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The Rights of Aliens in the 1980s

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THE RIGHTS OF ALIENS IN THE 1980's

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I. BACKGROUND

The United States has always been on the receiving end of the immigration stream. Today's immigration flow however, is markedly different from that of the 19th and early 20th centuries. Immigrants continue to come from a large variety of countries and ethnic origins, but a majority of them tend to be both poor and non-white.

The flow of immigration has steadily increased since the early 1970's as international travel and communications have become more developed. Another element adding to the number of recent arrivals is the refugee crisis around the world. In some instances, the United States has perpetuated this crisis by supporting repressive regimes that produce a mass exodus of political opponents.

In addition to responding to international calls for the resettlement of refugees, the United States has become a haven for people fleeing repression or civil war in the Caribbean basin and Central America. The United States has also granted asylum to many persons from Communist dominated countries. These factors contribute to the admission of both half a million legal immigrants to the United States each year and the presence of millions of undocumented aliens.

The influx of immigrants takes place against a backdrop of lean economic conditions for all Americans. Inflation and unemployment rates continue to be high, while government benefits are being severely cut. Under these circumstances, newly arrived aliens are natural scapegoats for economic problems. Anti-alien sentiment creates a powerful constituency for restrictionist policies. Vote-conscious politicians are all too ready to capitalize on the myths and prejudices about the impact of immigration rather than to help develop a rational, humane and fair immigration policy.

There is unquestionably a need to regain control of the immigration process. The present system is inadequate to respond to the new realities. The issue is not *whether* to control migration, but rather *how* to do it. The Alien Law Project of the Lawyers' Committee for Civil Rights Under Law is attempting to design immigration and refugee policies that will represent a step forward in the struggle against discrimination and inequality.

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II. The Policy Reform Process

Little new federal legislation has been enacted to deal with current immigration problems. In the absence of such legislation, state and local governments have taken actions to discourage immigration. These actions have taken various forms, such as the denial of free public education to undocumented alien children. Some of these apparent restrictions to equal opportunity and due process are being tested in the courts. However, while some Courts have upheld the rights of aliens to equal protection and due process of law,[1] recent Supreme Court decisions show an alarming trend toward accepting these restrictions. This is particularly true in matters involving government benefits and public employment.

In the past few years, a large number of amendments to the Immigration and Nationality Act have been introduced in Congress in order to establish a new federal policy. Yet neither Congress nor recent administrations took any significant steps until the Select Commission on Immigration and Refugee Policy was created in 1978.[2] The Commission provided a forum for a variety of community and civil rights groups to participate in a debate on various policies, but its final report failed to satisfy the need for a deep, comprehensive review of immigration policy.

When presented with the report of the Commission, the Reagan Administration set up an Inter-Agency Task Force on Immigration. The task force conducted a study of alternatives from March to July of 1981. Finally, on July 30, 1981, the Administration announced its immigration policy to Congress.[3] Congress is now considering the issue.

III. The Reagan Administration Proposals

A. *Legalization*

There is general agreement on the need to legalize the status of undocumented aliens who have been in the United States for a pro-

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[1] *See, e.g.*, Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D.Fla. 1980); Doe v. Plyler, 501 F. Supp. 544 (S.D.Tex. 1980); In Re Alien Children Education Litigation, 628 F.2d 448 (5th Cir. 1980) (probable jurisdiction noted). In HRC v. Civiletti, a federal judge found that the INS and the State Department had violated constitutional, international and statutory law, as well as international regulations, in establishing a special "program" to expedite asylum claims filed by Haitian nationals. In both *Doe* and *In Re Alien Children*, district and appellate courts found that the policy in Texas of denying free public education to undocumented alien children is unconstitutional.

[2] This Commission is comprised of Members of Congress and the Executive Branch, as well as members of the public appointed by the President.

[3] On October 21, 1981, the Reagan Administration submitted its bill to Congress, under the name of the Immigration and Refugee Control Act of 1981.

longed period. The Task Force's proposals, however, grant "amnesty" in the form of a "renewable term temporary residence." This will permit those aliens who entered unlawfully prior to January 1, 1981, and are not otherwise excludable, to apply for this temporary status and obtain employment authorization. These individuals would pay regular Social Security and other taxes, but would lose access to any federal welfare benefits or unemployment compensation for which they are now eligible. Additionally, they would not be allowed permanent residence leading to citizenship. This proposal would create a class of workers who contribute to the wealth of this country but are entitled to few of its benefits.[4]

B. *Employer Sanctions*

The Reagan Administration has opted for the most controversial of proposed enforcement measures: the application of civil sanctions against employers who knowingly hire illegal aliens.[5] This proposal calls for injunctions in cases where a pattern of hiring violations can be shown.

If an employer requests documentation, the employee must show any two of the following: birth certificate, driver's license, Social Security card, or Selective Service registration certificate. Under this bill, employers would also be required to keep records ascertaining the existence of these documents.

Though it may be politically expedient, this program is an ineffective way to curb the immigration flow or open up job opportunities for unemployed Americans. Because of the burden of compliance, the likely effect of this law will simply be to encourage employers to discriminate against anyone who looks or sounds foreign, thereby exacerbating existing patterns of employment discrimination.[6]

The employer-sanction program uses the workplace as a means of enforcement, and the private employer as the enforcement agent. If the program does work, what will stop the government from instituting other programs, such as "landlord-tenant sanctions"[7] and "gro-

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[4] *US Immigration Policy and the National Interest*, Staff Report of the Select Commission on Immigration and Refugee Policy, April 30, 1981, et. seq.

[5] The Reagan Administration has decided against using a national identity card to implement employer sanctions, a measure proposed by the Select Commission on Immigration and Refugee Policy.

[6] Smith and Mendez, *Employer Sanctions and Other Market Restrictions on Alien Employment: The 'Scorched Earth' Approach to Immigration Control*, 6 N.C.C. INT'L L. COM. REG. J. 19 (1980).

[7] "Landlord sanctions" are penalties to those who knowingly rent homes to illegal aliens.

cery-store sanctions"? The result would be a major infringement on civil liberties.

President Reagan is correct in believing that unscrupulous employers who exploit aliens contribute to keeping wages low and working conditions inadequate. In our view, these practices should be discouraged by strictly enforcing fair-labor standards and occupational safety and health laws rather than by persecuting aliens. Additionally, a concerted effort should be made to foster union organizing among both citizen and alien workers. To accomplish this, the Immigration and Naturalization Service (INS) must be supported with sufficient resources to improve both its enforcement and service functions. Long-range measures should include efforts to organize international cooperation to deal adequately with the root causes of migration.

C. *Guest Worker Program*

The Reagan Administration is announcing an "experimental" two-year program to bring in as many as 50,000 Mexican temporary workers each year. These workers will be allowed to remain for up to twelve months to work in certain "pre-authorized" jobs. The determination of the need to bring in alien labor would be left to the states. Private employers would be allowed to bring in individual workers to work exclusively for them as a condition of their stay. These workers could not collect unemployment benefits, nor would they be entitled to any other benefits based on need. They would not be allowed to bring their spouses or children into the United States.

Farm-worker organizations and civil rights groups have objected to this program on the grounds that it creates a captive labor force for employers, who can depress working conditions, break down union organizing efforts, and generally exploit the situation. This will be done with the government's acquiescence and assistance.

D. *Refugees and Enforcement Measures*

One of the most controversial aspects of the measures proposed by the Reagan Administration is the detaining of boats carrying refugees on the high seas. Coast Guard vessels have received orders to stop boats suspected of breaking U.S. immigration laws, to detain suspects on board, to conduct exclusion hearings aboard the Coast Guard vessel, and to process any asylum claims. Aliens subjected to these proceedings will subsequently be returned to their country by the Coast Guard authorities without ever entering U.S. territory. In this setting, it is not difficult to see how these aliens would be denied all

effective measures of due process of law, particularly access to counsel. It seems that the Administration intends to start implementing this program immediately, before it is considered by Congress.[8]

In order to avoid violating international law, the Administration has managed to have the Haitian government "request United States cooperation."[9] This would presumably provide some validity to the stopping of Haitian flag vessels. The program is to be accompanied by a public relations effort in Haiti to discourage people from boarding boats bound for the United States. The project is likely to result in the use of additional police measures in Haiti against the very persons trying to escape a repressive government.

Systematic interdiction on the high seas, as proposed by the government, would violate the three major principles set forth in the United Nations Convention and Protocol Relating to the Status of Refugees.[10] First, it is likely to result in the return of some Haitians who would have *bona fide* claims to refugee status. Second, it obviously will not allow for an adequate opportunity to present a claim for asylum, as refugees on the high seas generally have no access to independent legal advice and are intimidated by the surroundings of a Coast Guard vessel. Third, directed solely against Haitians, this program violates the principle of nondiscrimination between refugees on the basis of race, national origin or political beliefs.

An ironic aspect of this proposal is that it is precisely the type of action that the United States has deplored when used by Southeast Asian countries, including Vietnam, Cambodia and Laos.

As a means to deter mass applications for first asylum in the United States, the Administration has begun to establish a policy of prolonged detention in refugee camps. The government has acknowledged that these camps are similar to "concentration camps." This detention practice has already begun. The situation is expected to intensify with the preparation of new, remote detention sites where access to lawyers and community services is non-existent. In the eyes of the Administration, the willingness of refugees to withstand indefi-

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[8] Interdictions in the Windward Channel (near Haiti) started in mid-October, following a presidential proclamation issued in late September. Presidential Proclamation 4865, September 29, 1981 (46 FR 190, p. 48107, October 1, 1981); Exec. Order No. 12324, September 29, 1981 (46 FR 190, p. 48109, October 1, 1981).

[9] Memorandum of Understanding by U.S. Ambassador to Haiti, dated September 23, 1981.

[10] The Convention Relating to the Status of Refugees, adopted on July 28, 1951, by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429(V) of December 14, 1950. The 1967 Protocol Relating to the Status of Refugees, 19 U.S. Treaties 6223, TIAS No. 6577, entered into force for the U.S.A. November 1, 1968, subject to a reservation.

nite detention without being charged seems to be a measure of the validity of their asylum claims. Thus, we are returning to medieval methods of trial by ordeal.

Finally, the Administration is drafting legislation to change present procedures regarding exclusion and asylum. This legislation subjects anyone who has attempted entry without a proper visa to expedited procedures resulting in his or her exclusion from the country without a hearing. This procedure is not subject to any judicial review, except for *habeas corpus* on the narrow issue of an erroneous classification of an alien.

As proposed, this legislation also calls for expedited processing of asylum claims with no administrative review, limited participation of counsel, and no opportunity by counsel to present evidence. Most egregious is one INS proposal that would deny even an asylum petition to anyone who enters without inspection (EWI), or is in transit without a visa (TWOV). If the legislation were enacted today, it would automatically operate to deny Haitians and Salvadorans the chance of requesting asylum.[11]

IV. Discriminatory Treatment of Refugees

The bias against refugees from certain countries is visible not only in proposals for future legislative action, but also in present day practice. On September 17, 1981, Congress received the Administration's proposed allocations for refugee admissions for Fiscal Year 1982. For the next twelve months, the United States will admit 140,000 Indochinese, 46,000 people from the Soviet bloc and 5,000 from the Near East and Southwest Asia. In contrast, we will receive a maximum of 3,000 refugees from Africa and 2,000 from all of Latin America, including Cuba. This is the response of the United States to the refugee crisis in Africa, where over a million refugees need relocation from Somalia alone. In the Caribbean and Central America more than 200,000 Salvadorans have been displaced, and about 1,500 people are fleeing Haiti each month.

There are between 30,000 and 60,000 Salvadorans in the United States who have entered since hostilities in their country developed into an all-out civil war. Yet, in spite of repeated requests by civil rights, community-based and religious organizations, the Administration refuses to order "extended voluntary departure." If implemented,

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[11] The denial of standing to EWIs and TWOVs included in a "Draft Asylum Bill" prepared by INS and circulated to other Executive Branch agencies was not included in the bill introduced on October 22, 1981.

this measure would suspend deportations temporarily until conditions in El Salvador are such that these people can safely return. The U.S. Government has consistently adopted such measures in other countries undergoing civil strife, such as Nicaragua, Ethiopia, and Lebanon. The United Nations High Commissioner for Refugees considers every Salvadoran who has left in the past fifteen months a *prima facie* refugee. The Reagan Administration's refusal to grant political asylum for Salvadorans is a blatant example of inequitable immigration and refugee policies.

In the meantime, the Department of State and the Immigration Service claim that they are processing all Salvadoran asylum applicants according to the precepts of the Refugee Act of 1980. In reality, both agencies have repeatedly stated that all Salvadorans in the United States are here for "economic reasons" as opposed to "political persecution." This prejudicial attitude is reflected in the treatment that most Salvadorans receive. In most cases, they are induced by Immigration officials to withdraw their claims for asylum under the threat of prolonged detention or the imposition of unusually high bails.[12]

V. Conclusion

The political climate in the United States is a particularly grim one in which to raise the issue of alien rights. Immigration is potentially a very divisive issue, and one that is easy to over-simplify. Moreover, it lends itself to facile, demagogic solutions that do not resolve the problems, but are politically useful to exploit newcomers.

It is safe, then, to predict that in the 1980's we will witness an onslaught against due process and equal protection for non-citizens. There will also be substantial problems in the area of discrimination in employment, housing and government benefits. It is now up to the civil rights and civil liberties community to address the issue of immigration *as a human rights* problem, and to explore ways in which alien rights can be linked to the fundamental freedoms of all individuals.

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[12] *See* Hernandez v. Smith, Cr. No. 82-1107-KN(P) (C.D.Cal., filed March 4, 1982).