3-1-1986

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Synopsis

SIGNIFICANT DEVELOPMENTS IN THE IMMIGRATION LAWS OF THE UNITED STATES
1985

This synopsis highlights significant legal developments which occurred in the field of immigration in 1985. Although the Supreme Court decided only two cases concerning immigration law, the lower federal courts were highly active, especially with respect to issues evolving from illegal immigration. In 1985, increasing public debate in the United States over such issues as the sanctuary movement and the need for major immigration reform legislation evidenced the present lack of consensus as to the political, social, and economic effects which result from the flow of undocumented immigrants into this country.

INTRODUCTION

In 1985¹ over 1.3 million undocumented aliens were apprehended in the United States.² This figure represents an eleven percent increase over last year’s record.³ Not surprisingly, issues involving illegal immigration dominated judicial and legislative activity in the field of immigration law.

United States immigration law and policy remain largely undeveloped; consequently, formulation of this law and policy often evokes fundamental questions concerning constitutional interpretation, moral and political philosophy, international law, and public law and

¹. fiscal year.
². See Federation for American Immigration Reform, IMMIGRATION REPORT, November 1985, at 1.
³. Id. INS Commissioner Alan Nelson estimates that only “one out of two” aliens who cross the border are ever caught. Id.

March-April 1986 Vol. 23 No. 2
administration. Court activity, public debate over the status of El Salvadorans in the United States, and the sanctuary movement are but a few specific illustrations of the divergence of views on these questions. This lack of consensus also produced conflict in the legislative arena as Congress again tackled the issue of whether and how to stem the ever-increasing flow of illegal immigration.

The Supreme Court decided only two immigration cases in 1985. These cases presented issues concerning eligibility for suspension of deportation and the detention and denial of parole to refugees. In the lower courts, asylum issues continued to dominate immigration litigation with particular attention focusing on the appropriate standards of proof for asylum and withholding of deportation claimants. Additionally, federal courts addressed the fate of the excludable Cuban "Marielitos" and further delineated fourth amendment rights.

**UNITED STATES SUPREME COURT DECISIONS**

In 1985, Supreme Court activity in the field of immigration declined sharply, with the Court deciding just two immigration cases, *INS v. Rios-Pineda* and *Jean v. Nelson*, on the merits. The Court denied review in six other cases.

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5. 105 S. Ct. 2982 (1985) [hereinafter cited as *Jean III*].
6. In Robinson v. Mississippi, 443 So. 2d 850 (Miss. 1983), cert. denied, 105 S. Ct. 1354 (1985), the Court declined to review affirmance by the Supreme Court of Mississippi of a trial court's decision that land purchased by a nonresident alien in bad faith for use in a drug smuggling operation should escheat to the state, notwithstanding the treaty between the United States and Great Britain containing a "most favored nation" clause. In *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 1054 (1985), the Court denied review of dismissal by a court of appeals, for lack of subject matter jurisdiction, of a complaint by survivors and legal representatives of persons killed in Israel against the Libyan Arab Republic and various Arab organizations. The claimants had sued in the district court, alleging violations of law of nations, treaties of the United States, and criminal and common law of the United States.


On October 7, 1985, the opening day of its 1985-1986 term, the Supreme Court denied certiorari in *Herrier-Darcherial v. United States*, 762 F.2d 1019 (9th Cir.), *cert. denied*, 106 S. Ct. 75 (1985), which was an unpublished decision of the Ninth Circuit. The court of appeals had affirmed the conviction of a man found in the United States after deportation in violation of the Immigration and Nationality Act (INA) § 326 (See infra note 7 for full citation). The court found that the petitioner had not proved that there was a denial of due process in the underlying deportation order. Immigration judges are not required to notify aliens of either (1) their eligibility for a waiver of inadmissibility, or (2) their need for permission to reapply for admission under INA § 212(a)(17). 62 INTERPRETER RELEASES 976 (1985).

In *Unauthorized Practice Comm., State Bar of Texas v. Cortez*, 692 S.W.2d 47 (Tex.), *cert. denied*, 106 S. Ct. 384 (1985), the Court refused to review the Texas Supreme Court holding that non-lawyers could be enjoined from performing immigration services which required legal skill and knowledge.
INS v. Rios-Pineda

Section 244(a)(1) of the Immigration and Nationality Act (INA)\(^7\) allows the Attorney General, in his discretion, to suspend an alien’s deportation if the alien has been continuously present in the United States for seven years, is of good moral character, and demonstrates that deportation would result in extreme hardship to the alien or to the alien’s parent, spouse, or child who is a citizen or lawful permanent resident.\(^8\) The Attorney General delegates this discretionary authority to immigration judges\(^9\) whose decisions are subject to review by the Board of Immigration Appeals (BIA).\(^10\)

The respondents in INS V. Rios-Pineda were a Mexican national couple who illegally entered the United States in 1974.\(^11\) Between the time of their entry and their deportation hearing in December 1978, respondent wife gave birth to a child, a United States citizen. At the time of their deportation hearing, however, the immigration judge denied their request for suspension of deportation because they had not been continuously present in the United States for seven years. On appeal, the BIA affirmed this ruling.\(^12\)

In July 1980 the couple filed a petition for review in the Eighth Circuit Court of Appeals, alleging that: (1) the immigration judge should have given them Miranda warnings; (2) their deportation was an unlawful de facto deportation of their citizen child; and (3) re-

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8. Id.  
10. See Dill v. INS, 773 F.2d 25, 27 (3d Cir. 1985).  
11. Respondent husband had first entered the United States illegally in 1972. He was apprehended by the INS, and returned to Mexico in 1974 under threat of deportation. Two months later, he and his wife entered the United States with the aid of a paid smuggler. Rios-Pineda, 105 S. Ct. at 2100.  
12. See id. 105 S. Ct. at 2100-01.

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spondent husband had met the continuous presence requirement.\textsuperscript{13} When the appeal was eventually heard fifteen months later,\textsuperscript{14} both respondents had accrued the requisite seven years' presence. In light of this development, the court of appeals remanded the case to the BIA for consideration of respondents' motion to reopen.\textsuperscript{15} The BIA denied the motion as a matter of discretion, citing both procedural and substantive reasons.\textsuperscript{16} The Eighth Circuit again reversed and ordered the BIA to reopen the proceedings.\textsuperscript{17}

The Supreme Court granted certiorari to explore the scope of the Attorney General's discretion in acting on motions to reopen civil requests for suspension of deportation.\textsuperscript{18} The Court found the Attorney General's authority in this area to be broad, holding that even where a motion to reopen demonstrates a prima facie case of eligibility for suspension of deportation, the Attorney General has the discretion to deny the motion.\textsuperscript{19} Based upon the facts of this case, the BIA was justified in denying respondents' motion to reopen for two separate and adequate reasons.

First, respondents had satisfied the continuous presence requirement only by virtue of their meritless appeals. Neither husband nor wife had been in the country for seven years when suspension of deportation was initially denied.\textsuperscript{20} The Court reasoned that the purpose of an appeal is to correct legal errors which occurred at the initial determination of deportability, not to delay physical deportation with the hope of satisfying legal requirements.\textsuperscript{21}

Second, the Court held that the BIA had not abused its discretion by denying reopening of the proceedings on the basis of respondents' flagrant immigration law violations.\textsuperscript{22} Respondents had illegally en-
Significant Developments
SAN DIEGO LAW REVIEW

Next unlawful entry into the country repeatedly, utilized the services of a paid smuggler, and respondent husband had refused to honor his voluntary departure agreement with the Immigration and Naturalization Service (INS). The Court held that the BIA has the authority to differentiate between degrees of immigration law violations, and could deny a reopening based upon the respondents' prior conduct. By basing its holding on these particular facts, however, the Court refrained from establishing a rule that an alien may not be granted suspension of deportation if he has achieved statutory eligibility pending administrative or judicial review. A lower federal court subsequently cautioned the BIA against labeling legal propositions as frivolous, but noted that respondents' contentions in *Rios-Pineda* did offer excellent examples of frivolous arguments.

*Jean v. Nelson*

For almost thirty years prior to 1981, the INS followed a policy of granting parole to undocumented aliens seeking admission to the United States. However, responding to the great influx of Cubans and Haitians arriving in southern Florida, the INS adopted a new detention procedure in 1981 at the direction of the Attorney General. Under this procedure, all immigrants who could not present a prima facie case for admission would be detained without parole pending a decision on their admissibility. This procedure, which was not based on any new statutory or regulatory authority, became fully operational in southern Florida by July 31, 1982.

In June 1981 a class action was filed by a group of Haitians who

23. *Id.*
24. *See Dill*, 773 F.2d at 25.
25. *Id.* at 29. The *Dill* court noted that it was frivolous for aliens to argue that (1) they were entitled to suspension of deportation when less than seven years had passed since their first entry into the United States; and (2) a two-month trip abroad under threat of deportation followed by an illegal clandestine reentry was not “meaningfully interruptive” of the statutory period. The first argument is squarely contradicted by statute; the second is one on which the law is clear. *Id.* at 29 n.1.
27. *See Jean III*, 105 S. Ct. at 2995.
28. *Id.*
29. *Id.*
30. *Id.*
had been detained and denied parole pursuant to this procedure.\textsuperscript{31}

The petitioners sought a writ of habeas corpus under 28 U.S.C. § 2241,\textsuperscript{32} and declaratory and injunctive relief. Their complaint alleged two causes of action which ultimately received attention by the Supreme Court. First, petitioners alleged that the new INS detention procedure was adopted without adhering to the notice-and-comment rulemaking procedures required by the Administrative Procedure Act (APA).\textsuperscript{33} Second, they alleged that the parole procedure, as implemented by INS field officers, violated the equal protection guarantee of the fifth amendment because it discriminated against petitioners on the basis of their race and national origin.\textsuperscript{34}

The district court concluded that the policy had not been applied in a discriminatory manner, but ruled that the government had failed to comply with the requirements of the APA and ordered the release of the detained class members.\textsuperscript{35} The court enjoined the INS from further enforcing the policy of detaining unadmitted aliens until the INS complied with the APA rulemaking procedure. The INS promptly promulgated a rule within the thirty-day time frame set by the district court.\textsuperscript{36} Although the district court found the original parole policy constitutionally sound, the INS detention/parole rule was promulgated with facially neutral language to preclude further equal protection challenge. Both petitioners and respondents agreed that the new regulation was constitutional on its face, requiring even-handed and non-discriminatory conduct in parole determinations.\textsuperscript{37}

The INS appealed the district court’s decision on the APA claim, and petitioners cross-appealed the district court’s denial of the discrimination claim in \textit{Jean v. Nelson}\textsuperscript{38} (\textit{Jean I}). An Eleventh Circuit panel affirmed the ruling of the district court on the APA claim,


\textsuperscript{32} According to the statute, writs of habeas corpus may be granted by the Supreme Court, any Supreme Court Justice, the district courts, and all circuit judges within their respective jurisdictions. The basic purpose of the writ is to enable those unlawfully incarcerated or restricted by any branch or agency of government to obtain their freedom. \textit{See}, e.g., \textit{Scaggs v. Larsen}, 396 U.S. 1206 (1969).

\textsuperscript{33} 5 U.S.C. §§ 553(b)-553(e) (1982). An administrative agency generally cannot adopt a substantive rule without first publishing notice of the proposed regulation and providing interested parties with the opportunity to comment.

\textsuperscript{34} \textit{Id.} at 1003-04.

\textsuperscript{35} \textit{See Jean III}, 105 S. Ct. at 2996. The district court imposed a 30 day stay upon its enjoining order. For the text of the new regulations concerning parole, promulgated during this 30 day period, see 8 C.F.R. § 212.5 (1985), \textit{promulgated at 47 Fed. Reg. 30,045} (July 9, 1982), \textit{amended by 47 Fed. Reg. 46,494} (Oct. 19, 1982).

\textsuperscript{36} \textit{See Jean III}, 105 S. Ct. at 2996.

\textsuperscript{37} 711 F.2d 1455 (11th Cir.), \textit{reh'g granted}, 714 F.2d 96 (11th Cir. 1983) (en banc).
albeit on a somewhat different rationale. On the cross-appeal, the panel held that the district court erred in holding that plaintiffs (petitioners) had failed to prove that the governmental actions were the product of discriminatory intent. However, when the INS petition for rehearing en banc was granted by the Eleventh Circuit, the panel opinion was vacated by operation of Eleventh Circuit rules of court.

The en banc court in Jean v. Nelson (Jean II) held that the APA claim had become moot since the INS was no longer detaining any class members under the policy held invalid by the district court. All class members who were still incarcerated had either violated the terms of their parole or had arrived after implementation of the new regulations. The court then reviewed petitioners' equal protection claim, holding the fifth amendment inapplicable to unadmitted aliens for purposes of consideration for parole. Following prior decisions relating to the constitutional rights of non-entrant aliens, such as Shaughnessy v. United States ex. rel. Mezei, the court concluded that high-level members of the executive branch (the President and Attorney General) are statutorily authorized to discriminate on the basis of national origin in making parole decisions. On the other hand, lower-level INS officers are not empowered to discriminate against particular detainees in violation of facially neutral instructions from their superiors. The newly promulgated regulations required that parole decisions be made without regard to race or national origin. The en banc Eleventh Circuit remanded the case to the district court to determine whether the remaining detainees had been discriminated against by lower-level INS officers.

39. The court concluded that the new policy was not within any of the notice-and-comment rulemaking exceptions of APA § 553. (Administrative Procedure Act, codified at 5 U.S.C. § 553 (1982)). Jean I, 711 F.2d at 1483.
41. 727 F.2d 957 (11th Cir. 1984).
42. Id. at 962.
43. 345 U.S. 206 (1953). Under the “entry doctrine” fiction, excludable aliens who are physically present in the United States and who are being detained or paroled pending their admissibility, are deemed not to have made an “entry” into the United States. Thus, they are not accorded the extent of constitutional rights enjoyed by deportable aliens who have “entered.”
44. 8 U.S.C. § 1182(d)(5)(a) (1982) permits the Executive, in his discretion, to discriminate on the basis of national origin in making parole decisions. The Eleventh Circuit (en banc) concluded that any such discrimination concerning parole would not violate the fifth amendment because of the plenary power of the government to control the borders of the nation. Jean II, 727 F.2d at 975.
45. Jean II, 727 F.2d at 978.
46. Id. at 962.
The petitioners argued before the Supreme Court that the statutory remedy fashioned by the court of appeals would permit lower-level INS officers to discriminate against class members released on parole and current detainees. Petitioners argued that the only adequate remedy was a Supreme Court order for declaratory and injunctive relief on the fifth amendment equal protection grounds prohibiting such discrimination. The government asked the Court to hold that fifth amendment equal protection had no bearing on an unadmitted alien's request for parole.

In a six to two decision, the Supreme Court affirmed the court of appeals remand to the district court on the issue whether lower-level INS officers were complying with the statutory requirement of non-discrimination, but held that there was no need to consider the equal protection issue. Criticizing the court of appeals for having decided the constitutional question, the Court, citing ample precedent, reemphasized that courts should consider the non-constitutional grounds for a decision before evaluating any constitutional bases. The Court further stated:

Had the court in Jean II followed this rule, it would have addressed the issue involving the immigration statutes and INS regulations first, instead of after its discussion of the Constitution. Because the current statutes and regulations provide petitioners with non-discriminatory parole consideration—which is all they seek to obtain by virtue of their constitutional argument—there was no need to address the constitutional issue.

The Court concluded that the new statutes and regulations would be as effective as a constitutional remedy in protecting petitioners from the conduct they feared. On remand, the Court ordered the district court to consider whether any aliens were currently detained as a result of any discriminatory application of the new regulations.

Although the Court disapproved of the Eleventh Circuit's consideration of the constitutional issue, the Court did not evaluate the circuit court's restrictive view of the constitutional rights of non-entrant aliens. Thus, the issue of the constitutional rights of non-entrant aliens remains ripe for judicial review.

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47. Jean III, 105 S. Ct. at 2992.
48. Id. at 2997.
49. Id.
51. Jean III, 105 S. Ct. at 2998.
52. Id. at 2999.
53. For a discussion of the rights or lack thereof of non-entrant aliens, see Comment, From Mezal to Jean: Toward the Exit of the Entry Doctrine, 22 SAN DIEGO L. REV. 1143 (1985).
ASYLUM AND WITHHOLDING OF DEPORTATION

United States immigration statutes provide two forms of relief to those aliens physically present in the United States who seek to avoid deportation based upon their fear of being persecuted in the country to which they would be deported. An alien may apply for a discretionary grant of asylum pursuant to section 208(a) of the Immigration and Nationality Act (INA), or for withholding of deportation under section 243(h). When a request for asylum is made pursuant to section 208(a), it is also treated as a request for relief under section 243(h).

In 1984, in INS v. Stevic, the Supreme Court held that an alien applying for withholding of deportation bears the burden of showing a clear probability of persecution if deported. The “clear probability” standard is a heavy burden, requiring a showing that it is more likely than not that the alien would be subject to persecution if deported. Because the Stevic Court was not presented with a petition for asylum it refrained from defining the “well-founded fear of persecution” standard applicable to asylum requests. Consequently, the courts of appeals have given much attention to the issues of

54. See infra notes 55-56.
55. The petitioner is eligible for a discretionary grant of asylum if he can demonstrate that he is a “refugee” within the meaning of § 101(a) of the Refugee Act of 1980. See 8 U.S.C. § 1101(a)(42)(A) (1982), originally enacted as Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), codified at INA, §§ 101(a)(42), 207-209, 243(h), 411-414, 8 U.S.C. §§ 1101(a)(42), 1157-1159, 1243(h), 1521-1524 (1982). This section defines a refugee as “any person who is ... unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .” 8 U.S.C. § 1101(a)(42)(A). If a petitioner demonstrates a “well-founded fear of persecution,” the Attorney General may discretionarily grant asylum pursuant to INA § 208(a). INA § 208(a), 8 U.S.C. § 1158(a) (1982) provides in pertinent part, “the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.”
56. Section 243(h) of the INA prohibits the Attorney General from deporting or returning any alien to a country if the Attorney General determines that “such alien’s life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1253(h)(1) (1982).
57. 8 C.F.R. § 208.3(b) (1985) provides that “asylum requests shall also be considered as requests for withholding exclusion or deportation pursuant to section 243(h) of the [INA].”
59. Id. at 2492.
60. Id. at 2501.
61. Id.
whether and how the standards of proof for asylum and withholding of deportation differ.62

For example, the Sixth, Seventh, and Ninth Circuits agree that the standards of proof under these sections are not the same; while the standard for withholding of deportation requires that the petitioner demonstrate a “clear probability of persecution” if deported, asylum applicants are held to the less stringent “well-founded fear of persecution” standard.63 However, the nature and amount of evidence necessary to satisfy this more liberal standard remains unclear.64

In a Ninth Circuit case, Sarvia-Quintanilla v. INS,65 the petitioner, an El Salvadoran native, had requested political asylum at his deportation hearing. According to petitioner, he had been indirectly threatened by a leftist political group with which he had briefly associated. Additionally, the petitioner testified that he feared retaliation from the government itself since his brother had killed two government workers. The petitioner introduced, as evidence, supporting affidavits of relatives and an attorney. These affidavits and general newspaper articles were found to lend only indirect support to the claims of the petitioner.66

On appeal, the Ninth Circuit reviewed the nature and amount of proof which would satisfy the “clear probability” and “well-founded fear” standards. Citing its own recent decision in Bolanos-Hernandez v. INS,67 the court acknowledged that the “clear probability” standard could be met by the alien’s own testimony regarding specific threats against him.68 In such a case, however, there should be no doubt as to the credibility of the alien, and there must be documentary evidence indicating the seriousness of the threats.69

The “well-founded fear” standard, on the other hand, is more liberal than the “clear probability” standard. Although the threshold under this test is yet undefined, the court viewed the standard as a partially objective one. Thus, while the state of mind of the alien should be considered, even a sincere fear of persecution is not adequate to establish an alien’s eligibility for political asylum.70 There must always be specific, direct, and credible evidence supporting the

62. See infra notes 65-81 and accompanying text. The Supreme Court has granted certiorari in Cardoza-Fonseca v. INS, 767 F.2d 1448 (9th Cir. 1984), cert. granted, 54 U.S.L.W. 3561 (U.S. Feb. 25, 1986) (No. 85-782), to resolve the issue of whether and how the standards of proof for asylum and withholding of deportation differ.
63. See infra notes 65-81 and accompanying text.
64. Id.
65. 767 F.2d 1387 (9th Cir. 1985).
66. Id. at 1394.
67. 749 F.2d 1316, 1321 (9th Cir. 1984).
68. Sarvia-Quintanilla, 767 F.2d at 1392 (citing Bolanos, 749 F.2d at 1326).
69. Id.
70. Id. at 1394.
claim of the alien.\textsuperscript{71}

Applying the facts of this case to its analysis, the court concluded that neither standard had been satisfied. In addition to citing petitioner's lack of credibility, the court noted that the petitioner had experienced no difficulty obtaining a passport, and that neither the petitioner nor his family had been directly threatened or harmed.\textsuperscript{72}

The Seventh Circuit, in \textit{Carvajal-Munoz v. INS},\textsuperscript{73} distinguished the standards in terms of relative evidentiary burdens. As in the Ninth Circuit, an alien's own uncorroborated testimony will not satisfy the "clear probability" standard; objective evidence is necessary.\textsuperscript{74} The uncorroborated testimony of an applicant can suffice to meet the "well-founded fear" standard.\textsuperscript{75} If the testimony of an alien is uncorroborated, it must be credible, persuasive, and specific, so as to create an inference that the alien's fear of persecution is well-founded.\textsuperscript{76} While the Sixth Circuit also evaluates the standards separately, it has not delineated their specific evidentiary requirements.\textsuperscript{77}

The Third Circuit, on the other hand, has held that the same standards of proof apply to both these sections. In \textit{Sotto v. INS},\textsuperscript{78} a Philippine citizen who was determined to be deportable after overstaying his business visa, filed applications for asylum and withholding of deportation. Petitioner claimed he had been interrogated, intimidated, and harassed in the Philippines due to his membership in organizations hostile to the Philippine government. The Third Circuit Court of Appeals evaluated the proof standards relevant to petitioner's applications and found no difference between the "well-founded fear" standard and the "clear probability" standard.\textsuperscript{79} Since a request for withholding of deportation is frequently joined with a request for asylum at deportation proceedings, the court found it appropriate to apply congruent standards.\textsuperscript{80}

The court reviewed the administrative record of Sotto's case after the determination by both the immigration judge and the BIA that Sotto had not submitted sufficient evidence to corroborate his fear of

\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} 743 F.2d 562 (7th Cir. 1984).
\textsuperscript{74} \textit{Id. at} 573.
\textsuperscript{75} \textit{Id. at} 574.
\textsuperscript{76} \textit{Id.}
\textsuperscript{77} \textit{See, e.g.}, Youkhanna \textit{v. INS}, 749 F.2d 360, 362 (6th Cir. 1984).
\textsuperscript{78} 748 F.2d 832 (3d Cir. 1984).
\textsuperscript{79} \textit{Id. at} 836. By so holding, the court maintained its earlier position adopted in \textit{Rejaie v. INS}, 691 F.2d 139 (3d Cir. 1982).
\textsuperscript{80} 748 F.2d at 836.
persecution. The Third Circuit could not reconcile these findings with the evidence in Sotto's file. The court was particularly concerned with an affidavit of a former general and Philippine assemblyman which stated that petitioner had been on a wanted list for his political activities, that Sotto's father had been tortured for his son's political activities, and, that in his opinion, Sotto would be arrested, detained, and tortured if returned to the Philippines. The court found the affidavit was important evidence, material to satisfaction of the proof standard by petitioner, and remanded the case to the BIA for full assessment of the evidence.

The Ninth Circuit also addressed the issue of an alien's right to notice of possible asylum relief at his deportation hearing. In Duran v. INS, petitioners Leonillo and Shirley Duran sought to reopen their deportation proceedings on the grounds that: (1) Mr. Duran had not been informed of his right to asylum and withholding of deportation, relief he would have otherwise applied for; and (2) Mrs. Duran had not been informed of her eligibility for suspension of deportation, relief she would have likewise applied for.

Addressing first Mr. Duran's claim, the Ninth Circuit affirmed the conclusion of the immigration judge that INS regulations did not require the immigration judge to notify petitioner of his right to apply for asylum relief since Mr. Duran had specified the country to which he would be deported. Notice of the right to asylum is required only where the immigration judge, rather than the alien, designates the country of deportation. The court affirmed the denial of petitioner's motion to reopen, bringing the Ninth Circuit view on this issue into accord with holdings in the Fifth and Eighth Circuits.

Turning to Mrs. Duran's claim, the court found that the immigration regulations required the immigration judge to inform an alien of the right to apply for suspension of deportation when the judge is presented with evidence indicating eligibility for such relief. Because it appeared from the record that Mrs. Duran had been contin-

81. Id. at 836-37.
82. 756 F.2d 1338 (9th Cir. 1985).
83. Id. at 1339.
84. See 8 C.F.R. § 242.17(c) (1985).
85. 8 C.F.R. § 242.17(c) (1985) states in pertinent part: "The respondent shall be advised that pursuant to section 243(h) of the [INA] he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer . . . ." (emphasis added). In addition, under current INS procedures, aliens are informed of their right to petition for asylum if they give any indication of fear of persecution upon being returned. See Ramirez-Osorio v. INS, 745 F.2d 937 (5th Cir. 1984).
86. See 8 C.F.R. § 242.17(c) (1985).
87. See, e.g., Ramirez-Osorio, 745 F.2d at 943-44; Minwalla v. INS, 706 F.2d 831, 833 (8th Cir. 1983).
uously present in the United States for seven years, the court remanded her case to the BIA with instructions to restore her to such status as would enable her to apply for suspension of deportation on the same terms as an alien who received proper notice at the deportation hearing.\textsuperscript{88}

**FOURTH AMENDMENT**

In *INS v. Delgado*,\textsuperscript{89} the Supreme Court held that INS “factory surveys”\textsuperscript{90} did not result in an unlawful seizure or detention of the entire work force. In 1985, however, two lower federal courts enjoined two INS search practices found to violate the fourth amendment.

In *International Molders’ and Allied Workers’ Local 164 v. Nelson*,\textsuperscript{91} the District Court for Northern California enjoined the INS practice of conducting workplace raids under “warrants of inspection.” “Warrants of inspection” are warrants which name one or more individuals thought to be illegal aliens at a particular location, but which also allow the INS to apprehend unspecified and unlimited “others” on the premises who may also be undocumented.\textsuperscript{92} In the present case, eight workplace raids took place under such “warrants of inspection.” Of the 192 individuals arrested in these raids, 179 were “others” not identified in the warrants.

The plaintiff class requested a preliminary injunction against workplace raids of this character on the theory that they violated fourth amendment and equal protection rights of the plaintiffs. Plaintiffs argued that the warrants were the equivalent of general warrants, because they failed to describe with requisite particularity the persons to be seized, and they authorized searches and seizures absent probable cause.\textsuperscript{93}

The INS relied on *Blackie’s House of Beef v. Castillo*,\textsuperscript{94} where the validity of a similar warrant was upheld. In that case, the court...

\textsuperscript{88} 756 F.2d at 1342.
\textsuperscript{89} 466 U.S. 210 (1984).
\textsuperscript{90} In June and September of 1977, the INS entered the Southern California Davis Pleating Company to determine whether any of the persons employed there were illegal aliens. While several INS agents positioned themselves near the factory exits, other agents moved systematically through the factory, questioning employees as to their citizenship. The “surveys” were conducted pursuant to warrants which did not identify any particular aliens by name. *Id.* at 212.
\textsuperscript{91} 54 U.S.L.W. 2245 (N.D. Cal. Oct. 11, 1985).
\textsuperscript{92} *Id.*
\textsuperscript{93} *Id.*
\textsuperscript{94} 659 F.2d 1211 (D.C. Cir. 1981).
reasoned that the traditional probable cause standard for criminal searches and seizures did not apply to INS investigations, which can be analogized to administrative inspections.\textsuperscript{96} Further, Congress contemplated a vigorous INS enforcement program, the efficacy of which depends upon broad search powers.\textsuperscript{97}

The district judge, however, rejected the analogy of an INS raid to an administrative inspection. Administrative inspections are strictly regulated by legislation and are traditionally designed to monitor industries or working conditions subject to close government scrutiny.\textsuperscript{98} Congress has not legislated any such enforcement scheme for aliens, nor are workplace raids strictly regulated.\textsuperscript{99} The court also rejected the defendant’s analogizing undocumented aliens with generic contraband, which is subject to seizure even if unnamed in the warrant. People cannot be equated with items of contraband, and unlike objects, people enjoy fourth amendment protections.\textsuperscript{100}

The court concluded that the INS was routinely using “warrants of inspection” to conduct disruptive dragnet-style questioning and seizures of large numbers of workers. In suggesting an acceptable alternative, the court found guidance in \textit{Delgado}. The court stated:

It is reasonable to require agents, upon their arrival at a workplace, to serve a warrant identifying only a small number of individuals, and first ask the owner or manager to immediately produce those individuals identified in the warrant. The agents can still position themselves at exits and question or detain any workers attempting to flee. If the owner or manager is unwilling or unable to produce the suspects, it then becomes reasonable for the agents to enter and conduct a sweep. Even this sweep, however, must be directed at finding the named suspects as quickly as possible rather than questioning all workers. Any questioning that does transpire must resemble the brief, “consensual encounters” described in \textit{INS v. Delgado}.\textsuperscript{101}

In \textit{La Duke v. Nelson},\textsuperscript{102} the Ninth Circuit upheld a district court injunction prohibiting the INS from conducting searches of migrant farm and ranch housing without a warrant, probable cause, or ar-

\textsuperscript{96} Id. at 1218-19.
\textsuperscript{97} Id.
\textsuperscript{98} \textit{International Molders’}, 54 U.S.L.W. at 2245.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Id. The Court noted in \textit{Delgado} that it has yet to rule directly on whether questioning of an individual by a police officer, without more, could constitute a seizure under the fourth amendment. 466 U.S. at 216. The Court stated, however, that “[unless] the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in detention under the Fourth Amendment.” Id.

In \textit{Delgado}, the Court noted that INS agents approached employees at their work stations, indentified themselves, and then asked the employees one to three brief questions regarding their citizenship. At no time were the workers prevented from performing their jobs or moving about the factory. The \textit{Delgado} Court concluded that these encounters between the employees and INS agents “were classic consensual encounters rather than Fourth Amendment seizures.” Id.

\textsuperscript{102} 762 F.2d 1318 (9th Cir. 1985).
ticulable suspicion. The record indicated that armed border patrol agents engaged in the practice of sealing off roads or paths leading to a housing area, surrounding the residences in emergency vehicles with flashing lights, and stationing officers at all doors and windows. The officers then conducted house-to-house searches in the night or early morning without the consent of the occupants.103

Addressing the fourth amendment issue, the court affirmed the district court's finding that the INS had accomplished an impermissible seizure of the entire unit.104 The court rejected the INS argument that Delgado precluded a finding that a seizure had occurred.105 This case was distinguishable from Delgado because the searches were made without a warrant, articulable suspicion, or the consent of the housing owner.106 Furthermore, these searches differed materially from those in Delgado because they took place in the home. Farm and ranch housing is not a mere extension of the workplace and is thus accorded a greater degree of protection under the fourth amendment.107

**BOND PROCEEDINGS**

Pending the determination of deportability, an alien may be held in custody, released on conditional parole, or released on bond containing conditions prescribed by the Attorney General.108 Prior to 1983, the INS had discretionary authority to impose a condition barring an alien from engaging in unauthorized employment.109 In December 1983, however, the INS issued new regulations which made the imposition of a "no-work" condition mandatory, thus precluding

103. *Id.* at 1321.
104. *Id.* at 1327-28.
105. *Id.* According to Delgado, an encounter is classified as a fourth amendment seizure "if, in view of all the circumstances, surrounding the incident, a reasonable person would have believed that he was not free to leave." 466 U.S. at 215 (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)).
106. *La Duke*, 762 F.2d at 1328.
107. *Id.* at 1328-29.
108. INA § 242(a), 8 U.S.C. § 1252(a) (1982) provides:
Pending determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole . . . .
individualized determinations. One result of this regulation was to impair the ability of aliens to support themselves and to obtain legal counsel pending their deportation hearings.

Soon after the new regulation was implemented, it was challenged in National Center for Immigration Rights v. INS (NCIR). The case arose as a class action brought by a number of nonprofit immigration service organizations, a union affiliate, and sixteen individuals currently in deportation proceedings. Plaintiffs challenged the validity of the regulation under a number of legal theories. Among these, plaintiffs argued that the regulation: (1) was enacted without statutory authority; (2) was not reasonably related to the purpose of assuring a detainee’s appearance at future deportation proceedings; (3) violated fifth amendment due process and equal protection guarantees; and (4) was inconsistent with and superseded by federal laws. Upon motion by plaintiffs, the district court granted an injunction against enforcement of the regulation. The court concluded that plaintiffs had a fair chance of showing that the regulation was inconsistent with federal law and that it violated due process guarantees. After weighing the competing interests, the court concluded that the harm which could result from unemployment was irreparable and outweighed the potential harm to the government caused by a delay in implementing the regulation.

On appeal, the Ninth Circuit first disposed of the INS two-point attack on the jurisdiction of the district court. The court declined to review, de novo, the validity of the regulation, and confirmed the ruling of the district court that the plaintiffs had a fair chance of showing that the prohibition of employment pending a deportation hearing is not reasonably related to the purpose of securing the detainee’s presence at the proceeding; thus, the district court had not abused its discretion by granting the injunction.

110. See 8 C.F.R. §§ 103.6(a)(2)(ii)-(iii), 109.1(b)(8) (1985), which provide in pertinent part: “[a] condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding . . . Only those aliens who upon application . . . establish compelling reasons for granting employment authorization may be authorized to accept employment.”
111. 743 F.2d 1365 (9th Cir. 1984).
112. Id. at 1367. The district court opinion of December 16, 1983, is as yet unreported. See 62 INTERPRETER RELEASES 400 (1985).
113. 743 F.2d at 1368.
114. Id.
115. The INS asserted that judicial review is only available through habeas corpus provisions of 8 U.S.C. § 1252(a), and that the case was not ripe for adjudication. 743 F.2d at 1368-69.
116. 743 F.2d at 1369-70. It is interesting to note that following the final hearing before the district court, the INS moved for summary judgment. The court, however, granted summary judgment to the non-moving plaintiffs. The court held that there was no issue of material fact; the regulations at issue were invalid because they were promulgated without statutory authority. See 62 INTERPRETER RELEASES 400 (1985).
Because plaintiffs had not moved for class certification in the district court, the Ninth Circuit concluded that without nationwide class certification, the injunction could cover only the named plaintiffs in the action.\textsuperscript{117} It is expected that the plaintiffs will present a motion for nationwide certification before the district court.

\section*{Sanctuary Movement}

The influx of refugees from Central America has prompted a humanitarian response among a loose network of religious congregations across the United States.\textsuperscript{118} These sanctuary workers have chosen to violate immigration laws in order to shelter and often transport illegal aliens.

Proponents of the sanctuary movement argue that the aliens are predominantly political refugees fleeing persecution in their homelands.\textsuperscript{119} They further allege that the Reagan Administration has politicized the asylum process.\textsuperscript{120} For example, supporters point out that in 1984, the INS granted fewer than three percent of Salvadoran asylum requests, while the general average was about twenty percent.\textsuperscript{121} Federal authorities, on the other hand, argue that most Central Americans are economic rather than political refugees.\textsuperscript{122} They further argue that an adequate asylum procedure, which includes judicial review, already exists.\textsuperscript{123} Consequently, the reaction of the administration to the sanctuary movement has been harsh; more than eighteen people were indicted for conspiracy to violate immigration laws between October 1984 and April 1985.\textsuperscript{124}

The sanctuary movement has given rise to a difficult tension between the individual's right to religious freedom and the government's right to enforce immigration laws. In resolving these conflicts between religious freedom and criminal conduct, courts first require defendants to prove their conduct was motivated by religious beliefs.\textsuperscript{125} Courts must show extreme deference in evaluating these be-

\textsuperscript{117} 743 F.2d at 1371-72.
\textsuperscript{119} See N.Y. Times, Mar. 28, 1985, at A20, col. 1.
\textsuperscript{121} Id.
\textsuperscript{122} See N.Y. Times, Mar. 28, 1985, at A20, col. 1.
\textsuperscript{124} See Helton, \textit{supra} note 118.
\textsuperscript{125} See Peyote Way Church of God, Inc. v. Smith, 742 F.2d 193 (5th Cir. 1984);
liefs and should not attempt to interpret canon law. The burden then shifts to the government to show that the restriction is essential and also the least burdensome method for accomplishing a compelling government objective.

In the well-publicized case of United States v. Elder, the INS charged Elder, a Roman Catholic church worker, with unlawfully transporting three Salvadorans in violation of section 274(a)(2) of the INA. Elder was the director of a church-affiliated Texas shelter which provided assistance to Central Americans, primarily Salvadorans. In a bench trial, the district court convicted Elder of all three counts. In so doing, the court held, first, that the free exercise of religion clause does not preclude prosecuting those who feel a charitable obligation to assist those fleeing violence in other countries. Second, the court held that neither domestic nor international refugee law prohibited Elder's prosecution.

Elder satisfied his initial burden of showing that his conduct was motivated by his religious beliefs. However, the government demonstrated an overriding interest in the protection of the congressionally-sanctioned immigration system. The court noted that creating such a system is within inherent sovereign power and necessary for the welfare and security of all Americans. Further, the government utilized the least burdensome method for achieving its purpose. Although Elder's actions were motivated by good will, the court reasoned that judicial sanctioning of individual immigration policies would result in no immigration policy at all. Furthermore, the court rejected Elder's argument that because the Salvadorans qualified for asylum the government could not prove the aliens were present un-

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127. See cases cited supra note 125.
129. 8 U.S.C. § 1324(a)(2) (1982). This section makes it a felony to transport or harbor an alien not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States.
130. 601 F. Supp. at 1577-80.
131. Id. at 1580-81. Elder argued that international laws and treaties automatically entitled the aliens to receive refugee status without regard to domestic laws. The court concluded, however, that Congress intended the Refugee Act of 1980 to fulfill its obligations under international law, and that this act designates the Attorney General to determine refugee status. 601 F. Supp. at 1581. Furthermore, Congress has indicated that the government should review applications from Salvadorans on a case-by-case basis. Id. at 1581 (citing Pub. L. No. 97-113, § 731, 95 Stat. 1519 (1981)). The Elder court also stated that the court could not interfere with political decisions made by the United States with regard to the interpretation, enforcement, or rejection of treaty commitments which affect immigration. 601 F. Supp. at 1581.
133. 601 F. Supp. at 1580.
lawfully, an essential element of section 274(a)(2) of the INA. The court found that the statutory scheme requires the decision of refugee status to be made by the Attorney General, not by the courts or individuals. As of this writing, eleven sanctuary workers were being prosecuted in Tucson, Arizona on charges of smuggling, transporting, and harboring aliens unlawfully in the United States. Congress is presently considering legislation which would temporarily suspend deportation of Salvadorans currently residing in the United States.

DETENTION AND REPATRIATION OF CUBAN “MARIELITOS”

In the spring of 1980, approximately 125,000 Cuban nationals came to the United States as part of the “Mariel Boatlift.” Although the Cubans, referred to as “Marielitos,” were deemed excludable aliens, most were paroled into the United States and are now being processed by the INS for permanent resident status. A small percentage of the Marielitos, however, were denied parole and detained, largely due to their serious criminal or mental health records. Most of the approximately 1800 detainees were issued final exclusion orders, but have remained in custody because of the unwillingness of Cuba to take them back. The detention of the Marielitos has prompted extensive and complex litigation regarding two largely independent issues, the first involving the Marielitos’ challenges to their continued detention while in the United States, and second, their attempts to avoid repatriation to Cuba.

In Garcia-Mir v. Smith, the Eleventh Circuit heard a consolidated appeal by the government concerning these issues. The first

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134. The Attorney General is authorized to determine an individual’s refugee status. 8 U.S.C. §§ 1159 and 1253(h) (1982). See also Ramirez-Osorio v. INS, 745 F.2d 937 (5th Cir. 1984).
136. See infra notes 178-82 and accompanying text.
137. See Garcia-Mir v. Smith, 766 F.2d 1478, 1480 (11th Cir. 1985).
138. Such permanent resident status is authorized under legislation known as the Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended by § 88 of the Immigration and Nationality Amendments of 1976, Pub. L. No. 94-571 at 8 U.S.C. § 1255 (1982)). Under this act, Cubans escaping the Castro regime were able to adjust to permanent resident status. The INS has adopted the policy that the Cuban Adjustment Act may still be used to adjust the status of the Marielitos. See 61 INTERPRETER RELEASES 989-91 (1984) (Questions and Answers on Cuban Adjustment Act of 1966).
139. See Garcia-Mir, 766 F.2d at 1480.
140. Id.
141. 766 F.2d 1478 (11th Cir. 1985).
issue decided by the court involved the Marielitos’ challenge to their lengthy detention. The litigation commenced in 1981 when the Marielitos filed a class action alleging their incarceration was unlawful.\textsuperscript{142} Although the district court conditionally certified the class and began scheduling hearings on the claims,\textsuperscript{143} the court suspended review when the Attorney General instituted a special “Status Review Plan”\textsuperscript{144} to evaluate the necessity of the continued detention of each class member.\textsuperscript{145} As of December 14, 1984, 147 detainees had been approved for release under the plan.\textsuperscript{146} On the same date, however, Cuba agreed to accept the return of 2746 Mariel Cubans in exchange for the United States agreement to resume processing immigrant visas for Cuban applicants.\textsuperscript{147} Theorizing that this repatriation agreement increased the likelihood that an alien faced with immediate deportation would abscond if released on parole, the Attorney General directed that no Marielito be released pending modification of the Status Review Plan.\textsuperscript{148}

The district court rejected the Attorney General’s rationale for delayed implementation of the plan and ordered the release of detainees who had been approved for release and had obtained sponsors.\textsuperscript{149} The Eleventh Circuit reversed on appeal, holding that the district court erred in evaluating the decision of the Attorney General under the traditional “abuse of discretion” standard. The “facially legitimate and bona fide reason” test adopted by the same court in Jean v. Nelson\textsuperscript{150} was considered the proper standard of review. Utilizing this standard, the court concluded that the Attorney General had advanced a legitimate and bona fide reason for suspen-

\begin{itemize}
\item \textsuperscript{142} Id. at 1481.
\item \textsuperscript{144} Under the plan, a detainee is to be released if the review board determines that: (1) the detainee is presently a nonviolent person; (2) the detainee is likely to remain nonviolent; and (3) the detainee is unlikely to commit any criminal offenses following his release. Garcia-Mir, 766 F.2d at 1481 n.1.
\item \textsuperscript{145} Id. at 1481.
\item \textsuperscript{146} Id.
\item \textsuperscript{147} Press Statement by White House Press Secretary (Dec. 14, 1984), \textit{reprinted in} 61 \textit{INTERPRETER RELEASES} 1080 (1984). As of May 24, 1985, 201 Cubans had been returned under the agreement. \textit{See} 62 \textit{INTERPRETER RELEASES} 483 (1985). However, Cuba subsequently rescinded the agreement, in retaliation to United States resumption of Radio Marti broadcasts. \textit{See id.}
\item \textsuperscript{148} Garcia-Mir, 766 F.2d at 1481.
\item \textsuperscript{149} Fernandez-Roque v. Smith, 600 F. Supp. 1500, 1506-07 (N.D. Ga. 1985). The government, aside from the appeal presently discussed, also requested a stay of the district court order, which the court granted on January 22, 1985. \textit{See Garcia-Mir, 766 F.2d at 1481 n.2. On February 1, 1985, the Supreme Court denied the application of the plaintiffs to vacate this stay. Garcia-Mir v. Smith, 105 S. Ct. 948, 949-50 (1985)}.
\item \textsuperscript{150} Garcia-Mir, 766 F.2d at 1478.
\item \textsuperscript{151} Jean v. Nelson, 727 F.2d 957, 977 (11th Cir. 1984), \textit{aff’d}, 105 S. Ct. 2992 (1985) \textit{(en banc)}.
\end{itemize}
A separate issue heard by the court related to Marielito attempts to avoid deportation to Cuba. The issue arose when two Marielitos, Leon-Orosco and Rodriguez-Colas, amended their class-action complaint to request asylum or withholding of deportation. The district court, however, concluded that its review power was limited to class members who had exhausted their administrative rights—those who had undergone both an exclusion hearing before an immigration judge and an appeal before the BIA. Meanwhile, these plaintiffs had acquired new evidence which they believed would lend support to their asylum and withholding claims. In order to introduce the new evidence and still comply with the statutory exhaustion requirements, plaintiffs filed two administrative “test cases,” which both parties stipulated to be binding on all asylum and withholding of deportation issues relating to class members. After losing the “test cases,” these plaintiffs moved to reopen, alleging that they were members of a “social group” who had a well-founded fear of persecution should they be returned to Cuba. Both motions were subsequently denied on the merits.

Having lost their “test cases,” plaintiffs returned to the district court alleging that the BIA had abused its discretion by denying the motions to reopen and claiming that the district court was empowered under 8 U.S.C. § 1105(b) to grant remedial relief to the entire class. The district court agreed with the plaintiffs on both counts and ordered the BIA to set aside all outstanding exclusion orders. The court further ordered the reopening of plaintiffs’ exclusion cases for consideration of the merits of their asylum claims.

The INS appealed this decision, challenging both the procedural and substantive findings of the district court. In Garcia-Mir, the court first considered the governmental contention that the dis-
District court was without jurisdiction to set aside the entire class’ exclusion orders prior to their making individual motions to reopen.\textsuperscript{164} Noting that the exhaustion statute severely limits the power of the federal courts to review exclusion orders, the court concluded that the governmental stipulations in the two test cases could not be interpreted to waive the exhaustion requirements for other class members.\textsuperscript{165} Furthermore, the stipulations were limited to narrow issues and could not adequately encompass other cases which possibly involved multi-issue claims for exclusion and withholding of deportation.\textsuperscript{166} Thus, the district court could properly exercise jurisdiction only over the two cases which were known to be administratively final.\textsuperscript{167}

As to the merits of the claims of Leon-Orosco and Rodriguez-Colas the circuit court also reversed the district court, holding that the BIA had applied the appropriate “well-founded fear of persecution” standard to the asylum claims and had justifiably denied the motions in light of the evidence.\textsuperscript{168}

\textbf{PROPOSED LEGISLATION}

In 1985, Congress again attempted to enact comprehensive immigration reform legislation. Major reform bills were introduced before both houses of Congress. However, insufficient time remained in the first session of the Ninety-ninth Congress for debate and reconciliation.

On September 19, 1985, the Senate passed its bill, the Immigration Reform and Control Act of 1985.\textsuperscript{169} This measure is a simplified version of the Simpson-Mazzoli Bill of the previous Congress, which failed in a joint conference committee after passing both houses.\textsuperscript{170} The goal of the bill remains the same—to control the flow of illegal immigrants into the United States. It provides for increased funding for INS border patrol and other inspection and enforcement activities, increased penalties for immigration-related violations,\textsuperscript{171} and employer sanctions for those who knowingly hire illegal aliens.

\begin{footnotesize}
\begin{enumerate}
\item 164. \textit{Id.} at 1486.
\item 165. \textit{Id.} at 1486-89.
\item 166. \textit{Id.} at 1487.
\item 167. \textit{Id.} at 1489.
\item 168. \textit{Id.} at 1489-93.
\item 171. For example, the bill increases the penalties for activities such as the knowing transportation or harboring of undocumented aliens. S. 1200, 99th Cong., 1st Sess. (1985).
\end{enumerate}
\end{footnotesize}
The focal point of the bill is employer sanctions. The bill makes it unlawful for a person or other entity to knowingly hire, recruit, or refer for consideration or employment in the United States, an alien unauthorized to work. To defend against the charge of unlawful hiring, the employer must be able to attest that he examined legitimate documents establishing the prospective employee's eligibility to work. If an employer of four or more employees does not follow the verification procedure and an unauthorized alien is found in his employ, the employer will be presumed to have knowingly hired the alien. Penalties for the first offense include administrative desist orders and civil fines ranging from $100 to $2000 for each violation; a pattern or practice of violation can lead to fines of $3000 to $10,000.

Another important aspect of the bill is its program to legalize the status of long-term undocumented aliens. The bill would grant temporary legal status to illegal aliens who have been physically present in the United States since the date of enactment and (1) have continuously resided in the United States since January 1, 1980, or (2) are special Cuban or Haitian entrants whose residency dates from October 14, 1981. Persons receiving temporary status would be able to subsequently adjust to permanent status upon fulfillment of minimum requirements. Commencement of this program, however, is made contingent upon the effectiveness of employer sanctions and other enforcement measures. As passed by the Senate, the bill also includes a controversial amendment establishing a seasonal guestworker program for growers of perishable commodities.

172. It is interesting to note that on July 23, 1985, the State of Louisiana enacted an employer sanctions law which imposes civil fines on persons who knowingly hire, employ, recruit or refer for employment in the United States, aliens not entitled to reside or work within the United States. See 62 INTERPRETER RELEASES 1056 (1985).

173. The bill requires minimum knowledge of English and United States history and government, or enrollment in a program to acquire such knowledge. S. 1200, 99th Cong., 1st Sess. (1985).


175. The guest-worker program would provide for the admittance of up to 350,000 workers at a time, to work for up to nine months a year, in specific regions of the United States. The program would end after three years, unless Congress and the White House agree to its extension. See San Diego Union, Oct. 1, 1985, at A1, col. 1. On September 30, 1985, the Reagan Administration proposed its own version of a guestworker program. The plan is primarily intended to benefit western growers of perishable crops. The growers have traditionally relied on illegal aliens to harvest the crops. The program would allow non-resident aliens to enter the United States and work for growers of perishable crops for specified periods of time. The details of the program, such as its size and duration, would be determined by Congress. See San Diego Union, Oct. 1, 1985, at A1, col. 1; see also 62 INTERPRETER RELEASES 866-67, 896-97 (1985) (review of bills proposed
The House Immigration Subcommittee opened hearings on the Immigration Control and Legalization Amendments Act of 1985.\textsuperscript{178} Similar to the Senate measure, the House bill proposes employer sanctions and improved enforcement activities to control illegal immigration, a legalization program for undocumented aliens residing in the United States since January 1, 1982, and a special procedure for the admission of temporary agricultural workers.\textsuperscript{177} Attempted reconciliation of the House and Senate bills will most likely take place in 1986 when the second session of the Ninety-ninth Congress commences.

The United States does not presently grant special immigration benefits to Salvadorans as a group. Identical bills have been introduced before both houses of Congress to temporarily suspend the deportation of those Salvadorans who currently reside in the United States.\textsuperscript{178} No Salvadoran would be deported pending a government study regarding: (1) the number and condition of displaced persons in El Salvador, Honduras, Guatemala, and Mexico; (2) the fate of those persons returned to El Salvador from the United States whether through deportation or otherwise; and (3) the conditions in El Salvador as compared with those in other countries in which their nationals have been granted extended voluntary departure. Proponents of the measure argue that extended voluntary departure is mandated by the widespread violence in El Salvador, coupled with the inability of the El Salvadoran government to provide basic protection to its citizens.\textsuperscript{178} Supporters of the bill are critical of the Reagan Administration’s practice of approving only a small percentage of Salvadoran asylum requests.\textsuperscript{180} The Reagan Administration opposes the bill and denies allegations that a conspiracy to deny Salvadoran asylum requests exists.\textsuperscript{181} Other opponents of the bill contend that violence has dramatically decreased in El Salvador, obviating the need for congressional action. They further assert that the bill would undermine the existing asylum system and increase the flow of

\textsuperscript{177} Another immigration bill, the Immigration Reform Act of 1985, H.R. 2180, 99th Cong., 1st Sess. (1985), was introduced before the House on April 23, 1985, by Edward R. Roybal. Also concerned with the rate of illegal immigration, the bill proposes enhanced law enforcement mechanisms rather than employer sanctions. Additionally, the Roybal bill provides for a one-tier legalization program with an eligibility date of January 1, 1982. The Immigration Reform Act of 1985 further provides for a system of protections for aliens who seek legalization, and the establishment of commissions and programs to resolve the underlying causes of illegal immigration.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
illegal immigration.\textsuperscript{182}

CONCLUSION

In 1985 Congress and the courts focused much attention on perceived crises involving immigration issues. For example, federal courts examined the legality of the growing sanctuary movement and the fate of the Cuban "Marielitos" still incarcerated in the United States. Congress considered the necessity of imposing employer sanctions to control the ever-increasing flow of illegal immigrants into the United States, and the possibility of extending special immigration benefits to El Salvadorans presently residing in the United States.

The Supreme Court was considerably less active in the field of immigration than in recent years. The two cases decided by the Court in 1985 presented issues concerning eligibility for suspension of deportation and the detention and denial of parole to refugees.

Lower federal courts continued to disagree over the standards of proof which must be met by persons seeking asylum or withholding of deportation relief. Additionally, federal courts evaluated the legality of certain INS search practices in the context of the fourth amendment. The increasing rate of illegal immigration suggests that judicial activism will increase in this field in the coming years, as United States immigration law and policy struggle to keep up with the latest "wave of immigration" in this country.

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