NOTE

BUSTOS v. MITCHELL (SAXBE v. BUSTOS*): THE DILEMMA OF COMMUTING ALIEN LABORERS

Almost daily, this country's labor force is flooded with over 55,000 aliens who enter the United States from Mexico and Can-

* As this issue proceeded into the final stages of publication, the United States Supreme Court decided Saxbe v. Bustos and the companion case, Cardona v. Saxbe. Saxbe v. Bustos, No. 73-300 (U.S. Sup. Ct., Nov. 25, 1974); Cardona v. Saxbe, No. 73-480 (U.S. Sup. Ct., Nov. 25, 1974). In a 5 to 4 decision, the court upheld the right to entry for both seasonal and daily commuting laborers. The holding was primarily concerned with the issue of whether congressional acquiescence and administrative practice may overcome the plain language of the federal statute. The majority opinion, written by Justice Douglas, joined in by Chief Justice Burger, and Justices Stewart, Powell, and Rehnquist, gave great weight to the fact that Congress has not acted to change the commuter practice. In reference to the apparent conflicts between the immigration law and the alien commuter program, Justice Douglas stated, "Such a history of administrative construction and congressional acquiescence may add a gloss or qualification to what is on its face unqualified statutory language." *Id.*, at 9.

Furthermore, the court was unwilling to accept the distinction drawn by the District of Columbia Court of Appeals between daily commuters and seasonal commuters. Justice Douglas wrote, "We would have read the same language in two opposed ways to sanction the daily commuter and strike down the seasonal commuter program." *Id.*, at 14.

In addition to the attention given to the long history of commuter practice, the majority was influenced by the political, economic, and social implications that would result from a decision to ban alien commuters. The court cited the estimate of the United States Commission on Civil Rights that if the Mexican commuters were cut off, they would lose $50,000,000 annually. Also, 250,000 family members who depend on the income earned by commuters would lose their means of support. It is thought that these aliens account for 25% to 30% of the income earned by the labor force in some Mexican border communities. *Id.*, at 13.

The majority also gave great weight to the fact that termination of the alien commuter practice might force those Mexicans who are lawfully admitted for permanent residence in this country to actually move to this country. *Id.*, at 14. It is clear that such an occurrence would create problems of housing and education in this country's border towns.

The majority concluded that "The changes suggested implicate so many problems of a political, economic, and social nature that it is fit that the judiciary recuse itself." *Id.*, at 14. For these reasons, the majority upheld the present criteria for admission of both daily and seasonal commuter aliens.

The minority in Bustos refused to be swayed by the historical longevity of the commuter practice. Justice White, joined by Justices Brennan, Marshall, and

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ada to work in the industries and agricultural areas of various American border communities.[1] Many of these laborers come to this country each work day and return to their foreign residences at night. Others, particularly farm workers, remain here for months, taking employment wherever agricultural jobs are available. Although these aliens differ in terms of the duration of their visits, they all possess three common characteristics. First, they originally came to the United States as immigrants lawfully admitted for permanent residence in the United States.[2]

Blackmun, urged that "[a]dministrative construction over a long period of time is an available tool for judicial interpretation of a statute only when the statutory terms are doubtful or ambiguous." *Id.*, dissenting opinion at 1. Furthermore, the minority argued that congressional silence standing alone cannot constitute acceptance of a continuing administrative practice.

The four-man minority contended that neither the daily nor the seasonal commuter were properly admissible under the provisions of the Immigration and Nationality Act. Employing logic similar to that set forth in this note, they concluded that neither class of commuter qualifies as a United States resident as defined in section 101(a)(33) of the 1952 Act. Thus, these aliens are not exempt from the entry documentation requirements of 8 C.F.R. § 211.1(b) and would be subject to the labor certification process of section 212(a)(14) of the 1965 Amendments to the 1952 Act.

As stated throughout the text of this note, the alien commuter practice simply does not conform to the plain language of the relevant immigration laws. It is clear from both opinions that, under the federal statutes, there should be no differentiation between daily and seasonal commuting aliens. The problem, however, is that the majority refuses to interpret the statute in accord with its clear language, since to do so would have social, political, and economic implications. Neither these implications nor the historical longevity of the practice should force the Court to avoid the plain language of the federal statute involved. It is the sole prerogative of the legislature to take such extrinsic factors into consideration. To quote Justice White's minority opinion, "Because I believe that the Court has strayed from the neutral judicial function of applying traditional principles of statutory construction, I must dissent." *Id.*, dissenting opinion at 10. It is the final conclusion of this note that Justice White is correct in his analysis and the legislature should now exercise its proper function and resolve this dilemma.

1. Brief for Appellees at 3, Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973). This figure is based on records of the Immigration and Naturalization Service as of April 30, 1972, which break down as follows: Seasonal commuters from Mexico, 8,283; daily commuters from Mexico, 47,174; total commuters from Canada 8,514. In contrast, the California Farm Bureau has estimated that there are approximately 150,000 seasonal commuters working in California agriculture. The Farm Bureau arrived at this figure based on an extrapolation of a survey taken at four representative California farms. California Farm Bureau Federation As Amicus Curiae, Richardson v. Bustos, No. 73-300 (U.S. Sup. Ct. Sept. 7, 1973).

2. Brief for Appellees at 2, Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973); Stipulation, Bustos v. Mitchell, *reprinted in* Petition for Certiorari at 34-35, Richardson v. Bustos, No. 73-300 (U.S. Sup. Ct., Aug. 14, 1973).

Second, none of them maintain actual permanent residences in this country.[3] Third, they are allowed to enter the United States by presenting only the Alien Registration Identification Cards (commonly known as green cards) which they received when they were admitted for permanent United States residence.[4]

Thus, by working in this country and residing in Mexico or Canada, these commuters are able to earn higher wages than possible in their native countries, and avoid the greater living expenses found in the United States.[5] Since these foreigners require less money to maintain themselves in Mexico and Canada, they are frequently willing to work for wages below those acceptable to American residents.[6] It is well documented that this situation contributes to the overall depressed economic and working conditions in America's border areas.[7] Consequently, for the past decade American labor organizations have been attempting to enjoin the admission of commuting workers into this country. As will be shown, the history of these attempts is dominated by a reluctance on the part of the courts to disturb this long continued practice.

The recent decision of the United States Court of Appeals for the District of Columbia in *Bustos v. Mitchell*[8] marks the most successful challenge to the commuter system. *Bustos* involved an attack by American farm workers, permanent resident alien farm workers, and the United Farm Workers Organizing Committee from California against the Immigration and Naturalization Service's practice of permitting Mexican aliens to commute daily or

3. Daily commuters are defined by the Board of Immigration and Naturalization Appeals as "persons who have their place of residence in foreign contiguous territory and commute daily to the United States to work." In the Matter of L—, 4 I. & N. Dec. 454, 455 (1951). The seasonal commuter has been defined by the Immigration Service in their responses to the Senate Subcommittee on Migratory Labor as "an alien lawfully admitted to the United States for permanent residence, who resides in a contiguous foreign country, who comes to the United States solely to perform seasonal work for extended periods." *Hearings entitled "Migrant and Seasonal Farmworker Powerlessness" before the Subcomm. on Migratory Labor of the Comm. on Labor and Public Welfare of the U.S. Senate*, 91st Cong., 1st & 2d Sess. pt. 5-A, at 2022 (1970).

4. Brief for Appellees at 2, Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973); Stipulation, *reprinted in* Petition for Certiorari at 34-35, Richardson v. Bustos, No. 73-300 (U.S. Sup. Ct., Aug. 14, 1973).

5. Department of Labor, *The "Commuter Problem" and Low Wages and Unemployment in American Cities on the Mexican Border*, REPORT OF THE SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION, at 113 (1968).

6. *Id.*, at 126.

7. *Id.*, at 116, 127, 128.

8. 481 F.2d 479 (D.C. Cir. 1973).

seasonably to employment, regardless of any adverse effect they may have on wages or working conditions in this country. In its decision, the *Bustos* court chose not to disturb the daily commuter system, which includes nearly eighty-five percent of the total commuting work force.[9] Nevertheless, the court struck down the practice of allowing seasonal workers to enter this country by utilizing only their alien registration receipt cards on two grounds. First, it found that seasonal commuters are not returning resident aliens, and thus are not exempt from the requirement that immigrant aliens obtain immigrant visas prior to coming into the United States.[10] Second, the court decided that seasonal commuters are properly considered as being nonimmigrants,[11] and for this reason their entry must be preceded by a showing that there are not unemployed persons capable of performing such labor to be found in this country. As it will be seen, it is almost impossible for the seasonal farm worker to obtain entry documentation as either an immigrant or nonimmigrant. So, by prohibiting the seasonal commuter's use of his green card as documentation for reentry into the United States, the court in *Bustos v. Mitchell* would in effect close the gates at our borders to the alien seasonal farm workers.

The decision in *Bustos*, however, is in direct conflict with the 1970 ruling handed down by the Ninth Circuit in *Gooch v. Clark*.[12] In *Gooch*, the court upheld the legality of both the daily and seasonal commuter practices. In order to resolve this conflict, the United States Supreme Court has granted certiorari[13] to the *Bustos* case and will hear argument during the October term of 1974. This article will be primarily an analysis of the arguments presented by both sides in the controversy. The conclusion drawn will be based almost exclusively on the strict interpretation of the language of the statutes in question. It is fairly well established that an arbitrary decision to exclude alien commuters would have widespread economic and political ramifications on both sides of the border.[14] However, this article will suggest only what the Su-

9. Brief for Appellees at 3, Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973).

10. 481 F.2d 479, 483 (D.C. Cir. 1973).

11. *Id.*

12. Gooch v. Clark, 433 F.2d 74 (9th Cir. 1970).

13. Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973), *cert. granted*, 414 U.S. 1143 (1974).

14. For an expression of this conclusion, see the affidavit of former Secretary of State William P. Rogers, Appendix to Petition for Certiorari, at 38, Richardson v. Bustos, No. 73-300 (U.S. Sup. Ct., Aug. 14, 1973).

preme Court's decision should be, as dictated by the plain language of the statutory provisions governing immigration.

The opinion of the Court of Appeals in *Bustos* represents a strong victory for American farm labor, but the court should have expanded its judgment to remove the daily commuter from competition with workers in this country. This contention is based on the fact that many of the court's reasons for excluding the seasonal commuter are equally applicable to the daily commuter. *Bustos v. Mitchell* was decided on the strength of interpretations given by the court to a number of interrelated sections of the Immigration and Nationality Act of 1952, and the Code of Federal Regulations. The appellants (referred to alternatively as the United Farm Workers) contended that the language of these statutes dictated the exclusion of all commuting farm workers from the United States.[15] Despite the Court's decision to ban only seasonal commuters, they nevertheless employed the same logic presented in the United Farm Worker's arguments. The first part of this note, therefore, shall present the Appellant United Farm Worker's view of the disputed statutory provisions. Consideration will then turn to the court's decision not to exclude daily commuting farm workers, a decision which was influenced primarily by the fact that the practice had been in existence for over forty years.[16] This argument, as set forth by the government in *Bustos*, will be analyzed within the context of a historical survey of the commuter system. Finally, the decision of the Court of Appeals will be evaluated, and recommendations will be made that, to be consistent, the Supreme Court should broaden the findings of the Court of Appeals to also enjoin the daily commuter practice.

I. THE ISSUES IN BUSTOS V. MITCHELL

A. The Appellant's Arguments

1. The Immigrant Visa Requirement—The challenge to the commuter system advanced by the appellants in *Bustos* was threefold, although the court's published opinion addressed itself to only the first two claims for relief.[17] First, the United Farm

15. Supplemental Appendix to Brief for Appellants, Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973); Respondent's Brief, Saxbe v. Bustos, No. 73-300 (U.S. Sup. Ct., April 19, 1974).

16. 481 F.2d 479, 485 (D.C. Cir. 1973).

17. The Court did not discuss the question of whether 8 C.F.R. § 211.1(b)(1) permits commuters to enter the country to take employment at a place where a labor dispute exists even if they have been employed there previously.

Workers contended that alien commuters must have a valid immigrant visa in order to enter the United States for work.[18] An immigrant visa is good for four months, and is surrendered upon entry.[19] Immigrant aliens may not come into this country without a valid immigrant visa, unless they are returning resident immigrants.[20] This restriction on the admission of immigrants is embodied in sections 211(a) and 211(b) of the 1965 Amendments to the Immigration and Nationality Act of 1952:

> 211(a). Except as provided in subsection (b) no immigrant shall be admitted into the United States unless at the time of application for admission he has a valid unexpired immigrant visa or was born subsequent to the issuance of such a visa to the accompanying parent.
>
> 211(b). Notwithstanding the provisions of Section 212(a) (20) of this Act in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, *returning resident immigrants, defined in Section 101(a)(27)(B)*, who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation.[21] (Emphasis added).

The implications of sections 211(a) and 211(b) are dependent upon the interpretation given to the term *returning resident immigrant* under section 101(a)(27)(B) of the 1952 Act.[22] The United Farm Workers alleged that an alien commuter is not a returning resident immigrant under this section,[23] which defined that alien as an immigrant lawfully admitted for permanent residence who is returning from a temporary visit abroad. They maintained that the commuting laborer fails in two ways to meet

18. Supplemental Appendix to Brief for Appellants at 4, 481 F.2d 479 (D.C. Cir. 1973); Respondent's Brief at 19, Saxbe v. Bustos, No. 73-300 (U.S. Sup. Ct., April 19, 1974).

19. Immigration and Nationality Act of 1952, § 221(c), (e), 8 U.S.C. § 1201 (c), (e) (1970).

20. *Id.*, § 211(a), (b), *as amended*, 8 U.S.C. § 1181(a), (b) (1970).

21. *Id.*

22. Immigration and Nationality Act of 1952, § 101(a)(27)(B), 8 U.S.C. § 1101(a)(27)(B) (1970).

23. Supplemental Appendix to Brief for Appellants at 7, Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973); Respondent's Brief at 20, Saxbe v. Bustos, No. 73-300 (U.S. Sup. Ct., April 19, 1974).

the requisites of section 101(a)(27)(B). First, the status of being lawfully admitted for permanent residence has been abandoned by the commuter due to his failure to establish a permanent home in the United States.[24] Indeed, section 101(a)(20) of the 1952 Act lends support to the appellants' contention. In this section, the ensuing definition is given to the phrase *lawfully admitted for permanent residence*:

> [T]he status of having been accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, *such status not having changed.*[25] (Emphasis added).

Hence, the appellants in *Bustos* reasoned that the permanent resident status spoken of in section 101(a)(20) may terminate if the immigrant fails to maintain a permanent residence in this country.[26]

The second argument made by the United Farm Workers was that the commuting alien is not returning from a temporary visit abroad, and is not, therefore, within the proper construction of *returning resident immigrant* in section 101(a)(27)(B).[27] Under ordinary usage, the Mexican or Canadian commuter's daily or seasonal visit to the United States cannot fairly be looked upon as a return from a temporary visit abroad. Also, it must be noted that under 8 C.F.R. 211.1(b)(2), an immigrant alien may use his Alien Registration Card to enter the United States only if he is returning to an unrelinquished lawful permanent residence in the United States.[28] As the appellants in *Bustos* maintained, when 8 C.F.R. 211.1(b)(1) is considered together with section 211 (waiver of visa requirement to returning resident immigrants), it is clear that the commuter may not enter using only his green card.[29]

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24. Supplemental Appendix to Brief for Appellants at 7, Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973); Respondent's Brief at 30-36, Saxbe v. Bustos, No. 73-300 (U.S. Sup. Ct., April 19, 1974).

25. Immigration and Nationality Act of 1952, § 101(a)(20), 8 U.S.C. § 1101(a)(20) (1970).

26. Supplemental Appendix to Brief for Appellants at 11, Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973); Respondent's Brief at 30 *et seq.*, Saxbe v. Bustos, No. 73-300 (U.S. Sup. Ct., Aug. 19, 1974).

27. Supplemental Appendix to Brief for Appellants at 11, Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973); Respondent's Brief at 36-40, Saxbe v. Bustos, No. 73-300 (U.S. Sup. Ct., Aug. 19, 1974).

28. 8 C.F.R. § 211.1(b)(1) (1974).

29. Supplemental Appendix to Brief for Appellants at 7, Bustos v. Mitchell, 481 F 2d 479 (D.C. Cir. 1973); Respondent's Brief at 37-40, Saxbe v. Bustos, No. 73-300 (U.S. Sup. Ct., Aug. 19, 1974).

Furthermore, it was urged that a construction of the expression *returning resident immigrants* in any fashion other than that espoused by the appellants would blatantly contradict the meaning given to the term *residence* in section 101(a)(33) of the 1952 Act: "the place of general abode; the place of general abode of a person means his principal actual dwelling place without regard to intent."[30]

Since the Mexican laborers complained of by the appellants in *Bustos* are not United States residents within the plain language of section 101(a)(33), it is appropriate that they obtain immigrant visas prior to crossing into this country. For the commuting agricultural worker, this restriction would probably act as a complete bar to his admission. An immigrant may not procure a visa to perform skilled or unskilled labor in the United States, unless the Secretary of Labor has made a favorable labor certification, pursuant to section 212(a)(14) of the 1965 Amendments.[31] Under this section, it must be shown that there are insufficient domestic workers to perform such labor, and that the applicant's employment would not adversely affect the wages and working conditions of American laborers. The United Farm Workers concluded that the farm labor supply in this country is sufficient and that the commuting agricultural worker should not be admitted into the United States.[32]

2. Commuters Are Properly Considered Nonimmigrants— The second position advocated by the appellants was that alien commuters who maintain their residences in a foreign country should be reclassified as *nonimmigrants*.[33] The United Farm Workers stressed the fact that the commuting Mexican farm workers originally represented to immigration authorities that they intended to become permanent United States residents. For this reason, they were not classified by the Immigration Service as *nonimmigrant aliens* under section 101(a)(15)(H) of the 1952

30. Immigration and Nationality Act of 1952, § 101(a)(33), 8 U.S.C. § 1101(a)(33) (1970).

31. *Id.*, § 212(a)(14), *as amended*, 8 U.S.C. § 1182(a)(14) (1970).

32. Supplemental Appendix to Brief for Appellants at 6, Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973); Respondent's Brief at 19, Saxbe v. Bustos, No. 73-300 (U.S. Sup. Ct., Aug. 19, 1974).

33. Supplemental Appendix to Brief for Appellants at 10, Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973); Respondent's Brief at 85-90, Saxbe v. Bustos, No. 73-300 (U.S. Sup. Ct., Aug. 19, 1974).

Immigration and Nationality Act. The 1952 legislation reads as follows:

> (15). The term "immigrant" means every alien except an alien who is in one of the following classes of nonimmigrant aliens
>
> (H). . . . ; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country.[34]

In order for an alien to enter this country to accept employment as a nonimmigrant, the prospective employer must show the Secretary of Labor that he has made an effort to recruit laborers locally, has offered specified wages, housing and other benefits, and has abided by state and local labor, health, and housing laws.[35] The appellants concluded that since no shortage of farm labor exists in the United States, it is not permissible to admit Mexican residents for such employment.[36] With the aforementioned factors in mind, the United Farm Workers asked that the United States District Court reclassify commuter aliens as *nonimmigrants* under section 101(a)(15)(H)(ii) of the 1952 Act.

B. The Court's Decision to Ban Seasonal Commuters

The *Bustos* court concluded that seasonal commuters are not exempt from the requirement that all immigrant aliens obtain immigrant visas prior to entering this country. Under section 211(b) of the 1965 Amendments, the waiver of the immigrant visa is limited to returning resident immigrants. This immigrant is defined in section 101(a)(27)(B) of the Act of 1952 as an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad. In holding that seasonal commuters failed to satisfy the criteria of this section, the court went so far as to quote from the following dissent by Judge Wright

34. Immigration and Nationality Act of 1952, § 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H) (1970).

35. 29 C.F.R. §§ 60.2, 60.6 Schedule B (1973). The enabling legislation for this regulation reads:

> The question of importing any alien as a nonimmigrant under Section 101(a)(15)(H) in any specific case shall be determined by the Attorney General, after consultation with appropriate agencies of the government, upon petition of the importing employer.

Immigration and Nationality Act of 1952, § 211(c), 8 U.S.C. § 1184(c) (1970).

36. Supplemental Appendix to Brief for Appellants at 12, Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973); Respondent's Brief at 18-19, Saxbe v. Bustos, No. 73-300 (U.S. Sup. Ct., Aug. 19, 1974).

in *Gooch v. Clark*:

> [T]he majority's construction of "lawfully admitted for permanent residence" as including commuters makes nonsense of the congressional policy embodied in no fewer than five sections of the Act entirely apart from § 1101(a)(27)(B), and is contrary to the plain meaning of two others.[37]

Further, the court determined that the language of 8 C.F.R. 211.1(b)(1), which limits the use of the green card as entry documentation to persons returning to an unrelinquished lawful permanent residence in the United States, does not include seasonal commuters.[38]

Thus, the court's decision dictates that seasonal commuters obtain immigrant visas before coming into this country. An immigrant visa may be obtained by an alien to perform labor only if the Secretary of Labor finds that there are not sufficient workers available to perform the labor, and that his employment will not adversely affect the wages and working conditions of American domestic workers.[39] Since the seasonal commuters' adverse affect on labor in this country has been fairly well established,[40] the holding of the court in *Bustos* should serve to exclude them from the United States.

The Court of Appeals went even further, however, finding that seasonal commuters should be classified as nonimmigrants under section 101(a)(15)(H)(ii) of the 1952 Act.[41] As the decision in *Bustos* states:

> This provision reflects the intention of Congress in the Act of 1952 to differentiate carefully between immigrants coming to the United States for permanent residence and nonimmigrants coming temporarily.[42]

Since the commuting seasonal worker is a nonimmigrant, his prospective employer must demonstrate to the Secretary of Labor that

37. Gooch v. Clark, 433 F.2d 74, 83 (9th Cir. 1970); *cert. denied*, 402 U.S. 995 (1971).

38. 481 F.2d 479, 483 (D.C. Cir. 1973).

39. Immigration and Nationality Act of 1952, § 212(a)(14), *as amended*, 8 U.S.C. § 1182(a)(14) (1970).

40. *See, e.g.*, Department of Labor, *The "Commuter Problem" and Low Wages and Unemployment in American Cities on the Mexican Border*, in REPORT OF THE SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION (1968). *See also*, Note, *Aliens in the Fields: The "Green Card Commuter" Under the Immigration and Nationality Laws*, 21 STAN. L. REV. 1750 (1969).

41. 481 F.2d 479, 483 (D.C. Cir. 1973).

42. *Id.*

he has been unable to recruit workers locally.[43] If no such showing can be made, then the seasonal commuter is banned from this country.

C. *The Government's Argument*

The appellees in *Bustos* (hereinafter referred to alternatively as the government) took a more conservative approach to the questions involving the proper interpretations of sections 211(a) and (b), 101(a)(27), 101(a)(20), and 101(a)(33). Rather than setting forth its own construction of the statutes as the only possible view, the government seemed to assert that its definitions are at least feasible, and supported its position mostly with the fact of congressional accession to and judicial approval of the long established commuter practice. Since many of its arguments were couched in terms of historical longevity of the commuter system, the discussion of the government's claims will take place within the context of a survey of the history of the commuter program.

Prior to 1921, the commuter practice was to allow Mexican and Canadian laborers to enter the United States to work free of restriction, including the anti-contract labor section of the Immigration Act of 1917.[44] Indeed, section 23 of the Act directed the Commissioner of Immigration not to delay ordinary travel across our border.[45] It was pursuant to this section that immigration authorities prescribed an identification card for the benefit of any persons who habitually crossed the border.[46]

The Immigration Act of 1921 placed the first numerical limitations on immigration to the United States, but provided exemptions for persons from all countries who entered as temporary visitors.[47] In addition, the 1921 Act, which had been designed to lessen immigration from Southern and Eastern Europe,[48] provided no quota for workers entering the United States from Mexico or Canada.[49]

This temporary legislation was replaced by the Immigration Act of 1924, which created the immigrant and nonimmigrant cat-

43. 29 C.F.R. § 60.2 (1973).

44. Immigration and Nationality Act of February 5, 1917, § 3, 39 STAT. 875.

45. *Id.*, § 23, 39 STAT. 892.

46. Immigration Laws and Rules of May 1, 1917, Rule 12(9), Rule 13(3).

47. Immigration Act of 1921, § 2(a)(4), 42 STAT. 5.

48. *Id.*, § 2(a)(7).

49. *Id.*

egories of entering aliens, and required immigrants to obtain visas prior to entering the United States. Immigrants were defined as all entering aliens, with the exception of certain specified nonimmigrants.[50] This immigrant class was further divided into quota and non-quota immigrants.[51] Among the aliens included within this non-quota category were: (1) natives of independent Western Hemisphere countries,[52] and (2) an immigrant previously lawfully admitted to the United States who was returning from a temporary visit abroad.[53] This second category of immigrant is similar to that for which the visa requirement was waived in section 211(b) of the 1952 Act. Indeed, section 13(b) of the 1924 Act also exempted this class from the necessity of presenting an immigrant visa upon each arrival.[54] Initially, commuting workers were classified as nonimmigrant visitors for business or pleasure under section 3(2) of the Act.[55] Since nonimmigrant visas were not required of Mexican and Canadian citizens, commuters entering from these countries needed no documentation at all.[56] Most of these aliens, however, continued to obtain border crossing cards so as to expedite their entry.[57] Soon, workers from quota countries began to use this waiver as a loophole through which they could enter the United States from Mexico or Canada.[58] By living in the foreign contiguous country, and entering the United States daily as temporary visitors for business, these aliens were able to defeat the labor safeguards intended by the quota limitations on immigration.

In response to this problem, the Bureau of Immigration at Washington issued General Order No. 86,[59] in which it declared

50. Immigration Act of 1924, § 3, 43 STAT. 153.

51. *Id.*, § 4, 13 STAT. 155.

52. *Id.*

53. *Id.*

54. *Id.*, § 13(b), 43 STAT. 162.

55. *Id.*, § 3(2), 43 STAT. 154.

56. *Hearings to Clarify the Law Relating to the Temporary Admission of Aliens to the United States Before the Senate Committee on Immigration*, 70th Congress, 2d Sess., at 42 (1929) [hereinafter cited as *Clarification Hearings*].

57. The Immigration Rules of March 1, 1927, provide in Rule 3, para. 1:

> With a view to avoiding delays and embarrassment in cases of aliens and citizens, who residing upon either side of the line, habitually cross and recross the boundary upon legitimate pursuits, an identification card will be furnished such persons upon application to the immigration official in charge at the place of ingress and egress.

58. *Clarification Hearings, supra* note 56, at 41-43.

59. Department of Labor, General Order 86 (April 1, 1927), [1927] 1 FOREIGN REL. U.S. 494-95 (1942).

that daily commuters were no longer to be considered temporary visitors for business, but were instead immigrant aliens. In this way, daily border crossers were first subject to the quota limitations applicable to their native countries. Once admitted, they were regarded as permanent United States residents, making temporary visits to Mexico or Canada each time they returned home to those countries. Since no quota limitations were set for Mexican and Canadian nationals, they could obtain immigrant visas without difficulty. Upon admission, this national was treated as a resident immigrant, with no requirement by the Immigration Service that he actually take up residence in the United States.[60] Due to the impracticality of the daily commuter obtaining the required documentation for each of his trips across the border, and because of the conclusion by the Immigration Service that Congress had not intended the end of the commuter practice,[61] these commuters were not required to present the immigrant visas or reentry permits prescribed by the Act of 1924. Instead, the Immigration officials authorized the use by the daily commuter of the 1917-type border crossing card that he had previously used as a nonimmigrant visitor for business.[62]

Shortly after its promulgation, General Order No. 86 was challenged by two alien laborers from quota countries seeking admission from Canada as nonimmigrant temporary visitors for business. The Supreme Court, in *Karnuth v. United States ex rel. Albro*,[63] affirmed the validity of General Order No. 86, basing its decision primarily on the reasoning that the inclusion of temporary laborers in the class of immigrants was consistent with the Congressional policy of protecting American labor.[64] The court in *Karnuth* did not specifically mention the propriety of permitting commuters to enter with border crossing cards once they had been admitted for permanent residence. Nevertheless, the Immigration Service has for forty years relied upon the notion that the court was upholding the entire regulation.[65]

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60. *Id.*

61. HOUSE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE NO. 1, STUDY ON POPULATION AND IMMIGRATION PROBLEMS, ADMINISTRATIVE PRESENTATIONS: ADMISSION OF ALIENS INTO THE UNITED STATES FOR TEMPORARY EMPLOYMENT AND "COMMUTER WORKERS", PART II: THE MEXICAN FARM LABOR PROBLEM, at 27 (Special Series No. 11, 1963).

62. Immigration Rules of 1930, Rule 3 (Q), para. 1.

63. 279 U.S. 231 (1929).

64. *Id.*, at 243.

65. Brief for Appellees at 10-11, Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir.

In 1952, the immigration, nationality, and naturalization laws were revised and codified into the Immigration and Nationality Act of 1952.[66] This legislation added the new nonimmigrant category, section 101(a)(15)(H)(ii), which the *Bustos* court found applicable to seasonal commuters. As shown in the discussion of the appellant's argument, this section classifies temporary laborers coming into this country as being nonimmigrants.

The government contended in *Bustos*, however, that commuter aliens are properly classed as *special immigrants* within section 101(a)(27)(B) of the 1952 Act.[67] This legislation defined the term *non-quota immigrant* as an immigrant lawfully admitted for permanent residence, who is returning from a temporary visit abroad. By viewing the commuter's entry into the United States as a return from a temporary visit abroad, the Immigration Service has frequently employed this section to justify its admission of daily and seasonal commuters without immigrant visas.[68]

The 1952 Act also heralded the beginning of the labor certification process of section 212(a)(14). In addition, the definition of residence was supplied in 101(a)(33), and provision was made in section 211(b) for the waiver of the immigrant visa for otherwise admissible aliens lawfully admitted for permanent residence who depart from the United States temporarily.

In 1960, the United States District Court for the District of Columbia decided the first major case involving the 1952 Act. *Amalgamated Meat Cutters v. Rogers*[69] involved a suit by a labor organization against the Attorney General and the Commissioner of Immigration, demanding that the labor certification process of section 212(a)(14) be applied not only to non-quota aliens seeking permanent residence, but also to immigrants who had previously been admitted for permanent residence. Further, Amalgamated contended that even if aliens lawfully admitted for permanent residence were not subject to exclusion by a negative labor certification, this exemption was not intended to embrace alien commuters residing outside the United States. The court's

1973); Petitioner's Brief at 47, Saxbe v. Bustos, No. 73-300 (U.S. Sup. Ct., March 22, 1974).

66. Immigration and Nationality Act of 1952, 66 STAT. 163.

67. Brief for Appellees at 21, Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973); Petitioner's Brief at 18, Saxbe v. Bustos, No. 73-300 (U.S. Sup. Ct., March 22, 1974).

68. Brief for Appellees at 26, Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973).

69. Amalgamated Meat Cutters v. Rogers, 186 F. Supp. 114 (D.D.C. 1960).

finding in *Amalgamated* was two-fold: First, the labor certification process of section 212(a)(14) is not applicable to aliens lawfully admitted for permanent residence.[70] Second, the court concluded that it is impossible for nonresident commuters to be aliens lawfully admitted for permanent residence.[71] Hence, commuting workers were excludible by the Secretary of Labor's finding that there were sufficient domestic laborers in this country. The court characterized its opinion in the following manner:

> To do otherwise would be to permit administrative practice to make a shambles of a provision (212(a)(14)) which, with Section 101(a)(15)(H), was newly designed by the 1952 Act in order to assure "strong safeguards for American labor."[72]

This portion of the *Amalgamated* decision was later rejected in *Gooch v. Clark*,[73] a 1967 case involving an action by resident farm workers in California seeking an order that government officials deny admission to alien commuters. The resident farm workers in *Gooch* argued that commuting farm workers were nonresidents coming temporarily to the United States to perform temporary labor. As such, they would be considered *nonimmigrants* under section 101(a)(15)(H)(ii) of the 1952 Act. The United States Court of Appeals for the Ninth Circuit rejected this appeal on the reasoning that section 101(a)(15)(H)(ii) was intended not to exclude commuters, but rather its purpose was:

> [T]o confer nonimmigrant status on certain aliens who were needed in the American labor force but who, unlike commuters, would be unable to achieve admittance under immigrant status.[74]

Second, the court concluded that commuters are lawfully admitted for permanent residence, thus overturning the decision reached in *Amalgamated*. Third, the court found that the 1965 Amendment to section 211(b) of the Act of 1952 did not terminate the commuter system. This amendment changed the old language of the section so that only returning resident immigrants, as defined in section 101(a)(27)(B), could enter without immigrant visas or reentry permits. Formerly, section 211(b) had exempted otherwise admissible aliens lawfully admitted for per-

70. *Id.*, at 118.
71. *Id.*, at 118-19.
72. *Id.*, at 119 (footnotes omitted).
73. Gooch v. Clark, 433 F.2d 74 (9th Cir. 1970); *cert. denied*, 402 U.S. 995.
74. *Id.*, at 78.

manent residence who depart from the United States temporarily. The 1965 Amendment, as delineated in section 101(a)(27)(B), was limited to an immigrant lawfully admitted for permanent residence who is returning from a temporary visit abroad. Thus, the only difference between the 1952 Act and the 1965 Amendment to section 211(b) was limited to the contrast between an immigrant who departs from the United States temporarily, and one returning from a temporary visit abroad. The *Gooch* court found this change insignificant, and held that the 1965 Amendment was not intended to terminate the commuter system.[75] So, the court gave its approval to the practice of the Immigration Service whereby commuting workers are allowed to reenter the United States using their green cards as documentation.

Also in 1965, the Congress had amended section 212(a)(14) so as to reverse the burden of initiating the labor certification process.[76] Under this new provision, an alien laborer cannot enter the United States unless the Secretary of Labor has certified that there are not sufficient domestic workers to perform such labor and that his employment would not adversely affect the wages of American laborers similarly situated. The court in *Gooch*, however, found that since commuters were lawfully admitted for permanent residence, the certification process applied only to their initial entrance into the United States.[77]

Two years later, in 1967, the Immigration Service issued a new regulation to prevent commuters from acting as strikebreakers. 8 C.F.R. 211.1 (b)(1) provides the following rule:

> When the Secretary of Labor determines and announces that a labor dispute involving a work stoppage or layoff of employees is in progress at a named place of employment, Form I-151 [green card] shall be invalid when presented in lieu of an immigrant visa or reentry permit by an alien who has departed for and seeks reentry from any foreign place and who, prior to his departure or during his temporary absence abroad has in any manner entered into an arrangement to return to the United States for the primary purpose, or seeks reentry with the intention, of accepting employment at the place where the Secretary of Labor has determined that a labor dispute exists, or of continuing employment which com-

75. *Id.*, at 81-82.

76. Immigration and Nationality Act of 1952, § 212(a)(14), *as amended*, 8 U.S.C. § 1182(a)(14) (1970).

77. 433 F.2d 74, 81 (9th Cir. 1970).

> menced at such place subsequent to the date of the Secretary of Labor's determination.[78]

Although this regulation could be a valuable weapon to exclude the daily and seasonal commuters, its impact is weakened considerably by the difficulty in proving the commuters intent at the time of his entry. It was probably for this reason that the court in *Bustos* did not discuss the appellants' claim that the government was allowing commuters to enter this country in violation of the purpose of the regulation.

Finally, in 1968, quota limitations on immigration from Mexico and Canada passed by Congress in 1965 became effective.[79] It was against this historical background that the *Bustos* court gave its approval to the Immigration Service's administration of the daily commuter system.

II. ANALYSIS: THE DECISION AND ITS IMPLICATIONS

In its decision, the court stated that the Immigration Service's practice of classifying seasonal commuters as returning resident aliens is in violation of the clear language of the statute.[80] The Supreme Court has made it clear that an administrative practice, however long continued and consistently applied by successive administrative officers, must yield to the language of the legislation.[81] For this reason, it is difficult to understand the distinction drawn by the court in *Bustos* between daily and seasonal commuters. First, neither daily nor seasonal commuters have an unrelinquished domicile in the United States. As discussed, under sections 211(a) and 211(b) of the 1965 Amendments, only returning resident immigrants are exempt from the requirement that immigrants obtain either an immigrant visa or reentry permit prior to coming into the United States.[82] Further, 8 C.F.R. 211.1 (b)(1) limits the waiver of immigrant visas to persons returning to an unrelinquished lawful permanent residence in the United States. Thus, the plain language of the law dictates that a daily commuter obtain a visa or reentry permit for each work day. Use of the green card (I-151) by the daily commuter is simply not within the statutory scheme. Since no immigrant visa may be ob-

78. 8 C.F.R. § 211.1(b)(1) (1972).
79. Act of Oct. 3, 1965, § 21(e), 79 STAT. 921.
80. 481 F.2d 479, 483 (D.C. Cir. 1973).
81. Houghton v. Payne, 194 U.S. 88 (1904).
82. Immigration and Nationality Act of 1952, § 211(a), (b), *as amended*, 8 U.S.C. § 1181(a), (b) (1970).

tained without a prior positive labor certification by the Secretary of Labor,[83] daily commuters who are unable to receive this certification should be denied entrance into this country. The court maintained that the concept of residence can be expanded to include the daily commuter's place of work,[84] yet it offered no authorities outside of the decision in the *Gooch*[85] case in support of this contention. To the contrary, the citations presented to demonstrate the seasonal commuter's lack of residency are equally convincing when applied to the daily commuter. Section 101(a)(33) of the 1952 Act defines a person's residence as ". . . his principal, actual dwelling place without regard to intent." Clearly, an individual who maintains his only home in Mexico, and who returns there each day after work, is a resident of Mexico. The court's labeling of the daily commuters as returning resident immigrants is, therefore, without statutory support.

Second, daily commuters should not be considered to be nonquota immigrants exempt from the labor certification process. section 101(a)(27)(B) limits this class to immigrants lawfully admitted for permanent residence, who are returning from a temporary visit abroad. It would be a novel argument indeed to say that each entry by the commuter on his way to his employment in the United States is a return from a temporary visit abroad. If the language is strained when applied to the seasonal commuter, it is similarly misapplied to the daily commuter.

III. CONCLUSION

The perversion of the language of the statutes by the Court of Appeals in *Bustos* so as to spare the daily commuter system seems to be largely due to the continued practice by immigration authorities of allowing these workers to enter without visas or reentry permits. In addition great weight was given to the fact Congress took no positive action to end this practice.[86] This position ignores the fact that neither administrative practice nor congressional accession to that practice will overcome the plain language of a statute. Tacit congressional approval of administrative or judicial interpretation cannot change the meaning of a clear federal statute.[87]

83. *Id.*, § 212(a)(14), *as amended*, 8 U.S.C. § 1182(a)(14) (1970).
84. 481 F.2d 479, 486 (D.C. Cir. 1973).
85. 433 F.2d 74 (9th Cir. 1970).
86. 481 F.2d 479, 486 (D.C. Cir. 1973).
87. Biddle v. Commissioner, 302 U.S. 573, 582 (1938).

The government asked that the court exercise its discretion and refrain from adjudicating the legality of the commuter system.[88] The court attempted to do so with respect to the daily commuter practice, stating that "efforts to change or eliminate such a practice should be addressed to the Congress, not to the Courts."[89] The court could have exercised this discretion by finding that the commuter system was not blatantly repugnant to the immigration laws. When it concluded, however, that the statutes were distorted when used as a basis for the admission of the seasonal commuter, it made the daily commuter practice vulnerable to a similar attack.

The court's decision that the seasonal commuter system is not the product of long administrative practice is seemingly correct. As stated in the opinion,[90] the seasonal commuter was given life only when the Immigration Board of Appeals altered certain requirements to allow the entry of ex-braceros as seasonal workers.[91]

The long duration of the daily commuter program, however, should not be allowed to overshadow the gross statutory deviations necessary to insure its existence. Congress should act to eradicate either the practice or the ambiguities in the statutes. There are indications that it will do so soon.[92] For the present, to be consistent with the language of the statute, the Supreme Court should extend the decision of the Court of Appeals in *Bustos* and should enjoin the daily commuter practice.

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88. Brief for Appellees at 34, Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973).

89. 481 F.2d 479, 486 (D.C. Cir. 1973).

90. *Id.*, at 482-83 (D.C. Cir. 1973).

91. In 1965, the Immigration Board of Appeals changed the requirement that an alien commuter have a permanent and stable job in this country to the words "regular and stable" employment and interpreted that phrase loosely to allow the entrance of seasonal commuters. Matter of Bailey, 11 I. & N. Dec. 466 (1965).

92. Various bills attempting to change the commuter practice have been introduced in Congress in recent years. However, none of these bills has yet received a favorable committee report. *See, e.g.*, S. 1373, 92d Cong., 1st Sess. Sess. (1971); S.1488, 92d Cong., 1st Sess. (1971); H.R. 8746, 92d Cong., 1st Sess. (1971); H.R. 14831, 92d Cong., 2d Sess. (1971); S. 2643, 93d Cong., 1st Sess. (1973); H.R. 980, 93d Cong., 1st Sess. (1973); H.R. 3870, 93d Cong., 1st Sess. (1973); H.R. 10141, 93d Cong., 1st Sess. (1973); H.R. 10466, 93d Cong., 1st Sess. (1973).