The Alien Commuter After Saxbe v. Bustos

I. INTRODUCTION

"Alien commuters" are residents of Canada and Mexico who cross the border daily or seasonally to work in the United States.[1] The practice of commuting currently involves some 60,000 alien laborers,[2] and has existed in the United States since the nineteenth century.[3] Although U.S. immigration laws have changed drastically since that time,[4] the practical treatment of alien commuters has remained substantially the same. At his initial admission to the United States, a commuter must follow normal immigration procedure and meet all requirements of the Immigration and Nationality Act.[5] Once he has attained the status of an "immigrant, lawfully admitted for permanent residence,"[6] the commuter may leave this country for a "temporary visit abroad."[7] On his return, his classification as a "special immigrant" under the Immigration and Nationality Act,[8] signified

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[1]Gooch v. Clark, 433 F.2d 74, 76 (9th Cir. 1970), *cert. denied*, 402 U.S. 995 (1971).

[2]Saxbe v. Bustos, ___ U.S. ___, 95 S. Ct. 272, 281 (1974). Daily commuters from Mexico number more than 42,000. Approximately 10,000 laborers commute from Canada. The Immigration and Naturalization Service (INS) estimates that there may be as many as 8300 seasonal commuters as well. *Id.* INS statistics as of April 30, 1972, substantially agree with the above figures. Brief for Appellees at 3, Bustos v. Mitchell, 481 F.2d 479 (D.C. Cir. 1973), *affirmed in part, reversed in part*, ___U.S.___, 95 S. Ct. 272 (1974). These figures are estimates only. Because commuters are legally indistinguishable from immigrants lawfully admitted for permanent residence who actually reside in the United States (and who are returning from a temporary visit abroad), their numbers cannot be determined with certainty.

[3]Bustos v. Mitchell, 481 F.2d at 485 (D.C. Cir. 1973).

[4]*See* Part II.

[5]These include: (1) any applicable quota requirements, 8 U.S.C. §1151(a) (1970); (2) "qualitative" requirements relating to health, morals, and economic status, 8 U.S.C. §1182 (1970); and (3) the need for an immigrant visa, 8 U.S.C. §1181(a) (1970).

[6]8 U.S.C. §1101(a)(20) (1970).

[7]The Immigration and Nationality Act, 8 U.S.C. §§1101 *et seq.* (1970), does not define the term "temporary visit abroad." The Regulations require that the immigrant alien be "returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year . . . " 8 C.F.R. §211.1(b)(1) (1975).

[8]One of the five types of aliens defined as a "special immigrant" under the Act is

by his use of a re-entry permit known as a "green card,"[9] will exempt him from the documentation, quota and labor certification requirements which it was necessary to meet on his initial entry.[10]

A frequent criticism of the commuter practice is that it defeats one of the basic Congressional purposes in passing immigration legislation: the protection of American labor from foreign competition.[11] Most severely affected are American farm laborers in California, Texas, and other areas in the southwestern United States.[12] The willingness of large numbers of Mexican commuters to cross picket lines and to work for low wages and under relatively unfavorable conditions has had a negative impact on the economic well-being of the American agricultural worker.[13] Thus, questions have been raised as to the desirability of the commuter practice as a matter of public policy.[14] In addition, the authorization for the commuter practice under the Immigration and Nationality Act has been disputed.[15] In November 1974 the United States Supreme Court addressed the latter issue for the first time in *Saxbe v. Bustos.*[16]

This article will consider the questions the Supreme Court's decision raised regarding Congressional authorization for the existing commuter practice. The article will analyze the commuter practice's historical roots, focus on the provisions in the Immigration and Nationality Act under which it is sanctioned, and examine its treat-

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"an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad." 8 U.S.C. § 1101(a)(27)(B) (1970).

[9]The Alien Registration Receipt Card (Form I-151), commonly referred to as a "green card," is the document used in place of an immigrant visa by a returning immigrant alien. 8 C.F.R. § 211.1(b)(1) (1975).

[10]8 U.S.C. § § 1181(b), 1151(a), and 1182(a)(14) (1970).

[11]*See generally* SENATE COMM. ON THE JUDICIARY, THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, S. REP. NO. 1515, 81st Cong., 2d Sess. 43-66 (1950) [hereinafter cited as SENATE REPORT].

[12]Approximately 40 per cent of the estimated 42,000 daily commuters from Mexico are agricultural workers. Saxbe v. Bustos, ___ U.S. ___, 95 S. Ct. at 281 (1974). Because of their smaller numbers and the relatively high standard of living in their own country, Canadian commuters do not pose nearly the threat to American laborers in the northern United States that Mexican commuters pose to American laborers in the south. *See* Part V.

[13]*See* Note, *Commuters, Illegals and American Farmworkers: The Need for a Broader Approach to Domestic Farm Labor Problems*, 48 N.Y.U. L. REV. 439, 464-68 (1973). *See also Hearings on H.R. 12667 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess. (1969) [hereinafter cited as *Hearings on H.R. 12667*], and *Hearings on Border Commuter Labor Problem Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess., pts. 5-A and 5-B (1969) [hereinafter cited as *Border Commuter Labor Problem*].

[14]*See* note 13. *See also Hearings Before the Select Commission on Western Hemisphere Immigration*, pts. 1 and 2 (1968).

[15]The Immigration and Nationality Act provides no express statutory classification for commuters. *See, e.g.*, Matter of M-D-S- & L-G- & W-D-C-, 8 I. & N. Dec. 209, 213 (1958).

[16] ___ U.S. ___, 95 S. Ct. 272 (1974).

ment by the federal courts. Finally, this article will review, in light of *Saxbe v. Bustos*, the various alternatives available to Congress should it decide to take further action regarding the commuter practice.

II. STATUS OF COMMUTERS UNDER THE IMMIGRATION ACTS

A. GENERAL ORDER 86 AND THE RISE OF THE "AMIABLE FICTION"

Border-crossing identification cards, known today as "green cards," were first issued pursuant to the Immigration Act of 1917,[17] solely for the purpose of expediting travel to the United States from Canada and Mexico. The Act neither imposed quotas, nor established special conditions of entry for those who wished to commute. The card was simply an administrative convenience which facilitated the periodic re-entry of those who lived across the border, but worked in the United States.[18]

In 1921, Congress put the first quantitative restrictions on entry into the United States when it established temporary quotas, which limited immigration from designated countries.[19] The 1921 Act did not establish quotas for immigration from Canada and Medico. Instead, the legislation primarily deterred the large influx of Southern and Eastern Europeans who had come to America in the early twentieth century. One of the basic purposes of the quotas was the protection of American laborers from competition with immigrant labor.[20] The position of commuters, however, was left unchanged. The 1921 Act allowed without restriction the admission of aliens "visiting the United States . . . temporarily for business or pleasure."[21]

The Act of 1924 made the temporary quotas permanent, yet left unaffected the practice of unrestricted border-crossing.[22] The Act placed aliens within one of the two mutually exclusive categories found in the current immigration statute: immigrants and nonimmigrants.[23] Generally, the distinction between the two turned on whether the alien sought permanent or temporary admission to the United States. Applicants for admission were held to be applying for immigrant (permanent) status unless they fell within one of the six enumerated categories of nonimmigrants.[24] The distinction was sig-

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[17] Act of February 5, 1917, ch. 29, 39 Stat. 874.
[18] Bustos v. Mitchell, 481 F.2d at 485 (D.C. Cir. 1973).
[19] Act of 1921, ch. 8, 42 Stat. 5.
[20] SENATE REPORT, *supra* note 11, at 56.
[21] Act of 1921, ch. 8, § 2(a)(4), 42 Stat. 5.
[22] Immigration Act of 1924, ch. 190, 43 Stat. 153.
[23] *Id.* at § 3.
[24] These were: (1) a government official, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or

nificant. Aliens from quota countries entering the United States as immigrants were subject to the numerical limits the Act established, while those aliens entering as nonimmigrants (temporary visitors) were not. The 1924 Act did not affect the commuter practice because commuters (as a result of the 1921 Act) fell within the nonimmigrant category of aliens in the United States "temporarily for business or pleasure."[25]

The privilege of unrestricted border-crossing was not to continue. By 1927, the classification of commuters as nonimmigrants "visiting the United States . . . temporarily for business or pleasure" had become a loophole through which large numbers of quota-country aliens entered the United States from Canada and Mexico to seek employment.[26] By establishing a permanent residence in Canada or Mexico and entering the United States as nonimmigrant commuters, quota-country aliens were able to avoid the applicable quota, thus eluding Congress' intent in establishing numerical limits on entry. Pressure from the American Federation of Labor to change this situation resulted in the United States Department of Labor's issuance of General Order 86 in 1927.[27]

General Order 86 redefined "visiting the United States . . . temporarily for business or pleasure" to exclude aliens from continued classification within this category. It subjected quota-country aliens commuting daily from Canada or Mexico to the quotas applicable to their native countries on their initial entry into the United States. Once the applicable quota was filled, no additional aliens of that nationality would be admitted. In other words, quota-country aliens who sought to commute were treated as if they were entering the United States from their native country. By making the quotas applicable to commuters, General Order 86 effectively reclassified commuters as "immigrants" under the 1924 statutory scheme.

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temporarily for business or pleasure, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory, (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman, and (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation. *Id.*

[25] *Id.*

[26] Note, *Bustos v. Mitchell (Saxbe v. Bustos): The Dilemma of Commuting Alien Laborers*, 5 CALIF. W. INT'L. L.J. 184, 195 (1974-75), *citing Hearings to Clarify the Law Relating to the Temporary Admission of Aliens to the United States Before the Senate Subcomm. on Immigration*, 70th Cong., 2d Sess. (1929).

[27] Note, *Aliens in the Fields: The "Green-Card Commuter" Under the Immigration and Naturalization Laws*, 21 STAN. L. REV. 1750, 1752 (1969), *citing* Dep't. of Labor, General Order 86 (April 1, 1972), reprinted in I FOREIGN REL. U.S. 494-95 (1942). The text of General Order 86 also appears in Saxbe v. Bustos, ___ U.S. ___, 95 S. Ct. at 278 n. 25 (1974).

Once admitted to the United States for permanent residence, an immigrant alien, having satisfied the applicable quota on his initial entry, was exempt from the quota requirement on his return from a temporary visit abroad.[28] "Nonquota immigrants" was the term which the 1924 Act applied to immigrants, lawfully admitted for permanent residence, who were returning from a temporary visit abroad.[29] General Order 86's reclassification of commuters as "immigrants," and the subsequent administrative treatment of the commuter's journey across the border each day as a return from a temporary visit abroad, meant that commuters fell within the statutory definition of "nonquota immigrants."[30] Commuters could thus continue to cross the border each day, never having to face the quota limitations again. General Order 86 had, in other words, led to the creation of a class of nonquota immigrants who neither resided in the United States, nor intended to do so, but who were given the same status and privileges under the immigration laws as those who did.

A unanimous Supreme Court in *Karnuth v. U.S. ex rel. Albro* upheld General Order 86 two years after its issuance.[31] The Court held that "business" as used in the 1924 Act did not include "labor," and thus commuters (laborers) were not to be classified as nonimmigrants in the United States "temporarily for business or pleasure."[32] One writer has noted that the 1924 Act repeated verbatim the language of the 1921 Act, which treated laborers as having visited the United States "temporarily for business."[33] Furthermore, nothing in the legislative history of the 1924 Act suggests that the definition of "business" was to be changed.[34] The *Karnuth* Court implied, however, that since a literal reading of the statutory language would largely defeat the purpose of the immigration legislation, a slightly constrained reading of the provision in question was warranted.[35]

Karnuth thus affirmed the ruling implicit in General Order 86 that the actual residence of "resident aliens," once admitted to the United States, was less important than the simple fact that they had

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[28] Immigration Act of 1924, ch. 190, § 13(b), 43 Stat. 162.
[29] Immigration Act of 1924, ch. 190, § 4(b), 43 Stat. 155.
[30] The administrative treatment of alien commuters by the Immigration and Naturalization Service (INS) has been termed an "amiable fiction." 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 2.8b, at 2-43 n.17 (1974). The "amiable fiction" refers to the treatment of the commuter's place of employment as an actual residence in the United States. The fiction is obviously a necessity if commuters are to be thought of as "returning from a temporary visit abroad," which in turn is a requirement for "nonquota immigrant" status. *See also* Comment, *The Amiable Fiction — Alien Commuters Under our Immigration Laws*, 1 CASE W. RES. J. INT'L. L. 124 (1969).
[31] 279 U.S. 231 (1929).
[32] *Id.* at 243-44.
[33] Note, *supra* note 27, at 1753 n.22.
[34] *Id.*
[35] 279 U.S. at 243-44.

been admitted. At a time when the only concern was closing the administrative loophole in the 1924 Act, this was hardly a glaring inconsistency, and at that time had no adverse consequences. The fiction created survived, however, while legal and economic forces affecting the commuter drastically changed. The result has been a legal anomaly of major proportions.

B. TREATMENT OF COMMUTERS UNDER THE IMMIGRATION AND NATIONALITY ACT OF 1952

In the early 1950s, Congress undertook a comprehensive study of the immigration laws, and in 1952 passed a revised and expanded Immigration and Nationality Act.[36] Several provisions of the 1952 Act are essential to an understanding of the current commuter practice.

With only minor, technical changes, the 1952 Act retained the provisions of the 1924 Act defining nonquota immigrants and exempting them from quotas.[37] The question then became whether Congress, in re-enacting these provisions, intended to ratify General Order 86 and thereby authorize the treatment of commuters as nonquota immigrants.

The legislative history of the 1952 Act provides no clear indication as to whether Congress intended a change in the status of commuters.[38] The Immigration and Naturalization Service (INS), in not altering its treatment of commuters after the 1952 Act became law, interpreted the statute as affirming the practice of classifying commuters as nonquota immigrants.[39] The Board of Immigration Appeals upheld this interpretation in 1954 when it overturned the action of a border officer who had denied entry to a commuter on the grounds that he did not qualify as a nonquota immigrant under the new statute.[40] The Board cited Congress' express recognition of the pre-1952 commuter practice,[41] and reasoned that the new statute's silence on this subject indicated Congressional approval of the status quo.[42] Perhaps a more logical interpretation would have been that no meaningful conclusion about Congressional intent could be drawn

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[36] Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified, with amendments, in 8 U.S.C. § § 1101 *et seq.* (1970)).

[37] Immigration and Nationality Act of 1952, ch. 477, § § 101(a)(27)(B), § 201(d), 66 Stat. 169, 176 (codified at 8 U.S.C. § § 1101(a)(27)(B), 1151(a) (1970)).

[38] SENATE REPORT, *supra* note 11, at 470-72, 589-90. *See also* S. REP. NO. 1137, 82d Cong., 2d Sess. (1952), and H. REP. NO. 1365, 82d Cong., 2d Sess. (1952) [hereinafter cited as H. REP. 1365].

[39] *See* In the Matter of H-O-, 5 I. & N. Dec. 716 (1954).

[40] *Id.*

[41] *Id.* at 716-17.

[42] *Id.* at 718-19.

from the few pages devoted to commuters in the voluminous legislative history of the Act. Nevertheless, the INS continued the commuter practice without change.

In addition the 1952 Act established a new category of nonimmigrant, defined in 8 U.S.C. section 1101(a)(15)(H)(ii) as

> an alien having a residence in a foreign country which he has no intention of abandoning ... 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 ...[43]

The question arose whether Congress, with the enactment of this new nonimmigrant category, intended to overrule General Order 86, and return commuters to their original nonimmigrant status under the 1924 Act. Arguably, this new statutory classification more accurately described the commuter than did the category of "immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad." If Congress intended to reclassify commuters and place them in this category, the legislative concern with protecting American labor would be vindicated, since a "temporary worker" could be admitted only to perform a job for which unemployed Americans could not be found. On the other hand, it is doubtful that commuters who crossed the border daily to work at ongoing jobs would have been referred to as performing "temporary services or labor." Once again, the legislative history is unclear as to what group Congress intended that section 1101(a)(15)(H)(ii) apply.[44]

Consistent with the policy of extending greater protection to American labor, the 1952 Act set forth a labor certification procedure as an additional condition of entry for some immigrant aliens.[45] The procedure allowed the Secretary of Labor to order the exclusion of an alien "seeking to enter the United States for the purpose of performing skilled or unskilled labor" if the Secretary certified that the alien's entry would have an "adverse effect" on the labor market in which the applicant sought work.[46] The Act exempted certain immigrants (including those lawfully admitted for permanent residence who were returning from a temporary visit abroad) from exclusion under the Secretary's certification. The labor certification procedure and the requirement that nonimmigrant "temporary workers" be admitted only for jobs which unemployed

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[43] Immigration and Nationality Act of 1952, ch. 477, § 101(a)(15)(H)(ii), 66 Stat. 168 (codified at 8 U.S.C. § 1101(a)(15)(H)(ii) (1970)).

[44] *See* discussion in Part III as to whether Congress in 1952 intended that commuters be classified as immigrants or nonimmigrants.

[45] Immigration and Nationality Act of 1952, ch. 477, § 212(a)(14), 66 Stat. 183 (codified at 8 U.S.C. § 1182(a)(14) (1970)).

[46] *Id.*

Americans could not perform illustrated the large degree of protection which Congress sought for American labor. The labor certification procedure did not apply to immigrants lawfully admitted for permanent residence who were returning from a temporary visit abroad because it had been complied with on the immigrant's initial entry into the United States. In this regard the certification requirement was directly analogous to the exemption from further compliance with the quota restrictions.

The significance of the exemption of nonquota immigrants from this procedure cannot be overemphasized. If commuters on their re-entry into the United States were still nonquota immigrants (that is, if Congress did not intend to change their status with the passage of the 1952 Act), then once having complied with the labor certification requirement on his initial entry and receiving his green card, a commuter would never be excludable under the Secretary of Labor's certificate again. The implications are staggering: regardless of whatever drastic shifts may take place in the domestic labor market after his initial entry, the commuter, once having attained nonquota immigrant status, may cross the border each day, competing for jobs with perhaps large numbers of unemployed American laborers. Whereas one may reasonably assume that Congress intended this benefit (competition with American citizens) for aliens actually residing in the United States, it is certainly questionable whether it believed that commuters should be privileged in the same manner.

In 1965 Congress passed a series of amendments to the Immigration and Nationality Act of 1952.[47] Two of the amendments again raised the question of whether Congress intended to modify the commuter practice.[48] The first involved a shift in the burden of showing an "adverse effect" on the relevant labor market under the labor certification procedure. Prior to 1965, this provision allowed the admission of all aliens otherwise qualified, until such time that the Secretary certified that an alien's admission would have an "adverse effect" on the labor market which the alien sought to enter. The 1965 amendment denied admission to aliens until such time that the Secretary certified such admission would not have an "adverse effect."[49] Although the certification requirement was still not ap-

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[47] Act of October 3, 1965, Pub. L. No. 89-236, 79 Stat. 916 (codified at 8 U.S.C. § § 1101 *et seq.*).

[48] The legislative history of the 1965 amendments provides as little indication of Congressional intent regarding the commuter practice as does the 1952 Act. Both the majority and dissenting opinions in *Gooch v. Clark*, for example, referred to Congress' "silence" in 1965, differing only on the proper interpretation to be given that silence. 433 F.2d at 80, 85 n.4 (9th Cir. 1970).

[49] Act of October 3, 1965, Pub. L. No. 89-236, § 10(a), 79 Stat. 917, 918, *amending* Immigration and Nationality Act of 1952, ch. 477, § 212(a)(14), 66 Stat. 183 (codified at 8 U.S.C. § 1182(a)(14) (1970)).

plicable to commuters on their re-entry into the United States, Congress' desire to further strengthen labor's position made the ongoing commuter practice even more of a paradox than it had been before.

Congress also enacted an apparently minor change in the language of 8 U.S.C. section 1181(b), the provision which exempted nonquota immigrants from the Act's documentation requirements.[50] Prior to 1965, section 1181(b) referred to "aliens lawfully admitted for permanent residence who depart from the United States temporarily. . . ."[51] The 1965 amendment replaces this language with: "returning resident immigrants, defined in section 1101(a)(27)(B),"[52] which in turn speaks of "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad."[53] This change could be regarded as evidence of Congressional intent to modify the treatment of commuters under the statute. The argument is that although commuters could logically be characterized as "depart[ing] from the United States temporarily," under no circumstances, by merely coming to work each day from their homes across the border, could they be described as "returning from a temporary visit abroad."[54]

III. JUDICIAL TREATMENT OF THE COMMUTER PRACTICE

A. ALIEN COMMUTERS IN THE FEDERAL COURTS

The preceding description of the statutory provisions relating to alien commuters suggests the problems courts have faced in ascertaining Congress' intent regarding the commuter practice. Forced to interpret and apply these vague provisions, the courts have sometimes resorted to questionable legal analyses in determining the status of commuters.

Four times in the past fifteen years, labor unions or their members have appeared in federal court to directly challenge the INS's classification of alien commuters as "special immigrants" under the Act

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[50] Act of October 3, 1965, Pub. L. No. 89-236, § 9, 79 Stat. 917, *amending* Immigration and Nationality Act of 1952, ch. 477, § 211(b), 66 Stat. 181 (codified at 8 U.S.C. § 1181 (1970)).

[51] Immigration and Nationality Act of 1952, ch. 477, § 211(b), 66 Stat. 181 (codified, as amended, at 8 U.S.C. § 1181(b) (1970)).

[52] Act of October 3, 1965, Pub. L. No. 89-236, § 9, 79 Stat. 917, *amending* Immigration and Nationality Act of 1952, ch. 477, § 211, 66 Stat. 181-82 (codified at 8 U.S.C. § 1181 (1970)).

[53] 8 U.S.C. § 1101(a)(27)(B) (1970).

[54] In contrast, the INS Regulations refer to a return to "an unrelinquished lawful permanent residence" in the United States from "a temporary *absence* abroad. . ." 8 C.F.R. § 211.1(b) (1974) [emphasis added]. *See* Saxbe v. Bustos, ___U.S. ___, 95 S. Ct. at 282 n.2 (1974)(White, J., dissenting).

(the phrase was changed from "nonquota immigrants" in 1965). The first case, *Amalgamated Meat Cutters and Butcher Workmen v. Rogers*,[55] decided in 1960, held that commuters were not "lawfully admitted for permanent residence," and thus could not enter the United States for employment during the time that a labor certificate was in effect. Much of the impact of this decision was lost, however, when the burden of proof under the labor certification procedure was shifted by Congress in 1965.[56]

In the second case, *Texas State AFL-CIO v. Kennedy*,[57] the U.S. Court of Appeals never reached the commuter issue, dismissing the case on the grounds that the plaintiff union did not have standing to sue.[58] The case is significant nonetheless. For the first time, the INS's administrative treatment of commuters per se had been challenged, and a new theory was necessary to defend the INS classification. The INS thus introduced the argument to which it has continued to adhere: that the statutory classification of commuters as "lawfully admitted for permanent residence" does not require commuters to actually live in this country. The INS maintained that the status of "lawfully admitted for permanent residence" requires only that the immigrant have been granted the privilege of making his home in the United States.[59] A majority of the U.S. Supreme Court in *Saxbe v. Bustos* relied heavily on this argument.[60]

The Supreme Court's grant of certiorari in *Saxbe v. Bustos* resulted from a conflict between the opinion of the U.S. Court of Appeals, Ninth Circuit, in *Gooch v. Clark*,[61] and that of the D.C.

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[55] 186 F. Supp. 114 (D.D.C. 1960).

[56] *Amalgamated* involved a suit by an AFL-CIO-affiliated union against the Attorney General and the Commissioner of Immigration to require the exclusion of commuters who were replacing American employees at a packing plant where plaintiff union was conducting a strike. Plaintiffs argued that commuters were not properly classified as "nonquota immigrants," and should be denied entry because an "adverse effect" certificate had issued pursuant to the labor certification provision in the 1952 Act. Defendants cited the Board of Immigration Appeals decision, *In the Matter of H-O-*, *supra* note 39, for the proposition that commuters were properly classified. The district court held for plaintiffs, finding that commuters were not "lawfully admitted for permanent residence." But rather than contravene the Board's decision, the court distinguished it, pointing out that, unlike *Amalgamated*, no labor certificate had issued in the *H-O-* case. The court's narrow holding meant that *Amalgamated* was largely useless precedent after 1965.

[57] 330 F.2d 217 (D.C. Cir. 1964).

[58] The standing requirements were subsequently liberalized by two companion U.S. Supreme Court cases, Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970), and Barlow v. Collins, 397 U.S. 159 (1970). As a result, unions were no longer prevented from suing on the commuter issue in federal court.

[59] Note, *supra* note 27, at 1757 n.45, *citing* Brief for Appellees at 53-62, Texas State AFL-CIO v. Kennedy, 330 F.2d 217 (D.C. Cir. 1964).

[60] ___ U.S. ___, 95 S. Ct. at 277 (1974).

[61] 433 F.2d 74 (9th Cir. 1970).

Circuit in *Bustos v. Mitchell.*[62] The conflict arose over whether the differences between seasonal and daily commuters justified a distinction in their respective classifications by the INS. Daily commuters[63] cross the border each day for ongoing employment in the United States. Seasonal commuters cross the border no more than several times a year, remaining in the United States "for extended periods to perform seasonal work."[64] The seasonal commuter practice is generally regarding as having evolved from the *bracero* program, established in 1943, under which Mexican agricultural laborers were imported to work in the United States.[65] *Gooch*, the first commuter case brought since the termination of the *bracero* program in 1964, not only held that seasonal and daily commuters were to be treated identically under the Act, but also acknowledged little if any practical distinction between the two groups.[66] Both were held to be properly classified as special immigrants. *Bustos v. Mitchell*, while agreeing with *Gooch* as to daily commuters,[67] held that seasonal commuters were not properly classified by the INS, and belonged instead in the "temporary worker" category of nonimmigrant.[68] Thus, seasonal commuters could not legally receive a green card and its consequent privileges. The Supreme Court, considering the opinions of both circuits, affirmed the D.C. Circuit's decision regarding daily commuters, but reversed its finding as to seasonal commuters.[69] This holding was nothing more than an affirmation of the Ninth Circuit's decision in *Gooch* that both daily and seasonal commuters were "special immigrants," and the Court stated as much.[70]

The traditional attack on the INS classification of alien commuters as special immigrants has taken a three-pronged approach, challenging each requirement that the commuter must satisfy in order to achieve special immigrant status. Plaintiffs in *Gooch*, for example, argued that (1) commuters did not fit the statutory definition of "immigrant;" (2) commuters were not "lawfully admitted for perma-

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[62] 481 F.2d 479 (D.C. Cir. 1973). *See* Saxbe v. Bustos, ____U.S.____, 95 S. Ct. 272, 276 (1974).

[63] Daily commuters were the group whose history was described in Part II.

[64] 481 F.2d at 482 n.3 (D.C. Cir. 1973).

[65] Agreement between the United States of America and Mexico respecting the temporary migration of Mexican agricultural workers, effected August 4, 1942, 56 Stat. 1759. The program was extended several times until 1948. *See* Act of Feb. 14, 1944, Pub. L. No. 229, ch. 16, 58 Stat. 11, 15-16. In 1951, the program was renewed, with modifications made in the agreement for the purpose of protecting American labor. Bustos v. Mitchell, 481 F.2d 479, 482 (D.C. Cir. 1973), *citing* Act of July 12, 1951, Pub. L. No. 78, ch. 223, 65 Stat. 119. The *bracero* program was then extended several more times, until allowed to lapse on December 31, 1964.

[66] 433 F.2d at 77 (9th Cir. 1970).

[67] 481 F.2d at 487 (D.C. Cir. 1973).

[68] *Id.* at 483.

[69] ____U.S.____, 95 S. Ct. at 276 (1974).

[70] *Id.*

nent residence;" and (3) commuters were not "returning from a temporary visit abroad."[71] Each of these arguments is considered below.

B. ARE COMMUTERS IMMIGRANTS OR NONIMMIGRANTS?

As mentioned previously, the distinction between aliens as either immigrants or nonimmigrants originally arose in the classification scheme which the 1924 Act adopted.[72] Unless they could bring themselves into one of the six enumerated categories of nonimmigrants, aliens coming to this country were presumed to be applying for immigrant status. The 1952 Act retained this approach. The question for the INS and the courts was whether the 1952 Act changed the status of commuters, effectively reclassified as "immigrants" by General Order 86.

Whether Congress by retaining the immigrant/nonimmigrant classification scheme and the privileges attending certain types of immigrant status also intended to ratify General Order 86 is not clear. The issue is whether Congressional silence on the matter, in spite of a comprehensive revision of the immigration laws, indicated approval of a long-standing administrative practice once upheld by the U.S. Supreme Court. The evidence is so scant that a convincing argument can hardly be made for either position. Both the majority and the dissent spoke to this question in *Saxbe v. Bustos*. The majority decided that the administrative interpretation should control where Congress has revised the Act and left the administrative practice unaltered.[73] The dissent countered that the practice was not left unaltered, and that the current administrative interpretation contravenes the intent of Congress as expressed in the 1952 Act.[74]

As noted before, the Immigration and Nationality Act carries a presumption of immigrant status.[75] Because of this presumption, plaintiffs in *Gooch* and *Bustos* had to do more than merely challenge the assertion that Congress intended commuters to be classified as immigrants. They also had to show that Congress actually intended to place commuters under a new nonimmigrant category. Plaintiffs could not argue that commuters came within the nonimmigrant category designated "visiting the United States . . . temporarily for business or pleasure," because *Karnuth* had held that this category did not include those temporarily in the U.S. to perform labor.[76] The

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[71] 433 F.2d at 76 (9th Cir. 1970).
[72] Immigration Act of 1924, ch. 190, § 3, 43 Stat. 154. *See* Part II.
[73] ___ U.S. ___, 95 S. Ct. at 279 (1974).
[74] *Id.* at 283 (White, J., dissenting).
[75] 8 U.S.C. § 1184(b) (1970).
[76] Karnuth v. U.S. *ex rel.* Albro, 279 U.S. 231 (1929).

only nonimmigrant category in which commuters could be placed was that defined in 8 U.S.C. section 1101(a)(15)(H)(ii),[77] "temporary workers." Plaintiffs in both cases argued that this category was added to the 1952 Act for the purpose of reclassifying commuters as nonimmigrants.

The Supreme Court's reasoning in disposing of this contention is not entirely clear. The Court relied in large part on the conclusion reached by a majority of the Ninth Circuit in *Gooch*: that the (H)(ii) category was designed not for commuters, but for an entirely different group of aliens.[78] Referring to the legislative history of the 1952 Act, the Ninth Circuit had decided that Congress enacted section 1101(a)(15)(H)(ii) as a statutory authorization for the *bracero* program, under which Mexican agricultural laborers worked on a seasonal basis in the United States.[79] Because (H)(ii) did not apply to commuters, the court concluded that the 1952 Act left the commuter practice unaffected.[80]

The *Gooch* analysis raises a number of questions. Most important,

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[77] *See* discussion of 1952 Act in Part II.

[78] ___ U.S. ___, 95 S. Ct. at 277 (1974), *citing* Gooch v. Clark, 433 F.2d 74, 78 (9th Cir. 1970).

[79] Evidence for this conclusion can be found in the report issued by a Senate study group in 1950, recommending "that provision should be made in permanent legislation which would permit the admission of temporary agricultural labor in a nonimmigrant classification when like labor cannot be found in this country." SENATE REPORT, *supra* note 10, at 586. The Ninth Circuit held that "Subsection (H) of the 1952 Act was an expanded implementation of this recommendation." 433 F.2d at 77 (9th Cir. 1970).

[80] The paradox of this argument becomes apparent from the Court of Appeals decision in *Bustos*, recognizing a distinction between daily and seasonal commuters. The seasonal commuter practice arose and is largely indistinguishable from the *bracero* program, which the *Gooch* majority said was authorized by the (H)(ii) class of nonimmigrant in the 1952 Act. When the *Gooch* court speaks of (H)(ii) as applying to *braceros* and not commuters, 433 F.2d at 77 (9th Cir. 1970), it is clearly referring to daily commuters — those holding ongoing, permanent jobs (as opposed to those who perform "temporary services or labor"). Ironically, by tacitly making this distinction, the court seems to anticipate the finding of the Court of Appeals in *Bustos*, a finding the Supreme Court rejected in favor of the analysis set forth by the majority in *Gooch*.

Of further interest is the admission of the INS, cited in *Bustos v. Mitchell*, that the "seasonal worker is a person who came into being largely after the repeal of the *bracero* law," and that "many of them are former *braceros* who have been admitted to the United States temporarily for employment" under the Act. 481 F.2d at 482-83 n.8 (D.C. Cir. 1973), *citing* Statement by James S. Hennessy, Executive Assistant to the Commissioner of the Service, in *Hearings on H.R. 12667*, *supra* note 12, at 73. The INS, it seems, has conceded that a conclusion regarding seasonal commuters like that reached by the *Gooch* court is wrong. *Gooch* in effect held that seasonal and daily commuters were not nonimmigrants because (H)(ii) referred to *braceros*, and the INS acknowledges that there is virtually no distinction between seasonal commuters and *braceros*. Note further that although the distinction between seasonal and daily commuters was not expressly recognized in any reported decision until *Bustos v. Mitchell* in 1973, the statements quoted above were made at Congressional hearings in 1969, a year before *Gooch* was decided.

as Judge Wright pointed out in his dissent,[81] is that if the only purpose of the (H)(ii) category was to codify the existing *bracero* program, why did Congress explicitly renew that program periodically until it was allowed to lapse in 1964? Neither the Ninth Circuit nor the Supreme Court offers any explanation.

Two more points which the *Gooch* majority relied on can similarly be called into question. First, the court concluded that plaintiffs were in effect estopped from arguing that commuters were properly regarded as nonimmigrants. The court noted that under (H)(ii), nonimmigrants could enter the country only during a labor shortage. Plaintiffs' alleged injury, however, resulted because commuters were allowed to enter at a time when no labor shortage existed. The court concluded that commuters must be immigrants, since nonimmigrants could enter only during a labor shortage, which plaintiffs claimed didn't exist.[82] But what plaintiffs were challenging was the refusal of the INS to classify commuters as nonimmigrants. To hold that their claim was erroneous because commuters were not nonimmigrants was to decide the issue merely by stating a conclusion of law.

Secondly, the *Gooch* majority noted that a 1950 Senate Report comprising an important part of the 1952 Act's legislative history explicitly referred to commuters as "immigrants" with apparent approval.[83] The court concluded that Congress was aware of the administrative treatment and was satisfied with the practice. The (H)(ii) category, however, was not added until 1952, two years after the issuance of the Senate Report. Thus, in 1950, commuters were "immigrants," and at that time could not be anything else. The reference in the Senate Report can hardly support the finding that the passage of the 1952 Act did not reclassify commuters as nonimmigrants.

The above discussion focuses on the rationale of the *Gooch* holding that neither daily nor seasonal commuters are nonimmigrants. The Court of Appeals in *Bustos v. Mitchell* distinguished the two groups. Reading the statute literally, the court held that seasonal commuters qualified as aliens "coming temporarily to the United States to perform temporary services or labor," and thus were nonimmigrants under section 1101(a)(15)(H)(ii).[84] The court decided that daily commuters could not be so classified. Though daily commuters could accurately be described as "in the United States temporarily," the labor they performed was hardly "temporary." Whereas seasonal commuters worked in the United States for several months and then returned to their homes across the border for the remainder of the year, daily commuters crossed the border each day

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[81] Gooch v. Clark, 433 F.2d at 82 (9th Cir. 1970) (Wright, J., dissenting).
[82] 433 F.2d at 78 (9th Cir. 1970).
[83] *Id.* at 77 n. 7, *citing* SENATE REPORT, *supra* note 11, at 616.
[84] 481 F.2d at 484 (D.C. Cir. 1973). *See* note 80.

to work in year-round jobs.[85] For this reason, the Court of Appeals in *Bustos* described daily commuters as engaging in permanent labor, and concluded that (H)(ii) did not apply.[86] In upholding the classification of daily commuters, the court also pointed out the problems inherent in the judicial termination of a long-standing administrative practice involving thousands of people and wide-ranging social and economic considerations.[87] The court evidently believed, with some justification, that those considerations were of a lesser magnitude in the case of seasonal commuters.[88]

Because *Gooch* had not acknowledged the distinction between daily and seasonal commuters, and because no dissent was filed in the Court of Appeals opinion in *Bustos*, the Supreme Court acted largely on its own in reversing the lower court's decision on seasonal commuters. The judicial reasoning is again open to question. The majority began by terming "inaccurate" the lower court's characterization of "the seasonal commuter [as] merely a new name for the former *bracero*."[89] "The *braceros*," noted the majority, "were at the start *nonimmigrants*: the *seasonal* commuters were *immigrants*."[90] Once again, a conclusion of law was substituted for an analysis of the issue. The majority decided the question by merely describing the situation about which plaintiffs complained, the alleged improper classification of commuters by the INS. The Court also concluded, "The status of the *seasonal* commuter is the same as the status of the *daily* commuter because the identical statutory words cover *each*."[91] The same criticism applies to this statement. The identical language covered both groups because the INS placed them in the same category. If the INS was wrong, as plaintiffs contended, then the same statutory provision would not cover both groups. In reaching its conclusion, the Court also ignored many historical and practical distinctions between seasonal and daily commuters on which the Court of Appeals relied.[92]

Thus, as to whether commuters should be classified as immigrants or nonimmigrants, three possibilities have been identified: (1) both daily and seasonal commuters are properly classified as immigrants (as the Supreme Court, and, impliedly, the Ninth Circuit, held); (2) both daily and seasonal commuters are improperly classified, and

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[85] 481 F.2d at 484 n.13 (D.C. Cir. 1973).
[86] *Id.*
[87] *Id.* at 487. *See* Part V.
[88] The number of seasonal commuters is estimated at less than 20 per cent of the total number of alien commuters. Saxbe v. Bustos, ____U.S. ___, 95 S. Ct. at 281 (1974).
[89] *Id.* at 279.
[90] *Id.*
[91] *Id.*
[92] 481 F.2d at 482-86 (D.C. Cir. 1973).

should be treated as nonimmigrants (as apparently contended by the dissents in both the Supreme Court and Ninth Circuit opinions); and (3) daily commuters are properly classified as immigrants, but seasonal commuters should be reclassified as nonimmigrants (as held by the Court of Appeals in *Bustos*). The point is not that any of these interpretations is necessarily more correct than the others. It is rather that, given the nature of the statute with which the courts have had to grapple, no single interpretation of the Act can be said to be any more correct than any other.

C. ARE COMMUTERS "LAWFULLY ADMITTED FOR PERMANENT RESIDENCE"?

The second requirement for obtaining "special immigrant" status under 8 U.S.C. section 1101(a)(27)(B) is classification as "lawfully admitted for permanent residence" under 8 U.S.C. section 1101(a)(20).[93] The "status" theory of "lawfully admitted for permanent residence" was the contribution which *Texas State AFL-CIO v. Kennedy* made to the field of commuter litigation. The Supreme Court adopted this theory without qualification.[94] The Court construed the statute to include commuters under section 1101(a)(20). The Court also referred to the long-standing administrative interpretation, unaltered by Congress in its 1952 revision of the Act, and cited this as additional support for its characterization of commuters as "lawfully admitted for permanent residence."[95]

Section 1101(a)(20) includes a requirement that the status of being lawfully admitted for permanent residence "not have changed." Plaintiffs in both *Gooch* and *Bustos* argued that commuters were not "lawfully admitted for permanent residence" because their status had changed. In *Gooch*, plaintiffs contended that this was because most commuters wouldn't qualify for immigrant visas if they applied again at the time the suit was brought.[96] Plaintiffs in *Bustos* argued that the failure to claim residence resulted in a

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[93] "[T]he status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20) (1970).

See Note, *Alien Commuters: A Privileged Class*, 23 HASTINGS L.J. 1241 (1972), which suggests a possibility regarding § 1101(a)(20) that has been dealt with only peripherally by the courts, namely, that commuters are immigrants, *not* lawfully admitted for permanent residence. The Note suggested that judicial recognition of such a category might represent an ideal resolution of the commuter issue, one consistent with the current classification scheme and with Congress' protectionist policy regarding American labor. *See* Part V.

[94] "The applicant (for 'lawfully admitted for permanent residence' status) must . . . state whether he plans to remain in the United States permanently. But the Act does not declare or suggest that the *status* will be denied him, if he does not intend to reside permanently here." ___ U.S. ___, 95 S. Ct. at 278 (1974).

[95] *Id.* at 279.

[96] 433 F.2d at 79 (9th Cir. 1970).

change of status.[97] The response of the majority in *Gooch*, cited by the Supreme Court, was simply that this phrase referred only to a "change" from the status of an immigrant, lawfully admitted for permanent residence, to that of a nonimmigrant.[98]

The dissent in *Saxbe v. Bustos* argued that the majority opinion contravened the basic principle of statutory construction that if a statutory provision is clear on its face, it must be applied without discretion as to its meaning.[99] Citing sections 1101(a)(31) and 1101(a)(33), which define "permanent residence" under the Act, the dissent noted that the INS practice conflicts with both the statutory definition and the INS's own regulations on the subject.[100]

The dissent also stated: "Administrative construction of a statute which conflicts with the express meaning of the statutory terms can be viewed as authoritative only if it appears that Congress has in fact accepted that construction."[101] The burden of proof falls on the proponent of the administrative view.[102] The dissent then concluded that no evidence of Congressional acceptance exists in this case, and that legislative silence on the subject can hardly be interpreted as a sign of approval.[103] It contended that the authority the Court cited did not carry the burden of proof, and that the Court was simply attempting to shift the burden to plaintiffs, thus forcing them to show that silence indicated disapproval.[104] The "silence equals approval" theory was further weakened by the government's admission that the seasonal commuter practice arose largely after Congress ended the *bracero* program.[105] Indeed, if Congress approves of the practice of seasonal commuting, one might ask why the *bracero* program was ever ended.

Finally, the dissent argued that by considering issues which were properly "part of the congressional calculus,"[106] the Court had "strayed from the neutral judicial function of applying traditional principles of statutory construction,"[107] and was in effect legislating. This recognition (noted by the majority as well)[108] that the Court

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[97] Saxbe v. Bustos, ___ U.S. ___, 95 S. Ct. at 277 (1974).
[98] *Id.*, *citing* Gooch v. Clark, 433 F.2d at 79 (9th Cir. 1970).
[99] ___ U.S. ___, 95 S. Ct. at 281 (1974) (White, J., dissenting), *citing* Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933).
[100] *Id.* at 282, *citing* 8 U.S.C. § § 1101(a)(31), (33), (1970), and 8 C.F.R. § 211.1(b) (1974). The dissent's point is well-taken, of course, only if the INS's "amiable fiction" is not recognized.
[101] *Id.* at 283.
[102] *Id.*
[103] *Id.* at 282-83, *citing* Zuber v. Allen, 396 U.S. 168, 185-86 n.21 (1969).
[104] *Id.* at 284, 285.
[105] *Id.* at 285 n. 11.
[106] *Id.* at 286.
[107] *Id.*
[108] ___ U.S. ___, 95 S. Ct. at 281 (1974).

had entered an area where it did not belong compelled four Justices to file a strong dissent to the opinion in *Saxbe v. Bustos.*

D. ARE COMMUTERS "RETURNING FROM A TEMPORARY VISIT ABROAD"?

The final requirement of the three-pronged "special immigrant" test, that the immigrant, lawfully admitted for permanent residence, be "returning from a temporary visit abroad," can be viewed generally in the same manner as the "permanent residence" issue. Though the opinions deal less extensively with this final question, the same arguments with reference to legislative history and statutory construction undoubtedly apply. The change in the language of section 1181(b) and the resulting speculation over whether Congress intended to alter the then-existing commuter practice have already been mentioned in the context of the Act's 1965 amendments.[109] Similar questions can be raised regarding a discrepancy between the language of section 1101(a)(27)(B), which refers to a "temporary visit abroad," and Title 8, Code of Federal Regulations, section 211.1(b), the INS regulation which refers to a "temporary *absence* abroad" [emphasis added]. Arguably, the commuter's daily or seasonal journey across the border could be considered an "absence," but (considering that he is returning from the United States to his actual residence in Canada or Mexico) hardly a "visit." The attempt to draw meaningful conclusions about Congressional intent from such minimal pieces of evidence is itself symptomatic of the problems which permeate the commuter issue. That the majority and dissenting opinions in both *Gooch* and *Saxbe v. Bustos* felt compelled to justify their conclusions by arguing over the proper canons of statutory construction indicates that no one can presume to speak with any real certainty about Congress' past or present intent regarding the status of commuters under the Immigration and Nationality Act.

IV. EFFECT OF SAXBE v. BUSTOS

The previous sections indicate that (1) the Immigration and Nationality Act neither contemplates nor expressly authorizes the commuter practice; and (2) the courts are unwilling to terminate the practice. These two factors have forced the courts to search the Act for a construction which would allow aliens to regularly enter the country for employment purposes. The resultant classification legitimizes the commuter practice. The classification of special immigrant, however, was not drafted to include commuters. The consequence has been a series of inconsistencies and uncertainties which have

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[109] *See* Part II.

arisen in the interpretation and application of the statute.

The statutory inconsistencies begin with the classification of commuters as immigrants. A commuter, by definition, has no intention of relinquishing his residence in his native country. Consequently, the commuter would be unable to meet the residence requirements for United States citizenship.[110] This is inconsistent with the purpose of the immigrant classification. Immigrants face a series of restrictions on entry, which deny admission to aliens of questionable character, morals or health.[111] The restrictions are imposed on immigrants because only aliens classified as immigrants are eligible for U.S. citizenship. Since the number of immigrant visas is limited,[112] each one a commuter receives results in the exclusion of an alien who genuinely desires to become a citizen.

Perhaps of greater significance are the inconsistencies which result from the courts' treatment of commuters as lawfully admitted for permanent residence. The main purposes of the 1952 Act were to protect American labor and to facilitate unity among alien families.[113] Accordingly, Congress removed many of the obstacles to entry which confront immediate family members of aliens lawfully admitted for permanent residence. Alien commuters acquire these statutory benefits by virtue of their classification as "lawfully admitted for permanent residence." This result is per se incongruous with Congressional intent because commuters reside in a foreign country with their families. Judge Wright first articulated this paradox in his dissent to *Gooch*.[114] He noted that the Act allows the Attorney General to waive the ban against entry of aliens who have been convicted of a crime or who have procured entry documents by fraud where the alien is the spouse, child, or parent of a U.S. citizen or of an alien lawfully admitted for permanent residence.[115] He concluded:

> If an alien lawfully admitted for permanent residence is taken to be one who actually resides or actually intends to reside in the United States, then the sections embody a humanitarian, family-maintaining policy for residents of the United States. But I can think of no reason why Congress would choose to extend favored treatment, for example, to a Mexican convicted of a crime, simply because he was the parent of a commuter resident in Tijuana.[116]

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[110] 8 U.S.C. § 1427 (1970). While the INS once regarded a commuter's place of employment as his residence so as to allow for the treatment of commuters as lawfully admitted permanent residents, the place of employment has never qualified as a residence for naturalization purposes.

[111] 8 U.S.C. § 1182 (1970).

[112] 8 U.S.C. § 1151(a) (1970).

[113] *See* SENATE REPORT, *supra* note 11. *See also* S. REP. NO. 1137, 82d Cong., 2d Sess. (1952), and H. REP. NO. 1365, 82d Cong., 2d Sess. (1952).

[114] Gooch v. Clark, 433 F.2d at 82 (9th Cir. 1970) (Wright, J., dissenting).

[115] 8 U.S.C. § § 1182(h), 1182(i) (1970).

[116] Gooch v. Clark, 433 F.2d at 84 (9th Cir. 1970) (Wright, J., dissenting).

These are only two examples of the inconsistencies in the statutory scheme which inevitably follow the characterization of commuters as lawfully admitted for permanent residence. Judge Wright pointed to others as well. Section 1251(f) forbids the deportation of an alien who gained entry by fraud, if he is the spouse, parent or child of an alien lawfully admitted for permanent residence.[117] Section 1153(a)(2) gives second preference[118] status to the spouse, unmarried son or unmarried daughter of an alien lawfully admitted for permanent residence. Finally, sections 1182(a)(14) and 1101(a)(27)(B), when read together, would allow the parent, child or spouse of an alien lawfully admitted for permanent residence to enter the United States as a special immigrant without complying with the labor certification procedure.[119] The effect is to allow an alien to commute even if a labor certification has not been issued for his job, simply because he is a qualifying relative of a commuter. Each of these statutory provisions serves a logical and humanitarian purpose for resident aliens. Extending these benefits to alien commuters serves no such purpose. In fact, the labor certification exemption contradicts the basic Congressional purpose of protecting American labor without furthering the policy of fostering family unity.

The effects of *Saxbe v. Bustos* do not end with statutory inconsistency. The language in the majority opinion created a series of ambiguities. The effect of the status of lawfully admitted for permanent residence has been examined.[120] The question remains as to when the status attaches. According to the Supreme Court in *Bustos*, the alien acquires this status when granted a visa.[121] The procedure for obtaining a visa does not require the applicant to enter the United States.[122] Consequently, under a literal interpretation of the Court's language, an alien could be lawfully admitted for permanent residence with all the appurtenant statutory benefits, without ever having entered the United States.

After *Saxbe v. Bustos*, the proper classification of new aliens desiring to become commuters is not entirely certain. The Court notes that commuters and (H)(ii) nonimmigrant temporary workers have no intention of abandoning their foreign residences, both groups intending to come to this country only temporarily to work.[123] Commuters were not classified as nonimmigrants because (H)(ii) nonimmigrants must demonstrate that unemployed workers cannot be

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[117] 8 U.S.C. § 1251(f) (1970).
[118] 8 U.S.C. § 1153(a)(2) (1970).
[119] 8 U.S.C. § § 1182(a)(14), 1101(a)(27)(A) (1970).
[120] *See* Part III.
[121] Saxbe v. Bustos, ____U.S.____ , 95 S. Ct. at 277 (1974).
[122] C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, § § 3.3-3.11 (rev. ed. 1975).
[123] Saxbe v. Bustos, ____U.S. ____ , 95 S. Ct. at 275 (1974).

found in this country,[124] while commuters are under no such burden. The Court observed, however, that since 1965, aliens desiring to become immigrants so that they might begin to commute have had to meet substantially the same labor certification requirement as nonimmigrants.[125] In effect, the Court eliminated the only remaining distinguishing factor between commuters and (H)(ii) nonimmigrants. Arguably, the Court held that only existing commuters should be classified as immigrants, while future commuters should be admitted as (H)(ii) nonimmigrants.

Finally, in contrast to its argument outlined above, the Supreme Court seems to suggest that in the future, no alien could be classified as an (H)(ii) nonimmigrant. Under the existing procedure, when applying for a visa, an alien must state whether he intends to reside in the United States permanently. The majority noted this, but concluded that the INS cannot use the alien's response to deny him the status of lawfully admitted for permanent residence.[126] The alien's intent to reside permanently in a foreign country is the key element of the nonimmigrant (H)(ii) class.[127] In light of the Supreme Court's decision, it is uncertain whether the alien's intent in this regard is now of any importance and indeed if any aliens can properly be classified as (H)(ii) nonimmigrants in the future.

V. LEGISLATIVE ALTERNATIVES AFTER SAXBE V. BUSTOS

As the Supreme Court pointed out in *Saxbe v. Bustos*,[128] the United States Congress has long been aware of the commuter practice. Nevertheless, Congress has never weighed the advantages and disadvantages of the practice to arrive at a decision on its merits. Various committee investigations since the 1952 Act have gathered information on the commuter practice,[129] but the issue always arose as a portion of a larger inquiry and was never acted on per se by the Congress as a whole. Consequently, the Court was forced to determine Congress' intent from Congressional silence. The Court concluded that legislative inaction in view of Congress' awareness of the commuter practice indicated Congressional approval of the practice.[130] If this conclusion was incorrect and Congress actually does

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[124] 8 U.S.C. § 1101(a)(15)(H)(ii) (1970) requires that before an alien can be admitted as a nonimmigrant for temporary employment, no United States workers can be found for the job in question.
[125] Saxbe v. Bustos, ___ U.S. ___, 95 S. Ct. at 280 (1974).
[126] *Id.* at 278.
[127] 8 U.S.C. § 1101(a)(15)(H) (1970).
[128] Saxbe v. Bustos, ___ U.S. ___, 95 S. Ct. at 280 (1974).
[129] *See Hearings on Border Commuter Labor Problem, supra* note 13 and *Hearings on H.R. 12667, supra* note 13.
[130] Saxbe v. Bustos, ___ U.S. ___, 95 S. Ct. at 280 (1974).

not condone the commuter practice, then clearly legislation is required to contravene the *Saxbe v. Bustos* holding.[131] Even if Congress does desire to continue the commuter practice as it now exists, statutory revisions should be made to recognize commuters as a class. Finally, Congress may intend that the commuter practice continue, but on a more restricted basis than that which the INS and the courts have sanctioned. Again, legislation would be required because the Act in its present form does not expressly authorize such an approach.[132] This section will examine possible legislative solutions and the likely effects of each.

A. LEGISLATIVE TERMINATION OF THE COMMUTER PRACTICE

In drafting legislation to terminate the commuter practice, Congress should be aware that such legislation will affect two groups of aliens. The first is the group of immigrants, lawfully admitted for permanent residence, which presently commutes. This status bestows upon commuters the privilege of residing in the United States. Therefore, a legislative termination of the commuter practice must take care not to interfere with this group's vested right of residence.[133] The second group consists of prospective immigrants who seek to become classified as lawfully admitted for permanent residence so that they too may become commuters.

The most readily apparent method for ending the commuter practice is simply to require that all immigrants maintain a bona fide physical residence in the United States. Such a proposal would effectively eliminate future commuting by immigrants while respecting the vested right to United States residence possessed by existing commuters. The Select Commission on Western Hemisphere Immigration proposed the Ruttenberg-Scammon Plan,[134] which adopted this approach. The Plan urged a three-fold action. After a given date, all visas would issue only on the express understanding that the immigrant intended to establish and maintain a bona fide physical

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[131] *Id.*

[132] Once an alien is granted the status of lawfully admitted for permanent residence, there are virtually no restrictions on his ability to cross the border.

[133] In Sam Andrews' Sons v. Mitchell, 457 F.2d 745, 749 (9th Cir. 1972), the court noted that commuters have full constitutional protection, and such status is not to be "terminated, altered or diminished because he spends the night across the border." It would appear that Congress is without authority to deny entry to existing commuters as a group.

[134] The plan was authored by Richard M. Scammon, Chairman, Select Commission on Western Hemisphere Immigration, and Stanley H. Ruttenberg, member of the Commission. It was first unveiled in a letter to President Johnson on July 22, 1968, reprinted in *Hearings on Border Commuter Labor Problem*, *supra* note 13, at 2614. [The Plan is hereinafter cited as Ruttenberg-Scammon Plan].

residence in the United States.[135] Second, a new type of nonimmigrant classification would be developed for those who wished to reside in a contiguous foreign country and regularly cross the border to work in the United States.[136] Third, at the end of a predetermined grace period, the ability of present commuters to cross the border to work in this country would terminate.[137]

The first part of the Ruttenberg-Scammon Plan would bar commuting by aliens who achieve immigrant status in the future. The second part is designed to ease the economic impact which a termination of the commuter practice would have on border cities.[138] The final part of the proposal would require present commuters to establish a bona fide physical residence in the United States by the end of the grace period. Upon failure to do so they would be reclassified as nonimmigrants, thus losing their ability to freely commute.

At least one writer has criticized the third aspect of the Ruttenberg-Scammon Plan as being somewhat unrealistic.[139] The charge is that the Plan will foster mass migrations of commuters to border cities in order that those commuters may keep their jobs.[140] Such a migration would likely occur just before the end of the grace period and could have a devastating effect on the local economies of border communities. The effects would be increased demands on housing, schooling and other community services. The local job market would be strained as members of the commuter's family seek employment. In addition, the prospect of leaving their homes or losing their livelihood would work extreme hardship on families confronting this ultimatum. Some evidence indicates that this migration would in fact take place. In a survey of commuters conducted for the Department of Labor,[141] 87 per cent of the Mexican commuters questioned stated that if they could not commute, they would move to the United States.[142]

A less obvious effect of the Ruttenberg-Scammon Plan would be

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[135] *Id.*

[136] The nonimmigrant work permit would have much the same effect as the temporary worker status under 8 U.S.C. § 1101(a)(15)(H)(ii) (1970), except that the labor certification would be made periodically.

[137] Ruttenberg-Scammon Plan, *supra* note 135.

[138] The economies of border communities are to some degree linked to the commuter who is a source of both purchasing power and inexpensive labor. *See generally*, NORTH, THE BORDER CROSSERS, TRANS-CENTURY CORPORATION at 143-84 (1970) [hereinafter cited as DEPT. OF LABOR SURVEY]. This Study was conducted for the U.S. Department of Labor. The reclassification of commuters as nonimmigrants would not completely terminate their ability to enter the country. It would, however, subject commuters to the same entry requirements faced by other nonimmigrants.

[139] Note, *supra* note 27, at 1770-71.

[140] *Id.*

[141] DEPT. OF LABOR SURVEY, *supra* note 139.

[142] *Id.* at 316.

the economic hardships faced by the majority of those commuters and their families who chose to migrate to the United States. The Department of Labor Survey discloses that 75 per cent of the Mexican commuters contacted live in Mexico either for economic reasons or because some member(s) of their family are unable to qualify for a visa.[143] The majority of commuters earn less than the United States minimum poverty level.[144] They are able to survive only because they live in Mexico where the relative cost of living is lower than that in the United States.[145] Subjecting the commuter to the higher United States cost of living would lower his standard of living.

Mandatory United States residence would also result in separating many commuters from close family members. The Act imposes rather severe restrictions on admission in terms of the applicant's economic, moral, physical and mental status.[146] The Department of Labor Survey discloses that commuters have had little success in seeking to secure immigration visas for their entire families and that if the commuters surveyed were required to move to the United States, up to 20 per cent would be forced to leave behind a close family member.[147]

Conversely, some members of the commuter's family would qualify for immigrant visas. Mandatory United States residence for commuters would result in large numbers of visa applications from those family members. Certain family members would be entitled to a high quota preference by virtue of their relationship to the commuter.[148] Thus, the commuter's family would be considered for visas ahead of other aliens, including those who have been on waiting lists for longer periods because they cannot qualify for an equivalent preference.

An alternative to the Ruttenberg-Scammon Plan to end the commuter practice is to simply classify commuters as nonimmigrants. The problem with this approach lies in the fact that existing commuters have what appears to be a constitutionally protected right of residence.[149] Consequently, Congress may only have the authority to classify as nonimmigrants those aliens who would seek to commute in the future.

Congressman Peter Rodino introduced such a reclassification plan

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[143] *Id.* at 310.
[144] *Id.* at 114.
[145] *Hearings on H.R. 12667, supra* note 13, at 168.
[146] 8 U.S.C. §1182(a) (1970); *Hearings on H.R. 981, Before Subcomm. No. 1, House Comm. on the Judiciary*, 92d Cong., 1st Sess. 60 (1969) [hereinafter cited as *Hearings on H.R. 981*].
[147] DEPT. OF LABOR SURVEY, *supra* note 139, at 310, 316.
[148] 8 U.S.C. §1153(a) (1970).
[149] While the Ruttenberg-Scammon Plan, *supra* note 135, proposed such a class of nonimmigrants, it should be noted that existing commuters have the option of establishing a U.S. residence. *See* note 134.

in 1971.[150] The Rodino bill would have amended the Immigration and Nationality Act to establish a new class of nonimmigrant, those coming to the United States under a contract to perform labor for no longer than one year. The bill would have restricted the alien's ability to change jobs and would have required that he obtain the Secretary of Labor's certification.[151] The Rodino bill never reached the floor of the 91st Congress. Arguably, its effect would have been minimal. The bill eliminated the (H)(ii) category consisting of nonimmigrants coming to the United States temporarily to perform temporary labor.[152] To qualify as a nonimmigrant, an alien would have to have been under contract to perform labor in the United States. Most aliens seeking admission would probably not possess such a contract and consequently would have to seek admission as immigrants.

H.R. 981,[153] which passed the House in 1973, would have taken a similar approach. The bill would have authorized a general revision of Western Hemisphere immigration under the Immigration and Nationality Act, and in so doing would have changed the existing statutory language regarding nonimmigrants. Presently, aliens can be admitted as nonimmigrants to perform "temporary labor or services."[154] The INS has adopted a restrictive view of what constitutes "temporary labor or services."[155] H.R. 981 would have deleted the "temporary labor or services" requirement, thus allowing the alien to perform temporary or permanent jobs as a nonimmigrant. The length of stay in the United States would have been limited to two years.

The potential effect of the approach taken in H.R. 981 is not entirely clear. The bill was not designed to deal primarily with the commuter practice. The language regarding nonimmigrants may have been a compromise in exchange for lower quotas for Mexico.[156] The intent of the proposed change, however, was clearly to classify aliens desiring to maintain a residence in a foreign country and work in the United States as nonimmigrants.[157] Arguably, the alien could have avoided this result by expressing a desire to maintain a residence in the United States when applying for an immigrant visa.[158] Addition-

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[150] H.R. 1537, 91st Cong., 1st Sess. (1969) [hereinafter cited as the Rodino Bill].
[151] 8 U.S.C. § 1182(a)(14) (1970).
[152] 8 U.S.C. § 1101(a)(15)(H)(ii) (1970).
[153] H.R. 981, 93d Cong., 1st Sess. (1973), passed by the U.S. House of Representatives, on Sept. 26, 1973, 119 CONG. REC. H8323-47 (daily edition). The session of Congress ended before the bill reached the Senate floor.
[154] 8 U.S.C. § 1101(a)(15)(H)(ii) (1970).
[155] Matter of Contopoulos, 10 I. & N. Dec. 654. It is the nature of the job rather than the length of the employment which is controlling.
[156] *See* H. REP. NO. 93-461, 93d Cong., 1st Sess. 9 (1973).
[157] *Id.* at 10.
[158] Such a statement may well be made in good faith. THE DEPARTMENT OF LABOR SURVEY suggests that the majority of commuters actually maintained a residence in the U.S. for a short time when they first received a green card. The

ally, H.R. 981 would have established quota limits of 20,000 from Mexico annually, increasing the waiting period for a Mexican alien seeking to immigrate to the United States.[159]

Regardless of whether Congress should choose to require a mandatory residence or to reclassify commuters as nonimmigrants, termination of the commuter practice would have at least two additional important effects: the impact on local border economies and the effect on the foreign relations of the United States. Former Secretary of State Dean Rusk informed the court deciding *Texas State AFL-CIO v. Kennedy* that not only would international repercussions result, but also that depriving commuters of their livelihood would cause harmful reverberations through the local economies of U.S. border towns.[160] Former Secretary of State William Rogers expressed a similar view before the United States Supreme Court in *Saxbe v. Bustos.*[161] The State Department has consistently maintained that any sudden termination of the commuter practice could seriously affect the United States' friendly relations with Mexico. The Department considers "retaliatory action" possible, even if efforts were taken to minimize the adverse impact.[162]

B. REVISIONS REQUIRED TO MAINTAIN THE COMMUTER PRACTICE

The Supreme Court upheld the current commuter practice in *Bustos* by classifying commuters as immigrants lawfully admitted for permanent residence who are returning from a temporary visit abroad.[163] Because the Immigration and Nationality Act does not expressly recognize commuters as a class, this is the only classification which allows aliens to regularly cross the border to employment in this country without maintaining an actual United States residence. This classification, however, bestows unnecessary burdens and privileges on commuters.

The Act views immigrants as aliens coming to the United States

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U.S. cost of living forced them to return to their foreign residences and commute to work here. *Supra* note 139, at 118, 122-23.

[159] H. REP. NO. 93-461, 93d Cong., 1st Sess. 10 (1973). The report discloses that in fiscal 1972, 64,040 immigrants were admitted from Mexico.

[160] The Commuter on the United States-Mexico Border, United States Commission on Civil Rights, reprinted in *Hearings on H.R. 12667, supra* note 13, at 155. Secretary Rusk's claim that there would be severe economic effects in U.S. communities if the commuter practice was terminated is supported by figures in the DEPT. OF LABOR SURVEY. Commuters earned approximately $150 million in the U.S. during 1970. The SURVEY showed that approximately 50 per cent was spent in the U.S. *See Hearings on H.R. 12667, supra* note 13, at 180.

[161] Saxbe v. Bustos, ___ U.S. ___, 95 S. Ct. at 281 (1974).

[162] *Hearings on H.R. 981, supra* note 148, at 29.

[163] Saxbe v. Bustos, ___U.S. ___, 95 S. Ct. at 281 (1974).

desiring to become U.S. citizens.[164] The immigration quotas were established to limit the number of immigrants admitted annually.[165] Classifying commuters as immigrants subjects them on their initial entry to the limitations of the immigration quotas.[166] Such a procedure is both pointless and burdensome to aliens desiring to commute, since by definition the would-be commuter is not seeking to become a citizen. Furthermore, the result is to lower the number of visas available to other aliens who do in fact desire to become American citizens. Conversely, the same classification grants commuters certain privileges which are meaningless to them because commuters reside in their own country.[167]

One author has suggested that commuters might be classified as "immigrants, not lawfully admitted for permanent residence."[168] Such a construction would solve the problem of the unfounded privileges commuters currently enjoy. It would not, however, remove commuters from the quota requirements. The creation of a statutory classification solely for commuters would thus be a more desirable solution. The Act should be amended to define commuters as a special group of aliens who may freely enter the country on a regular basis to work in the United States.

This new commuter classification could circumvent the problems outlined previously by carefully avoiding the terms "immigrant" and "lawfully admitted for permanent residence." Conceptually, the new class could be viewed as comprised of nonimmigrants, because the aliens it would cover would have no intention of becoming citizens. The labor certification procedure under 8 U.S.C. section 1182(a)(14) should be made applicable on a commuter's initial entry, because he is competing with United States laborers. Congress should retain the right to deport a commuter who is in the country but unemployed. A possible title for this proposed category is "aliens lawfully admitted for continuing employment."

The effect of allowing commuting under the proposed classification would likely be a continuation of the existing commuter practice. The Department of Labor Survey reveals that the effect of this practice in the geographic areas where commuters are employed is lower wages and higher unemployment than in comparable areas having no commuter influence.[169] The survey concluded that commuters have a measurable adverse economic impact on the economies

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[164] 8 U.S.C. § 1427(a) (1970).
[165] SENATE REPORT, *supra* note 11, at 56.
[166] 8 U.S.C. § 1152 (1970).
[167] *See* Part IV.
[168] Note, *supra* note 93. The classification of "immigrant, not lawfully admitted for permanent residence," although not presently employed by the INS, is implied in 8 U.S.C. § 1101(a)(20) (1970).
[169] DEPT. OF LABOR SURVEY, *supra* note 139, at 143-85.

of local border communities and on the economic welfare of local resident U.S. laborers.[170] Additionally, the commuter practice interferes with efforts to organize labor in border areas. Commuters represent a steady source of both cheap labor and strikebreakers.[171] The creation of an express statutory classification for commuters will not alter these effects of the current commuter practice. It would, however, serve to relieve confusion, remove unnecessary burdens, and withhold unfounded benefits.

C. POSSIBLE LEGISLATIVE MODIFICATIONS OF THE EXISTING COMMUTER PRACTICE

As noted above, the commuter practice has a deleterious effect on American labor in border communities.[172] Termination of the practice, however, would have a severe impact.[173] Congress could modify the commuter practice so as to avoid the effect of its termination while eliminating its present harms.

In 1969, Senator Edward Kennedy introduced a bill which would have imposed restrictions on the existing commuter practice.[174] The primary feature of the Kennedy bill was an on-going labor certification procedure. Every six months, the Secretary of Labor would have had to recertify that each commuter's employment would not adversely affect the wages and working conditions of United States laborers. Presently, commuters receive certification only on their initial application for a visa.[175]

Additionally, the Kennedy bill would have instituted a minimum wage scheme.[176] The procedure would have required a border labor board to determine the wage level at which employment of commuters begins to constitute unfair competition to United States workers. That level would have been designated the "adverse effect wage." Anyone who employed a commuter below that adverse effect wage would violate the law. The Department of Labor Survey argues that the combined effect of the on-going labor certification and the adverse effect wage would be an affirmative step toward removing any unfair competitive advantage which the commuter possesses.[177]

It has been suggested that the Kennedy bill, like the Ruttenberg-

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[170] *Id.*
[171] Statement by William L. Kircher, Director of Organization, AFL-CIO, *Hearings on H.R. 12667, supra* note 13, at 5-6.
[172] DEPT. OF LABOR SURVEY, *supra* note 139, at 143-85.
[173] *See* note 163.
[174] S. 1694, 91st Cong., 2d Sess. (1969). The bill was referred to the Senate Committee on the Judiciary. As proposed, it would have applied to all commuters, both existing and future.
[175] 8 U.S.C. § 1182(a)(14) (1970).
[176] S. 1694, 91st Cong., 2d Sess. (1969).
[177] DEPT. OF LABOR SURVEY, *supra* note 139, at 236.

Scammon Plan, might have fostered a mass migration.[178] The argument assumes that commuters would simply establish a residence in this country rather than face the continuing recertification. No empirical evidence to either substantiate or discredit this argument is available.

Presently, the United States Attorney General has the authority to deny admission to commuters desiring to work at a site where the Secretary of Labor has declared that a work stoppage is in progress.[179] This procedure was designed to prevent the use of commuters as strikebreakers. Labor leaders have criticized the procedure as inadequate.[180] Commuters can evade the procedure simply by lying to the INS officials about their place of employment. Commuters found working on the premises in question can be deported, but by the time this is accomplished the strike may effectively be broken.[181] Legislation making liable those employers who hire commuters as strikebreakers would likely be a more effective remedy,[182] notwithstanding that this may encourage employers to hire U.S. citizens as strikebreakers.

The considerations of this section have largely been ones of general public policy. The discussion has raised issues of economics, social policy and international relations. With its resources for research and procedure for deliberation, only Congress can effectively consider such issues. The courts, approaching problems on a case-by-case basis, are ill-equipped to deal with matters such as the commuter practice. Only through decisive and deliberate Congressional action will the issues raised here be resolved with finality.

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[178] Note, *supra* note 26, at 1772.
[179] 8 C.F.R. § 211.1(b) (1975), issued pursuant to 8 U.S.C. § 1103(a) (1970). *See also* Cermeno-Cerna v. Farrell, 291 F. Supp. 251 (C.D. Cal. 1968) and Sam Andrews' Sons v. Mitchell, 457 F.2d 745 (9th Cir. 1972).
[180] *Hearings on H.R. 12667, supra* note 13, at 5-6.
[181] *Id.*
[182] Such a bill was proposed in 1969 by Rep. Frank Thompson, H.R. 12667, 91st Cong., 1st Sess. (1969).