

# Foreword

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"Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore, Send these, the homeless, tempest tossed, to me; I lift my lamp beside the golden door."<sup>1</sup>

As we proceed to celebrate the 100th Anniversary of the Statue of Liberty, it is appropriate that we pause to consider the direction which our immigration policy appears to be taking at this important juncture. Although the grand lady in New York's harbor still beckons to the world's wretched refuse, its message has been largely muted with time. The Congress and the administrative agencies which carry out its mandate in this field of law have long since diminished the humane principles which the statue has symbolized for our society. Commentators regard this trend of recent immigration policy as "restrictive."<sup>2</sup> This perception becomes apparent as one scans broad-ranging legislative proposals, recent United States Supreme Court case law, and current enforcement trends in the Departments of Justice, State and Labor, which determine and implement our immigration policy.

Some attribute this restrictive policy to the frustrations of a post-Vietnam America reacting to a perception of itself as no longer invincible, a post-Watergate America with diminished confidence in its

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1. Inscription on the Statue of Liberty, New York Harbor.

2. Maurice Roberts, Foreword (Immigration & Nationality X), 22 SAN DIEGO L. REV. 963 (1985).

leadership, and a feeling of national impotence which followed the Iranian hostage crisis.<sup>3</sup> The driving force behind this increasingly restrictive trend, however, may be more rooted in practicality than in philosophy. The cumulative effect of an ever-increasing immigration, both legal and undocumented, may have triggered the various authorities to adopt what they perceive to be a pragmatic response to the problem. The Attorney General's assertion that "[s]imply put, we have lost control of our own borders,"<sup>4</sup> won ready administrative acceptance. It also became the call to arms for those advocating a reassertion of control over our borders through tighter management of the limited resources available for the enforcement of our immigration laws.

Having been denied the changes in the law it has proposed to the Congress, the Immigration and Naturalization Service finds no alternative but to implement some rather fundamental management steps to increase its efficiency in controlling the nation's borders. If, as a result of this new focus on tighter management and control, we temporarily lose sight of the generous, essentially humanistic and compassionate principles underlying our traditional immigration policy as symbolized by the Statue of Liberty, so be it. Even if we must set aside the generous invitation etched at the foot of this revered symbol of our hospitality as a pronouncement of a simpler era, the choice is deemed a necessary one in allocating the limited government resources to the monumental enforcement tasks they face. No other government agency has so plainly acknowledged its inability to cope with its statutory tasks as has the Immigration and Naturalization Service.

On the legislative scene, Congress continues to deny, largely for mundane reasons, efforts to add to the government's arsenal of weapons to combat illegal immigration.<sup>5</sup>

The restrictive policy is most evident in the area of judicial review, particularly before the Supreme Court. The Chief Justice is a strong proponent of the Court managing its own case load and an advocate of a similar approach in the lower courts and agencies. In *INS v. Phinpathya*<sup>6</sup> the Court took a narrow, literalist approach in interpreting the seven year continuous physical presence requirement for suspension of deportation, narrowly limiting the availability of the remedy. In *INS v. Rio-Pineda*,<sup>7</sup> the Court upheld the Attorney Gen-

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3. *Id.* at 963-64.

4. *Immigration Reform and Control Act of 1983: Hearings on H.R. 1510 Before the Sub Comm. on Immigration, Refugees and Int'l. Law, 98th Cong., 1st Sess. 151 (1983)* (Statement of William French Smith, United States Attorney General).

5. See Synopsis, *Significant Developments in the Immigration Law of the United States 1985*, 23 SAN DIEGO L. REV. 441 (1986).

6. 464 U.S. 183 (1984).

7. 105 S. Ct. 2098 (1985).

eral's denial of motions to reopen deportation proceedings where the seven year eligibility for suspension of deportation accrued—after what the Board of Immigration Appeals perceived to be flagrant immigration law violations. The Court thereby denied a statutorily eligible alien any access to a hearing on his application. In *INS v. Lopez-Mendoza*,<sup>8</sup> the Court held that the exclusionary rule does not apply to deportation hearings, thus streamlining procedures for the admissibility of illegally obtained evidence to prove deportability. *Jean v. Nelson*<sup>9</sup> again demonstrated the theme of the pragmatic, limiting approach with its insistence on avoiding philosophical questions. In *Jean*, the Court chastized the Eleventh Circuit for looking to constitutional issues when the statute and regulations would suffice as a basis for decision in the case.

This management approach in Supreme Court thinking is no longer relegated to the position of an unspoken underlying philosophy. In *INS v. Delgado*,<sup>10</sup> the Court sanctioned factory raids by the INS, euphemistically referred to as “surveys,” over the objection of American workers who claimed an unreasonable seizure of the entire factory. *Delgado* spelled out the Court's motivation more explicitly and even the dissent noted the enormous enforcement problems which accompany Congress' failure to enact legislation to penalize employers for the employment of undocumented aliens. The dissent noted:

The INS methods under review in this case are, in my view, more the product of expedience than of prudent law enforcement policy . . . .

What this position amounts to, I submit, is an admission that since we have allowed border enforcement to collapse and since we are unwilling to require American employers to share any of the blame, we must, as a matter of expediency, visit all the burdens of this jury-rigged enforcement scheme on the privacy interests of completely lawful citizens and resident aliens . . . .

The answer to these problems, I suggest, does not lie in abandoning our commitment to protecting the cherished rights secured by the Fourth Amendment, but rather may be found by reexamining our immigration policy.<sup>11</sup>

On the administrative level, the Immigration Service has enthusiastically adopted the pragmatic approach in an attempt to improve its effectiveness in adjudicating an ever-increasing number of applications and petitions. Its administrative response was the establish-

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8. 104 S. Ct. 3479 (1984).

9. 105 S. Ct. 2992 (1985).

10. 104 S. Ct. 1748 (1984).

11. *Id.* at 1775-76 (Brennan, J., dissenting).

ment of Regional Adjudication Centers (RAC) which have taken over the bulk of adjudications on behalf of district offices of the Immigration Service throughout the country. The INS intentionally established these RACs at locations remote from the public and organized and managed them to maximize production in adjudications and minimize personal contact. The program is successful in reducing backlogs and in increasing the uniformity of decisionmaking. One notes, however, an ever-greater distancing of the adjudication process from the very human petitioners, applicants and beneficiaries of those applications.<sup>12</sup>

Practitioners find a similar approach in the Department of Labor which increasingly applies highly technical regulations to the alien labor certification process in an attempt to limit the pool of potential certification applicants. Labor certifications, which qualify their holders in the only immigration preference categories allowing for new seed immigration to this country, are surrounded by an administrative maze of regulatory requirements. These regulations seem to turn the labor certification process into a job placement procedure for American workers, a process which, whether intended by the Congress or not, at least has positive philosophical underpinnings.<sup>13</sup>

Conversely, a development at the Department of Labor which is having a deleterious effect involves a number of recent investigations by its Office of the Inspector General into the labor certification process. These investigations have been characterized by a disquieting direct approach to employers, disregarding the notices of appearance filed by attorneys to evidence their representation of these employers. Just as criminal defense attorneys perceive themselves as targets of investigations intended to discourage aggressive defense of criminals, a similar perception is growing among the immigration defense bar. Many feel the Department is using the criminal process against rep-

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12. See the Outline of Procedures at the Eastern "RAC" prepared by Officer-in-Charge Gilbert Tabor, published as App. I, 62 INTERPRETER RELEASES 827, 827-32, (1985).

13. See Immigration and Nationality Act § 212(a)(14), 8 U.S.C. § 1182(a)(14)(1982). The labor certification provision prescribes that aliens entering the United States in the occupational and professional preference and non-preference categories must secure a certification from the Secretary of Labor that there are not sufficient workers who are able, willing, qualified and available to perform specified duties and that the employment of such aliens will not adversely affect the wages and working conditions of workers in the United States similarly employed. The intent of Congress was obviously to use the Department of Labor as a facility to test the market. The Department of Labor, however, adds a different requirement. Regulations promulgated by the Secretary of Labor require that a job opportunity must be open to any qualified United States worker, 20 C.F.R. § 656.20(c)(8) (1985). The regulations specify that American workers may only be rejected for lawful, job-related reasons and that the failure to hire a qualified American worker shall result in denial of the labor certification application. There would appear to be some question as to whether substantial portions of the regulations are ultra vires.

representatives as a cost-efficient way of controlling the labor certification process. If the judicial and administrative trend in further restricting the discretionary (that is, humanistic) element in the adjudicative process continues and if attorneys are discouraged from zealously defending aliens, then the government's efforts, no matter how well intended or for how good a cause, will approach the oppressive.

It is against the essentially generous nature of the American people and their sense of fairness to allow this to happen. We are a nation founded on principles of liberty, essentially hospitable to newcomers. Inevitably, an overly restrictive trend to control immigration will set off the pendulum of reaction in the opposite direction.

The signs of resistance are already apparent. The "sanctuary" movement appears to be an essentially humanitarian reaction to the stern immigration policy which the government felt obliged to establish with regard to refugees. For the first time in our national history, refugees presented themselves physically at our doorstep, no longer waiting for neat and orderly processing at way-stations abroad. A rapid influx of Haitians and Cubans, including many criminals freed from Cuban prisons for the occasion, presented our government with a situation it never previously faced, resulting in the incarceration of many of the asylum applicants. Armed more with moral indignation than with legal doctrine, the sanctuary movement evolved. No one will contest, however, that many of its supporters, be they individuals or such agencies as the Municipality of Los Angeles,<sup>14</sup> have a genuine concern that our country return to a more humanistic immigration policy. A recent decision of the District Court of Northern California<sup>15</sup> reflected these sentiments. The court enjoined the INS practice of conducting work place raids based upon "warrants of inspection," despite the Supreme Court's decision in *INS v. Delgado*<sup>16</sup> sanctioning such factory "surveys." Of special interest was the argument proposed and summarily rejected by the district court that it was appropriate to analogize undocumented aliens to "generic contraband," permissably subject to seizure even if unnamed in the warrant. Significantly, the decision notes that "[p]eople cannot be equated with items of contraband

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14. See 63 INTERPRETER RELEASES 164 (1986).

15. *International Molders' and Allied Workers' Local 164 v. Nelson*, 54 U.S.L.W. 2245 (N.D. Cal. Oct. 4, 1985).

16. 104 S. Ct. 1748 (1984).

and, unlike objects, enjoy Fourth Amendment protections."<sup>17</sup>

The articles in this annual issue of the *San Diego Law Review* are thoughtful and timely treatments reflecting these themes. Eleanor Pelta, in *INS v. Phinpathya: Literalist Statutory Interpretation in the Supreme Court*, notes that the Court's narrow literal interpretation is a departure from prior case law which tends to emasculate Congress' original purpose in its enactment of the suspension of deportation provision. Lorna Rogers Burgess illustrates the complicated nature of the Department of Labor's regulations governing alien labor certifications in her article *Actual Minimum Job Requirements in Labor Certifications: Analysis of 20 C.F.R. § 656.21(b) (6) Application to Experience or Training Gained With The Employer*, a comprehensive analysis of one of the many regulations on this subject.

The humanistic reaction is apparent in several contexts. The article entitled *The Ninth Circuit and the Protection of Asylum-Seekers Since the Passage of the Refugee Act of 1980*, by Carolyn P. Blum is a timely analysis focusing on the Ninth Circuit's current decisions analyzing the related remedies of asylum and withholding of deportation under the Refugee Act of 1980. Implicit in the comment, *Should Undocumented Aliens be Eligible for Resident Tuition Status at State Universities* is a call to the states to treat aliens who settle within their territory as productive elements of society, even if they are undocumented, to enable them to avail themselves of the benefits provided by the state and its universities.

In his article, *The Right To Appellate Review of Administrative Determinations of Loss of Nationality*, Alan James, the distinguished Chairman of The Board of Appellate Review of the Department of State, describes the practice before this important administrative body which deals with issues of citizenship and expatriation. While the severe enforcement problems plaguing the Immigration Service have never confronted the Board of Appellate Review, the Board's policy and practice illustrate the potential for effectively balancing an agency's mandate to enforce the law with the humanitarian traditions of our society.

Predictions are hard to make in the atmosphere of seige in which the government perceives itself. If Congress enacts legislation penalizing employers for employing undocumented aliens, it is likely that the government will relent in its strict policy to contain immigration. On the other hand, the government's frustration with its failure at securing new legislation and its resulting feelings of impotence are fertile territory for further future restrictions. Nevertheless, optimism, even tempered with some naivete, is a traditional American

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17. *International Molders*, 54 U.S.L.W. at 2245.

characteristic. Perhaps I engage in such naive optimism in stating a belief that ultimately principles of our traditional hospitality to newcomers will temper the restrictive policy engendered by the government's desire to once again gain control over our borders. The Lady in New York Harbor still lifts her lamp and the golden door is still not closed.

