

Alien Rights and Government Authority: An Examination of the Conflicting Views of the Ninth Circuit Court of Appeals and the United States Supreme Court

SANA LOUE*

Within the last ten years, the United States Court of Appeals for the Ninth Circuit has adjudicated issues of major import in the area of immigration and nationality law. The United States Supreme Court has reversed the majority of these holdings, often reiterating holdings from other circuits. This article examines the decisions of both of these courts, the precedents culminating in these pronouncements, and the views of these courts as to their own function in this area of law. The author concludes that despite cautioning the Ninth Circuit to refrain from legislating law judicially, the Supreme Court has itself been an activist court, allocating greater power to the federal government at the expense of individual rights. This activism results from an abdication by Congress of its duty to decide currently unresolved issues. The courts differ in the direction that this activism has taken due to differing ideals as to what constitutes the perfect system.

* Member of the California, Louisiana, New Jersey, and Texas Bars. B.A., University of West Florida, 1975; M.A., University of West Florida, 1976; J.D., University of San Diego, 1980. Ms. Loue is a Staff Attorney with the Legal Aid Society of San Diego, Inc., San Diego, California.

INTRODUCTION

The Ninth Circuit Court of Appeals is the largest of the thirteen federal appeals courts in the country and handles more cases subject to Supreme Court review than any other circuit.¹ Over the past ten years, the United States Supreme Court has reversed Ninth Circuit holdings in most of the Immigration and Nationality cases on which it has granted certiorari. The cases fall into four categories within the context of immigration and naturalization: (1) search and seizure; (2) suspension of deportation; (3) proceedings to determine the existence of an "entry" by a returning resident alien; and (4) the use of equitable and collateral estoppel in the immigration context.

Legal scholars may explain the startling consistency of reversals either as reflecting a "philosophical difference" between the two courts,² or as a mere statistical coincidence.³ An examination of these pronouncements, the legislative history, and the case law, reveals not only differences between the courts in their analysis of the law, but great divergence of opinion with respect to the function of the court itself. This article explores construction by both courts of the applicable immigration law and the impact of its philosophy of its own role upon the construction.

SEARCH AND SEIZURE

Interrogation

The Immigration and Nationality Act (the Act) confers upon any immigration officer⁴ the authority to interrogate, without warrant, any alien or individual believed to be an alien, as to his right to be or

1. *9th Circuit Is 'O for 22' in High Court Reviews*, L.A. Times, June 25, 1984, at A1, col. 3.

2. "Clearly, there is a philosophical difference. The 9th Circuit is one of the most liberal circuits in the country, due largely to an influx of appointments during the Carter presidency It may be a case where the Supreme Court is particularly watching 9th Circuit rulings." Gerald F. Uelman, Loyola Law School, Los Angeles, California, *quoted in id.* If there is, indeed, a philosophical difference, that difference may result from the changed composition of the Ninth Circuit during the Carter administration. Carter appointed 262 federal judges during his administration, including 15 to the Ninth Circuit. Maher, *Engine, Engine Number 9* . . . , 5 CAL. LAW. 39 (1985).

3. *9th Circuit is 'O for 22' in High Court Reviews*, *supra* note 1, at 16.

4. An "immigration officer" is any INS or other federal employee or class of employees "designated by the Attorney General, individually or by regulation, to perform the function of an immigration officer." Immigration and Nationality Act § 101(a)(18), 8 U.S.C. § 1101 (a)(18) (1982) [hereinafter cited as INA]. By regulation, immigration officers include immigration inspectors and examiners, border patrol agents, deportation officers, trial attorneys, pilots, detention officers, investigators, attorneys, paralegal specialists, naturalization examiners, and supervisory officers of such employees. 8 C.F.R. § 103.1(i) (1984). Immigration officers may exercise their authority anywhere in the United States. 8 C.F.R. § 287.1(c) (1984). For a discussion as to the place and manner in which an officer may exercise this authority, see 1A C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 5.2 (1984).

to remain in the United States.⁵ The officer need not have probable cause for this inquiry. The Ninth Circuit, in a decision subsequently affirmed by the Supreme Court,⁶ somewhat limited this authority to conform to the dictates of the Fourth Amendment.

*United States v. Brignoni-Ponce*⁷ involved an appeal from a conviction for transporting illegal aliens. The conviction stemmed from a warrantless stop near, but not at, the San Clemente checkpoint.⁸ The court found that such a stop and resulting interrogation must be supported by a founded suspicion that the individuals questioned are illegal aliens. Membership in a particular ethnic group, however, could not by itself constitute founded suspicion.⁹

The Supreme Court, affirming, explained that the validity of the stop and inquiry rests upon whether it is "reasonably related in scope to the justification for [its] initiation."¹⁰ Any inquiry beyond mere questioning as to the individual's citizenship and immigration status requires consent or probable cause.¹¹ The Court enumerated several factors to be considered in deciding whether reasonable suspicion existed: (1) the character of the area, including its proximity to the border; (2) the usual traffic patterns, and prior experience with alien traffic; (3) information regarding recent illegal border crossings; (4) the driver's behavior; (5) the appearance of the vehicle; and, (6) the characteristic appearance of persons living in Mexico.¹² The Court

5. INA § 287(a), 8 U.S.C. § 1357(a) (1982). See, e.g., *Cheung Tin Wong v. INS*, 468 F.2d 1123 (D.C. Cir. 1972).

6. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

7. 499 F.2d 1109 (9th Cir. 1974).

8. The INS maintains three types of surveillance operations. The first type of operation consists of permanent checkpoints located at certain intersections. The second operation consists of temporary checkpoints existing from time to time at a variety of locations. The third manner of surveillance is the roving patrol. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 268 (1973).

The court premised its characterization of San Clemente as a fixed checkpoint in *United States v. Morgan*, 501 F.2d 1351 (9th Cir. 1974) (en banc). With respect to its characterization of the stop in *Brignoni-Ponce*, the court stated: "Although the line between a roving-patrol stop and a fixed-checkpoint stop is not a clear one, we hold that pursuing a passing car and flagging it to the side of the road is conduct more characteristic of a roving-patrol stop than of a fixed-checkpoint stop." *Brignoni-Ponce*, 499 F.2d at 1110.

9. "[T]here is nothing suspicious about six persons riding in a sedan. The conduct does not become suspicious simply because the skins of the occupants are non-white." *Id.* at 1112 (quoting *United States v. Mallides*, 473 F.2d 859, 861 (9th Cir. 1973)).

10. *Brignoni-Ponce*, 422 U.S. at 881 (quoting *Terry v. Ohio*, 392 U.S. 1, 29 (1968)).

11. *Id.* at 881-82.

12. *Id.* at 884-86. At least one court has since relied upon these criteria and the

specifically refrained from deciding whether a warrant could validly issue for an entire area based upon area conditions.¹³ The Court emphasized that congressional power over aliens could not be allowed to diminish the Fourth Amendment rights of citizens who might be mistaken for aliens.¹⁴ In a concurring opinion, Justice White argued that the decision of the Court essentially dismantled the governmental system of interception and that law enforcement functions more properly rested with the executive and legislative branches.¹⁵

The Ninth Circuit reiterated its philosophy in *United States v. Martinez-Fuerte*.¹⁶ Three individuals had been stopped at the San Clemente checkpoint, pursuant to an area warrant.¹⁷ In holding the

need for individualized suspicion to find INS stops of vehicles on the highway violative of the Fourth Amendment. *Niacio v. INS*, 595 F. Supp. 19 (E.D. Wash. 1984).

13. *Brignoni-Ponce*, 442 U.S. at 882 n.7.

14. *Id.* at 884. The Fourth Amendment applies to all seizures of a person, including seizures that involved only a brief detention that falls short of arrest. *Terry v. Ohio*, 392 U.S. 1 (1968). An individual is "seized" "whenever a police officer accosts an individual and restrains his freedom to walk away . . ." *Id.* at 16. The Fourth Amendment requires that a seizure be "reasonable." U.S. CONST. amend. IV. Whether a particular seizure is reasonable depends upon the balance between the public interest and the individual's right to personal security free from the arbitrary interference by law enforcement officers. *Terry*, 392 U.S. at 20-21. See also *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967).

15. The entire system, however, has been notably unsuccessful in deterring or stemming this heavy flow [of illegal aliens]; and its costs, including added burdens on the courts, have been substantial. Perhaps the Judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country. This problem, which ordinary law enforcement has not been able to solve, essentially poses questions of national policy and is chiefly the business of Congress and the Executive Branch rather than the courts. *Brignoni-Ponce*, 442 U.S. at 915.

16. 514 F.2d 308 (9th Cir. 1975).

17. The warrant read as follows:

TO: Any authorized officer of the Immigration and Naturalization Service including any agent of the U.S. Border Patrol:

Application having been made by the United States for a warrant of inspection for the operation of a fixed checkpoint at San Clemente, California, and having reviewed and considered the affidavits of Robert D. McCord and Richard Wischknemper, and having reviewed and considered the findings made by the United States District Court in *United States v. Baca*, 368 F. Supp. 398 (S.D. Cal. 1973) and having reviewed and considered a copy of the certified reporter's transcript of the sworn testimony of Deputy Chief Border Patrol Agent Richard E. Batchelor presented in the *Baca* case.

I am satisfied that there is probable cause to believe that mass violations of the Immigration laws of the United States (Title 8, United States Code) have been and are being committed at a point known as the Border Patrol checkpoint on the northbound lanes of Interstate Highway Route 5, approximately five miles south of San Clemente, California.

Wherefore, You are Hereby Commanded:

(1) to conduct an immigration traffic checkpoint on the northbound lanes of Interstate Route 5, five miles south of San Clemente, California, and;

(2) to stop northbound motor vehicles for the purpose of making routine inquiries to determine the nationality and/or immigration status of the occupants of said vehicles, and;

warrant invalid and reversing the resulting convictions, the court noted that the warrant failed to specify any individuals, and thus gave border patrol agents blanket authority to stop anyone at their discretion. The court condemned the warrant as authorizing the conduct denounced in *Brignoni-Ponce*.¹⁸ Further, the court emphasized that the fact that protection of a constitutional right would lay a heavy burden upon the government was insufficient grounds for the failure to protect that right.¹⁹ In his dissent, Judge Carter speculated that a majority of the Supreme Court would support the legality of a stop pursuant to an area warrant.²⁰ He characterized the border patrol action here as a stop and interrogation, necessitating only a tem-

(3) to conduct a routine inspection of said vehicles for the presence of aliens, and;

(4) since the flow of alien traffic occurs at all hours of the day, and since limited operation of the traffic checkpoint would tend to defeat its purpose, the operation of this checkpoint may be conducted at any time of day or night, and;

(5) a copy of the warrant shall be displayed in a conspicuous manner at the checkpoint location and upon request, shall be given to any person detained.

(6) The Immigration and Naturalization Service shall file a written return on this warrant containing the following:

A. The approximate number of vehicles passing through the checkpoint during the hours of operation;

B. The approximate number of vehicles stopped for questioning concerning citizenship status;

C. The number of vehicles inspected;

D. The number of vehicles in which aliens were discovered;

E. A recapitulation of the total number of deportable aliens apprehended;

F. An inventory of any property seized.

(7) This warrant shall be returned within ten days of this date, as required by law.

Id. at 311 n.2. The record did not reveal why the INS sought a warrant. Prior to the application for the warrant, however, the Ninth Circuit had held unconstitutional a stop and search conducted without a warrant at a permanent checkpoint. *See United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974), *aff'd* 422 U.S. 916 (1975); *United States v. Juarez-Rodriguez*, 498 F.2d 7 (9th Cir. 1974), *cert. denied* 430 U.S. 985, *reh'g denied*, 431 U.S. 975 (1977). Shortly after the warrant issued, the court also found unconstitutional routine checkpoint stops conducted without a warrant. *See United States v. Esquer-Rivera*, 500 F.2d 313 (9th Cir. 1974).

18. *Martinez-Fuerte*, 514 F.2d at 315-16.

19. In explaining its criticism of the government's reasoning, the court speculated that:

the influx of illegal aliens could conceivably be stemmed in various ways. It is not our business to tell the executive how to enforce the laws, nor to tell the Congress what laws to enact. But when, as in this case, the government chooses to pitch its case upon an alleged unavoidable necessity if the laws are to be successfully enforced, we feel compelled to comment on the claimed necessity.

Id. at 318.

20. *Id.* at 323. Justice Carter based his opinion on the various opinions expressed in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), discussed *supra* note 8.

porary slowdown of the vehicle, resulting in a lesser degree of intrusion than that occasioned by a roving patrol.²¹

The Supreme Court reversed the Ninth Circuit decision in *Martinez-Fuerte*²² and upheld the legality of the stops despite the absence of reasonable suspicion by border patrol agents. The Court found the public interest was substantial because of the impossibility of controlling the flow of illegal aliens from the border. Further, the requirement of reasonable suspicion for stops on major routes would be "impractical" because of the flow of traffic. The Court reasoned that checkpoint stops involve less discretionary enforcement activity than do other types of stops and, in any event, the exercise of that discretion is subject to judicial review. The expectation of privacy in an automobile was viewed as different than that in a dwelling.²³

The Supreme Court acknowledged that individual suspicion was usually a prerequisite to a constitutional search or seizure. It qualified that requirement, however, by finding that "the Fourth Amendment imposes no irreducible requirement of such suspicion."²⁴ The Court simultaneously limited *Brignoni-Ponce* by upholding the constitutionality of selective referrals to the secondary inspection area on the sole basis of apparent Mexican ancestry. The Court justified its decision by noting that the San Clemente checkpoint differed from the roving patrols involved in *Brignoni-Ponce*,²⁵ but failed, however, to explain why that distinction justified disparate treatment.

Justices Brennan and Marshall registered a strong dissent in *Martinez-Fuerte*, characterizing the majority holding as a "defacement of Fourth Amendment protections,"²⁶ and contrary to prior Court holdings.²⁷ The dissent defined the status quo under the Fourth Amendment as one of nonintrusion,²⁸ a requirement the majority was willing to minimize merely because it could not be satisfied conveniently.²⁹ Justices Brennan and Marshall found especially unpalatable the wide discretion the ruling gave law enforcement officers³⁰

21. *Martinez-Fuerte*, 514 F.2d at 324.

22. 428 U.S. 543 (1976). The Court, in so doing, resolved a conflict between the Ninth Circuit and a companion case arising in the Fifth Circuit.

23. *Id.* at 561.

24. *Id.*

25. *Id.* at 563.

26. *Id.* at 570.

27. See *United States v. Ortiz*, 422 U.S. 891 (1975); *Brignoni-Ponce v. United States*, 422 U.S. 873 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

28. *Martinez-Fuerte*, 428 U.S. at 572 n.2.

29. *Id.* at 575.

30. The dissent accurately pointed out the contradiction in the majority's reasoning. The majority indicated that checkpoint stops involve less discretion than roving patrols. It also indicated that the officers must have wide discretion in selecting the motorists to be diverted. *Id.* at 576.

and expressed grave concern over the possible consequences of such a pronouncement.³¹

After *Martinez-Fuerte*, the Seventh Circuit, in *Illinois Migrant Council v. Pilliod*, found street stops based upon an appearance of Mexican ancestry or upon a Spanish surname unconstitutional.³² In response to the governmental claim of nonjusticiability, the court noted that an injunction against such stops did not involve the court in the internal affairs of the Immigration and Naturalization Service (INS), nor did it require that agency to act affirmatively. It merely required compliance with the Constitution. The displeasure of the executive branch was immaterial to the validity of the injunction.³³

31. The cornerstone of this society, indeed of any free society, is orderly procedure. The Constitution, as originally adopted, was therefore, in great measure, a procedural document. For the same reasons the drafters of the Bill of Rights largely placed their faith in procedural limitations on government action. The Fourth Amendment's requirement that searches and seizures be reasonable enforces this fundamental understanding in erecting its buffer against the arbitrary treatment of citizens by government. But to permit, as the Court does today, police discretion to supplant the objectivity of reason and, thereby, expediency to reign in the place of order, is to undermine Fourth Amendment safeguards and threaten erosion of the cornerstone of our system of government, for, as Mr. Justice Frankfurter reminded us, "[t]he history of American freedom is, in no small measure, the history of procedure."

Id. at 578 (quoting *Malinski v. New York*, 324 U.S. 401, 414 (1945)).

One scholar has explained the limits of discretion:

Discretion is not limited to what is authorized but includes all that is within "the effective limits" on the officer's power Discretion includes interim choices as well as final ones and procedural choices as well as substantive ones. Discretion extends to methods, forms, timing, degrees of emphasis and many other subsidiary factors.

An officer who decides what to do or not to do often (1) finds facts, (2) applies law, and (3) decides what is desirable in the circumstances after the facts and the law are known. Interpreting facts and interpreting law may both involve some exercise of discretion, but the third of the three functions is usually the largest element of discretion.

An officer who exercises discretion needs not only the facts which give rise to the discretionary problem; he may also need facts to guide his exercise of discretion.

K. DAVIS, *ADMINISTRATIVE LAW: CASES—TEXT—PROBLEMS* 443 (6th ed. 1977). For a thorough examination of the nature of discretionary justice, see K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1977).

32. *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (7th Cir. 1976), *modified*, 548 F.2d 715 (7th Cir. 1977).

33. The dissent argues that the federal courts lack power to issue the injunction requested here because Congress has plenary authority to exclude aliens. It is true that Congress has such power. It is also true that the INS agents act pursuant to the authority granted by Congress. It is not true, however, as the dissent's syllogism would have us hold, that the actions of INS officials are beyond judicial review so that we are barred from granting relief. As with any provision of the Constitution which purportedly grants Congress plenary power,

The court ruled that an INS agent could engage an individual in casual conversation. It concluded, however, that the INS agent must have a reasonable suspicion that the individual was an illegal alien prior to questioning and/or detainment.³⁴

A district court in New York reached a similar conclusion in *Marquez v. Kiley*.³⁵ In that case, INS agents stopped several individuals of Hispanic appearance on the street, pursuant to an area control operation.³⁶ The court, recognizing the realities of everyday life, found it "in the nature of an oxymoron" to speak of a "casual" inquiry between a person suspected of alienage and an armed government officer.³⁷

The Ninth Circuit in *United States v. Cortez*,³⁸ consistent with its prior emphasis upon the need for founded suspicion³⁹ as the basis for a stop, reversed a conviction premised solely on a profile of an individual. The Supreme Court⁴⁰ reversed the Ninth Circuit ruling, finding that based upon "the whole picture," the detaining officers had met the *Brignoni-Ponce* requirement of founded suspicion.⁴¹ In so holding, however, the Court encroached even further upon the pro-

whether exercise of that authority is beyond judicial review depends upon the context in which the officer acts This case . . . involves the legality of INS questioning individuals already present in this country, regardless of whether those individuals are transient aliens, permanent residents, or natural-born citizens. *Congress' power to exclude aliens cannot be interpreted so broadly as to limit the Fourth Amendment rights of those present in the United States.* Consequently, the subject matter of this lawsuit is properly before the district court.

Id. at 1068 n.5. (emphasis added).

34. *Id.* at 1070.

35. 436 F. Supp. 100 (S.D.N.Y. 1977).

36. The "Investigator's Handbook" advises:

5. Area control operations are basically selective on-the-scene interrogations which are authorized by section 287. It should be remembered that these inquiries are interrogations pursuant to section 287(a)(1), and may not necessarily involve an arrest. Under the authority of *Terry v. Ohio*, 392 U.S. 1 (1968) interrogation may involve some measure of brief restraint.

Id. at 106.

37. *Id.* at 113-14.

38. 595 F.2d 505 (9th Cir. 1979).

39. "The founded suspicion test must be read as requiring some additional fact or facts which focus suspicion on the individual or vehicle stopped." *Id.* at 508. The founded suspicion test is equivalent to the reasonable suspicion required by *Brignoni-Ponce*.

40. *United States v. Cortez*, 449 U.S. 411 (1981).

41. Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances — the whole picture — must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

Id. at 417-18. For a more recent application of "the whole picture" standard, see *United States v. Garcia*, 732 F.2d 1221 (5th Cir. 1984).

tections enunciated in *Brignoni-Ponce*, already eroded by *Martinez-Fuerte*.

Brignoni-Ponce imposed reasonable suspicion as a prerequisite to a roving patrol stop but found Mexican ancestry alone insufficient to constitute reasonable suspicion. Unlike the Ninth Circuit, however, the Supreme Court in *Martinez-Fuerte* did not view nonintrusion as the status quo. Instead, the Court viewed the degree of intrusion occasioned by the stops to be minimal and outweighed by the government's need to enforce the immigration laws. The Court characterized the nature of the intrusion as different from that in *Brignoni-Ponce*, noting that subjective intrusion at a checkpoint was significantly less than that conducted by a roving patrol.⁴²

The Ninth Circuit *Cortez* decision restores the discretion exercised by the INS prior to *Brignoni-Ponce* by allowing a roving patrol to stop individuals who may be guilty of nothing more than driving a particular type of vehicle at a particular time of the day.⁴³ The fact that an individual may conform to a profile developed from general characteristics does not constitute the founded suspicion particular to an individual required by *Brignoni-Ponce*. Such an approach permits the possibility of increased government misconduct in the exercise of this discretion.

Such abuses conceivably could be directed at particular ethnic groups. The Supreme Court in *Martinez-Fuerte* declared that apparent Mexican ancestry was sufficient to support referral to the secondary inspection area of a checkpoint.⁴⁴ *Cortez* lends credence to the proposition that a particular ancestry, together with several other factors, can be the basis for a stop. Consequently, where an area is densely populated by a particular ethnic group, a large percentage of such stops may be intrusions on individuals lawfully in the United States.⁴⁵

The possibility that misconduct will remain uncorrected is great. Many individuals are reluctant to assume the emotional and financial burden of long-term litigation to remedy a situation which, although it exists, rarely touches their lives. Although the INS provides guidance as to what constitutes a stop and what an officer may

42. *Martinez-Fuerte*, 428 U.S. at 558.

43. Justice Douglas, in his concurring opinion in *Brignoni-Ponce*, expressed his displeasure with even the suspicion test as a prerequisite, noting that it would allow the police to interfere with a law-abiding citizen whose only transgression was a nonconformist appearance. *Brignoni-Ponce*, 422 U.S. at 889.

44. *Martinez-Fuerte*, 428 U.S. at 575.

45. See, e.g., *Nicacio v. INS*, 595 F. Supp. 19 (E.D. Wash. 1984).

do pursuant to a stop, the agency has not delineated which factors give rise to an individualized founded suspicion. Indeed, the Ninth Circuit *Cortez* decision obviates the need for such caution.

Searches

The Immigration and Nationality Act permits immigration officers to conduct warrantless searches.⁴⁶ This authorization includes the power to board and search vessels, conveyances, and vehicles within a reasonable distance⁴⁷ from any external boundary of the United States.⁴⁸ Until 1973, the majority of lower court decisions upheld such searches in the absence of probable cause or warrant.⁴⁹ The Supreme Court, in *Almeida-Sanchez v. United States*,⁵⁰ recognized the constitutional difficulties inherent in such an approach. The Court reversed a Ninth Circuit decision that upheld a conviction resulting from a search conducted by a roving patrol without probable cause.⁵¹

46. INA § 287(a), 8 U.S.C. § 1357(a) (1982).

47. Regulations define "reasonable distance" as a maximum of 100 air miles from the border. 8 C.F.R. §§ 287.1(a)(b) (1984).

48. Immigration officers are also authorized to board and search any vessel, conveyance or vehicle which they believe is bringing aliens into the United States. INA § 235(a), 8 U.S.C. § 1225(a) (1982). See also 8 C.F.R. § 287.1 (e)(f) (1984).

49. For a discussion of these lower court cases, see 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 5.2(c) (1984).

50. 413 U.S. 266 (1973).

51. *United States v. Almeida-Sanchez*, 452 F.2d 459 (9th Cir. 1971) (per curiam).

Judge Browning registered a sharp dissent. He noted first that a valid border search in the absence of probable cause necessitated a direct relationship to an entry across the border. He found no basis for the court's requirement of probable cause in searches for contraband and the absence of such a requirement in searches for persons. *Id.* at 463. Judge Browning explained that the statutory language was not conclusive with respect to the need for probable cause: "Even assuming that the statute reflects Congress' understanding of the reach of the Fourth Amendment, Congress' view, though entitled to respect, does not diminish the obligation of the judiciary to interpret and enforce the constitutional mandate independently." *Id.* at 465.

The statute does not define the standards of reasonableness for government agents' searches. Rather, it delegates the authority to be exercised by agents in accordance with constitutional limitations. Congress was aware of the constitutional limitations upon the immigration officers' authority.

It has been repeatedly held that the right to exclude or to expel all aliens or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare; that this power to exclude and to expel aliens, being a power affecting international relations, is vested in the political departments of the Government, and is to be regulated by treaty or by act of Congress and to be executed by the executive authority according to the regulations so established, *except so far as the judicial department . . . is required by the paramount law of the Constitution to intervene.*

H.R. REP. NO. 1365, 82d Cong., 2d Sess. (1952), reprinted in 1952 U.S. CODE CONG. & AD. NEWS 1654 (emphasis added).

The Supreme Court, echoing Judge Browning's dissent in the Ninth Circuit opinion, found that Congress could not authorize a violation of the Constitution. The plurality opinion defined the Court's duty to mandate the interpretation of the statute in a manner consistent with the Fourth Amendment.⁵² It held that searches of this kind were appropriate at the border and its functional equivalent, but were otherwise unreasonable absent probable cause or consent.⁵³ Four justices registered a sharp dissent,⁵⁴ preferring to defer to congressional judgment.⁵⁵ Justice Powell, concurring in the plurality opinion, expressed his approval of an area search warrant in a footnote.⁵⁶

52. "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." *Almeida-Sanchez*, 413 U.S. at 273.

The Fourth Amendment provides that "no Warrants shall issue, but upon probable Cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. Probable cause is not required where the search constitutes a "border search." This exception is based upon "the inherent right of sovereignty to protect its territorial integrity against intrusion of unauthorized persons or things." *Almeida-Sanchez*, 452 F.2d at 462 (citing *Carroll v. United States*, 267 U.S. 132 (1925)). Such searches may occur not only at the border, but at its functional equivalents. *Almeida-Sanchez*, 413 U.S. at 272-73. However, since the exception is in derogation of Fourth Amendment principles, it should be narrowly construed. *Almeida-Sanchez*, 452 F.2d at 462.

53. The plurality explained what was meant by a functional equivalent:

For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.

Almeida-Sanchez, 413 U.S. at 272-73.

54. Justice White authored the dissenting opinion and was joined by Justices Blackmun, Rehnquist and Chief Justice Burger.

55. The judgment of Congress obviously was that there are circumstances in which it is reasonably necessary, in the enforcement of the immigration laws, to search vehicles and other private property for aliens, without warrant or probable cause, and at locations other than at the border. To disagree with this legislative judgment is to invalidate 8 U.S.C. § 1357(a)(3) in the face of the contrary opinion of Congress that its legislation comported with the standard of reasonableness of the Fourth Amendment.

Id. at 293.

56. "There is no reason why a judicial officer could not approve where appropriate a series of roving searches over the course of several days or weeks. Experience with an initial search or series of searches would be highly relevant in considering applications for renewal of a warrant . . ." *Id.* at 283 n.3.

Although standards for probable cause in the context of this case are relatively unstructured . . . there are a number of relevant factors which would merit consideration: they include (i) the frequency with which aliens illegally in the

The *Almeida-Sanchez* opinion created confusion⁵⁷ until the Supreme Court, in *United States v. Ortiz*, clarified its position and declared that an automobile search away from the border or its functional equivalent required consent or probable cause.⁵⁸ In so holding, the Court noted that any search, regardless of its location, necessarily entailed an intrusion of privacy and the possibility of embarrassment.⁵⁹

Several circuits recently have ruled on the legality of searches undertaken in public areas and workplaces. *Blackie's House of Beef, Inc. v. Castillo*⁶⁰ addressed the validity of two warrants obtained by the INS based on information concerning the employment of illegal aliens at a restaurant. The court of appeals of the District of Columbia Circuit held invalid the first warrant, which was obtained pursuant to Rule 41 of the Federal Rules of Criminal Procedure. The court concluded that warrants obtained pursuant to that rule aid in criminal investigations; INS investigations were characterized by the court as essentially civil law enforcement activities.⁶¹ The second warrant, which was premised upon an agent's surveillance of the res-

country are known or reasonably believed to be transported within a particular area; (ii) the proximity of the area in question to the border; (iii) the extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use; and (iv) the probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area.

In short, the determination of whether a warrant should be issued for an area search involves a balancing of the legitimate interests of law enforcement with protected Fourth Amendment rights. This presents the type of delicate question of constitutional judgment which ought to be resolved by the Judiciary rather than the Executive . . . This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search.

Id. at 283-84 (quoting *Camara*, 387 U.S. at 532-33).

57. See 1A C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 5.2c (1984). The Supreme Court addressed the retroactive application of *Almeida-Sanchez* in *Bowen v. United States*, 422 U.S. 916 (1975), *aff'g* *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974). The Supreme Court in *Bowen* relied upon its holding in *United States v. Peltier*, 422 U.S. 531 (1975), *rev'g* 500 F.2d 985 (9th Cir. 1974).

58. *United States v. Ortiz*, 422 U.S. 891 (1975). The Supreme Court affirmed an unreported Ninth Circuit decision. *Id.* at 892.

59. While the differences between a roving patrol and a checkpoint would be significant in determining the propriety of a stop, which is considerably less intrusive than a search, . . . they do not appear to make any difference in the search itself. The greater regularity attending the stop does not mitigate the invasion of privacy that a search entails. Nor do checkpoint procedures significantly reduce the likelihood of embarrassment. Motorists whose cars are searched, unlike those who are only questioned, may not be reassured by seeing that the Border Patrol searches other cars as well. Where only a few are singled out for a search . . . motorists may find the searches especially offensive.

Id. at 895. The Court specifically refrained from deciding whether checkpoints and roving patrols should be treated the same for all purposes. *Id.* at 897 n.3.

60. 659 F.2d 1211 (D.C. Cir. 1981), *cert. denied* 455 U.S. 940 (1982).

61. *Id.* at 1228.

taurant and information received from outside sources, was upheld. The INS claimed its authority to search derived from its general powers to question aliens and to enforce immigration laws.⁶² The warrant limited the search to daylight hours within ten days of the order. It permitted the search of "any locked rooms on the premises in order to locate aliens in the United States without legal authority."⁶³

The court upheld the validity of the second warrant in *Blackie's House of Beef* despite its failure to identify specific persons sought.⁶⁴ The lack of specificity as to identity of persons sought was counter-balanced by the specificity of the places to be searched, the time and scope of the search, and the strong supporting affidavits.⁶⁵ The court acknowledged the necessity of a warrant to search even commercial premises, but warned that the commercial nature of the establishment may "affect the type of evidence that constitutes probable cause to obtain a search warrant in a particular case."⁶⁶ Emphasizing the public interest in enforcing immigration laws,⁶⁷ the court held that the balance of interests "preclud[ed] insistence upon . . . individualized suspicion" as to the persons sought.⁶⁸

Similarly, the Third Circuit in *Babula v. INS*⁶⁹ upheld the legality of arrests in the absence of individualized suspicion. Based on information from an informant, INS agents entered a factory without a warrant in search of seven specific individuals. They surrounded the building to prevent escapes. The agents ascertained that six of the seven aliens sought were present legally and that the seventh had left company employment one year earlier. The agents questioned all of the employees regarding their right to be there,⁷⁰ basing their suspi-

62. INA §§ 287, 103(a), 8 U.S.C. §§ 1357, 1103(a)(1982).

63. *Blackie's House of Beef*, 659 F.2d at 1216.

64. Probable cause to support a warrant requires probable cause as to the belief that the *legitimate object* of a search is located in a *particular place*. A warrant is insufficient to justify the resulting invasion of privacy if either element is lacking. *Steagald v. United States*, 451 U.S. 204, 213 (1981).

65. *Blackie's House of Beef*, 659 F.2d at 1227.

66. *Id.* at 1216-17 n.5.

67. *Id.* at 1220-21.

68. *Id.* at 1225 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)). One court has since relied upon *Blackie's House of Beef* to permit INS reliance upon a less rigid probable cause standard than that required for a criminal warrant. *Kotler Industries, Inc. v. INS*, 586 F. Supp. 72 (N.D. Ill. 1984).

69. 665 F.2d 293 (3rd Cir. 1981).

70. The agents inquired whether (1) the individual was a Polish national; (2) the individual possessed an alien registration receipt card; and (3) the individual held a tourist visa. *Id.* at 295.

cions upon the "milieu."⁷¹ Despite the inability of the employees to leave or to avoid the questioning, the court held that no arrest occurred until the individuals had responded to the questions. Such a holding, however, precludes an alien subject to an area control operation from avoiding arrest.⁷² Yet, the Third Circuit found the intrusion no greater than it would have had the individuals been in a car. Further, the court dispensed with the requirement of individualized suspicion by noting that the INS action here involved neither a search nor a private dwelling.⁷³

Judge Adams, concurring, expressed concern that the search violated the dictates of *Brignoni-Ponce*.⁷⁴ The agents had been instructed to question each employee regardless of whether reasonable suspicion of his alien status existed. Adams noted that several courts had found area control operations irreconcilable with the dictates of the Fourth Amendment.⁷⁵

The Ninth Circuit, in *ILGWU v. Sureck*,⁷⁶ was confronted with the validity of an area control operation targeted at a factory. The agents did not question all workers, but rather selected individuals based upon their clothing, facial appearance, hair color and styling, demeanor, language, and accent.⁷⁷ The court found that the agents had created a detentive environment by their verbal authority, badges, and handcuffs; the element of surprise; the sustained disruption of the working environment; and the methodical execution of their operation down the rows of workers. Because a reasonable worker would believe he was not free to leave, such action was characterized as a seizure within the meaning of the Fourth Amend-

71. *Id.* at 296.

72. We are aware that our holding that petitioners were not arrested until they answered the three questions effectively precludes any illegal alien subject to a similar area control operation from avoiding arrest. Whether or not the petitioners knew the agents had the building surrounded, it is quite clear that, once the building was surrounded, arrests were inevitable. Each petitioner could flee, as petitioners Babula and Weszandize did, but such action gives an agent reasonable suspicion that justifies further detention. Each could answer the questions, as the other four petitioners did, thereby giving probable cause to arrest. Or each could remain silent and refuse to produce evidence of his identity, although this too would justify an agent's further suspicion of illegal alienage

In short, although surrounding the factory and preventing any escape did lead to arrest, petitioners were not in fact arrested until they had answered the three questions, at which time the arresting agent had probable cause.

Id. at 298.

73. *Id.* at 296.

74. *Id.* at 300 (citing *Illinois Migrant Council v. Pilliod*, 548 F.2d 715 (7th Cir. 1977) (en banc), *modifying* 540 F.2d 1062 (7th Cir. 1976), *aff'g* 398 F. Supp. 882 (N.D. Ill. 1975)).

75. *International Ladies' Garment Workers' Union v. Sureck*, 681 F.2d 624 (9th Cir. 1982), *rev'd*, *INS v. Delgado*, 104 S.Ct. 1758 (1984).

76. *Id.* at 627. One agent termed this a "multisensory" approach.

77. *Id.* at 634.

ment.⁷⁸ The court held that a standard which allowed detentive questioning on the basis of alienage would diminish the privacy and security of individuals legally here.⁷⁹

The Ninth Circuit, in rejecting the governmental analogy to *Martinez-Fuerte*, found that the INS action in *Sureck* was not minimally intrusive but instead resulted in surprise and continuous disruption. The court criticized the reasoning of *Babula* and found the Third Circuit "milieu" standard inconsistent with the Fourth Amendment and with the decision of the Seventh Circuit in *Pilliod*.⁸⁰

The Supreme Court reversed the Ninth Circuit ruling in *Sureck*,⁸¹ and characterized the encounter between the agents and the employees as consensual. The Court found that the actions of the employees were restricted not by the agents, but rather by their voluntary obligations to their employer.⁸² Justice Powell, concurring in the result, compared the situation to that presented in *Martinez-Fuerte*. He noted that the employees were allowed to continue working; that the systematic and public nature of agent inquiries minimized fright; and that the expectation of privacy in a plant is significantly less than in a residence. He found no necessity for individualized suspicion as a basis for the questioning.⁸³

Justice Brennan vigorously objected to majority portrayal of the facts, noting that the factory exits had been conspicuously guarded and that the agents had been equipped with handcuffs. The objective characteristics of the encounter, he insisted, necessitated its characterization as a seizure. He found *Martinez-Fuerte* inapposite for several reasons. First, the type of encounter in *Sureck* provided agents with a greater degree of discretion than they possessed at checkpoints. Second, individuals expect a greater element of privacy in a workplace than in a car. Third, no historical precedent existed for the factory surveys which would make them expectable or predictable.⁸⁴ Brennan sharply criticized the majority for abandoning the

78. *Id.* at 639.

79. *Id.* at 642. The court concluded: "To find the factory survey procedures evidenced by the record before us constitutional would be . . . straining the Fourth Amendment requirements in order to accommodate an intrusive and objectionable method of immigration law enforcement. The Constitution, as we interpret it, cannot be so accommodating." *Id.* at 644.

80. *INS v. Delgado*, 104 S.Ct. 1758 (1984).

81. *Id.* at 4438.

82. *Id.* at 4439-40.

83. *Id.* at 4442-43.

84. No one doubts that the presence of large numbers of undocumented aliens in this country creates law enforcement problems of titanic proportions for the INS. Nor

Fourth Amendment as a means of solving the problem of illegal immigration.⁸⁵

The Ninth and Seventh Circuits stand alone in their commitment to the Fourth Amendment and its requirement of individualized suspicion as a prerequisite to a search or seizure. The Supreme Court appears to have abandoned its *Brignoni-Ponce* caution against the diminution of Fourth Amendment rights through unwarranted emphasis upon congressional power over aliens. Instead, the Supreme Court and the Second Circuit have been willing to analogize the area control operation to the *Martinez-Fuerte* checkpoint procedure and to uphold fewer safeguards in the interest of law enforcement.

In many respects, the area control operation is similar to the *Almeida-Sanchez* roving patrol situation and, consequently, presents the same dangers which that decision sought to prevent. Intrusions on the workplace involve surprise, as do searches by roving patrols. An individual seeking to avoid passing through a checkpoint may choose to take a different route. No such choice is available to the employee at a targeted job site. He cannot avoid his voluntary obligations to his employer without suffering the consequences of leaving the premises during working hours. Thus, he is unable to avoid arrest. Although the workplace encounter involves questioning rather than the search for an alien, it is conducted in full view of all em-

does anyone question that this agency must be afforded considerable latitude in meeting its delegated enforcement responsibilities. I am afraid, however, that the Court has become so mesmerized by the magnitude of the problem that it has too easily allowed Fourth Amendment freedoms to be sacrificed. Before we discard all efforts to respect the commands of the Fourth Amendment in this troubling area, however, it is worth remembering that the difficulties faced by the INS today are partly of our own making . . .

In the face of these facts, it seems anomalous to insist that the INS must now be permitted virtually unconstrained discretion to conduct wide-ranging searches for undocumented aliens at otherwise lawful places of employment in the interior of the United States. What this position amounts to, I submit, is an admission that since we have allowed border enforcement to collapse and since we are unwilling to require American employers to share any of the blame, we must, as a matter of expediency, visit all of the burdens of this jury-rigged enforcement scheme on the privacy interests of completely lawful citizens and resident aliens who are subjected to these factory raids solely because they happen to work alongside some undocumented aliens. The average American, as we have long recognized, expects some interference with his or her liberty when seeking to cross the Nation's borders, but until today's decision no one would ever have expected the same treatment while lawfully at work in the country's interior. Because the conditions which spawned such expedient solutions are in no sense the fault of those lawful workers, the Court, as the guardian of their constitutional rights, should attend to this problem with greater sensitivity before simply pronouncing the Fourth Amendment a dead letter in the context of immigration enforcement. The answer to these problems, I suggest, does not lie in abandoning our commitment to protecting the cherished rights secured by the Fourth Amendment, but rather may be found by reexamining our immigration policy.

Id. at 4444.

85. See *id.* at 4443.

ployees. As Brennan noted, an individual expects greater privacy in his workplace than in his car. The workplace is a relatively small, recognizable community, allowing significantly less anonymity than the long line of cars driven by unacquainted persons passing through a permanent checkpoint.⁸⁶ Consequently, the individual faces the same degree of embarrassment in the workplace as that occasioned by an encounter with a roving patrol.

The Supreme Court has emphasized the public interest in controlling immigration and considers this factor important enough to permit the absence of particularized suspicion as a factor in the probable cause formulation. This allows INS agents a significantly greater degree of discretion in the conduct of their investigations. Furthermore, it increases the possibility for abuse of that discretion, not only vis-à-vis aliens unlawfully in the United States, but also with respect to documented persons and citizens as well.

The Application of the Exclusionary Rule

The Supreme Court has similarly enhanced the possibility of abuse by refusing to apply the exclusionary rule to deportation proceedings.⁸⁷ Although the Court, in *Lopez-Mendoza v. INS*, applied the same balancing test as the Ninth Circuit,⁸⁸ it weighed the cost-

86. The Supreme Court did not hold, however, that aliens have no rights under the Fourth Amendment. The Board of Immigration Appeals has since relied upon the Supreme Court's decision to find that a respondent in a deportation proceeding does not have the right to a separate hearing on a motion to suppress evidence. *In re Benitez*, Interim Dec. No. 2979 (BIA 1984).

87. *Lopez-Mendoza v. INS*, 705 F.2d 1059 (1983).

The case involves two Mexican aliens, Lopez-Mendoza and Sandoval-Sanchez. They were found deportable in separate proceedings. The court of appeals consolidated their separate petitions for review.

The INS arrested Lopez-Mendoza at his place of employment, without a warrant. Although the owner refused to permit the agents to interview him during working hours, one agent entered the shop and questioned him. The agent arrested him based upon his responses, and subsequently prepared a "Record of Deportable Alien" (Form I-213) and an affidavit which Lopez-Mendoza executed. Counsel for Lopez-Mendoza moved to terminate deportation proceedings, arguing that his client had been arrested illegally. The Immigration Judge found the legality of the arrest irrelevant and admitted the affidavit and Form I-213 into evidence. The Immigration Judge found him deportable based on this evidence.

Sandoval-Sanchez was arrested at his workplace following a disruptive INS search of the plant. The plant manager had consented to the search. The Immigration Judge ruled the arrest legal and ruled alternatively that the legality of the arrest was irrelevant. Sandoval-Sanchez was found deportable based upon the written record of his admissions.

88. Both courts applied the cost-benefit test established by *United States v. Janis*, 428 U.S. 433 (1976).

benefit element of that formulation significantly differently.⁸⁹

The Ninth Circuit examined the strength of the connection between the purposes of the offending officers and the purposes of those seeking to use the illegally seized evidence. The violation in *Lopez-Mendoza* was both intra-sovereign and intra-agency. The arresting officer used illegally obtained information to prepare the paperwork the INS attorneys relied upon in deportation proceedings. Since the offending officer and the prosecutor shared common goals, the deterrent effect of the exclusionary rule was maximized.⁹⁰ The Ninth Circuit found existing deterrents ineffective. It characterized as unlikely the possibilities that an illegal alien would sue an agent in his individual capacity⁹¹ or that internal discipline would be effective.⁹² The social cost of applying the rule was to be measured in terms of the number of aliens who would succeed in escaping deportation because of the suppression of illegally obtained evidence of alienage or illegal status. The court predicted that few would do so. It ultimately concluded that the marginal deterrent benefit of applying the exclusionary rule to deportation proceedings far outweighed the social cost of such application.⁹³

In support of its decision in *Lopez-Mendoza*, the Ninth Circuit majority explained that the exclusionary rule had applied to deportation proceedings until 1979, when the Board of Immigration Appeals (BIA), in *In re Sandoval*, held that it did not apply.⁹⁴ Although the court did not premise its decision in *Lopez-Mendoza* on the nature of

89. *Lopez-Mendoza*, 705 F.2d at 1069.

90. Such an action is possible pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

91. "[W]e are hesitant to place sole responsibility for ensuring that citizens and aliens alike are free from unwarranted government intrusions into their privacy on the same officers responsible for patrolling the borders and apprehending persons they suspect are aliens in this country illegally." *Lopez-Mendoza*, 705 F.2d at 1059. For an examination of the effectiveness of an internal deterrent mechanism, see Note, *The Administration of Complaints by Civilians Against the Police*, 77 HARV. L. REV. 499 (1964).

92. *Lopez-Mendoza*, 705 F.2d at 1073.

93. *In re Sandoval*, 17 I. & N. Dec. 70 (BIA 1979). But see 1A C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 5.2c (1977) ("It is undisputed that the Fourth Amendment's prohibition against unreasonable searches and seizures applies in deportation proceedings and that evidence obtained as the result of an unlawful search cannot be used.")

94. In essence, civil and criminal proceedings walk hand in hand in intrasovereign wedlock . . . [t]he government may have a criminal action against an alien for violation of [the immigration laws] . . . thrown out because of fatally contaminated evidence, and then turn right around and proceed against him in a deportation proceeding of equal or greater consequence, relying on the identical evidence. This is wrong . . . Underlying the majority decision is the premise that there is something inherent in a civil deportation proceeding, as against a criminal proceeding, which makes the application of the rule (a) less necessary, and (b) less effective. Neither of these assumptions is acceptable.

Lopez-Mendoza, 705 F.2d at 1065-66 n.9 (quoting *Sandoval*, 17 I. & N. Dec. at 95-96 (Appleman, dissenting)).

the proceeding, it asserted that the exclusionary rule could apply to deportation proceedings because of their quasi-criminal nature.⁹⁵

The dissent, authored by Judge Alarcon and joined by Judges Wright, Wallace, and Poole, characterized the majority holding in *Lopez-Mendoza* as a "radical departure from existing law."⁹⁶ The dissent disagreed with both the majority's analysis of prior case law and its application of *Janis*.⁹⁷ It found that the majority ruling contravened case precedent which characterized deportation as a regulatory proceeding.⁹⁸ The dissent premised much of its argument upon the anticipated cost to the existing system of an increased number of hearings dealing with significantly more complex issues.⁹⁹ The dissent ultimately concluded that policy questions regarding punishment for the commission of unreasonable searches and seizures are reserved for the executive and legislative branches of government.¹⁰⁰

95. *Id.* at 1075.

96. *Id.* at 1076-86.

97. *Id.* at 1086-89.

98. Absent the applicability of the exclusionary rule, questions relating to deportability routinely involve simple factual allegations and matters of proof. When Fourth Amendment issues are raised at deportation hearings, the result is a diversion of attention from the main issues which those proceedings were created to resolve, both in terms of the expertise of the administrative decision makers and of the structure of the forum to accommodate inquiries into search and seizure questions. The result frequently seems to be a long, confused record in which the issues are not clearly defined and in which there is voluminous testimony, but the underlying facts [are] not sufficiently developed. The ensuing delays and inordinate amount of time spent on such cases at all levels has an adverse impact on the effective administration of the immigration laws, which to date (in view of the virtual absence of cases in which evidence has been ultimately excluded) has in no way been counterbalanced by any apparent productive result.

Id. at 1091 (quoting *Sandoval*, 17 I. & N. Dec. at 80).

99. Unlike the field of criminal law, the supervisory role over deportation is committed to the political branches of our government. The power of Congress over the admission of aliens and their right to remain "is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security . . ." The formulation of policies pertaining to the alien's right to remain here are entrusted exclusively to Congress, and in the enforcement of these policies the Executive Branch must respect the safeguards of due process . . . Policy questions concerning the appropriate punishment to be applied for the commission of unreasonable searches and seizures do not come within the safeguards of the due process clause. Thus, these matters should be left to the political branches of government.

Lopez-Mendoza, 705 F.2d at 1094-95 (quoting *Galvan v. Press*, 347 U.S. 522, 530 (1954)).

100. In my view, a sufficient reason for excluding from civil deportation proceedings evidence obtained in violation of the Fourth Amendment is that there is no other way to achieve "the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people — all potential victims of unlawful government conduct — that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."

The Supreme Court granted certiorari in *Lopez-Mendoza* and reiterated its characterization of deportation proceedings as civil in nature and determinative of an individual's right to remain in the United States. The Court found that Lopez entered no objection to the evidence introduced against him. Furthermore, even had the arrest been illegal, it was irrelevant to the deportation proceedings. The Court, in applying the *Janis* formulation, found the deterrent value of the exclusionary rule in deportation proceedings minimal and the social costs great.

The Court ruled that the INS could meet its burden by relying on evidence independently obtained or sufficiently attenuated from the original arrest. In addition, few arrestees would challenge the legality of the arrest. Furthermore, the INS had internal mechanisms to deter Fourth Amendment violations by its agents. The Court found other available remedies sufficient.

The majority discussed the practical problems encountered by the INS and emphasized the great weight to be afforded this element in the *Janis* calculation. The Court expressed its concern in terms closely tailored to the language of the Ninth Circuit dissent. Justices O'Connor, with whom Justices Blackmun, Powell, and Rehnquist concurred, conceded a possible contrary ruling should Fourth Amendment violations by the INS become widespread.

Justice White filed a strong dissent in *Lopez-Mendoza*, with Justices Brennan, Marshall, and Stevens agreeing in part. White viewed the majority decision as premised on a faulty assessment of costs and benefits. He found insufficient the alternative remedies suggested by the majority; for example, an INS internal mechanism to deter violations and civil suits for damages. In particular, White criticized several aspects of the majority opinion. First, he attacked the implication by the majority that attorneys and judges are significantly less familiar with the intricacies of the Fourth Amendment than are INS officers. Second, White took exception to the majority conclusion that the application of the rule would interfere with hearings and result in minimal deterrence of violations. Finally, Justice White noted that the exclusionary rule had previously applied to deportation proceedings and that no evidence existed to indicate that the rule interfered with INS operations.

Justice Brennan, in a separate dissenting opinion, disagreed with the argument that the deterrent effect provided the only justification for the rule. Justice Marshall, also writing a separate dissent, reiterated the obligation of the judiciary to avoid participation in unlawful

Id. at 1067 n.11 (quoting *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting)).

conduct.¹⁰¹

The Supreme Court and the Ninth Circuit based their decisions in *Lopez-Mendoza* on the premise that deterrence was the sole purpose for the exclusionary rule. This is contrary to the various purposes for which the rule was originally intended.¹⁰² The Supreme Court decision allocates greater control to the federal government enforcement functions at the expense of individual rights.¹⁰³ This in turn opens the door to possible greater abuse of that discretion, and diminishes the possibility of its correction. An alien deported as a result of reliance on illegally obtained data is unable to pursue either a civil suit against the offending officer or file a complaint against him with the INS. The trend by the Supreme Court to allocate greater authority to the federal government is visible in other areas of immigration law.

SUSPENSION OF DEPORTATION

The Immigration and Nationality Act authorizes the suspension of an alien's deportation¹⁰⁴ within the context of deportation proceed-

101. Although one would gain little inkling of this from recent Supreme Court opinions, the primary goals of the framers of the exclusionary rule were to avoid "sanctioning" or "ratifying" unconstitutional police conduct; to preserve the judicial process from contamination; and to prevent the Government from profiting from its own wrongdoing. The framers of the exclusionary rule may have expected, or at least hoped, to affect police behavior, but there is no suggestion in any of the early cases that the rule's survival was to depend on proof that it deters police misconduct.

B. Kamisar, quoted in *N.Y. Times*, July 11, 1984, at A25.

102. "Of late the Court has acquired a voracious appetite for judicial activism in its Fourth Amendment jurisprudence, at least when it comes to restricting the constitutional rights of the citizen." *New Jersey v. T.L.O.*, 104 S. Ct. 3583 (1984) (Stevens, J., dissenting).

103. For examples of such abuse see *Benitez-Mendoza v. INS*, 707 F.2d 1107 (9th Cir. 1983), modified at 748 F.2d 539 (1984); *In re Castaneda* (A23447807) (BIA 1984). See also U.S. COMM'N ON CIVIL RIGHTS: THE TARNISHED GOLDEN DOOR (Sept. 1980). Aliens must increasingly rely upon the protections of the Fifth Amendment to avoid the consequence of the non-applicability of the Fourth Amendment. See, e.g., *In re Castaneda* (A23447807) (BIA 1984).

104. Section 244 of the I.N.A., 8 U.S.C. § 1254(a)(1) (1982) currently provides:

(a) 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 (other than an alien described in section 1251(a)(19) of this title) who applies to the Attorney General for suspension of deportation and —

(1) 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

ings,¹⁰⁵ when that alien can establish: (1) that he has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of application; (2) that he has been and continues to be a person of good moral character; and (3) that the deportation would result in extreme hardship to the alien or to the alien's spouse, parent, or child, who is a citizen or permanent resident of the United States. Additionally, the Attorney General or his delegate must be convinced that that individual merits a favorable exercise of discretion. The Ninth Circuit and the Supreme Court have recently clashed in their construction of the requirement of "continuous physical presence" and the function of a court reviewing an administrative determination regarding the existence of extreme hardship.¹⁰⁶

"Continuous Physical Presence": The History of the Provision and Prior Judicial Interpretation

Congress did not incorporate a residence requirement into the suspension of deportation provision until 1948. At that time, it amended the immigration laws to authorize suspension of deportation for those aliens who had "resided continuously in the United States for seven years or more" and could demonstrate good moral character during the years preceding the application for such relief.¹⁰⁷ Concerned with instances of substantial abuse,¹⁰⁸ Congress ultimately re-

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

105. The Supreme Court has characterized deportation as "a drastic measure and at times the equivalent of banishment or exile *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). The deportation of an individual may separate him from his home and family and deprive him "of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). See also *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 479 (1963) ("deportation is a drastic sanction, one which can destroy lives and disrupt families").

There are 19 substantive grounds for the deportation of aliens. INA § 241(a)(1)-(19), 8 U.S.C. §§ 1251(a)(1)-(19)(1982). The procedural mechanism for deportation is outlined in sections 242 and 243 of the I.N.A., 8 U.S.C. §§ 1252, 1253 (1982).

An application to suspend deportation may also arise within the context of a motion to reopen. If circumstances change following the deportation proceeding, the alien may move to reopen the proceeding to apply for this remedy. 8 C.F.R. § 242.22 (1984). Where the alien has appealed to the Board of Immigration Appeals from an order of deportation and the Board has rendered a decision, the alien must direct the motion to reopen to the Board, rather than to the Immigration Judge. 8 C.F.R. § 3.2 (1984).

106. *INS v. Jong Ha Wang*, 450 U.S. 139 (1981). Other articles have examined this case extensively; their analysis will not be repeated here. See Loue, *What Went Wrong With Wang?: An Examination of INS v. Wang*, 20 SAN DIEGO L. REV. 59 (1982); Feldman, *Scope of Judicial Review: Extreme Hardship and the Whipsaw of Illegal Aliens*, 36 AD. L. REV. 27 (1984).

107. 62 Stat. 1206.

108. E.g., where an alien "has a total of 7 years residence in the United States [but] the alien has been out of the United States for as long as 2 years during the last 7

placed the seven years "continuous residence" requirement with the requirement of seven years "continuous physical presence."¹⁰⁹ No direct statement exists which indicates that Congress, in enacting the 1952 Act, intended the term "continuous" to be interpreted literally.

Congress in 1962 drastically amended section 244 of the Act, but left intact the requirement of seven years continuous physical presence.¹¹⁰ Prior to the 1962 amendment, only one court of appeals had interpreted the continuous physical presence requirement. This court held that the term should be construed flexibly.¹¹¹ The INS purported to interpret the provision literally, but in at least one case, failed to do so.¹¹² Congress presumably knew of these prior interpretations at the time that it adopted the new law.¹¹³

In *Rosenberg v. Fleuti*,¹¹⁴ subsequent to the adoption of the 1962 amendments, the Supreme Court construed the term "entry" within the meaning of section 101(a)(13) of the Immigration and National-

years." S. REP. NO. 1515, 81st Cong., 2d Sess. 602 (1950). See also S. REP. NO. 1137, 82d Cong., 2d Sess., pt. 1, 25 (1952); H.R. REP. NO. 1365, 82d Cong., 2d Sess. 31 (1952).

109. H.R. REP. NO. 1365, 82d Cong., 2d Sess. 31 (1952).

110. 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.9a (1977).

111. The respondent was initially denied suspension of deportation for failure to meet the continuous physical presence requirement. On review in *McLeod v. Peterson*, 283 F.2d 180 (3d Cir. 1960), the court of appeals found that the respondent's failure to fulfill this requirement resulted from reliance upon the statements of INS agents. INS, in effect, argued that reliance upon that error deprived respondent of the suspension remedy. The court vehemently opposed such an interpretation of the law:

To yield to this argument would be to become a party to a "bootstrap" operation by means of which officers of the United States seek to turn their own error, however innocent, into the bar to the assertion of a right by the victim of this very error. We cannot hold that this is what the statute demands.

Id. at 187. The court refused to determine the length of absence which would negate a finding of continuous physical presence: "While 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." *Id.* at 186.

112. *In re J.M.D.*, 7 I. & N. Dec. 105 (BIA 1956). The INS stated that "a statute should be construed so as to carry out the intent of the legislature, although such construction may seem contrary to the letter of the statute." *Id.* at 107.

113. See *Merrill, Lynch, Pierce, Fenner & Smith, Inc., v. Curran*, 456 U.S. 353, 382 n.66 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

114. 374 U.S. 449 (1963).

The Supreme Court granted certiorari to resolve a conflict between the Second and Ninth Circuits. The court in *DiPasquale v. Karnuth*, 158 F.2d 878 (2d Cir. 1947), declined to find an "entry" where an alien passed through Canada while asleep on a night train en route from Buffalo to Detroit. The Ninth Circuit in *DelGuercio v. Delgadillo*, 159 F.2d 130 (9th Cir. 1947), found an "entry" where an alien entered the United States following a one week recovery in Cuba resulting from the torpedoing of his boat.

ity Act.¹¹⁵ The case involved a Swiss national who held permanent residence status in the United States. Upon his attempt to enter the United States following a short trip of several hours' duration to Mexico, *Fleuti* faced excludability charges.¹¹⁶ The Supreme Court, however, found that an exclusion here would be inconsistent with congressional intent.¹¹⁷ The Court cautioned that an alien could imperil his status by interrupting his residence either frequently or for extended periods of time.¹¹⁸ However, the test for determining whether an entry constituted an "entry" for immigration purposes depended upon whether the alien's intent to depart was meaningfully interruptive of the alien's permanent residence. The Court enumerated three factors to be considered in making such determinations: (1) the length of time the alien was gone; (2) the purpose of the departure; and (3) the need to procure travel documents. Other factors, however, could be considered relevant.¹¹⁹

Later cases which construed the physical presence requirement of section 244(a)(1) routinely applied the *Fleuti* construction of "entry," even though the *Fleuti* Court had construed only section 101(a)(13). The Ninth Circuit, in *Wadman v. INS*, found the distinction between "entry" and "continuous physical presence" "not significant."¹²⁰ The court ruled that this liberal construction would affect the ameliorative purposes of the statute and would "tend to increase the scope of the Attorney General's review and thus his power to act in amelioration of hardship."¹²¹ The Ninth Circuit continued to consistently apply the *Fleuti* rationale to section 244(a)(1)

115. 8 U.S.C. § 1101(a)(13) (1982). Justice Clark, joined by Justices Harlan, Stewart, and White, argued vigorously that the majority had engaged in statutory construction rather than construing the meaning of the term "entry." *Fleuti*, 374 U.S. at 463-67. For one writer's disapproval of the majority result and support for Clark's view, see Note, *Deportation: Procedural Rights of Reentering Permanent Resident Aliens Subject to Exclusion Hearings*, 51 *FORDHAM L. REV.* 1339, 1350 (1983).

116. INA § 212, 8 U.S.C. § 1182 (1982) enumerates the substantive grounds of excludability.

117. *Fleuti*, 374 U.S. at 461-62. The Court found that Congress, in enacting section 101(a)(13), intended to ameliorate harsh results suffered by permanent resident aliens. The Court premised its conclusion upon naturalization provisions in the 1952 Act which provided that an absence of less than six months duration would not presumptively interrupt continuous residence. INA § 316, 66 Stat. 242-43, 8 U.S.C. § 1427 (1982), construed in *Fleuti*, 374 U.S. at 458-59.

118. *Fleuti*, 374 U.S. at 461.

119. "[T]he operation of these and other possibly relevant factors remains to be developed 'by the gradual process of judicial inclusion and exclusion'" *Id.* at 462 quoting *Davidson v. New Orleans*, 96 U.S. 97, 104 (1871).

120. *Wadman v. INS*, 329 F.2d 812, 815 (9th Cir. 1964). "The question is whether the interruption, viewed in balance with its consequences, can be said to have been a significant one under the guides laid down in *Fleuti* The answer cannot be found as a matter of law." *Id.* at 816.

121. *Id.* at 817. Compare with *INS v. Jong Ja Wang*, 450 U.S. 139 (1981) (liberal construction of "extreme hardship" by reviewing court so as to effectuate ameliorative purpose improperly limits Attorney General's discretion).

cases.¹²²

The Second Circuit had occasion to construe the physical presence requirement of section 244(a)(1) in *Heitland v. INS*.¹²³ Although conceding that *Fleuti* "supports a liberal rather than a niggardly construction of the phrase 'continuous period' as used in § 244(a)(1),"¹²⁴ the court found, nevertheless, that the couple's six-week departure to Germany was meaningfully interruptive of their presence here. The court noted that while *Fleuti* was a permanent resident, the Heitlands were in the United States in violation of their status, with no reasonable basis for believing they would be allowed to remain.¹²⁵ Further, the Heitlands were able to effect a return to the United States following that departure solely by engaging in "implicit misrepresentations."¹²⁶

122. *E.g.*, *Mamane v. INS*, 566 F.2d 1103 (9th Cir. 1977); *Yuen Sang Law v. Attorney General of the United States*, 479 F.2d 820 (9th Cir. 1973), *cert. denied*, 414 U.S. 1039 (1973); *Barragan-Sanchez v. Rosenberg*, 471 F.2d 758 (9th Cir. 1972); *Toon-Ming Wong v. INS*, 363 F.2d 234 (9th Cir. 1966); *Git Foo Wong v. INS*, 358 F.2d 151 (9th Cir. 1966). The court in *Toon-Ming Wong* explained the *Fleuti* criteria:

The length of the absence is relevant, but not alone determinative. Two absences aggregating sixteen months caused by the wrongful act of the Immigration and Naturalization Service, have been held insufficient to break a five-year "continuous presence" [*McCleod v. Peterson*, 283 F.2d 180 (3rd Cir. 1960)] On the other hand, a very brief absence might suffice if voluntary and accompanied by a realization of possible consequences to the alien's status as a United States resident, particularly if the journey abroad were motivated by a purpose inconsistent with the policies of the Act.

Toon-Ming Wong, 363 F.2d at 236.

123. 551 F.2d 495 (2d Cir. 1977), *cert. denied*, 434 U.S. 819 (1977).

124. *Id.* at 501.

The statute surely was not designed to protect the wanderers or the rootless. Hence Congress used the word "continuous." 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 § 244(a)(1), since the hardship in such a case would not be substantially different from that where the presence has been uninterrupted.

Id.

125. *Id.* at 502.

126. To permit them to treat their six-week absence and re-entry as if these events had never occurred would be to reward them for what amounted to misleading conduct and would render meaningless the express requirement that the seven-year residence be "continuous." The implicitly fraudulent circumstances of their return, when considered with the admitted illegality of their presence in the United States before their departure and the substantial period of time for which they absented themselves, do not present a picture of the type of hardship or injustice which *Fleuti* or its progeny were intended to remedy.

Id. at 503. The court here appears to collapse into one requirement the three separate and distinct requirements of physical presence, good moral character, and extreme hardship. The court also premised its decision on the aliens' illegal presence in the United States. The statute, however, makes no distinction between those individuals who are

The Ninth Circuit, in *Kamheangpatiyooth v. INS*,¹²⁷ found the *Fleuti* factors merely evidentiary and not themselves the object of inquiry.¹²⁸ The court introduced into the calculation two additional factors: (1) whether the hardship would be as severe if the absence had not occurred; and (2) whether there would be an increase in the risk of deportation as a result of the absence.¹²⁹ The court found that Congress had replaced the "continuous residence" requirement with the "continuous physical presence" requirement only to appease field officers. If any time period by itself were to bar relief, it would be a period of two years based upon the complaints of those field officers.¹³⁰ The court explained its construction of the statute by noting that an alien who departed briefly during the seven years could realistically be in a situation comparable to an alien who has not departed at all,¹³¹ and that congressional attention was actually directed to the individual's degree of commitment to this society.¹³² Although the Ninth Circuit subsequently reaffirmed this new formulation,¹³³ several other circuits vigorously rejected it.

The Fourth Circuit, in *McColvin v. INS*, ruled that the Ninth Circuit in *Kamheangpatiyooth* gave a broader interpretation to "contin-

legally present and those who have entered and/or remained without authorization.

127. 597 F.2d 1253 (1979).

128. The particular facts focused upon by the immigration judge — the time petitioner was away, the distance he traveled, and the three documents petitioner obtained before or during the trip — should not, alone or in the aggregate, bar the Attorney General from considering the merits of petitioner's application for suspension of deportation. An absence of six or even 16 months does not interrupt the requisite continuity of physical presence as a matter of law . . . Nor does travel to any specific point, no matter how distant break continuity conclusively.

Id. at 1258. The court interpreted congressional concern of abuse as barring relief to those who had remained outside of the United States for two of the requisite seven years.

Id. at n.6 (construing S. REP. NO. 1515, 81st Cong., 2d Sess. 602 (1950)).

129. 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 absence 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 1257.

130. *Id.* at 1258 n.6 (quoting S. REP. NO. 1515, 81st Cong., Sess. 602 (1950)).

131. *Id.* at 1256-57.

132. The court reflected that:

It was Congress' 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 . . . Presence that is only intermittent suggests the alien has not become so attached to this country that the authorities should consider suspending normal operation of the immigration laws on his behalf.

Id. at 1256.

133. *de Gallardo v. INS*, 624 F.2d 85 (9th Cir. 1980); *Chan v. INS*, 610 F.2d 651 (9th Cir. 1979).

uous" than intended by *Fleuti* or by Congress.¹³⁴ The court found that retention by Congress of the "continuous physical presence" requirement despite other changes to the suspension provision evidenced congressional intent that the requirement be strictly applied.¹³⁵

The application of the "continuous physical presence" requirement first confronted the Eleventh Circuit in *Fidalgo-Velez v. INS*.¹³⁶ The court ruled that the "broad and liberal" interpretation of the Ninth Circuit in *Kamheangpatiyooth* contravened the plain language and the legislative history of the statute. Furthermore, the *Kamheangpatiyooth* test exceeded even the flexible standards of *Fleuti*. The court ultimately concluded that the statute allowed no exceptions and was to be strictly applied.¹³⁷ The Eleventh Circuit reaffirmed its position in *Marti-Xiques v. INS*.¹³⁸

Phinpathya v. INS

*Phinpathya v. INS*¹³⁹ involved the departure of a student for three months to Thailand. Both the Immigration Judge and the Board of Immigration Appeals found that, even under the *Kamheangpatiyooth* standard, the trip was "meaningfully interruptive." The BIA also noted that the trip necessitated a new passport and that respondent was in the United States illegally at the time she left for Thailand. Further, the respondent was able to return to the United States only by misrepresenting her status as the wife of a foreign student.

The Ninth Circuit reversed on the grounds that the BIA had misapplied the test.¹⁴⁰ The proper application required that the Board

134. *McColvin v. INS*, 648 F.2d 935 (1981).

135. *Id.* at 938. The court relied on various congressional reports, *supra* note 108, and emphasized Congress' intent to exclude:

aliens [who] are deliberately flouting our immigration laws by the processes of gaining admission into the United States illegally or ostensibly as nonimmigrants 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.

McColvin, 648 F.2d at 938 (quoting S. REP. NO. 1137, 82d Cong., 2d Sess., pt. 1, 25 (1952)).

136. 697 F.2d 1026 (11th Cir. 1983).

137. *Id.* at 1029.

138. 713 F.2d 1511, 1514 n.3 (11th Cir. 1983), *vacated*, 724 F.2d 1463 (11th Cir. 1984), *aff'd*, 741 F.2d 350 (11th Cir. 1984).

139. 673 F.2d 1013 (9th Cir. 1981) *rev'd*, 104 S. Ct. 584 (1984).

140. The court found that the Board had adopted the position that an absence would necessarily be "meaningfully interruptive" if either of the factors enunciated by *Kamheangpatiyooth* were absent. *Id.* at 1018.

“view the circumstances in their totality, and analyze those circumstances in light of the congressional purpose underlying the continuity requirement.”¹⁴¹ The court reiterated the *Kamheangpatiyooth* view of the congressional purpose.¹⁴²

The Supreme Court vehemently rejected the Ninth Circuit approach to the “continuous physical presence” requirement.¹⁴³ The Court reviewed the same legislative documents and found that “[h]ad Congress been concerned only with ‘non-intermittent’ presence or with the mere maintenance of a domicile or general abode, it could have retained the ‘continuous residence’ requirement.”¹⁴⁴ It noted further that Congress had provided moderating provisions in other portions of the Immigration and Nationality Act where it had desired flexibility in administering the law.¹⁴⁵ The Court found the ameliorative intent of the 1962 amendments relevant only to the extreme hardship requirement.¹⁴⁶ The Court suggested that the *Kamheangpatiyooth* formulation would merge the extreme hardship requirement with the separate and distinct requirement of continuous physical presence, and read the latter out of the Act entirely.¹⁴⁷

The Supreme Court eliminated the degree of flexibility available under the *Fleuti* doctrine. The Court found *Fleuti* “essentially irrelevant” to suspension applications. It characterized *Fleuti* as dealing with a statutory exception enacted to ameliorate the harsh effects of prior judicial construction of the term “entry.” Congress had added the requirement of continuous physical presence to the statute as a threshold requirement to limit the discretionary availability of the suspension remedy. The Court further distinguished *Fleuti* by noting that the case involved the departure of a lawful resident, whereas *Phinpathya* addressed the status of an illegal resident who had no basis for expecting permission to remain.¹⁴⁸

The respondent argued that the Act should be construed so as to

141. *Id.* at 1017.

142. *Id.*

143. *INS v. Phinpathya*, 464 U.S. 183 (1984). The Ninth Circuit has since commented that the Supreme Court changed the law from what the Ninth Circuit believed it to be. *Dasigan v. INS*, 743 F.2d 628 (9th Cir. 1984).

144. *Phinpathya*, 464 U.S. at 191.

145. *Id.* See former section 301(b) of the I.N.A. Although this section required two years of continuous physical presence for the maintenance of one's status as a United States citizen or national, it provided that “absence from the United States of less than sixty days in the aggregate during the period for which continuous physical presence in the United States is required shall not break the continuity of such physical presence.” 86 Stat. 1289 (repealing 71 Stat. 644 (12-month aggregate absence does not break continuity of physical presence)). Compare the Court's refusal to read moderation into the application of the presence requirement of section 244(a)(1) with its willingness in *Fleuti* to do so with respect to “entry.”

146. *Phinpathya*, 464 U.S. at 191.

147. *Id.* at 195.

148. *Id.* at 192-194.

broaden the discretion of the Attorney General. The Court found that such an approach would shift authority from Congress to the INS, and ultimately, to the courts. The Court found this scheme "impermissible in our tripartite scheme of government."¹⁴⁹

Justice Brennan, joined by Justices Marshall and Stevens, concurred in the judgment but voiced opposition to the reasoning of the majority. They interpreted the legislative history as compelling a flexible interpretation of the continuous physical presence requirement. In addition, the legislative history indicated intended exceptions to the language of the Act.¹⁵⁰ Finally, Brennan noted that the INS had formerly applied the provision flexibly.¹⁵¹

Phinpathya—An Analysis

Both the Ninth Circuit and the Supreme Court purported to base their holdings in *Phinpathya* entirely upon congressional intent as reflected in the language of the legislation and its developmental history. Several circuits prior to the *Phinpathya* decision had indicated that the statute allowed no flexibility.¹⁵² Each court's philosophy of its role and the location of authority may have as much to do with the divergent holdings in *Phinpathya*, as did the views of legislative intent.

The Supreme Court and the Ninth Circuit both discussed congressional concern regarding the abuses of the former "continuous residence" requirement.¹⁵³ Despite the lack of a direct statement indicating that Congress intended to literally apply the "continuous physical presence" requirement, the Supreme Court accepted congressional statements of concern as conclusively establishing such an intent. It did not, however, apply the statute in accordance with congressional intent in comparing the factual situations of *Fleuti* and

149. *Id.* at 592.

150. It is a hornbook proposition that:

All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character.

The reason for the law in such cases should prevail over its letter.

United States v. Kirby, 74 U.S. 482, 486-87 (7 Wall. 1868).

151. *Phinpathya*, 464 U.S. at 185 n.1. The Government conceded at oral argument that "the [INS] believes that there is room for flexibility in applying [§ 244]." *Id.* at 593.

152. *E.g.*, *Marti-Xiques v. INS*, 713 F.2d 1511 (11th Cir. 1983); *Fidalgo-Velez*, 697 F.2d at 1026; *McColvin*, 648 F.2d at 935.

153. See *supra* notes 108 and 132 and accompanying text.

Phinpathya. The fact of Phinpathya's illegal status in the United States is irrelevant to the determination of the suspension application since the statute attaches no significance to the legality of one's presence in the calculation of eligibility for suspension.¹⁵⁴

The Supreme Court eliminated the Attorney General's discretion in the application of this requirement. The practical effects of this decision are twofold. First, it virtually eliminates judicial review of suspension cases where the alien has been outside of the United States for any period, however short, during the seven years preceding the application for relief. Second, the decision all but forecloses suspension as a remedy.

Ample evidence now exists supporting the Ninth Circuit's assertion that Congress intended a flexible application of the continuous physical presence requirement. The House of Representatives, in a 411 to 4 vote adopting the Roybal Amendment (number 35) to H.R. 1510,¹⁵⁵ gave clear notice that it did not approve of the Supreme Court's nullification of the suspension remedy.¹⁵⁶ The bill would reinstate a "meaningful interruption" test,¹⁵⁷ but did not specify whether the *Fleuti* or the *Kamheangpatiyooth* criteria would apply.

Phinpathya and Wang: Siamese Twins?

The Supreme Court in *Ins v. Jung Ha Wang*,¹⁵⁸ echoing Wallace's vigorous dissent in *Villena v. INS*,¹⁵⁹ interpreted section 244(a)(1)

154. Justice Kaufman explained that such a distinction would result in discrimination unauthorized by statute. *Heitland v. INS*, 551 F.2d 495, 507, n.3 (2d Cir. 1977) (Kaufman, J., dissenting).

155. 130 CONG. REC. H5808 (daily ed. June 14, 1984) (statement of Rep. Roybal).

156. [T]he 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. This was not the intent of Congress when the legislation was passed. The administration does not agree with the Supreme Court, and what 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.

Id. It is questionable, however, whether the 98th Congress in 1984 can legitimately speak to the intent of the 82d Congress in 1952.

157. The amendment would provide: "(2) An alien shall not be considered to have failed to maintain continuous physical presence in the United States under paragraphs (1) and (2) of subsection (a) if the absence from the United States did not meaningfully interrupt the continuous physical presence." *Id.*

158. 450 U.S. 139 (1981).

159. 622 F.2d 1352 (9th Cir. 1980).

If INS discretion is to mean anything, it must be that the INS has some lati-

as delegating to the Attorney General the definition of "extreme hardship," reviewable only for abuse of discretion. The decision effectively foreclosed judicial review of the substantive decision, and left open only review of the process by which the Attorney General reached a determination as to the existence of extreme hardship in any given case. *Wang* thus shifted authority from the courts to the Attorney General.¹⁶⁰

Phinpathya, too, foreclosed the possibility of judicial review of the definition of "continuous physical presence." *Phinpathya*, though, reached even further in its curtailment of discretion, by eliminating that discretion which the courts had interpolated from the statute to be within the province of the Attorney General.¹⁶¹

In two watershed decisions, the Supreme Court has thus removed the judiciary as a major directive element in the application and formulation of the law. These decisions adhere to Justice Clark's remonstrance that the courts in construing statutes should refrain from

tude in deciding when they reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations. There can be no doubt that the majority opinion eliminates the INS discretion anticipated by the regulations creating the motion to reopen.

Id. at 1362-63.

160. *Wang* addressed an application for suspension of deportation filed in the context of a motion to reopen. Courts have applied *Wang* to motions to reopen generally. *See, e.g.* *Anwazi v. INS*, 751 F.2d 1120 (9th Cir. 1985) (application for adjustment of status). The standard to be applied in ruling on a motion to reopen is not always clear, though, and different panels of the same court of appeals may express conflicting views. *Compare with* *Mattis v. INS*, 756 F.2d 748 (9th Cir. 1985) (application for suspension of deportation). For the Supreme Court's most recent pronouncement on a motion to reopen, premised upon an application for suspension of deportation, see *INS v. Rios-Pineda*, 105 S. Ct. 2098 (1985), *rev'g* *Rios Pineda v. U.S. Dept. of Justice*, INS, 720 F.2d 529 (8th Cir. 1983). The Ninth Circuit has also recently addressed the standard governing motions to reopen premised on applications for suspension of deportation. *See, e.g.,* *Saldana v. INS*, 762 F.2d 824 (9th Cir. 1985).

161. *Phinpathya*, 464 U.S. at 195.

In *INS v. Wang*, we rejected a relaxed standard for evaluating the "extreme hardship" requirement as impermissibly shifting discretionary authority from INS to the courts . . . Respondent's suggestion that we construe the Act to broaden the Attorney General's discretion analogously would shift authority to relax the "continuous physical presence" requirement from Congress to INS and, eventually, as is evident from the experience in this case, to the courts. We must therefore reject respondent's suggestion as impermissible in our tripartite scheme of government. Congress designs the immigration laws, and it is up to Congress to temper the laws' rigidity if it so desires.

Id.

constructing statutes.¹⁶² In the process, however, the Supreme Court itself has engaged in legislating. By lessening the possibility of judicial review, it has effectively eliminated a remedy which Congress expressly formulated as a means of alleviating hardship.¹⁶³ The Supreme Court has refused to acknowledge, however, that such an approach may permit violations of an individual's due process rights, even though the individual is illegally here.¹⁶⁴ Such an approach effectively sidesteps the concerns voiced by both circuit courts¹⁶⁵ and Congress.¹⁶⁶

DUE PROCESS FOR RETURNING RESIDENTS

The Immigration and Nationality Act provides for the exclusion of aliens who are ineligible to receive visas.¹⁶⁷ These provisions also apply to those who have obtained permanent resident status, later leave the United States, and subsequently seek re-entry, only to find that they have committed an offense or assumed a status which renders them excludable. Whether the alien will ultimately be found

162. *Fleuti*, 374 U.S. at 449, 463 (Clark, J., dissenting).

163. Although the conclusion is clear that some discretionary power exercised by agencies is so far "committed" to agency discretion as to be unreviewable and some is not, the problem of determining what action is so committed and what is not is often subtle, elusive and unclear.

. . . .
The most important problem about action committed to agency discretion by law is the extent to which courts should refrain from entering highly specialized areas of administration for the purpose of determining whether discretion has been abused. When administrators are specialists, when the subject matter is within their specialization, when the factors that may have influenced their discretionary determination are numerous and complex, and when the judges as generalists have little confidence in their own capacity to provide a useful check, the natural tendency of judges is to get rid of the challenge of the administrators' discretion by reciting that the action is committed to agency discretion by law and that it is therefore unreviewable. Yet whenever a court so holds, a party who thinks that discretion has been abused is denied a meaningful judicial check.

K. DAVIS, *ADMINISTRATIVE LAW: CASES—TEXT—PROBLEMS* 64-65 (6th ed. 1977).

164. For example, if the INS coerces an individual to sign a voluntary return rather than processing him for a deportation proceeding, the alien arguably has been denied due process. Yet, under *Phinpathya*, the individual's coerced departure is still interruptive of the seven year continuous physical presence. Consequently, the possibility of suspension of deportation is foreclosed.

165. See, e.g., *Amezquita-Soto v. INS*, 708 F.2d 898 (3d Cir. 1983) (Gibbons, J., dissenting); *Antoine-Dorcelli v. INS*, 703 F.2d 19 (1st Cir. 1983); *Santana-Figueroa v. INS*, 644 F.2d 1354 (9th Cir. 1981); *Tovar v. INS*, 612 F.2d 794 (3d Cir. 1980).

The Supreme Court in the past has recognized that where the literal application of a statute would lead to absurd results, the Court was obliged to abide by the legislative policy rather than by the plain language of the legislation. See, e.g., *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940). The Supreme Court's tenacity to the plain language of the physical presence requirement has produced an absurd result — the nullification of that remedial provision.

166. See *supra* note 156 and accompanying text.

167. INA § 212, 8 U.S.C. § 1182 (1982).

excludable may turn on whether his departure was "meaningfully interruptive."¹⁶⁸ The Supreme Court in *Landon v. Plasencia*,¹⁶⁹ reversed a Ninth Circuit decision¹⁷⁰ holding that such a determination could be made only within the context of deportation proceedings. The Supreme Court held that exclusion proceedings were sufficient in such circumstances. If the exclusion proceedings determined that the resident had not made an "entry,"¹⁷¹ such proceedings would be terminated and the government could pursue its case solely within the context of a deportation hearing.¹⁷² This holding significantly reduces the remedies available to returning residents, by streamlining governmental procedure for expulsion and minimizing the possibility of judicial review.

Background

The distinction between an exclusion hearing and a deportation hearing is significant. An exclusion hearing determines admissibility while a deportation hearing determines whether an alien should be expelled. In an exclusion hearing, the applicant for admission must establish his admissibility. In deportation proceedings, the government bears the burden.¹⁷³ While an alien in deportation proceedings must receive a minimum of seven days notice of the charges against him,¹⁷⁴ there is no notice requirement for those in exclusion proceedings.¹⁷⁵ An alien who does not prevail in the context of a deportation proceeding may appeal directly to a court of appeals.¹⁷⁶ An alien may challenge an exclusion order only by petitioning for a writ of habeas corpus.¹⁷⁷ Further, various substantive remedies are available to those in deportation proceedings which are denied to those in exclusion proceedings, including voluntary departure,¹⁷⁸ suspension of deportation,¹⁷⁹ and the ability to designate the country of

168. See *supra* notes 115-19 and accompanying text.

169. *Landon v. Plasencia*, 459 U.S. 21 (1982).

170. *Plasencia v. Sureck*, 637 F.2d 1286 (9th Cir. 1980).

171. For a discussion of "entry," see *supra* notes 114-19 and accompanying text.

172. *Plasencia*, 459 U.S. at 28.

173. See generally 1A C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE §§ 3.18-3.23, 5.5-5.11 (1984).

174. 8 C.F.R. § 242.1(b)(1984).

175. See *In re Salazar*, 17 I. & N. Dec. 167, 169 (BIA 1969).

176. INA § 106(a), 8 U.S.C. § 1105a(a) (1982).

177. INA § 106(b), 8 U.S.C. § 1105a(b) (1982).

178. INA § 244(e), 8 U.S.C. § 1254(e) (1982).

179. INA § 244(a), 8 U.S.C. § 1254(a) (1982).

deportation.¹⁸⁰

A permanent resident alien confronted with either event is actually confronting the possible loss of his permanent resident status.¹⁸¹ The Supreme Court, in *Kwong Hai Chew v. Colding*,¹⁸² emphasized that a temporary trip outside the United States does not terminate the constitutional status of a permanent resident, nor deprive him of his constitutional right to procedural due process.¹⁸³ Subsequently, in *Kwong Hai Chew v. Rogers*,¹⁸⁴ the court said flatly: "[I]f Chew is to be deprived of his status . . . the Immigration and Naturalization Service may do so only in proceedings in which the Service is moving party, and bears the burden of proof"¹⁸⁵ These holdings echoed to some degree the substance of a much earlier Ninth Circuit decision.¹⁸⁶ Later decisions of the Board of Immigration Appeals reiterated the *Chew v. Rogers* holding.¹⁸⁷

*Maldonado-Sandoval v. INS*¹⁸⁸ confronted the Ninth Circuit with the question of which forum was appropriate for the determination

180. INA § 243(a), 8 U.S.C. § 1253(a) (1982).

181. Permanent resident aliens may also lose their status through recission of abandonment. INA § 246, 8 U.S.C. § 1256.

182. 344 U.S. 590 (1953).

183. *Id.* at 600-01. The Court stated:

While it may be that a resident alien's ultimate right to remain in the United States is subject to alteration by statute or authorized regulation because of a voyage undertaken by him to foreign ports, it does not follow that he is thereby deprived of his constitutional right to procedural due process. His status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him. Where neither Congress, the President, the Secretary of State nor the Attorney General has inescapably said so, we are not ready to assume that any of them has attempted to deprive such a person of a fair hearing.

Id. at 601-02. See also *Shaughnessy v. United States ex. rel. Mezei*, 345 U.S. 206, 228 (1953) (Jackson, J., dissenting).

184. 257 F.2d 606 (D.C. Cir. 1958).

185. *Id.*

186. *Carmichael v. Delaney*, 170 F.2d 239 (9th Cir. 1948), involved a claim by a returning resident facing exclusion to United States citizenship. In discussing the various possible forums in which such a determination could be made, the court concluded that "[T]he due process of law guaranteed by the Fifth Amendment would seem to require that his substantially supported claim of citizenship be accorded a judicial trial." *Id.* at 244. The court further commented upon the fate of an individual actually excluded:

Throughout history banishment or exile has been looked upon as a penalty little less dreadful than death. To one in appellee's situation exclusion is in substance and practical effect the equivalent of banishment. It involves the same severance from home and existing ties that the individual suffers who is expelled from the country in a proceeding to deport. There is no difference in their loss of freedom of movement or in the nature of the hardships they are called upon to undergo. The sole distinction resides in the mere matter of nomenclature. The distinction, we think, is of no moment insofar as concerns the Constitutional guaranty of due process of law.

Id. at 245.

187. *In re Salazar*, 17 I. & N. Dec. 167 (BIA 1979); *In re Kane*, 15 I. & N. Dec. 258 (BIA 1975).

188. 518 F.2d 278 (9th Cir. 1975) (per curiam).

of admissibility of a permanent resident. Respondent was a Mexican citizen who obtained his permanent residence in 1967. At the time of his marriage to a United States citizen, he was also married to a Mexican citizen. Upon his return from a short trip to Mexico, respondent was refused entry and found excludable in exclusion proceedings.

The Ninth Circuit reversed, finding that a departure could not be meaningfully interruptive if it appeared during exclusion proceedings that the alien was a permanent resident seeking to return after a brief visit.¹⁸⁹ In the event of such an occurrence, the INS could proceed only within the context of deportation proceedings since the respondent was already a permanent resident and not an alien seeking entry. By this ruling, the Court adopted the procedure outlined by the Board of Immigration Appeals in several unpublished decisions.¹⁹⁰

Landon v. Plasencia

*Plasencia v. Sureck*¹⁹¹ again placed the issue of due process for returning residents before the Ninth Circuit. Respondent was a citizen of Mexico and a permanent resident of the United States. Upon respondent's return from a trip to Mexico, she was charged with attempting to smuggle six aliens into the United States. In exclusion proceedings, the immigration judge, placing upon her the burden of proving her admissibility, ultimately found her excludable. The district court, upon entertaining a petition for writ of habeas corpus, remanded the case to the INS to begin deportation proceedings.¹⁹²

Relying upon the *Kwong Hai Chew* cases and its decision in *Malonado-Sandoval*, the Ninth Circuit affirmed the lower court decision to litigate the issue in deportation proceedings. The court distinguished respondent's situation from those cases in which the criminal charges had been fully litigated prior to the exclusion proceeding. These cases did not address the question of whether the departure was meaningfully interruptive.¹⁹³

Judge Wallace registered a forceful dissent. He distinguished the prior Ninth Circuit case of *Palatian v. INS* by noting that the statute under which *Palatian* was excluded required a conviction,

189. *Id.* at 280-81.

190. *Id.* at 281 n.6.

191. 637 F.2d 1286 (9th Cir. 1980), *rev'd*, 459 U.S. 21 (1982).

192. *Id.* at 1287.

193. *See, e.g.*, *Palatian v. INS*, 502 F.2d 1091 (9th Cir. 1974).

whereas Plasencia faced exclusion on grounds not requiring conviction. Wallace also distinguished *Maldonado-Sandoval* as dealing with a brief, innocent departure involving no criminal purpose.¹⁹⁴ Additionally, Wallace relied upon the language of the legislation by noting that while Congress had explicitly provided certain procedural safeguards for those to be excluded for drug smuggling, it had not done the same for those accused of alien smuggling. The former required a conviction and the latter did not. He concluded that the court does "not have the right or power to interpolate procedural requirements from one statute to another."¹⁹⁵

In *Landon v. Plasencia*, the Supreme Court reversed the Ninth Circuit holding and followed the reasoning of Judge Wallace in basing its conclusion upon the legislative history of the exclusion provision.¹⁹⁶ The Court found that Congress intended admissibility to be determined only in the context of an exclusion hearing.¹⁹⁷ It interpreted the *Kwong Hai Chew* cases as requiring only due process; not as establishing a right to identical treatment with those permanent residents still within the United States.¹⁹⁸ The Court balanced the interest of Plasencia in retaining her resident status against the governmental interest in the efficient administration of the immigration laws.¹⁹⁹ In striking a balance in favor of the government,²⁰⁰ the Court limited the role of the judiciary to determining "what procedures would satisfy the minimum requirements of due process on the

194. *Maldonado-Sandoval*, 637 F.2d at 1289-90.

195. *Id.* at 1291. Wallace also stated: "Even though the statutes provide for a seemingly disparate treatment, 'Congress unquestionably has the power to exclude all classes of undesirable aliens from this country, and the courts are charged with enforcing such exclusion when Congress has directed it'" *Id.* at 1291 (quoting *Fleuti*, 374 U.S. at 461).

196. *Plasencia*, 459 U.S. at 21.

197. The special inquiry officer is empowered to determine whether an alien detained for further inquiry shall be excluded and deported or shall be allowed to enter after he has given the alien a hearing. The procedure established in the bill is made the sole and exclusive procedure for determining the admissibility of a person to the United States.

S. REP. NO. 1137, 82d Cong., 2d Sess. 29 (1952); H. R. REP. NO. 1365, 82d Cong., 2d Sess. 56 (1952), reprinted in 1953 U.S. CODE CONG. & AD. NEWS 1653, 1711.

198. *Plasencia*, 459 U.S. at 31. Cf. *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (distinction between two classes of permanent residents for relief under section 212(c) unconstitutional).

199. [T]he courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.

Id. at 34 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)).

200. "[I]t must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Plasencia*, 459 U.S. at 34.

reentry of a permanent resident alien."²⁰¹ The Court remanded for further findings the issue of whether Plasencia herself had been accorded due process.²⁰²

Although both the Ninth Circuit and the Supreme Court agreed that a returning resident was to be accorded due process, the courts differed on what constituted the minimum requirements necessary. Consistent with its reasoning in *Plasencia*, the Supreme Court conceivably could find the almost nonexistent protections afforded one during exclusion proceedings sufficient, providing the government bore the burden of proof, pursuant to the *Kwang Hai Chew* holdings. Judge Wallace's examination of the relevant case and statutory law appears to support this construction. However, while admonishing his colleagues to refrain from "interpolat[ing] procedural requirements from one statute to another,"²⁰³ Wallace did not explain why *Kwang Hai Chew's* interpolation with respect to the burden of proof is any more satisfactory than the wholesale interpolation of the safeguards afforded by the deportation process, or how minimal due process is satisfied where a long-term permanent resident has fewer rights in a hearing procedure than does a casual visitor facing expulsion. Thus, while seemingly antagonistic to judicial activism of a remedial nature, the Supreme Court has judicially constructed a hybrid third procedure for the determination of an alien's expulsion, where no such procedure existed legislatively. The effect of this hybrid procedure closely resembles the effect of Supreme Court limitations on judicial reviewability in the suspension context and Supreme Court rulings in the search and seizure context: a reduction of remedies available for the individual and a corresponding increase in the speed and efficiency with which the agency can process an individual for expulsion.

201. *Id.* at 35. The Court elaborated:

The role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy. Our previous discussion has shown that Congress did not intend to require the use of deportation procedures in cases such as this one. Thus, it would be improper simply to impose deportation procedures here because the reviewing court may find them preferable.

Id. at 34-35. For one writer's approval of these limitations, see Note, *Immigration Law: Process Due Resident Aliens Upon Entering the United States — Landon v. Plasencia*, 103 S.Ct. 321 (1982), 24 HARV. INT'L L. J. 198, 204 (1983). Query whether the Court would find such procedures sufficient where the entrant facing expulsion presents a colorable claim to United States citizenship.

202. *Plasencia*, 459 U.S. at 37.

203. *Plasencia*, 637 F.2d at 1289-90.

The Court has correspondingly limited the remedies available to aliens who detrimentally rely upon government action or nonaction. These holdings support INS facilitated expulsion process.

ESTOPPEL IN THE IMMIGRATION CONTEXT

Equitable Estoppel

*INS v. Hibi*²⁰⁴ confronted the Ninth Circuit with a claim for naturalization benefits under the expired provisions of sections 701 through 705 of the Nationality Act of 1940. This legislation provided for the overseas naturalization of persons who (1) served honorably in the military or naval forces of the United States; (2) were not within the jurisdiction of any court authorized to naturalize aliens; (3) met specific eligibility requirements relating to residence and literacy; and (4) filed the petition under these sections prior to December 31, 1946.²⁰⁵ Pursuant to these provisions, INS officers

204. 475 F.2d 7 (9th Cir. 1973).

205. Second War Powers Act of 1942, ch. 199, 56 Stat. 182, as amended. Section 701 provided in pertinent part: [A]ny person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and [w]ho shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) having entered the United States, including its Territories and possessions, prior to September 1, 1943, being unable to establish lawful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has so served may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention, no certificate of arrival for those described in group (b) hereof, and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; . . . *Provided, however, That* . . . (3) the petition shall be filed not later than December 31, 1946

Section 702 provided in pertinent part: During the present war, any person entitled to naturalization under section 701 of this Act, who serving honorably in the military . . . forces of the United States is not within the jurisdiction of any court authorized to naturalize aliens, may be naturalized in accordance with all the applicable provisions of section 701 without appearing before a naturalization court. The petition for naturalization of any petitioner under this section shall be made and sworn to before and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner of a Deputy Commissioner, which designated representative is hereby authorized to receive such petition in behalf of the Service, to conduct hearings thereon, to take testimony concerning any matter touching or in any way affecting the admissibility of any such petitioner for naturalization, to call witnesses, to administer oaths, including the oath of petitioner and his witnesses to petition for naturalization and the oath of renunciation and allegiance prescribed by section 335 of this Act, and to grant naturalization, and to issue certificates of citizenship

Section 705 provided in pertinent part: The Commissioner, with the approval

traveled to overseas military posts to effect the naturalization of those eligible under this legislation. In August 1945 the INS designated George Ennis, Vice Consul of the United States in Manila, to naturalize aliens pursuant to section 702.

The State Department, just prior to the independence of the Philippines, received a communication from that government expressing concern over the naturalization of Filipinos who had always lived in the Philippines. The Commissioner of INS subsequently requested that the Attorney General revoke Ennis' authority to naturalize aliens and refrain from naming a new naturalization officer. The Attorney General accordingly revoked Ennis' authority on September 26, 1945, and Ennis received notice of that revocation in October 1945. Another naturalization officer was not appointed until August 1946. The Act expired by its terms on December 31, 1946. Thus, Filipinos eligible to naturalize under these provisions were unable to do so for approximately nine months during the effective period of the provisions.²⁰⁶

The Ninth Circuit reasoned in *Hibi* that section 705 had imposed upon the Commissioner of INS a legal duty to make available to all qualified applicants the benefits of sections 701 and 702. Further, the INS had failed in its duty to effectuate the purpose of section 702 and had prejudiced the applicant by its failure to notify him. The court held the agency estopped from denying the naturalization benefits of these provisions to petitioner, even though the effectiveness period of the Act had long since expired.²⁰⁷ The Supreme Court reversed, finding that the failure to publicize respondent's rights under the statute and the failure to have an authorized naturalization examiner stationed in the Philippines during the effective period of the

of the Attorney General, shall prescribe and furnish such forms, and shall make such rules and regulations, as may be necessary to carry into effect the provisions of this Act.

206. *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931, 935-36 (N.D. Ca. 1975). The court did not address the government's liability for the absence of a naturalization examiner during the period between the return of the United States forces to the Philippines in October 1944 and the first appointment of a naturalization examiner to the Philippines in August 1945. See *ENCYCLOPEDIA BRITANNICA* 1009 (1975).

207. *Hibi*, 475 F.2d at 10-11. Four elements must exist to establish estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the three facts; and (4) he must rely on the former's conduct to his injury. *United States v. Georgia Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970).

legislation, did not give rise to estoppel against the government.²⁰⁸ The Court found that, unlike the usual estoppel claim premised upon the action of a minor official, a major policy decision was at issue. In balancing the equities in favor of the government, the Court placed particular emphasis upon the sovereign nature of the immigration function. It did not, however, expressly disapprove of the invocation of estoppel against the federal government. In dissent, Douglas sharply criticized the majority for disregarding the successful and deliberate efforts of the executive branch in 1945 to frustrate the congressional purpose. Douglas further criticized majority denial of substantive rights to Filipinos by judicial fiat.²⁰⁹

Several courts subsequent to *Hibi* found sufficient cause to estop the Immigration and Naturalization Service. The respondent in *Corniel-Rodriguez v. INS* entered the United States as the holder of a second preference visa.²¹⁰ Prior to entering, the United States consul in Santo Domingo failed to advise respondent in accordance with Department of State regulations that her second preference visa classification would no longer apply if she married prior to entry into the United States.²¹¹ Respondent married her childhood sweetheart before coming to the United States. The court, in precluding deportation, found the alien naive and poorly educated and speculated that the failure to comply would have been avoided if the consul had given the mandatory warning. While limiting its holding to the "extraordinary circumstances" of the case,²¹² the Second Circuit held that "the basic notions of fairness must preclude the Government from taking advantage of the consul's dereliction, and that a con-

208. *INS v. Hibi*, 414 U.S. 5, 9 (1973).

Compare *Hibi* with *In re Vacontios* Petition, 155 F. Supp. 427 (S.D.N.Y. 1957). There, the alien timely filed an application to petition for naturalization pursuant to section 330(a) of the Immigration and Nationality Act. The applicable provision was due to expire on December 23, 1953. The petitioner failed to file timely the actual petition as the result of an INS delay in responding to a communication. The court found that the filing of the application was the only affirmative step that petitioner could have taken. *Id.* at 430. The court held: "When one takes all necessary affirmative steps to comply with the literal requirements of a statute and is prevented from complying fully by the failure of an administrative agency to take the steps necessary to permit his compliance he will not be barred from asserting his rights under that statute." *Id.* at 433. But see *Montana v. Kennedy*, 366 U.S. 308 (1961), *aff'g* *Montana v. Rogers*, 278 F.2d 68 (7th Cir. 1960) (misconduct of consular official insufficient to estop United States from denying citizenship). The *Montana* Court did venture that "there may be circumstances in which the United States is estopped to deny citizenship because of the conduct of its officials." *Id.* at 315.

209. *Hibi*, 414 U.S. at 11.

210. 532 F.2d 301 (2d Cir. 1976).

211. The regulation provided: "The consular officer shall warn an alien [issued a visa as a child], when appropriate, that he will be inadmissible as such an immigrant if he is not unmarried at the time of application for admission." 22 C.F.R. § 42.122(d) (1960).

212. *Corniel-Rodriguez*, 532 F.2d at 307.

trary result would work a serious and manifest injustice."²¹³

Somewhat similar situations confronted the Ninth Circuit in *Santiago v. INS*.²¹⁴ In this case involving separate incidents, respondents entered the United States as either the child or spouse of a permanent resident alien. Respondents, holders of second preference visas, entered before the principal visa holder. Subsequently, the principal visa holder either died or had their visa expire prior to their own entry.²¹⁵ In contesting deportability, the respondents claimed that the INS should be estopped based on any combination of four grounds: (1) the failure of the consular official to inform them of the applicable statutory provision; (2) the failure of the INS officer at the port of entry to advise them of the statutory provision; (3) the failure of the INS officer at the port of entry to inquire as to the whereabouts of the principal alien; and (4) the failure of the INS officer at the port of entry to deny entry upon learning of the whereabouts of the principal alien. The court, weighing the governmental failure to inform against the standards enunciated in *Hibi*, found no affirmative misconduct to justify the application of estoppel. The court ruled that the respondents failed to establish a duty on the part of the officers. This differed from *Hibi* where officials had acted contrary to directive. Further, the court noted that respondents had lost no rights since they were not entitled to admission.²¹⁶

Judge Choy registered his disagreement with majority balancing of the equities. He found that the injustice resulting from failure of the INS officer to exercise minimal care outweighed any harm to public policy, particularly since this situation did not involve, as *Hibi* did, the nullification of an entire policy.²¹⁷

The Ninth Circuit did find, however, affirmative misconduct justi-

213. *Id.* at 302.

214. 526 F.2d 488 (9th Cir. 1975). For another case involving similar claims of reliance upon consular official's conduct, see *Perwolf v. INS*, 741 F.2d 1109 (8th Cir. 1984).

215. A spouse or child as defined in section 101(b)(1)(A), (B), (C), (D), or (E) [8 U.S.C. § 1101 (b)(1)(A), (B), (C), (D), or (E)] shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa or to conditional entry under paragraphs (1) through (7), be entitled to the same status, and the same order of consideration provided in subsection (b), if accompanying, or following to join, his spouse or parent.

INA § 203(a)(8), 8 U.S.C. § 1153(a)(9) (1982).

216. *Santiago*, 526 F.2d at 493. The court intimated that a finding of "affirmative misconduct" might depend on the distinction between government misfeasance, justifying the application of estoppel, and government nonfeasance, insufficient for the invocation of that remedy. *Id.*

217. *Id.* at 494-96.

fying estoppel in *Sun IL Yoo v. INS*.²¹⁸ During a one year delay by INS in adjudicating an application, the applicable Department of Labor regulations changed, resulting in the respondent becoming ineligible for the preference classification.²¹⁹ The court distinguished this case from *Santiago* by noting an absolute right to the labor certification under the previously existing regulation. The court also distinguished this case from *Hibi* by noting that while *Hibi* could have done more to ascertain his rights, the respondent here did everything he could to legalize his status. Consequently, he should not be left to sustain an unconscionable injury.²²⁰ Judge Wright, in dissent, argued that the INS should not be estopped from denying respondent's application. Wright noted that this case paralleled *Hibi* in that *Hibi* had an analogous absolute right to naturalize. Yet, unlike here, this right in *Hibi* was insufficient to support estoppel.²²¹

The Fifth Circuit, in reliance on both *Hibi* and *Santiago*, found estoppel appropriate in *Jung Been Suh v. INS*.²²² This case involved a deportation proceeding by the INS against an alien based on the alien mistakenly filling out the wrong forms. The alien could have filed the correct applications, but relied instead upon the INS wrongful acceptance and retention of another application. The court expressed its displeasure with the INS violation of its own regulations and refused to allow such noncompliance by the agency to result in the deportation of the alien.²²³

The Ninth Circuit again addressed the issue of delay as a basis for estoppel in *Miranda v. INS*.²²⁴ The respondent originally entered the United States as a visitor and later married an American citizen. The INS failed to act during an eighteen month period on petition of the wife of the respondent. She ultimately withdrew the petition and the INS denied respondent's application for adjustment of status. The court found that the unexplained failure of the agency to adjudicate the petition in the eighteen month period prior to marital dis-

218. 534 F.2d 1325 (9th Cir. 1976).

219 An alien whose occupation is currently listed in Schedule C-Precertification List will be considered as having obtained a certification under Section 212(a)(14) [8 U.S.C. § 1182(a)(14)] of the Act upon determination by the district director that the alien is qualified for and will be engaged in such occupation and that the alien will not reside in an area excluded from precertification by the Secretary of Labor.

8 C.F.R. § 204.1(d)(2) (1970).

220. "When such serious injury may be caused by INS decisions, its officials must be held to the highest standards in the diligent performance of their duties." *Sun IL Yoo*, 534 F.2d at 1329. The court continued, "[A] person might sustain such a profound and unconscionable injury in reliance on [an official's] action as to require, in accordance with any sense of justice and fair play, that [he] not be allowed to inflict the injury." *Id.* at 1329 (quoting *Schuster v. CIR*, 312 F.2d 311, 317 (9th Cir. 1962)).

221. *Sun IL Yoo*, 534 F.2d at 1330.

222. 592 F.2d 230 (5th Cir. 1979).

223. *Id.* at 231-32.

224. 638 F.2d 83 (9th Cir. 1980).

cord constituted affirmative misconduct, and remanded for consideration the petition under the circumstances existing during the time the INS should have acted.²²⁵ Following remand from the Supreme Court,²²⁶ the Ninth Circuit affirmed its original decision.²²⁷

The Supreme Court, in a per curiam opinion, reversed.²²⁸ The Court relied on a presumption of regularity to explain the lengthy delay in adjudicating the petition and emphasized the deference to be accorded to the decisions of the INS.²²⁹

The question of when the government may be estopped was not addressed by the Supreme Court despite lack of guidance for the circuit courts on this issue.²³⁰ Although the Supreme Court had previously left open the possibility that estoppel could apply in an immigration context,²³¹ it did not, in *Miranda*, expand upon when this opportunity might present itself. The Court characterized governmental failure to fulfill its duty as "questionable," particularly when compared to governmental's "clear error" in *Hibi*. The court commented that if the "clear error" presented by *Hibi* failed to justify estoppel, then "neither the Government's conduct nor the harm to the respondent [was] sufficient to estop the Government from enforcing the conditions imposed by Congress for residency in this country."²³²

225. *Id.* at 84.

226. *INS v. Miranda*, 454 U.S. 808 (1981).

227. *Miranda v. INS*, 673 F.2d 1105 (9th Cir. 1982). The Supreme Court had remanded to allow the Ninth Circuit to consider the applicability of *Schweiker v. Hansen*, 450 U.S. 785 (1981). The Ninth Circuit found the case inapplicable.

228. *INS v. Miranda*, 459 U.S. 14 (1982).

229. *Montana* and *Hibi* make clear that neither the Government's conduct nor the harm to the respondent is sufficient to estop the Government from enforcing the conditions imposed by Congress for residency in this country

Enforcing the immigration laws, and the conditions for residency in this country, is becoming more difficult Moreover, the INS is the agency primarily charged by Congress to implement the public policy underlying these laws Appropriate deference must be accorded its decisions.

Id. at 283-84.

230. See, e.g., *Hansen*, 450 U.S. at 790 (Marshall, J., dissenting); *Corniel-Rodriguez*, 532 F.2d at 307; *United States v. Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973); *United States v. Fox Lake State Bank*, 366 F.2d 962 (7th Cir. 1966); *Walsonavich v. United States*, 335 F.2d 96 (3d Cir. 1964); *Simmons v. United States*, 308 F.2d 938 (5th Cir. 1962); *Semaan v. Mumford*, 335 F.2d 704 (D.C. Cir. 1964); *Eichelberger v. Commissioner of Internal Revenue*, 88 F.2d 874 (5th Cir. 1937). See generally K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 17.01 (1976); Veldman, *Estopping the Government in Immigration Cases: The Immigration Estoppel Light Remains Cautionary Yellow*, 56 NOTRE DAME LAW. 731 (1981); Note, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551 (1979).

231. E.g., *Hibi*, 414 U.S. at 5; *Montana*, 366 U.S. at 308.

232. *Miranda*, 459 U.S. at 18.

The Supreme Court decision does not affect the law with respect to the denial of estoppel in immigration cases in at least two situations. First, pursuant to *Hibi*, a benefit available by statute but whose availability is foreclosed by the failure of the United States government to publicize the availability of those benefits and to authorize an individual to effect the grant of those benefits, does not give rise to estoppel. Second, pursuant to the Ninth Circuit decision in *Santiago*, the failure of a consular official to advise, as mandated by regulation, a visa recipient of the terms of that visa, or of the failure of the INS officer at the port of entry to similarly advise the recipient, will not give rise to estoppel where the individual is erroneously admitted. This holds true unless, pursuant to the decision of the Second Circuit in *Corniel-Rodriguez*, that individual can demonstrate poor education and singular naivete.²³³

Miranda appears to eliminate further, however, the possibility of estoppel against the government in a third situation, that of unreasonable delay.²³⁴ *Miranda*, in foreclosing this possibility, disregards the plight of individuals, many of whom perceive themselves as pitted against a huge bureaucracy infamous for its delays in adjudicat-

233. *But see* Mukherjee v. INS, — F. Supp. — (D. Ore. Civil No. 84-564, Jan. 3, 1985).

234. The Supreme Court, in a per curiam opinion, recently expressed its displeasure with the application of estoppel in a non-immigration delay context. *Hansen*, 450 U.S. at 785, involved the possible estoppel of the Social Security Administration from denying benefits to the respondent. The respondent was eligible for such benefits but had not filed a written application due to a claims representative's erroneous statement and neglect of the Claims Manual. In reversing the Second Circuit, 619 F.2d 942 (2d Cir. 1980), the Court observed that (1) "the duty of all courts [is] to observe the conditions defined by Congress for charging the public treasury" (quoting *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 385 (1947)); (2) the Claims Manual was not a regulation and has no legal force; and (3) respondent's resulting failure to satisfy a procedural requirement rather than substantive ineligibility was insufficient to justify estoppel. *Hansen*, 450 U.S. at 788-90. Marshall, in dissent, noted that the majority's summary disposition of the case left lower courts guessing as to "whether the factual differences cited by the majority are of any real consequence." *Hansen*, 450 U.S. at 792.

It appears from the Court's decision in *Miranda* that such distinctions are insignificant. The Supreme Court remanded that case to the Ninth Circuit for reconsideration in light of *Hansen*. The Ninth Circuit, finding no impact upon the public fisc, reaffirmed its original determination, 673 F.2d 1105 (9th Cir. 1982). The Supreme Court reversed, without addressing *Hansen's* applicability. 103 S.Ct. 281 (1982).

More recently, the Tenth Circuit in *Che-Li Shen v. INS*, 749 F.2d 1469 (1984), found in an immigration context that the agency would not be estopped from deporting the individual even though INS took almost three years to adjudicate an application for adjustment of status and an additional two years elapsed before the denial of his renewed application in deportation proceedings. The court relied upon a four-prong test: (1) the party to be estopped must know the facts; (2) that party must intend that his conduct be acted upon or must act so that the party asserting estoppel has the right to believe that it was so intended; (3) the latter must be ignorant of the these facts; and (4) he must rely on the first party's conduct to his injury. The court here found no detrimental reliance and therefore never reached considerations of public policy relevant to estopping the government. *See also* Hassanali v. Attorney General, 599 F. Supp. 189 (D.D.C. 1984).

ing applications.²³⁵ This reality, although ignored by the Supreme Court, appears to be well recognized by the circuit courts.

Wright's objection to majority invocation of estoppel in *Sun IL Yoo* appears to be well-founded. There appears to be little factual distinction between the *Hibi* situation, where there was an absolute right but no opportunity to naturalize because of government action, and the *Yoo* situation, which involved a filed application for certain benefits but which suffered prejudice as the result of delay. The situations are distinguishable only because *Hibi* did not actually apply for the benefits. Such application, however, would have been a futile act.²³⁶

One commentator has suggested the adoption of a two-part formulation by which to judge the applicability of equitable estoppel in any given case.²³⁷ This approach, while including government silence as the basis for estoppel, fails to give guidance as to when silence becomes actionable. Such guidance is crucial when dealing with an

235. See, e.g., Trillin, *Profiles: Making Adjustments*, *The New Yorker* 50 (May 28, 1984). For a discussion of INS management problems, see H.R. REP. NO. 96-821, 96th Cong., 2d Sess. (1980); H.R. REP. NO. 96-1459, 96th Cong., 2d Sess. (1980).

236. Resort to administrative remedies is not required where (1) there is no adequate administrative remedy. *Rhodes v. United States*, 574 F.2d 1179, 1181 (5th Cir. 1978); (2) there are extensive administrative delays which render administrative remedies inadequate. *Camenish v. University of Texas*, 616 F.2d 127, 134 (5th Cir. 1980); (3) there is a clear showing of irreparable injury. *Rhodes*, 574 F.2d at 1181; (4) there is a substantial showing that the plaintiff's constitutional rights are being violated. *McClenendon v. Jackson Television, Inc.*, 603 F.2d 1174, 1177 (5th Cir. 1979). See generally *K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES* § 20 (1976).

237. Veldman, *supra* note 231. Veldman postulated that the demonstration of five criteria should give rise to a rebuttable presumption that estoppel should apply:

- (1) The government must engage in conduct — acts, language, or silence — amounting to a representation or concealment of a material fact.
- (2) The government must know the true facts at the time of its questioned conduct, or at least the circumstances must be such that the Government must reasonably be expected to possess such knowledge.
- (3) The government must intend that its conduct shall be acted on or must so act that the alien has a right to believe it is so intended.
- (4) The alien must be ignorant of the true facts at the time of the questioned conduct and at the time he acted upon such conduct.
- (5) The alien must rely to his detriment on the questioned conduct of the government.

If the government successfully rebuts the showing of these five elements, the court must balance the equities and must necessarily consider the seriousness of the injustice caused by the government misconduct; the duration of the alien's United States residency; the likelihood of family separation; the loss of eligibility to a previously available right; the type of right affected; and damage to the public interest, e.g., loss of legal protections, monetary costs, the effect on the separation of powers, and the "sovereign" nature of the immigration function. *Id.* at 740-41.

agency to which the Supreme Court has expressed deference²³⁸ and whose "normal" processing time for applications may run into years.²³⁹ The danger of government silence does not lie in its reflection of possible administrative backlog, although this is a serious problem in itself as circumstances may change drastically during such time. Rather, the danger resides in government silence being interpreted by an alien as tacit approval of the form of his application, if not the substance.²⁴⁰ Additionally, this formulation fails to address circumstances where the INS accepts applications for one purpose and refuses to do so for another.²⁴¹

Collateral Estoppel

Subsequent to *Hibi*, the United States District Court for the Northern District of California was confronted with the same factual situation in *In re Naturalization of 68 Filipino War Veterans*.²⁴² The court divided the petitioners into three categories: (I) those individuals who, prior to the statutory deadline, actually filed an application or inquired as to the means by which they could naturalize;²⁴³ (II) petitioners who, like *Hibi*, although qualified for naturalization benefits under the relevant provisions, failed to take action; and (III) individuals in the same position as those in Category II, but who were unable to provide proof of their qualifying military service. Petitioners premised their claim to naturalization benefits on governmental denial of due process, rather than on equitable estoppel.²⁴⁴ The court ruled that petitioners in Categories I and II were

238. See, e.g., *Miranda*, 459 U.S. at 19.

239. For instance, the Houston office of the INS indicated in its August 1984 "Date of Application and Petitions Being Processed at the Houston District Office" that N-400's (Applications to Final Hearing) were backlogged to June 1983. The San Antonio office indicated in its August 8, 1984, "Progress Report of Applications or Petitions Presently Being Adjudicated" that N-400's were backlogged 365 days.

240. See, e.g., *Jung Been Suh v. INS*, 592 F.2d 230 (5th Cir. 1979).

241. One lower court held that although the government had recognized a Ghanaian divorce as valid when it approved the immediate relative visa petition based on the alien's subsequent marriage to a United States citizen, the INS was not equitably estopped from challenging the validity of that Ghanaian divorce and requiring that it be properly proved for the alien's second preference visa petition for his third wife. *Lokko v. INS*, No. 83 Civ. 4353 (Mel) (E.D.N.Y. Oct. 3, 1984) (available Oct. 12, 1985, on LEXIS, Genfed library, dist. file).

242. 406 F. Supp. 931 (N.D. Ca. 1975).

243. Petitioners in Category I relied upon *In re Vacantios Petition*, 475 F.2d 7 (9th Cir. 1973). For another Category I case, see *In re Petition for Naturalization of Candellario T. Trial*, Pet. No. 30801 (San Diego, Ca., July 27, 1984).

244. The court found *Hibi* not controlling, despite the similarity of the factual situations.

While the Court cannot lightly disregard a Supreme Court decision dealing with the precise factual situation presented here, the Court notes again that *Hibi* was a summary reversal decided solely on the basis of a petition for certiorari without the benefit of full briefs and oral argument. The Supreme Court itself has recognized that a summary disposition of a case wherein a constitu-

entitled to the naturalization benefits claimed. The government filed a notice of appeal in *68 Filipinos*, but subsequently withdrew its appeal with respect to Categories I and II veterans.²⁴⁵ The government later reversed its position with respect to Category II applications, and now opposes such applications.

Subsequent to *68 Filipinos*, two district courts held the government collaterally estopped from relitigating the constitutional issue resolved in that case.²⁴⁶ The Second Circuit, facing the same issue, found that the government was not collaterally estopped by *68 Filipinos* from contesting a naturalization petition premised on similar facts.²⁴⁷ The same issue later confronted the Ninth Circuit in *Mendoza v. United States*,²⁴⁸ involving a Category II veteran.

The Ninth Circuit, after reviewing the consequences of collateral estoppel against the government, ultimately concluded that collateral estoppel in *Mendoza* would not be unfair. Concluding that the government "had every incentive to litigate vigorously the issue in *68*

tional issue was raised and presented to the Court in oral argument, but was not treated substantively in the Court's opinion, is "obviously . . . not of the same precedential value as would be an opinion of this Court treating the question on the merits."

68 Filipinos, 406 F. Supp. at 943 (quoting *Edelman v. Jordan*, 415 U.S. 651, 671 (1974)). The district court found that *Hibi* did not address the constitutional issues and could not, therefore, bar the constitutional claim presented by *68 Filipinos*.

245. *Mendoza v. United States*, 672 F.2d 1320, 1324 (9th Cir. 1982), *appeal dismissed*, (U.S. Nov. 30, 1977) (No. 76-1832). The Commissioner of Immigration testified before the House Judiciary Subcommittee on Immigration, Citizenship and International Law on February 8, 1978, that the government had originally filed its appeal on the grounds that *68 Veterans* was inconsistent with the Supreme Court decision in *Hibi*. He explained the basis for the withdrawal of the appeal:

[H]owever, upon examining this issue, I became convinced that the District Court's decision in *68 Filipinos* was based upon sound legal reasoning, and that there was also strong humanitarian reasons for not pursuing the appeal. I therefore recommended to the Solicitor General that the government's appeal be withdrawn, and the decision of the District Court be allowed to stand.

55 INTERPRETER RELEASES (Feb. 24, 1978).

246. *Petition of Nisperos*, 471 F. Supp. 296 (C.D. Cal. 1979); *Petition of Crispulo Columna Colmenar*, No. 308-P-22551 (S.D. Cal. Mar. 20, 1979).

The issue of the offensive application of collateral estoppel arises "when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party." *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 326 n.4 (1979).

247. *Olegario v. United States*, 629 F.2d 204 (2d Cir. 1980), *cert. denied* 450 U.S. 980 (1981). The *Olegario* Court found that the relevant statutory provisions delegated to the Attorney General sufficient discretion in the implementation of the naturalization procedures so as to negate any claim that the failure to appoint an examiner constituted a violation of due process.

248. 672 F.2d 1320 (9th Cir. 1982). *See also Barretto v. United States*, 694 F.2d 603 (9th Cir. 1982).

Filipinos" and to pursue an appeal of the adverse judgment,²⁴⁹ the court found that the unfairness resulting from the Second Circuit's inconsistent decision was no greater than the unfairness resulting from any disagreement between circuits. Consequently there existed no "critical" need to redetermine veteran rights.²⁵⁰

The Supreme Court reversed unanimously the Ninth Circuit decision by finding the position of the United States as a party so significantly different from that of a private litigant as to justify the non-application of nonmutual offensive collateral estoppel.²⁵¹ The Court held that the Solicitor General, unlike a private litigant, must consider a variety of factors prior to pursuing an appeal. It noted that policy choices made by one administration may be re-evaluated by the next one. The Court speculated that allowing nonmutual offensive collateral estoppel against the government would prevent the ongoing development of law on important issues.²⁵² The Ninth Circuit's required showing of a "crucial need" to redetermine the original issues was criticized as "so wholly subjective that it affords no guidance to the courts or to the government."²⁵³

The Supreme Court reasoning in *Mendoza* was neither realistic nor faultless. Private litigants may well consider many factors prior to pursuing an appeal, including the expense of continuing litigation, the possibility of any settlement, and the emotional aspects of dealing with a still unresolved and costly court case. Supreme Court criticism of the Ninth Circuit "subjective" requirement of "crucial need" applies equally well to its own refusal to deal comprehensively with the circumstances in which equitable estoppel may apply.

More troubling is Supreme Court deference to the shifting policies of different administrations. It is the executive branch of the government which channels government litigation through the courts.²⁵⁴ Supreme Court refusal to allow nonmutual offensive collateral estoppel against the government evinces a willingness to allow political choices to dictate, via the courts, the existence and extent of various rights already determined by the legislature. And, in the case of the

249. *Mendoza*, 672 F.2d at 1327.

250. *Id.* at 1329.

251. *United States v. Mendoza*, 464 U.S. 154 (1984). The government, however, has attempted to use findings of facts in *Olegario*, 629 F.2d at 204, in the context of litigation with other Filipino war veterans.

252. A rule allowing nonmutual collateral estoppel against the government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.

Mendoza, 464 U.S. at 160.

253. *Id.* at 162.

254. R. NEELY, *HOW COURTS GOVERN AMERICA* 216 (1981).

Filipino war veterans, it permits the government the luxury of "clean error" and unfulfilled commitments.²⁵⁵

CONCLUSION

Although the Ninth Circuit has been characterized as one of the most liberal of the federal circuits,²⁵⁶ many of its decisions coincide with those of other courts. Both the Seventh Circuit and the District Court for the Southern District of New York reached similar conclusions with respect to area control operations.²⁵⁷ The Board of Immigration Appeals had previously applied the exclusionary rule to deportation proceedings.²⁵⁸ The Second Circuit acknowledged the applicability of *Fleuti* to section 244(a)(1) applications.²⁵⁹ Even though the Ninth Circuit *Kamheangpatiyooth* formulation went beyond *Fleuti*, *Fleuti* itself supported the consideration of factors in addition to those specifically stated.²⁶⁰ Both the Second and Fifth Circuits have been willing to allow estoppel against the INS in appropriate situations.²⁶¹ Although many of these decisions have resulted in an expansion and/or strengthening of individual rights vis-a-vis the government, the Ninth Circuit cannot be characterized as either radical or as out of step with other courts of appeals.

Recent Supreme Court decisions have resulted in the narrowing of individual rights and a broadening of governmental discretion, particularly with respect to law enforcement functions. Although the current Supreme Court is viewed as conservative in nature, it is perhaps more accurate to view both the Supreme Court and the Ninth Circuit court as activist courts, taking very different directions.²⁶²

255. "[G]reat notions, like great men, should keep their word." *Astrup v. INS*, 402 U.S. 509 (1971).

256. See *supra* note 1.

257. See *supra* notes 32-37 and accompanying text.

258. See *supra* note 93 and accompanying text.

259. See *supra* notes 123-26 and accompanying text.

260. See *supra* note 117 and accompanying text.

261. See *supra* notes 206-09 and 217-18 and accompanying text.

262. Judges who perpetrate *verbicide* on the law are judicial activists. A judicial activist is a judge who interprets the Constitution or a piece of legislation to mean what it would have said if he instead of the Founding Fathers or Congress had written it. Contrary to popular opinion, all judicial activists are not liberals. Some of them are conservatives. A liberal judicial activist is a judge who expands the scope of a law by stretching its words beyond their true meaning, and a conservative judicial activist is one who narrows the scope of a law by restricting their true meaning. Judicial activism of the right or left substitutes the personal will of the judges for the impersonal will of the law.

Ervin, *Judicial Activism and Verbicide*, in *ACTIVISM BY THE BRANCH OF THE LAST RESORT: OF THE SEIZURE OF ABANDONED SWORDS AND PURSES* (1984). "Verbicide" is

Each court has evidenced a willingness to depart from precedent in order to move in a particular direction²⁶³ despite our system's intrinsic limits upon such activism.²⁶⁴ Such judicial activism disrupts the fundamental theory of the separation of powers.²⁶⁵ Additionally, judicial activism places an inordinate burden upon the courts, results in policy decisions which neither Congress nor the voters can easily change, impairs the ability of the courts to gain acceptance of and support for necessary and legitimate decisions, and instigates movements to limit or eradicate judicial jurisdiction on controversial

the "violent treatment of a word with fatal results to its legitimate meaning, which is its life." O. HOLMES, *AUTOCRAT AT THE BREAKFAST TABLE* 9 (1955). The direction of court activism is a function of the background, attitudes, and other attributes of the judges. M. KLEIN, *LAW, COURTS, AND POLICY* 255 (1984). For biographical data on each of the Ninth Circuit and Supreme Court judges, see *CALIFORNIA COURTS AND JUDGES HANDBOOK* (1984). See generally Snider, *Researching the Person Under the Black Robe*, 4 CAL. LAW. 21 (Nov. 1984). For one comment on the Supreme Court's current activism, see *supra* note 102. One writer has suggested that whether the Ninth Circuit judges "are 'too activist' is a question crawling with complications and one perhaps best left to editorial writers, talk-show hosts and other certified clairvoyants." Maher, *supra* note 2, at 67.

Contrast activism with the assumptions underlying judicial restraint:

One [assumption underlying judicial restraint] is history and that obligation that constitutionalism imposes to adhere to the essential meaning put in the document by its framers. A second is the intrinsically undemocratic nature of the Supreme Court. A third is a corollary to the second, an abiding respect for the judgments of those branches of government that are elected representatives of their constituents. A fourth is the recognition that judicial error at this level is more difficult of correction than other forms of judicial action. A fifth is respect for the judgments of earlier courts. But [sixth], the essential feature of judicial restraint that has gained most attention and aroused the greatest doubts probably because few men are themselves big enough to abide by its command — is the notion of rejection of personal preference.

P. KURLAND, *MR. JUSTICE FRANKFURTER AND THE SUPREME COURT* 5 (1971). Justice Frankfurter has commented upon the need for judicial restraint.

It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observation of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do

Trop v. Dulles, 356 U.S. 86, 120 (1958).

263. The willingness to depart from *stare decisis* is characteristic of activist courts. M. KLEIN, *supra* note 262, at 255. Ninth Circuit decisions may become precedent for other circuits, but initially represent departures from the law as previously applied. *E.g.*, *Wadman v. INS*, 329 812 (9th Cir. 1964).

264. U.S. CONST. arts. I, II, III. Such limits include the President, the states, the lower courts, and the nature of the nation's majority coalition. M. KLEIN, *supra* note 262, at 260-62. Even with these limits, some judicial policymaking is inevitable. *Id.* at 257.

265. M. WILKEY, *ACTIVISM BY THE BRANCH OF THE LAST RESORT: OF THE SEIZURE OF ABANDONED SWORDS AND PURSES* 3 (1984). "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor." MADISON, *THE FEDERALIST* NO. 46 (quoting Montesquieu).

issues.²⁶⁶

This behavior may be due to the sheer wilfulness of both courts to take activist positions.²⁶⁷ It is more likely, however, that this action results from an effort by both courts to fill a void resulting from Congress' abdication of its own responsibility for decisionmaking in the area of immigration law.²⁶⁸ Both the Supreme Court and the Ninth Circuit have chosen to fill this void in different manners.

One scholar has hypothesized as to the existence of two simultaneously existing systems, the myth system and the operational system.²⁶⁹ The myth system operates as an ideal and results from the fear of vicious tendencies in human nature. The operational system represents how things actually work. The myth system is analogous to a religion, providing the standards by which to judge the operational system. We demand that the courts deliver the results promised by the myth system and not delivered by the operational system.²⁷⁰ The court will intervene, that is, become activist, where the operational system breaks down to become a travesty of the myth system.²⁷¹

The Ninth Circuit has consistently viewed existing rights of the individual as absolute, requiring extreme situations to justify their disturbance and constant vigilance against government misconduct

266. M. WILKEY, *supra* note 265, at 14-16.

267. *Id.* at 17.

268. *Id.* at 2.

Various presidential candidates in the 1984 presidential election have characterized the United States borders as being "out of control" or as suffering from "hemorrhage." Despite growing awareness of the need for a coherent immigration policy, neither the executive nor the legislative branches have adopted such a policy. *See id.* One court, in a different immigration context, commented on its function in relation to the role of the other two governmental branches:

At root, the controversy here [the Cuban Freedom Flotilla], reflects a basic contradiction between, on the one hand, America's tradition of providing sanctuary for the homeless, the outcast and, particularly, the political refugee and, on the other, our immigration laws. That tension finds expression in the discomfiting question of who, and how many, can come to this country and in what circumstances. *Resolution of that tension through promulgation and enforcement of a coherent immigration policy is a matter within the provinces of the Legislative and Executive Branches of government.* This Court has neither the willingness nor the competence to interject itself into the arena of immigration policy, except insofar as such a policy runs afoul of constitutional and statutory safeguards

Pollgreen v. Morris, 496 F. Supp. 1042, 1049 (S.D. Fla. 1980) (emphasis added). For a recent update on congressional efforts to address immigration reform, see *The Policy Dilemma, Trying to Stem the Illegal Tide*, TIME, July 8, 1983 at 50-52.

269. R. NEELY, *supra* note 254, at 12-14.

270. *Id.* See also W. REISMAN, *FOLDED LIES* (1979).

271. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).

to ensure their survival.²⁷² The examined opinions of the Ninth Circuit develop a myth system portraying helpless victims at the mercy of a huge, relentless, and unsympathetic bureaucracy. The court has expressed its reluctance to act where Congress should act, but has felt compelled to do so because of the existing void.²⁷³

The Supreme Court has also indicated its unwillingness to act where Congress and the executive branch have abdicated their responsibility to do so.²⁷⁴ It has, however, acted, and in a manner premised upon a significantly different myth system. The decisions of the Supreme Court reflect a view of aliens as manipulative of an already overburdened agency, trying its best to enforce the laws as mandated by the executive and legislative branches.²⁷⁵ The Supreme Court views immigration as a function of the sovereign nature of government, allowing little or no interference.

Each court is attempting to reconcile the existing operational system with its own myth system. Each myth system, however, fails in varying degrees to adequately allow for the possibility of modification of the myth system itself, rather than modification of only the operational system. The judges of each court need to review the positions which provide a basis for the decisions of the court and determine how closely geared those positions are to the day to day realities of the immigration situation. It may be that the reality lies between the currently existing myths. This is the reality which the judges must use as a basis for the development of a new and coherent myth system or ideal, to which the operational system can be

272. The question of activism may reflect a basic difference of reading constitutional commands in light of the judicial function, *i.e.*, which constitutional commands are absolute injunctions. H. ABRAHAM, *THE JUDICIARY: THE SUPREME COURT IN THE GOVERNMENTAL PROCESS* 200 (5th ed. 1980).

273. See, *e.g.*, *supra* note 19.

274. See, *e.g.*, *supra* notes 15 and 150 and accompanying text.

275. See, *e.g.*, *supra* notes 23, 83, 99, 159, 200-01 and accompanying text.

To be sure, not all members of each court have views consistent with the activism/self-restraint characterization. Judge Wallace of the Ninth Circuit appears to seek reconciliation of the operational system with the same myth system as a majority of the Supreme Court. See, *e.g.*, *supra* note 157. Justice Brennan's myth system, with which Justices Marshall, Stevens, and White at varying times agree, appears to be the same as that of a majority of the Ninth Circuit court. See, *e.g.*, *supra* notes 26-31, 82-83, 99, 148-49 and accompanying text.

For data regarding the nature and extent of the immigration "problem," see COMMUNITY RESEARCH ASSOCIATES, INC., *UNDOCUMENTED IMMIGRANTS: THEIR IMPACT ON THE COUNTY OF SAN DIEGO* (1980); COMPTROLLER GENERAL, *REPORT TO THE CONGRESS OF THE UNITED STATES: ILLEGAL ALIENS: ESTIMATING THEIR IMPACT ON THE UNITED STATES* (1980); COMPTROLLER GENERAL, *REPORT TO THE CONGRESS OF THE UNITED STATES: NUMBER OF UNDOCUMENTED ALIENS RESIDING IN THE UNITED STATES UNKNOWN* (1981); SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, *SECOND SEMI-ANNUAL REPORT* (1980); P. EHRLICH, L. BILDERBACK, & A. EHRLICH, *THE GOLDEN DOOR: INTERNATIONAL MIGRATION, MEXICO, AND THE UNITED STATES* (1979). For a summary of the approaches of other countries to immigration and the problem of illegal aliens, see *U.S. Immigration Policy*, NUESTRO, Aug. 1984, at 21-24.

better adjusted.

Concurrently, the executive and legislative branches must assume their responsibility for the adoption of legislation which provides adequate measures and funding for enforcement and adjudication, and for remedying those situations which justice and fair play abhor. The legislature must address not only the issue of how many individuals are to be admitted to this country and in what classifications, but the status of those individuals vis-à-vis the legal system, once they are present in the United States. These branches have, to date, failed in this responsibility.²⁷⁶

276. Representative Peter W. Roding, Jr., Chairman of the House Judiciary Committee, has recognized the problems posed by continuous Congressional inaction:

As Americans, we must ask ourselves how much longer we are willing to pay the moral, social, and economic price of avoiding our sovereign responsibility to control our borders. I am fearful that unless Congress acts to address this problem now, the time may come when America is forced to close its door to everyone. This would be a tragic outcome and must not be allowed to happen.

Representative Romano L. Mazzoli, Chairman of the Judiciary Committee's Subcommittee on Immigration, Refugees, and International Law, has also addressed the issue: "The immigration problem has not and will not go away on its own. Our job in Congress must be to deal squarely with this nettlesome and vexing issue" 62 INTERPRETER RELEASES 673-74 (July 26, 1985).

