpretations of law, which are binding).⁷ There is no other provision, in either the statute or the regulations, for *administrative* review of the consulate's decision.

Whether *judicial* review is available under the current statute is the subject of some controversy. Although nothing in the statute expressly prohibits judicial review of visa denials, the courts have inferred — from various statutory provisions and from the legislative history — a congressional intent to preclude judicial review.⁸ Academic commentary has been highly critical of those court decisions.⁹

Legal issues concerning the reviewability of visa denials have been debated for several years but recent developments now make these issues especially timely. As for administrative review, Representative Gonzalez has introduced a bill that would establish, within the State Department, an appellate board to review specified categories of visa denials.¹⁰ As for judicial review, a few recent court decisions have announced limited exceptions to the rule of nonreviewability.¹¹ Recent academic commentary¹² has revived the general issue of judicial review of visa denials. Representative Frank has introduced legisla-

5. See INA §§ 212(a)(20) (immigrant visas), 212(a)(26) (nonimmigrant visas), 8 U.S.C. § 1182(a)(20), (26).

6. See *id.* § 221(a), 8 U.S.C. § 1201(a).

7. See 22 C.F.R. § 42.130(c)(1987).

8. For summaries of the statutory provisions and legislative history on which the courts have relied, see the writings compiled in Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1307 n.74 (1986).

9. *Id.*

10. See H.R. 2567, 100th Cong., 1st Sess. (June 2, 1987).

11. See D. MARTIN, MAJOR ISSUES IN IMMIGRATION LAW 108 (1987) (cases cited).

12. See generally Legomsky, *supra* note 8.

tion that would expressly authorize judicial review of those visa denials which are based on national security grounds.¹³ Finally, the general subject of visa denials occupied much of the 1986-87 mid-year conference of the American Immigration Lawyers Association.¹⁴

The following questions should be addressed:

1. What exactly would be the benefits of either administrative or judicial review of visa denials? How much practical importance would those benefits have? To what extent do the answers vary depending on the category of visa in question — for example, immigrant versus nonimmigrant visas, one type of immigrant visa versus another, and one type of nonimmigrant visa versus another?
2. What are the volumes of (a) visa applications; (b) visa denials; (c) denied applicants who request reconsideration by the consulates; (d) denied applicants who request advisory opinions from the Visa Office; (e) instances in which the Visa Office recommends a contrary decision; and (f) decisions actually changed upon reconsideration? How do these numbers break down by visa category?
3. Would the procedures currently employed by the consular officers be capable of generating an administrative record adequate to permit either administrative or judicial review? If not, at what cost could the procedures be modified to make them adequate? Could the interests protected by INA section 222(f),¹⁵ which makes State Department visa records confidential, be accommodated? Should section 222(f) be amended?
4. If *administrative* review is recommended, then the following questions should be addressed:
 - a. What type of body should perform the review function? In particular, what should be its location, degree of independence, and the number, qualifications, and tenure of its members?¹⁶
 - b. Over which categories of visa denials should this body have jurisdiction?
 - c. Who should have standing to challenge the visa denial? The alien applicant? The United States relative, em-

13. See H.R. 1119, 100th Cong., 1st Sess., § 2(b) (Feb. 18, 1987).

14. Remarks at the meeting of the American Immigration Lawyers Association (AILA) at the December 1986 AILA Conference in Acapulco, Mexico (transcripts available from AILA, 1000 16th Street N.W., Washington, D.C.).

15. 8 U.S.C. § 1202(f).

16. Here, the study could consider the forum selection factors articulated in the Administrative Conference of the U.S., ACUS Rec. 85-4, 1 C.F.R. § 305.85-4 (1987) [hereinafter ACUS].

- ployer, or school? Case law generally has assumed that, apart from reviewability, only certain United States residents other than the alien applicant would have standing to challenge the visa denial.¹⁷
- d. What procedure should the administrative review body employ? One could include here the mechanics and logistics of assembling the administrative record, the timing of review, and the possibility of oral argument. Should the decision be collegial or individual? What should be the standard of review? When, if ever, is *in camera* review appropriate? In national security cases? In criminal informant cases? What should the final disposition contain?
 - e. The Gonzalez bill¹⁸ should be evaluated as to:
 - i. its approaches to the questions listed above, and
 - ii. how, if at all, it would affect future courts' analyses of whether the statute precludes judicial review.

5. As for *judicial review*:

- a. Evaluate the case law. Have the courts correctly interpreted the existing statute?
- b. As a matter of policy, *should* there be judicial review of any categories of visa denials, such as immigrant visas or certain nonimmigrant visas?
 - i. Identify the problems associated with judicial review, including logistics, economics, and delays.
 - ii. How do these problems stack up against the benefits?
- c. If there is to be judicial review, should it be in the district courts or in the courts of appeals (or in a specialized court)? Who should have standing? What time limits, if any, should be imposed? What is the appropriate standard of review?

17. See cases cited in D. MARTIN, *supra* note 11, at 108; see also *Pena v. Kissinger*, 409 F. Supp. 1182, 1184-85 (S.D.N.Y. 1976).

18. See *supra* note 10 and accompanying text.

II. REPRESENTATION OF ALIENS IN ADMINISTRATIVE PROCEEDINGS

Several recent developments noted below would make timely a comprehensive study of the means by which aliens, particularly indigent aliens, may obtain competent representation in deportation and other immigration-related administrative proceedings. The study could examine the following questions:

1. How useful is representation at various stages (*e.g.*, interview, hearing, appeal) of various immigration proceedings (*e.g.*, deportation, exclusion, visa application, naturalization)? Within given categories, on what variables would the degree of usefulness depend? Consider the benefits to the alien and the advantages and disadvantages to the agency.
2. How many aliens currently are (a) represented and (b) unrepresented, at various stages of various categories of immigration proceedings? Of those who are represented, how many of the representatives are (a) lawyers, (b) law students, or (c) individuals with no legal training? What observations can those who have come into contact with the various representatives offer about the quality of the representation and its impact on either the conduct or the disposition of the case?
3. In types of cases where representation is found to be desirable, what devices could be employed to facilitate the representation of those aliens who cannot afford private counsel?
 - a. In many immigration cases aliens are represented by nonlawyers. When is this appropriate? A recent Administrative Conference recommendation¹⁹ urged the "mass justice" agencies to encourage greater use of nonlawyer representation. This portion of the study could explore in depth the extent to which that recommendation should apply to immigration. Sub-issues include:
 - i. The existing INS regulations permit a law student enrolled in the final year of an accredited law school (or a law graduate not yet admitted to the bar) to represent an alien on an individual case basis.²⁰ There must be proper supervision that is part of a legal aid program or law school clinic, the representative may not be paid, and the official before whom the representative would appear must permit the appearance. Should the restrictions be either broadened or nar-

19. See 1 C.F.R. § 305.86-1 (1987).

20. 8 C.F.R. § 292.1(a)(2) (1987).

- rowed? For example, should it be necessary that the student be in his or her final year?
- ii. Is there a way to use law students in legalization cases? The immigration law section of the Association of American Law Schools is actively looking for ways to do this.²¹
- b. How might indigent aliens obtain lawyers?
- i. The statute allows aliens in both exclusion and deportation proceedings to be represented by counsel, but "at no expense to the government."²² The sixth amendment is inapplicable because deportation has been held to be a matter of civil law. Recent judicial dicta, however, suggest that in certain deportation cases due process will require appointed counsel.²³ Are there situations in which counsel should be appointed, either as a matter of constitutional law or as a matter of policy?
 - ii. Current law prohibits the Legal Services Corporation from expending funds for the representation of most categories of aliens.²⁴ Should these restrictions be reassessed?²⁵
 - iii. The Ninth Circuit has recently held en banc that the Equal Access to Justice Act²⁶ permits the award of attorney fees to the prevailing party in proceedings before immigration judges and the Board of Immigration Appeals.²⁷ As a matter of (a) statutory interpretation and (b) policy, should the prevailing party be awarded attorney fees in these cases?

21. A problem with studying this issue is that the period for filing legalization applications is due to expire May 4, 1988. Study of this issue might still prove useful, however, for reasons set out in the discussion of legalization. *See infra* text accompanying notes 104-05.

22. *See* INA § 292, 8 U.S.C. § 1362.

23. *See* D. MARTIN, *supra* note 11, at 28-29.

24. *See* 45 C.F.R. § 1626 (1986).

25. In 1986 Congress exempted from these restrictions temporary agricultural workers who seek assistance with specified housing and employment problems. IRCA § 305, 100 Stat. at 3434 (codified at 8 U.S.C. § 1101 note).

26. Pub. L. No. 99-80, 99 Stat. 183, 5 U.S.C. § 504 note, 28 U.S.C. § 2412 note (Supp. IV 1986).

27. *See* Escobar Ruiz v. INS, 838 F.2d 1020 (9th Cir. 1988).

III. RULES OF PRACTICE FOR IMMIGRATION JUDGE PROCEEDINGS²⁸

The Justice Department's Executive Office for Immigration Review (EOIR) recently announced a comprehensive set of rules to govern the practice and procedure in almost all proceedings before immigration judges.²⁹ The proceedings to which the new rules apply are deportation, exclusion, bond redetermination, and rescission of adjustment of status.³⁰ The new rules apply nationwide,³¹ but individual immigration courts, by majority vote of the local immigration judges, may adopt local rules of procedure that do not conflict with the national rules.³²

Questions that might usefully be examined are:

1. What types of local rules are contemplated?
2. What have been the responses of the immigration courts?
3. What criteria should determine whether a given procedural issue is better addressed nationally or locally?
4. How do the new EOIR rules measure up against those criteria?
5. Should the EOIR also promulgate rules of practice and procedure for the Board of Immigration Appeals?

IV. EXEMPTION OF DEPORTATION HEARINGS FROM THE ADMINISTRATIVE PROCEDURE ACT

In passing the INA in 1952, Congress exempted deportation hearings from the Administrative Procedure Act (APA) requirements applicable to most other formal agency adjudication.³³ Instead, Congress chose to spell out a specific procedure for deportation hearings.³⁴ As a practical matter, the INA procedure supplies most of the safeguards afforded by the APA, and administrative practice in recent years has inched deportation procedure even closer to the APA model (e.g., transferring immigration judges out of the INS and into the Executive Office for Immigration Review). Differences remain, however, and the question arises why deportation hearings should be conducted any differently from other formal agency adjudication. A study could identify the differences, assess their practical

28. Rules of practice for immigration judge proceedings, exemption of deportation hearings from APA, and hearing procedure (exclusion versus deportation) could be combined into a single study of hearing procedures in immigration cases.

29. See 52 Fed. Reg. 2931-42 (Jan. 29, 1987) (to be codified at 8 C.F.R. §§ 3.12-3.38).

30. See 52 Fed. Reg. at 2931-39.

31. See *Id.* at 2937-39 (to be codified at 8 C.F.R. § 3.38).

32. *Id.* at 2939 (to be codified at 8 C.F.R. § 3.38).

33. See *Marcello v. Bonds*, 349 U.S. 302 (1955).

34. See INA § 242(b), 8 U.S.C. § 1252(b).

impact, and examine whether the INA should be amended to bring deportation hearing procedure within the APA. The study could address the following:

1. The major respect in which deportation hearings deviate from APA procedure is that deportation hearings do not require separation of functions. This is true in two respects. First, the "special inquiry officers" (or "immigration judges" as they are now commonly called)³⁵ who preside over the hearings sometimes perform what could be classified as a prosecuting function.³⁶ Second, the officers are subordinate to the Attorney General.³⁷ One could study whether either aspect of this combination of functions has any practical impact on deportation decisions, and, if so, whether there are any categories of immigration cases in which combining functions is desirable.³⁸
2. The immigration judges are not administrative law judges. The study could compare the personnel rules for both types of officials, determine whether there are pertinent differences in salary, benefits, or security, and examine whether the officials who preside over deportation hearings ought to be administrative law judges.
3. Are there any other differences between deportation procedure and APA procedure? If so, are they desirable?
4. Are there other formal agency proceedings exempt from the APA? What patterns can be found?

V. HEARING PROCEDURE: EXCLUSION VERSUS DEPORTATION³⁹

In immigration, many legal consequences flow from the determination of whether an alien has made an "entry" into the United States. One consequence concerns the procedure that the government must follow when removing the alien from the United States. If there has been a technical "entry," the alien is entitled to a deporta-

35. See 8 C.F.R. § 1.1(b) (1987).

36. INA § 242(b), 8 U.S.C. § 1252(b) (they may "interrogate, examine, and cross-examine the alien or witnesses").

37. The chain of command begins with the Attorney General, INA § 103(a), 8 U.S.C. § 1103(a), and continues downward to the Director of the Executive Office for Immigration Review, 8 C.F.R. § 3.0 (1987), to the Chief Special Inquiry Officer, *id.*, to the individual special inquiry officers. *Id.* § 3.9 (1987).

38. For a general analysis of intra-departmental separation of functions, see ACUS Rec. 86-4, 1 C.F.R. § 305.86-4 (1987).

39. See *supra* note 28 (comments therein).

tion hearing;⁴⁰ if not, then the alien is entitled only to an exclusion hearing, at which the substantive defenses are narrower and the procedural safeguards somewhat fewer.⁴¹ The main procedural differences concern burdens and standards of proof, appealability of bond determinations, and availability of constitutional safeguards.⁴²

Entry issues tend to be of two types. Sometimes the question is whether the alien became sufficiently free of restraint to have effected an entry. In other cases the question is whether an alien who clearly entered once, but who then left and returned, has made a second entry. The case law is vast, technically complex, and productive of many anomalies.⁴³

Professors Aleinikoff and Martin have advanced the interesting suggestion that Congress should abolish the distinctions between exclusion procedure and deportation procedure and provide instead a single type of hearing at which an alien would have to prove either that he or she had once been inspected and admitted, or that he or she now has the right to be admitted.⁴⁴ Issues worthy of study might include:

1. Should their general suggestion be adopted?
2. If so, what specific ingredients should this generic procedure contain?
3. Should the procedure rest on any other distinctions, including whether the alien is an immigrant or a nonimmigrant?

VI. ASYLUM PROCEDURE⁴⁵

The INA affords two distinct routes to asylum. With certain qualifications, INA section 208⁴⁶ provides that an alien who has a "well-founded fear" of being persecuted on specified grounds may be granted asylum in the United States. Section 243(h),⁴⁷ again with certain qualifications, provides that an alien whose life or freedom would be threatened on any of those specified grounds shall not be returned to the country of persecution.

An application for relief under INA section 208 is filed with the local district office of the INS,⁴⁸ unless either exclusion or deporta-

40. T. ALENIKOFF & D. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 315 (1985).

41. *Id.* at 315, 323.

42. *Id.* at 323.

43. *See id.*

44. *See id.* at 342-47.

45. Much has been written on asylum procedure. For a partial compilation of the recent writings, see Legomsky, *supra* note 8, at 1363 n.410.

46. INA § 208, 8 U.S.C. § 1158.

47. *Id.* § 243(h), 8 U.S.C. § 1253(h).

48. *See* 8 C.F.R. §§ 208.1(a), 208.3(a) (1987).

tion proceedings have begun, in which case the application is filed with the immigration judge.⁴⁹ A decision by the district office is not appealable,⁵⁰ but the application may be renewed before the immigration judge in any subsequent exclusion or deportation proceeding.⁵¹ The asylum decision, being part of the final exclusion or deportation order of the immigration judge, ultimately will be reviewable by the Board of Immigration Appeals (BIA).⁵² In contrast, an application for relief under INA section 243(h) can be filed only with the immigration judge.⁵³ Again, that decision will ultimately be reviewable by the BIA.⁵⁴

In recent years there has been much controversy and commentary concerning asylum procedure. The major procedural issues worthy of study include:

1. Who should adjudicate asylum claims, both at the initial stage and at any appellate stage? Local immigration officers, immigration judges, and BIA members possess neither special knowledge of conditions in foreign countries nor specialized expertise in the area of asylum. Should a specialized corps of asylum adjudicators therefore be created? The Justice Department has so proposed.⁵⁵ Sub-issues include:
 - a. What are the general pros and cons of specialized adjudication, and how do they apply to asylum?
 - b. Is the need for specialized expertise already adequately supplied by the State Department's Bureau of Human Rights and Humanitarian Affairs, which supplies advisory opinions in those cases it considers appropriate?⁵⁶ What are the disadvantages of placing weight on the State Department views?
 - c. Could the need for expertise be met by providing for participation by the United Nations High Commission for Refugees? This idea has been adopted in several other countries and has been advanced by some commentators

49. See *id.* §§ 208.1(b), 208.3(b).

50. *Id.* § 208.8(c).

51. *Id.* § 208.9.

52. See *id.* §§ 3.1(b)(1) & (2), 236.7, 242.21.

53. *Id.* § 242.17(c).

54. *Id.* §§ 3.1(b)(1) & (2), 236.7, 242.21.

55. See Arocha, *Political Asylum Revision Dropped*, Wash. Post, Oct. 30, 1987, at A23.

56. See 64 INTERPRETER RELEASES 1215-17 (Nov. 2, 1987).

here.⁵⁷ What would be the advantages and disadvantages of such participation?

- d. If specialized asylum adjudication is recommended, either for the initial decision making or for any administrative appeals or for both, what attributes should the adjudicators possess?
 - i. How independent should adjudicators be? In particular, should they be part of the State Department? Should they be part of the Justice Department, either within or outside the INS? Should an independent agency be created? What tenure should the decision makers be given? How can personnel practices accommodate radical fluctuations in workload without assigning to the adjudicators any "fill-in" responsibilities inconsistent with judicial detachment?
 - ii. Should proceedings be formal or informal? Adversarial or inquisitorial?⁵⁸
 - iii. Should the adjudicators be lawyers?
 - iv. What kinds of recruitment and training programs should be provided?
 - v. Should the adjudicators be centralized or geographically dispersed?
 - vi. Should they specialize by country (or region) of origin?
 - vii. Should there continue to be judicial review? In which court? If the asylum decision is severed from the exclusion or deportation decision at the administrative level, should the two orders nonetheless be consolidated at the judicial level?
2. What should be done with the alien while the asylum adjudication is pending (a) administratively and (b) in court? The options include detention, parole, and release on bond.

57. See, e.g., Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. MICH. J.L. REF. 183, 236 (1984); Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 263-64 (1984).

58. See Martin, *The End of De Facto Asylum: Toward a Humane and Realistic Response to Refugee Challenges*, 18 CAL. W.J. INT'L L. 161 (1988).

VII. ADMINISTRATIVE DETENTION OF ALIENS⁵⁹

The INS has the discretionary power to detain aliens pending either exclusion proceedings⁶⁰ or deportation proceedings.⁶¹ In 1982 the INS adopted the practice of automatically detaining those aliens who arrive at the border without documents, absent specified unusual circumstances.⁶² In many cases the undocumented arrivals are asylum claimants. The INS approach, which has generated much controversy, could be the focal point of a more general study of administrative detention of aliens pending administrative or judicial proceedings. Issues could include:

1. What are the costs and benefits of detaining, pending an admission decision, those aliens who arrive at the border without documents?
 - a. Have aliens detained in remote facilities, including the major detention center in Oakdale, Louisiana, been able to obtain adequate representation? This issue is quite timely. The recent construction of the Oakdale facility was controversial, and a second facility — Oakdale II — is now being planned for the same site.⁶³
 - b. How much discretion should INS officials have in making individual detention decisions?
2. The INS recently proposed disallowing the use of surety bonds as security against several contingencies, including appearances at deportation hearings; cash would become the only acceptable security.⁶⁴ This proposed regulation is worth studying. Sub-issues include:
 - a. How much impact would this change have? In some states, the bonding companies already insist on 100% collateral in deportation cases; in others, the alien need pay the company only a fraction of the bond amount.⁶⁵

59. See generally Schmidt, *Detention of Aliens*, 24 SAN DIEGO L. REV. 305 (1987).

60. See INA § 235(b), 8 U.S.C. § 1225(a) & (c). See also 8 C.F.R. § 235.3 (1987).

61. See INA § 242(a) & (c), 8 U.S.C. § 1252(a) & (c); 8 C.F.R. § 242.2 (1987).

62. See 8 C.F.R. § 235.3(b) (1987) (qualified by INA § 212.5(a)).

63. Telephone conversation with INS Associate General Counsel William Joyce (July 30, 1987).

64. 52 Fed. Reg. 24,475 (July 1, 1987).

65. Telephone conversation with Warren Leiden, Executive Director, Am. Immigration Lawyers Ass'n (Aug. 4, 1987).

- b. What would be the benefits of the new rule?
 - c. What would be the costs?
3. Special detention problems arise in connection with the Cubans who arrived in 1980 from Mariel. Some are suspected to be criminally dangerous, and Cuba will not readmit them. The INS therefore is detaining, indefinitely, those whom it regards as dangerous to society.⁶⁶ The INS instituted, then halted, and has now recently reinstated,⁶⁷ a program to review the status of each of the Cubans who are detained to ascertain which ones can safely be released. The fairness and efficiency of the status review program could usefully be studied.⁶⁸

VIII. MOTIONS TO REOPEN DEPORTATION PROCEEDINGS

A deportation order is issued by an immigration judge after an evidentiary hearing.⁶⁹ The order is administratively appealable to the BIA.⁷⁰ Judicial review of the BIA decision is ordinarily by petition for review in the court of appeals.⁷¹

Occasionally, after a deportation order has been issued but before it has been executed, circumstances change. The alien might no longer fit within one of the statutory deportation grounds or, more commonly, the alien might now qualify for some statutory grant of affirmative relief from deportation. In other cases, new evidence might enable the alien to establish material facts that had been present all along. In any of those situations, the alien's only options are either to leave the country under an order of voluntary departure (if granted the opportunity), or to file a motion to reopen the deportation proceeding or reconsider the deportation order. The motion is filed with the BIA if the BIA has previously rendered a decision in the case; otherwise, the motion is filed with the immigration judge.⁷²

Filing a motion to reopen does not automatically stay execution of the deportation order.⁷³ Once the motion is denied, however, the alien may petition the court of appeals for review of the denial.⁷⁴ Filing that petition triggers an automatic stay unless the reviewing

66. For the background events and litigation, see D. MARTIN, *supra* note 11, at 31-33 (1987).

67. Telephone conversation with William Joyce, *supra* note 63.

68. While this article was in press, the United States and Cuba reached agreement on a plan that will alter the situation of the Cuban detainees. See generally 64 INTERPRETER RELEASES 1331 (Dec. 7, 1987) 1365 (Dec. 14, 1987).

69. See INA §§ 236(a), 242(b), 8 U.S.C. §§ 1226(a), 1252(b).

70. See 8 C.F.R. § 3.1(b)(2) (1987).

71. See INA § 106(a), 8 U.S.C. § 1105a(a).

72. See 8 C.F.R. §§ 3.2, 3.8, 242.22 (1987).

73. *Id.* §§ 3.8, 242.22.

74. See *Giova v. Rosenberg*, 379 U.S. 18 (1964).

court affirmatively decides otherwise.⁷⁵

In recent years, significant numbers of aliens have moved to reopen their deportation proceedings. There is at present a great controversy as to the extent of the problem of frivolous motions to reopen. By far the most common ground asserted for reopening is that the alien is now eligible for a remedy called "suspension of deportation," which in most cases requires seven years of continuous physical presence, extreme hardship, good moral character, and the favorable exercise of administrative discretion.⁷⁶ In those cases, the alien is seeking a hearing at which to present evidence establishing eligibility for suspension. However, because the motion to reopen ordinarily will delay execution of the deportation order, an alien can have an incentive to file such a motion even when the arguments for reopening are frivolous. The INS considers the problem serious; many others do not. There is similar controversy over what, if anything, should be done to reduce whatever delay does exist.

One recent development that enhances the timeliness of the subject of motions to reopen is the Supreme Court's decision in *INS v. Cardoza-Fonseca*.⁷⁷ The Court held that an applicant for political asylum under INA section 208⁷⁸ need establish only a "well-founded fear of persecution," rather than meet the more stringent "clear probability" standard that the BIA previously had been applying.⁷⁹ It seems likely that many aliens previously ordered deported soon will file motions to reopen or reconsider in light of *Cardoza-Fonseca*.

A study of this subject matter might address the following:

1. How many motions to reopen are filed? What proportion are frivolous? Of those that are not frivolous, what proportion are granted? When motions are granted, how often does the reopened proceeding result in a different outcome on the merits? When motions are denied, how often do aliens seek judicial review? How much delay does judicial review actually entail? What proportion of the petitions for review are frivolous? In what proportion does the court reverse? When a court does reverse and remand for a reopened hearing, how much additional delay is there? In what proportion of cases reopened by court order does the BIA or immigration judge alter the origi-

75. See INA § 106(a)(3), 8 U.S.C. § 1105a(a)(3).

76. See INA § 244(a), 8 U.S.C. § 1254(a).

77. 107 S. Ct. 1207 (1987).

78. INA § 208, 8 U.S.C. § 1158.

79. 107 S. Ct. at 1222.

nal decision? Empirical research on these questions would be useful.

2. What should be the criteria for determining whether to reopen or reconsider? How much detail should the regulations provide?
3. How might delay at the administrative level be minimized? What is currently being done?
 - a. Should there be preliminary screening for frivolousness and expedition of cases found to be frivolous?
 - b. Should attorneys who file frivolous motions be disciplined?
4. Should the BIA set up a special track to process the expected high volume of *Cardoza-Fonseca* motions?
5. The Supreme Court has held that, when an alien moves to reopen for the purpose of applying for suspension of deportation and the BIA denies the motion on the ground the alien has not alleged facts that demonstrate extreme hardship, the BIA determination is entitled to great deference.⁸⁰ But more specific details of the role of the reviewing court after *Wang* are in much doubt. Should courts require the BIA to articulate reasons for its decision, or to consider all relevant hardship factors cumulatively rather than individually? What is, and what should be, left of substantive judicial review? May the BIA deny the motion (without a hearing) on the ground that it doubts the truth of the allegations in the moving papers? Should motions to reopen be construed in the light most favorable to the movant?⁸¹

IX. HABEAS CORPUS REVIEW OF DEPORTATION ORDERS

Final deportation orders are generally reviewable only by petition for review in the court of appeals.⁸² But there is one exception: “[An] alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.”⁸³ This exception has given rise to exceptionally difficult technical issues that would benefit from comprehensive study. The cases are in hopeless conflict on (a) the meaning of “custody” and (b) precisely which orders may be reviewed in the habeas corpus proceeding once custody is established. Recent cases have added to the confusion.⁸⁴

80. *INS v. Jong Ha Wang*, 450 U.S. 139, 144-46 (1981).

81. The Supreme Court might decide this issue in *INS v. Abudu*, 802 F.2d 1096 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 1564 (1987).

82. See INA § 106(a), 8 U.S.C. § 1105a(a).

83. *Id.* § 106(a)(9), 8 U.S.C. § 1105(a)(9).

84. For a discussion of recent cases see T. ALENIKOFF & D. MARTIN, *supra* note

Here, problems include:⁸⁵

1. As a matter of statutory interpretation, does the exception authorize habeas corpus only to the extent constitutionally required?
 - a. How broadly is "custody" to be construed? Is incarceration required? Is the existence of an outstanding deportation order sufficient?
 - b. If there is custody, may the court review the validity of the deportation order, or just the legality of the custody itself? Is there a middle ground?
2. What is the constitutional minimum?
3. As a matter of policy, what types of restrictions on liberty should be viewed as custody for purposes of habeas corpus jurisdiction in deportation proceedings?
4. As a matter of policy, once custody is established, should the deportation order itself be reviewed by habeas corpus (in the district court) or by petition for review in the court of appeals?
5. How specific should the statute be in spelling out the answers to (3) and (4) above, and how much discretion should be reserved for the courts?⁸⁶

X. LEGALIZATION

The Immigration Reform and Control Act of 1986⁸⁷ (IRCA) establishes a program to legalize the status of certain aliens who have been residing unlawfully in the United States since January 1, 1982.⁸⁸ Between May 5, 1987 and May 4, 1988, aliens who meet certain requirements may apply for "temporary resident alien" status.⁸⁹ The alien must then apply for "permanent resident status"

40, at 599-611 (Supp. 1987, ch. 7, § E).

85. This list of issues is set out in more detail in Legomsky, *supra* note 8, at 1341-53.

86. The discussion of habeas corpus review of deportation orders, *supra* text accompanying notes 82-86, could quite easily be expanded to include the more general problem of whether judicial review of various immigration-related orders (not just deportation) should be in the district courts or the courts of appeals. *See* Legomsky, *supra* note 8, at 1334-69. Perhaps it would be worthwhile to reconsider this general subject.

87. Pub. L. No. 99-603, 100 Stat. at 3359 (1986) (codified in scattered titles and sections).

88. *See* IRCA § 201, 100 Stat. at 3394 (codified at 8 U.S.C. § 1255a).

89. *See* 8 C.F.R. § 245a.2(a)(1) (1987).

during the one-year period that begins approximately one and one-half years after the granting of temporary resident status.⁹⁰ To succeed, the alien will then have to satisfy additional substantive requirements. To encourage applications, the statute permits aliens to use as intermediaries certain private "qualified designated entities" (QDE's) recognized by the INS.⁹¹ These organizations advise aliens confidentially about eligibility and help them prepare and assemble the needed documentation. With one important qualification concerning timing,⁹² this subject seems important enough to study in depth. The main areas of inquiry would be:

1. What can be done to improve the initial application process? Sub-issues include:
 - a. How well are the QDE's working? Is the INS providing them adequate procedural guidance?
 - b. In how much detail should the INS spell out, in its regulations, which documents will suffice to establish eligibility? How much leeway should be left to individual INS legalization offices to assess the sufficiency of the documentation?
 - c. What should happen when the INS denies an application on the ground that further documentation is needed? Current INS practice is *not* to accept a supplementary submission to cure the deficiency except when the application was filed by a QDE, and then only if the supplementary submission was filed between June 16 and August 15, 1987.⁹³ When should supplementation be permitted?
2. The statute directs the Attorney General to establish a single level of administrative review.⁹⁴ The Attorney General has designated for this purpose the Administrative Appeals Unit of the INS.⁹⁵ Is this the optimal reviewing body?⁹⁶
3. There are several issues concerning judicial review:
 - a. IRCA precludes judicial review of a denial of either temporary or permanent resident status except as part of the review of any subsequent deportation order.⁹⁷ Congress

90. See INA § 245A(b)(1)(A), 8 U.S.C. § 1255a(b)(1)(A).

91. *Id.* § 245a(c), 8 U.S.C. § 1255a(c).

92. See *infra* text accompanying notes 104-105.

93. See 64 INTERPRETER RELEASES 705, 869 (June 8, 1987).

94. See INA § 245A(f)(3), 8 U.S.C. § 1255a(f)(3).

95. 8 C.F.R. § 245a.2(p) (review of denial of temporary resident status) C.F.R., § 245a.3(j) (1987) (review of denial of permanent resident status).

96. One might apply the forum selection factors contained in ACUS Rec. 85-4, 1 C.F.R. § 305.85-4 (1987).

97. INA § 245A(f)(4)(A), 8 U.S.C. § 1255a(f)(4)(A).

evidently assumed that a denial of legalization likely would be followed by deportation proceedings that in turn would provide an opportunity for judicial review. Because the information in legalization applications is confidential,⁹⁸ however, the INS might not learn of the alien's illegal presence for many years. Thus, Congress' assumption might not be justified. Study would be worthwhile.

One specific sub-issue concerns those aliens who were found deportable by the BIA before the enactment of IRCA but who applied for legalization after its enactment. If those legalization applications are denied administratively, will there be any opportunity for judicial review? The six-month time limit for judicial review of the original deportation order⁹⁹ will already have expired, and, once the legalization denial is administratively final, the BIA would have no reason to reopen the deportation proceeding.

- b. As noted earlier, judicial review of the deportation order is normally in the court of appeals.¹⁰⁰ Is that the best forum in which to review the legalization decision, which is initially reached in an informal proceeding and, given the Attorney General's regulations discussed above, subject to relatively informal administrative review in the INS Administrative Appeals Unit?¹⁰¹
- c. IRCA sets out the following standard of judicial review: "[T]he findings of fact *and determinations* contained in [the administrative] record shall be conclusive unless the applicant can establish either *abuse of discretion or that the findings are directly contrary to clear and convincing facts* contained in the record, considered as a whole."¹⁰²

This remarkable provision generates several sub-issues:

- i. Does "determinations" add something to "findings of fact?" If so, does it extend to interpretations of law? If it does, is the prescribed standard of review appropriate?

98. See INA § 245A(c)(4) & (5), 8 U.S.C. § 1255a(c)(4) & (5).

99. See INA § 106(a)(1), 8 U.S.C. § 1105a(a)(1).

100. INA § 106(a), 8 U.S.C. § 1105a(a)..

101. See ACUS Rec. 85-4, 1 C.F.R. § 305.85-4 (1987) (factors bearing on forum selection for review of agency adjudication).

102. INA § 245A(f)(4)(B), 8 U.S.C. § 1255a(f)(4)(B) (emphasis added).

- ii. What discretion, exactly, does the INS have that might be abused? (If the statutory requirements are met, approval is mandatory.) Perhaps the drafters were contemplating the discretion inherent in establishing procedural rules?
 - iii. Did the drafters really mean to adopt "clear and convincing" as a standard of review, rather than a standard of proof? Would this permit the reviewing court to weigh the conflicting evidence?
4. There is a parallel program, with more lenient substantive requirements and fairly analogous procedural rules, for certain "special agricultural workers" (SAWs) who have previously worked in the United States and for certain "replenishment agricultural workers" (RAWs) who may be admitted to fill shortages in fiscal years 1990-93.¹⁰³ To what extent do the analyses of the issues mentioned above apply to SAWs and RAWs?

Qualification: The major problem with a thorough study of legalization is timing. By the time a serious study can be completed, the May 4, 1988 deadline¹⁰⁴ for applying for temporary resident status under the general legalization program already will have passed.

Despite this problem, a study of legalization procedure might well be worthwhile for several reasons:

- a. It is always possible Congress will extend the application deadline to encourage more aliens to come forward.
- b. Even without an amendment, the period for filing *permanent* resident alien applications will not begin until November 1988 (one and one-half years after the first alien obtained temporary resident status), and must remain open until November 1990 (two and one-half years after the last alien obtains temporary status).
- c. There will be both administrative appeals and petitions for judicial review in the pipeline for an appreciable time after that.
- d. For special agricultural workers, even the initial application period will continue until December 1, 1988.¹⁰⁵
- e. It also would be possible to confine the legalization study to the issues of administrative and judicial review. This limitation might permit earlier completion and would focus on issues that will be live for a longer time.

103. See IRCA § 302 (adding INA § 210), 100 Stat. at 3417 (codified at 8 U.S.C. § 1160); IRCA § 303 (adding INA § 210A), 100 Stat. at 3422 (codified at 8 U.S.C. § 1161a).

104. See 52 Fed. Reg. 16,209 (May 1, 1987) (to be codified at 8 C.F.R. § 245a.2(a)(1)).

105. See INA § 210(a)(1)(A), 8 U.S.C. § 1160(a)(1)(A).

XI. EMPLOYER SANCTIONS¹⁰⁶

With some exceptions, IRCA makes it unlawful to hire, recruit or refer for a fee, or continue to employ (a) any alien, knowing he or she is not authorized to work, or (b) any person, without performing certain specified paperwork.¹⁰⁷ Sanctions include cease-and-desist orders and fines, with imprisonment, after a court order, for pattern and practice violations.¹⁰⁸

Implementation is generally entrusted to the Attorney General. Hearings on alleged violations are conducted by administrative law judges (ALJs) located within the EOIR.¹⁰⁹ There is a right of appeal to the EOIR's chief administrative law judge.¹¹⁰ Judicial review is by petition for review in the court of appeals.¹¹¹ Actions to enforce final administrative orders are to be brought in the district court, which lacks jurisdiction to review the validity of the administrative orders.¹¹²

One could examine the following:

1. The government obviously will not have the resources to individually verify the employment practices of every employer in the United States. Thus, it will have to make tactical decisions about whom to target. What types of enforcement guidelines, if any, should be available to the public?
2. Should the ALJs who adjudicate employer sanction cases include some of the individuals who adjudicate claims arising under the anti-discrimination provisions of IRCA?¹¹³

106. This topic and the anti-discrimination provisions of IRCA, *infra* text accompanying notes 115-133, could be combined into a single study. Both subjects concern the imposition of sanctions on employers, and the procedural issues have many parallels. Consolidation might enhance both uniformity and efficiency.

107. INA § 274A(a), 8 U.S.C. § 1324a(a).

108. *See id.* §§ 274A(e)(4) & (5), 274A(f), 8 U.S.C. §§ 1324A(e)(4) & (5), 1324a(f).

109. *Id.* § 274A(e)(3), 8 U.S.C. § 1324a(e)(3); 52 Fed. Reg. 44,972 (Nov. 24, 1987) (to be codified at 8 C.F.R. § 68.1) (interim final rule).

110. 52 Fed. Reg. 44,972 (Nov. 24, 1987) (codified at 8 C.F.R. § 68.52(a)). The Attorney General is not permitted to delegate this review function "to any entity which has review authority over immigration-related matters." INA § 274A(e)(6), 8 U.S.C. § 1324a(e)(6).

111. *Id.* § 274(e)(7), 8 U.S.C. § 1324a(e)(7).

112. *Id.* § 274A(e)(8), 8 U.S.C. § 1324a(e)(8).

113. The interim final rules, 52 Fed. Reg. 44,972 (Nov. 24, 1987), do not specify whether overlap is expected. The ALJs who hear the anti-discrimination cases must be designated by the Attorney General as specially trained in the field of employment discrimination and, "to the extent practicable," should not hear other cases. INA § 274B(e)(2), 8 U.S.C. § 1324b(e)(2).

3. How will the administrative review process work? How should it work? Will (and should) the Chief ALJ delegate the review function to a subordinate unit? How many members should comprise such a unit? How much independence should they have from the Attorney General? Should decision making be collegial or individual? How formal should the procedure be? What is the appropriate standard of review? Should precedents be published?
4. Judicial review has been assigned to the courts of appeals. Is that a wise choice? Should that choice affect the type of administrative review?
5. Enforcement actions are in the district court. Since the district court may not review the validity of the order, what exactly *is* its job? Must it always order enforcement? If yes, what is gained by this step? If no, then by what criteria should the court reach its decision?¹¹⁴

XII. ANTI-DISCRIMINATION PROVISIONS OF IRCA¹¹⁵

IRCA prohibits employment discrimination against authorized workers on the basis of either national origin or, in the case of citizens or authorized aliens who intend to become citizens, citizenship status.¹¹⁶ A discrimination claim is filed with the Special Counsel for Immigration-Related Unfair Employment Practices, within the Justice Department.¹¹⁷ Upon finding reasonable cause to believe the charge is true, the Special Counsel may file a complaint with an ALJ who has been designated by the Attorney General as having had special training in the area of employment discrimination.¹¹⁸ If the Special Counsel does not file such a complaint within 120 days, the person making the charge may file a private action with the ALJ.¹¹⁹ If the ALJ finds a violation, he or she may impose various sanctions, including a cease-and-desist order, reinstatement, back pay, and a civil fine.¹²⁰ There is no statutory provision for administrative review of the ALJ's decision, but there is judicial review in the court of appeals.¹²¹ In addition, the complainant may bring an action in the district court to enforce the ALJ's decision.¹²²

114. Decisions of the NLRB are similarly enforceable only by court order, but in an NLRB enforcement proceeding the court of appeals reviews on the merits. *See* 29 U.S.C. § 160(e).

115. *See supra* note 106.

116. INA § 274B(a)(1), 8 U.S.C. § 1324b(a)(1).

117. *Id.* § 274B(b) & (c), 8 U.S.C. § 1324b(b) & (c).

118. *Id.* § 274B(d)(1) & (e)(2), 8 U.S.C. § 1324b(d)(1) & (e)(2).

119. *Id.* § 274B(d)(2), 8 U.S.C. § 1324b(d)(2).

120. *Id.* § 274B(g)(2), 8 U.S.C. § 1324b(g)(2).

121. *Id.* § 274B(i), 8 U.S.C. § 1324b(i).

122. *Id.* § 274B(j), 8 U.S.C. § 1324b(j).

Issues here might include:

1. What standards and procedures should the Special Counsel adopt for investigating charges and for deciding whether to file complaints? The Justice Department's Civil Rights Division, in one of its recent semi-annual regulatory agendas, listed this subject as a priority.¹²³
2. The statute provides for presidential appointment and senate confirmation of a Special Counsel, within the Justice Department, "to serve for a term of four years."¹²⁴ In his signing statement, President Reagan interpreted this language to mean that the Special Counsel would serve at the President's pleasure for a term *not to exceed* four years.¹²⁵ The questions presented are how much independence Congress intended to confer, and how much independence the Special Counsel ought to have.
3. Although as noted earlier the statute gives the Special Counsel 120 days in which to file a complaint with the ALJ, it places no express time limit on the period for filing a private claim once the Special Counsel declines to file a complaint. The INS, however, has proposed a regulation that would impose a time limit of ninety days for filing private claims; the period would begin at the end of the 120-day period.¹²⁶ Whether the INS has the authority to impose a nonstatutory time limit is debatable.¹²⁷ The study could address both the validity and the desirability of an administrative statute of limitations.
4. The provision prohibiting discrimination on the basis of citizenship status applies to authorized aliens only if they are "intending citizens."¹²⁸ The procedure for becoming an intending citizen is somewhat confusing and might well merit study.¹²⁹
5. Like those ALJs who adjudicate employer sanctions cases, the ALJs who hear the anti-discrimination cases will be part of

123. See 52 Fed. Reg. 14,484 (Apr. 27, 1987).

124. INA § 274B(c)(1), 8 U.S.C. § 1324b(c)(1).

125. See Statement on Signing S. 1200 into Law, 22 WEEKLY COMP. PRES. DOC. 1534, 1535 (Nov. 6, 1987).

126. See 52 Fed. Reg. 37,401, 37,411 (Oct. 6, 1987) (to be codified at 28 C.F.R. § 44.303 (c)(1)).

127. See 64 INTERPRETER RELEASES 378-79 (Mar. 26, 1987).

128. INA § 274B(a)(1)(B), 8 U.S.C. § 1324b(a)(1)(B).

129. See INA § 274B(a)(3)(b), 8 U.S.C. § 1324b(a)(3)(B); 52 Fed. Reg. 9277 (Mar. 23, 1987).

the Executive Office for Immigration Review.¹³⁰ Therefore, issues similar to those raised in the discussion of employer sanctions (topic XI, issue 2) arise here as well.

6. Neither Congress nor the Justice Department has provided for administrative review of the ALJ's decision. Does the Justice Department have the authority to create a tribunal for administrative review rather than relegate the parties to judicial review?¹³¹ If it has that power, should it exercise it? If so, what attributes should the reviewer have?¹³²
7. Issues as to judicial review and judicial enforcement also have counterparts in the employer sanctions discussion.¹³³

XIII. ADMINISTRATIVE NATURALIZATION

Under current law, an alien who seeks naturalization must go through a two-step process: an investigation and recommendation by the INS, and a final, *de novo* determination by a court.¹³⁴ Under a bill passed by the House of Representatives in 1987, the Attorney General, through his or her delegates, would perform the entire procedure at the administrative level (with an opportunity for a judicial ceremony if the alien wishes).¹³⁵

After an initial recommendation by an employee of the INS, an aggrieved applicant would be entitled to a "hearing" (procedure not specified) by an immigration officer.¹³⁶ If the immigration officer denies the application, the applicant would be permitted to file an administrative appeal with the BIA, and then to seek judicial review in the district court.¹³⁷

Issues that could be studied include:

1. What would be the benefits and the costs of administrative naturalization?
2. What type of hearing does the bill contemplate? If the intent is to entrust the procedural decisions to the Attorney General, what kind of hearing would be desirable?
3. By what standard would the BIA review the decision of the immigration officer? What type of record would there be?

130. See generally 52 Fed. Reg. 44,972 (Nov. 24, 1987) (to be codified at 8 C.F.R. § 68).

131. The Board of Immigration Appeals, for example, is an administrative creation, not a statutory body. See 8 C.F.R. §§ 3.0-3.8 (1987).

132. For an analogous discussion of employer sanctions, see *supra* page 247, item 3.

133. See *id.* (issues 4 and 5, respectively).

134. See INA §§ 310-48, 8 U.S.C. §§ 1421-59.

135. H.R. 735, 100th Cong., 1st Sess., 133 CONG. REC. H6160-65 (daily ed. July 13, 1987) (statement of Rep. Rodino).

136. *Id.* § 4(d) (14).

137. *Id.* § 2(c).

4. Should the bill be amended to create a right to a de novo judicial trial, rather than merely judicial review, in cases where the BIA denies naturalization?¹³⁸

XIV. OTHER TOPICS CONSIDERED

Several other contemporary immigration topics raise interesting procedural issues. In each case, however, I felt unable to recommend a full-scale study because after careful consideration I was not confident there would actually be much to say. Nonetheless, a series of short, generally one-issue projects might include the following:

1. Several provisions of the INA render deportable those aliens who have been convicted of specified crimes.¹³⁹ IRCA requires the Attorney General to institute deportation proceedings in those cases "as expeditiously as possible after the date of the conviction"¹⁴⁰ (rather than wait until the alien has been released from prison, as is the current practice). The INS is now in the process of establishing procedures for conducting deportation hearings for those aliens who are still serving criminal sentences. Perhaps, input from the Administrative Conference would be helpful.¹⁴¹
2. A perennial problem in asylum cases is that there is often no one either to corroborate or to refute the testimony of the alien. Consequently, determinations frequently hinge on credibility assessments. Can administrative law teachings help either immigration judges in making those assessments, or administrative or judicial appellate authorities in reviewing them?
3. One of the recent immigration enactments is the statute known as the Immigration Marriage Fraud Amendments of 1986.¹⁴² Although the Amendments raise many interesting issues of substantive immigration law, I could think of only one administrative law problem that might lend itself to a (short)

138. The American Immigration Lawyers Association has so argued. Telephone conversation with Warren Leiden, *supra* note 65.

139. See INA § 241(a)(4), (5), (11) & (14-18), 8 U.S.C. § 1251(a)(4), (5), (11) & (14-18).

140. See IRCA § 701, 100 Stat. at 3445 (codified at 8 U.S.C. § 1252(i)).

141. This suggestion was made by William Joyce in a telephone conversation with the author. See *supra* note 63.

142. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986) (codified at scattered sections of 8 U.S.C.).

study. Under the INA as amended, an alien who acquires permanent resident status on the basis of a marriage that is less than two years old will now acquire such status only conditionally.¹⁴³ Two years after the marriage, both parties will have to establish that the marriage was not originally entered into for immigration purposes, and that the marriage is still legally intact.¹⁴⁴ What procedures should the INS employ (a) when it investigates, and (b) when it adjudicates, the genuineness of the marriage?

4. As noted earlier, the deportation of an alien is automatically stayed while a petition for review is pending in the court of appeals, unless the court directs otherwise.¹⁴⁵ Conversely, if the alien leaves the United States after the deportation order is issued, the statute bars judicial review.¹⁴⁶ Should both provisions be reexamined?¹⁴⁷

CONCLUSION

Only in the past few years has the subject of immigration begun to attract the degree of attention that its importance has long warranted. Much work remains. The procedural problems considered in this article are only a few of the difficult questions posed by immigration controls, but they are among those to which the scholarly community is uniquely positioned to make substantial contributions.

143. *Id.* § 2(a), 100 Stat. at 3537 (codified at 8 U.S.C. § 1186(a)(1) & (g)(1)).

144. *Id.* § 2(a), 100 Stat. at 3537-38 (codified at 8 U.S.C. § 1186a(b)(1)(A)).

145. INA § 106(a)(3), 8 U.S.C. § 1105a(a)(3).

146. *Id.* § 106(c), 8 U.S.C. § 1105a(c).

147. In the United Kingdom, for example, not only does departure from the country not *prevent* review; in certain instances, departure is a *prerequisite* to review! *See* Immigration Act 1971, § 16(2), 41 Halsbury's Stats. of England 37 (3d ed., Continuous Vol. 1971) (restricting review by specialized tribunal). The suggestion that this contrast be examined came from David Martin in a telephone conversation with the author.