San Diego Law Review

Volume 21
Issue 1 *Immigration and Nationality IX Symposium*

Article 10

12-1-1983

Significant Developments in the Immigration Laws of the United States 1982-1983

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Synopsis

SIGNIFICANT DEVELOPMENTS IN THE IMMIGRATION LAWS OF THE UNITED STATES 1982-1983

INTRODUCTION

This synopsis outlines significant developments in immigration law from July 1982, through July 1983.[1] The Supreme Court, the lower federal courts, and Congress each had an impact on the developments which occurred in immigration law. The Supreme Court addressed the following important issues: the one-House veto of suspension of deportation; the proper forum for litigating the admissibility of a lawful permanent resident after a brief trip abroad; the ability of nonimmigrant aliens to establish domicile; and whether states have standing to seek declaratory and injunctive relief from violations of the immigration laws.

The lower federal courts rendered significant decisions regarding the applicability of the exclusionary rule to deportation proceedings and the constricts of search and seizure law. Areas which also demanded review by the lower courts were: the practice and consequences of indefinite detention, the requirements for suspension of deportation, and issues of entry and exclusion. The decisions of the United States Circuit Courts of Appeals were not in complete accord

1. The July 1982 starting date coincides with the end of the previous synopsis article. *See* 20 SAN DIEGO L. REV. 191 (1982). The July 1983 ending date coincides with the adjournment of the Supreme Court's 1982-1983 term.

during the year regarding the issues of the proper burden of proof in an asylum application and the requirement of showing the criminal intent of an alien charged with violating the immigration laws by reentering the United States after deportation.

Congress was active in the immigration field as well. The Simpson-Mazzoli bill was re-introduced after dying in the lame-duck session of Congress in late 1982. Legislation affecting Amerasian children and eligibility for legal assistance from the Legal Services Corporation was also enacted.

UNITED STATES SUPREME COURT DECISIONS

During the 1982-1983 Term, the Supreme Court decided six cases in the area of immigration law, giving two of these cases summary treatment.[2] The Court denied review in nine other significant cases involving various areas of immigration law.[3] A discussion and analy-

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2. INS v. Chadha, 15 U.S.L.W. 4907 (U.S. June 23, 1983); Landon v. Plasencia, 103 S. Ct. 321 (1982); Alfred L. Snapp & Son, Inc. v. Puerto Rico, 102 S. Ct. 3260 (1982); Toll v. Moreno, 102 S. Ct. 2977 (1982). In INS v. Miranda, 103 S. Ct. 281 (1982), the Court granted certiorari, but without hearing oral argument, summarily reversed the Ninth Circuit's decision that the INS was estopped by its unexplained delay in adjudicating a visa petition. In United States v. Armijo-Martinez, 103 S. Ct. 34 (1982), the Court granted certiorari and summarily vacated and remanded the case to the Sixth Circuit Court of Appeals for further consideration in light of United States v. Valenzuela-Bernal, 102 S. Ct. 3440 (1982).

3. The Court refused to review an unreported decision from the Eleventh Circuit which convicted the petitioner on six counts of transporting undocumented aliens, a violation of § 274 (a)(2) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324(a)(2) (1982). In Patterson v. United States, No. 82-1466, slip op. 1 (11th Cir. Nov. 16, 1983) *cert. denied*, 51 U.S.L.W. 3857 (U.S. May 31, 1983) (No. 82-1466), the Court refused to review the trial court's jury instruction to the effect that conviction could be based on assisting undocumented aliens to remain in the United States illegally, rather than directly assisting such aliens to enter the country.

In Binder v. INS, 102 S. Ct. 2957 (1982) *denying cert. to* 667 F.2d 1030 (9th Cir. 1981), the Court refused to review the finding that an order of deportation based on the alien's management of a house of prostitution, which is legal in the State of Nevada, was not a denial of equal protection. The Court also declined to review a Fifth Circuit decision which held that an alien is not barred from suing in federal court for breach of contract involving services rendered in the United States, regardless of allegations that entry was gained with a fraudulently obtained visa. Oppenheim v. Moreau, 102 S. Ct. 3486 (1982) *denying cert. to* 663 F.2d 1300 (5th Cir. 1982).

In Hill v. United States, 669 F.2d 23 (1st Cir. 1982), *cert. denied*, 103 S. Ct. 63 (1982), the Court refused to disturb a decision of the First Circuit which concluded that the district court acted correctly in denying a motion to dismiss a nonimmigration criminal charge because a potential witness was deported. The Court of Appeals had held that there was no denial of due process engendered by the deportation because the Government had valid reasons for the deportation beyond its assessment of the witness's value to the defense, and the defendant had failed to demonstrate that the witness would offer meaningful evidence unobtainable from other sources. The Court in Mila v. District Director, 678 F.2d 123 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 726 (1983), refused to review petitioner's claim that Tongan customary adoptions should be recognized under the immigration laws.

The Court refused to reconsider petitioner's deportation order which was based on a conviction prior to entry in Squires v. INS, 689 F.2d 1276 (6th Cir. 1982), *cert. denied*,

sis of the cases which were decided on the merits of the claim follows.

INS v. Chadha

The most significant Supreme Court decision rendered in the past year was *INS* v. *Chadha*,[4] wherein the Court held that a one-House of Congress veto provision[5] contained in the Immigration and Nationality Act (INA) is unconstitutional. Although the decision arose in an immigration context, it essentially nullifies similar veto provisions contained in other federal legislation.[6]

The Attorney General of the United States acting through the Immigration and Naturalization Service (INS) has been delegated the responsibility by Congress of enforcing the INA.[7] Section 244(a)(1)

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103 S. Ct. 1874 (1983). The Court of Appeals had held that for purposes of the "petty offense" exception of § 212(a)(9) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9) (1982), the equivalent offense under the District of Columbia Code at the time of the alien's entry was determinative, rather than the parallel code which existed at the time of the alien's conviction.

In INS v. Perez, 103 S. Ct. 320 (1982), *dismissing appeal from* 643 F.2d 640 (9th Cir. 1981), the petition for certiorari was dismissed pursuant to Rule 53 (dismissal by agreement). The INS' petition raised only the issue of the adequacy of a motion to reopen in light of INS v. Wang, 450 U.S. 139 (1981), where the motion was unsupported by affidavits.

In Diaz-Salazar v. INS, 51 U.S.L.W. 3902 (U.S. June 20, 1983) *denying cert. to* 700 F.2d 1156 (7th Cir. 1983), the Court declined to review the Seventh Circuit's holding that an order by the Board of Immigration Appeals (BIA) denying a stay of deportation while a motion to reopen deportation proceedings is pending, is not reviewable under § 106(a) of the INA, 8 U.S.C. § 1105a(a) (1982). The lower court had also found that the Board did not abuse its discretion in denying the motion to reopen.

The Court also let stand a decision from the Fifth Circuit which denied a motion to reopen, even though the BIA had placed great emphasis in its denial on adverse factors which were used by the Board five years earlier in denying an application for suspension of deportation. Marcello v. INS, 103 S. Ct. 1868 (1983), *denying cert. to* 694 F.2d 1033 (5th Cir. 1983).

4. 51 U.S.L.W. 4907 (U.S. June 23, 1983).

5. A "one-House veto" permits Congress to monitor or oversee the exercise of the discretionary powers which it has delegated to the Executive branch. Typically, such a provision allows one House of Congress to veto, by affirmative action or inaction, the exercise of the power it delegated to the Executive branch. Absent a veto, the act or proposal becomes law. For a fuller treatment and presentation of opposing views, see Javits & Klien, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455 (1977); Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253 (1982); Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 NW. U.L. REV. 1064 (1981).

6. One commentator has placed the number of congressional veto provisions at 295. *See*, Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L. J. 323, 324 (1977).

7. § 103(a), 8 U.S.C. § 1103(a) (1982).

of the INA[8] gives the Attorney General discretion to suspend deportation proceedings and adjust the status of aliens when certain statutory requirements are met.[9] However, section 244(c)(2)[10] allows Congress to pass a resolution contrary to the Attorney General's determination that deportation of an alien should be suspended.

Chadha, an alien who overstayed his nonimmigrant student visa, was granted suspension of deportation by an immigration judge. The House of Representatives, however, by resolution without debate or recorded vote, vetoed the suspension determination pursuant to section 244(c)(2). Chadha challenged the one-House veto provision, contending that the House's action was essentially legislative in purpose and effect, and thus subject to Article I, Section 7 of the Constitution, which requires legislation to be passed by a majority of both houses of Congress and presented to the President before becoming law.[11]

After disposing of numerous protestations that the case was nonjusticiable,[12] the Court analyzed the purposes and design of the system of checks and balances, adopted by the Framers of the Constitution, to ensure a separation of the three branches of government.[13] The Court concluded the constitutional provisions requiring presentment of the legislation to the President and bicameral approval "represents the Framer's decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[14]

Having established that the procedural requirements of Article I, Section 7 must be strictly adhered to when the government enacts legislation, the Court next considered whether Congress' action under INA section 244(c)(2) is an exercise of legislative power. The Court concluded that Congress had effectuated legislation because the "legal rights, duties and relations of persons"[15] had been altered. The fact that deportation of any alien could not be achieved until

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8. § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1982).

9. Section 244(a)(1) of the United States Code provides that deportation may be suspended if the alien has been physically present in the United States for seven years, proves his good moral character, and the Attorney General is of the belief that deportation would constitute an extreme hardship on the alien, his spouse, parent, or child who is a citizen of the United States or has been lawfully admitted for permanent residence. § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1982). *See infra* notes 139-51 and accompanying text.

10. § 244(c)(2), 8 U.S.C. §1254(c)(2).

11. U.S. CONST. art. I, § 7.

12. Congress argued that the Court was without appellate jurisdiction, that § 244(c)(2) of the Act could not be severed from § 244, that Chadha lacked standing, that Chadha had alternative statutory relief available to him, that the case did not present a genuine controversy because the INS agreed with Chadha's position, and that the case presented a nonjusticiable political question. 51 U.S.L.W. 4910-14.

13. *Id.* at 4914-16.

14. *Id.* at 4916.

15. *Id.*

legislation requiring such deportation was enacted was used as additional support for the Court's conclusion that Congress' action was legislative in character. As final support for its decision, the Court noted that the veto provision in INA section 244(c)(2) does not come within the narrowly prescribed situations enumerated in the Constitution that allow one House of Congress to act exclusively of the other.[16]

The Court's resolution of *Chadha* wrested ultimate determination on suspension of deportation from Congress under the current delegation of powers of the Attorney General. The decision may eliminate Congressional veto provisions in other statutes delegating authority to executive and administrative agencies.

Landon v. Plasencia

In *Landon v. Plasencia*,[17] the Court unanimously[18] reversed a Ninth Circuit holding[19] that an exclusion hearing is an impermissible proceeding for litigating whether a lawful permanent resident may return to the United States after a brief visit abroad.

Plasencia was lawfully admitted to the United States as a permanent resident from her native El Salvador in 1970. In 1975, after a brief visit to Mexico where she agreed to assist in the illegal entry of Salvadoran and Mexican nationals, Plasencia was held at the port of entry[20] and charged with attempting to smuggle aliens into the

16. U.S. CONST. art. I, § 2, cl. 6 gives the House the power to initiate impeachments. Art. I, § 3, cl. 5 gives the Senate the power to conduct trials following impeachment charges and to convict on such charges. Art. II, § 2, cl. 2 gives the Senate the power to approve presidential appointments. Art. II, § 2, cl. 2 gives the Senate the power to ratify treaties entered into by the President.

17. 103 S. Ct. 321 (1982).

18. Justice Marshall filed a separate opinion, concurring in the majority's resolution of the type of proceeding a re-entering resident alien can be afforded, but dissented from the order to remand on the question of whether respondent was denied due process. 103 S. Ct. at 332 (1982)(Marshall, J., concurring in part and dissenting in part).

19. 637 F.2d 1286 (9th Cir. 1980), *rev'd* 103 S. Ct. 321 (1982).

20. Section 235 of the Immigration and Nationality Act provides in part:

> (a) The inspection . . . of aliens (including alien crewmen) seeking admission or readmission to . . . the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. . . .
>
> (b) Every alien . . . who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer.

Immigration and Nationality Act § 235, 8 U.S.C. § 1225 (1982).

United States.[21] In an exclusion proceeding, the Immigration Judge determined that Plasencia's return was an "entry" as defined in §101 (a)(13) of the INA[22] because her trip abroad was "meaningfully interruptive" of her residence in the United States.[23] Upon clear and convincing evidence that Plasencia had aided an alien in illegally entering the country, the INS ordered her excluded and deported. Plasencia filed a petition for a writ of habeas corpus arguing that because she was a permanent resident she was entitled to have the issue of "entry" litigated in a deportation proceeding with its attendant procedural safeguards.[24]

The Supreme Court, examining the language and legislative history of the INA, concluded that regardless of the residency status of the alien, admissibility is to be determined in an exclusion hearing. "Nothing in the statutory language or the legislative history suggests that the respondent's status as a permanent resident entitles her to a suspension of the exclusion hearing or requires the INS to proceed only through a deportation hearing."[25] The Court rejected the Ninth Circuit's reasoning that the denial of a deportation proceeding is "manifestly unfair" and in contravention of both the spirit and the scope of *Rosenberg v. Fleuti*,[26] which held that a brief, unintended

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21. Section 212(a)(31) of the INA excludes from admission into the United States: "Any alien who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted or aided any other alien to enter or to try to enter the United States in violation of law." Immigration and Nationality Act § 212(a)(31), 8 U.S.C. § 1182(a)(31) (1982).

22. Section 101(a)(31), defines "entry" as:

> [A]ny coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

Immigration and Nationality Act § 101(a)(31), 8 U.S.C. § 1101(a)(13) (1982).

23. In Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963), the Court articulated several factors for determining "meaningful" interruption, including the purpose of the visit, the length of absence, and the necessity of procuring travel documents. *See infra* notes 26, 139-49 and accompanying text.

24. Deportation proceedings differ from exclusion proceedings in several ways. For example, the burden of proof on the Government in a deportation proceeding is much higher than in an exclusion proceeding. In terms of judicial review of administrative decisions, the alien in deportation proceedings may seek review from the court of appeals, while exclusion orders may only be reviewed in habeas corpus proceedings. For further procedural and substantive distinctions, see Note, *Statutory and Constitutional Limitations on the Indefinite Detention of Excludable Aliens*, 62 B.U.L. REV. 553 (1982).

25. 103 S. Ct. at 326-27.

26. 374 U.S. 449 (1963).

departure from the country should not subject an alien to the consequences of an "entry."

The Court recognized Plasencia's right to due process within the context of her exclusion hearing,[27] and remanded the case for resolution of this issue.[28]

Toll v. Moreno

The Supreme Court, in *Toll v. Moreno*,[29] held that the University of Maryland's policy of categorically denying "in-state" status, with its concomitant tuition and admission advantages, to domiciled G-4 nonimmigrants[30] and their families, is invalid under the Supremacy Clause.[31] The respondents were students at the University of Maryland when suit commenced. They resided in Maryland with their parents, nonimmigrant aliens and holders of G-4 visas. Despite respondents' residence in the State, for the requisite time to qualify for in-state status, the University denied them in-state status pursuant to a University policy of denying such status to all nonimmigrant aliens due to their inability to demonstrate an intent to live permanently or indefinitely in Maryland.[32]

Respondents filed a class action against the University of Maryland, contending that the University's policy violated the due process and equal protection clauses of the fourteenth amendment,[33] the

27. 103 S. Ct. at 330-32. However, the Court stated that such due process rights may be lost if the permanent resident alien's absence is extended. *Id.* at 330.

28. Among the possible deficiencies noted by the Court were: the eleven hour notice of the exclusion hearing; improper allocation of the burden of proof; waiver of right to representation without a full understanding of the right or the ramifications of waiving it. *Id.* at 330-31.

29. 102 S.Ct. 2977 (1982).

30. G-4 visas are issued to nonimmigrant aliens who are officers or employees of enumerated international organizations, and to their immediate families. Immigration and Nationality Act § 101(a)(15)(G)(iv), 8 U.S.C. § 1101(a)(15)(G)(iv) (1982).

31. 102 S. Ct. at 2977, 2986. The Supremacy Clause of the Constitution provides:

> This Constitution, and the Laws of the United which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U. S. CONST. art. VI, cl. 2.

32. 102 S. Ct. at 2979.

33. The Fourteenth Amendment states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, §1.

supremacy clause, and various federal laws. The District Court granted partial summary judgment for the plaintiffs and the class they represented. In the court's view, the University's policy had created an irrebuttable presumption of inability to establish Maryland domicile by G-4 aliens. This, the court concluded, was "not universally true"[34] as a matter of federal or state law. The policy, therefore, violated the due process clause.[35] The Fourth Circuit Court of Appeals affirmed.[36]

On appeal to the United States Supreme Court, the Court, in *Elkins v. Moreno*,[37] agreed that as a matter of federal law the presumption was not universally true. The Court, however, certified the remaining question, the validity of the presumption under state law, to the Maryland Court of Appeals. That court found nothing in Maryland law which rendered G-4 aliens incapable of establishing state domicile.[38]

After the Supreme Court decision in *Elkins*, but before the state court response, the University reaffirmed its exclusion policy in a "clarifying resolution." The University abandoned its position that G-4 aliens were incapable of establishing Maryland domicile. Instead, the University based its exclusion policy on a "number of substantial purposes and interests,"[39] including a desire to grant greater tuition subsidies to those individuals more likely to remain in the State and contribute to the State's economic well-being, administrative efficiency, and the prevention of disparate treatment of nonimmigrants.

Following the Maryland Court of Appeals decision, certiorari was again granted by the Supreme Court. Holding that the University's revamped resolution raised new constitutional issues, the Court vacated the Court of Appeals judgment and remanded the case.[40]

On remand, the District Court held, with respect to the period prior to the resolution, that the University's policy violated due process by establishing a conclusive presumption that a nonimmigrant

34. Moreno v. University of Maryland, 420 F. Supp. 541, 559-60 (D. Md. 1976).
35. *Id.* The district court relied on the Supreme Court's due process analysis in Vlandis v. Kline, 412 U.S. 441 (1973). *Vlandis* involved a Connecticut statute which classified certain married couples admitted for admission to the University of Connecticut as out-of-state students based on the applicant's legal address prior to or at the time of application for admission. The Court held the statute to be violative of the Due Process Clause because it denied resident tuition rates on the basis of a permanent and irrebuttable presumption of non-residence, when the presumption was not always true in fact. 412 U.S. at 452.
36. Moreno v. Elkins, 556 F.2d 573 (4th Cir. 1977).
37. 435 U.S. 647 (1978).
38. Toll v. Moreno, 284 Md. 425, 444, 397 A.2d 1009, 1019 (1979).
39. 102 S. Ct. at 2981.
40. Toll v. Moreno, 441 U.S. 458 (1979) (per curiam).

could not have a Maryland domicile.[41] With respect to the clarifying resolution, wherein domicile was no longer the paramount consideration in granting in-state status, the court concluded that the policy violated the equal protection clause[42] and the supremacy clause by encroaching upon the federal government's power over the regulation of immigration. The Court of Appeals affirmed, per curiam.[43]

The Supreme Court affirmed, finding the resolution to be in violation of the supremacy clause. After recognizing "the preeminent role of the Federal Government with respect to the regulation of aliens,"[44] the Court reiterated the principle that "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress."[45] The Court found it significant that Congress had allowed G-4 aliens the opportunity to establish domicile in the United States, whereas other categories of nonimmigrants were barred from doing so. Furthermore, the Court pointed to additional affirmative steps taken by the Federal Government, in the form of special tax privileges, designed to facilitate the immigration of international organizations and their employees to the United States. According to the Court, Maryland's policy of denying in-state status to the G-4 alien frustrated these federal policies in contravention of the supremacy clause and amounted to a burden not contemplated by Congress.

The Court avoided consideration of the due process and equal protection arguments relied upon by the lower courts, but reiterated the validity of its recent decisions upholding a state's right to limit the participation of non-citizens in the governmental process without violating the equal protection clause.[46]

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41. 480 F. Supp. 1116, 1122-25 (D. Md. 1979).

42. In the view of the district court, the clarifying resolution created an alienage classification which had to fall under strict scrutiny because the state failed to justify the classification with a requisite compelling state interest. *See infra* note 46 and accompanying text.

43. Moreno v. University of Maryland, 645 F.2d 217, 220-21 (4th Cir. 1981) (per curiam).

44. 102 S. Ct. at 2982.

45. *Id.* at 2983 (quoting De Canas v. Bica, 424 U.S. 351, 358 n.6 (1976)).

46. 102 S. Ct. at 2983 n.17. Justice Rehnquist, joined by Chief Justice Burger, wrote a vehement dissent, contending that the state's classification was not suspect and should only be subjected to minimal scrutiny. 102 S. Ct. at 2990-3002 (Rehnquist, J., dissenting).

In *Alfred L. Snapp & Son, Inc. v. Puerto Rico*,[47] the Court concluded that the Commonwealth of Puerto Rico has standing as *parens patriae*[48] to seek declaratory and injunctive relief against Virginia defendants for alleged discrimination against Puerto Rican temporary farm workers in violation of the Wagner-Peyser Act[49] and a provision of the INA authorizing admission of temporary workers into the United States.[50]

Puerto Rico charged that defendants engaged in preferential hiring treatment of Jamaican workers in violation of the Wagner-Peyser Act which requires clearance of an interstate system for locating domestic laborers before an employer may hire foreign laborers.[51]

The Supreme Court held *parens patriae* standing arises if the state has an articulable interest independent of the private parties involved. The Court recognized two categories of such quasi-sovereign interests: the State's interest in the general economic and physical well-being of its residents and the State's interest in ensuring that it is not being discriminatorily denied its status within the federal system. The Commonwealth of Puerto Rico manifested both interests. Seeking to protect its residents from the cancerous effects of ethnic discrimination, Puerto Rico manifested an interest in its economic well-being. Alternatively, the Commonwealth's participation in the federal employment scheme and its desire for its residents to reap the full benefits of such legislation was found to be a quasi-sovereign interest, vesting Puerto Rico with *parens patriae* standing.[52] The Court, however, in defining interests which enable a state to vindicate the federal rights of its citizens, did not abandon the ad hoc approach it has taken with *parens patriae* actions.

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47. 102 S. Ct. 3260 (1982).

48. The concept of *parens patriae* (parent of the country), as developed in the United States, grants standing to a state if it is able to assert an injury to a "quasi-sovereign" interest. *See* note 52 *infra* and accompanying text. *See also*, Curtis, *The Checkered Career of Parens Patriae*, 25 DE PAUL L. REV. 895 (1976).

49. 102 S. Ct. at 3270. The Wagner-Peyser National Employment System Act created the United States Employment Service to promote a national system of public employment offices. Wagner-Peyser National Employment System Act, Ch. 49, 48 Stat. 113 (1933) (codified as amended in scattered sections of 29 U.S.C.).

50. 102 S. Ct. at 3270. Section 101(a)(15)(H)(ii) of the INA authorizes admission of temporary workers into the United States if unemployed persons in the country are unable to fill available positions. Immigration and Nationality Act § 101(a)(15)(H)(ii), 8 U.S.C. § 1101(a)(15)(H)(ii) (1982).

51. For purposes of the Wagner-Peyser Act, Puerto Rico is included in the federal-state system established by the Act. 29 U.S.C. § 49b(b) (1976).

52. 102 S. Ct. at 3269-71.

CRIMINAL PROCEDURE

Many of the past year's significant immigration decisions involved criminal procedure issues. The Ninth Circuit, with a decidedly liberal bent, ruled on the use of the exclusionary rule in deportation proceedings and the boundaries of permissible searches and seizures of aliens.

Ninth Circuit Decisions

Once an alien has been admitted to the United States and has passed examination by immigration officers, he can only be expelled from the country through deportation proceedings.[53] In *Lopez-Mendoza v. INS*,[54] the Ninth Circuit held that the exclusionary rule[55] applies in deportation proceedings.

Lopez and Sandoval were arrested along with 35 others by INS agents in a search for undocumented aliens at a Washington potato processing plant. Both made pre-hearing admissions to INS agents that they were illegally in the country, but they refused to depart voluntarily. An INS agent completed Form I-213,[56] stating that Sandoval was an alien who had entered the United States without inspection and was deportable.[57] Sandoval refused to testify at his deportation hearing, attempting instead to suppress his admission because it was the product of an arrest violative of the fourth amendment.[58] However, the Immigration Judge found no violation of the fourth amendment in Sandoval's detention.[59] Sandoval was ordered deported on the basis of his admission. The Ninth Circuit reversed Sandoval's deportation order, holding that his arrest was not predicated on probable cause, that his statements were the fruit of an

53. *See generally*, 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 5.1-5.21 (rev. ed. 1981).

54. 705 F.2d 1059 (9th Cir. 1983).

55. The exclusionary rule is a judicially created doctrine which excludes evidence derived by exploitation of an unconstitutional search or seizure when it is offered in a criminal proceeding to prove guilt or its equivalent. *See* Wong Sun v. United States, 371 U.S. 471 (1963). *See generally* Note, *The Exclusionary Rule in Deportation Proceedings: A Time for Alternatives*, 14 J. INT'L LAW & ECON. 349 (1980).

56. Form I-213, entitled "Record of Deportable Alien" is comparable to a police report. It provides biographical data and the circumstances of the alien's entry into the United States.

57. Immigration and Nationality Act § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1982) (an alien who enters the United states without inspection is deportable).

58. 705 F.2d at 1060.

59. 705 F.2d at 1062. Lopez made the same argument in his deportation hearing, but the immigration judge, holding that the exclusionary rule is inapplicable in deportation proceedings, never reached the issue. *Id.* at 1061.

illegal arrest, and that the exclusionary rule bars the INS from using such statements in deportation proceedings.[60]

The court summarily concluded that the actions of the INS agents were arrests absent probable cause.[61] In determining the applicability of the exclusionary rule to deportation proceedings, which have historically been deemed civil in nature,[62] the court utilized the analysis of *United States v. Janis*.[63] In *Janis*, the Supreme Court held that in a civil tax proceeding the exclusionary rule does not bar the federal government from using evidence seized by state law enforcement officers in violation of the fourth amendment. Interpreting *Janis* as an advocation of selective use of the exclusionary rule, the Ninth Circuit focused on whether the exclusionary rule should be applied in civil cases involving "*intra*sovereign violation,"[64] as opposed to the *inter*sovereign transgression involved in *Janis*. Using deterrence of future unlawful conduct as a touchstone rather than the civil nature of the proceedings,[65] the majority concluded that the deterrent effect of the exclusionary rule is maximized in situations where the offending enforcement officer and the prosecutor are members of the same government agency, sharing the common goal of prosecution.[66] Moreover, the extent to which immigration officers are already subject to the deterrent effects of the exclusionary rule outside the deportation context was found by the court to be minimal. Application of the exclusionary sanction to intrasovereign transgression would therefore produce a "substantial and efficient"[67] deterrent effect.

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60. The court vacated Lopez's order for deportation and remanded to consider the lawfulness of Lopez's detention. *Id.* at 1061.

61. *Id.* at 1062-63. The aliens were originally detained in the men's room of the factory and then transported to the Franklin County jail. The court concluded that Sandoval was under arrest at the time he was interrogated at the jail, basing its conclusion on Dunaway v. New York, 442 U.S. 200 (1979)(the detention of a person in a police station interrogation room must be supported by probable cause), and its own recent decision in ILGWU v. Sureck, 681 F.2d 624 (9th Cir. 1982)(factory surveys violate the fourth amendment absent reasonable and articulable suspicion that each questioned alien is illegally in the country). For a further discussion of *ILGWU v. Sureck* see *infra* notes 72-85 and accompanying text.

62. *See* Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 285 (1966).

63. 428 U.S. 433 (1976).

64. 705 F.2d at 1067-68. "Intrasovereign violations" occur when the officer committing the unconstitutional search or seizure is an agent of the same sovereign that seeks to use the evidence. United States v. Janis, 428 U.S. 455-56, n. 31.

65. In a footnote, the court, relying on One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965), argued alternatively that deportation proceedings could be characterized as quasi-criminal, thereby justifying application of the exclusionary rule. 705 F.2d at 1065, n. 9.

66. 705 F.2d at 1070.

67. United States v. Janis, 428 U.S. 433, 453 (1976). *See also* Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L. J. 1361 (1981).

The court employed empirical balancing in its last step under the *Janis* analysis, determining whether the social cost of invoking the exclusionary rule outweighs its deterrent effect.[68] The majority opined that the number of aliens likely to benefit from invoking the exclusionary rule paled in comparison to the number of aliens streaming across the border. The court thus concluded that the deterrent benefit far outweighs the social cost of applying the rule in deportation proceedings.[69] Alternatives to the exclusionary rule, propounded in an administrative decision by the Board of Immigration Appeals (BIA),[70] were dismissed as "unrealistic and unacceptable."[71]

In *ILGWU v. Sureck*,[72] the Ninth Circuit held INS factory surveys constitute an unreasonable seizure violative of the fourth amendment absent reasonable and articulable suspicion that each questioned worker is an alien illegally in the United States. Pursuant to an INS factory survey,[73] two U.S. citizens and two permanent resident aliens were questioned regarding their citizenship status. Appellants[74] argued that the INS action constituted bodily seizure because they were detained and questioned in the custody of the INS agents.[75] Although the court disagreed with appellants' conten-

68. 705 F.2d at 1071-73 (applying the test set forth in United States v. Janis, 428 U.S. 433, 447-60 (1976)).

69. 705 F.2d at 1073. A sharp dissent by four judges maintained that the majority's new rule of evidence would add greater economic burdens by encouraging aliens to demand a deportation hearing and lessen the efficient enforcement of the immigration laws. *Id.* at 1075-95 (Alarcon, J., dissenting).

70. *In re* Sandoval, 17 I. & N. Dec. 70 (1979). Among the alternatives espoused were private damage suits against INS officers, injunctive relief, and internal INS sanctions. For a further discussion of alternatives to the exclusionary rule, see Schroeder, *supra* note 67. For a discussion of the Board of Immigration Appeals and its function, see, Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1 (1980); Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29 (1977).

71. 705 F.2d at 1073.

72. 681 F.2d 624 (9th Cir. 1982).

73. An INS factory survey involves the positioning of INS agents at exits in a factory while detentive questioning of the entire work force is conducted on the suspicion that some of the workers may be illegal aliens. 681 F.2d at 626.

74. The ILGWU, certified as the exclusive bargaining representative of the employees at the two factories involved, and the four individuals, brought the class action challenging the INS factory surveys. The District Court dismissed the union as a party and denied the motion to certify the class. In December 1979 and January 1980, the court granted INS motions for summary judgment and these consolidated appeals followed. 681 F.2d at 626.

75. The court did not decide whether search warrants, procured where consent was denied by factory owners, were defective as the court was persuaded that the conduct of the INS during the factory surveys violated the fourth amendment rights of the workers.

tion that factory surveys are similar to arrests requiring probable cause to arrest, the court did accept the characterization of factory surveys as seizures of the work force.[76] Given the intrusive nature and threatening execution of the survey, the court concluded that, even prior to individual questioning, a reasonable worker "would have believed that he was not free to leave."[77]

Following its conclusion that factory surveys, conducted pursuant to INS procedures, constitute a fourth amendment seizure, the court considered the constitutional standard applicable to INS factory survey questioning.[78] After analyzing Ninth Circuit case law and extrapolating from recent Supreme Court pronouncements,[79] the court concluded that "INS investigators may not seize or detain workers for citizenship status questioning unless the investigators are able to articulate objective facts providing investigators with a reasonable suspicion that each questioned person, so detained, is an alien illegally in this country."[80] Requiring a reasonable suspicion of illegality also assures that citizens and aliens legally in the country will not be subjected to the type of arbitrary government action prohibited by the fourth amendment. To comply with the fourth amendment rights of all workers involved, the predicate for detentive questioning must be a reasonable and individualized suspicion of illegal alienage rather than reasonable suspicion that someone is an alien.[81]

In requiring individualized suspicion, the Ninth Circuit rejected

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681 F.2d at 629.

76. *Id.* at 630, 634. The court relied on its language in United States v. Anderson, 663 F.2d 934, 939 (9th Cir. 1981): "[A] person has been 'seized' within the meaning of the fourth amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 939 (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)).

77. 681 F.2d at 634.

78. *Id.* An INS agent has statutory authority under § 287(a)(1) of the Immigration and Nationality Act, to question a person as to his right to be or remain in the United States without implicating the fourth amendment, provided the agent has a reasonable belief that the questioned person is an alien. 8 U.S.C. § 1357(a)(1) (1982). A seizure complies with the fourth amendment if the officer can articulate a reasonable suspicion that the questioned person is an illegal alien. Au Yi Lau v. INS, 445 F.2d 217 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 864 (1971). *See also*, Ojeda-Vinales v. INS, 523 F.2d 286 (2d Cir. 1975).

79. Michigan v. Summers, 452 U.S. 692 (1981) (limited intrusions on the personal security of detained persons may be made on less than probable cause, provided the police have an articulable basis for suspecting criminal activity); United States v. Cortez, 449 U.S. 411 (1981) (investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity).

80. 681 F.2d at 683.

81. *See supra* note 78. In a case which was decided after *ILGWU*, a Washington district court permanently enjoined INS agents from entering farm labor housing in search of undocumented workers, absent a search warrant or individualized suspicion supported by "articulable objective facts" that each person seized was illegally in the country. La Duke v. Nelson, 560 F. Supp. 158 (E.D. Wash. 1982).

the government's argument that *United States v. Martinez-Fuerte*[82] should control. The court reasoned that factory surveys are more similar to roving patrols than permanent checkpoints, and that the individualized suspicion standard articulated in *United States v. Brignoni-Ponce*[83] should apply. By refusing to accept the government's analogy, the court rejected the Third Circuit's ruling in *Babula v. INS*,[84] to the extent that it held factory survey questioning constitutionally permissible on less than a particularized suspicion. The INS subsequently filed a certiorari petition seeking review of *ILGWU v. Sureck*.[85]

The Ninth Circuit, in *Zepeda v. INS*,[86] distinguished its *ILGWU* holding. The *Zepeda* court, though affirming the issuance of a preliminary injunction against certain INS investigatory policies, rejected the district court's conclusion that the mere approach of persons for questioning constitutes a seizure within the fourth amendment.[87] The court held that the approach of a residence by an INS agent, for the purpose of questioning persons within, does not implicate constitutional rights.[88] Moreover, to enjoin such a basic right of approach would preclude the efficient enforcement of immigration laws. The stationing of agents at exits and entrances of the factory in *ILGWU* distinguished that case from the situation of mere approach.

82. 428 U.S. 543 (1976)(the practice of referring certain vehicles to secondary inspection areas at permanent checkpoints for further questioning on less than particularized suspicion is constitutional).

83. 422 U.S. 873 (1974). "Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." *Id.* at 884.

84. 665 F.2d 293 (3d Cir. 1981).

85. INS v. Delgado, 51 U.S.L.W. 3774 (U.S. April 26, 1983).

86. 708 F.2d 355 (9th Cir. 1983).

87. *Id.* at 362. The District Court enjoined the Service from: (1) entering a residence or nonpublic area of business without consent, warrant, or exigent circumstance; (2) engaging in general searches of homes or nonpublic areas of businesses, unless incident to arrest or when exigent circumstances dictate; (3) detaining and questioning persons concerning their immigration status without reasonable suspicion that the persons detained are illegally in the country; and (4) arresting persons absent a warrant or probable cause to believe the person is illegally in the country and likely to escape before a warrant is procured. The Court of Appeal upheld these prohibitions. 708 F.2d at 358-59.

88. *See*, Cuevas-Ortega v. INS, 588 F.2d 1274 (9th Cir. 1979); Cordon de Ruano v. INS, 554 F.2d 944 (9th Cir. 1979).

Unlawful Intent In a §276 Charge

The United States Circuit Courts of Appeals disagreed regarding the Government's burden of proving unlawful intent in INA §276[89] cases charging aliens with unlawful reentry into the United States after deportation. Pursuant to §276, an alien who has been arrested and deported or excluded and deported and thereafter enters the United States is guilty of a felony. In 1968, *Pena-Cabanillas v. United States*[90] held that, to prosecute a §276 charge, the Government need only prove that the accused is an alien and that he illegally entered the United States after deportation had been executed. The court stated that there was no indication in the statute that a specific intent to reenter need be shown.[91] The Court construed the statute as a regulatory statute without basis in any common law crime; the offense was deemed *mala prohibita*, or a public welfare offense, wherein intent is implied once it is shown that the defendant voluntarily committed the forbidden act.[92]

The Sixth, Second, and Tenth Circuits agreed with the Ninth Circuit's reasoning in cases decided during the past year. In *United States v. Hussein*[93] the Sixth Circuit held that the district court did not err in failing to instruct the jury that a specific unlawful intent by the defendants must exist before a guilty verdict for violation of INA §276 could be returned. The court reiterated the holding and reasoning of the Ninth Circuit in *Pena-Cabanillas*. The Second Circuit in *United States v. Newton*,[94] similarly concurred with *Pena-Cabanillas*, but did not totally foreclose the possibility of a good faith defense.[95] Because the good faith instruction was not requested in a timely fashion, however, the court did not resolve its viability as a defense. The Tenth Circuit in *United States v. Hernandez*,[96] similarly relied on *Pena-Cabanillas*, concluding that showing specific unlawful intent is not an element of the felony of unlawful reentry.

The Seventh Circuit, however, rejected the reasoning of *Pena-Cabanillas* in *United States v. Anton*.[97] The court disagreed with the

89. Immigration and Nationality Act § 276, 8 U.S.C. § 1326 (1982).
90. 394 F.2d 785 (9th Cir. 1968).
91. *Id.* at 789.
92. *Id.* at 788-89. *See generally* Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).
93. 675 F.2d 114, 116 (6th Cir. 1982).
94. 677 F.2d 16 (2d Cir. 1982).
95. *Id* at 17. Section 276 of the INA states that a deported alien commits a crime if he is found in the United States, "unless" he has the "express" consent of the Attorney General to re-enter the country. Immigration and Nationality Act § 276, 8 U.S.C. § 1326 (1982). The good faith defense contends that the alien who enters the country with a reasonable belief that the Attorney General had consented is innocent of the crime. *See* 677 F.2d at 17. *See generally* W. LAFAVE & A. SCOTT, CRIMINAL LAW 356-57 (1972).
96. 693 F.2d 996, 1000 (10th Cir. 1982).
97. 683 F.2d 1101 (7th Cir. 1982).

characterization of §276 as a *mala prohibita* offense. The court reasoned that such offenses are minor violations of laws or regulations passed for the safety and health of the community and usually do not carry severe sanctions.[98] Section 276, however, is a felony punishable by imprisonment and/or fines and should, therefore, require a showing of criminal intent.[99] The Seventh Circuit further disagreed with the Ninth Circuit that Congress' intent was to eliminate the specific intent requirement.[100] The court concluded that the alien's belief that he had the consent of the Attorney General to reenter the country constituted a mistake-of-law, making it unjust to levy criminal sanctions upon him.[101] The court thus gave viability to a good faith defense in the face of an INA §276 charge.[102]

ASYLUM

Prior to 1968, the INS and Board of Immigration Appeals (BIA), under section 243(h) of the INA,[103] required an asylum applicant to show a "clear probability" of persecution in the country to which he was being deported.[104] In 1968, however, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, which defined a refugee as one outside his country owing to a "well-founded fear of being persecuted."[105] In *In re Dunar*[106] the BIA determined that there was no substantial difference between the two burdens; both required objective evidence manifesting a realistic probability of persecution. The Refugee Act of 1980[107] modified section 243(h) to conform to "the well-founded fear" language of the Protocol.

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98. The court recognized a narrow class of *mala prohibita* offenses exists "for which substantial penalties have been found to be justified." 683 F.2d at 1015. *See* United States v. Dotterweich, 320 U.S. 277 (1943) (shipping adulterated and misbranded drugs); United States v. Balint, 258 U.S. 250 (1922) (selling narcotics).

99. 683 F.2d at 1017.

100. 683 F.2d at 1015-16.

101. *Id.* at 1018.

102. The dissenting judge criticized the majority for going against the weight of authority and for "[dumping] another case onto the crowded lap of the Supreme Court." *Id.* 1021 (Posner, J., dissenting).

103. Immigration and Nationality Act § 243(h), 8 U.S.C. §1253(h) (1982). This section authorizes the Attorney General to withhold deportation of any alien whose life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, if deported.

104. *See, e.g.*, Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1969); Lena v. INS, 379 F.2d 536 (7th Cir. 1967).

105. 19 U.S.T. 6257, 606 U.N.T.S. 268.

106. 14 I. & N. Dec. 310 (1973).

107. Pub. L. No. 96-212, 94 Stat. 102 (codified in various sections of 8 U.S.C.).

United States Circuit Courts of Appeals

A rift in the Circuit Courts of Appeals concerning the proper burden of proof in asylum applications widened as a result of the differing language and decisional law. In February, 1983, the Supreme Court granted the government's petition for certiorari to review *Stevic v. Sava.*[108] The Second Circuit had stated in *Stevic*[109] that the changes engendered by the Act were unambiguous concerning Congress' intention to conform the INA to the U.N. Protocol; therefore, the BIA's "clear probability" standard was too onerous.[110]

The Sixth Circuit in *Reyes v. INS*,[111] addressed the burden of proof question and agreed with the Second Circuit's determination in *Stevic* that the clear probability standard is inconsistent with recent legislative pronunciations. The Sixth Circuit, like the Second Circuit, did not delineate the evidence needed to establish a well-founded fear of persecution. However, the *Reyes* court did note that there must be more than the mere testimony of the alien in support of the claim.[112]

The Third Circuit, however, sharply rejected the Second Circuit's interpretation. In *Rejaie v. INS*,[113] the court concluded that the *Stevic* court had misconstrued the legislative history of the 1968 accession to the Protocol and to the Refugee Act, and had inadequately considered case law[114] stating that the two standards were equivalent. The legislative modification of §243(h) was deemed irrelevant to the clear probability standard and was discounted by the Third Circuit as mere "cosmetic surgery"[115] to bring the language of the Protocol and domestic law into conformity.

The District Courts

The Federal District Court for the Northern District of California, in a different context, also faced the issue of the proper burden of proof in establishing persecution. In *Almirol v. INS*[116] the court held that the "well-founded fear" standard is the correct burden of proof where "persecution" is required to waive the foreign residence

108. 678 F.2d 401 (2d Cir. 1982), *cert. granted sub nom* INS v. Stevic, 51 U.S.L.W. 3633 (U.S. March 1, 1983) (No 82-973).

109. 678 F.2d 401 (2d Cir. 1982).

110. *Id.* at 409.

111. 693 F.2d 597 (6th Cir. 1982).

112. The court held the testimony of Reyes and affidavits from relatives, general newspaper and documentary reports concerning conditions in the Philippines, and a letter from an official of the Catholic Church in the Philippines sufficient to meet the well-founded fear burden. *Id.* at 600.

113. 691 F.2d 139, 146 (3d Cir. 1982).

114. *See, e.g.*, Kashani v. INS, 542 F.2d 376 (7th Cir. 1977).

115. 691 F.2d at 146.

116. 550 F. Supp. 253, 256 (N.D. Cal. 1982).

requirement of INA §212(e).[117] Because the issue was one of first impression for the district court and the legislative history regarding the section was barren of any interpretations, the court looked to the Ninth Circuit's decision in *Pereira-Diaz v. INS*,[118] which established the propriety of the "well-founded fear" standard in reviewing asylum applications.

The Refugee Act of 1980 and the United Nations Protocol Relating to the Status of Refugees were also cited in *Nunez v. Boldin*,[119] holding that an alien is entitled to be notified of his right to apply for asylum before he is caused to depart, whether voluntarily or by deportation. The court found additional support for its temporary injunction requiring the INS to notify the detainees of their right to apply for political asylum in the fifth amendment's due process guarantee.[120] The court held the political asylum applicant may be deprived of life, liberty, and property by deportation. The applicable regulations only required the INS to notify an alien of his right to apply for political asylum or withholding of deportation where deportation proceedings had already commenced. "The present procedures," the court concluded, "do not sufficiently assure that genuine asylum claims will be heard, nor do they assure that an alien subject to persecution will not be returned to the country of his persecutors."[121]

Similarly, in *Orantes-Hernandez v. Smith*,[122] a California district court issued preliminary injunctions prohibiting the INS from coercing Salvadoran aliens into signing voluntary departure forms and requiring the INS to advise the aliens of their rights to apply for asylum and a deportation hearing before requesting the aliens to depart voluntarily.[123] The court concluded that in order to execute informed

117. Immigration and Nationality Act § 212(e), 8 U.S.C. § 1182(e) (1982).
118. 551 F.2d 1149 (9th Cir. 1977).
119. 537 F. Supp. 578 (S.D. Tex. 1982).
120. 537 F. Supp. at 584-87. The due process clause requires that life, liberty, or property shall not be deprived by the Federal Government without due process of law. In Matthews v. Eldridge, 424 U.S. 319 (1976), the Supreme Court asserted a framework for the "specific dictates of due process" in each particular case, requiring consideration of three factors: (1) the private interest that will be affected by the Government's action; (2) the risk of deprivation of life, liberty, or property through current procedures, and the probable value of new or additional procedural safeguards; and (3) the Government's fiscal and administrative interests in new or additional procedures. *Id.* at 339-49.
121. 537 F. Supp. at 586.
122. 541 F. Supp. 351 (C.D. Cal. 1982).
123. The Attorney General is authorized by 8 U.S.C. § 1252(b)(g) (1982), to allow certain classes of deportable aliens to voluntarily depart from the United States. An alien in this situation admits to being in the country illegally and no hearing is con-

waivers[124] of the right to apply for asylum and the right to a deportation hearing, aliens must receive notice of these rights. The court recognized, as did the *Nunez* court, that this new procedure will be burdensome for the INS and may lead to frivolous asylum applications; however, in balancing these recognized hardships against an alien's right to apply for asylum and a deportation hearing, "the scales tip sharply in favor of Plaintiffs."[125]

The Board of Immigration Appeals

Once deportation proceedings have been instituted, the merit of an alien's asylum is determined by an immigration judge.[126] The BIA issued two significant decisions regarding the presentation of such claims in the immigration courts. In *In re Exame*,[127] the BIA concluded that an immigration judge denied an alien a full and fair opportunity to present his asylum claim by refusing to admit background evidence on the general conditions in the alien's homeland, Haiti. The BIA stated that while such evidence will not be sufficient in and of itself to establish a persecution claim, it should be considered, provided the background evidence is relevant, material, and noncumulative. In *In re Exilus*,[128] the Board found no prejudice in an immigration judge's refusal to allow an alien to submit interrogatories to the State Department regarding its conclusion contained in an advisory opinion that the alien failed to establish a well-founded fear of persecution. The decision stated such a refusal was not a denial of due process, nor was the immigration judge's denial of a simultaneous translation of the entire exclusion proceeding.

Detention And Denial Of Parole

Prior to the early 1980's the INS paroled aliens seeking admission into the United States under INA § 212(d)(5)[129] rather than physically incarcerating them. Physical incarceration was only utilized when the alien posed a security risk to the public safety if paroled or if the alien was likely to abscond before being deported.[130] In 1981, the INS changed its detention policy in response to the Cuban and Haitian influx to a more restrictive use of parole and increased use of physical detention.[131]

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ducted. The alien is informed of his right to request a hearing.

124. *See* Johnson v. Zerbst, 304 U.S. 458 (1938) (a waiver of rights must be knowingly and intelligently made when a life or liberty interest is threatened).

125. 541 F. Supp. at 380.

126. 8 C.F.R. § 208.3(b) (1983).

127. I.D. 2920 (BIA 1982).

128. I.D. 2914 (BIA 1982).

129. Immigration and Nationality Act § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1982).

130. *See* Lewis v. Nelson, 544 F. Supp. 973, 978-81 (S.D. Fla. 1982).

131. *Id.*

In *Jean v. Nelson*,[132] the Court of Appeals held the change in policy constituted a rule which was invalid for failure to comply with the notice and comment requirements of the Administrative Procedure Act (APA).[133] The court rejected the government's argument that even if the policy change was a "rule" it was exempt due to its military or foreign affairs function.[134] The court also rejected the contention that the rule was exempt as a "general statement of policy."[135]

The Court of Appeals, however, disagreed with the lower court's holding that the policy was neither discriminatory in intent or effect. The court stated that plaintiffs could establish a discriminatory practice in contravention of the fifth amendment to the United States Constitution by showing the official action was at least motivated in part by a discriminatory purpose.[136] Moreover, the court stated that circumstantial evidence should be used by courts where a patent pattern of discrimination is not evident.[137] The court continued that once a *prima facie* claim of discrimination has been established, the burden shifts to the defendant to rebut the inference of intentional discrimination. In the present case, the court concluded that plaintiffs' statistical and testimonial evidence made out a *prima facie* case and the Government's rebuttal evidence was inadequate to dispel the showing.[138]

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132. No. 82-5772 slip op. (11th Cir. April 12, 1983) (available on LEXIS, Genfed library, Cir file).

133. 5 U.S.C. § 553 (1982).

134. *See* 5 U.S.C. § 553(a)(1) (1982).

135. *See* 5 U.S.C. § 553(b)(A) (1982). The court however, disagreed with the District Court's use of a "substantial impact" test, adopting instead a test which focuses on the amount of discretion the challenged policy leaves the affected agency. No. 82-5772, slip op. (available on LEXIS, Genfed library, Cir file).

136. No. 82-5772, slip op. (available on LEXIS, Genfed library, Cir file).

137. *Id.*

138. The court also addressed the issues of whether aliens are entitled to notice of the right to have counsel present at an exclusion hearing and whether the INS is required to notify such aliens of the right to file for political asylum. Although the court found no error in the District Court's reliance on the principles of exhaustion of administrative remedies and standing in dismissing the counsel claim, on the merits the court held that plaintiffs had a right to be notified of their right to apply for asylum. *Id. See also supra* notes 119-124 and accompanying text.

The court also addressed the plaintiff's claim of significant restrictions on access to legal counsel. The court remanded on this issue due to an insufficient factual record, but not before finding merit in the claim based upon Supreme Court precedent allowing the exercise of counsel's right of political speech, in the absence of an expectation of compensation, by advising individuals of their legal rights. No. 82-5772, slip op. (available on LEXIS, Genfed library, Cir file). *See also* In re Primus, 436 U.S. 412, (1978); NAACP v. Button, 371 U.S. 415 (1963).

Consequences of Wrongful Detention

During the past year, at least one district court recognized that aliens have a legal remedy, in addition to equitable relief, for wrongful detention. In *Chairez v. County of Van Buren*,[139] the court held that aliens wrongfully detained[140] by local police at the behest of the INS have a cause of action for damages under the INA. The court utilized the four factors enunciated in *Cort v. Ash*[141] to determine whether the INA implied a private cause of action for INS violation of the Act.[142] The District Court found that the four factors were satisfied and that damages were an appropriate form of relief.

In *Gonzales v. City of Peoria*,[143] the District Court held that the city was not susceptible to a punitive damages claim by an alien who was temporarily detained by local police officers for suspected immigration violations. The Court concluded that a state law enforcement officer may arrest a person upon probable cause that the person has illegally entered the country and may detain him, provided that federal authorities are contacted and have instructed state officials to detain the alien.[144]

Possibly encouraged by the holding in *Gonzales*, the Attorney General revised a Justice Department policy regarding responsibility for the enforcement of domestic immigration laws.[145] The new policy revises one in effect since 1978, and provides for INS cooperation with local law enforcement agencies in the detention of suspected violators and cooperation in discovering violations of both federal and state law.

Suspension Of Deportation

Section 244(a) of the Immigration and Nationality Act[146] permits the Attorney General to suspend deportation proceedings if an alien is physically present in the United States for a continuous period of not less than seven years; the alien is of good moral character; and

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139. 542 F. Supp. 706 (W.D. Mich. 1982).

140. The INS failed to provide plaintiff a timely determination of lawful custody as required by section 287(a)(2) of the INA, 8 U.S.C. §1357(a)(2) (1982); and 8 C.F.R. §287.3 (1983). 542 F. Supp. at 714-15.

141. 422 U.S. 68 (1975).

142. The factors necessary to find an implied private cause of action are:

1. Whether the statute at issue was enacted for the benefit of the aggrieved party;
2. Whether the legislative history indicates a creation or denial of such right;
3. Whether the remedy is consistent with the purpose behind the legislation;
4. Whether the cause of action has traditionally been a matter of state law.

Id. at 78.

143. 537 F. Supp. 793, 797 (D. Ariz. 1982).

144. *Id.* at 797.

145. *See* 60 Interpreter Releases 172 (1983).

146. § 244(a), 8 U.S.C. § 1254(a) (1982).

the proposed deportation would result in extreme hardship to the alien, his spouse, or child who is a citizen or legal resident of the United States. The Supreme Court considered the physical presence requirement in *Phinpathya v. INS*,[147] and was presented with the question of whether an alien's absence from the United States may be considered meaningfully interruptive of his continued physical presence in this country where the hardship of deportation would be as severe if the absence had not occurred.[148] The Court did not dispose of the case during its 1982-1983 term. The lower courts, however, continued to disagree over the procedural and definitional aspects of suspension of deportation.

The Eleventh Circuit, confronted with an issue of first impression regarding the continuous physical presence requirement, held in *Fidalgo/Velez v. INS*[149] that a one-day trip out of the country was meaningfully interruptive[150] of presence in the United States. Petitioner entered the United States in 1968 as a nonimmigrant and married a U.S. citizen. An immediate relative visa petition[151] was granted in mid 1974. In early 1975 petitioner traveled to Toronto, Canada for a scheduled interview with a consular officer there, but she neglected to inform the officer that her citizen husband had died subsequent to the approval of her visa petition. The immigrant visa was granted and she returned to the United States the same day. Deportation proceedings were initiated in 1978 charging Fidalgo-Velez with entry absent valid entry documents. Both the immigration judge and the BIA refused her plea for suspension of deportation on the ground that continuous physical presence had not been established.

The Eleventh Circuit upheld the denial of suspension of deportation. The court rejected as contrary to Congressional intent and the plain language of the provision, the Ninth Circuit's reading of INA § 244(a)(1) in *Kamheangpatiyooth v. INS*[152] and *Phinpathya v.*

147. 673 F.2d 1013 (9th Cir. 1981), *cert. granted*, 103 S. Ct. 291 (1982).

148. 103 S. Ct. at 291. For additional background on the lower court decisions, see Synopsis: *Significant Developments in the Immigration Laws of the United States 1981-1982*, 20 SAN DIEGO L. REV. 191, 205-07 (1982).

149. 697 F.2d 1026 (11th Cir. 1983).

150. For further discussion of the "meaningfully interruptive" standard, see *supra* notes 23-26 and accompanying text.

151. *See* Immigration and Nationality Act § 201(b), 8 U.S.C. § 1151(b) (1982).

152. 597 F.2d 1253 (9th Cir. 1979). *See also*, Synopsis: *Significant Developments in the Immigration Laws of the United States 1979-1980*, 18 SAN DIEGO L. REV. 107-41 (1980).

INS.[153] In these cases, the Ninth Circuit gave a liberal interpretation to § 244(a)(1), holding that the three requirements of continuous physical presence, good moral character, and absence of extreme hardship, "are only evidentiary on the issue under § 244(a)(1) of whether an absence reduced the significance of the whole seven-year period as reflective of the hardship and unexpectedness of exposure to expulsion."[154] The court relied heavily on *Rosenberg v. Fleuti*,[155] where the purpose of the trip abroad was one of three significant factors in determining whether continuous physical presence had been meaningfully interrupted. The court found it highly relevant that petitioner crossed the border to attain a visa she knew she was not entitled to.

In *Ramos v. INS*,[156] the Fifth Circuit addressed the meaning of the "extreme hardship" requirement of § 244(a)(1). The BIA had denied the Ramos' application for suspension of deportation for failure to exhibit extreme hardship if deportation were to occur. The court recognized that *INS v. Wang*[157] precludes judicial substantive review of the Attorney General's "extreme hardship" determination. However, the court stated that *Wang* does not foreclose review of the procedural aspects of the determination[158] and reversed the BIA's decision because the Board failed to fully address all the elements which constitute a case of extreme hardship. More specifically, the court noted that noneconomic hardship, including the emotional trauma of children, asserted hardship to petitioner's parents in the United States, and the cumulative effect on all persons affected, must be taken into consideration to ensure a full and fair review of the extreme hardship element of § 244(a)(1). Moreover, the court required the BIA, for purposes of appeal, to fully articulate its reasoning that extreme hardship has not been established.

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153. 673 F.2d 1013 (9th Cir. 1981), *cert. granted*, 103 S. Ct. 291 (1982). *See supra* notes 147-148 and accompanying text.

154. 597 F.2d at 1257.

155. 374 U.S. 449 (1963). *See supra* notes 23-26, 150 and accompanying text.

156. 695 F.2d 181 (5th Cir. 1983).

157. 450 U.S. 139 (1981). For a fuller treatment of the case, see Synopsis: *Significant Developments in the Immigration Laws of the United States 1980-1981*, 19 SAN DIEGO L. REV. 195, 200-02 (1981). *See also*, Loue, *What Went Wrong With Wang?: An Examination of* Immigration and Naturalization Service v. Wang, 20 SAN DIEGO L. REV. 59 (1982).

158. Other courts of appeals have made the same distinction in post-*Wang* decisions. *See, e.g.*, Prapavat v. INS, 638 F.2d 87 (9th Cir. 1981), *aff'd on rehearing*, 662 F.2d 561, 562 (9th Cir. 1982); Santana-Figueroa v. INS, 644 F.2d 1354, 1356-57 (9th Cir. 1981); Ravancho v. INS, 658 F.2d 169, 174-76 (3d Cir. 1981). *Cf.* Bueno-Carrillo v. Landon, 682 F.2d 143 (7th Cir. 1982) (a reviewing court may overturn a BIA decision only if there has been an abuse of discretion).

ENTRY AND EXCLUSION

The INS for many years excluded homosexual aliens under INA § 212(a)(4),[159] which provides for the exclusion of aliens afflicted with psychopathic personality, sexual deviation, or mental defect. However, once the Surgeon General no longer considered homosexuality, per se, to be a mental disorder or sexual deviation, and therefore refused to grant the medical certification[160] necessary to exclude an alien on the basis of § 244(a)(4), the INS initiated a policy of excluding homosexual aliens on the basis of their own or others' statements regarding sexual preferences.

In *Lesbian/Gay Freedom Day Committee v. INS*,[161] an incorporated association contended that the exclusion of homosexual visitors from entering the country violated the citizens' first amendment speech rights. The court relied on *Kleindeinst v. Mandel*,[162] which enunciated the standard of review to be applied when INS conduct pursuant to the Immigration and Nationality Act is challenged as unconstitutional. The Court in *Kleindeinst* stated that in reviewing the INS action, it would not delve behind the exercise of a discretionary power if the exercise was based on a "facially legitimate and bona fide reason,"[163] nor would the Court balance the justification for the exercise of the discretion against first amendment interests.

After reviewing the history of exclusion of homosexuals and recognizing the absence of medical grounds for continued exclusion of such aliens, the court concluded that the INS' policy of excluding homosexual aliens on the basis of statements regarding their sexual preference was not based on facially legitimate and bona fide reasons. Moreover, the court found that the plaintiff's first amendment interests in engaging in the free exchange of ideas and political strategies far outweighed any INS interests in a per se exclusion of homosexual aliens.[164]

The *Kleindeinst* standard of review was also employed by a district court in resolving the propriety of excluding a Libyan national without a hearing on national security grounds. In *El-Werfalli v.*

159. Immigration and Nationality Act § 212(a)(4), 8 U.S.C. § 1182(a)(4) (1982).
160. 8 U.S.C. § 1224 (1982) provides that a Public Health Service official must certify findings of mental or physical defect in a Class A certificate to the INS. The certificate constitutes the evidentiary basis for exclusion at the exclusion hearing. 8 U.S.C. § 1226(d) (1982).
161. 541 F. Supp. 569 (N.D. Cal. 1982).
162. 408 U.S. 753 (1972).
163. *Id.* at 770.
164. 541 F. Supp at 587-88.

Smith,[165] the plaintiff was excluded based upon classified intelligence information which led to the conclusion that the Libyan aircraft specialist endangered the welfare and security of the United States within the meaning of INA section 212(a)(27).[166] The court found that the classified material revealed facially legitimate and bona fide reasons for exclusion of the petitioner and stopped short of probing into its wisdom or basis.

In March of 1983, the INS amended 8 C.F.R. part 214, terminating the nonimmigrant status of any Libyan entity connected with aircraft maintenance, flight operation, or nuclear-related training.[167]

Bond Proceedings

Pursuant to 8 U.S.C. § 1252(a)[168] the Attorney General may authorize the release of an alien pending deportation upon the posting of a bond by the alien and agreement to other conditions the Attorney General deems appropriate. Custody, bond, and parole determinations, however, are separate and distinct from deportation proceedings, which are governed by subsection (b) of section 1252.[169]

In *Gornicka v. INS*,[170] petitioner was released on $2,000 bond pending deportation proceedings. She appealed the amount of the bond before an immigration judge[171] and the bond was reduced to $1,500. Petitioner then appealed the decision of the immigration judge to the BIA, contending that the bond was unnecessary and, alternatively, excessive. The Board rejected these contentions and upheld the immigration judge's determination. Petitioner, without ever having a deportation hearing, applied directly to the Seventh Circuit Court of Appeals.

The court held that an administrative bond determination is not a "final order of deportation" within 8 U.S.C. § 1105(a),[172] which provides for direct judicial review of final orders of deportation in a Court of Appeals. Furthermore, the court noted that 8 U.S.C. § 1252(a) provides for special limited review of bond proceedings in habeas corpus proceedings brought in district court.

In *In re Chew*,[173] respondent appealed to the BIA for review of the imposition of a bond condition barring him from engaging in unau-

165. 547 F. Supp. 152 (S.D.N.Y. 1982).
166. Immigration and Nationality Act § 212(a)(27), 8 U.S.C. § 1182(a)(27) (1982).
167. 48 Fed. Reg. 10,296-97 (1983).
168. Immigration and Nationality Act § 242(a), 8 U.S.C. § 1252(a) (1982).
169. *Id.* § 1252(b).
170. 681 F.2d 501 (7th Cir. 1982).
171. 8 C.F.R. § 242.2(b) provides for review of an initial bond determination by an immigration judge.
172. Immigration and Nationality Act § 106(a), 8 U.S.C. § 1105(a) (1982).
173. I.D. 2910 (BIA 1982).

thorized employment. The Board had stated in dicta in *In re Vea*[174] that once a ruling on modification of the conditions of custody status had been rendered by an immigration judge, the alien's only recourse was to appeal to the BIA. This dicta essentially removed authority from the district director to consider requests for change in the custody status after an immigration judge had acted on such a request. The Board, upon closer scrutiny, retreated from the dicta of *In re Vea* because no regulations foreclose an alien from reapplying for modification of custody status to the district director once the immigration judge has been divested of jurisdiction.[175] The Board, however, reiterated the factors in *In re Vea* which are to be considered in determining whether a no-work rider to a bond is appropriate under 8 C.F.R. § 103.6(a)(2)(ii).[176]

The INS proposed an amendment to 8 C.F.R. § 103.6(a)(2)(ii)[177] which would make a condition against unauthorized employment mandatory in all bond cases, absent a grant of employment authorization from the district director. This amendment would be applicable to aliens released on bond in deportation or exclusion proceedings. The previous regulation left the inclusion of the condition with the discretion of the district director and required the prior approval of the Regional Commissioner.

EMPLOYMENT

Under § 212(a)(14) of the INA[178] aliens seeking to enter the United States to perform skilled or unskilled labor are excluded unless the Secretary of Labor has determined that (1) there is an insufficient number of workers in the United States who are qualified for the position, and (2) the employment of such aliens will not have an adverse affect on similarly employed workers in the United States. This section applies to third[179] and sixth preference[180] visas, as well

174. I.D. 2890 (BIA 1981). *See also*, Synopsis: *Significant Developments in the Immigration Laws of the United States 1981-1982*, 20 SAN DIEGO L. REV. 226 (1980).

175. 8 C.F.R. § 242.2(a) and (b) provide that jurisdiction of the immigration judge lapses seven days after release from custody or by the entry of a final administrative order of deportation.

176. I.D. 2910, slip op. at 3-4. One such condition is the impact of the alien's employment upon the American labor market. *See also In re* Toscano-Rivas, 14 I. & N. Dec. 523 (1972).

177. 48 Fed. Reg. 8,820-21 (1983).

178. Immigration and Nationality Act § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1982).

179. § 203 (a)(3), 8 U.S.C. § 1153(a)(3) (1982). Third preference visas are available to "qualified immigrants who are members of the professions, or who because of

as to nonpreference immigrant aliens.[181]

Two circuit Courts of Appeals addressed whether the INS or the Department of Labor has primary authority to determine job qualification. In *Madany v. Smith*,[182] the Court of Appeals for the District of Columbia held that the INS has primary authority to determine whether the beneficiary of a third preference visa is qualified as a registered nurse, regardless of existing labor certification by the Department of Labor.[183] Appellant argued that once the Department of Labor has granted a labor certification, based on favorable resolution of the statutory requirements of § 212(a)(14), the INS is powerless to review the Department of Labor certification beyond the fact that a valid certification exists. The court disagreed. The court's analysis of the regulations promulgated by both agencies and their respective legislative histories indicated that, while the Department of Labor may consider job qualification in resolving its statutory mandate, primary authority for preference classification decisions, of which job qualification is a part, lies with the INS. The court rejected appellant's argument that the INS had abused its discretion by requiring more stringent qualifying criteria than did the Department of Labor.

The BIA overruled its previous holding in *In re Contopoulos*[184] that the nature of the duties to be performed is controlling in determining whether an alien is an H-2 temporary worker in compliance with INA § 101(a)(15)(H)(ii).[185] The petitioner provided temporary employment to technically-oriented firms and petitioned to have his alien employees classified as temporary labor governed as H-2 nonimmigrant aliens. The Commissioner stated that the nature of the need for the duties to be performed, not the nature of the duties, determines the "temporariness" of H-2 applicants. Using this definition and acknowledging the frequent and recurring demand for ma-

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their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States . . . ." *Id.* (footnote omitted).

180. § 203(a)(6), 8 U.S.C. § 1153(a)(6) (1982). Sixth preferences visas are available to immigrants "capable of performing specified skilled or unskilled labor . . . for which a shortage of employable and willing persons exists in the United States." *Id.* (footnote omitted).

181. § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1982). Nonpreference visas are "made available to other qualified immigrants strictly in the chronological order in which they qualify." *Id.* These visas, however, are limited in number in that the preference category visas are subtracted from the total allocated visas for a year before nonpreference visas are issued. *Id.*

182. 696 F.2d 1008 (D.C. Cir. 1983).

183. The Ninth Circuit, in K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006 (9th Cir. 1983), similarly resolved the issue in a case concerning a sixth preference visa petition.

184. 10 I. & N. Dec. 654 (1964).

185. § 101(a)(15)(H)(ii), 8 U.S.C. § 1101(a)(15)(H)(ii) (1982). The section provides that an alien is a nonimmigrant if he comes temporarily to the United States to perform temporary services or labor provided that unemployed persons capable of doing the same work cannot be found.

chinists in the industries which the petitioner serviced, the Commissioner denied the petition to classify the machinists as ones performing temporary services or labor.

LEGISLATION

The Simpson-Mazzoli bill is the most comprehensive immigration reform legislation since the INA was revamped in 1952. It never reached a final vote on the floor of the House of Representatives in the "lame-duck" session of the 97th Congress.[186] However, the Simpson-Mazzoli bill was reintroduced into both houses of Congress on February 17, 1983 as "The Immigration Reform and Control Act of 1983."[187] The Senate acted quickly in amending and enacting its version of the bill on May 18, 1983.[188] Although the bills as introduced into both houses are substantially similar, differences exist that may present conflicts once the House of Representatives passes its version and the bill is reported to a conference committee. These conflicts include the following:

1. Employer Sanctions: Substantively, both versions of the bill provide for sanctions against the knowing employment or recruitment of unauthorized aliens. The Senate's version of the bill contains no sanctions against employers for discriminating on the basis of alien status or national origin. The House Committee on Education and Labor, however, recommended such sanctions in its submitted report of the bill.[189] The bills also differ over review of civil penalties and the use of national identification cards in determining employment eligibility.

2. Adjudication Procedures and Asylum: Both versions of the bill provide for a new United States Immigration Board to replace the existing Board of Immigration Appeals in anticipation of increased immigration litigation subsequent to passage of the Simpson-Mazzoli bill. Provisions for the structure of the new Board, however, vary. Although both versions of the bill provide that an alien without doc-

186. The Senate version of the bill, S. 2222, was enacted by a vote of 80-19 on August 17, 1982. The text of the bill passed by the Senate is contained in 128th CONG. REC. S10619-31 (daily ed. August 17, 1982).

187. S. 529 was introduced into the First Session of the 98th Congress by Senator Alan K. Simpson (R-Wyo.), Chairman of the Senate Judiciary Subcommittee on Immigration and Refugee Policy. H.R. 1510 was introduced by Representative Romano L. Mazzoli (D-Ky.), Chairman of the House Judiciary Subcommittee on Immigration, Refugees, and International Law. *See* 60 INTERPRETER RELEASES 150 (1983).

188. The text of the bill enacted by the Senate is contained in 129 CONG. REC. S6970-6986 (daily ed. May 18, 1983).

189. H.R. REP. No. 115, pt. 4, 98th Cong., 1st Sess. (1983).

umentation may be excluded without a hearing, absent indication that the alien desires to apply for asylum, the House bill requires the examining INS officer to inform the alien of his right to a full hearing of his claim before an Administrative Law Judge.

3. Numerical Limitations on Legal Immigration: Although the House version lacks substantial changes in the present system of numerical limitations on legal immigrants or the preference system of admitting such immigrants, the Senate version lists new annual ceilings of 350,000 visas for family reunification and 75,000 visas for independent immigrants. New formulas for preference and nonpreference allocation are also enumerated in the Senate bill.

4. Nonimmigrant Temporary Workers:[190] The House version, if enacted, may be in disagreement with the very limited role the Senate provided for the Secretary of Agriculture in the labor certification process and the length of the period for requesting alien workers.

The 97th Congress passed legislation which allows "Amerasian" children[191] born after 1950 and prior to enactment of the bill[192] to immigrate to the United States as immediate relatives or as first or fourth preference immigrants. A person desiring to come to the United States under this legislation must provide the Attorney General a guarantee by an adult sponsor that the sponsor will financially support the alien for five years or until the age of 21, whichever period is longer.

An alien's eligibility for legal assistance from the Legal Services Corporation was severely restricted in an appropriations bill[193] for fiscal year 1983. The legislation bars legal assistance for aliens unless the alien is (1) a resident of the United States, and (2) a lawful permanent resident; or the spouse, parent, or minor child of a citizen who is awaiting adjustment of status; or has been admitted as a refugee, or been granted asylum or withholding of deportation.

CONCLUSION

The past year was a very active one in immigration law. The Supreme Court invalidated the one-House congressional veto of suspension of deportations and questioned the validity of all legislative vetos of administrative determinations. The Court held that exclusion proceedings are the proper forum for determining the admissi-

190. *See supra* note 50 and accompanying text.

191. "Amerasian" children is the euphemism used to describe children born in Southeast Asia whose fathers are United States citizens.

192. Immigration and Nationality Act, Amendment; Certain Children of U.S. Citizens, Admission, Pub. L. No. 97-359, 96 Stat. 1716 (1982).

193. Continuing appropriations for Fiscal Year 1983, Pub. L. No. 97-276, 96 Stat. 1186 (1982).

bility of lawful permanent residents after brief visits abroad and that nonimmigrant aliens are able to establish domicile in the United States. The Court also decided that states may have standing to pursue declaratory and injunctive relief from violations of the immigration laws.

The lower federal courts, especially the Ninth Circuit Court of Appeals, were very active in the criminal procedure area. The ramifications of the pressures in the immigration area, engendered by the boatlifts from Caribbean countries, were still being felt by the courts; detention, asylum, and suspension of deportation were adjudicated by the various circuits. A notable split in the circuit courts concerning the burden of proof in establishing a fear of persecution in an asylum application deepened during the year and should be resolved by the Supreme Court during its next term.

Congress re-introduced the Simpson-Mazzoli bill and amended the legislation in many important areas. Legislation concerning Amerasian children and access to Legal Service Corporation attorneys was also promulgated.

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