



# **IMMIGRATION:**

## **PROCESS AND POLICY**

### **Third Edition**

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And for Cyndy, Amy, and Jeff*

*To the Motomuras, Sakumas, Kishis, and Katos  
And for Linda and Amy*

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## Preface to the Third Edition

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"Immigration is an issue you can hardly mention without having steam coming out of people's ears."<sup>1</sup> So wrote David Broder, one of America's foremost political commentators, in October 1994. Anyone who followed the news during the 1994 elections, particularly the news from California, knows what he is talking about. The political climate now could hardly be more different from early 1991, when we finished work on the second edition. Congress then had just enacted a major revision of the immigration laws, the Immigration Act of 1990. Among many other changes, that legislation increased the level of annual legal immigration by a few hundred thousand. The bill excited little public debate or focused commentary in the United States, even though the increase ran sharply against a global tide of restrictionism then gaining force. Our challenge in writing that edition was to provide a vehicle for understanding an unnecessarily complex new law and the policies it embodied, at a time when many of the implementing regulations were not in force.

By 1994 it seemed that political debaters were trying to make up for the lack of public discussion—or simple lack of volume—that surrounded the 1990 changes. California, suffering more than the rest of the country from recession, but also the home to more immigrants, both legal and illegal, than any other state, blazed the trail. Proposition 187 presented its voters with a direct opportunity to vote on measures that would crack down on illegal migration (or so it was argued), by denying to undocumented aliens most state services, including even elementary education, and by requiring state officials to check the immigration status of virtually all their clientele. Some politicians called for a constitutional amendment to deny birthright citizenship to children born in this country of undocumented alien mothers. Members of Congress joined in with proposals to impose a moratorium on immigration or to slash admission levels permanently. Opponents denounced these measures, from the left, as discriminatory scapegoating, and sometimes from the free-market right as unrealistic restrictions in a world of tighter interdependence where goods and capital already move with few hindrances across national borders. Proposition 187 nonetheless passed with nearly 60 percent of the California vote; implementation was immediately stayed by litigation challenging its constitutionality. The Constitution remains intact, as do the immigration levels established in 1990, but these issues will probably figure prominently in the 104th Congress and indeed in the 1996 elections. And Congress and the President have both supported steep increases in the budgets of the immigration agencies, in order to respond more directly to the challenge of controlling illegal migration.

Meantime, two of the country's most serious foreign policy crises centered on migration—the boat migrations from Haiti and Cuba. The former was largely resolved, at least for the time being, by a massive U.S. military

1. Broder, *Immigration: 'Time for Reason and Logic,'* Wash. Post, Oct. 4, 1994, at A17.

intervention in Haiti, under UN authority. The Cuban raft flow brought an end to the open-door policy for all Cubans who escaped the island, a policy that had lasted 35 years and had defied the Cold War's demise for a half-decade. It also launched the United States on a new and untested scheme for increased legal migration from Cuba, including a guaranteed minimum of 20,000 admissions per year. But both solutions left open new questions about the use of offshore "safe havens" of the kind still in operation at the U.S. naval base at Guantanamo.

In short, immigration is no longer a stepchild of policy analysis (indeed, migration is increasingly counted as a legitimate issue of high politics by national security scholars and analysts), and it commands increasing attention in the law schools. None of these developments have made the policy questions easier to resolve, of course, but they have produced an abundance of new practice and new analysis upon which we draw extensively here. For example, Section 3C, which examines the issue of undocumented migration, has been completely rewritten and significantly expanded, including analysis of Proposition 187. Chapter Eight takes account of the Cuban and Haitian cases and of new asylum regulations that went into effect in early 1995, as well as the increasingly salient issue of gender-based claims to refugee status. We have also tried throughout the book to incorporate expanded attention to the treatment of aliens after admission—both constitutional doctrine and ongoing legislative policy changes. Thus we discuss such cases as *Graham v. Richardson*, *Mathews v. Diaz*, *Cabell v. Chavez-Salido* and *Plyler v. Doe* in Chapter Three and often refer to these issues elsewhere. And of course we are now able to present the 1990 statutory changes in the full light cast by the implementing regulations and four years of operation. Comparable updating, covering both case law and policy, will be evident in each of the chapters.

For this edition of the casebook, the two veteran authors are also pleased to welcome a new collaborator, who has brought a fresh perspective and a remarkable level of energy to the task. This change proved quite timely, because just as we were considering that expansion of the team, Alex Aleinikoff joined the ranks of the Immigration and Naturalization Service as its General Counsel. As a result, he has played only a minimal role in the preparation of this volume, and is certainly not to be held accountable for the editorial comments, speculations, or argumentative questions included in these materials. *A fortiori* the traditional disclaimer applies with full force: opinions expressed or implied here are not to be taken as representing the views of the INS or the U.S. government.

Most of our work on the book was completed in December 1994. We have found it possible, however, to incorporate brief mention of a few later developments, through February 1995. The casebook is designed to be used with an accompanying supplement containing relevant statutes, treaties, regulations, and forms.<sup>2</sup>

**2.** Immigration and Nationality Laws of the United States: Selected Statutes, Regulations and Forms (T. Aleinikoff, D. Martin, & H. Motomura eds., West Publishing Co., 1995 ed.). Updated statutory supplements are expected as legislative changes warrant.

*Acknowledgments.* Again we express our gratitude to colleagues who have provided support and suggestions, either as users of the book or as inspired analysts of the immigration scene. At the risk of overlooking some we should cite, we would mention Deborah Anker, Lenni Benson, Carolyn Patty Blum, Linda Bosniak, Michael Churgin, David Cole, Joan Fitzpatrick, Maryellen Fullerton, Lucas Guttentag, Susan Gzesh, Michael Heyman, Stephen Legomsky, Gerald Neuman, Michael Olivas, Juan Osuna, Maurice Roberts, Paul Schmidt, Peter Schuck, Peter Spiro, Margaret Taylor, Ibrahim Wani, Leon Wildes, and Stephen Yale-Loehr. Much-appreciated research assistance was provided by Tracy Ashmore, Craig Barber, Jackson Boggs, Charles Brower, Melissa Decker John Griffin, Julie Murray, and Judith Smith. And we owe a continuing debt of gratitude to those who helped us in typing manuscripts and correcting drafts: Marjorie Brunner, Cynthia Carter, Anne Guthrie, Barbara McLean, Marian Ryerson, Vanessa Smith, and Kay Wilkie.

ALEX ALEINIKOFF  
DAVID MARTIN  
HIROSHI MOTOMURA

April 1995

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## Preface to the First Edition

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For decades, immigration and nationality law has been something of a neglected stepchild in the law schools. Most schools offer no immigration course at all. Where courses exist, they typically focus on the practical business of learning a complex statute and preparing students for careers as immigration attorneys, often finding little time to devote to larger issues of policy and principle.

Immigration law has suffered from the lack of sustained academic attention. All too often, instead of measured policy debate, one encounters in this field merely the polarized confrontation of charge and counter-charge: government supporters reflexively advocating a hardline response; government opponents reflexively assuming that maximum advocacy for the particular aliens involved will bring about the best public policy. We don't deny that the issues are the kind that stir—and ought to stir—deep feelings. But we believe there is far more room for careful and balanced study of long-term policy options, even among those who care passionately about the ultimate values at stake. Law schools should serve as one important forum for such exploration.

As law students, we too enjoyed little exposure to the subject. Later, during stints in government service in Washington, each of us found himself dealing occasionally with immigration matters, but we discovered our mutual interest in the subject only when the Cuban boatlift of 1980 brought lawyers from the Departments of Justice and State together. There is nothing like a full-fledged crisis—especially one offering no satisfactory solutions—to cement an appreciation of the subject's fascinations and frustrations. We carried that interest with us when we moved into the academy, along with vague intentions to teach immigration law, but with little idea of just what was in store.

Now, after teaching and writing in the field for several years, we have come to wonder how the intrinsic attractions of the subject for classroom teaching have gone so widely unnoticed. Immigration law, we have learned, can be one of the richest and most rewarding subjects for both students and professors. It is redolent of our national history, reflecting both successes that are the legitimate source of national pride, and dispiriting failures. Major public policy issues appear repeatedly, posing deeper questions concerning national identity, membership, moral philosophy, constitutional interpretation, public law, public administration, international relations, and the limits of practical politics. Immigration law also furnishes a vital setting for studying the interaction of our three branches of government. Indeed, we have been struck by how many major Supreme Court decisions on larger questions of administrative and constitutional law have been decided in immigration cases—the legislative veto case, *INS v. Chadha*, 103 S.Ct. 2764 (1983), being only the latest example.

An immigration course, however, need not always keep the student at the heights occupied by great questions of philosophy, public policy, and constitutional interpretation. Immigration law also provides a worthy vehicle for refining basic lawyering skills, especially the capacity for close reading of an intricate statute and the discipline of mastering a specialized technical vocabulary. One judge who had just struggled through a complex interpretive task reflected on his experience:

Whatever guidance the regulations furnish to those cognoscenti familiar with [immigration] procedures, this court, despite many years of legal experience, finds that they yield up meaning only grudgingly and that morsels of comprehension must be pried from mollusks of jargon.

*Dong Sik Kwon v. INS*, 646 F.2d 909, 919 (5th Cir.1981). Students ought to learn how to wield their *escargot* forks expertly, and then they should be inspired to ask whether the food could not be prepared in a more sensible way.

Beyond this, the student of immigration law must develop an awareness of how legislation evolves and an ability to make use of the materials of legislative history—for today's Immigration and Nationality Act (INA) is the product of over a hundred years of congressional efforts to fashion laws that regulate immigration. There are also thousands of administrative and judicial precedents, often in remarkable conflict with one another in both holding and spirit. These provide excellent raw materials for practice in the art of advocacy, hypothetically representing either a private client or a government agency.

There may be many reasons for immigration law's historical insularity. But we wrote this book with the conviction that a lack of good teaching materials has played a role--materials with which nonspecialists might feel comfortable but which specialists might also find challenging. (In this respect, we remember well our own problems when we first taught the course.) When we began our work on this book, there was no casebook at all on the subject of immigration law. Treatises existed, and various kinds of manuals that have been used as the basis for the course by practitioners of many years' experience. But it is a daunting prospect for nonspecialists to put together workable supplemental materials on their own, especially if they aspire to teaching more than just the technical details.

We hope this book will contribute toward ending the law schools' neglect and the subject's insularity. We have consciously sought to make the reader aware of the broader dimensions of the subject, but without ignoring the nuts-and-bolts foundation that a novice practitioner in the field would find necessary. We don't spend time, for example, exploring all 19 grounds for deportation appearing in INA § 241(a). We do devote enough attention to selected grounds, however, as well as the basic structure of those provisions, so that a student would know where to turn for answers to the detailed questions that might arise in practice. We have aimed, above all, at recapturing immigration law as a worthy and exciting area for academic

study, without losing sight of the basic learning a student must master if he or she chooses to open an immigration practice the following year. Whether we have succeeded in these aims remains to be seen, but we invite users of this book—instructors and students—to write us with their reactions and suggestions for expanded or reduced coverage.

We have also consciously tried to avoid the polarities that often beset the field. It is easy to develop sympathy for the individual alien involved in a particular case, and to strive to mold the legal doctrine to bring about a warm-hearted result for that person. Too many law review notes, and often judges as well, succumb to this temptation, neglecting to take adequate account of the long-term implications for an immigration system that must cope with millions of applications each year. We try to keep the reader aware of that larger systemic perspective—without suggesting that systems should always prevail over warm-heartedness, of course.

\* \* \*

ALEX ALEINIKOFF  
DAVID MARTIN

November 30, 1984

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# Technical Matters

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## EDITING STYLE

In editing cases and other materials reprinted here, we have marked textual deletions with asterisks, but we have often omitted simple citations to cases or other authorities without any printed indication. Similarly, we have deleted footnotes from reprinted materials without signalling the omission. Where we chose to retain a footnote, however, we have maintained the original numbering. Our own footnotes appearing in the midst of reprinted materials are marked with alphabetical superscripts; they also end with the notation “—eds.” When we drop footnotes to text that we wrote ourselves, we have used the ordinary numerical designations.

## INA CITATIONS

How to cite the sections of the Immigration and Nationality Act (INA) posed a special problem. Most—but not all—court decisions refer to INA provisions by means of the numbers employed in Title 8 of the U.S. Code, where the Act is codified. This is understandable, even though the system used to translate Act numbers into U.S. Code numbers strikes us as eccentric and unpredictable. But specialists in the field almost religiously employ the INA section numbers and would be mystified at references to the U.S. Code enumeration.

We decided ultimately to use the section numbers of the Act consistently throughout this book, to the exclusion of the U.S. Code numbers—and not only because we expect our readers to count themselves as specialists before they are finished. The administrative framework for regulations and Operations Instructions is intimately linked to the numbering scheme of the original Act. For example, regulations implementing the exclusion provisions, § 212 of the INA, appear in Part 212 of 8 C.F.R. Operations Instructions are similarly coded. Anyone even minimally active in the field therefore will profit from acquaintance with this fundamental numbering scheme.

Consequently, to avoid confusion, we have excised references to the Act using the U.S. Code numbering system from all cases and materials, and substituted direct INA section references, without expressly indicating where such substitutions have occurred. Readers who must know the corresponding U.S. Code number will find a conversion chart below.

## ABBREVIATED CITATION FORMS

Most citations in the book conform generally to *A Uniform System of Citation*, customarily used by law journals. For a few items that are cited frequently, however, we have abbreviated even further.

### GM & Y

C. Gordon, S. Mailman, and S. Yale-Loehr, *Immigration Law and Procedure* (rev. ed. 1995). (The leading

treatise in the field, available now as a 12-volume looseleaf set, including five volumes containing primary materials [INA, regulations, Operations Instructions, etc.]

**IMFA** Immigration Marriage Fraud Amendments of 1986, Pub.L. No. 99-639, 100 Stat. 3537.

**INA** The Immigration and Nationality Act. (Passed in 1952, Pub.L. No. 82-414, 66 Stat. 163, as a comprehensive codification replacing earlier immigration and nationality laws, and frequently amended since then. The Act itself is codified, according to an idiosyncratic numbering scheme, in Title 8 of the United States Code; a conversion chart, showing corresponding section numbers, appears below. We cite by INA section number, *not* U.S.C. section number, to the current amended statute.)

**IRCA** Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359.

**INS Statistical Yearbook**

United States Department of Justice, Immigration and Naturalization Service, Statistical Yearbook of the Immigration and Naturalization Service.

**Interp.Rel.** Interpreter Releases. (The leading reporting service on administrative, legislative and judicial developments in the immigration field. It is published weekly by Federal Publications, Inc.)

**1990 Act** Immigration Act of 1990, Pub.L. No. 101-649, 104 Stat. 4978

**O.I.** Operations Instructions. (The manual of detailed guidelines and policy statements issued by the Immigration and Naturalization Service and used by immigration officers in implementing the statute and the regulations. Those Instructions which have been released to the public are reprinted in Volume 9 of the GM & Y treatise.)

**SCIRP, Final Report; SCIRP, Staff Report; SCIRP, Appendix A, etc.**

Select Commission on Immigration and Refugee Policy (SCIRP), U.S. Immigration Policy and the National Interest, Final Report and Recommendations (1981); *id.*, Staff Report, Supplement to the Final Report and Recommendations of [SCIRP]; *id.*, Appendix A to the Staff Report, etc. (The Select Commission, composed of four public members, four Cabinet officers, four Senators, and four Representatives, was chartered by statute in 1978. Act of October 5, 1978, Pub.L. No.

95-412, 92 Stat. 907. Each lettered appendix to the staff report was published as a separate volume; the appendices represent important compilations of research materials on the specific subject to which the volume is dedicated.)

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