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The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*

LEON WILDES**

Had it not been for a certain rock musician and former Beatle named John Lennon, an article on the nonpriority program might never have been written. The research required a plaintiff willing to patiently await the outcome of numerous administrative requests for information and then to pursue a suit under the Freedom of Information Act (FOIA).1 The entire program was so shrouded in secrecy that a former District Director of the Immigration and


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Naturalization Service (INS) actually denied the existence of the program. The Operations Instruction\(^2\) embodying the procedure was buried in the Blue Sheets, the INS internal regulations never made available to the public. The situation was a classic example of secret law.

The purpose of this article is to make the practicing bar more fully aware of the nonpriority program. In addition, this article will describe how the FOIA can be used as an information gathering device and as a litigation tool.

**The Freedom of Information Act**

Perhaps no amendment to the Administrative Procedure Act has had so profound an effect on administrative law as the FOIA. Since its passage in 1967, veritable mountains of documents, internal operating instructions, and federal agencies’ procedural rules have been made public. Although in the short span of nine years, an entire body of new law has developed around the FOIA, only the surface issues have been dealt with. It has been conceded without argument\(^3\) that the primary purpose of the FOIA is to make available to the public the records, rules, and internal workings of federal agencies. The issue which remains unresolved is the extent of the new rights which have been created for members of the public involved in litigation. This question was raised in litigation between John Lennon and the INS.\(^4\)


\(^3\) See U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 1 (1967).

\(^4\) Lennon’s difficulties with the INS resulted in three district court actions as well as a Petition for Review before the court of appeals:

Lennon came to the United States as a visitor in August 1971, and was permitted to remain until late February 1972. At that time the INS instituted deportation proceedings against him as an alleged overstay. Lennon claimed that the proceedings were instituted for political reasons. Among other things, he requested a grant of non-priority status.

Nonpriority status is a euphemism for an administrative stay of deportation which effectively places an otherwise deportable alien in a position where he is not removed simply because his case has the lowest possible priority for INS action. Traditionally, the status was accorded to aliens whose departure from the United States would result in extreme hardship. Lennon and artist Yoko Ono, his wife, had come to this country to fight contested custody proceed-

accomplished its purpose and became moot when the Immigration Service acted upon Lennon's petition within hours of the filing of the action in the district court.

B. Lennon v. Richardson, 378 F. Supp. 39 (S.D.N.Y. 1974), was an action brought under the Administrative Procedure Act, 5 U.S.C. § 522 (1966), to obtain Immigration Service records detailing the program and procedures relating to the granting of nonpriority status.

C. Lennon v. United States, 387 F. Supp. 561 (S.D.N.Y. 1975), was a suit to enjoin Lennon's deportation on the ground that he had been singled out because of his political beliefs and to seek other relief.

D. Lennon v. INS, 527 F.2d 187 (2d Cir. 1975), was a petition for review of the Board of Immigration Appeals decision upholding the deportation order against Lennon. A petition for review is the device for obtaining judicial review of a final administrative order of deportation, 8 U.S.C. § 1105(a) (1970).

Ultimately, the deportation order against Lennon was reversed by the Second Circuit in a 2 to 1 decision written by Chief Judge Irving Kaufman. The court held that petitioner's guilty plea in London in 1968 to a charge of possessing cannabis resin in violation of the British Dangerous Drugs Act of 1965, C.15, § 4(I) (A); Dangerous Drugs (No. 2) Regulations §§ 3 & 9 (1964), Stat. Instr. 1964 No. 1811, which makes possession of a narcotic unlawful even if the possessor does not know the illicit nature of what he possesses, does not amount to a conviction under a "law or regulation relating to the illicit possession of ... marijuana" within the meaning of section 212(a)(23) of the Immigration & Nationality Act, 8 U.S.C. § 1182(a)(23) (1970). The case was remanded to the Service to determine Lennon's eligibility as a matter of discretion. On July 27, 1976, a hearing was held before Immigration Judge Fieldsteel immediately after which Lennon was granted residence, culminating his five-year struggle against the INS.

Another action had been contemplated against the Senate Internal Security Committee for withholding documents relating to the selective prosecution of Lennon. Although congressional committees are exempt from FOIA disclosure, Lennon would have argued that the documents requested originated from executive sources and could not be protected from disclosure by being sent to a Senate Committee. See Comment, Immigration Law and Procedure—Excludability—Conviction Under British Dangerous Drugs Act of 1965 Is not a Conviction Under a Law Prohibiting "Illicit Possession" Within the Meaning of Immigration and Nationality Act, § 212(a), 11 Tex. Int'l L.J. 345 (1976).

ings concerning Kyoko, Ono's daughter by a prior marriage. Lennon and Ono were completely successful on the law, with courts in several jurisdictions awarding them custody of Kyoko. However the father absconded with the child and could not be found. In the midst of the frantic search for the child, Lennon and Ono were subjected to expulsion proceedings. They felt, accordingly, that the equities involved in their continued search for the child justified the application for nonpriority status. Hardship notwithstanding, non-priority status was never even given consideration, and the deportation proceedings relentlessly advanced. 6

Commencing on May 1, 1972, through extensive correspondence with the INS, Lennon made every conceivable effort to obtain the records relevant to nonpriority procedures before instituting suit in federal court. However, after more than a year's correspondence, the records were not forthcoming. 7 In fact, the Service stated that the data about nonpriority cases were "not compiled" although at no time did it deny the existence of either a nonpriority program or relevant records. 8 Lennon's demands, made pursuant to the FOIA, 9

7. The first request for records relating to the nonpriority program was made on May 1, 1972, to Sol Marks, the district director in New York who is now retired. Subsequent correspondence continued with both the district director and the central office in Washington. As of the date of this writing, a request for data regarding denied nonpriority applications is pending.
8. Perhaps the best way to describe the attitude of the Service is one of passive resistance.
9. 5 U.S.C. § 552(a) (3) (1970). Note that this action was instituted prior to the 1974 amendment to the FOIA which had among its purposes assuring prompt compliance by the agency with requests for information under the FOIA:

(6) (A) Each agency upon any request for records made under paragraph (1), (2) or (3) of this subsection shall—

(i) determine within ten days (excepting Saturdays, Sundays and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reason therefore, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (except Saturdays, Sundays and legal public holidays) after the receipt of such appeal. If after appeal the denial of a request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.
Id. § 552(a) (6) (A) (1974).
continued until August 1973, with no response from the Service.

In his deportation proceedings, Lennon moved to depose a Government witness with knowledge of the program. His motion was rejected, however, because the immigration judge thought it irrelevant to any issue over which he could rule. Finally, when attempts to obtain the records through regular administrative channels failed, an action was instituted in district court, requesting injunctive relief pursuant to section (a)(3) of the FOIA. The suit was filed within a short time after filing a companion action against certain Government officials. The companion suit sought a hearing to determine whether such officials had conspired to prejudge an immigration case, to prejudge various applications for discretionary relief and the premature commencement of deportation proceedings against the plaintiff. Among the wrongs alleged was the Government's unexplained failure to consider Lennon's request for nonpriority classification.

Section (a)(1) of the FOIA provides for publication in the Federal Register of basic information on how agencies are organized and on the rules which they follow in administrating their mandates. The publication must include descriptions of central and field organizations of the agencies, statements of the general course or method by which the agencies function, rules of procedure, descriptions of available forms and places where they may be obtained, and substantive rules of general applicability adopted as authorized by law. This section also provides that a person cannot be adversely affected by "a matter required to be published in the Federal Register and not so published." Section (a)(2) requires that the following be made available for public inspection and copying: (A) the final opinions made in the adjudication of cases; (B) interpretations which have been adopted but which have not been published in the Federal Register; and (C) administrative staff manuals which could affect a member of the public.

When Lennon's FOIA action was instituted, the rules on nonpriority classification were contained in an INS Operations Instruction which was not available to the public. Subsequent to the action and as a direct result of it, this Instruction was transferred from the unpublished Blue Sheets to the published White Sheets. The pub-

12. Id.
14. Id. § (E).
15. Id. §§ (A) & (B).
16. Id. § (C).
17. The INS has available to the public in various district offices, includ-
lication of this Operations Instruction was significant, for it was a formal, public acknowledgement by the INS that such a program existed. Even so, of much greater value to the litigant are the records of those cases in which nonpriority status was granted or denied. The records requested at the time of the action consisted of periodic reports by district directors. Each time a nonpriority decision was made, the director had to record his reasons, forward his recommendation or decision to his regional commissioner, who then forwarded it to the Central Office in Washington, D.C., where an officer or a committee of officers acted on the decision and kept records.¹⁸

Section (b) of the FOIA lists nine exceptions to the publication requirements of section (a).¹⁹ Pursuant to section (c), exceptions are expressly limited to those specifically stated in section (b).²⁰ Attempts to expand this list of exceptions have failed.²¹ Thus, the

¹⁸. As is discussed infra, at text accompanying note 32, the Operations Instruction has recently been revised so that nonpriority applications are handled at the regional level rather than by a Central Office committee. This change was instituted on April 30, 1975, as a result of the litigation described herein.


²⁰. Id. § 552(c).

²¹. Records excepted from disclosure are those:
(1) (A) specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such executive order;
(2) related solely to the internal personnel rules and practices of an agency;
(3) specifically exempted from disclosure by statute;
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
(5) inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency;
(6) personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the
INS could not argue that the records requested were exempt from the provisions of section (a) of the FOIA. Even if such records were termed Private Letter Rulings or Technical Service Memoranda, they would not have been exempt from production and disclosure.22 An exemption in the FOIA protects “inter-agency or intra-agency” memoranda or letters23 which would “not be available by law to a party other than an agency in litigation with the agency.”24 This exemption was intended to encourage the free exchange of ideas during the policymaking process. It has been held to protect internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking process, but not purely factual or investigative reports.25 Factual information may be protected only if it is inextricably intertwined with the policymaking process. The courts do not view this exception expansively.26

The nonpriority records were clearly a “class or category of documents” in the normal course of INS affairs. Therefore, the reports had to be produced.27 In view of the arguments cited above, the

*identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or safety of law enforcement personnel; (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; (9) geological and geophysical information and data, including maps, concerning wells.*

Id. § 552(b).


27. National Cable Television Ass'n v. F.T.C., 479 F.2d 183 (D.C. Cir. 1973). Even if an agency has never segregated a class or category, publication is required when the agency may be able to identify that material with reasonable effort. Even if the agency can demonstrate that the memoran-
Government decided that its most appropriate course would be to provide the plaintiff with the case histories of all extant approved nonpriority cases—1843 in number. Thus, for the first time, both the procedures and the records of all known approved cases were made available to the public.

**The Nonpriority Program**

*The Immigration Act’s Failure to Deal with all Humanitarian Problems*

Section 212(a) of the Immigration and Nationality Act (Act)\(^{28}\) lists thirty-one classes of excludable aliens who are inadmissible to the United States.\(^{29}\) The provision, which has been characterized as “labyrinthine,”\(^ {30}\) actually prevents many aliens from permanently settling in this country. With respect to certain grounds for exclusion, waivers are available to those able to demonstrate hardship to themselves, or to close relatives who are either United States citizens or permanent residents.\(^ {31}\) Other aliens have no administrative remedy available, in which case, the immutable provisions of the law often mandate deportation. Aside from the general language “shall,” the Act is silent about whether the INS, which has been delegated full authority to deal with aliens, may permit aliens to remain on the basis of nonstatutory reasons. Because of the Act’s silence, the INS developed a secret program which it used to ameliorate the Act’s stern provisions.

The following discussion will detail the operative factors in an INS decision to invoke nonpriority status. The general rule is that when an alien is otherwise deportable or excludable, the Service...
will use nonpriority status to avoid a result which on humanitarian grounds would be unconscionable. The Service, aware that the mechanical enforcement of the often harsh immigration laws and regulations sometimes leads to great inequity, voluntarily developed this special category to safeguard against gross injustices.

What is a Nonpriority Case?

E. A. Loughran, former INS Associate Commissioner, Management, defined a nonpriority case as:

one in which the Service in the exercise of discretion determines that adverse action would be unconscionable because of appealing humanitarian factors. Generally these cases are identified at an early stage in Service processing and are not put under deportation proceedings. However in a number of cases the appealing humanitarian factors may occur or be recognized after procedures have been started. In the latter cases extended voluntary departure or stays of deportation may be granted as appropriate.\(^{32}\)

The nonpriority category is not a haphazard, informal designation subject to the whim of any immigration officer. On the con-

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The recently revised Operations Instruction provides that:

In every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for nonpriority. His recommendation shall be made to the regional commissioner concerned on Form G-312, which shall be signed personally by the district director. Interim or biennial reviews should be conducted to determine whether approved cases be continued or removed from nonpriority. (Revised)

When determining whether a case should be recommended for nonpriority category, consideration should include the following: (1) Advanced or tender age; (2) Many years presence in the United States; (3) Physical or mental condition requiring care or treatment in the States; (4) Family situation in the United States effect of expulsion; (5) Criminal, Immoral or Subversive activities or affiliations—recent conduct. If the nonpriority recommendation is approved by the regional commissioner the alien shall be notified that no action will be taken by the Service to disturb his immigration status, or that his departure from the United States has been deferred indefinitely, whichever is appropriate. (Revised)

Each regional commissioner shall submit a quarterly statistical nonpriority report (Reports Control System Number CCOM-28) to the Deputy Commissioner which shall be filed in CO 840-P (nonpriority cases). The report shall be forwarded by the 25th day after the close of the report period and should include: (1) Number of cases in nonpriority status at the beginning of the quarter; (2) Number of recommendations received during the quarter; (3) Number of recommendations denied; (4) Number of recommendations approved; (5) Number of cases removed from nonpriority status; (6) Number of nonpriority cases pending at the end of the quarter. (Added)

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trary, it is a formalized procedure initiated by a District Director in accordance with the mandate of the Operations Instruction. The Instruction requires that the District Director "shall" recommend nonpriority status when there are appealing humanitarian factors. This is a completely internal procedure of the Service, initiated by the District Director and acted upon without any input from the alien himself; the forms are not even available to the public. However, an attorney aware of the procedure may request such status on behalf of his client and submit evidence to the local District Director to substantiate the request that his client be placed in nonpriority status.

Which Categories of Aliens are Eligible for Nonpriority Status?

I have carefully examined the 1843 nonpriority decisions which constitute the entire body of approved cases as of 31 December 1974. In virtually any circumstance where following established procedure would result in a grave injustice, nonpriority status is considered. An alien may achieve nonpriority status regardless of the factual reasons or statutory grounds for his deportability or excludability. Nonpriority has been granted to aliens who have committed serious crimes involving moral turpitude, drug convictions, fraud, or prostitution. Moreover, nonpriority has been given to Communists, the insane, the feebleminded, and the medically infirm. In sum, nonpriority has been granted to those who have violated almost any provision of the Act. Often there are multiple grounds for deportability and ineligibility for other administrative relief. Table One provides a breakdown of some of the major categories

33. INS, Operating Instruction § 103.1(a) (1)(ii) (April 30, 1975).

34. Table One*

<table>
<thead>
<tr>
<th>Ground for Deportability or Excludability</th>
<th>Number of Cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>No immigrant visa**</td>
<td>638</td>
<td>34.6%</td>
</tr>
<tr>
<td>Overstay**</td>
<td>430</td>
<td>23.3%</td>
</tr>
<tr>
<td>Insanity***</td>
<td>383</td>
<td>20.8%</td>
</tr>
<tr>
<td>Criminal convictions****</td>
<td>168</td>
<td>9.1%</td>
</tr>
<tr>
<td>Drug convictions</td>
<td>138</td>
<td>7.5%</td>
</tr>
<tr>
<td>Physical health</td>
<td>46</td>
<td>2.5%</td>
</tr>
<tr>
<td>Communist</td>
<td>16</td>
<td>.9%</td>
</tr>
<tr>
<td>Transporting illegal aliens</td>
<td>14</td>
<td>.8%</td>
</tr>
<tr>
<td>Prostitution****</td>
<td>10</td>
<td>.5%</td>
</tr>
</tbody>
</table>

TOTAL 1843 100.0%

* These figures are compiled from the 1843 cases in my possession. The
of aliens granted nonpriority status.

The statistical spread of the cases highlighted in Table One supports the proposition that any alien, in any category of deportability or excludability, is eligible for nonpriority status. The cases appear to hinge on the humanitarian reasons for granting nonpriority rather than on the original ground of deportability. The most convincing evidence of the relative unimportance of the ground of deportability is the following case history (case 12-31).36

Subject is a native and citizen of China, 46 years of age. . . . He first entered the United States May 19, 1921 as the alien son of a domiciled Chinese merchant. He made a trip to China in 1935-36 and was absent in Mexico again one day in about 1949 when he fled to avoid prosecution on a charge of burglary lodged against him in Seattle, Washington. He was returned to the United States by Mexican authorities on February 16, 1949. He then gained entry by falsely claiming birth in the United States. Deportation proceedings were initiated by issuance of a Warrant for Arrest on March 25, 1946 charging deportability for conviction and sentence for rape. Before completion of these proceedings he departed to Mexico which invalidated the warrant. Proceedings were again instituted by issuance of a Warrant for Arrest on April 29, 1949 on the charge

reasons were listed by the district directors on the Form G-312 application for nonpriority status under “Grounds for Deportability or Exclusion.” See note 32 supra.

** The large majority of cases are technically ones in which the aliens are overstays or are not in possession of an immigrant visa. Included in these categories are cases which involve fraudulent entries and entries without inspection; many of these cases also involve some other deportable ground. The notations on the forms G-312 are often rather cryptic—e.g., that the alien is not in possession of an immigrant visa—without stating exactly why or whether the alien is ineligible to receive such visa for any reason.

*** Insanity cases include all those in which the alien is ineligible for immigration based upon his mental condition—e.g., feeble-mindedness, class A mental defective, schizophrenic, or likely to become a public charge within five years of entry.

**** All categories of criminal convictions resulted in eligibility for an immigrant visa—e.g., convicted of two crimes involving moral turpitude, or convicted of a crime involving moral turpitude within five years after entering the United States.


The case reports furnished to the author consisted of 1843 forms G-312. The Service claimed that these were not indexed in any particular fashion at the Central Office, where they were on file. Because the names, alien registration numbers, and other identifying data had been blacked out, there was no way to confirm this assertion. The case reports were received in forty-six packets. Accordingly, the author indexed them in the order in which they were received—e.g., case 12-3 was received as packet 12, case 3. The drug cases were indexed separately by number (1 through 138) to facilitate research with regard to the Lennon case.
of having been convicted of the crime of rape prior to entry. During the subsequent hearing in 1949 he applied for Suspension of Deportation which was denied, and he was ordered deported. A new hearing was held in 1955 resulting in the same decision. A Warrant for Deportation was issued August 12, 1955.

This subject has a criminal record which includes convictions for auto theft, contributing to the delinquency of a minor, vagrancy (pimp), rape, burglary in the second degree, robbery, possession of narcotics, and numerous other arrests. Despite his lengthy criminal record and numerous grounds for deportability, he was granted nonpriority status based upon his subsequent good behavior, successful marriage, and the fact that deportation would result in the separation of a good family unit. Clearly this decision was reached through strict evaluation of humanitarian factors alone. This principle will become clearer as the various categories of humanitarian factors are considered.

Why is Nonpriority Recommended?

Although the nonpriority category is special, meant to accommodate unusual or unique circumstances, an analysis of the cases demonstrated several discernable categories which were, as a matter of policy, granted nonpriority status in substantial numbers. Table Two indicates that the elderly, the young, the mentally incompetent, the infirm, and those who would be separated from their families were treated favorably by the Service.

The Elderly

Elderly aliens for whom deportation proceedings would be a hardship are usually granted nonpriority status. The equities in these cases are generally quite obvious. Often these aliens have been in the United States for extended periods of time. They usu-

<table>
<thead>
<tr>
<th>Factors</th>
<th>Number of cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Separation of family</td>
<td>590</td>
<td>32.0%</td>
</tr>
<tr>
<td>The young</td>
<td>431</td>
<td>23.4%</td>
</tr>
<tr>
<td>The elderly</td>
<td>389</td>
<td>21.1%</td>
</tr>
<tr>
<td>The mentally incompetent</td>
<td>357</td>
<td>19.4%</td>
</tr>
<tr>
<td>The infirm</td>
<td>48</td>
<td>2.6%</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>28</td>
<td>1.5%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>1843</td>
<td>100.0%</td>
</tr>
</tbody>
</table>
ally have no place to go outside this country or would be traumatized by forced departure. In some instances their only living relatives are in the United States, or they are incompetent to some extent and are being cared for by family members in the United States. It cannot be overemphasized that the Service, particularly in these cases, is not impeded by statutory limitations. Rather its considerations are the real family ties of the people whose lives it controls.

A typical case is 3-34. The subject is an eighty-year-old Colombian who entered the United States in 1965 as a visitor for pleasure. She is deportable as an overstay with no administrative relief available. Her physical and mental condition are described as normal for one of advanced years. A niece and grandniece have undertaken the care of this elderly woman. Based upon their statements and the equities involved, nonpriority status was granted.

Quite similar circumstances prevailed in case 26-1. Subject, an eighty-year-old Portuguese man, was admitted as a visitor for pleasure in 1968 and was deportable in 1970 as an overstay. His only living relative is his adopted daughter who lives in the United States and with whom he now resides. The report states that expulsion proceedings would be very detrimental to his physical and mental well-being. The subject has no visible means of support. He is entirely dependent upon his adopted daughter and her husband, __________, for his livelihood. The record indicates that the alien would not become a public charge. Also his age precludes him from entering the labor market. [The stepdaughter] has been contributing full support for the past sixteen years. She feels that since she is responsible for his upkeep, it would be better if the alien were to remain in her home. Nonpriority status was granted.

37. Her case report reads:
Subject has only one sister, residing in Colombia, also age 80, who cannot take care of her. She has no place to return to and no one to care for her and this would create an extreme hardship on her in view of her advanced age of 80. The subject is residing with __________, a permanent resident alien who immigrated on June 22, 1964 at Miami and who is her niece. The subject previously resided with __________ in Colombia until she emigrated to the United States. ______, son of ______ is also a permanent resident alien who wants to sponsor the subject for his mother. He is employed by ______, California as a truck lift operator earning $2.27 per hour for a 40-hour week, plus overtime. He is single and resides with his parents, both permanent resident aliens, and the subject at this address. He is willing and able to support the subject as he does his parents and submits an affidavit to the effect she will not become a public charge.
In some instances nonpriority status has been granted even though administrative relief was available—e.g., suspension of deportation proceedings or the possibility of obtaining an immigrant visa. Elderly aliens, however, who were incapable of initiating or following through with the requisite procedures, or refused to do so, were nevertheless granted nonpriority status. Case 7-29 is just such a circumstance. A fifty-seven-year-old native of Mexico had entered the United States without inspection and had nine United States citizen children, ranging in age from two to twenty-nine. Although she is prima facie eligible for registry,\(^3\) "[s]he, however, is mentally unable to apply for such adjustment. She is supported by welfare and money from her children. She does field work when available." It was recommended and approved that she be retained in nonpriority status. This case demonstrates that old age is also subjectively determined.

In all these cases the overriding humanitarian factors involved were the advanced age of the alien and the trauma that would result to the alien if expulsion proceedings were initiated or prosecuted. When requested to do so, because of the special character of the cases, the INS has acted with great compassion and granted nonpriority status.

The Young

The equities in dealing with the young are the inverse of those in dealing with the elderly. When a child is deportable and would be separated from the friends or relatives who function in the supportive role of the immediate family, nonpriority may be recommended. Apparently the Service treats children with sympathetic consideration. Those who are orphans living in institutions, adoptive homes, or being cared for by various agencies will not be expelled. The well-being of the child is considered the primary factor, and a harmonious homelife is protected if possible.

Case 8-19 is representative. The subject, a fifteen-year-old Mexican national, entered the United States without an immigrant visa. Although she was statutorily eligible to receive a visa, no adminis-

trative method assures its issuance. This minor, who lived with her half-brother and his wife, was granted nonpriority status so that she would not be deprived of adult supervision and care.

With respect to the young, the cases also deal with post-adolescents, people in their twenties, who of course are not technically children. Even so, some of these individuals have been in the United States since early childhood and will suffer extreme hardship if expelled to a country with which they have ties only in a technical sense.

In case 25-32, a twenty-one-year-old Mexican national, in the United States with her mother, also an illegal alien, was granted nonpriority status. Nonpriority in this case was a device used to

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39. The case report reads:
The subject's mother is deceased and her father abandoned her upon his remarriage in Mexico. The subject was brought to the U.S. by her half-brother who is a naturalized citizen of the U.S. and employed by the city. She resides with her half-brother and his family consisting of a wife and four children. She has no close relatives in Mexico with whom she can stay. The exact whereabouts of her father in Mexico is unknown. The half-brother stated that he would like to secure an immigrant visa for the subject. The case was discussed with Consul of the Visa Section American Consulate, Cd. Juarez, Chih., Mexico as to whether he would favorably consider a visa application submitted in the girl's behalf. The half-brother indicated his willingness to execute an Affidavit of Support although he appears disinterested in legally adopting his half-sister. The Consular Officer stated that in line with the Consulate policy of not accepting Affidavits of Support from relatives with no legal responsibility, he would refuse the visa. He also stated that in his opinion the income of the subject's half-brother, as a city sanitation worker, would be considered inadequate to support a family of 7, under the Consulate's criteria of adequacy.

40. The case report describes the difficulties that would result from expulsion:
This would result in subject and her mother departing this country after 21 years of United States residence—subject since 8 days of age—with no home or place to go abroad, or ability to obtain employment legally to obtain immigrant visa for return to the United States. Subject's case should be considered jointly with that of her mother. Subject had no knowledge she was not a citizen of the United States until officers of this Service interviewed her mother in July, 1961. Subject is a student, in eleventh grade, and is not now employed. She is entirely dependent on her mother who is employed as a domestic earning $40.00 a week for support. Mother and daughter attempted to procure immigrant visas but were not successful for lack of approved employment letter and, in addition, inability to obtain Mexico passports. H.R. 5939, 88th Congress, 1st session, for relief of subjects was turned down by the Subcommittee on Immigration owing to surreptitious entries. They applied under Section 249 of the Immigration and Nationality Act in July, 1966 for adjustment of status to permanent residents but were unable to establish residence in this country since prior to June 30, 1948. They are now not eligible for any type of administrative relief.
keep a family unit intact and to protect the emotional well-being of a young woman and her mother. As with all the cases in this category, the Service first seeks to protect the child and then examines the child's family situation in order to decide upon the application for the nonpriority program.

The Mentally Incompetent

Like the elderly and the young, the mentally incompetent are a class of aliens requiring special care and attention. When expulsion would be a hardship in such cases, nonpriority is generally recommended. This category includes aliens being cared for by family members or those institutionalized with no place to go outside this country. Another frequent case is that of the alien who has had an attack of insanity and is now in a state of remission with a guarded prognosis. If expulsion would have the effect of possibly causing a new breakdown or of reversing the remission, nonpriority is granted.41

What is significant, if somewhat ironic, is that in most of these cases the grounds for deportability—e.g., mental defects, institutionalization after entry—are also grounds for nonpriority consideration because of the humanitarian factors involved. Thus the Immigration Service through its nonpriority program seems to be adding both flexibility and sensitivity to an otherwise indiscriminate and harsh law.

A related type of mental incompetency case occurs when a family is granted permanent residence status before it is discovered that one member (usually a child) is mentally incompetent and thus ineligible for permanent residence. Rather than expelling the family member, nonpriority status is granted.42

41. A representative insanity case is 3-18. The subject, forty-six years of age at the time of inquiry, had an insanity crisis while living with her United States citizen husband and children. The report reads:

The subject was a patient at ______________ Mass. from 12/5/31 to 3/24/33. She has been at ______________ since 1/15/53. Her husband has attempted to defray part of the hospitalization cost though was compelled to cease payment in August, 1953 because of family obligations. ______________ is a minister whose earnings are small. The hospital authorities are unable to predict whether recovery is possible.

The recommendation was to retain the case in nonpriority status.

42. This occurred in case 27-32, which involved a twenty-seven-year-old
The Infirm

The Service has a general policy of finding special accommodation in the nonpriority program for those who are in some manner helpless and dependent. Within that range of categories are those who have medical problems. If expulsion would have a serious physical effect upon the alien or deprive him of needed medical care or the care of family members upon whom he is dependent, nonpriority is generally recommended.43

Separation of Family

The largest category of cases involved illegal aliens whose expulsion would separate a family unit. The variety of family constellations whose potential breakup would warrant consideration for nonpriority appears to be almost endless. In fact a careful review of the categories previously discussed would reveal that a high percentage of cases involving the elderly, the young, the mentally incompetent, and the infirm also involves elements of family separation. What distinguishes those cases from the ones mentioned here is that in the former, separation is not the essential element warranting nonpriority, while in these cases it is the operative factor.

The most typical case is that of an illegal alien married to a United States citizen or permanent residence alien. Rarely will nonpriority status be granted if it involves the “mere” separation of the husband and wife. The Service apparently believes that separation of the family unit need not occur in such case, for the spouse can always leave with the expelled alien. If there are children in-

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Canadian national who was deportable because of an attack of insanity prior to entry. The subject’s father and mother were both permanent resident aliens, and the subject was also a permanent resident. The report reads:

Hospitalized 3/21/50, released 3/7/50, readmitted 2/4/52 to 3/22/56 and from April 1956 to date. The father is a minister and has limited income, however, partial payments have been made to the State. While she has acquired five years for Immigration Act section 244(a) (3), relief is not feasible since she is still institutionalized. She is allowed occasional home visits.

The approved recommendation was to continue in nonpriority status.

43. A typical case is 28-36, in which the subject had polio during childhood which continues to affect her muscular coordination and speech. The report explains:

No family in Guyana. She is maintained by her two United States citizen sisters who are registered nurses. In the event of expulsion she would be deprived of her sisters’ care and companionship and support.

Nonpriority was granted.

58
volved, however, granting nonpriority is much more likely. This is so regardless of whether the male or female parent is to be expelled. When the male is to be expelled, the report is usually framed in language indicating that the family would be deprived of paternal support (usually meaning financial support) and care. Economic factors are less frequently relevant when the female member is the subject of deportation proceedings, although this is not always true.

A representative case is 1-12, in which the subject was a Mexican national, without an immigrant visa, who had a permanent resident husband and several United States citizen children. The report states the expulsion would “[r]esult in the separation of subject from her children in the United States. She has no means of support in Mexico.” Nonpriority status was granted despite her previous separation from her husband and the fact that she was on welfare.

Cases occur in which the relationship is not a legal one, such as case 1-32. The report describes the subject as separated from her husband, living with another man who is a United States citizen, and having several children through each relationship. In case 3-46 the subject’s husband was in jail. Because her departure would require leaving her children with someone else, nonpriority was granted.

The equities of the cases are not limited only to family separation; on the contrary other compassionate elements usually exist. The most frequent is economic hardship. There are others—e.g., case 2-35—reflecting unusual circumstances involved in the most frequent kind of separation case, the separation of parents from a child. In this case nonpriority status was granted to keep a mother in the court district having jurisdiction over her children.

44. The report reads:
Subject would be removed from the Court district having jurisdiction of her children. Civil authorities advise that family may be rehabilitated and reunited. The subject’s husband, ————, a Staff Sergeant in the U.S. Air Force, is presently serving a 2-year prison term in Leavenworth, Kansas, on conviction of sodomy. The case was brought to light by the subject reporting to the Air Police that her husband was forcing her child to be involved in abnormal sexual behavior, which included the subject, her husband and child. Subject is again pregnant and delivery is expected shortly.
Miscellaneous Factors

Unusual circumstances comprising various diverse factors and individual situations could potentially give rise to nonpriority classification. One such category of cases involves those technically eligible for immigrant visas but for economic reasons unable to obtain them at a United States Consulate. Thus an illegal alien presently in the United States who cannot afford the airfare to get back to his country for a visa interview at the Consulate may be granted nonpriority to avoid an unnecessary hardship.

Another factor considered is the educational welfare of children. A mother who is subject to expulsion and who would be required to move her children from United States' schools, particularly if they are United States citizen-children, may be granted nonpriority status.

Adverse publicity is a factor which is mentioned in the reports of approximately twenty cases (1.1%) and is implicit in many others. Typical instances are the wife of an American soldier killed in the Vietnam War or the family which has been involved in a well-publicized hardship. A related type of case is that of the elderly Chinese who confess their illegal status in the United States as part of the Chinese confession program and are granted nonpriority status in order to encourage such confessions within the Chinese community on the West Coast.

What Effect Does the Immigration Status of Family Members Have?

Although the majority of cases involved families with at least one United States citizen member, clearly this situation is not a prerequisite. In fact, contrary to popular thought, it plays only a minor role in consideration for nonpriority classification.45

No United States citizen family member was involved in 36.8 percent of the cases. In many cases citizenship was not relevant

<table>
<thead>
<tr>
<th>Status of Family Members</th>
<th>Number of Cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States Citizen</td>
<td>867</td>
<td>47.0%</td>
</tr>
<tr>
<td>Permanent Resident Alien</td>
<td>343</td>
<td>18.8%</td>
</tr>
<tr>
<td>Both*</td>
<td>298</td>
<td>16.2%</td>
</tr>
<tr>
<td>Neither**</td>
<td>335</td>
<td>18.2%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>1843</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

45. TABLE THREE

60
and was noted only in the informational background portion of the required application forms.

The citizenship status of a family member appeared relevant in cases in which expulsion of the subject would result in separation and other hardship to the family member. In these cases the Service does not want to force the United States citizen to choose between leaving the country or remaining but being separated from loved ones. Because the same consideration is given to permanent resident aliens, especially if they have been in the United States for any appreciable length of time, status is not a significant factor.

The Drug Cases

The author's original interest in obtaining the nonpriority data was to ascertain whether the denial of nonpriority status to Lennon, who had been convicted in Britain of marijuana possession, was in keeping with the general policies of the INS with regard to the application of the nonpriority program. Thus, special attention was given to cases which involved drug convictions. Indeed, the intractable provisions of the immigration law relating to the deportation and exclusion of aliens with even minor drug offenses made the remedy of nonpriority classification particularly appropriate in many cases.

There were 138 cases of aliens with previous drug convictions. These cases range from simple possession of marijuana, the lightest offense, to heavy trafficking in heroin and cocaine, the more serious offenses. Many involved multiple offenders. As was previously established with regard to all classifications of deportable aliens, these cases were found to have been accorded nonpriority status regardless of the seriousness of the previous offense. In fact, aliens with narcotics convictions were granted nonpriority status although they had also been convicted of murder, had been described as the "largest supplier of marijuana and narcotics in the ______ area," were an admitted heroin addict, "using approximately eighteen grams of heroin a day," and had even been convicted of selling and possessing

* Family members who are both United States citizens and permanent resident aliens.
** Cases of families in which there is no member in status.
cocaine. As with the other categories, nonpriority was granted based upon the various humanitarian considerations involved.46

Table Four47 shows that the same types of humanitarian factors which were the basis for granting nonpriority status in cases of deportable aliens in general are applicable also to drug cases. Youth is a consideration in few drug cases, and the factor of insanity does not appear at all. This situation does not reflect a low approval rate for requests from the young and the insane, but rather demonstrates the rarity of such cases occurring in the first instance. Most nonpriority youth cases involve children of extremely tender years who are not involved in narcotic convictions, and the insane are not likely to have drug convictions. The major categories of aliens granted nonpriority status in the drug cases are those involving family separation and the elderly.

As part of this study, figures under the broad category of “Separation” were also compiled. Although fifty-seven of the cases involved both separation and economic factors, a substantial number of separation cases involved no economic factors at all. Typical was case 9-8, involving a young man who was recommended for nonpriority status because expulsion “would separate subject from his lawful resident wife and United States citizen child. It would be a hardship on all of them to be separated and they are a well-adjusted family and devoted to each other.” When he was twenty-four years old, the alien had been convicted of transporting marijuana. Not unlike Lennon, he was reported to be a person of higher caliber in spite of his conviction and is referred to as being “respected by people who know him . . . . He is a good husband and a good father.” No other humanitarian factors appear in the record of this case. Apparently the fact that one of the grounds for potential expulsion is a drug offense is not significant in the determination of nonpriority status.

In light of these considerations, perhaps the best statement concerning the nonpriority category is that it is the Immigration Serv-

<table>
<thead>
<tr>
<th>Factors</th>
<th>Number of Cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Separation and economic</td>
<td>57</td>
<td>41.3%</td>
</tr>
<tr>
<td>Separation</td>
<td>36</td>
<td>26.1%</td>
</tr>
<tr>
<td>Elderly</td>
<td>32</td>
<td>23.2%</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>5</td>
<td>3.6%</td>
</tr>
<tr>
<td>Youth</td>
<td>4</td>
<td>2.9%</td>
</tr>
<tr>
<td>Health</td>
<td>4</td>
<td>2.9%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>138</strong></td>
<td><strong>100.0%</strong></td>
</tr>
</tbody>
</table>

46. 47. Id.
ice's ad hoc balancing device. It accommodates the individual alien's human needs and concerns to the harsh, often immutable conditions of the immigration law. Because of the commendable purposes and motivations which must have engendered this spontaneous humanitarian program, it is an anomaly why this procedure was hidden so thoroughly from public knowledge and its operation so shrouded in mystery. Its very existence demonstrates how an administrative agency, required by law to enforce a harsh mandate, can at the same time be sensitive to the possible tragic consequences of that mandate and find means to ameliorate them.48

One can only speculate about the reasons that the Government enshrouded the nonpriority program in a mantle of secrecy. It is quite possible that the Government wished to achieve the broadest discretion, free even of the restraint of stare decisis. Perhaps through nondisclosure the Government hoped to establish a discretionary realm free of any judicial restraint whatsoever, even as to potential claims concerning abuse of discretion. However, because the program provided potential grist for claims of ultra-vires action on the part of Government officials, it is equally possible that the Government election to keep the program secret was based upon its desire not to be challenged for having exceeded its statutory mandate. Nonpriority case records which disclose prior applications for suspension of deportation which were unsuccessful before the Congress illustrate the potential for claims that the entire program was beyond the authority of the INS. In the final analysis, however, it is clear that the Attorney General has sufficient authority under the statute upon which to ground a program of uniformly administered deferred departure.

Use of Published Nonpriority Decisions

Now that most of the information concerning the nonpriority program is available to the public, exploring how it can best be used

48. The only other judicial reference to the nonpriority program found by the author was in an unreported decision, Riva v. INS, Civil No. 74-1691 (D.N.J., Oct. 24, 1973), in which the court stated that the exercise of discretion in the nonpriority program was unreviewable. Lennon v. United States, 378 F. Supp. 39 (S.D.N.Y. 1974), held that the court would review the mala fide selective use of the deportation process in a proper case and authorized Lennon to conduct limited discovery proceedings to prove his allegations that the Government had purposely failed to consider nonpriority classification and had proceeded to deport him for reasons which abridged his constitutional rights.
is worthwhile. As was explained\(^{49}\) when the 1,843 cases in the Central Office of the INS were obtained, they were organized in no discernible manner. Clearly evident from the procedure used by the Central Office Nonpriority Committee to decide these cases\(^{50}\) is the fact that stare decisis did not play a role. Requests for nonpriority classification were decided on a case-by-case basis without reference to previous decisions. They were decided on the equities of individual cases, with the Central Office basing its decisions upon INS guidelines.\(^{51}\) At present, because cases are decided at the regional level,\(^{52}\) four separate files of nonpriority cases exist\(^{53}\)—one in each of the four regional INS offices.

Despite the fact that the principles of stare decisis are not formally used in such cases, tables\(^{54}\) clearly demonstrate that distinct criteria are used in deciding nonpriority cases. Thus, the practitioner can cull from the now-published records cases whose fact patterns compare in significant detail with his own client's case. The previous decisions will support by analogy his arguments in applications for nonpriority consideration. Because these records reflect a consistent application of the policies described in the Operations Instruction,\(^{55}\) their presentation should have great influence in determining the outcome of nonpriority applications. Although a refusal to follow the previous nonpriority cases might not be a violation of the principle of stare decisis, it might constitute such a deviation from the accepted standards and policies of the administrative agency as to be equally unacceptable.\(^{56}\)

\(^{49}\) See note 35 supra.

\(^{50}\) This conclusion is not based on any direct indications from immigration officials. Apparently nonpriority applications were decided on a case-by-case basis. Until this time the entire nonpriority procedure was strictly an internal function of the agency. Especially because there has been no input whatsoever from applicants or their attorneys until recent years and because the records were not tabulated, it is assumed that decisions were made informally on a case-to-case method. The first known systemization and categorization of nonpriority cases was made and published in Wildes, supra note *.

\(^{51}\) See text accompanying note 32 supra.

\(^{52}\) See text accompanying note 29 supra. At present the Immigration Service has four regional offices. The Northeast Regional Office is at Burlington, Vermont; the Northwest Regional Office is at St. Paul, Minnesota; the Southwest Regional Office is at San Pedro, California; and the Southeast Regional Office is at Richmond, Virginia. For a description of the functions of the regional offices, see C. Gordon & H. Rosenfield, Immigration Law & Procedure § 1.9(b), at 1-40 (rev. ed. 1976).

\(^{53}\) See note 32 supra.

\(^{54}\) See notes 34, 36, 45, & 46 supra.

\(^{55}\) See text accompanying notes 32-52 supra.

\(^{56}\) Although the federal courts have very limited jurisdiction to review
Our analysis of the possible abuses of discretion inherent in the decisionmaking process of the District Director in recommending nonpriority is complicated by some unique procedural features of the nonpriority application process. Although an alien may request, through his attorney, that he be considered for nonpriority status, no formal mechanism exists to request or apply for this kind of consideration. The INS views this program as an intra-agency operation initiated not by any outside request but rather through the initiative of the District Director. Furthermore, a recommendation for nonpriority can be initiated by the District Director at any stage of any immigration proceeding before or after a deportation order has been issued. Consequently, even though it might be very clear that according to the established INS policies and procedures, a particular alien warrants nonpriority consideration, it would nevertheless be difficult to pinpoint at what juncture the District Director has committed an abuse of discretion through his failure to recommend nonpriority.

Apparently, once an alien makes an application or request for nonpriority consideration, bringing to the attention of the District Director all the factors which he considers relevant to such classification, a duty is imposed upon the Director to act in accordance with the procedures outlined in the *Operations Instruction*. It could also be argued, however, that the purpose of the nonpriority program is to avoid adverse action when the circumstances warrant it and that until such adverse action is imminent, the District Director has not abused his discretion. This writer believes that the second argument is fallacious as no purpose is served by delaying the recommendation until adverse action is imminent. Delay serves only to place the applicant in a position of great disadvantage. He is left on tenterhooks until the very last minute, not knowing whether an edict will issue to spare him from misfortune. More-

discretionary decisions of administrative officials, they are permitted to review an action which would constitute an abuse of discretion. They may thus review decisions which are arbitrary or capricious. See *Rassano v. INS*, 492 F.2d 220 (7th Cir. 1974), cert. denied, 413 U.S. 1113 (1975). Therefore, a failure on the part of the District Director to adhere to an established pattern might indicate caprice and might be an abuse of discretion. See *Lum Wan v. Esperdy*, 321 F.2d 133 (2d Cir. 1963). See also *Dimaren v. INS*, 398 F. Supp. 556 (S.D.N.Y. 1974), in which it was ruled that an inexplicable departure from established policies would indicate an abuse of discretion.
over, it is established from the decided cases that the INS has not had a policy to defer nonpriority decisions to the last possible moment. Assistant Commissioner Loughran, in a letter dated July 16, 1973, describes the policy of the INS as requiring an attempt to identify cases warranting nonpriority as early as possible in the proceeding. Thus, it would seem an abuse of discretion for the District Director not to recommend nonpriority status if (a) the equities present in the particular applicant's situation at the time are those which the INS has, as a matter of policy, determined sufficient to warrant nonpriority recommendation, and (b) the circumstances have come to or been brought to the attention of the District Director. Query whether an action in mandamus or for declaratory relief would lie to challenge this abuse of discretion.

**Litigative Use of the Freedom of Information Act**

The preceding pages have outlined how the FOIA was successfully used in the context of an immigration case to uncover valuable information and make it available to the public. During the course of the same litigation, an attempt was made to use the FOIA in a completely different way. Although it was not successful, the issues raised introduced some intriguing and exciting possibilities for future immigration practice. While Lennon's deportation proceeding was on appeal before the Board of Immigration Appeals (BIA), Lennon made a motion in the FOIA action to enjoin and prohibit the INS from finalizing the deportation order and from closing the administrative record as well as from taking any intended action to enforce his removal from the United States, pending the disclosure of the information sought under the FOIA. The thrust of the motion was to maintain the status quo while obtaining needed information so that it might be filed with the Board as a supplemental brief and thus be included in the administrative record for eventual judicial review. Thus this was a request to stay the administrative process until such time that the information requested in the FOIA action was made available.

The leading case on this issue is *Renegotiation Board v. Banner*.

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57. As mentioned above, this action is not completed. The author is attempting to obtain information regarding the nonpriority applications which were denied. In a pretrial conference with Judge Owen on May 25, 1976, the judge indicated that despite the fact that Lennon had already obtained nonpriority status, plaintiff was nevertheless entitled to this information. The Government has not opposed this position.

In *Bannercraft* the Court of Appeals for the District of Columbia Circuit sustained the granting of injunctions by the district court that restrained the agency involved from continuing the administrative process pending the outcome of the FOIA litigation. Plaintiffs in the FOIA action were contractors whose contract was subject to renegotiation in administrative proceedings provided by law before the Renegotiation Board. They filed proper requests for the documents with the Renegotiation Board, but in each case their requests were rejected. The Renegotiation Board relied on one or more of the exemptions contained in the FOIA as a ground for rejecting the requests. The contractors successfully argued before the district court that an injunction was essential in order to preserve the status quo and to prevent irreparable injury. Specifically, they claimed that without an injunction, the renegotiation process would be completed long before the status of the disputed documents could be determined. The court of appeals found that

although completion of renegotiation would not formally moot the controversy, appellees contended it would frustrate the purpose of the Information Act by depriving them of access to the documents during the period when such access would be useful. 60

The Renegotiation Board argued that the FOIA nowhere conferred jurisdiction on trial judges to enjoin Board proceedings. It also argued, in the alternative, that even if such authority to enjoin Board proceedings existed, the doctrine of exhaustion of administrative remedies precluded equitable intervention in ongoing administrative procedures. However, the Board’s arguments were rejected by the circuit court of appeals.

We hold that the FOIA does confer jurisdiction on District Courts to enjoin administrative proceedings pending a judicial determination of the applicability of the Information Act to documents involved in those proceedings. We further hold that the exhaustion doctrine causes no obstacle to issuance of such an injunction in a proper case. 61

Despite the fact that the FOIA does not in explicit terms grant jurisdiction to enjoin agency proceedings either pending the produc-

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61. *Id.* at 349.
tion of documents or until their status is decided, the court held that such authority is within its general equity powers. The court found that among equity's oldest inherent powers is the authority to preserve the status quo pending a judicial review of the merits.

The court further distinguished the doctrine of exhaustion of administrative remedies as not being a jurisdictional matter but rather one which went to the timing of the action and noted that courts can reach the merits of administrative proceedings despite the existence of unexhausted administrative remedies. It held further that there was a showing of irreparable injury, a normal requirement in equity for the issuance of an injunction, for plaintiffs would be required to renegotiate contracts without access to important relevant documents. The court reasoned that even assuming that the damage could somehow be undone at a later stage of the proceedings and despite the fact that the statute involved vested an exclusive power in the Court of Claims to hear the matter de novo, neither the Renegotiation Board nor the Court of Claims has authority to correct errors made under the FOIA because such authority was vested exclusively in the district courts.

While Lennon's motion for a stay of his deportation proceedings was pending in the district court, the Supreme Court reversed the circuit court's holding that in this specific circumstance plaintiff was entitled to an injunction. The Supreme Court's 5-to-4 decision did not limit in any way the jurisdiction of a district court to issue an injunction in a proper case in order to preserve the status quo. By its own terms, it was limited to the issuance of injunctions

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62. As the Act's history makes clear, Congress was also troubled by the plight of those forced to litigate with agencies on the basis of secret laws or incomplete information. ... When this subsidiary statutory purpose is kept in mind, the possibility that Congress intended to authorize injunctions against pending administrative proceedings until secret records are revealed or their status determined, seems less unlikely.

63. Since temporary stays of pending administrative procedures may be necessary on occasion to enforce the policy of the FOIA, we hold that the District Court has jurisdiction to issue such stays.

64. See K. Davis, 3 ADMINISTRATIVE LAW TREATISE § 20.10 (1958).


against the Renegotiation Board. The Court expressly affirmed that a district court has equitable jurisdiction under the FOIA to enjoin agency action in a proper case.

With the express vesting of equitable jurisdiction in the district court by section 552(a), there is little to suggest despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity Court.

The Bannercraft decision left undetermined exactly which circumstances would justify a judicial stay of administrative proceedings pending the outcome of a FOIA action. However, the decision seems to indicate that courts should be guided mainly by the legislative history and purpose of the pertinent enabling statute. The Court would not permit interferences with the Renegotiation Act's "purposeful design of negotiation without interruption for judicial review." Relying on this understanding of the Renegotiation Act and buttressed by past interpretation of that Act, the Court required exhaustion of administrative remedies before access to the courts would be allowed with respect to contract negotiation before the Renegotiation Board. However, the Court's holding was limited to this particular issue before this specific agency.

The situation in which Lennon found himself was significantly different from that of plaintiffs in Bannercraft. Lennon was on the brink of having a deportation order administratively finalized against him in proceedings before the BIA, acting in accordance with a mandate derived from the Immigration and Naturalization Act—an Act very different from the Renegotiation Act. It was
submitted that Lennon was subject to circumstances in which a stay of the administrative proceeding would be appropriate. The renegotiation and the deportation processes are distinguishable in several significant respects.

Judicial Review

The Renegotiation Act provides for de novo proceeding in the Court of Claims, unfettered by any prejudice which might arise from the agency proceeding and free from any presumption that the Renegotiation Board's determination is supported by substantial evidence. The Immigration and Nationality Act specifically designates the Petition for Review to be "determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact." The Act requires a determination that the Immigration Service's findings be "supported by reasonable, substantial, and probative evidence on the record considered as a whole." If the plaintiff were permitted to expand his brief on appeal to include information disclosed pursuant to the FOIA action, a motion for a preliminary injunction would perhaps be unnecessary. However, as the Act specifically provides, appeal of a deportation order is limited strictly to the administrative record. Thus, a failure to stay the proceedings could clearly cause irreparable harm. Moreover, unlike the Immigration Act, the


72. For analysis of the Bannercraft decision and some suggestions about the extent to which stays of administrative proceedings have been limited, see Comment, supra note 66; Casenote, supra note 66.

See generally Recent Decision, Administrative Law—Freedom of Information Act, 41 Geo. Wash. L. Rev. 1072, 1081 (1973) (district court should have jurisdiction to issue stay as an incident of its FOIA subsection (a) (3) jurisdiction); Casenote, Administrative Law—Freedom of Information Act, 51 Texas L. Rev. 757, 767 (1973) (issuance of a stay conforms to the congressional policy of full disclosure); Recent Development, Administrative Law—Freedom of Information Act, 1973 U. Ill. L.F. 180, 192 (recommends that a showing of probable success on the merits be a prerequisite for an injunction to issue).

73. See text accompanying notes 74-94 infra.


75. Id. § 106(a) (4), 8 U.S.C. § 1106(a) (4).

76. Id.

77. Cases standing for the principle that deportation visits great hardship upon an alien are innumerable. The Supreme Court has said that deportation may constitute as severe a punishment as loss of livelihood. Delgadillo v. Carmichael, 332 U.S. 388 (1947). As stated by Mr. Justice Brandeis, speaking for the Court in Ng Fund H. v. White, "deportation may result in a loss of all that makes life worth living." 259 U.S. 276, 284 (1922).
Renegotiation Act allows litigants the usual rights of discovery in proceedings before the Court of Claims. Regulations promulgated pursuant to the Immigration Act do not permit a respondent to subpoena a witness in his own behalf in deportation proceedings; nor can anything be done to expand the record before the circuit court of appeals.

Congressional Intent

As expressed by Congress, the purpose of the Renegotiation Act is to allow the process of renegotiation to continue at various levels without reference to prior decisions. Of course, time was not a major factor because the contract being renegotiated had already been executed. The Immigration Act, however, established a process of confrontation (as contrasted with negotiation) with a premium placed upon the prompt removal of deportable aliens from the United States. In fact, the purpose of judicial review under section 106(a) of the Immigration Act is to supplant and replace the many different methods, often dilatory and indirect, previously used to secure review of deportation orders. The procedure was intended to streamline the removal process to a one-step confrontation, based upon an exact and complete administrative record. The necessity of a complete and all-inclusive record demands that any action by the Government to finalize the record in incomplete form be enjoined and prohibited by a court of competent jurisdiction. Thus, a stay of the administrative process in an immigration case under appropriate circumstances would be an accommodation to the congressional intent in passing the Immigration Act and would thus be an appropriate use of the court’s equity powers.

78. 8 C.F.R. § 287.4(a) (2) (1976).
81. See H. REP. No. 1086, 87 Cong., 1st Sess. 28 (1961). Moreover, a deportation proceeding is basically irreversible because a court cannot review the deportation once the alien leaves the country. See 8 U.S.C. § 1105(a) (1970). Thus once an alien is deported, subsequently developed information is of little assistance.
83. The 1974 FOIA amendment puts a premium on prompt reply to requests for records. See note 9 supra. This emphasis supports the con-
Although these arguments are persuasive, the issue is less clear in any attempt to apply them to the nonpriority program of the INS. The status of this program is indefinite within the agency itself. The Government has contended that the decision to classify a case as nonpriority is analogous to the decision of a prosecutor not to prosecute a case and that such matters are determined in the absolute discretion of the prosecutor. The courts have thus far not interfered. Furthermore, the Government contended in Lennon that the issue of nonpriority consideration is one which cannot appropriately be brought before the BIA and that stay of the BIA's proceedings would thus serve no purpose.

These are admittedly complicated issues. However, the analogy drawn between this agency procedure and a prosecutor's discretion about which cases should be prosecuted is faulty. If any analogy is to be made, it is between the nonpriority program and the typical stay of an alien's deportation. The decision not to act upon a deportation order or not to prosecute a deportation case by placing it in a nonpriority category is never final or permanent. Rather it is limited to a fixed period of time, reviewed periodically, and is subject to change when the criteria which warranted nonpriority treatment in the first instance no longer exist. The decisionmaking process in the prosecutor's office is usually a single and final determination about whether a case is worthy of prosecution. The prosecutor's decision not to proceed with the case is not a device providing temporary relief for a fixed period of time and subject to review, based upon individual equities; it is definitely not a special program of any kind. Regarding the Government's second point—while it is true that the issue of nonpriority consideration had never previously come before the BIA, it is also true that potential litigants were never aware that such a program existed. Including the issues raised by the nonpriority program in the context of a deportation proceeding before an immigration judge and subsequently

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84. See Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973); Smith v. United States, 375 F.2d 243, 247 (5th Cir.), cert. denied, 389 U.S. 841 (1967). The Government contended that the determination to grant or deny nonpriority status is a matter of complete discretion which is not subject to judicial review and even if it were subject to judicial review, that review would be narrowly limited to whether the decision constituted an abuse of discretion. See Wong Wing Hang v. INS, 360 F.2d 715 (2d Cir. 1966). See also note 56 supra.
85. See text accompanying note 32 supra.
86. Id.
87. Id.
before the BIA is appropriate because of the program’s relevance to the substance and issues involved in the deportation proceeding.

In the Lennon litigation, persuaded by the Government’s contention that no irreparable harm had been done to the plaintiff and relying upon the immigration judge’s contention that matters regarding the nonpriority program were irrelevant, District Court Judge Richard Owen refused to grant the injunction. Judge Owen argued that:

If that ruling is proper, there is no basis for an injunction to permit plaintiff to obtain these records to introduce in that proceeding. If it is improper, either the [BIA] or the Court of Appeals may reverse with appropriate directions to the Immigration Judge to receive and consider such proof.

Judge Owen was unwilling to issue an injunction, given the possibility, however remote, that another forum might fashion an appropriate remedy. He clearly relied heavily on the language in Sears Roebuck & Co. v. NLRB, which he quoted in his opinion:

It is only in extraordinary circumstances that a court may, in the sound exercise of discretion, intervene to interrupt an agency proceeding to dispose of a single intermediate or collateral issue. A cogent showing of irreparable harm is an indispensable condition of such intervention.

Judge Owen’s restrictive ruling may have missed the essential issue. He made the assumption that if it were appropriate for the INS to act upon a nonpriority application, neither the Board nor the court of appeals would take jurisdiction of this matter and fashion the appropriate remedy. However, both these bodies could conclude that the immigration judge was right in that the issue of nonpriority status is not one appropriately within their jurisdiction. If that were the case, the plaintiff would truly have suffered irreparable harm.

Indeed, the plaintiff’s essential claim is that he is being selectively prosecuted. In essence, he claims that the reason that his nonpriority application remained unadjudicated was that the agency was acting improperly. Thus, a situation would exist in which an order

89. Id. at 42 (citation omitted).
of deportation was to be reviewed on several judicial levels, ostensibly based upon the legal and factual issues in the case, while plaintiff claims that the entire record upon which they purport to decide the case is a sham. If the plaintiff must allow this procedure to continue without benefit of a stay of deportation, he has no alternative but to resort to a collateral action in a district court to resolve the matter of selective prosecution. However, such a collateral action can in no way prevent the INS from deporting the alien while the selective prosecution action continues in the district court unless the district court is willing to stay the deportation proceeding. Once the plaintiff has been deported, his chances of overcoming the negative determination of the INS become almost negligible. When collateral issues which challenge the entire administrative process being pursued are at issue, a stay of the administrative proceeding would be most appropriate. This would also have the effect of properly placing the evidence of the alleged abuses before the circuit court of appeals as part of the record on appeal, thus enabling the court to determine whether this vital issue was properly within its jurisdiction. The court of appeals, of course, has authority to stay deportation until the appropriate action is taken.

**CONCLUSION**

Unfortunately the question of whether a stay of administrative procedures would be appropriate in an immigration case was never answered in *Lennon*. The writer nevertheless anticipates that inevitably these issues will arise in future litigation by other aliens before the INS. Whether such litigation involves the nonpriority

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92. No specific immigration statute empowers a federal district court to stay a deportation proceeding while a collateral action is being pursued.


94. Immigration and Nationality Act § 106(a) (3), 8 U.S.C. § 1105(a) (3) (1970), provides that the serving of a petition for review automatically stays the deportation of the alien unless the court otherwise directs.

95. An attempt was made to obtain a stay of administrative procedure
program or some other collateral issue affecting the rights of an alien subject to deportation, no question exists in this writer's mind that the FOIA will have an active role to play in such litigation. 96

96. In the summer of 1975, the INS consented to have Lennon's application for nonpriority status reconsidered by an official who had no previous connection with the case. In September 1975, days before the date set for oral arguments in the court of appeals action, the author's office was informed by telephone by the District Office in New York that Lennon had been granted nonpriority status. The decision became moot when the court of appeals reversed the BIA's decision which had ordered Lennon's deportation. Lennon received his green card on July 27, 1976. See note 4 supra.