



## My Year of Living Dangerously

"Of course I will write a column about my time as chief counsel to the Citizenship & Immigration Service in Washington, DC," I told Editor Tim Eigo a few weeks ago. Happy to be invited back to the last page of the *Arizona Attorney*, I thought I could bang something out in a few hours.

Wrong. A few hours and many drafts later, my keyboard was smoking, and I was writing things that sounded like I had morphed into George Carlin with Tourette's. I didn't even know I knew those words! What was going on? Where had that anger come from?

I mostly enjoyed my stint in federal government. After all, I worked for the Secretary of DHS, whom I have known and admired for more than a quarter century, in an area in which I have 40 years of policy, academic and legal experience. And I was tucked into the niche of U.S. immigration law that I had most focused on: the conferring of benefits. Although CIS is the runt of the immigration litter (ICE and CBP have the major funding, coveted designation as law enforcement agencies, and broad support for the way they wield hammers on immigrants), I knew many ways it could still do good.

In summer 2009, I went in with an agreement that I would spend most of my time on policy but also run the crackerjack CIS law section, known as the Office of Chief Counsel, or OCC. There is no finer group of immigration lawyers in the country, period.

But I returned in January 2011, sadder and angrier. What happened? The same thing that happened to so many Americans—dismay at a Congress that too often refused to do any work at all and disappointment in an Administration that spent all its energy on health care reform, however essential, while so many other crises, including immigration, needed leadership.

Legislative irresponsibility and the lack of executive leadership made people very cranky (*see* the 2010 midyear elections). The neglect in the field of immigration has been so acute that most who care about that hot topic have lost hope change could happen. "*Si se puede*" now looks more like "*No me molesta*."

Forget that Comprehensive Immigration Reform (CIR) died a premature death last spring. Charles Schumer and Lindsay Graham, two heavy hitters, refused even to introduce the modest CIR legislation, drafted largely by DHS, because they were unable to get a single other Senator to sign on. Leadership, anyone?

The White House was mostly MIA, with attention so glued to other matters that even a rousing march to the Capitol by Dream Act kids and thousands of advocates merited no real action. Indifference, anyone?

And CIS stayed underground, armed with bureaucratic plans and a PR machine rather than visionary policy statements or practical field directives that would move us forward. Timidity, anyone?

However, not everyone stood down. CBP and ICE went into overdrive to detain more people, remove more people, and exercise less discretion than at any time in our nation's modern history. Progressive became regressive, and the prom-

ised helping hand had a serious slap to it. When advocacy groups questioned this 180-degree pivot from the campaign, they were told that no reform would be politically feasible until the anti-immigrant politicians were convinced that this Administration was tough on immigration. Not a good strategy. The groups who hijacked the immigration conversation will never be appeased. And reform by increased enforcement was hardly the campaign promise. Duplicity, anyone?

So how does this wave of disappointment play out on the most vulnerable immigrants? Painfully and cruelly. Here are two examples.

A year ago, Haiti was flattened by a cataclysmic earthquake that buried an already battered people. Today, not much has changed; Haiti remains a dangerous wasteland.

At first, the immigration agencies and DHS were responsive, evacuating and assisting those in terrible need. The Secretary masterfully kept the many parts—Coast Guard, FEMA, TSA, CBP, ICE and CIS—oiled and moving quickly. All spring, CIS spoke publicly to reassure the traumatized Haitian communities that it would treat requests for benefits and discretionary relief with a "generous and open heart." Well, somebody must have had a heart transplant, because very soon it was back to business as usual.

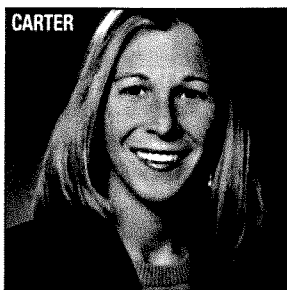
A year ago, we told Haitians we would suspend deportations. We were clear that sending men, women and children who have committed no violent crime—often no crime at all—into a country in which rape, illness and violence are rampant was not good policy. But in the middle of January, in the midst of a cholera epidemic, deportations to Haiti resumed. Daily, we send hard-working people to Dante's hell, and no leader in the Administration even seems embarrassed, much less angry or sad.

A year ago, we agreed to Haiti's request for humanitarian Temporary Protected Status (TPS) for its citizens. Unfortunately, due in part to State Department and CBP errors, thousands of Haitians were admitted after the tragedy as tourists rather than as humanitarian parolees. To correct our own error

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*Roxie Bacon*  
Roxie Bacon is currently spending a great deal of time in her backyard, staring at the orange trees, and refusing to read the news. When she emerges from PTSD, she will be writing and teaching. And she is a former President of the State Bar of Arizona.

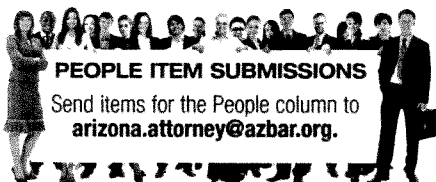


She is a member of the firm's Commercial Litigation group.

Richard J. Pocker passed the July 2009 New York State Bar Examination and was admitted to practice in New York in May 2010. He is the Administrative Partner for the Nevada office of New York-based Boies, Schiller & Flexner LLP.

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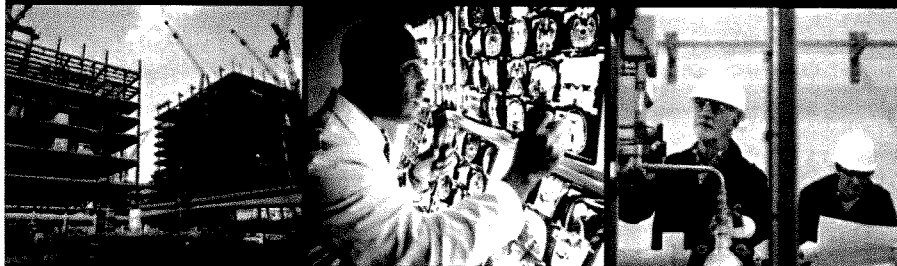
## THE LAST WORD

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and bring these innocents into the TPS safety net, DHS must redesignate the date of eligibility forward a few months—a simple stroke embraced by literally every advocate voice and much of Congress. It is exclusively an executive-branch decision, and Administrations in both parties have redesignated TPS for desperate countries more than five times in the 20 years TPS has been around. But, because not everyone wants to support these Haitians' cry for help, this Administration has refused to act. Instead we send people, mostly poor and unprotected, into a nightmare of deprivation and cruelty.

The second example strikes a distinctly southwestern chord. Remember the Dream Act, the decade-old proposal that would let the best and brightest of our undocumented youth legalize their long-term commitment to and lifetime residence in the only country they know, in exchange for proving their good character and

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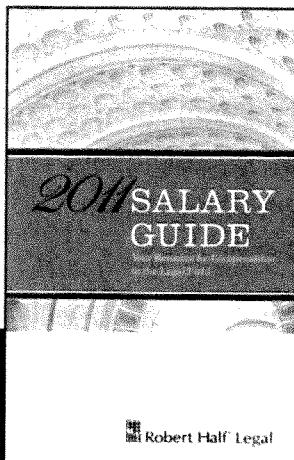
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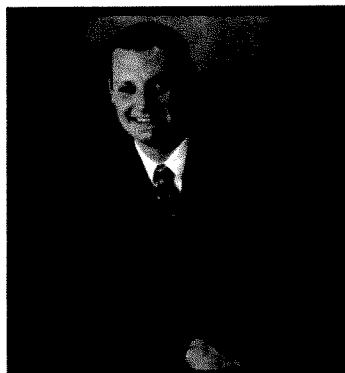
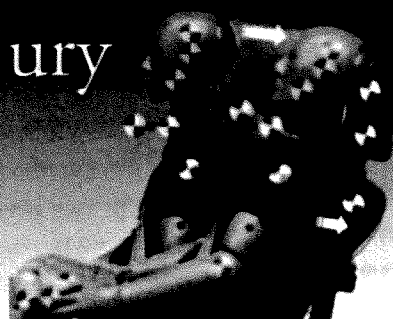
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## THE LAST WORD

performing national service? These are not people who deliberately "broke the law"; they were brought here as infants and children. Punishing them is like jailing a one-year-old for not wearing a seatbelt.

Well, last fall the Senate voted down that modest piece of legislation, even though, privately, almost every Senator agrees that an educated next generation of leaders is best for the country. When our elected representatives deprive our most talented Latino students of access to higher education, states like Arizona are hit the hardest. What future can we have without the economic prowess and social stability that come from an educated population? Even the most reactive voices acknowledge that the Dream Act kids cannot all be deported; rather, almost all will stay here. The only issue is whether we set them up for failure or maximize their contribution. Remarkably, we opted for failure.

We need visionary thinking and incisive analysis grounded on economic truths to create the functioning immigration policy the nation needs. None of this is likely to come from this Congress, or from this Administration. Some of this must come from emboldened advocates, who stand up to meanness and indifference in the face of human pain and need, and from inventive lawyers representing them.

I look to the states as the logical and most invested laboratories to sort through the complications inherent in deciding what a vital and secure immigration law should look like. I look also to the courts to ensure that due process and fundamental fairness are always included in the operation of our immigration laws.

Having seen U.S. immigration from the 30,000-foot level, I know that DC's collective ostriching is not a viable strategy. The reasons—demographic, national security and economic—are all around us. □

## APPELLATE HIGHLIGHTS

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precluding the state from presenting voice-recognition testimony at trial for foundational purposes where the witness had monitored, translated and transcribed numerous telephone conversations during a wiretap investigation, was familiar with the defendants' voices and was able to identify them individually as the same voices recorded in subsequent law enforcement interviews and jail-house telephone calls. It is well established that transcripts and recordings of telephone calls are admissible at a criminal trial when properly authenticated. Under Rule 901(b)(5), "Examples of authentication or identification conforming with the requirements of the rule" include voice identification "whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker."