SYMPOSIUM: IMMIGRANT'S RIGHTS & CRITICAL PERSPECTIVES ON IMMIGRATION REFORM, FEBRUARY 10, 2007:INTRODUCTION:Immigration Reform: A Civil Rights Issue

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LexisNexis Summary

… In the current context of "comprehensive immigration reform" and calls for a new legalization program, the importance of judicial review again takes on central importance. … … Third, civil rights is a key perspective because immigration laws and policies regularly present fundamental questions of personal liberty, protection against arbitrary and abusive government actions, and sweeping Executive power that raise core issues of constitutional law, individual rights, and separation of powers. … The attempt to deny constitutional protections to United States citizens subjected to that same designation was halted only when the Supreme Court intervened. … But for immigrants facing deportation, these attacks on judicial review and habeas corpus began much earlier. … Jurisdictional roadblocks enacted in 1996 that did not exist when the IRCA cases were litigated would impede pattern-and-practice, class action, and systemic reform lawsuits of the kind that were essential to enforcing IRCA's mandate. … I have suggested that the civil rights perspective is one essential approach that must inform this debate, and conversely that protecting immigrants is a necessary component of the civil rights struggle.

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Introduction

The debate over immigration reform is intense, and what qualifies as "reform" is hotly disputed. Important questions about the role of destination countries in stimulating the migration they now abhor are barely considered at all. This Symposium Issue presents a series of Articles on these and many other questions. The collection offers a wealth of perspectives on the current debate, on conceptualizing immigrants' rights, on the need for new approaches, and on the relationship of immigration policy to other arenas.

The threshold question I want to address, however, is why these topics are presented in the Stanford Civil Rights and Civil Liberties Journal. Put differently, why is immigration policy a civil rights issue?

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The Civil Rights Perspective

I believe there are several key reasons for viewing immigration and immigrants' rights through the prism of civil rights. Doing so adds an essential perspective, acknowledges our history, and enhances our understanding of the relationship between immigration issues and broader civil rights principles in critical ways.

First, immigration law and policy cannot be divorced from issues of race, national origin, ethnicity, and color. The history of our nation's immigration laws is steeped in race and racism. The Chinese Exclusion Act, the Asiatic barred zone, the National Origins Quota Act, and the so-called "Operation Wetback" are among the most prominent examples. For nearly 50 years, our laws expressly sought to preserve the racial and ethnic composition of the United States as it existed in the 1890's. Those restrictions were not repealed until 1965 at the height of the modern era of civil rights legislation. Much of the "new" immigration of the last 40 years can be traced to the long-overdue repeal of the Quota Act.

Acknowledging this legacy of racism should not obscure that another strand of our history is equally venerable. We justly celebrate our immigrant heritage, a central part of our national self-identity. The symbolism embodied in the Statute of Liberty and the sincerity of our civic and political culture that honors the accomplishments of immigrants and their children is genuine. Both traditions exist side by side and neither is ever completely submerged.

But even with respect to the immigrant roots that we venerate, we too often prefer to look backwards to tout the beauty and benefits of immigration from long ago rather than celebrate the immigrants of today. We are tempted to treat immigration as an historical artifact rather than as an ongoing dynamic process that continuously evolves each year and with each generation. The immigrants of yesterday are celebrated while the immigrants of today are feared. And here too, the reaction to new immigrants may be tinged with fears and biases against people of a different color or with unfamiliar languages.

Does immigration change our society, our community, and our country? It undoubtedly does in many small and profound ways. The challenge for civil rights advocates is to embrace that change, not fear it - and to do so when it is occurring, not just in retrospect.

Second, grappling with immigration issues from the vantage point of civil rights is crucial because the struggle over immigrants' rights must be grounded in the larger struggle for equality and opportunity on behalf of all disenfranchised and discriminated-against groups. In particular, we must ensure that protecting immigrants' rights does not compete or conflict with the huge unfinished business of addressing racism and discrimination against African Americans in our society. We must be certain that the struggle for immigrants' rights is in concert with that crucial struggle.

[*159] In that context, we need to recognize that our iconic slogan, which encapsulates our history as a "nation of immigrants," is not universally applauded. It can be profoundly offensive and alienating to African Americans and Native Americans if it ignores the untold horrors and costs that our immigrant predecessors visited on these communities. African Americans and Native Americans do not share in the same veneration of that "immigrant" tradition and our contemporary policies must address - not ignore - the consequences of our past policies.

Third, civil rights is a key perspective because immigration laws and policies regularly present fundamental questions of personal liberty, protection against arbitrary and abusive government actions, and sweeping Executive power that raise core issues of constitutional law, individual rights, and separation of powers. Federal immigration policies that trigger widespread arrests, impose lengthy incarcerations, deny rights based on political views, enhance police powers, generate ethnic, racial or religious profiling, and restrict federal court jurisdiction all present civil rights issues of central importance.

Such policies affect immigrants and U.S. citizens alike for several reasons. In the first place, non-citizens do not live in a world apart. Although the law confers rights and protections by distinguishing among categories - citizen vs. alien, temporary vs. permanent, legal resident vs. undocumented immigrant - our families and communities are not defined by those distinctions. Immigrant families are composed of people in all categories. The same is true of neighborhoods, churches, schools, and jobsites. When an immigrant is arrested, deported or driven underground, the consequences are felt by citizen family members and neighbors. When the police department is enlisted as an arm of immigration enforcement, the entire community becomes fearful of reporting crimes or suspicious activity. And when workers' employment and labor rights depend on their immigration status, all the workers - citizens and non-citizens alike - are vulnerable to an employer's divisive tactics and are less able to pursue their right to collective action and organizing.

Citizens also have an interest in immigration laws because restrictions on immigrants are often harbingers of broader restrictions on the civil rights and liberties of all. As David Cole explained in his 2002 Stanford Law Review article, "Enemy Aliens," [1] immigrants are often the proverbial canary in the coalmine. "What we are willing to allow our government to do to immigrants creates precedents for how it treats citizens." [2]

That is especially true in times like these when casual invocation of national security - long a rationale for judicial deference (if not abdication) to federal immigration policies - reverberates throughout government policy and becomes the justification for intrusions on the civil liberties of citizens and non-citizens alike. Historical examples are plentiful, and Cole demonstrates that **[*160]** both Japanese-American internment and McCarthy-era red-baiting had antecedents in the immigration laws. [3] This nexus has become more evident since 9/11 and the resulting claim of almost unprecedented Presidential powers.

For example, the core principles of judicial review and habeas corpus have been under more sustained attack in the aftermath of 9/11 than in generations. The claimed power to detain "enemy combatants" indefinitely at Guantanamo and in the United States rests in significant part on denying the efficacy of the federal courts' habeas corpus powers. The attempt to deny constitutional protections to United States citizens subjected to that same designation was halted only when the Supreme Court intervened. [4]

But for immigrants facing deportation, these attacks on judicial review and habeas corpus began much earlier. Responding to that challenge has been a centerpiece of my work since 1995,

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[1] 54 Stan. L. Rev. 953 (2002).

[2] Id. at 959.

[3] Id. at 994-997.

[4] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

when Congress proposed and then enacted new provisions that purported to strip the courts of their historic jurisdiction to review certain immigration deportation orders. [5] The Clinton and Bush Administrations argued aggressively that these laws should eliminate all judicial scrutiny of key legal claims concerning whether mandatory and retroactive deportation orders would issue against countless legal residents.

Courtstripping measures to eliminate federal court review over controversial issues had been proposed - but not enacted - in the past. Their rejection was a critical part of the civil rights revolution of the Twentieth Century. Most notoriously in the aftermath of Brown v. Board of Education, [6] bills were introduced to strip the federal courts of their jurisdiction to desegregate schools or order busing as a remedy. Similar proposals emerged to remove jurisdiction over abortion and school prayer cases after the Supreme Court issued controversial decisions in those areas. But the legislation was defeated each time because it was seen for what it was, a backdoor amendment to the Constitution that would facilitate the denial of substantive rights by barring their enforcement through jurisdictional restrictions.

The immigration amendments of 1996, however, legislated measures that were ominously reminiscent of these earlier failed efforts. This time the targets were powerless immigrants. And in some respects, the principle at stake could be said to be even more fundamental because depriving the federal courts of jurisdiction over these issues leaves no judicial check whatsoever. In the desegregation, abortion, and prayer contexts, the proponents of court-stripping often disingenuously argued that plaintiffs could still bring legal challenges in the state courts, knowing full well that those courts would never enforce these constitutional rights. This argument nonetheless afforded the courtstripping **[*161]** advocates a fig leaf to hide behind. In the immigration context, however, only the federal courts can address the federal government's immigration policies. Stripping the federal courts of jurisdiction eliminates any judicial check whosoever.

In I.N.S. v. St. Cyr, [7] decided just months before 9/11, the Supreme Court rejected such a fundamental transformation of judicial review. It reaffirmed the historic and constitutionally-guaranteed protection of habeas corpus for immigrants facing expulsion, and it construed the 1996 law as not abrogating that protection. In doing so, the Court stressed the special role of habeas in relation to "Executive detention" where (unlike the post-conviction criminal habeas) a person is detained based on the unilateral authority of the Executive Branch without any prior judicial process.

Legalization and Judicial Review

In the current context of "comprehensive immigration reform" and calls for a new legalization program, the importance of judicial review again takes on central importance. There is appropriately much argument over the precise contours that any new program should have. Questions such as who should be eligible, what will the application criteria be, and will there be a meaningful path to citizenship are all crucial.

But the enduring danger is that even the best program enacted by Congress can be eviscerated in practice by an overburdened, indifferent, incompetent, or even hostile bureaucracy. Experience

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[5] See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIA), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified in scattered sections of 8 & 18 U.S.C.).

[6] 347 U.S.483 (1954).

[7] 533 U.S. 289 (2001).

shows that how the agency implements any new legalization program will determine whether it fulfills its promise or is reduced to a hollow gesture. And proper implementation is assured only if judicial review of the agency's actions and decisions is robust, prompt. and effective.

The most telling lesson is from 1986, when Congress enacted the last major legalization program - the Immigration Reform and Control Act (IRCA). [8] The law promised to legalize millions during a one-year application window. But the agency adopted innumerable rules, regulations, practices, and polices that imposed restrictive eligibility rules and secret adjudication practices threatening to eviscerate the program and deny entitlement to many hundreds of thousands. Arcane but crucial statutory terms such as "known to the government," "continuous physical presence," and "public charge" became tools for denying eligibility. Practices such as failing to provide interpretation, absence of proper notice, and relying on evidence not disclosed to the applicant were deployed to deny applications.

[*162] Only a series of class action lawsuits by applicants and their representatives compelled the immigration agency and Justice Department to change their policies and practices. [9] In virtually every key case, the government's position was rejected and the policy or practice overturned. In fact, in many cases the government abandoned any defense of its position once the suit was filed or the district court ruled. [10] Yet, had the litigation not been possible and judicial review not been available, the illegal policies would have remained intact. The lesson is simple: implementation is key and judicial review is essential.

Today, those same lawsuits may well be thwarted if a new legalization program is enacted. Jurisdictional roadblocks enacted in 1996 that did not exist when the IRCA cases were litigated would impede pattern-and-practice, class action, and systemic reform lawsuits of the kind that were essential to enforcing IRCA's mandate. In addition, jurisdictional arguments the government interposed against IRCA litigation - after abandoning any defense on the merits - could also raise justiciability issues. [11]

More disturbing, the Bush Administration has advocated for prohibiting all review. Department of Homeland Security Secretary Michael Chertoff cleverly proposed in Senate testimony (shortly after this talk was delivered) that legalization applicants be allowed only the review that a visa applicant from abroad is permitted. [12] That model is tantamount to denying review altogether because visa applicants outside the United States are historically barred from challenging the

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8 Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 8 U.S.C.).

9 For a non-exhaustive list of cases, see McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991) (upholding injunction against adjudication practices that violate due process); Immigrant Assistance Project v. INS, 306 F.3d 842 (9th Cir. 2002) (class action challenge to "known to the government" requirement); Ayuda, Inc. v. Reno, 7 F.3d 246 (D.C. Cir. 1993) (class action challenge to restrictive interpretation of "known to the government" requirement); Zambrano v. INS, 972 F.2d 1122 (9th Cir. 1992) (class action challenge to "special rule" regarding "public charge" ground eligibility); Legalization Assistance Project v. INS, 976 F.2d 1198 (9th Cir. 1992);Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989).

10 Even while abandoning its position on the merits, the government argued that courts lacked jurisdiction or could not grant relief. The Supreme Court rejected the government's principal argument in McNary, 498 U.S. 479, but later construed IRCA as imposing exhaustion and ripeness requirements with regard to some claims. See Reno v. Catholic Social Services, 509 U.S. 43 (1993).

11 See note 9, supra.

12 Comprehensive Imigration Reform: Hearing Before the S. Comm. on the Judiciary, 110th Cong. (2007) (testimony of Michael Cheroff, Secretary, Department of Homeland Security).

decisions of consular officials in federal court. The fact that legalization applicants will be required to have lived in the United States for many years makes plain the error of the comparison and underscores the grave constitutional questions presented by a prohibition on review.

It is, therefore, essential that that any legalization program enacted into law provide affirmatively for federal court jurisdiction over systemic claims and **[*163]** review of individual denials. If the agency charged with implementation is left with unreviewable authority, the program itself and the individuals who apply will be vulnerable to unfettered abuse.

Conclusion

The Symposium organizers and Journal editors, Neesa Sethi, Laura Turlouw, Gloria Borges, and Lin Chan, deserve our gratitude for presenting a collection of articles that addresses some of the vexing questions raised by the reform debate and for stimulating broader thinking about issues that should be included.

For example, Ayelet Shachar examines the question of territorial jurisdiction and borders in light of globalization and suggests a new conceptualization for immigration regulation. Daniel Kanstroom analyzes the growth of deportation as a law enforcement tool and form of discretionary social control. He considers international human rights norms as a source of legal standards. Bill Ong Hing explores the legislative debates and the inevitability of global migration, and he invites a new system for facilitating the flow of migrants, especially from Mexico. Rebecca Smith discusses the potential for a human rights framework for protecting low wage immigrant workers. Grace Chang and Kathleen Kim report their findings on human trafficking, demonstrate that current policies undermine anti-trafficking efforts, and propose new approaches. Adam Francour traces the exclusion of LGBT immigrants and the portrayal of homosexuality as a "threat" emanating from outside the United States. Ray Ybarra reflects on his two years working at the US-Mexico border to fight vigilante activity with integrated strategies of litigation, advocacy, and legal observing.

These insightful and provocative articles confirm that immigration policy raises questions that go far beyond the current debate and implicate civil rights and civil liberties values. The contributions also show that fundamental disagreements remain over what constitutes "reform." Is it providing a path to legal status for the estimated 12 million undocumented residents? Is it revisiting the unprecedented privations and due process denials enacted the last time Congress passed major legislation in 1996? Is it constructing safeguards applicable to all workers to ensure that labor, safety, wage, and other workplace laws apply in fact and not just in theory? Is it reconceptualizing immigrants' rights altogether based on international, human rights or other norms?

I have suggested that the civil rights perspective is one essential approach that must inform this debate, and conversely that protecting immigrants is a necessary component of the civil rights struggle.

Most critically, any set of rights, no matter what their source or basis, are dependent on effective enforcement. Our constitutional system compels judicial review. Although the Judiciary is not the only check on Executive power, **[*164]** judicial review is one central safeguard. That is especially true for non-citizens whose political power is limited. Robust legal protections and rights for immigrants are essential, but none will endure unless the foundation of judicial review and enforcement is guaranteed.

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