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FOREWORD

MAURICE A. ROBERTS*

The United States is no longer at the crossroads in shaping its national immigration policy; the path it has chosen is fixed and becoming well traveled. Developments in recent years have evidenced a trend that is distinctly restrictive. What has emerged is a national policy designed to decrease the number of aliens who may enter the country legally, whether through normal immigration channels or as refugees, and to require the departure of those who have been able to get here without our consent. In the process, as a nation we have diminished the rights of the individuals whose cases are being judged. This retrogressive trend, which is likely to continue for some time, is seen in the actions, inactions, and attitudes of each of the three departments of the government of the United States.

The factors which have led to the development of the restrictive trend are easily identified. Most are rooted in recent history. First and foremost is a new lack of confidence in the power of the United States, as a nation, to cope in foreign affairs. The Vietnam experience undermined its assurance of military invincibility; Watergate diminished its confidence in the integrity of top national leaders. The Iranian hostage crisis engendered feelings of general frustration and impotence at the inability of the national government to respond meaningfully to protect its citizens abroad. Added to this was the sense of frustration and outrage that emerged in 1980 when the United States failed to repel what many regarded as an “invasion” by hordes of Cubans and Haitians. In the 1980 Freedom Flotilla from Mariel, Fidel Castro unloaded his political undesirables on the United States, in the process emptying his jails and mental hospitals.

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Seemingly helpless, the United States stood by and accepted them. Thousands of Haitians came here in open boats and the United States government felt it had no alternative then but to receive them. Finally, disquieting statistics told of millions of aliens streaming unchecked over the Mexican border. Understandably, the Attorney General's assertion, "Simply put, we have lost control of our own borders," has won ready acceptance.

The relative national ignorance regarding the dimensions of the immigration problem is a second factor promoting a restrictive trend. For one thing, there are no reliable statistics regarding the number of undocumented aliens in our midst, and scant information detailing the impact they have on the United States as a nation. Numerical estimates vary widely, from three million to twelve million. As one observer remarked, "If they could be counted, after all, they could be deported." In recent years, the Immigration and Nationality Service (INS) has captured over a million illegal entrants a year; it is generally conceded this represents only the tip of the iceberg. Aggravating the uncertainty of these numbers is the fact that many of the entrants are counted more than once. This results from a sort of revolving-door operation: an alien is detected by the Border Patrol and returned to Mexico, he promptly and surreptitiously re-enters the United States, he is again detected and returned to Mexico, he comes back again, and so on.

The economic effect of the new immigration is unknown, although it appears dramatic in certain localities, such as southern Florida and southern California. Some experts claim the new immigrants, especially the undocumented, represent a drain on our economy: those newcomers who are employed take away job opportunities from our own citizens. Unarguably, this is an effective contention in times of unacceptably high unemployment. Newcomers who are on public welfare are a drain on an economy already struggling with massive annual budget deficits. In the view of some observers, the United States is now experiencing "compassion fatigue."

Other experts urge the opposite position: the undocumented workers contribute more than they take out of the system. Although income taxes and Social Security contributions are deducted from their salaries, these workers, as part of a huge underground subculture, avoid making claims for benefits to which they are legally entitled. In addition, say these experts, the net effect of immigration on the United States, both legal and illegal, has been to stimulate the

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economy. The new arrivals bring new skills; they are also all consumers, hence customers.

Despite the absence of definitive answers, these important questions have already had substantial impact in the decision-making process in Congress, in the executive department, and in the courts. The awesome statistics bandied about have undoubtedly affected attitudes in all three branches; some have made their way into Supreme Court opinions. Last year, when it seemed that the Simpson-Mazzoli bill was on the verge of enactment, it was the projected cost of legalization on which the legislation foundered in conference.

While the emphasis on greater enforcement has reached greater shrillness under the present Reagan administration, a restrictive policy is nothing new in the executive branch. Under the Ford administration, a brief economic recession caused the INS to devote its resources largely to its enforcement functions, at the expense of its service responsibilities, resulting in huge backlogs in the latter area that took years to clean up. Under the Carter administration, the 1977 Task Force recommended more restrictive legislation, and the Select Commission on Immigration and Refugee Policy developed an intensive study embodied in its report in the early days of the Reagan administration. That report, too, recommended employer sanctions and other limitations. The Reagan administration drafted its own version of confining legislation; however, it was willing to settle for the less expensive edition of Simpson-Mazzoli.

With that opportunity for legislation now temporarily lost, the Reagan administration has embarked on a policy of more effective enforcement and has put into place more restrictive measures without waiting for specific legislation. In addition to a system of interdiction of Haitian immigrants on the high seas, the INS is now making greater use of the more cost-effective factory raids recently approved by the Supreme Court.4 Greater showings are now required on the part of applicants for discretionary relief, both in establishing eligibility and in the favorable exercise of administrative discretion. The regulations have been amended to require "no work" riders in bond conditions generally, and asylum applications are receiving a narrower (and heavily politicized) review. The Immigration Judges and Board of Immigration Appeals, although independent of the INS, are still part of the Department of Justice. Their decisions increasingly reflect the policies of the Attorney General.

In Congress, despite the many in-depth studies undertaken in recent years, no major immigration legislation has become law. This inaction gives the administration a free hand in enforcing existing legislation more restrictively. The Simpson-Mazzoli bill, containing some of the most drastic limitations ever imposed on our immigration system, narrowly failed enactment. Its highlights included provisions for sanctions on employers of undocumented workers, and a provision for a possible national identity card. Additional provisions were included for exclusion of arriving aliens without a hearing. The jurisdiction of the courts to review certain types of administrative immigration decisions was reduced and, in some instances, eliminated altogether. The bill failed to pass because of the administration's objection to the absence of limitations on reimbursement to states for legalization costs. The Senate passed the bill by the lopsided vote of 76 to 18; the House version passed by the much narrower margin of 216 to 211. The fact that a bill with so many drastic new limitations almost passed, however, illustrates the mood of Congress.

The greatest policy swing has occurred in the judicial branch, most notably in the Supreme Court. It is hard to believe that this is the same Court which only a few years ago applied realism to the administration of the immigration laws by decisions such as *Rosenberg v. Fleuti*. In a few recent terms, the Court has handed down a series of decisions which have given new life to the harsher approach of the Reagan administration. In opinion after opinion, the Court, citing statistics, has stressed the difficult task of enforcement confronting the INS, and has preached the doctrine of deference due to administrative interpretations. In *INS v. Wang*, the Court, in a summary reversal, endorsed the narrow construction by the Board of Immigration Appeals of the "extreme hardship" requirement for suspension of deportation under section 244(a) of the Immigration and Nationality Act (the Act), and although noting that the words are not self-explanatory and that reasonable men may construe them differently, the Court cautioned the lower courts not to interfere with the administrative interpretation of the statutory phrase. In *INS v. Miranda*, again in a summary reversal, the Court declined to estop the INS for its unexplained failure for eighteen months to adjudicate an immediate relative visa petition. Stressing that the INS is the

agency primarily charged by Congress to implement the public policy underlying the immigration laws, the Court ruled that appropriate deference must be accorded to its decision.

The Court underscored its new direction with a series of decisions in the 1983-84 term. In *INS v. Phinpathya*, the Court literally construed the continuous physical presence requirement for suspension of deportation under section 244 of the Act, even though the INS did not seek or argue for such a literal construction. In *INS v. Delgado*, the Court held that the INS practice of conducting “factory surveys” does not result in the seizure of the entire work force, and that brief individual questioning of the employees concerning their citizenship by armed INS agents is not a detention or seizure under the fourth amendment. This appraisal of the facts, regarded as unrealistic by some, gives the INS a free hand in conducting factory raids and other “area control operations” without confronting fourth amendment requirements. Further, in *INS v. Stevic*, the Court held that an alien seeking to avoid deportation under section 243(h) must carry the heavy burden of proving the clear probability that he will be singled out for persecution. Finally, in *INS v. Lopez-Mendoza*, the Court, in a 5-4 decision, ruled that the exclusionary rule does not apply to deportation proceedings because such proceedings are civil in nature.

The effect of the Supreme Court decisions on the lower courts is obvious. Although compelled to follow the legal conclusions laid down by the Supreme Court, some courts of appeals, notably the Ninth Circuit, still struggle with the peripheral issues of due process and other questions not foreclosed by the decisions of the Court. Many important issues remain open, and there is great need for the services of skilled immigration lawyers. Yet the trend of recent Supreme Court decisions has, undeniably, had a chilling effect. For one thing, although the lower federal courts still decide an abundance of immigration cases, very few of these reach the Supreme Court. Perhaps, to the aliens involved and their counsel, the chance of success in the Supreme Court appears so slim that the venture seems pointless. Further, there has been a growing tendency in the lower courts to discipline counsel for professional misconduct, including taking appeals in immigration cases solely for purposes of delay.

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It is difficult to give adequate representation to an alien client even under the most equable circumstances. There are language barriers to cope with, problems in obtaining documents from abroad, and the need for translations. The difficulty is compounded geometrically when not merely one, but all three, of the departments of government are unsympathetic, or even hostile. These increased disadvantages underscore the growing importance of informed representation for aliens in their dealings with the agencies of government.

The articles devoted to immigration in this annual issue of the *San Diego Law Review* are all relevant to the foregoing developments. "Professional Responsibility in Immigration Practice and Government Service," by Robert G. Heiserman and Linda K. Pacun, provides a much needed analysis of the ethical principles pertinent to the representation of aliens in immigration cases. It contains a well-developed discussion of the instances in which attempts have been made to impose sanctions on representatives accused of overstepping ethical boundaries in immigration cases.

Arthur C. Helton’s article on “The Proper Role of Discretion in Political Asylum Determinations” is a timely analysis of an increasingly important area in which the statutory authority is only recent, and the number of cases requiring adjudication is prodigious.

“Alien’s Rights and Government Authority: An Examination of the Conflicting Views of the Ninth Circuit Court of Appeals and the United States Supreme Court,” by Sana Loue, presents a detailed analysis of two activist courts going in different directions in the immigration field. One is the Supreme Court; the outcome, therefore, is predictable.

Finally, Judge Henry E. Watkins’ dissertation on “Streamlining Deportation Proceedings: Self-Incrimination, Immunity from Prosecution, and the Duty to Testify in a Deportation Context” is a lucid exposition of the law on self-incrimination applicable to deportation cases. Although deportation proceedings are civil in nature, any witness testifying in those proceedings (including the alien who is the subject of the proceedings) remains free to invoke the privilege against self-incrimination. This subject is little understood by many practitioners and even by some courts. Judge Watkins proposes a practical way of making self-incrimination claims unavailable to aliens in deportation proceedings, which thereby streamlines the procedure and leaves additional time to judges for more important issues.

The editors and contributors to the *San Diego Law Review* de-
serve the sincere gratitude of the growing body of persons, lawyers and lawmen alike, interested in the latest developments in the dynamic field of immigration and nationality law. The annual issues of the Review devoted to Articles and Comments on this important field of law have contributed greatly to a better understanding of the many problems presented which still need reasonable solutions.