RECENT DECISIONS

ALIENS—IMMIGRATION AND NATURALIZATION—SEASONAL AND DAILY COMMUTERS QUALIFY AS "SPECIAL IMMIGRANTS" WHO ARE LAWFULLY ADMITTED FOR PERMANENT RESIDENCE AND ARE RETURNING FROM A TEMPORARY VISIT ABROAD.

Certain farm workers and their collective bargaining agent, the United Farm Workers' Organizing Committee,[1] brought suit for declaratory and injunctive relief against the Immigration and Naturalization Service (INS)[2] which permits some aliens living in Mexico and Canada to commute freely to work in the United States on a daily and seasonal basis. The challenged INS practice is that of giving alien commuters the documentation and labor certification benefits of classification as immigrants "lawfully admitted for permanent residence" who are "returning from a temporary visit abroad."[3] The district court granted defendant's motion for summary judgment and the plaintiffs appealed.[4] On appeal the District of Columbia Court of Appeals held that this loosely restricted admission of daily commuters was proper, but the similar admission of seasonal commuters was not.[5] The Supreme Court granted certiorari.[6] *Held*, judgment affirmed in part and reversed in part. Seasonal commuters, as well as daily commuters, are entitled to the "special immigrant" privileged status which distinguishes such aliens from those groups of aliens who can be admitted only on certification by the Secretary of Labor. *Saxbe v. Bustos*, 419 U.S. 65 (1974).

The classification of aliens as immigrants dates back to the Immigration Act of 1924.[7] In response to the possible adverse effect such classification might

---

[1] The United Farm Workers' Organizing Committee is a collective bargaining agent for farm workers. Two farm laborers were also plaintiffs, and four more intervened in the district court.

[2] The Immigration and Naturalization Service is hereinafter referred to as the INS.

[3] In the district court and the court of appeals, plaintiffs also argued that 8 C.F.R. § 211.1(b)(1) should be read to preclude the entry of a commuter to work at a place where a labor dispute exists, even if the commuter has previously been employed there. This claim was not decided by the appellate court nor was it presented in plaintiffs' petition for certiorari. Thus, the Supreme Court offered no view on the merits of this claim. Bustos v. Mitchell, 481 F.2d 479, 483 (D.C. Cir. 1973).

[4] *Id.* at 479, 481.

[5] *Id.* at 484, 485-86. Daily commuters are persons whose actual dwelling place, without regard to intent, is in a foreign contiguous country and who commute daily to work in the United States. Seasonal commuters are persons whose actual dwelling place, without regard to intent, is in a foreign contiguous country and who come to the United States for extended periods to perform seasonal work. *See generally* Immigration and Nationality Act of 1952, 8 U.S.C. § 1101(a)(33) (1970) [hereinafter cited as 1952 Act].

[6] Saxbe v. Bustos, 414 U.S. 1143 (1974). Certiorari was granted to resolve the conflict between the holding of the District of Columbia Court of Appeals and that of the Ninth Circuit Court of Appeals in *Gooch v. Clark*, 433 F.2d 74 (9th Cir. 1970), *cert. denied*, 402 U.S. 995 (1971).

[7] Immigration Act of May 26, 1924, ch. 190, 43 Stat. 153 [hereinafter cited as 1924 Act]. The

have on the alien commuter,[8] the Labor Department in 1927 issued General Order 86,[9] which exempted native Canadian and Mexican aliens from the quota

---

Act defined an "immigrant" as "any alien departing from any place outside the United States destined for the United States." *Id.* at 154.

[8] The effect was that commuters would be required to comply with quota standards preventing daily commuting. Note, *Immigration and Naturalization—The Alien Commuter Fiction—Actual Residence Test Applied to Exclude Entry Into the United States*, 5 N.Y.U.J. INT'L L. & POL. 139, 140 (1972)[hereinafter cited as *Alien Commuter*]. Mexicans and Canadians who had no quota requirements applied to them were nevertheless required to apply for immigrant status if they were commuters.

[9] Immigration and Naturalization Service General Order 86, [1927] 1 FOREIGN REL. U.S. 490 (1942) [hereinafter cited as General Order 86]. Prior to the issuance of the order, alien commuters who entered the United States daily to work were classified as nonimmigrants temporarily visiting this country for business or pleasure. General Order No. 86 reads as follows:

> Subject: Land border crossing procedure
>
> 1. Hereafter aliens residing in foreign contiguous countries and entering the United States to engage in existing employment or to seek employment in this country will not be considered as visiting the United States temporarily as tourists, or temporarily for business or pleasure, under any provisions of the Immigration Law which exempt visitors from complying with certain requirements thereof; that is, they will be considered as aliens of the "immigrant" class.
>
> 2. However, the following aliens of the said "immigrant" class residing in foreign contiguous countries and who are now enjoying the border crossing privilege may continue so to enjoy it upon the payment of head tax, provided such head tax was assessible on aliens and, provided further, that they are not coming back to seek employment.
>
> A. Aliens whose original admission occurred prior to June 3, 1921.
>
> B. Natives of nonquota countries whose original admission occurred prior to July 1, 1924.
>
> . . . .
>
> 3. Aliens of all nationalities of the "immigrant" class whose original admission occurred subsequent to June 30, 1924, will be required to meet all provisions of the Immigration Laws applying to aliens of the "immigrant" class. Aliens of this class already enjoying the border crossing privilege, however, will be granted a reasonable time, not to exceed six months from July 1, 1927, within which to obtain immigration visas and otherwise comply with the laws.
>
> 4. Aliens who have already complied with the requirements of the Immigration Laws and this General Order may be permitted to continue to enjoy the border crossing privilege.
>
> 5. Aliens who have complied with the requirements of this General Order governing permanent admission will be considered as having entered for permanent residence.
>
> 6. The use and issuance of identification cards to all classes of aliens entitled to same will continue as heretofore.
>
> 7. Identification cards held by or issued to aliens of the "immigrant" class shall be rubber-stamped as follows:
>
> IMMIGRANT
>
> . . . .
>
> 10. All identification cards heretofore issued, held by aliens who cannot, or do not, meet the requirements of law, regulations and this order, will be taken up and canceled upon an incoming trip of the holder and appropriate action taken.
>
> . . . .
>
> 12. The status of holders of identification card [*sic*] shall be inquired into

provisions covering nonimmigrants[10] by granting them the status of aliens admitted for permanent residence.[11] The Supreme Court unanimously upheld this order in *Karnuth v. United States ex rel. Albro*,[12] giving judicial credence to the underlying policy that certain aliens could continue to cross the Canadian and Mexican borders unhampered by the usual certification procedures.[13] The practice[14] allowed by General Order 86 continued unchanged until 1960, when in *Amalgamated Meat Cutters v. Rogers*,[15] a district court rejected this long standing INS policy.[16] Nonetheless, in practice the INS generally ignored this case.[17] An exception was recognized in a situation involving labor disputes[18] where a commuter, whose primary purpose for reentry was to work and not to resume residence and who chose to seek employment with an employer

---

periodically . . . . When the holder of a "non-immigrant" identification card qualifies as an "immigrant," a new identification card shall be . . . stamped to show the correct status.

[10] Section 1101(a)(15)(H) of the 1952 Act specifically provides that an alien who has no intention of abandoning his home in a foreign country when coming into the United States to perform temporary work is designated as a "nonimmigrant." If persons in the United States cannot be found to do the available work, nonimmigrant aliens are admitted, but subject to exclusion should circumstances warrant such action. Consequently, the "nonimmigrant" alien does not possess rights equivalent to resident aliens who cannot be so excluded.

[11] General Order 86, *supra* note 9, at § 5. The commuter alien system with its permanent alien status is predicated on maintaining friendly foreign relations with countries bordering the United States, despite INS knowledge that these commuters actually make their residence in Canada and Mexico. *Alien Commuter, supra* note 8, at 141.

[12] 279 U.S. 231 (1929). As a result of this decision, commuters were brought out of the "temporarily for business" category found in § 3(2) of the 1924 Act.

[13] 279 U.S. at 242.

[14] *See In re* M.D.S. & L.G. & W.D.C., 8 I. & N. Dec. 209 (Bd. Imm. App. 1958); *In re* H.O., 5 I. & N. Dec. 716 (Bd. Imm. App. 1954).

[15] 186 F. Supp. 114 (D.D.C. 1960). The plaintiff in *Amalgamated Meat Cutters* was a labor organization which represented workers at the Peyton Packing Company. Because of a strike, the Peyton Packing Company hired aliens who resided in Mexico to replace its striking workers. Pursuant to the Immigration and Nationality Act of 1952, ch. 477, § 212(a)(14), 66 Stat. 183 (1952), *as amended*, 8 U.S.C. § 1182(a)(14) (1970), the union sought a certification from the Secretary of Labor that these aliens were adversely affecting wages and working conditions in the United States, and therefore should be excluded. The Secretary of Labor, in accordance with section 212(a)(14), issued the proper certification. The INS interpreted the certification as not applying to the alien commuter, because the commuter was classified as a permanent resident and because permanent residents were exempt from section 212(a)(14). The union brought suit in order to require the Attorney General and the Commissioner of Immigration to enforce section 212(a)(14) against the commuter. Amalgamated Meat Cutters v. Rogers, *supra* at 115-16.

[16] The court based its decision on the definition of "residence" in section 1101(a)(33) of the 1952 Act which states specifically that "[t]he place of general abode . . . means his principal, actual dwelling place in fact without regard to intent." 186 F. Supp. at 118.

[17] *See* Note, *Aliens in the Fields: The "Green-Card Commuter" Under the Immigration and Naturalization Laws*, 21 STAN. L. REV. 1750, 1758 (1969). The INS did not appeal the *Amalgamated Meat Cutters* ruling, and except for this particular case, did not appear to follow the direction of that court.

[18] 8 C.F.R. § 211.1(b) (1972); *see* note 3 *supra*.

involved in a certified labor dispute, was subject to exclusion.[19] In *Cermeno-Cerna v. Farrell*,[20] another district court distinguished the status of the commuter from that of the permanent resident alien, maintaining that all commuter aliens were subject to the labor dispute provision,[21] with reentrance subject to the discretion of the Attorney General.[22] However, in *Gooch v. Clark*[23] the United States Court of Appeals for the Ninth Circuit refused to follow *Amalgamated Meat Cutters*[24] and rejected the distinction made in *Cermeno-Cerna*,[25] by holding that the alien commuter's status as a permanent resident was not compromised by residence across the border.[26]

In the instant case, the District of Columbia Court of Appeals[27] found a historical and legal distinction between a seasonal and a daily commuter which

---

[19] Exhibit B, Brief for Appellee at 86, Sam Andrews' Sons v. Mitchell, 457 F.2d 745 (9th Cir. 1972). A lettuce and melon grower whose work force consisted of commuter aliens sought declaratory judgment with respect to regulations relating to commuter aliens. The court of appeals held that the regulation, providing for use of green cards in lieu of visas or reentry permits, may not be used when the immigrant alien reenters with the intention of accepting or continuing employment at a place of business where the Secretary of Labor has determined that a labor dispute exists. The court also ruled that if the regulation was applied to compel commuters to choose between quitting their jobs or facing loss of their cards, then it constituted an abuse of the Attorney General's discretion.

[20] 291 F. Supp. 521 (C.D. Cal. 1968), *appeal dismissed as moot sub nom.* Guimarra Vineyards Corp. v. Farrell, 431 F.2d 923 (9th Cir. 1970). Plaintiffs contended that the Attorney General lacked the statutory authority to promulgate regulations which would create a new class of aliens excludable under the immigration laws. *Id.* at 527-28. *See generally* Immigration and Nationality Act of 1952, § 101(a)(27)(B), 8 U.S.C. § 1101(a)(27)(B) (1970).

[21] Even though the *Cermeno* court recognized that the commuter had been accorded the opportunity to establish residence, failure to do so denied the commuter any "special" status under the immigration laws. This subjected them to regulations administered to control the commuter practice. 291 F. Supp. at 529.

[22] *Id.* at 527; *see* Immigration and Nationality Act of 1952, § 211(b), 8 U.S.C. § 1181(b) (1970).

[23] 433 F.2d 74 (9th Cir. 1970), *cert. denied*, 402 U.S. 995 (1971). Farm workers sought an order directing officials to deny admission to commuter aliens. The AFL-CIO intervened as a plaintiff representing the class of United States citizens who compete with the commuters for employment. *Id.* at 76.

[24] *Id.* at 81.

[25] *Id.* at 78-81.

[26] *Id.* at 80. Steering away from previous judicial decisions which deemed foreign residence as the bar to special immigrant status, the *Gooch* court focused instead on a person's status under the immigration laws and concluded that the commuter should be classified as an "immigrant lawfully admitted for permanent residence who is returning from a temporary visit abroad." *Id.* at 78-81. Section 101(a)(20) of the amended 1952 Act defined "permanent residence" as "the *status* of having been lawfully *accorded* the privilege of residing permanently in the United States in accordance with the immigration laws, such status not having changed." The court reasoned that the commuter's "actual" place of abode did not change his special immigrant classification as long as he had been "accorded" the "status" of permanent residency under the existing immigration law. In effect, *Gooch* confirmed the commuter's use of the "green-card" readmission procedure and exempted him from the labor certification requirement. *See* note 15 *supra*.

[27] Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973).

dictated different treatment.[28] Evolving from the bracero program,[29] the seasonal commuter[30] was created by the INS as a new class of immigrant not required to obtain immigrant visas upon reentry.[31] The court of appeals rationalized that "[t]he metamorphosis of the bracero to seasonal commuter is directly inconsistent with Congress's [*sic*] purpose in ending the bracero program in order to eliminate its adverse impact on American workers."[32] Finding further support for this rationalization in Judge Wright's dissenting opinion in *Gooch v. Clark*,[33] which criticized the fiction of construing "those lawfully admitted for permanent residence" so as to include alien commuters,[34] the court held that *seasonal* commuters were improperly classified as "returning resident aliens" and therefore were not entitled to the benefits of such classification.[35]

The Supreme Court granted certiorari[36] and the majority,[37] speaking through Justice Douglas, held that *all* commuters are immigrants "lawfully admitted for permanent residence"[38] and are deemed to be "returning from a temporary visit abroad."[39] The majority gave great weight to the long-standing administrative practice and statutory construction[40] and saw no merit in distin-

---

[28] *Id.* at 485.

[29] The bracero program was initiated in 1943 to provide for seasonal importation of Mexican agricultural workers due to the unusual farm labor shortage during World War II. Agreement with Mexico on the Temporary Migration of Mexican Agricultural Workers, Aug. 4, 1942, 56 Stat. 1759 (1942), E.A.S. No. 278.

[30] Until the 1952 Act, the number of commuters classifiable as seasonal was "inconspicuous." However, the INS has admitted that many seasonal commuters are former braceros who have been admitted to the United States temporarily for employment under the 1952 Act. Statement by James S. Hennessy, Executive Assistant to the Commissioner, at the *Hearings on H.R. 12667 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess. 73 (1969).

[31] Immigration and Nationality Act of 1952, 8 U.S.C. § 1181(b) (1970).

[32] 481 F.2d at 483.

[33] 433 F.2d 74, 82 (9th Cir. 1970), *cert. denied*, 402 U.S. 995 (1971).

[34] *Id.* at 82.

[35] 481 F.2d at 484. Aside from presumed congressional intent, the appellate court took notice of section 101(a)(15) of the 1952 Act which defines "immigrant" as an alien not coming within one of the ten categories of nonimmigrants. A "nonimmigrant" is defined as "an alien having a residence in a foreign country which he has no intention of abandoning . . . [and] who is coming *temporarily* to the United States to perform *temporary* services or labor . . . ." Immigration and Nationality Act of 1952, 8 U.S.C. § 1101(a)(15)(H) (1970) (emphasis added). Retaining residence in a foreign country which he has no intention of abandoning and coming only temporarily to the United States, the seasonal commuter, according to the court of appeals, could no longer be classified by the INS as a returning resident alien. Such INS practice, having no statutory warrant, is contrary to the intent of Congress and is illegal. 481 F.2d at 483.

[36] Saxbe v. Bustos, 414 U.S. 1143 (1974). *See* note 6 *supra*.

[37] Justice Douglas delivered the opinion of the Court, and he was joined by Chief Justice Burger and by Justices Stewart, Powell, and Rehnquist.

[38] Saxbe v. Bustos, 419 U.S. 65, 71 (1974).

[39] *Id.* at 72.

[40] *Id.* at 73. The weight given in such a situation is especially heavy when Congress has "revisited" the Act (1965 amendments) and left the practice untouched. *See* note 45 *infra*.

guishing the daily commuter from the seasonal commuter.[41] Justice Douglas refused to accept the court of appeals' historical interpretation that a seasonal commuter was merely a new name for a bracero.[42] His refusal was based on the premise that braceros were initially nonimmigrants whereas seasonal commuters were immigrants.[43] Therefore, unlike the braceros, seasonal and daily commuters never had to acquire permanent resident status because they had always enjoyed that status and were entitled to the benefits of such a classification.[44] The Court also maintained that the 1965 amendments to the 1952 Act,[45] which called for stricter certification of alien laborers,[46] did not apply to alien commuters.[47] According to the Court, the objective of the congressional amendments was "to limit *new* admissions of alien laborers, not to prejudice the *status* of aliens, who, whether *daily* or *seasonal* commuters, had acquired permanent residence here and were returning to existing jobs."[48] Recognizing the political, social and economic policy considerations involved in any sudden judicial termination of the commuter system,[49] the Court exercised judicial restraint by saying that "if alien commuters are to be abolished or if *seasonal* commuters are to be treated differently than *daily* commuters, the Congress must do it."[50]

---

[41] *Id.* at 75.

[42] *Id.* at 76. Justice Douglas stated that the seasonal commuter problem originated in 1943 when the United States and Mexico agreed to seasonal importation of Mexican agricultural workers. Agreement with Mexico on the Temporary Migration of Mexican Agricultural Workers, Aug. 4, 1942, 56 Stat. 1759 (1942), E.A.S. No. 278. However, according to Justice Douglas, the bracero program did not arise until 1951 when Congress amended the Agricultural Act of 1949. Act of July 12, 1951, ch. 223, § 503, 65 Stat. 119, *amending* 7 U.S.C. § 1421 *et seq.* (1970) (codified at 7 U.S.C. § 1463 (1970)). This amendment required United States farmers to make reasonable efforts to "first" attract domestic labor prior to certification by the Secretary of Labor of the need for foreign workers. Thus, the seasonal classification "predated" the bracero classification, not the reverse as contended by the District of Columbia Court of Appeals.

[43] 419 U.S. at 76.

[44] *Id.*; *see* H.R. REP. NO. 722, 88th Cong., 1st Sess. 7 (1963).

[45] Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911, *amending* 8 U.S.C. § 1101 *et seq.* (1970) (codified at 8 U.S.C. § 1101 *et seq.* (1970)); *see* S. REP. NO. 748, 89th Cong., 1st Sess. (1965).

[46] Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(a)(14) (1970). Congress further restricted certification by providing that "aliens were inadmissible unless the Secretary of Labor certified that there were insufficient domestic workers available in the field and that the employment of aliens would not adversely affect wages and conditions of American workers." *Id.*

[47] 419 U.S. at 76.

[48] *Id.* Reports on the 1965 Act indicated no suggestion that the commuter system was to be uprooted in its entirety. *See* S. REP. NO. 748, 89th Cong., 1st Sess. (1965). This report simply emphasized that the purpose of the amendments was to prevent an "influx" of foreign labor, not to destroy existing labor arrangements.

[49] The recognition is in reference to the SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION, COMMUTERS, WESTERN HEMISPHERE REPORT, S. REP. NO. 1006, 90th Cong., 2d Sess. 104 (1968). An affidavit submitted by former Secretary of State Rogers to the district court supported the stand taken by the Supreme Court for fear of the serious "deleterious effect" it would have upon relations of the United States with both Mexico and Canada. 419 U.S. at 79.

[50] 419 U.S. at 79.

Justice White, with three justices concurring,[51] did not agree with Justice Douglas' theory that judicial restraint should be exercised when it comes to long-standing administrative practice, especially where the governing statute is so plain in its language as to leave little room for administrative interpretation.[52] Rather than adopting the majority's proposition that long-standing administrative practice coupled with congressional silence is presumptive of congressional acquiescence, the dissenters were of the opinion that plain statutory language could not be taken by the INS and manufactured into legal practice in the absence of congressional approval.[53] Justice White's main criticism was that the Court, in sanctioning the status privileges of the commuter alien, was straying from the neutral judicial function of applying traditional principles of statutory construction.[54] This is particularly evident in judicial language which intimates the traditional policy that the Court should only legislate when the statute is so ambiguous as to require resolution.[55] However, the language used by the Court to reject the unambiguous provisions of the immigration laws was based on legislative considerations, such as the economic consequences for the commuter and the border communities and the need to avoid negative effects upon the relations which the United States has with Mexico and Canada.[56] To predict, as did the majority, the ultimate outcome of any balancing of interests, is beyond the responsibility of the Court.

It is a fearful possibility that the Court's perpetuation of the INS practice of creating legal fictions will have a sedating effect on Congress. Since Congress is reluctant to enter an area where its will is weak and its competency questionable, that body is likely to avoid any reevaluation of the commuter alien system either through continued silence or through continued requoting of the *Gooch* and *Bustos* majority opinions. Congress will quote and requote in the hope that constitutional lawyers will not realize that all Congress is doing is paying homage to a new standard of neutral judicial considerations. If such fears become reality, Congress will have become the second victim of fictional statutory construction.

However, it is conceivable that *Bustos* will have a direct bearing on the future

---

[51] Justices Brennan, Marshall, and Blackmun joined with Justice White in the dissent.

[52] 419 U.S. at 80. Justice White felt that the majority's position violated one of the cardinal principles of statutory construction; *i.e.*, "administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction." Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933) (Cardozo, J.).

[53] 419 U.S. at 83.

[54] *Id.* at 86.

[55] *Id.* at 88.

[56] *Id.* "The majority acknowledges the many political, economic, and social implications of the issues in this case and the need for the Court to legislate only when interstitial ambiguities in a statute require resolution, but it then rests its rejection of these unambiguous provisions of the immigration laws upon legislative considerations . . . . But these interests, as well as the opposing interests of domestic labor, form part of the congressional calculus, and this Court is hardly equipped or authorized to predict by its decision the direction in which that balance of interests will ultimately tip." *Id.*

of the commuter alien system as it now exists. A narrow interpretation of the Court's ruling could culminate in legislative expansion or at least in solidification of the current INS practice which permits commuter aliens to reenter almost at will. An interpretation taken from a broader perspective could result in diminution or even possible elimination of the special immigrant status granted to commuter aliens if *Bustos* is construed as a decisive judicial step in the articulation of growing disapproval of INS statutory interpretation and practice in the field of immigration. This mounting discontent originated in *Amalgamated Meat Cutters v. Rogers*[57] and has induced various restrictions[58] and greater judicial consideration of "home" economics and American labor concerns in making decisions. The broad affirmative policy of General Order 86[59] has been further tarnished by *Cermeno-Cerna v. Farrell*[60] and by the recent dissent in *Gooch v. Clark*,[61] which expressed a reluctance to adhere to fictitious INS interpretations at the expense of the American worker.[62] In *Bustos*, the District of Columbia Court of Appeals accentuated this attitude by distinguishing between the status of a seasonal commuter and that of a daily commuter.[63] Even Justice Douglas' majority opinion indicated a judicial mood that a change is sorely needed, but only on the initiative of Congress, not the Court.[64]

More recent endeavors to refine INS commuter procedures, such as the Ruttenberg-Scammon proposal[65] and the Kennedy proposal,[66] have attempted to restrict the competitive advantage that commuters enjoy over domestic

---

[57] 186 F. Supp. 114 (D.D.C. 1960).

[58] *See* Sam Andrews' Sons v. Mitchell, 457 F.2d 745 (9th Cir. 1972); note 19 *supra*; 8 C.F.R. § 211.1(b) (1972); note 3 *supra*.

[59] *See* note 9 *supra*.

[60] 291 F. Supp. 521 (C.D. Cal. 1968).

[61] 433 F.2d 74 (9th Cir. 1970), *cert. denied*, 402 U.S. 995 (1971).

[62] 433 F.2d at 74, 82.

[63] Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973).

[64] Saxbe v. Bustos, 419 U.S. 65, 79 (1974).

[65] SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION, COMMUTERS, WESTERN HEMISPHERE REPORT, S. REP. NO. 1006, 90th Cong., 2d Sess. 99-109, 111-30 (1968). Mr. Scammon and Mr. Ruttenberg were, respectively, the Chairman, and a member of the Select Commission on Western Hemisphere Immigration. Their plan, as explained in a letter to President Lyndon Johnson, would have required all holders of immigrant visas to maintain bona fide residence within the United States. Any commuter who chose not to move would only be eligible for a "noncitizen, non-resident work permit," which would be granted only if his entry into the work force would not jeopardize certain minimum working conditions of domestic workers. Letter from Richard Scammon, Chairman of the Select Commission on Western Hemisphere Immigration, and from Stanley H. Ruttenberg, Commission member, to President Lyndon Johnson, July 22, 1968.

[66] Senator Kennedy introduced a similar bill, S. 1694, 91st Cong., 1st Sess. (1968). Rather than causing commuters to lose their jobs unless they moved into the United States (*i.e.* Ruttenberg-Scammon proposal), the Kennedy proposal would permit the commuter practice to continue, subject to several conditions. Otherwise, employers would be forced to pay higher wages for the same work, and the loss would be passed along to the consumer. In addition, Mexican commuters and border communities would lose an important source of income, and foreign relations would suffer.

workers with regard to lower wages. However, the effect of these proposals is to hinder the free flow of labor across the border at the risk of a number of possible adverse consequences. An alternative has been proposed by the INS which would abolish the commuter alien fiction altogether by instituting a program based on temporary labor need.[67] In *Bustos*, the Court balanced legislative considerations in the exercise of judicial restraint; now it is up to Congress to weigh these same considerations and for the first time take a firm stand on the status of the commuter alien in the area of labor and immigration law.

Michael Kendall-Patrick Williams

---

[67] This initiative is an extension of the Ruttenberg-Scammon proposal which takes into account five factors to be weighed in a labor/need equation:

a. the nature of the employment,
b. the need for alien services,
c. the ability of United States residents to provide similar services,
d. the sources of the nonresident alien's income, and
e. the effect on American employers if nonresident aliens were denied entry.

In re Bailey, 11 I. & N. Dec. 466, 468 (Bd. Imm. App. 1954).