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INS v. Phinpathya: Literalist Statutory Interpretation in the Supreme Court

ELEANOR PELTA*

In INS v. Phinpathya, the Supreme Court interpreted the seven-year continuous presence requirement for suspension of deportation as a condition which allows for no interruptions whatsoever. This Article focuses upon Phinpathya in order to highlight the difficulties inherent in both literalist statutory interpretation and the use of "legislative intent." The author first presents a case history of the suspension statute which demonstrates the radical departure represented by the Phinpathya interpretation. Next, the author analyzes the reasoning of the Phinpathya Court, concluding that the Court's approach drains the presence requirement of substantive policy content. The author then proposes an alternate mode of interpretation which would enlarge the realm of sources upon which a court could draw in interpreting a statute, in order to uncover and give actual effect to the statutory policy. Finally, the author explores the post-Phinpathya possibilities for interpretation of the presence requirement.

INTRODUCTION

INS v. Phinpathya,1 a 1984 Supreme Court decision, represents a reversal of over twenty years of jurisprudence interpreting the requirement that an alien seeking suspension of deportation2 must

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show a continuous physical presence in the United States of not less than seven years. Prior case law which considered the requirement had developed a “meaningful interruption” standard in the assessment of an alien’s absences during the required period of physical presence. Simply stated, an absence during the seven year period was not considered interruptive if it did not signify a decrease in the hardship likely to be suffered by the alien upon deportation. In INS v. Phinpathya, however, Justice O’Connor, writing for the Court, stated that the legislative intent of the suspension statute, expressed by its “plain meaning,” required a strict application of the continuous physical presence requirement, allowing for no absences whatsoever.

The fundamental premise of Justice O’Connor’s approach to the construction of section 244(a)(1) of the Immigration and Nationality Act (INA or “the Act”) in Phinpathya expresses itself in her reference to Jay v. Boyd, an older Supreme Court decision regarding the interpretation of the suspension statute. Justice O’Connor asserts: “We do justice to [Congress’] scheme only by applying the ‘plain meaning of [section 244(a)], however severe the consequences.’” That Justice O’Connor should look to Jay v. Boyd for support in her literalist style of statutory interpretation casts a telling sidelight upon the overall tenor of the Phinpathya case. In Jay v. Boyd, the Supreme Court upheld the denial of suspension of deportation to Cecil Reginald Jay, a resident since 1914, who had been a member of the Communist Party from 1935 to 1940. The Court found that a regulation granting the Attorney General the right to base his suspension decision upon information undisclosed to the alien was not inconsistent with section 244, which, Jay had argued, implicitly required a hearing:

There is nothing in the language of Section 244 of the Act upon which to

163 [hereinafter cited as INA].
3. 464 U.S. at 188.
4. Section 244(a)(1) of the INA provides:
As hereinafter prescribed in this Section, the Attorney General may, in his discretion, suspend the deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation . . . is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence . . . .
base a belief that the Attorney General is required to give a hearing record with respect to the considerations which may bear upon his grant or denial of an application for suspension to an alien eligible for that relief.7

Jay v. Boyd may indeed have seemed a proper model for the Phinpathya decision, for the Court confines itself solely to the literal language of section 244 to determine the appropriateness of the confidential information regulation, implicitly discarding all other avenues of justification or re legitimization. Moreover, Jay v. Boyd was decided during an era when Supreme Court decisions were characterized by the presence of “sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason . . . . ”8

Opinions characterized by a tone of flat assertion rather than careful deliberation are not a surprising result when a court feels compelled to restrict itself to the literal language of a statute to produce a just construction. Although in Phinpathya Justice O’Connor moves out of the confines of the words of section 244(a)(1) in examining the statute’s legislative history, it is only to justify her theory that Congress’ literal language is the best evidence of its intent.9 In a time when this literalist mode of interpretation seems to characterize much of the Court’s statutory reasoning, one may justifiably wonder whether a return to the age of Jay v. Boyd has been signaled. This question warrants a critical analysis of the interpretive methodology of the Phinpathya decision as well as an investigation of its broader ramifications for the respective roles of the Court and Congress.

This Article explores several significant questions raised by the Court’s literalist interpretation of the continuous physical presence requirement in the suspension statute. The first section is a review of the case history which led up to the Phinpathya decision; it follows the development of the “meaningful interruption” standard, and demonstrates the reversal represented by Phinpathya. The following section is a critical analysis of the Phinpathya opinion, focusing upon the “clear statement” model of interpretation, and upon the use of legislative history and statutory analogy. What are the purposes

9. See Phinpathya, 464 U.S. at 189. The uses and abuses of legislative history to show clear intent are discussed infra at text accompanying notes 54-80.
served by the literalist approach in *Phinpathya*? What are its deficiencies? What substantive policy is effected by the strict interpretation of this aspect of the suspension statute? Does strict statutory interpretation implement the legislative will, or ignore it? The analysis of this section demonstrates that confining a statute to its literal meaning at the time of enactment is not reflective of legislative values, but rather of the mind of the legislature frozen at a particular point in time. The Court's mode of interpretation ignores the judicial development of suspension of deportation and obscures the substantive content of the physical presence requirement. In this, it actually neglects the legislative policy behind the statute, while asserting that it is following the legislative will.

The third section of the Article proposes an alternate model of interpretation—the "common law" approach—as envisioned by Guido Calabresi in *A Common Law for the Age of Statutes*.

After a short description of the approach, factors are enumerated which the Court might have implemented had it treated the suspension statute in the way courts treat common law doctrines. The *Phinpathya* decision, this Article contends, would have better reflected present-day majoritarian values if it had analyzed the suspension statute as a principle from which one might draw a policy conclusion through examination of legislative, common law, and administrative statutory evaluation. The Article concludes by evaluating the aftermath of *Phinpathya*: exploring the actual scope of the decision, the effect of the Court's interpretation upon application of the suspension statute as a whole, and the legislative response to the decision.

THE HISTORY OF THE PHINPATHYA DECISION

Suspension of deportation originated as a humanitarian exception to the severity of the deportation statute in the 1917 Immigration Act, which had provided no remedy for the deportation of any alien illegally present in the United States. Over the years, since its initial integration in statutory form into the body of immigration laws in 1940, suspension of deportation has evolved into an avenue of discretionary relief for aliens of good moral character who have been living in the United States for seven years or more, and have developed familial roots and community ties such that deportation would create an extreme hardship for them or their families. Whereas section 208 (Asylum Procedure) and section 243(h)

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13. See Villena v. INS, 622 F.2d 1352 (9th Cir. 1980).
(Withholding of Deportation) of the INA provide relief for aliens fleeing countries where they were, or would be, persecuted, the suspension remedy assists those aliens in illegal status whose reasons for remaining in the United States are related not primarily to a condition in their mother country, but to the degree of their settlement into a permanent life in American society.

In recent years, the requirement of section 244(a)(1), that an alien seeking suspension must establish that he has been physically present for a continuous period of seven years, has been interpreted liberally by several circuit courts as well as by the Board of Immigration Appeals (BIA) in response to changes in the interpretation of the “entry” doctrine of section 101(a)(13). This liberal interpretation of the seven year presence requirement allows for absences which would not amount to an abandonment of the alien’s commitment to a permanent life in the United States. In order to understand the basis for the generous construction of section 244(a)(1)’s continuous physical presence requirement, it is necessary to explore the evolution of the “entry” doctrine.

Before Congress enacted the INA in 1952, courts had developed a strict definition of “entry” which had severe consequences for aliens of legal status in the United States who, after an absence, were found excludable upon return. In *United States ex rel. Volpe v. Smith*, the Supreme Court upheld the deportation of an alien who, after twenty-four years of legal residence, was found excludable upon return from a trip to Cuba. The court ruled that “the word ‘entry’ . . . includes any coming of an alien from a foreign country

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The term “entry” means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntary or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or outlying possession was not intended or reasonably expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: Provided, That [sic] no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

into the United States whether such coming be the first or any subsequent one. In 1947, two judicial opinions, one in the Second Circuit and one in the Supreme Court, recognized the harsh effects of the entry definition formulated in *Volpe*. In *Di Pasquale v. Karnuth*, Judge Learned Hand refused to permit the deportation of an alien who rode a sleeping car from Buffalo to Detroit without the knowledge that the route of the train passed through Canada. In holding that the alien did not “enter” upon his return from Canada, Judge Hand commented: “We cannot believe that Congress meant to subject those who had acquired a residence, to the sport of chance, when the interests at stake may be so momentous.”

In *Delgadillo v. Carmichael*, an alien had originally entered the United States legally but after a ship he was aboard had been torpedoed, had been rescued and taken to Havana. The Immigration and Naturalization Service (INS) sought to deport him for a crime of moral turpitude within five years of his last “entry,” his return from Cuba. The Supreme Court stated:

> If . . . his return to this country was an “entry” into the United States within the meaning of the Act, the law has been given a capricious application . . . . We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized. The hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme.

In adopting section 101(a)(13) in 1952, Congress discussed the specific limitations on the entry doctrine by the *Di Pasquale* and *Delgadillo* cases, cited those cases by name, and ultimately accommodated those decisions. Section 101(a)(13) provides that an alien has not “entered” when he can prove to the Attorney General that his departure from the United States was “not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary.”

In 1963, the Supreme Court, in *Rosenberg v. Fleuti*, held that the exceptions to the definition of “entry,” created with *Di Pasquale* and *Delgadillo* in mind, should be read nonrestrictively. Thus, “in-

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20. *Id.* at 425.
21. 158 F.2d 878 (2d Cir. 1947).
22. *Id.* at 879.
24. *Id.* at 390-91.
tent” for the purpose of section 101(a)(13) means “an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien’s permanent residence.”\textsuperscript{29} If an alien’s voluntary and knowing absence from the United States is “innocent, casual and brief,”\textsuperscript{30} as the Court found in the case of Fleuti’s afternoon trip to Mexico, it is not “meaningfully interruptive” of his presence in the United States, so as to label his return an “entry” for the purposes of possible exclusion.

Additionally, the Court in Fleuti enumerated several factors which are relevant to the determination of whether the alien actually intended to depart in a “meaningfully interruptive” manner: the length of the absence, the purpose of the trip (whether the object of the trip was in violation of United States immigration law), and whether the alien had to procure travel documents, indicating consideration of the possible immigration consequences of departure.\textsuperscript{31}

In 1964, the Ninth Circuit applied the reasoning in Fleuti to an alien’s absence during the seven year period of continuous physical presence required for eligibility under section 244(a)(1). In Wadman v. INS,\textsuperscript{32} the court found that the significant issue is not whether there was an absence in the period of presence required. Rather, the question is whether the interruption, viewed in balance with its consequences, can be said to have been a significant one under the guidelines laid down in Fleuti.\textsuperscript{33} Moreover, the court in Wadman found that a rigid construction of section 244(a)(1) would be inconsistent with the statute’s remedial purposes, because the apparent purpose is to “ameliorate hardship and injustice.”\textsuperscript{34} The court added:

A strict and technical construction of the language in which this grant of discretion is couched could frustrate its purpose. A liberal construction would not open the door to suspension of deportation in cases of doubtful merit. It would simply tend to increase the scope of the Attorney General’s review and thus his power to act in amelioration of hardship.\textsuperscript{35}

In Wadman, the court did not comment specifically upon the effect of, and the limits upon, a generous reading of “continuous physical presence” except to suggest that the determination of a meaningful interruption should be guided by the factors set out in

\textsuperscript{29} Rosenberg, 374 U.S. at 462.
\textsuperscript{30} \textit{Id.} at 461.
\textsuperscript{31} \textit{Id.} at 462.
\textsuperscript{32} 329 F.2d 812 (9th Cir. 1964).
\textsuperscript{33} \textit{Id.} at 816.
\textsuperscript{34} \textit{Id.}
\textsuperscript{35} \textit{Id.} at 817.
Fleuti. Recent cases, however, have developed the principle that the significance of the absence regarding the eligibility of the alien for suspension depends upon the effect of the absence on the "extreme hardship" resulting from deportation. In Heitland v. INS, the Second Circuit suggested that the continuous physical presence requirement is a factor in determining whether deportation would work severe hardship upon the alien, and that this purpose should be taken into account in assessing the significance of the absence:

[Deportation of an alien who had accumulated seven years of fragmented residence in the United States, interrupted by frequent or long absences abroad, would not be expected to work as much hardship upon him as might result if he had resided in this country for an unbroken seven-year period, since the latter might reduce the likelihood of his being able to establish his home elsewhere. The statute surely was not designed to protect the wanderers or the rootless . . . . On the other hand, to deny a person the benefits of seven years' continuous residence because of one or two short interruptions might well defeat the purpose of Section 244(a)(1), since the hardship in such a case would not be substantially different from that where the presence has been uninterrupted.]

Similarly, in Kamheangpatiyooth v. INS, the Ninth Circuit explicitly addressed the purpose of the continuous physical presence requirement in its assessment of an absence in the statutory period, and concluded that this purpose is interrelated with the requirement of extreme hardship. The Kamheangpatiyooth court also found that the guidelines enunciated in Fleuti for the determination of a

36. Id. at 816.
38. Id. at 501.
39. 597 F.2d 1253 (9th Cir. 1979).
40. The court stated:

[T]he function of the Section 244(a)(1) requirement that an applicant for suspension of deportation be physically present in this country for a continuous period of seven years becomes clear. It was Congress's judgment that presence of that length was likely to give rise to a sufficient commitment to this society through establishment of roots and development of plans and expectations for the future to justify an examination by the Attorney General of the circumstances of the particular case to determine whether deportation would be unduly harsh. Continuity in the prescribed period of physical presence was required because continuity is important to the legitimacy of the inference that extended presence is likely to make deportation harsh . . . .

To effectuate the purposes underlying the continuous period requirement, and to realize Congress's desire (identified in Fleuti) to avoid exposing aliens to unexpected risks and unintended consequences, the Board [of Immigration Appeals] must determine whether a particular absence during the seven year period reduced the significance of the whole period as reflective of the hardship and unexpectedness of expulsion. An absence cannot be significant or meaningfully interruptive of the whole period if indications are that the hardship of deportation to the alien would be equally severe had the absences not occurred, and that no significant increase in the likelihood of deportation could reasonably have been expected to flow from the manner and circumstances surrounding the absence.

Id. at 1256-57.
meaningful interruption—length of absence, its purpose, and the procurement of travel documents—are only evidentiary in nature since they could prove different conditions in varied circumstances.\textsuperscript{41}

This evolution of a "meaningful interruption" standard in assessing absences during the physical presence period under section 244(a)(1) came to a sharp halt with the Supreme Court decision in the case of \textit{INS v. Phinpathya.}\textsuperscript{42} Padungrasi Phinpathya, a citizen of Thailand, first entered the United States in 1969 as a nonimmigrant student. When her visa expired in July of 1971, she remained in illegal status. In January 1974 she left the United States for Thailand to visit her mother, who was ill.\textsuperscript{43} In Thailand, she went to the United States Consul and obtained a nonimmigrant visa as the wife of a foreign student, in order to reenter the United States. She failed to inform the Consul that her husband's student visa had expired more than two years prior to that date.\textsuperscript{44} In January of 1977 the INS commenced deportation proceedings against Mrs. Phinpathya under section 241(a)(2) of the INA.\textsuperscript{45} Mrs. Phinpathya conceded deportability and applied for suspension of deportation. The immigration judge denied Mrs. Phinpathya's claim for suspension after an evaluation of her situation using the \textit{Fleuti} factors as a guideline.\textsuperscript{46}

The Board of Immigration Appeals affirmed the decision, noting that under \textit{Wadman}, Mrs. Phinpathya's absence was a significant interruption of her physical presence because it involved deception and increased the likelihood that her illegal status would be discovered.\textsuperscript{47} The Ninth Circuit reversed the decision of the BIA. Applying

\begin{itemize}
\item \textsuperscript{41} \textit{Id.} at 1257, 1259.
\item \textsuperscript{42} 464 U.S. 183 (1984).
\item \textsuperscript{44} \textit{Phinpathya}, 464 U.S. at 186 n.2.
\item \textsuperscript{45} Section 241(a)(2) of the INA provides:
\begin{quote}
Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who . . . entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States.
\end{quote}
\item \textsuperscript{46} [Mrs. Phinpathya's] three month absence was not brief, innocent or casual. The absence would have been longer than three months if she had not obtained the spouse of a student visa as fast as she did obtain it. It was not casual because she had to obtain a new Thailand passport, as well as a nonimmigrant visa from the American Consul, because she failed to inform the Consul that she was the wife of a student who had been out of status for three years (and therefore not entitled to the nonimmigrant visa she received).
\item \textsuperscript{47} \textit{Phinpathya}, 464 U.S. at 186 (citing App. to Petition for Cert. at 28a).
\item \textsuperscript{47} \textit{Phinpathya}, 464 U.S. at 186-87 (citing App. to Petition for Cert. at 17a-
the rationale of *Kamheangpatiyooth*, the Ninth Circuit held that the BIA had focused too much attention on the fact that Mrs. Phinpathya's absence increased the risk of her deportation and had "failed to view the circumstances in their totality and in light of the underlying Congressional purposes."^{48}

In reversing the Ninth Circuit decision, Justice O'Connor, writing for the Supreme Court, held that on its face, section 244(a)(1) did not admit any exception whatsoever to the seven year continuous physical presence requirement.^{49} The Court arrived at this conclusion by taking a literalist approach in interpreting the statute: "[W]e assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'"^{50} Yet the Court moved beyond the words of section 244 to look for support in the circumstances of the re-enactment of section 244 in 1952. In a two-fold approach, the Court first compared section 244(a)(1) with former section 301(b) of the INA, which permitted an absence of sixty days in the two year period of presence required for citizenship eligibility, and concluded from its statutory analogy that Congress knew how to provide the authority for flexible interpretation of a residence requirement when it desired to do so.^{51} The Court's second step involved an examination of the specific legislative history of section 244(a)(1). The Court found that House and Senate Reports during the debates over the INA in 1952 indicate a legislative intent to strengthen section 244 to prevent deliberate abuses of United States immigration law by aliens seeking relief.^{52} Thus, the Court concluded that the clear language of section 244(a)(1) is evidence of congressional desire for the rigid administration of the statute. Furthermore, the Court found the *Fleuti* case inapplicable to the adjudication of suspension claims: "[W]hereas a flexible approach to statutory construction was consistent with the congressional purpose underlying Section 101(a)(13), such an approach would not be consistent with the congressional purpose underlying the 'continuous physical presence' requirement."^{53}

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18a).


49. *Phinpathya*, 464 U.S. at 188. Note that the issue of whether Congress intended § 244(a)(1) to admit exceptions to the continuous physical presence requirement was not argued by the government in its brief to the Supreme Court. Rather, the government argued that Mrs. Phinpathya's interruption of her period of physical presence was "meaningful" when evaluated within the guidelines set forth in *Fleuti* and *Wadman*. The Supreme Court, sua sponte, ruled that the standard was inapplicable to § 244(a)(1). Furthermore, Justice Brennan noted in his concurrence that the government stated at oral argument that "the [INS] believes that there is room for flexibility in applying § 244." *Phinpathya*, 464 U.S. at 197 (quoting transcript of Oral Arg. at 8).

50. *Phinpathya*, 464 U.S. at 188 (citations omitted).

51. *Id.*

52. *Id.* at 188-89.
requirement."  
In embracing the literal words of the continuous physical presence requirement and rejecting the flexibility inherent in the application of the Fleuti doctrine, the Phinpathya decision reversed over twenty years of jurisprudence on this aspect of the suspension statute. A close reading of Justice O'Connor's opinion reveals the problematic nature of her "clear intent" mode of interpretation, and is crucial to understanding the effect of section 244(a)(1) in its post-Phinpathya application.

THE REASONING OF THE COURT

Plain Meaning, Clear Intent, and Legislative History

Justice O'Connor's construction of section 244(a)(1) begins with the application of the rule *expressio unius est exclusio alterius*: expression of one thing is the exclusion of another. The opinion sets forth its frame of reference—the words of the suspension statute itself—and finds that the face of the statute "does not readily admit any exception[s] to the seven year requirement of 'continuous physical presence' in the United States to be eligible for suspension of deportation." By adopting the language of section 244 as an analytical starting point, the Court anchors the statute in a world of legislative clarity and certainty, and diverts attention from the real limits of both human speech and legislative enactment. As Max Radin suggests, *expressio unius est exclusio alterius* is a maxim which actually contradicts the customs of human speech: "To say that all men are mortal does not mean that all women are not, or that all animals are not." Thus the notion that the mention of one thing excludes the possibility of another actually runs counter to "ordinary meaning."

One might argue, however, that a legislature enacting a statute, aware of the ramifications of its task, places a premium upon linguistic precision, whereas humans, in their customary patterns of speech, do not. A person engaging in normal conversation may correct him-

53. *Id.* at 190.
55. *Phinpathya*, 464 U.S. at 188 (citing McColvin v. INS, 648 F.2d 935, 937 (4th Cir. 1981)).
57. *Phinpathya*, 464 U.S. at 188.
self, or include the excluded item, much more quickly then a legisla-
ture can respond to an inadvertent exclusion. Nevertheless, this does
not indicate that a legislature, even in its most prudent use of lan-
guage, can envision each possible circumstance that may arise under
the statute it is enacting. Indeed, legislative delay in responding to
the unforeseeable seems to argue against application of this maxim
of interpretation. As Wellington and Albert suggest:

Is it not unrealistic to assume that the legislature decided these questions
and embodied its decision in the language of the enactment? If . . . a court
decides a case because of a statute's plain meaning, its decision will be one
that rests upon abstract doctrine of statutory interpretation that bears no
necessary relationship to legislative purpose.58

Thus, the face of a statute upon the printed page gives no indica-
tion of emphasis upon particular

words,59 nor does it reveal possible
meanings of the statute in particular situations. The question be-
comes “whether we are [going] to deny or affirm [the rule expressio
unius] in this particular case. We shall evidently deny it or affirm it
for some other reason than its axiomatic force, and it will be neces-
sary to search for that other reason.”60

In Phinpathya, the Supreme Court discovered the “other reason”
to affirm expressio unius est exclusio alterius in the legislative his-
tory of section 244(a)(1). Engaging in a technique which we might
call “statutory analogy,” the Court examined the way in which Con-
gress constructed other sections of the Act which required periods of
presence in the United States to qualify for immigration benefits.
The comparison led the Court to conclude that expressio unius est
exclusio alterius is indeed applicable, since the other statutes requir-
ing presence explicitly provide for permissible absences: “[W]hen
Congress in the past has intended for a 'continuous physical pres-
ence' requirement to be flexibly administered, it has provided the au-
thority for doing so.”61 The Court then moved to the legislative his-
tory of section 244(a)(1) itself, and asserted that it too supports the
restrictive interpretation of the statute.

One might note at this point that the inquiry into general legisla-
tive history and express provisions for permissible absences in other
sections of the Act to prove the exclusion of congressional intent to
provide for such absences in section 244(a)(1), necessarily negates
the notion that the ordinary meaning of the statute is clear from its
plain language. Once a court perceives the necessity of making
forays into statutory analogy and legislative history to support an

58. Wellington & Albert, Statutory Interpretation and the Political Process: A
59. Radin, supra note 54, at 874.
60. Id.
61. 464 U.S. at 188.
interpretation of a statute, that statute no longer stands on its own. At this point, the maxim \textit{expressio unius est exclusio alterius} opens, rather than answers, the question.\textsuperscript{62} The \textit{Phinpathya} Court, however, fails to recognize that by looking to legislative history for support, it has implicitly agreed that a possible ambiguity exists in the statutory language. Having implicitly admitted the possibility, the Court ignores the Pandora’s box of questions it has opened regarding the legitimacy of confining statutory purpose to legislative purpose at the time of enactment. Rather, having begun with a literalist reading of section 244(a)(1), “as a surrogate for actual legislative intent,”\textsuperscript{63} the Court creates a legislative intent consistent with its strict interpretation by pointing to similar provisions with “built-in” flexibility and by selecting legislative commentary from a certain point in the statute’s development.

Although the Court proceeds from its statutory analogy to an analysis of the history of section 244, this Article begins with the Court’s reading of legislative history. The general legislative background of section 244 will provide a broader understanding of the critique of the Court’s use of statutory analogy.

Selective Legislative History

Following a brief discussion of the origin of the suspension remedy, Justice O’Connor cites various statements from House and Senate Reports in support of the assertion that the 1952 reenactment of section 244 made the application of the statute more stringent in order to restrict administrative discretion and to prevent aliens from abusing United States immigration laws.\textsuperscript{64} This approach raises the initial question of the legitimacy of locating the purpose of a statute at a particular point in its legislative development. Does reenactment of a statute necessarily signal change in overall policy goals of that statute? Are alterations in the statute to be viewed in connection with the original reasons for enactment, or totally apart from these reasons solely in the context of the “legislative mind” in that particular year? Do subsequent liberalizations or restrictions in subparts of a statute affect the application of other subparts of the same statute? It seems that these questions can never be definitely answered unless the legislative history of the statute is both unambiguous and prolific. As such clear and detailed legislative commentary is rarely

\textsuperscript{62} Radin, \textit{supra} note 54, at 874.
\textsuperscript{63} \textit{Note, supra} note 54, at 894.
\textsuperscript{64} \textit{Phinpathya}, 464 U.S. at 189.
available, the technique of "reading the legislative mind" at the time of enactment becomes a potentially selective and misleading method of supporting a particular interpretation.

In light of the foregoing, it is useful to examine briefly the history of the suspension remedy, the focal point of Justice O'Connor's legislative history, from its origin until its re-enactment in 1952. The history of suspension of deportation indicates that the remedy was initially conceived as a humanitarian relaxation of the deportation statute, which had allowed no exceptions to the rule that aliens illegally present in the United States had to be deported. When large numbers of meritorious or "hardship" cases came to the attention of the administrative authorities, the authorities requested that Congress legislate relief from deportation. As the authorities awaited legislation, they withheld many orders of deportation and instituted the practice of pre-examination, which enabled illegal aliens who met all entry requirements to obtain a visa in Canada, instead of having to return to their mother countries to await a visa.

In 1940, Congress created the Alien Registration Act ("Smith Act"). The Smith Act, inter alia, authorized the Attorney General to suspend the deportation of an alien who could prove good moral character for the preceding five years and who was not racially inadmissible or ineligible for naturalization in the United States, if the Attorney General found that such deportation would result in serious economic detriment to a citizen or legally resident alien who was the spouse, parent, or minor child of such deportable alien. The suspension procedure of the Smith Act seems to have arisen, in part, because Congress was overburdened with special bills for individual relief from deportation, the only method by which an alien could receive such relief. The congressional debate over the bill contains references to the problem of hardship cases and the goal of relaxa-

65. See 2 C. Gordon & H. Rosenfield, supra note 12, § 7.9(a).
66. Id.
67. Id. §§ 7.7(a), 7.9(a).
68. Smith Act, ch. 439, 54 Stat. 670 (1940), amending § 19(c) of the 1917 Immigration Act.
69. Id. at 672.
   It was my original thought that the way to handle all these meritorious cases was through special bills. I am absolutely convinced as a result of what has occurred in this House that it is impossible to deal with this situation through special bills. We had a demonstration of that fact not long ago when 15 special bills were before this House. The House consumed 5 1/2 hours considering four bills and made no disposition of any of the bills. So necessarily the Congress of the United States, representing 127,000,000 people and dealing as it does with many major questions, cannot deal with all of the cases that are entitled exceptions in the deportation laws.
tion of the immigration laws, as well as references to the fear of an influx of aliens as a result of too liberal a measure.

In 1948 Congress amended the statute to authorize the Attorney General to suspend the deportation of an alien under certain circumstances. It is important to note that the 1948 amendment granted relief to aliens whose deportations would result in economic hardship to their families, and to aliens who had resided in the United States for seven years, regardless of family ties. The purpose of the amendment, according to the Senate Report, was to enlarge the class of aliens eligible for suspension.

The large-scale revisions of the immigration laws which took place in 1952 resulted in the replacement of the 1948 suspension process with a new procedure. Under the 1952 reenactment of the statute,

72. 81 CONG. REC. H5551 (daily ed. June 10, 1937) (Statement of Rep. Sirovich): "[T]his bill contains certain provisions that will help to humanize the immigration law class of aliens now residing in the United States, eligible for citizenship but who otherwise could never qualify on account of the obstacle of illegal entry."


74. Act of July 1, 1948, ch. 783, 62 Stat. 1206. The Attorney General can suspend deportation if the alien is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, and if the Attorney General finds:
   (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act.

   It is the information of the committee that there are a number of worthy cases in which persons are racially ineligible for naturalization and are under existing law subject to deportation. The only relief available to these people would be private bills to adjust the immigration status of certain deportable aliens who are racially ineligible for naturalization. It is only just that other persons in this category who have not been favored by the introduction of private bills should have their cases considered for relief.
   It is the information of the committee that there are a number of worthy cases in which persons deportable on technical grounds, have lived in the United States for many years, but have no close family ties so as to enable them to become eligible for discretionary relief on the basis of serious economic detriment to a citizen or legally resident alien, who is the spouse, parent, or minor child of such persons. The committee has already considered and recommended the enactment of private bills to adjust the immigration status of certain deportable aliens who are in this general category. It is only just that other persons in this category who have not been favored by the introduction of private bills should have their cases considered for relief.

76. INA § 244(a)(1), 8 U.S.C. § 1254(a)(1) as enacted in 1952.
   As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who . . . has been physically present in the United States for a continuous period of not less
the Attorney General was now authorized to grant suspension of deportation, in his discretion, to aliens who met the following three eligibility requirements: good moral character, continuous physical presence for seven years, and exceptional and extremely unusual hardship to the aliens or their families as a potential result of deportation. According to the House Report, the reason for the changes was to strengthen the statute "in an attempt to discontinue lax practices and discourage abuses." In the main, the revisions represented congressional response to studies by the Senate Judiciary Committee which found abuse of the suspension remedy and excessive favorable treatment of illegal entrants.

It is interesting to note that, in its critical assessment of the provisions of the 1948 statute, the Senate Report discussed only the requirements of good moral character and serious economic detriment; the requirement of continuous residence was not expressly considered as a separate issue in the report. Arguably, then, the requirement of continuous residence in the 1948 statute was not the primary source of abuse in the eyes of the Senate Judiciary Committee. The Senate Report does refer to the dissatisfaction of INS field officers with overly liberal administration of the residence requirement, but the legislative history gives no specific indication that the changes were directly in response to this criticism.

Justice O'Connor's opinion in Phinpathya gives an impression of clarity in the legislative history as to the substitution of the words "has been physically present in the United States for a continuous period of not less than seven years" in the 1952 enactment, for the words "has resided continuously in the United States for seven years or more" in the 1948 statute: "Finally in 1952, 'in an attempt to discontinue lax practices and discourage abuses,' Congress replaced... than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptionally and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence."
the seven year ‘continuous residence requirement’ with the current seven year ‘continuous physical presence requirement.’”

As mentioned above, the legislative history is silent as to the reasons for the replacement of “residence” with “physical presence.”

The congressional commentary cited by Justice O’Connor appears in a general description of the revisions in the 1952 reenactment of the suspension statute in the House Report. Justice O’Connor’s juxtaposition of this congressional comment, while noting the change in the statutory language of the residence requirement, yields the impression that Congress had clearly stated its reasons for this particular change.

Furthermore, in support of a legislative intent requiring rigorous application of the suspension statute as a whole, the Court cites legislative language, which, in the original text of the Senate Report, refers not to the statute as a whole, but specifically to the substitution of “serious economic detriment” from the 1948 statute with “exceptional and extremely unusual hardship.”

81. Phinpathya, 464 U.S. at 181 (citation omitted).
82. In view of the large scale overhaul of the immigration laws which Congress had undertaken at the time, the purpose of the language alteration may have been to avoid confusion between “residence” for the purpose of legal permanent residence and a statutory period of residence for the purposes of the suspension remedy, which is available to aliens who are not legal permanent residents.
83. See supra note 77 and accompanying text.
84. [Congress] made the criteria for suspension of the deportation more stringent both to restrict the opportunity for discretionary action . . . and to exclude: “Aliens [who] are deliberately flouting our immigration laws by the processes of gaining admission into the United States illegally or ostensibly as non-immigrants but with the intention of establishing themselves in a situation in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents.” 464 U.S. at 189 (quoting S. REP. No. 1137, 82d Cong., 2d Sess. pt. 1, 25 (1952)).

The original text of this portion of the report read as follows:

The term “exceptional and extremely unusual hardship” requires some explanation. The committee is aware that in almost all cases of deportation, hardship and frequently unusual hardship is experienced by the alien or the members of his family who may be separated from the alien. The committee is aware, too, of the progressively increasing number of cases in which aliens are deliberately flouting our immigration laws by the processes of gaining admission into the United States illegally or ostensibly as non-immigrants but with the intention of establishing themselves in a situation in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents. This practice is grossly unfair to aliens who await their turn on the quota waiting lists and who are deprived of their quota numbers in favor of aliens who indulge in the practice. This practice is threatening our entire immigration system and the incentive for the practice must be removed. Accordingly, under the bill, to justify the suspension of deportation the hardship must not only be unusual but must also be exceptionally and extremely unusual. The bill accordingly establishes a policy that the administra-
Finally, it must be noted that the specific requirement to which this language refers was relaxed by Congress in 1962 to require only a showing of "extreme hardship" to the alien, or her citizen or legal permanent resident spouse, parent, or child. That the Court quotes the restrictive 1952 legislative commentary in support of its strict reading of section 244(a)(1), and does not address the 1962 liberalization of the requirement to which that commentary referred, constitutes a serious gap in the Court's progression through the legislative history of the statute. If the restrictive language of 1952 relating to the hardship requirement supports a restrictive reading of the statute as a whole, does not the 1962 liberalization of the hardship requirement indicate congressional desire for a more generous reading of the entire statute from that point onward?

In sum, the selectivity practiced by the Supreme Court in its patchwork legislative history of section 244(a)(1) creates the impression that the 1952 reenactment derived solely from restrictivist motivation, and that the seven year continuous physical presence requirement resulted directly and expressly from those aims. This approach generates several criticisms. First, if we view the history of the development of section 244(a)(1) as a whole, including the liberalizing measures adopted in 1962, it is possible to derive two general legislative sentiments. The entire legislative history of the statute supports the view that section 244 was created as a humanitarian remedy and continued as such, with its most severe limitations imposed in 1952. From the general tone of the statute's 1952 legislative history, it does indeed seem likely that Congress imposed those limitations to prevent the abuse of the remedy by aliens who were in deliberate violation of United States immigration law. This should not imply, however, that the statute thereby lost its ameliorative force for those aliens in deserving situations who had not violated United States immigration law. Even if the case of Mrs. Phinpathya was one of an alien who had illegally circumvented immigration laws and was thus undeserving of relief, the Court's broad statements in Phinpathya would deny the humanitarian application of the statute to aliens whose circumstances lacked the presence of fraud.

A second criticism of the Court's search for legislative intent in
legislative history concerns the avoidance of any analysis of the specific purpose of the physical presence requirement itself. The Court seems to move around the issue of the meaning or administrative value of proof of seven years continuous physical presence. This determination would appear essential to an understanding of the significance of a break in such a period of presence, unless the period of presence is to be regarded as a technical obstacle of arbitrary length which an alien seeking suspension must overcome.

The legislative history of section 244(a)(1) does not explicitly touch upon the specific purpose of the requirement. One might look for assistance to the purpose behind the five year residency requirement for naturalization. The House Report states that the purpose of this five year residency period is "to insure that the alien becomes thoroughly familiar with the American way of life before receiving United States citizenship." Thus the residency period for naturalization functions in some sense as a prescribed time-frame for the alien to adjust and commit to the United States, and as a measuring stick with which the INS may assure itself that this adjustment has been accomplished.

If we allow the purposes of the residency requirement for citizenship to lend substance to the presence requirement for suspension, it seems reasonable to assert that, just as the five year residency requirement serves as a basis for the presumption that the alien has become accustomed to the American way of life, the physical presence requirement of section 244(a)(1) serves as one indication that the alien has developed a certain commitment to the United States through the establishment of roots, communal ties, and expectations. For the purposes of suspension, the fulfillment demonstrates to the INS, in a tangible way, that the alien's commitment may be so deep that it warrants examination to determine whether deportation would work undue hardship. Although the legislative history of section 244(a)(1) neither affirms nor denies the plausibility of such an interpretation, the interdependency of the presence requirement and the determination of extreme hardship has met with approval in several circuits and with the BIA.

88. See Phinpathya v. INS, 673 F.2d 1013 (9th Cir. 1981); Kamheangpatiyooth v. INS, 597 F.2d 1253 (9th Cir. 1979).
89. See supra note 48 and accompanying text. See also Heitland v. INS, 551 F.2d 495 (2d. Cir. 1977); McLeod v. Peterson, 283 F.2d 180 (3d. Cir. 1960).
The failure of the *Phinpathya* Court to address the purpose of the seven year period of continuous physical presence, or to venture any interpretation of its significance in relation to the suspension process as a whole, is likely related to the Court's rejection of an interpretation of section 244(a)(1) which would allow for all but "meaningfully interruptive" absences and which would collapse the seven year requirement into the extreme hardship requirement. Note, here, the tenuous logical position of the Court. Having supported a strict reading of the *entire* statute by citing legislative language referring to the "exceptional and extremely unusual hardship" standard, the Court now insists that each criterion for suspension be read and administered separately. Yet the Court fails to take the next step and address the specific meaning of the continuous physical presence requirement. Perhaps the Court did not engage in a search for an alternate meaning for the presence requirement because, if it had, it might have found itself contradicting the premise that the criteria are not independent. Whatever the motive, the argument that the continuous physical presence requirement is an isolated threshold criterion is problematic in that it effectively deprives the requirement of substantive policy content. Leaving legislative history aside for a moment, it seems reasonable to assume that the longer the amount of time an alien has spent in the United States, the more deeply he has settled into a new life, and the greater the potential hardship upon deportation. In the Court's interpretation, however, the requirement becomes no more than another hoop through which the alien seeking suspension must jump.

Statutory Analogy

As further proof of the applicability of the maxim *expressio unius est exclusio alterius*, the Court in *Phinpathya* compares section 244 to other sections of the INA which set forth periods of residency. Specifically, the opinion cites former section 301(b) of the INA, which required two years of presence for the preservation of United States citizenship, and provided that the continuity of such presence would...
would not be broken by absences of less than an aggregate of sixty days.\textsuperscript{92} From provisions of such permissible absences in other statutes which require periods of physical presence, the Court arrives at the conclusion that the lack of such provisions in section 244(a)(1) was a "deliberate omission."\textsuperscript{93} Thus, the Court reasons, "Congress meant this 'continuous physical presence' requirement to be administered as written."\textsuperscript{94} While there is some indication in the 1952 legislative history of section 244 that Congress was aware of INS concern over substantial interruptions in the seven year period,\textsuperscript{95} the inference that the omission of a similar provision was the result of a real legislative awareness of and desire for the consequences of a literal construction in all cases seems hastily drawn. The first obstacle encountered by this type of reasoning is the reality discussed above that legislatures are not omniscient. Although Congress in 1952 may have been aware of the abuse of granting suspension to an alien who had been absent two of the seven required years,\textsuperscript{96} it may not have foreseen such circumstances as an absence fraudulently induced by the INS,\textsuperscript{97} or a one month absence during a period of legal nonimmigrant status to visit a dying family member.\textsuperscript{98} Even those who support restrictive statutory interpretation would agree that the interpretation of a statute, however strict, should avoid results "too irrational to square with the statutory scheme."\textsuperscript{99}

Additionally, the Court's use of this type of analogy draws attention not to the substantive content of the statutes compared, but rather to the literal language of each statute and to the conspicuous absence of certain words. Thus, the focus once more becomes the words of the statute at the time enacted.

\textsuperscript{92} 464 U.S. at 189-90 (citing 86 Stat. 1289, repealing 71 Stat. 644).
\textsuperscript{93} Id. at 190.
\textsuperscript{94} Id.
\textsuperscript{95} See supra note 80.
\textsuperscript{96} Id.
\textsuperscript{97} See McLeod, 283 F.2d at 186. The court stated, "[w]hile it is true that the statutory language does not admit of flexibility in this matter, on its face it seems clear that circumstances can be suggested where an absence of even several years would not prevent an alien from being continuously physically present."
\textsuperscript{98} See Kamheangpatiyooth v. INS, 597 F.2d 1253 (1st Cir. 1979).
\textsuperscript{99} Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) (referring to interpretation of the definition of the term "entry"). See also F. Frankfurter, Some Reflections on the Reading of Statutes, The Sixth Annual Benjamin N. Cardozo Lecture Delivered Before the Ass'n of the Bar of the City of New York 13 (March 18, 1947). "A judge must not rewrite a statute, neither to enlarge nor to contract it . . . . He must read it by way of creation . . . . He must read out except to avoid patent nonsense or internal contradiction."
It is interesting to note that the technique of statutory analogy may be used in an alternate way, one which looks to similar statutes not for the presence or absence of certain words, but rather in search of a broader congressional or majoritarian policy in order to extend such policy to an under-inclusive statute. This approach forgoes the particulars of legislative intent at a certain time point in relation to individual similar statutes. Rather, it favors a unifying concept which makes sense of the statutes in light of their entire legislative and judicial development and illuminates their applicability to present-day circumstances. The latter approach examines statutes as "sources of law, statements of policy extensible to modern problems." 

The use of statutory analogy for generative purposes was demonstrated by Justice Harlan in his opinion in *Moragne v. States Marine Lines, Inc.* In an 1886 case, *The Harrisburg,* the Supreme Court had ruled that there was no remedy provided by general maritime law for death on the navigable waters of a state. In *Moragne,* Justice Harlan, writing for a unanimous court, overruled *The Harrisburg,* pointing out that every state had since enacted a wrongful death statute, and Congress had since enacted the Federal Employers' Liability Act (FELA) for wrongful death of railroad employees, the Jones Act for merchant seamen, and the Death on the High Seas Act for persons on the high seas. "These numerous and broadly applicable statutes, taken as a whole, make it clear that there is no present public policy against allowing recovery for wrongful death." 

It is true that the statutory controversy in *Phinpathya* does not precisely parallel that of *Moragne.* In *Moragne,* the statutes, the collective policy of which warranted a remedy for the excluded tort, had been enacted over a long period of time, by different legislatures in response to various problems. The development of these tort remedies suggests that the lack of a statute for wrongful death in navigable waters was more likely due to the fact that the specific problem had not yet come before state legislatures, than due to deliberate omission. In *Phinpathya,* however, the statute in question and the concern over abuse of that statute was considered by Congress during a large overhaul of the immigration laws in 1952. At that time, residence requirements were enacted which allowed for absences; the

100. Note, *supra* note 54, at 893 (citation omitted).
102. 119 U.S. 199 (1886).
physical presence requirement of section 244(a)(1), however, was enacted without such a provision. Moreover, there is some indication that the problem of excessive absences during the seven year period required for suspension did come to the attention of Congress at that time. 105 Thus, while there seemed to be nothing which impeded Justice Harlan's inference of a public policy warranting a wrongful death action for navigable waters, the inference of a clear public policy permitting reasonable absences in all required periods of residence is more difficult to draw.

There are, however, important general lessons to be learned from Justice Harlan's reasoning in Moragne. Commenting upon the legitimacy of his approach in light of legislative reality, Justice Harlan stated: "In many cases the scope of a statute may reflect nothing more than the dimensions of the particular problem that came to the attention of the legislature, inviting the conclusion that the legislative policy is equally applicable to other situations in which the mischief is identical." 106

Statutes with similar purposes need not be used solely for literal comparisons; they also represent legislative statements from which a Court may derive "the residual principle in legislation that should be given effect in circumstances not covered by the express statutory terms . . . ." 107 In regard to section 244(a)(1), comparisons with other residency or physical presence provisions in the INA which do allow absences would be useful to discern the purpose of the seven year continuous physical presence requirement, 108 and to decide the validity of allowing for nonexcessive absences in light of that purpose. The Court might have thereby used statutory analogy to fill, rather than widen, the gap created by the absence of explanation of section 244(a)(1)'s purpose, as illustrated earlier in the comparison of the residence requirement for naturalization and section 244(a)(1).

The Problematic Nature of the "Plain Meaning" Model

The revival of the maxim expressio unius est exclusio alterius as a mode of analysis for section 244(a)(1) obscures rather than clarifies the significance of the continuous physical presence requirement.

105. See supra note 80.
106. 398 U.S. at 392.
108. See supra text accompanying notes 105-13.
The use of literal words of section 244(a)(1) as a basis for establishing the "clear intent" of Congress removes from the statute its function as a source of policy in human circumstances; it instead views the statute as confined by the most simple meaning of its own words and by legislative commentary at the time of reenactment in 1952.

When the Court confines itself to the "plain meaning" of a statute, two immediate results are foreseeable, in terms of the type of judicial opinion which will result. If, as in the case of Phinpathya, the Court wishes the statute to stand as it is, circumstances unforeseen by the legislature, as well as changes in policy over the passage of time, will remain unaddressed; the statute will continue to be underinclusive. If, on the other hand, the Court seeks to reinterpret a statute, the desire to adhere to the "plain meaning" of the words may force the Court into distortion of the statutory language.

An example of this second possibility can be found in the Rosenberg v. Fleuti109 opinion. In Fleuti, the Supreme Court considered the issue of whether a legal permanent resident's return after a one-day trip across the Mexican border constituted "entry" within the definition set forth in section 101(a)(13),110 such that the alien could be excludable for a condition existing at the time of return. In enacting section 101(a)(13) in 1952, Congress had added a moderating provision in order to protect unsuspecting aliens who had involuntarily left the United States from the harsh and irrational hazards of strict application of the term "entry."

Although in 1952 Congress had only considered the difficulties faced by those aliens whose absences were involuntary,111 the Fleuti Court stated: "Nevertheless, it requires but brief consideration of the policies underlying section 101(a)(13), and of certain other aspects of the rights of returning resident aliens, to conclude that Congress . . . could not have meant to limit the meaning of the exceptions it created in section 101(a)(13) to [cases of involuntary absences]."112 Further, the court stated that: "We conclude, then, that it effectuates congressional purpose to construe the intent exception to Section 101(a)(13) as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence."113

Because of its goals of reinterpreting the statute while respecting the primacy of legislative language, the Court in Fleuti resorts to an explanation of what Congress must have meant in 1952, and to a

111. See supra note 26.
112. 374 U.S. at 458.
113. Id. at 462 (emphasis added).
questionable stretching of the word "intent." The Fleuti Court might have avoided this distortion of meaning by confronting the purpose of the statutory exception for involuntary departures, and deciding that a short interruption in residence, although intended, could, in certain circumstances, be as nonthreatening to the permanence of an alien's stay as an unintended, involuntary absence.

It is important to see the interrelation between the two types of statute-confined decisionmaking illustrated by Phinpathya and Fleuti. A decision which reinterprets or enlarges the reach of a statute by manipulating its words or rearranging its history makes it an easier task for a court to later return to a restrictive interpretation by citing the literal language of the statute, never having to confront its purpose. Since, in the first case, the policy reasons for the change in light of present-day circumstances might never be addressed honestly, they need not be confronted when a court later returns to a restrictive reading.

Consider the following: Suppose the Fleuti Court had felt the freedom to acknowledge that Congress, when it liberalized section 101(a)(13) in 1952, did not even consider the case of an innocent, brief, but voluntary absence during legal permanent residence. Instead of concluding that Congress could not have meant to exclude it, the Court leaves this point aside, and discerns in the actual liberalization of the statute the broad congressional policy of protecting aliens from the unsuspected risks of innocent departure. If the Court found that policy in tune with present-day legal and political thinking, it could openly apply the policy even though, at the time it was conceived, it was only meant for a narrow class of aliens. In later years, a Court wishing to restrict the applicability of the statute would then be forced to confront the actual policy and articulate its reasons for new restrictions.

The approach of the Court in Phinpathya raises deeper questions regarding a literalist Court's view of its role and the role of the legislature. One writer has suggested that the persistence of the Court in its "clear statement" model of statutory interpretation implies an institution lamenting its own judicial incompetence.114 It professes "complete judicial paralysis" unless Congress speaks clearly and addresses every possible consequence of a statute at the time of enactment. Yet while the Court asserts that the congressional "no trespassing" sign prevents it from "tampering and policy repair,"115 it is

114. Note, supra note 54, at 902.
115. Id.
the Court which is actually restricting the Congress. By keeping legislative intent a prisoner of time, and a statute a prisoner of words, the Court implicitly suggests that Congress is incapable of enacting legislation which incorporates broader, far-reaching policy goals. Instead, the literalist approach perceives Congress as a body which acts only in response to particular situations without any overarching conception of the structure and aims of an entire body of laws, such as the Immigration and Nationality Act as a whole. Moreover, the Court’s refusal to actively interpret a statute may imply a vision of legislative politics wherein the legislation, which is a product of Congress’ “situational reaction,” is not even based upon a sense of majoritarian values, but rather upon compromises concluded by various interest groups:

In the pluralist society, the only shared values are those that emerge—through a sort of natural selection—from the legislative battleground... It is not for the Court to question results that appear harsh, incongruous, or even inexplicable; who knows what interest group wrested those results from a perhaps distracted Congress, what logrolling transpired to yield up those outcomes?6

Thus, in the superficial deference to the primacy of legislative goals as expressed in statutory words, the Court actually disempowers Congress by refusing to interpret congressional words as those of a far-sighted policy-making body. The rejection of the interpretive function is also a disempowerment of the Court itself. The Court’s refusal to recognize statutes as sources of broader policy statements obstructs the “extra-legislative growth”117 of legislative mandates, a process for which we traditionally and legitimately rely upon the courts, once the legislature has spoken. Moreover, a shirking of the interpretive role through the “clear statement” model of statutory construction does not merely freeze statutory development; it forces such development to take several steps backward in time, since it confines legislative intent to the enactment. Because “clear statement tethers subsequent judicial freedom through doctrines of interpretation that become rules of clear statement”118 (as one might appreciate from the discussion of Fleuti and Phinpathya), literalist statutory interpretations put into continuous judicial practice underdeveloped policies or legislative intent which may not reflect the values of the present majority.

The Court’s choice of a model of statutory interpretation is to be judged by the effectiveness with which that model legitimates the exercise of legislative power.119 This, in turn, depends upon the abil-

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116. Note, supra note 54, at 900-01 (citations omitted).
117. Id. at 898.
118. Id. at 903.
119. Id. at 903-04.
ity of the model to realistically "account for deficiencies in congressional ability to achieve valid legislative ends" and to enable a court to perform a critical function in regard to the substance of these ends. The literalist approach fails in the first function because it asks Congress to reconsider legislation repeatedly, an unrealistic demand in view of the general burden of legislative concerns. As Wellington and Albert point out, "[t]he reasons for legislative inaction are numerous and have nothing whatever to do with a preference for one result or another in the particular case before a court." Yet this process yields a substantive policy decision without an explicit consideration of the substantive policy of Congress by the Court.

Moreover, with regard to the second function—the "critical capacity"—the literalist approach is incapable of evaluating the substantive policy decision it has made. The Phinpathya Court explicitly acknowledges this limitation when it cites Jay v. Boyd for the proposition that the plain language of the statute must be applied "however severe the consequences." However,

[critical review . . . would not require the Court to reconsider the substantive wisdom of congressional choices, nor would it require the Court to disapprove every inequity resulting from a statute's enforcement. A critical judicial role does demand, however, that the Court approve only those harsh results inevitably attendant on specifically chosen policies. Arbitrary harm unnecessarily imposed on individuals cannot be legitimated."

The Phinpathya decision puts the actual effect of the "clear statement" model in a particularly ironic light. Judicial decisions in the area of immigration law have continually made reference to the binding nature of Congress' plenary power over immigration. The Phinpathya decision, while deferring superficially to this power, actually wrests the far-reaching potential of this power from congressional hands. If a fair reading of the entire legislative development of section 244(a)(1) creates the impression of a dual congressional aim—to relieve the harsh consequences of deportation of an alien of long residence and in good standing, while denying relief to aliens in deliberate violation of the law—then the Court has taken from the

120. Id.
121. Id.
122. Wellington & Albert, supra note 58, at 1552 (citation omitted).
123. Note, supra note 54, at 906.
124. Id. at 904.
126. Note, supra note 54, at 905.
Attorney General his congressionally delegated power to invoke the ameliorative purposes of 244(a)(1) in a range of situations. In the guise of judicial submissiveness, the Court has taken an activist stand with regard to the remedy of suspension of deportation. Yet this judicial activism serves to disempower both Congress and the Court itself.

THE “COMMON LAW” MODEL OF STATUTORY INTERPRETATION

An Overview

Several legal thinkers in recent years have grappled with the problem of literalist statutory interpretation and its avoidance of honest confrontation with underlying policy. Justice Harlan’s use of statutes as generative of policy, as in *Moragne*, and in the case of *Welsh v. United States*,\(^1\) has had a deep effect upon the consideration of this issue by scholars. Senator Jack Davies of Minnesota credits to the reasoning of Justice Harlan his own theory of the nonprimacy of statutes.\(^1\) In 1979 Senator Davies proposed a Nonprimacy of Statutes Act for adoption by the Minnesota legislature.\(^1\)

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\(^{128}\) 398 U.S. 333, 344 (1970). Welsh, a conscientious objector during the Vietnam War, felt that he could not sign the statement in the Selective Service Conscientious Objector Application: “I am, by reason of my religious training and belief conscientiously opposed to participation in war in any form.” Selective Service Act of 1948, ch. 625, § 6(j), 62 Stat. 612 (1948). He struck out the words “my religious training and,” and signed the form. 398 U.S. at 345. The language establishing conscientious objector status read:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or merely a personal moral code.


Four justices found that Welsh was covered by this exemption by twisting the language of the Act. Three other justices read the statute literally and found that Welsh was not covered. Justice Harlan, writing alone, found that Congress' intent to exempt only religious objectors was clear, but violated the first amendment. At this point, Justice Harlan faced two possibilities: strike down the exemption, or extend it to cover those, like Welsh, who should have been included. He decided to repair the underinclusive statute because of Congress' broad policy of granting conscientious objector status to those who held sincere anti-war beliefs. He thus concurred in the result, “not as a matter of statutory construction but as the touchstone for salvaging a congressional policy of long-standing that would otherwise have to be nullified.” 398 U.S. at 345 (Harlan, J., concurring).


Under this bill each statute matures, twenty years after its enactment, into something comparable to a principle of common law. The bill declares legislative enactments at their twenty year “maturity” to be subject in litigated cases
It is interesting to note that, aside from the difficulties examined in the previous section’s analysis of *Phinpathya*, Senator Davies sees in statutory primacy the problem of the unavailability of the courts to the individual citizen as a forum for change. This is inherent in a court's refusal to go further than the literal words of Congress:

When the adverse rule is statutory . . . the client must be dismissed by the availability of the legislative institution as a handy scapegoat. The mechanism of law reformation through adjudication practically drops from the picture once the legislature acts on a body of law. What vanishes is the power to appeal to the judiciary for legal change. This power is vital.\(^1\)

In his recent book, *A Common Law for the Age of Statutes*,\(^2\) Guido Calabresi proposes a wholly judicial alternative to Senator Davies' statutory remedy. In his criticism of such “sunset statutes,” Calabresi notes:

[S]unset does not guarantee either that a current majority will rule or that only anachronistic laws will fail to be re-enacted. It only deprives a past majority of the benefit of [legislative inertia] and gives it to those who object to the laws. Since regulatory laws age at different rates and in different ways, a system that invalidates such laws with clockwork regularity gives a tremendous weapon to those who oppose regulation itself; the force of inertia shifts to their side . . . . The point is, in the end, quite simple. Time does not serve as a good indicator of age either in all statutes generally or in regulatory ones in particular.\(^3\)

Calabresi’s own proposal would give courts the power to treat statutes in the same way they treat the common law. In Calabresi’s model, courts could “alter a written law or some part of it in the same way . . . in which they can modify or abandon a common law doctrine or even a whole complex set of interrelated doctrines.”\(^4\)

Although both Calabresi and Davies center their theories upon the problem of statutory obsolescence, the substance of their models of

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\(^1\) Id. at 205.
\(^2\) Id. at 213.
\(^3\) G. CALABRESI, *supra* note 11.
\(^4\) Id. at 61-62.
interpretation provides general guidance for the process of bringing any statute in line with the present-day legal, political, and social landscape.

Central to Calabresi's model of "common law" interpretation is the abandonment of judicial subterfuges.136 Instead of relying on this ruse, courts could openly state that a statute does not fit the prevailing principles of present-day majoritarian values: "An honest recognition that sometimes interpretation is appropriately shaped by ends other than the desire to conform to legislative intent is very different from a sly refusal to follow such intent even though it can be discerned."138

In the "common law" model, a court would have the freedom to consider statutes as "consensually agreed-upon principles"137 and to use their generative potential. Further, Calabresi maintains that the power to treat statutes this way would not effect a deep change in the nature of the judicial task of treating "like cases alike":

In seeking to apply that framework to new circumstances, each judge inevitably brings to the task some sense of the majority that selected him or her and some sense of what is right for the country, and this, together with the fact that what the "like" case is depends on the level of generality at which one asks the question helps the fabric to change. If the object is to treat like cases alike, to adapt to changed technologies and ideologies, and to reflect the evolving values of a people, why should the input be only that of previous common law cases? Statutes, no less than common law decisions, reflect changes in underlying popular attitudes. The gravitational force of such statutes should surely affect courts seeking to keep their map current.138

Hence, statutes are allowed an "evolution" and an integration into a present legal, political and social landscape. A further implication of this approach is the open abandonment of legislative intent as a time-bound phenomenon. Calabresi maintains that the connection between legislative history and the current function of a statute is nonexistent.139

A more moderate solution than that posed by Calabresi might use legislative history, like statutes, as a source of information. Just as statutes are viewed as generative of policy, legislative history would be read as a source of majoritarian values and goals; not in the at-

135. Id.
136. Id. at 38.
137. Note, supra note 54, at 913.
138. G. CALABRESI, supra note 11, at 97-98.

Why should the ambiguity of words and of initial legislative intent have more than a purely causal connection with the position a statute has in the current fabric of the law? And why should those limits . . . which would follow from an honest adherence to the limited meaning that words have, be at all appropriate? Why should they not frequently be too restrictive and, at other times, be inappropriately broad?

Id.

139. Id.
tempt to justify application of the statute's literal meaning, but rather, in order to determine whether, and in what way, those goals fit in the present scenario.

The "common law" model of statutory interpretations poses deeper questions about the role of judicial power: Do we wish to enable judges to evolve statutory laws in this way? What, then, qualifies a judge for such a role? Moreover, what will be the effect of such a model upon the traditional conception of the separation of powers?

Calabresi argues that the "legal fabric and the principles that form it" are very good indications of the majoritarian will. He views the legal landscape as a slowly developing reflection of popular values as perceived and applied by many individual judges. If this is an appropriate starting point for discerning the wishes of the majority, then it seems natural to enable judges to develop statutory law from principles, since "principled decision-making within a legal landscape is the primary judicial task." Furthermore, the common law model would give courts the freedom to search for and make use of a wider range of indicators of popular values in the legal landscape, some not traditionally used in judicial decisions. With regard to the statute itself, a court could consider the age of the statute, the consequences of different interpretations, and the statute's development in the common law. Further, Calabresi suggests that the court's field of examination need not be limited to the statute: "Scholarly criticisms (both in law and derived from such related fields as philosophy, economics, and political science), jury actions that nullify or mitigate past rules, even administrative determinations, all can be appropriate reports of change in the landscape in response to changed beliefs or conditions."

In the end, Calabresi maintains, courts which implement the "common law" model will not be doing anything radically different from that which they do today, except that the judicial subterfuges would fall away. This implies, however, that a court wishing to reinterpret a statute will have an easier time of it as long as the court can openly point to the changes in the legal landscape which

140. Id. at 96-97.
141. Id. at 97.
142. Id. at 96.
143. Note, supra note 54, at 914.
144. G. CALABRESI, supra note 11, at 98.
145. Id.
146. Id. at 82.
warrant updating. A court which seeks to retain a statute’s literal meaning, however, will no longer be able to rely upon the words of the statute and its legislative history. While these tools of interpretation may not be “subterfuges” in the true sense of the word, they often divert attention from substantive issues of policy and purpose, as in the Phinpathya decision. Under the “common law” model, a court with retentionist goals would be forced to confront these issues and explain the reasons for the policy implemented by its reading of the statute, in terms of majoritarian values as reflected in the general legal and legislative fabric. In this sense, a court which adopts a “common law” model of interpretation is more likely to be implementing legislative or majoritarian will than ignoring it. Because courts interpreting statutes will be asked to articulate the factors which underlie their decisions, they will have to perceive popular values carefully and with deliberation rather than institute policies of their own.

If, under the “common law” approach to statutory interpretation, judges would do no more than perform their judicial task, in open adherence to both legislative will and popular values, it does not appear that a radical change in the balance of power between the legislature and the judiciary would be effected. Indeed, as we suggested earlier, the active interpretation of the words of the legislature in application to particular cases has been the traditional function of the judiciary. Such a role is no more than that perceived by Justice Marshall in Marbury v. Madison: “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule.”

Furthermore, the legislature remains the institution of last resort if a court misconstrues the legal landscape, or abuses its task. It may be argued, however, that a quick legislative response is more likely to occur when a court “remands” a statute to the legislature by giving it a strict interpretation. One danger of this approach, however, is that in so demonstrating to the legislature the problematic nature of the statute, the court may impose harsh or irrational results upon the litigants involved. If a court can instead reinterpret or revise a statute in accordance with its perception of current values, the burden of “legislative inertia” shifts to those who wish to retain older policies, or to those who believe that the court’s perception is mistaken. Thus, change is recommended (and effected) without the perpetuation in the case before the court of a legislative policy which the

147. Note, supra note 54, at 914.
148. 5 U.S. (1 Cranch) 137, 177 (1803).
149. G. Calabresi, supra note 11, at 179.

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court finds questionable or unduly harsh.

The “Common Law” Model Applied

How might the Court have implemented aspects of the “common law” model to decide the Phinpathya case? As a preliminary step in the analysis, the Court would attempt to discern the general purpose of the suspension statute. Of course, one’s first impulse is to read the statute’s legislative history—but in doing so it is important to remember that the answer is not to be found in the pages of The Congressional Record. Rather, the history serves us in furnishing information about the substantive policy origins of the statute. As mentioned in the first section of this Article, the legislative development of section 244 of the INA reveals two major congressional concerns: the need for an avenue of relief from deportation for “meritorious cases” of aliens who had lived in the United States as law-abiding citizens and developed roots in the community, and the desire for some reasonable limits on the remedy to prevent aliens from deliberately abusing United States immigration laws in order to request suspension. The next step might be an evaluation of the extent to which each of these concerns are carried out in the evaluation of requests for suspension both at the administrative level, in the BIA, and in the courts. Is the restrictivist aspect of the statute outweighed by its ameliorative purposes in present-day practice? How do courts strike a balance between the two concerns? What substantive limits have been, or should be imposed upon the remedy? The issue of Mrs. Phinpathya’s fraudulent concealment of her husband’s nonstudent status at the United States Consul in Thailand enters into consideration at this point. Does the notion of discouraging violation of United States immigration laws indicate that aliens who re-enter the United States under fraudulent circumstances should not be eligible for suspension of deportation? This might be a plausible way of balancing the two congressional concerns expressed in the legislative history of section 244. Is this type of limitation on the remedy supported by other decisions in the field of immigration law or by public policy? Here, the Court might look to other stat-

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151. See Heitland v. INS, 551 F.2d 495 (2d Cir. 1977) (fraudulent circumstances of alien’s return to the United States after an absence of six weeks, coupled with the illegality of the alien’s presence in the United States “meaningfully interrupted” continuous physical presence.) But cf. deGallardo v. INS, 642 F.2d 85 (9th Cir. 1980) (alien return to the United States)
utory remedies in the INA where fraud upon entry may be a bar to relief. For example, the Attorney General may deny asylum under section 208 of the INA where the alien made misrepresentations to gain entry to the United States. A comparison of the purposes of, and of the type of relief granted by sections 208 and 244 might yield some indication of whether fraudulent entry should bar relief under the suspension statute. For example, consideration of a fraudulent entry, in the case of asylum, or a fraudulent reentry, in the case of suspension, may be warranted because of the generous and permanent nature of the relief afforded by both statutes: adjustment of status to that of a legal permanent resident.

An essential part of the Court's analysis should focus upon the specific purpose of section 244(a)(1)'s continuous physical presence requirement in order to determine whether this purpose was violated by Mrs. Phinpathya's absence. Here again, the technique of statutory analogy, using statutes as generative of principles, would be helpful. A comparison of section 244(a)(1) with other sections of the INA requiring residency periods might assist the court in resolving the question of whether the continuous physical presence requirement ought to be read as a threshold requirement separate from "hardship" and "good moral character," or as a time-frame upon which these requirements depend. To what extent, if any, do the length and purpose of Mrs. Phinpathya's absence bear upon her eligibility for relief, in view of the purposes of section 244? What is the effect of the fraud upon Mrs. Phinpathya's adherence to the purposes of the presence requirement?

In this regard, the Court might examine the way in which suspension claims are evaluated by immigration judges and by the BIA. The Court could in this manner, discern current attitudes toward the suspension remedy where that remedy is considered and applied on a more widespread basis than on the judicial level. The Court should determine whether eligibility is dependent upon the strict fulfillment of the three requirements, or whether the borders between the three requirements should be permitted to merge to create a complete picture of the alien's life in the United States. Moreover, the Court should ask itself which style of deliberation fits more comfortably with the general purpose of the remedy, as determined in the first step of the analysis. The question of whether the continuous physical presence requirement should be collapsed into the hardship require-

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who interrupted a 10-year physical presence with a three-and-a-half month vacation to Honduras and Mexico held not to have "meaningfully interrupted" the physical presence despite the fact that she had obtained permission to reenter on the pretext that she intended to stay only a few days).


ment has also received a great deal of attention from circuit courts of appeals.\textsuperscript{155} The Court should examine these cases as an indication of the way in which the suspension statute has been woven into the "legal fabric" of current immigration policy.

In its "common law" consideration of the suspension statute's continuous physical presence requirement, the Court may also wish to examine the effect of both liberal and restrictive readings upon Attorney General discretion with regard to the remedy. Would a liberal reading of the statute's requirements give the Attorney General overbroad discretion in suspension claims? Would such discretion require relief to be granted in too many cases where relief is unwarranted,\textsuperscript{156} or would it merely empower the Attorney General to review each case on its merits and decide whether relief should be granted?\textsuperscript{157}

Finally, if it is part of the judicial task to sense the majoritarian will in the current legal, political and social landscape, the court in its assessment of section 244(a)(1) would have to give due regard to ascertainable sentiment of Congress. Has Congress passed any laws in recent years indicating concern about aliens in hardship situations? What influence, if any, should the 1962 liberalization of section 244(a)(1)'s hardship requirement have upon the reading of the continuous physical presence requirements? Has Congress expressed concern over the deliberate violation of United States immigration law by aliens seeking relief? The preceding represent suggestions for alternative methods of deciding a case like Phinpathya. It is not the goal of this inquiry to assert that the decision should have yielded a different result. It is conceivable that, after careful consideration of some of the enumerated factors, the Supreme Court would have arrived at the same result in Phinpathya and would have denied relief. That conclusion, however, would have been more solidly anchored in a conception of the current legal, political and social landscape in the area of immigration law and policy. As long as the Court's conception of this landscape remains unarticulated, obscured by "ordinary meaning" and "legislative intent," we will lack a necessary un-

\textsuperscript{155} See McCollin v. INS, 148 F.2d 936 (4th Cir. 1981); Kamheangpatiyooth v. INS, 597 F.2d 1253 (9th Cir. 1979); Heitland v. INS, 551 F.2d 495 (2d Cir. 1977).
\textsuperscript{156} T.A. Aleinikoff & D. Martin, Immigration Process and Policy 487 (1985) report that from 1977 to 1980, only 120 aliens were granted suspension of deportation. This was during a time when, at least in some jurisdictions, the "continuous physical presence" requirement was given a generous interpretation. Thus, it does not seem that such an interpretation would give rise to a great influx of aliens who are all receiving relief under § 244. The court using its "common law" model may wish to take this fact into account. \textit{Id}.
\textsuperscript{157} Kamheangpatiyooth, 597 F.2d at 1256 n.3.
derstanding of the basis of judicial opinions and their function in relation to substantive legislative policy.

THE AFTERMATH OF Phinpathya

The Supreme Court's strict reading of section 244(a)(1) in Phinpathya leaves us with a remedy from which much of the substantive content has been drained. Under a generous reading of the statute, it was possible to use the three requirements—good moral character, continuous physical presence, and extreme hardship—as interdependent factors to create a broad picture of the alien's life in the United States and to determine eligibility. If there were absences in the period of continuous physical presence, they might be overlooked if they were not significant enough to lessen the alien's hardship in abandoning the United States. Furthermore, if the object of the statute is to aid certain aliens who have, over a long period of time, adjusted to an American lifestyle and conducted themselves like residents or citizens, it seems only fair to allow these aliens the same insignificant leaves of absence which Americans themselves take without intending to abandon their homes.

Under the Court's reading of section 244(a)(1), the requirements become threshold criteria to be viewed in isolation. In this context, the purpose of the continuous physical presence requirement remains unclear. It takes on the feeling of a magical condition of arbitrary length, which an alien must fulfill precisely in order to be granted her wish. Contrary to the original remedial intent of the suspension statute, the Court's construction of section 244(a)(1) appears to create a barrier to be overcome by aliens, rather than an avenue of relief.

Moreover, the Court's literalist reading of the continuous physical presence requirement has affected the way in which the other criteria of section 244 have been read. In Zamora-Garcia v. INS, the Fifth Circuit held that, in considering the hardship of deportation to an alien who had been living with an American family for fourteen years, the BIA need not consider the hardship to the children of the family, since they were not the alien's United States citizen or legal permanent resident children, as specified in section 244(a)(1). The Court stated:

Although the Supreme Court's ruling [in Phinpathya] only specifically has an impact upon the "continuous physical presence" requirement, we—without deciding—have doubts that the Court would approach the "extreme hardship" requirement any differently. We therefore recognize—although perhaps reluctantly—that the Board need not consider the hardship to the Chrisma children posed by the possibility of [Zamora-Gar-

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158. 737 F.2d 488 (5th Cir. 1984).
In the main, however, *INS v. Wang*, in which the Supreme Court upheld the discretion of the Attorney General to define the term "extreme hardship" and construe it narrowly "should he deem it wise to do so," continues to control the interpretation of the extreme hardship requirement. Circuit courts have elaborated upon *Wang*, limiting the decision to the Attorney General's discretion to substantively define "extreme hardship;" the Attorney General must, according to these cases, perform a procedurally complete evaluation of the alien's hardship claim, giving due consideration to each element of the alien's case, examining these elements cumulatively, so as to understand the alien's circumstances in the aggregate. The Attorney General must also articulate the reasons for his findings in each case.

The broad statements in the *Phinpathya* case seem to defy such limitation by the lower courts. Because the *Phinpathya* ruling relates more directly to the general construction of the continuous physical presence requirement of section 244(a)(1) than to the specific facts of Mrs. Phinpathya's case, it would appear that an alien with an absence of any length, however small and for whatever reason, is now without remedy under the suspension statute.

Charles Gordon, one of the authors of the treatise *Immigration Law and Procedure*, suggests that the only alternative for an attorney who must argue a suspension claim where the alien has interrupted her presence, would be to view the Court's broad statements as dicta. Indeed, if the alien's absence was nonfraudulent or had occurred during a period of legal nonimmigrant status, this may be a viable option. One might assert that the legislative history of section 244 demonstrates congressional concern over deserving hardship cases, as well as over abuse of United States law. Thus, the Supreme Court's denial of suspension of deportation to Mrs. Phinpathya on the basis of her fraudulent reentry should not bar relief to aliens whose absences are not deliberate violations of law. These deserving

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159. *Id.* at 494.
161. *Id.* at 145.
162. *See* Prapavat v. INS, 662 F.2d 561 (9th Cir. 1981); Villena v. INS, 622 F.2d 1352 (9th Cir. 1980).
163. *See* Phinpathya, 464 U.S. at 196 (Brennan, J., concurring).
cases where the alien has remained a law-abiding member of society, but for an initial illegal entry or an overstay of a visa, were indeed the primary object of congressional concern in its enunciation of the remedy in statutory form. Thus, it may be possible to limit Phinpathya to situations in which absences were taken illegally or under fraudulent circumstances. Such a limitation would still exclude a broad class of aliens whose original entry into the United States was illegal and who, because of their illegal status, had no choice but to exit and reenter illegally or fraudulently, if they wished or needed to leave the United States. On the other hand, this limitation would lessen the general severity of the Phinpathya decision and bring the ruling more in line with Fleuti and its progeny, which imply that return after an absence for noninnocent purposes or under illegal circumstances should be regarded as an “entry” under section 101(a)(13) of the Act, and that such an absence constitutes a “meaningful interruption” in the period of continuous physical presence for the purposes of section 244(a)(1).166

There is also an argument to be made to the effect that Phinpathya actually conflicts with Wang, which granted the Attorney General wide discretion to define “extreme hardship”:

The crucial question in this case is what constitutes “extreme hardship”. These words are not self-explanatory and reasonable men can differ as to their construction. But the Act commits their definition in the first instance to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute.167

The holding of Phinpathya restricts the discretion of the Attorney General and his delegates in the application of the continuous presence requirement, and may thus, in a sense, restrict Attorney General discretion with regard to the administration of the statute as a whole. It is, however, doubtful that such an argument could be made with any degree of success. The combined effect of Phinpathya and Wang, despite the apparent inconsistency, is the very restrictive reading of the suspension statute as a whole: under Wang, the Attorney General was given broad discretion to interpret the extreme hardship requirement narrowly, and in Phinpathya, the Attorney General is given “discretion” to interpret the continuous physical presence requirement according to the literal meaning of the statute. In this respect, the Court’s decision in Phinpathya not only limits its own interpretive role and disempowers Congress in its policy-making role, it also ties the hands of the agency which is to carry out a legislatively mandated function.

166. See supra notes 12-53 and accompanying text.
168. Id. at 145.
Finally, it is important to note that five months after the *Phinpathya* decision, Representative Roybal of California introduced an amendment to the Simpson-Mazzoli bill to add the following paragraph to section 244 of the INA: “An alien shall not be considered to have failed to maintain continuous physical presence in the United States . . . if the absence from the United States did not meaningfully interrupt the continuous physical presence.” The amendment was adopted by a vote of 411 to 4, but was subsequently lost with the Simpson-Mazzoli legislation. It is unclear what weight this lost amendment would carry as an argument in a suspension case. The amendment, and the congressional commentary which surrounds it, certainly constitute some reflection of popular values (especially in light of the almost unanimous approval it received in the House). However, until the legislature is able to pass an amendment concerning its preferred construction of section 244(a)(1), if the Roybal Amendment is a reflection of present-day majoritarian will through legislative intent, it will remain obscured by the literal reading of the suspension statute embodied in the *Phinpathya* decision.

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169. 130 CONG. REC. H5808-09 (daily ed. June 14, 1984) (statement of Rep. Roybal). During the debate on this amendment, Representative Roybal stated:

To be eligible for suspension of deportation an individual must prove continuous physical presence in the United States for a period of seven years. This amendment would clarify that the requirements allow brief absences during this seven year period; that is, absences that do not meaningfully interrupt the continuous physical presence.

Now, the reason for that is to express the intent of Congress that the requirement not be literally or strictly construed in light of the recent Supreme Court opinion that did so. The practical result of the Supreme Court's opinion is to nullify the suspension of deportation provision, a result that the Congress could not have intended.

The more personal result is that the long-time residents of this country are being denied legal status unfairly on the grounds that they may have only briefly made an innocent trip to outside the borders . . . . [W]hat we are doing with this amendment is simply clarifying the matter and making it quite clear that it is the intent of Congress to make it possible for an individual to be able to physically leave the country in a temporary way and that absence not be a meaningful interruption of his continuous physical presence.

Representative Frank of Massachusetts reported:

[T]he Supreme Court issued an opinion giving very strict construction to his language, which was in fact stricter than the Immigration Service itself wanted to take and we have discussed this with the Immigration Service. While I could not say that they signed off on the exact language of the gentleman from California, the Immigration Service told us in a subcommittee meeting that they are convinced of the need to make some change.

Id. (statement of Rep. Frank).