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Recent Developments in Judicial Review of Immigration Cases*

CHARLES GORDON**

In his Article, Professor Gordon discusses the viability of judicial review in immigration decisions. He first discusses the history of judicial review in immigration cases and specifically addresses several considerations which have motivated courts in their review of immigration determinations. The author then considers several aspects of judicial review, including due process considerations, the judicial review of consular decisions, the Fleuti principle, and the limitations on immigration officers’ authority. Professor Gordon concludes with a discussion of the humanitarian concerns and constitutional issues involved in immigration cases.

INTRODUCTION

The respect for individual rights is a hallmark of our society, demanded by our traditions and proclaimed in our Constitution. This concept is a protective shield for each of us, and it is particularly significant in our dealings with resident aliens. Although there have been notable lapses in the past, it can reasonably be said that the alien in the United States has generally been assured fair treatment.

* This Article is based on, and expands, a speech given by the author at a symposium of the Los Angeles Bar Association on April 30, 1977.
The courts have been the chief agency in providing such assurance. They are the ultimate refuge for the individual confronted by the mighty forces of government. In discharging their constitutional functions, courts are constantly asked to curb the illegal, excessive, or arbitrary actions of government officials. Moreover, the courts have often been responsive to the pleas of aliens in the United States who contend that they have been dealt with unjustly.

It is true, of course, that the right to judicial review of immigration determinations has not always been a settled concept. After general immigration controls were imposed by the federal government in 1882, early decisions expressed a limited view of the judicial function, declaring that Congress had empowered the administrators to act "without judicial intervention." However, this view was soon modified, for the courts responded to the pleas of litigants who invoked the due process mandate of the fifth amendment. Developing due process concerns led to a constant expansion of the opportunities for judicial review.

There were significant setbacks in this process of development, usually reflecting popular attitudes during times of crisis or concern. Thus, the courts sanctioned extreme measures against the Chinese, even when rights of citizenship or established residence were involved. Additionally, judicial approval was often forthcoming for punitive measures against radicals. Severe wartime restrictions were also approved for resident aliens of enemy nationality, so-called enemy aliens. Finally, in the most shocking departure from their protective role, and influenced by wartime conditions, the courts tolerated curfew restrictions for people of Japanese ancestry, their removal from their homes, and their internment—regardless of whether they were citizens or aliens.

Although one must deplore the failures in these situations, it is fair to note that in some respects the courts ultimately ameliorated the
severity of their edicts. Thus, both Chinese and radicals in the United States were accorded more stringent safeguards. West coast citizens of Japanese ancestry could not be interned without a specific finding of disloyalty. Even alien enemies were accorded a limited—albeit inadequate—measure of procedural protection, consisting of an inquiry into whether the affected person was a national of an enemy country and whether the action against him was taken during a time of declared war or threatened invasion.

Despite these setbacks, the impact of judicial review in immigration cases has, in the long run, constantly increased. An important milestone was the enactment of the Administrative Procedure Act in 1946, under which the courts authorized expanded judicial review. Although Congress sought to limit this remedy in 1961, this effort ultimately was defeated. The result has been a marked expansion in the opportunities for judicial review.

As one who has been deeply involved in litigation for many years, I have always been fascinated by the developing panorama of judicial review. Of course, my own point of view has varied with the different directions of my approach to the courts—as a government official, a teacher, an author, and now as a private lawyer. The actors on the judicial stage have also changed. The Warren Court, which was

10. Ng Fung Ho v. White, 259 U.S. 276 (1922) (resident alien threatened with deportation entitled to de novo judicial determination on unfrivolous citizenship claim); United States v. Wong Kim Ark, 169 U.S. 649 (1898) (children born to Chinese aliens in the United States entitled to citizenship benefits); Wong Wing v. United States, 163 U.S. 228 (1896) (punishment cannot be imposed without safeguards afforded in criminal prosecution); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (right to earn livelihood protected).


13. Jaegeler v. Carusi, 342 U.S. 347 (1952); Zeller v. Watkins, 167 F.2d 279 (2d Cir. 1948); Gregoire v. Watkins, 164 F.2d 137 (2d Cir. 1947); Schwarzkopf v. Uhl, 137 F.2d 858 (2d Cir. 1943); Zdunic v. Uhl, 137 F.2d 898 (2d Cir. 1943).


generally liberal in its attitude to issues affecting aliens and citizenship, has been succeeded by the Burger Court, which is generally disposed to be more conservative on such issues. The result is that the lower courts are sometimes more active than the Supreme Court in seeking to explore new judicial trails.

Judicial review has produced a period of remarkable change. We have witnessed the death of many old concepts and the birth of new ones. Although some venerable precepts still persist, they are constantly being challenged. And it is not unreasonable to expect that this process of reevaluation will continue.

Exposure to the judicial process has enabled me to identify a number of major considerations which have motivated the courts in their review of immigration determinations. In recent years they have included 1) the imposition of limitations on the authority of government officers in order to reduce the opportunities for oppressive action; 2) the continuing expansion in the horizons of due process and increasing participation of the courts in the administrative process in order to promote greater fairness; 3) the reaction to humanitarian concerns, to profound hardships, and to the imposition of major penalties for minimal infractions; 4) the enlargement of the economic protections of resident aliens against restrictive actions by the states; 5) the willingness to confront constitutional challenges to deportation statutes (although no court has rejected the ancient Holmes-Frankfurter thesis of plenary and unreviewable Congressional power, an optimistic soul may possibly detect the beginning of a process of erosion); and 6) vigilance in safeguarding citizenship rights and status.

Like all generalizations, those previously enumerated are not infallibly true. But they may be helpful in assessing some of the recent judicial and administrative expressions which I have attempted to categorize.

**LIMITATIONS ON THE AUTHORITY OF IMMIGRATION OFFICERS**

Until quite recently it was assumed that immigration officers had virtually untrammeled authority to stop and search automobiles, to question persons suspected to be aliens, and to round up and detain such persons while the inquiry continued. That assumption was supported by an expansive statutory grant of authority and by numer-

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ous decisions of the lower federal courts. But it was shattered by the Supreme Court in a notable series of cases—commencing with *Almeida-Sanchez v. United States,* and continuing with *United States v. Brignoni-Ponce* and *United States v. Ortiz*—which have applied and enforced the strictures of the fourth amendment. The following principles emerged from those decisions:

1. Although immigration officers are empowered to stop, detain, and search vehicles at the border, random searches and detentions of such vehicles and their occupants which occur away from the border or its functional equivalent are prohibited unless they are based on consent, probable cause, or supported by a search warrant. Justice Powell's concurring opinion in *Almeida-Sanchez* suggested the possibility of an area search warrant. Even though such warrants have sometimes been utilized by the administrative authorities, their validity has been questioned by the United States Court of Appeals for the Ninth Circuit in *United States v. Martinez-Fuerte,* a decision subsequently reversed on other grounds.

2. In *Ortiz,* the Supreme Court held that searches of automobiles at Service checkpoints were barred absent consent or probable cause. However, the Court's later decision in *Martinez-Fuerte* permitted immigration officers to stop automobiles and question their occupants at Service checkpoints within a reasonable distance from the border.

3. In *Brignoni-Ponce,* the Supreme Court prohibited random stops and interrogations by immigration officers unless they are based on a reasonable suspicion—founded on specific, articulable facts together with rational inferences from those facts—that the questioned person is an alien. The Court declared that a person's race or ancestry was not in and of itself a reasonable basis for interrogating him, but it might be taken into account as a relevant factor. Thereafter, the Seventh Circuit, in addressing a question left unan-

26. 514 F.2d 308 (9th Cir. 1975).
answered in Brignoni-Ponce, ruled that the officers had no authority to stop and question any person unless they had a reasonable basis for suspecting that the interrogated person was an alien illegally in the United States.\textsuperscript{28} Yet, in a subsequent \textit{en banc} decision issued by a divided court, the Seventh Circuit reversed itself and ruled that immigration officers could interrogate persons reasonably suspected to be aliens without the need for reasonable suspicion that the questioned person is illegally in the United States.\textsuperscript{29}

These decisions have manifestly set limits on official enforcement activities. Recognizing such limits, the Immigration and Naturalization Service has issued a directive forbidding random interrogations by its officers, except when there are specific complaints against employed aliens at their places of employment or on the basis of reasonable grounds for believing the suspected person is an alien.\textsuperscript{30} However, there is often a wide gap between the official policies and the actual practices of enforcement officers. What can a lawyer do to challenge such practices?

One device is the class action, invoked with conspicuous success in \textit{Illinois Migrant Council v. Pilliod}.\textsuperscript{31} Obviously, this is not a feasible alternative for the practitioner representing clients with limited resources. Another approach is a suit against the officers, or against the United States, for damages resulting from their illegal actions. Although such suits are sanctioned by court decisions\textsuperscript{32} and by statute,\textsuperscript{33} I am aware of no such action against immigration officers which has been pressed to a successful conclusion. Again, however, this may not be an effective alternative for the lawyer representing individual clients in deportation cases. Moreover, the practitioner may be concerned with the fact that if he brought such suits, he would incur the hostility of officers with whom he must deal on a day-to-day basis.

The final device, and the one most frequently invoked by immigration lawyers, is to challenge evidence obtained by improper means. Although there have been some recent rumblings in the Supreme Court regarding the retention of the exclusionary rule,\textsuperscript{34} I have no

\begin{itemize}
\item \textsuperscript{28} Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976).
\item \textsuperscript{29} Illinois Migrant Council v. Pilliod, 548 F.2d 715 (7th Cir. 1977). It should be noted that there was no petition for certiorari from this decision.
\item \textsuperscript{30} Department of Justice, Press Release (Dec. 3, 1976) (with attached directive to Service field offices).
\item \textsuperscript{31} 548 F.2d 715 (7th Cir. 1977).
\item \textsuperscript{32} Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).
\item \textsuperscript{33} 28 U.S.C. § 2680(h) (1970).
\item \textsuperscript{34} See generally Gilligan, \textit{Continuing Evisceration of [the] Fourth Amendment}, 14 SAN DIEGO L. REV. 823 (1977).
\end{itemize}
doubt that a deportation order based on such tainted evidence would currently be rejected as the fruit of the poisonous tree.\textsuperscript{35} Yet challenges to deportation orders on this ground are rarely successful because the government invariably attempts to rely on untainted evidence. Its proof usually consists of identifying the respondent, relying on its official records relating to him and inferences arising from his silence,\textsuperscript{36} the identity of names,\textsuperscript{37} and the statutory requirement that the respondent show the time, place, and means of his entry.\textsuperscript{38} Practitioners counter this approach by advising the respondent to remain completely silent—even to the point of instructing the respondent to refuse to identify himself. This tactic may conceivably be successful, particularly when the respondent has entered without inspection and there are no official records relating to him.

**DUE PROCESS AND THE ASSURANCE OF FAIR PLAY**

The following group of decisions touch upon considerations of due process. In studying these decisions, one sometimes has the feeling he is witnessing the emergence of heroic new concepts struggling to be born.

**Right to Counsel**

The right to be represented by counsel is an acknowledged aspect of due process\textsuperscript{39} and is recognized in the immigration statute.\textsuperscript{40} But the statute specifies that such representation must be obtained by the alien "at no expense to the government."\textsuperscript{41} What of the indigent who cannot afford to pay for his own lawyer? A number of litigants have contended that, in light of the grave consequences of a deportation case, an indigent respondent has a constitutional right to be represented by an assigned counsel who is compensated by the government. In successfully opposing such contentions, the government has relied on the dogma that deportation proceedings, however severe their consequences, are civil and not criminal and thus the sixth

\textsuperscript{35} Choy v. Barber, 279 F.2d 642 (9th Cir. 1960).
\textsuperscript{36} Vajtauer v. Commissioner, 273 U.S. 103 (1927); Bilokumsky v. Tod, 263 U.S. 149 (1923).
\textsuperscript{37} Chung Young Chew v. Boyd, 309 F.2d 857 (9th Cir. 1962); Vlisidis v. Holland, 245 F.2d 812 (3d Cir. 1957).
\textsuperscript{40} I. & N. Act §§ 242(b), 292, 8 U.S.C. §§ 1252(b), 1362 (1970).
\textsuperscript{41} Id. § 292, 8 U.S.C. § 1362.
amendment is inapplicable. Some courts have summarily rejected the effort to invoke a right to assigned counsel; others have described the issue as "momentous" but have avoided resolving it on the ground that counsel could not have changed the result in the cases before them. One court recently declared that although there would be a right to assigned counsel if such assignment were necessary to achieve fundamental fairness, the failure to provide counsel had produced no unfairness in the case before the court.

Thus far no court has upheld a right to assigned counsel in deportation cases. At the same time the courts have emphasized the need for fundamental fairness, and doubtless would make an appropriate response if persuaded that the lack of counsel has resulted in prejudice to the respondent. In such situations the court could vacate the deportation order against the unrepresented respondent. The court might also direct that the case be remanded with directions that the government provide assigned counsel for the respondent.

A related issue concerns the situation of a respondent who was represented by counsel but claims that the representation was not effective because counsel botched his defense. One court recently indicated that a lack of effective representation might be offensive to due process, but found that there had been no such lack in the case before it.

Judicial Review of Consular Decisions

The critical importance of the American consul's function, and the widespread belief that consular determinations are sometimes arbitrary or unlawful, has led to repeated efforts to invoke judicial review. These efforts, however, have almost invariably been blocked by the traditional view that a consul's determination rejecting a visa

42. See 1 C. GORDON & H. ROSENFIELD, supra note 20, at 1-87.
43. United States v. Gasca-Kraft, 522 F.2d 149 (9th Cir. 1975); Dunn-Marin v. INS, 426 F.2d 894 (9th Cir. 1970).
44. Rosales-Caballero v. INS, 472 F.2d 1158 (5th Cir. 1973); Henriques v. INS, 465 F.2d 119 (2d Cir. 1972).
45. Aguilera-Enriques v. INS, 516 F.2d 565 (6th Cir. 1975).
46. Paul v. INS, 521 F.2d 194 (5th Cir. 1975).
47. The University of San Diego School of Law, under a grant from the National Science Foundation, is presently conducting an exhaustive study of the exercise of discretion by consular officers in the issuance of visas under the current immigration laws. The project will study variations in rejection rates for visa applications. These variations will then be correlated with possible causal factors such as the officer's workload, background, and country in which he is working. Through interviews and questionnaires, the study will attempt to define and compare the influence of specific factors in applying "public charge" and "valid marriage" criteria. Conclusions and recommendations will be published in volume 16 of the San Diego Law Review.
application is not subject to judicial review. In one recent case, a
litigant unsuccessfully sought such a review on the basis of a claim
that the consul had failed to follow State Department regulations. Similarly rejected were claims that judicial review was warranted
because the denial was predicated on an issue of law—for example, the validity of a marriage. However, the Supreme Court has sug-
gested that judicial review of visa refusals might be warranted when
constitutional rights of American citizens are implicated. Another
court has found that the consul’s determinations which do not relate
to the refusal of a visa—for example, the denial of a visa petition on
behalf of a relative—are subject to challenge in the courts.

I have always believed that the absolute power conferred upon a
consul is unjustifiable and that his decisions should be amenable to
appropriate administrative and judicial review. My own view is that
this is a concept which ultimately must prevail.

Estoppel

The possibility of estoppel against the government has a fascina-
tion for lawyers. The once-accepted axiom that the government can
never be estopped by the acts or omissions of its officers has lost
credibility over the years, and there are frequent efforts to invoke
estoppel. The Ninth Circuit has been quite receptive to such pleas. In
one case, that court found the government estopped to deport aliens
who were improperly admitted by the immigration officers. But the
Ninth Circuit, sitting en banc, reconsidered its decision and rejected
the estoppel claim, relying instead on the Supreme Court’s resolution
in INS v. Hibi.

Hibi involved World War II Filipino veterans who contended that
they had been improperly denied the opportunity to apply for special
naturalization benefits. The court summarily concluded that there
could be no estoppel against the government unless there was af-
firmative misconduct by its officers. Thereafter, many litigants have

48. Burrafato v. United States Dep’t of State, 523 F.2d 554 (2d Cir.), cert. den
Bell, 97 S. Ct. 1473 (1977).
52. See Gordon, The Need to Modernize Our Immigration Laws, 13 SAN
DIEGO L. REV. 1, 9 (1975); Rosenfield, Consular Non-Reviewability: A Case
attempted to establish such affirmative misconduct in various contexts. One such attempt was persuasive to a United States District Court in a recent decision, now on appeal, supporting naturalization applications by aliens in a situation similar to that of the unsuccessful Filipino veterans in \textit{Hibi}. Other courts have estopped the government when an applicant was disadvantaged by failure of an American consul to follow State Department regulations and by inexcusable delay by the Service in acting on an application. It would appear that the prospects for prevailing on an estoppel claim are far from hopeless.

\textbf{Fleuti Principle}

Issues generated by the Supreme Court's decision fourteen years ago in \textit{Rosenberg v. Fleuti}, relating to the effect of a brief absence from the United States, still provoke controversy. \textit{Fleuti} was a landmark in the Warren Court's generous approach to issues involving the rights of aliens. The Court's venerable precedents had characterized every return to the United States following a temporary absence as a new entry, subjecting a resident alien to possible exclusion and deportation. This so-called reentry doctrine had provoked widespread criticism and had been ameliorated by lower court decisions and by a Supreme Court holding which found that there could be no new entry under the immigration laws if the absence was involuntary.

With characteristic severity, the sponsors of the McCarran-Walter Act sought to halt the development of a more rational principle by defining \textit{entry} as "any coming of an alien into the United States . . . , whether voluntarily or otherwise," unless he could establish that his departure or his presence in a foreign state was not voluntary. However, this legislative effort to codify an unsound premise did not deter the Warren Court from seeking to forge a more reasonable principle. In \textit{Fleuti}, the Court held that an alien who had

56. Corniel-Rodriguez v. INS, 532 F.2d 301 (2d Cir. 1976).
57. Sun Il Yoo v. INS, 534 F.2d 1325 (9th Cir. 1976).
made a brief visit of a few hours to Mexico did not upon his return make an entry which made him subject to deportation. The Court found that the statutory definition of entry did not apply to a trip which was "innocent, casual, and brief." The Court suggested that a new entry by a resident alien could occur only if there was "an intent to depart in a manner which can be regarded as meaningfully inter-
ruptive of the alien's permanent residence." 64

Fleuti obviously was intended to alert the lower courts and the administrators to the need for a more rational attitude. To some extent, this effort has probably succeeded. Yet the circumstances under which there will be a "meaningful interruption of residence" are not yet fully defined. 65 Among the factors which Fleuti suggested for consideration are the length of the absence, whether its purpose was opposed to a policy reflected in the immigration laws, and whether travel documents had to be procured for the trip. An additional factor suggested by another court is the uprooting caused by deportation—for example, length of residence in the United States, family ties, property or employment interests in the United States, the nature of the environment to which the alien would be deported, and his relationship to that environment. 66

The precise limits of the Fleuti principle are still being debated. Thus, one court has found that an alien who became involved in illegal smuggling activity during a brief absence in Mexico did not make an entry upon his return. 67 The Ninth Circuit opposed this view, finding that the illegal activity obliterated the innocent char-
acter of the absence, whether the unlawful purpose was formed before or after the alien's departure. 68 Another court agreed, but a dissent-
ing judge exclaimed that he was "dismayed" by such "mechanical and inhumane application of our immigration laws" which impose deportability on the basis of a one-hour lunch trip across the bor-
der. 69 Still another court suggested possible doubt as to whether a resident alien forfeited his residence status by entering without inspection. 70

65. See 1 C. Gordon & H. Rosenfield, supra note 20, at 4-37.
66. Lozano-Giron v. INS, 506 F.2d 1073, 1077-78 (7th Cir. 1974).
67. Vargas-Banuelos v. INS, 466 F.2d 1371 (5th Cir. 1972).
68. Palatian v. INS, 502 F.2d 1091 (9th Cir. 1974).
69. Longoria-Castaneda v. INS, 548 F.2d 233 (8th Cir. 1977).
70. Ferraro v. INS, 533 F.2d 208 (2d Cir. 1976).
The Ninth Circuit, in a more generous mood, found that a resident alien who made a brief, casual trip across the border could not be deprived of his right to deportation proceedings.71 The Board of Immigration Appeals has now adopted that view.72

Applicability of the Administrative Procedure Act

Another dormant issue recently revived and rejected by the Third Circuit was a challenge to a deportation order on the ground that two members of the Board of Immigration Appeals had previously served on my staff in the INS General Counsel's office.73 A surprisingly vehement dissent urged that although the Supreme Court had found the Administrative Procedure Act inapplicable to hearings before immigration judges,74 the Act nevertheless applied to the appellate process before the Board. Although the same issue has subsequently arisen in other cases, no other judge has shared the dissenting judge's vehemence or point of view.75

Denial of Discretionary Relief When Eligibility Assumed

The Third Circuit recently favored another novel contention by holding that before denying an application in the exercise of discretion, it was necessary to rule specifically on the applicant's eligibility.76 The Supreme Court, evidently unimpressed by this holding, reversed it summarily without hearing argument and endorsed the practice of assuming eligibility when denning an application in the exercise of discretion.77

Denials of Labor Certifications

Litigants who challenge the denial of labor certifications have experienced almost uniform success,78 except perhaps in the District of Columbia.79 Yet for years the Labor Department remained impervious to repeated criticisms of its procedures. A recent revision of the

71. Maldonado-Sandoval v. INS, 518 F.2d 278 (9th Cir. 1975).
73. Giambanco v. INS, 531 F.2d 141 (3d Cir. 1976).
75. See Ho Chong Tsao v. INS, 538 F.2d 687 (5th Cir. 1976); Cisternas-Estay v. INS, 531 F.2d 155 (3d Cir. 1976).
76. Bagamasbad v. INS, 531 F.2d 111 (3d Cir. 1976).
78. Silva v. Secretary of Labor, 518 F.2d 301 (1st Cir. 1975); Yong v. United States Dep't of Labor, 509 F.2d 243 (9th Cir. 1975); Reddy, Inc. v. United States Dep't of Labor, 492 F.2d 538 (5th Cir. 1974); Secretary of Labor v. Farino, 490 F.2d 885 (7th Cir. 1973).
regulations\textsuperscript{80} did improve the opportunities for administrative review.\textsuperscript{81} However, the new regulations also inaugurated excessively burdensome preliminary requirements\textsuperscript{82} whose only purpose seems to be to obstruct the completion of the application. It is still too early to determine how those regulations will affect the attitude of the courts.

\textit{Mandates for Specific Administrative Procedures}

Three recent court cases, all of which were class actions sponsored by public interest groups, have mandated remarkably detailed administrative procedures. The first case is the previously discussed \textit{Illinois Migrant Council} decision,\textsuperscript{83} in which the court's decree spelled out in detail the practices permitted and those proscribed in interrogations and detentions.

An even more pervasive catalogue appears in the decree, entered with the government's consent, by the United States District Court for the Southern District of New York in \textit{Stokes v. United States}.\textsuperscript{84} The lawsuit questioned the administrative practices of conducting interviews in visa petition cases involving the spouses of American citizens. The consent decree agreed to comprehensive procedural improvements, including provisions for recorded interviews, increased participation by counsel, enhanced fairness, and the elimination of unreasonable, demeaning, and oppressive practices. Although there can be no reasonable justification for failing to extend the same procedures throughout the United States, the Service thus far has not done so.

The final instance is the temporary restraining order of the United States District Court for the Northern District of Illinois in \textit{Silva v. Levi}.\textsuperscript{85} This decision precludes efforts to deport Western Hemisphere aliens registered on consular waiting lists before January 1, 1977. The decree sets forth the form of notice that must be given to each such alien and requires that he also be given a statement authorizing his employment while he waits for his visa number to be allocated.

\textsuperscript{81} \textit{Id.} §§ 656.25-656.26.
\textsuperscript{82} \textit{Id.} § 656.21.
\textsuperscript{83} See notes 28 & 29 \textit{supra}.
\textsuperscript{84} No. 74-1022 (S.D.N.Y. Nov. 11, 1976).
\textsuperscript{85} No. 76-4268 (N.D. Ill. Mar. 10, 1977).
HUMANITARIAN CONCERNS

The promotion of family unity, the alleviation of excessive hardships, and other humanitarian concerns patently influence the courts in many cases. A number of examples will be given.

Errico and Its Progeny

A good starting point is the Supreme Court’s 1966 decision in INS v. Errico, which ruled that section 241(f) of the statute authorized waiver of quota restrictions for aliens with close family ties who had made misrepresentations in entering the United States. This generous reading of the statute, impelled by a desire to promote family unity, led to much litigation and an effort by some courts to enlarge the ambit of the waiver.

The Supreme Court in Reid v. INS attempted to halt these apparent distortions of the statute and declared that the statutory waiver was limited to excludability for the misrepresentation itself and did not apply when there was an independent ground for deportability—for example, entry without inspection or overstay of temporary entry. The Board of Immigration Appeals subsequently attempted to nail down the coffin of Errico by holding that the section 241(f) waiver did not apply when the deportation order was based on a charge of entry without a proper immigrant visa.

However, it seems that old concepts do not readily die or fade away, and conflicts have developed. Some courts have followed the Board and severely limited the applicability of the section 241(f) waiver. Other courts have rejected this narrow interpretation and have concluded that waiver of the fraud also nullifies a charge of entry without a proper immigrant visa. It seems clear that the battle lines are forming for another joust in the Supreme Court.

Waiver of Deportability for Longtime Residents

A desire to promote family unity has also caused an astonishing leap forward in decisions interpreting section 212(c) of the statute. This is a limited codification of the earlier Seventh Proviso of the

88. See 1 C. Gordon & H. Rosenfield, supra note 20, at 4-49.
89. 420 U.S. 619 (1975).
91. DeLeon v. INS, 547 F.2d 142 (2d Cir. 1976); Escobar-Ordenez v. INS, 526 F.2d 969 (5th Cir. 1976); Guel-Perales v. INS, 519 F.2d 1372 (9th Cir. 1975).
92. Cacho v. INS, 547 F.2d 1057 (9th Cir. 1976); Persaud v. INS, 537 F.2d 776 (3d Cir. 1976).
1917 Act and authorizes waiver of excludability for a lawful resident returning to an unrelinquished domicile of seven years. In its notable \textit{Francis v. INS} decision, the Second Circuit found it constitutionally impermissible to refuse the same benefit to lawful residents who had never left the United States and held that such resident aliens are eligible for a waiver of deportability under section 212(c). The Board of Immigration Appeals has since adopted that interpretation. Moreover, in a later holding the Second Circuit overruled a long-standing administrative interpretation and found that the seven-year residence period prescribed by the statute did not have to follow the alien's lawful admission for permanent residence. These interpretations in effect have opened up a new avenue of relief from deportation for longtime residents of the United States.

\textit{Narcotics Violations}

The immigration laws impose extreme penalties on narcotics violators. The severe and unyielding nature of such penalties, their irrational imposition of deportation for minor violations such as the possession of marijuana, and the absence of any significant provision for amelioration, have sometimes induced the courts to reach for more reasonable solutions.

One example of this attitude is the \textit{Francis} case. Another example relates to statutory provisions for expungement of convictions for minor drug offenses. A number of courts, following the lead of the Attorney General, have ruled that such expungement of narcotics convictions does not erase deportability. However, another court recently went the other way and questioned the soundness of the decisions which refused to recognize the effect of the expunge-ment. Moreover, the courts and administrative authorities now

\begin{footnotes}
95. 532 F.2d 268 (2d Cir. 1976).
97. Lok v. INS, 548 F.2d 37 (2d Cir. 1977).
99. \textit{See} text accompanying note 95 supra for a discussion of this decision.
102. Kolios v. INS, 532 F.2d 786 (1st Cir. 1976); Gonzalez de Lara v. United States, 439 F.2d 1316 (5th Cir. 1971); Garcia-Gonzales v. INS, 344 F.2d 804 (9th Cir.), \textit{cert. denied}, 382 U.S. 840 (1965).
103. Rehman v. INS, 544 F.2d 71 (2d Cir. 1976).
\end{footnotes}
hold that deportability is not incurred if the expungement is accomplished under a federal or state law designed to deal with juvenile offenders.\textsuperscript{104} Also of interest is the widely-publicized Lennon v. INS case,\textsuperscript{105} which held that conviction for possession of marijuana would result in deportation only if the conviction were under a statute penalizing possession with guilty knowledge.

\textit{Judicial Admonitions}

Many courts and jurists have deplored the excessive severity of the deportation laws—in particular, Chief Judge Irving Kaufman of the Second Circuit, who seems to have embarked on a campaign to expose the inadequacies and correct the inequities of the immigration law.\textsuperscript{106} Some courts have sought to provide relief through liberal interpretations.\textsuperscript{107} Others have declared that they are powerless to deviate from the harsh statutory mandates.\textsuperscript{108} In some instances the courts have suggested an effort by the administrative authorities to avert deportation (usually through the deferred action device) in cases involving humanitarian concerns.\textsuperscript{109} Of particular interest is the recent action of the Eighth Circuit in two cases upholding deportation orders but staying the court's mandate to enable the Service to consider discretionary action to permit the alien to remain in the United States.\textsuperscript{110} It can reasonably be anticipated that such judicial suggestions will be honored.

\textbf{Constitutional Issues}

Litigants keep launching constitutional assaults on various aspects of the statute, usually without success. However, the efforts continue and are occasionally productive.

A leading example, of course, is the \textit{Francis} case, where the court upheld an equal protection challenge favoring the extension of discretionary benefits to a previously excluded class of aliens.\textsuperscript{111} In another case, a district court upheld a constitutional challenge to the deportation of the alien parents of a citizen child, characterizing it as


\textsuperscript{105} 527 F.2d 187 (2d Cir. 1975).

\textsuperscript{106} \textit{Id}. \textit{See also Lok v. INS}, 548 F.2d 37 (2d Cir. 1977); \textit{Francis v. INS}, 532 F.2d 268 (2d Cir. 1976).

\textsuperscript{107} \textit{See cases cited note 106 supra.}

\textsuperscript{108} \textit{See cases cited note 110 infra.}

\textsuperscript{109} \textit{Id}.

\textsuperscript{110} \textit{Longoria-Castenada v. INS}, 548 F.2d 233 (8th Cir. 1977); \textit{David v. INS}, 548 F.2d 219 (8th Cir. 1977).

\textsuperscript{111} \textit{Francis v. INS}, 532 F.2d 268 (2d Cir. 1976).
de facto deportation of the citizen child. This decision was contrary to several appellate holdings,\(^{112}\) and was subsequently reversed by the Third Circuit.\(^{113}\) In a third case, a district court finding that the deportation of a marijuana offender would impose cruel and unusual punishment was summarily reversed without opinion by the Seventh Circuit.\(^{114}\)

A major constitutional issue recently in contention involved the validity of a statutory provision which grants immigration benefits to the mothers of illegitimate children but denies it to their fathers.\(^{115}\) In *Fiallo v. Bell,*\(^{116}\) the Supreme Court upheld the constitutionality of this statute, rejecting a contention that it denied equal protection to American citizens. While the Court reaffirmed the ancient thesis of sovereign federal power to define classes and prescribe benefits under the immigration laws,\(^{117}\) it left open a faint ray of hope for possible intervention in an appropriate case. The Court emphasized the "special judicial deference to congressional policy choices in the immigration context" but acknowledged the possibility of "limited judicial scrutiny" in assessing such legislation. However, as in the earlier *Kleindienst v. Mandel* decision,\(^{118}\) it rejected the need for "more searching judicial scrutiny" because the rights of citizens and resident aliens were implicated.

It is significant that in different contexts the Supreme Court has repudiated like discriminations against illegitimate children and their fathers\(^ {119}\)—for example, *Trimble v. Gordon,*\(^ {120}\) a decision rendered the same day as *Fiallo.* Since the Court declined to intervene when confronted by like discriminations against American citizens in the immigration laws, one may well wonder when the Supreme Court would be moved to undertake the "limited judicial scrutiny" suggested in *Fiallo.* A plausible explanation is that the Court intend-

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\(^{112}\) Gonzalez-Cuevas v. INS, 515 F.2d 1222 (5th Cir. 1975); Cervantes v. INS, 510 F.2d 89 (10th Cir. 1975); Robles v. INS, 485 F.2d 100 (10th Cir. 1973); Silverman v. Rogers, 437 F.2d 102 (1st Cir.), cert. denied, 402 U.S. 983 (1970).
\(^{117}\) See I. C. Gordon & H. Rosenfield, supra note 20, at 4-12.
\(^{119}\) 97 S. Ct. 1459 (1977).
ed to indicate that such scrutiny could be invoked only in extreme cases involving racial, religious, and comparable discriminations.

Finally, mention should be made of *De Canas v. Bica*, which upheld a California statute penalizing those who knowingly employ illegal aliens. To me this is a surprising decision because it deviated from the Court's prior holdings and from sound constitutional doctrine. The control of illegal aliens in my view is a matter of exclusive federal concern. The expected consequence of this decision was to encourage various states to enact their own laws, for Congress apparently is not eager to move ahead on proposed federal legislation. A number of states have passed such laws, and additional proposals are pending in other states. There are even proposals for municipal legislation.

**Economic Benefits for Resident Aliens**

Since *Yick Wo v. Hopkins*, the Supreme Court has generally supported the due process rights of resident aliens to be protected against arbitrary curtailment of economic benefits. But early decisions of the Supreme Court tolerated some limitations of such benefits. However, state discrimination limiting the economic benefits of resident aliens has largely been eliminated since the Supreme Court's decision in *Graham v. Richardson*, followed shortly thereafter by its decisions in *Sugarman v. Dougall*, *In re Griffiths*, and *Examining Board of Engineers v. Flores de Otero*. Yet, there have been some setbacks; one major source of discrimination remains in the continued exclusion of aliens from the federal civil service, which was upheld by the Supreme Court in 1976. Also upheld by

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123. The federal proposal has been known as the Rodino Bill, the last version of which (H.R. 8713, 94th Cong., 1st Sess. (1975)) was passed by the House of Representatives but not acted on in the Senate. In the current Congress, this legislation (H.R. 1663, 95th Cong., 1st Sess. (1977)) was introduced by Representative Eilberg but no action on it has yet been taken.
127. See 1 C. GORDON & H. ROSENFIELD, supra note 20, at 1-118.
129. 413 U.S. 634 (1973) (statute requiring citizenship for state or municipal employment held unconstitutional).
130. 413 U.S. 717 (1973) (state court rule precluding resident alien's admission to the bar prohibited).
131. 426 U.S. 572 (1976) (statute precluding alien civil engineers from practicing held unconstitutional).
the Court was a federal refusal of medicare benefits to resident aliens with less than five years residence in the United States. However, in its most recent decision the Supreme Court struck down state legislation denying educational assistance to resident aliens who were not interested in applying for naturalization. Also pending before the Court, but not yet argued, is another case involving the validity of a state law excluding resident aliens from employment as police officers.

**Citizenship Issues**

The retention of American citizenship has been a fruitful source of contention in the past. One area of debate has concerned the rights of naturalized citizens, which were protected by the Supreme Court in the famous Schneiderman v. United States and Schneider v. Rusk decisions. Another major area of litigation concerned the power of Congress to prescribe for the expatriation of American citizens upon their performance of specified acts. A continuing debate in the Supreme Court, spanning many years, ultimately produced a bare majority to strike down as unconstitutional a statutory provision prescribing loss of citizenship for voting in a foreign political election. This was the celebrated Afroyim v. Rusk case, in which Justice Black, writing for the majority, declared that an American citizen could not be deprived of his citizenship "unless he voluntarily relinquishes that citizenship."

Although disclaiming an intention to overrule Afroyim, the Supreme Court's subsequent ruling in Rogers v. Bellei probably undermined Justice Black's absolutist assertions in Afroyim. Bellei upheld a statutory provision for loss of citizenship through failure to establish residence in the United States by a child who had acquired such citizenship at birth abroad through a single citizen par-

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136. 320 U.S. 118 (1943).
How much remains of the *Afroyim* doctrine is an issue that eventually must be settled by the Supreme Court.145

After the fierce controversies of the past, there has been little recent activity on the citizenship front. Two items deserve brief mention. One was a tax case, in which the estate of a deceased woman unsuccessfully claimed that she had intended to relinquish her American citizenship upon her marriage to an alien and to accept his nationality.146 The other case involved the alleged ineligibility to citizenship—and consequential deportability—of an alien found to have departed the United States and to have remained outside the country in order to evade military service. The amnesty for Vietnam era draft evaders proclaimed by President Carter147 led to the remand of the case by the Supreme Court, upon consent of the parties, for administrative determination whether deportability was extinguished by the Presidential amnesty.148 This determination will affect the status of many aliens now in the United States and in foreign countries.

**CONCLUSION**

This survey has demonstrated the profound variety of issues constantly presented to courts and administrators in immigration and nationality cases. Unfortunately, the appellate courts are so overburdened that they often resort to affirmance without opinion, an expedient which is hardly satisfying to the parties or their attorneys. Nevertheless, I commend the enterprising attorneys and public interest organizations who continue to challenge administrative practices and interpretations. Our brethren of the bar should not be discouraged in confronting venerable prejudice and indifference. The advocate's role in appealing to the conscience of the court is a necessary aspect of our jurisprudence. His success in overcoming oppression and injustice is one of the richest rewards of our profession.

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144. For subsequent amelioration of this statutory requirement, see Act of Oct. 27, 1972, Pub. L. No. 92-584, 86 Stat. 1289.