

# EXCLUSION AND DEPORTATION OF RESIDENT ALIENS: THE RE-ENTRY DOCTRINE AND THE NEED FOR REFORM

## INTRODUCTION

Exclusion and deportation statutes have long applied to immigrants and resident aliens.<sup>1</sup> The exclusion or deportation of aliens is often based on an "entry" made by crossing the border into the United States.<sup>2</sup> This "entry" may be the original arrival in this country by an immigrant or any subsequent re-entry by a resident alien.<sup>3</sup> When "entry" is found, immigrants and resident aliens alike become subject to some of the exclusion and deportation provisions. As a result, an alien who has resided in this country for a substantial period of time may be treated the same as an immigrant who has never come into the United States. Thus, the question of "entry" may be critical to a resident alien who is being excluded or deported.

The concept of "entry" was originally a judicial doctrine<sup>4</sup> which was subsequently codified.<sup>5</sup> The statutory definition of "entry" excepted entries which were not "intended." In *Rosenberg v. Fleuti*,<sup>6</sup> the United States Supreme Court, under the guise of statutory construction, ascribed an unexpected meaning to the "intent" exception. *Fleuti* did more than interpret the statutory definition

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1. See *Lapina v. Williams*, 232 U.S. 78, 91 (1914).

2. See Immigration and Nationality Act §§ 212, 241, 8 U.S.C. §§ 1182, 1251 (1970).

3. *United States ex rel. Volpe v. Smith*, 289 U.S. 422, 425 (1933). This is because the relevant statutes apply to all persons who are not citizens or nationals thereby including resident aliens, who do not fall into either category. See Immigration and Nationality Act § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1970).

4. While Congress had written the "entry" requirement into the exclusion and deportation statutes, the courts originally had decided that a re-entry was the same as the original "entry" for the purposes of these statutes. See, e.g., *United States ex rel. Volpe v. Smith*, 289 U.S. 422, 425 (1933), and *Delgadillo v. Carmichael*, 322 U.S. 388 (1947).

5. Immigration and Nationality Act § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1970).

6. 374 U.S. 449 (1963).

of "entry"; it created substantive immigration law independent of the statutory framework. Lower federal courts and the Board of Immigration Appeals have had great difficulty interpreting *Fleuti* because the opinion used confusing language. Recently, the Seventh and Ninth Circuits have dealt with the *Fleuti* standard.<sup>7</sup> These decisions create a split in the circuits and demonstrate the critical need for definitive standards in this area of immigration law.

Before addressing the need for clarification of the re-entry doctrine, it is necessary to explore the substantive effects of "entry," and to examine how the early decisions interpreted the "entry" requirement.

#### DEFINING THE CONSEQUENCES OF ENTRY

Necessary to a discussion of the re-entry doctrine under *Fleuti* is an understanding of the substantive and procedural consequences of "entry." The exclusion and deportation statutes are harsh and a misinterpretation of the re-entry doctrine, which triggers some of these statutes, is not merely an academic error. For example, because of a recent Ninth Circuit interpretation of *Fleuti*, the defendant was deported to Bulgaria.<sup>8</sup>

Any non-citizen can be excluded from the United States at the border if he does not meet the rigorous immigration standards. Since the immigration laws apply to re-entering resident aliens, the exclusion statute can prevent a resident alien from returning to the United States even though he could not have been deported if he had not left the country. The exclusion statute can be used against a resident alien who was healthy when first admitted to the United States, and who subsequently becomes "insane," "mentally retarded," or develops a "psychopathic personality." This alien is not deportable but could be excluded from the United States following a later "entry" into this country.<sup>9</sup> The result would be the same for a "chronic alcoholic," a "polyga-

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7. *Lozano-Giron v. INS*, 506 F.2d 1073 (7th Cir. 1974); *Palatian v. INS*, 502 F.2d 1091 (9th Cir. 1974).

8. *Palatian v. INS*, 502 F.2d 1091 (9th Cir. 1974).

9. Immigration and Nationality Act § 212(a)(1), (2), (4), 8 U.S.C. § 1182(a)(1), (2), (4) (1970). This assumes that the alien is not a "public charge" or "institutionalized at public expense." *Id.* § 241(a)(8), 8 U.S.C. § 1251(a)(8).

mist," or a person "likely at any time to become a public charge."<sup>10</sup> An alien who was exempted from military service could not be deported, but could be excluded on re-entry.<sup>11</sup>

Two exclusion provisions deal with the alien's past conduct which could not have been grounds for his deportation.<sup>12</sup> The first is the exclusion of "[a]liens who have had one or more attacks of insanity."<sup>13</sup> Suppose that a resident alien suffered an attack of insanity after his original entry. This alien could be excluded on re-entry even if he was totally cured and thus was not deportable.<sup>14</sup>

The second exclusionary provision which covers the alien's past conduct has a broader reach. It provides for the exclusion of

[a]liens who have been convicted of a crime involving moral turpitude . . . or aliens who admit having committed such a crime, or aliens who admit committing acts which constitute the essential elements of such a crime . . . .<sup>15</sup>

Without leaving the country a resident alien might not have been deportable because there was no conviction, or because the crime occurred five years after his original entry. Because the moral turpitude section reaches back to cover all past crimes, a re-entering resident alien could be excluded for a crime which would not make him deportable.

The deportation statute authorizes the expulsion of an alien who was excludable at the time of "entry."<sup>16</sup> The substantive effect is that "entry" expands the scope of the deportation statute, and since there is no statute of limitations, there can be a much delayed deportation. Since "entry" includes re-entry, a resident alien who made a short trip over the border in the distant past and was then subject to exclusion could be deported years later even though the condition which made him subject to exclusion is gone.

Deportation can only be imposed for certain acts that occur within five years of "entry,"<sup>17</sup> but a final, significant substantive

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10. *Id.* § 241(a) (5), (11), (15), 8 U.S.C. § 1251(a) (5), (11), (15).

11. *Id.* § 241(a) (22), 8 U.S.C. § 1251(a) (22). See 1 C. GORDON & H. ROSENFIELD, *IMMIGRATION LAW AND PROCEDURE* § 2.49(b) (rev. ed. 1975).

12. Some other provisions deal with past conduct which can be a ground for deportation without an "entry." See, e.g., Immigration and Nationality Act § 212(a) (25), 8 U.S.C. § 1182(a) (25) (1970).

13. *Id.* § 212(a) (3), 8 U.S.C. § 1182(a) (3).

14. 1 GORDON, *supra* note 11, § 2.38(b) (1).

15. Immigration and Nationality Act § 212(a) (9), 8 U.S.C. § 1182(a) (9) (1970).

16. *Id.* § 241(a) (1), 8 U.S.C. § 1251(a) (1).

17. *Id.* § 241(a) (3), (4), (8), (13), (15), 8 U.S.C. § 1251(a) (3), (4), (8), (13), (15).

effect of "entry" is that a re-entry triggers the five-year period regardless of how long the alien has been in the United States. Thus, a resident alien who was convicted of a crime involving moral turpitude and sentenced to the penitentiary for a year or more within five years after any re-entry could be deported<sup>18</sup> even though he had lived here longer than five years after the original entry.

Besides the substantive effects of "entry," it can have important procedural consequences. An alien subject to deportation may be subject to exclusionary proceedings because of re-entry. Deportation proceedings are harsh, but at least the burden of proof is on the government<sup>19</sup> and the alien has some procedural rights.<sup>20</sup> However, in an exclusionary hearing the burden of proof is on the alien,<sup>21</sup> and in some cases there is no right to appeal.<sup>22</sup> The Supreme Court has stated that, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."<sup>23</sup> In light of the possible severe consequences to resident aliens, the need for clear guidelines for applying the re-entry doctrine is evident.

#### "ENTRY" BEFORE *Fleuti*

Originally the term "alien" in the immigration laws was interpreted to mean only alien immigrants.<sup>24</sup> The Supreme Court changed this interpretation when it decided that a person was not exempt from the immigration statutes merely because "of a previous residence or domicile in this country."<sup>25</sup> The re-entry doctrine was born in *Lewis v. Frick*<sup>26</sup> when the Supreme Court held that the "entry" requirement in the deportation statute was met regardless of any previous residence in this country.

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18. *Id.* § 241(a)(4), 8 U.S.C. § 1251(a)(4).

19. See *Woodby v. INS*, 385 U.S. 276, 286 (1966).

20. See Immigration and Nationality Act § 242(b), 8 U.S.C. § 1252(b) (1970) (right to counsel, cross examination, and the use of probative evidence).

21. *Id.* § 291, 8 U.S.C. § 1361. See *In re Alarcon-Acosta*, 14 I. & N. Dec. \_\_\_\_ (I.D. 2244 1973).

22. Immigration and Nationality Act § 236(d), 8 U.S.C. § 1226(d) (1970).

23. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

24. *Moffit v. United States*, 128 F. 375, 380 (9th Cir. 1904).

25. *Lapina v. Williams*, 232 U.S. 78, 91 (1914).

26. 233 U.S. 291 (1914).

When Congress first wrote the "entry" requirement into the immigration statutes, it probably was concerned with the original arrival of an immigrant into the United States.<sup>27</sup> "Entry," nevertheless, became a legal term separated from its common meaning. For example, an alien held at Ellis Island for twenty-one months was deemed not to have entered the United States, and therefore was not entitled to a deportation hearing.<sup>28</sup> In an earlier case, a one-day outing across the border created an "entry" for purposes of finding grounds for deportation.<sup>29</sup>

With only one exception,<sup>30</sup> the early decisions applied the re-entry doctrine literally. The Sixth Circuit in *Zurbrick v. Borg*<sup>31</sup> deported an alien because he made an "entry" without a visa when the train he was riding from Buffalo to Detroit passed through Canada. Although applied reluctantly at times,<sup>32</sup> the re-entry doctrine became crystallized and was given its clearest definition in *United States ex rel Volpe v. Smith*.<sup>33</sup> In *Volpe*, the Supreme Court noted that "entry" means "[a]ny coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one."<sup>34</sup>

The first break in the strict interpretation of the re-entry rule came in *Di Pasquale v. Karmuth*.<sup>35</sup> Justice Hand, writing for the Second Circuit on facts similar to *Borg*, decided that there was no "entry" because the alien did not intend to leave the United States when his train passed through Canada. The intent of the carrier was not imputed to the alien who had no duty to inquire as to the route.<sup>36</sup>

A second break in the *Volpe* rule came in *Delgadillo v. Carmichael*.<sup>37</sup> In *Delgadillo*, the Supreme Court had to determine whether an alien who was forced to Cuba after his ship was tor-

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27. See Gordon, *When Does An Alien Enter the United States?*, 9 FED. B.J. 248, 249 (1948).

28. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213 (1953).

29. *United States ex rel. Kowalenski v. Flynn*, 17 F.2d 524 (N.D.N.Y. 1927).

30. *United States ex rel. Valenti v. Karmuth*, 1 F. Supp. 370, 373 (N.D.N.Y. 1932) (boy on school picnic was not a free agent).

31. 47 F.2d 690 (6th Cir. 1931). See *Taguchi v. Carr*, 62 F.2d 307 (9th Cir. 1932).

32. See *Zurbrick v. Woodhead*, 90 F.2d 991, 992 (6th Cir. 1937); *Jackson v. Zurbrick*, 59 F.2d 937 (6th Cir. 1932).

33. 289 U.S. 422 (1933).

34. *Id.* at 425.

35. 158 F.2d 878 (2d Cir. 1947).

36. *Id.* at 879.

37. 332 U.S. 388 (1947).

pedoed had made an "entry" when he returned to the United States. The Court approved *Di Pasquale's* intent exception and created a second voluntariness exception. This alien did not make an "entry" because "the exigencies of war, not his voluntary act, put him on foreign soil."<sup>38</sup> The voluntariness exception was followed with little change from the *Delgadillo* formula.<sup>39</sup>

In 1952, as part of a revision of the immigration statutes, Congress codified the intent and voluntariness exceptions to the strict re-entry rule. The statute contains the following definition of "entry":

The term "entry" means any coming of an alien into the United States . . . except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if . . . his departure to a foreign port or place or to an outlying possession was not intended or . . . was not voluntary . . .<sup>40</sup>

This statute was to become the basis for the *Fleuti* decision.

### *Rosenberg v. Fleuti*

[W]e are in the never-never land of the Immigration and Nationality Act, where plain words do not always mean what they say.<sup>41</sup>

In *Rosenberg v. Fleuti*,<sup>42</sup> the Supreme Court decided that the statutory definition of "entry" did not mean what it obviously said. The Supreme Court interpreted the intent exception in the statutory definition of "entry" to mean something totally different from what either the *Delgadillo* court or Congress had considered as the relevant meaning of "entry."<sup>43</sup>

The Immigration and Naturalization Service sought to deport George Fleuti, a resident alien, on the grounds that as a homosexual he was "afflicted with a psychopathic personality." "Entry" was predicated on Fleuti's return from a trip of a few hours to Mexico. Fleuti appealed the deportation order to the Ninth Circuit to chal-

38. *Id.* at 391.

39. See, e.g., *Carmichael v. Delaney*, 170 F.2d 239, 242 (9th Cir. 1948); *Yukio Chai v. Bonham*, 165 F.2d 207 (9th Cir. 1947).

40. Immigration and Nationality Act § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1970).

41. *Yuen Sang Low v. Attorney General of United States*, 479 F.2d 820, 821 (9th Cir. 1973) (case did not deal with the re-entry doctrine).

42. 374 U.S. 449 (1963).

43. See *id.* at 466 (Clark, Harlan, Stewart, and White, JJ., dissenting).

lenge the constitutionality of the deportation provision. The appellate court agreed with *Fleuti* and found the statute unconstitutionally vague.<sup>44</sup> The Supreme Court granted certiorari to consider the validity of the statute; but rather than deal with the "psychopathic personality" provision, the Court decided to interpret the intent exception to the "entry" definition. The Court construed the intent exception to mean: [A]n intent to depart in a manner which can be regarded as *meaningfully interruptive* of the alien's permanent residence.<sup>45</sup> In order to determine if the proper intent was present, the Court furnished the following guidelines:

One major factor relevant to whether such an intent can be inferred is, of course, the *length of time* the alien is absent. Another is the *purpose* of the visit, for if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would be meaningful. Still another is whether the alien has to procure any travel *documents* in order to make his trip, since the need to obtain such items might well cause the alien to consider more fully the implications involved in his leaving the country . . . and other possible relevant factors . . .<sup>46</sup>

The Court concluded that "[a]n innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status . . . ."<sup>47</sup>

*Fleuti* changed the obvious meaning of the statute, reversed prior Supreme Court,<sup>48</sup> lower federal court<sup>49</sup> and Board of Immigration Appeals decisions,<sup>50</sup> and abandoned traditional notions of intent as applied to other areas of the law.<sup>51</sup> If the rationale in *Fleuti* is carefully examined, it is clear that the Court was not merely interpreting Congressional intent. To arrive at this elaborate interpretation of intent, the Court was forced to build on a number of questionable assumptions. Characterizing *Di Pasquale* and *Delga-*

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44. *Fleuti v. Rosenberg*, 302 F.2d 652, 658 (9th Cir. 1962).

45. 374 U.S. at 462 (emphasis added).

46. *Id.* (emphasis added). These will be referred to as the brevity, documents, and purpose factors.

47. *Id.*

48. *Bonetti v. Rogers*, 356 U.S. 691, 698-99 (1958) (dicta).

49. *Schoeps v. Carmichael*, 177 F.2d 391 (9th Cir. 1949).

50. *In re Bauer*, 10 I. & N. Dec. 304, 328 (1963) (intent exception was blurred with voluntariness).

51. See W. LA FAVE & A. SCOTT, *CRIMINAL LAW* § 28 at 197 (1972); W. PROSSER, *LAW OF TORTS* § 8 at 31 (4th ed. 1971).

dillo as a "substantial inroad"<sup>52</sup> into the re-entry doctrine was the first such assumption. These cases arose from special facts and only created a narrow exception to the re-entry rule<sup>53</sup> which otherwise remained in full force.<sup>54</sup>

The Court's second assumption was that Congress did not mean to limit *Di Pasquale* and *Delgadillo* to their facts because the statutory definition of "entry" was meant to reduce hardship.<sup>55</sup> In a footnote, the Court impliedly recognized that the "entry" definition was meant to codify these two decisions.<sup>56</sup> Since the language in the statute so closely resembles the *Di Pasquale* and *Delgadillo* holdings, there is simply no indication that Congress intended a sweeping change in the re-entry doctrine.

Having summarily rejected the *Di Pasquale* and *Delgadillo* holdings and the plain meaning of the statute's language, the Court assumed that "[t]he most basic guide to congressional intent as to the reach of the exceptions is the eloquent language of *Di Pasquale* and *Delgadillo* themselves . . . ."<sup>57</sup> The Court reasoned that because these two decisions sought to reduce the hardship caused by the re-entry doctrine, Congress could not have meant to have the statutory definition applied "woodenly."<sup>58</sup>

Thus, by limiting the impact of the statute's history, the Supreme Court concluded that it had a free hand in determining the meaning of "intent." As demonstrated by the decision, this free hand was used liberally.<sup>59</sup> Under the guise of statutory construction, the Court radically expanded the intent exception to the re-entry doctrine. The Supreme Court has recognized that Congress has plenary power in determining the prerequisites for exclusion and deportation.<sup>60</sup> However, the Court effectively curbed Congress'

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52. 374 U.S. at 454.

53. See *United States v. Kenton*, 224 F.2d 803 (2d Cir. 1955).

54. See, e.g., *Schoeps v. Carmichael*, 177 F.2d 391 (9th Cir. 1949).

55. 374 U.S. at 458.

56. *Id.* at 457 n.8. See *Lozano-Giron v. INS*, 506 F.2d 1073, 1076 (7th Cir. 1974) which stated, "[t]he 1952 exception was a 'codifying' of several cases decided shortly prior thereto."

57. 374 U.S. at 458.

58. *Id.* at 460.

59. The dissent argued the Court had "constructed" a doctrine when their proper function was to "construe" statutes. *Id.* at 463. (Clark, Harlan, Stewart, and White, JJ., dissenting.)

60. See *id.* at 461.



power by misconstruing the language Congress had selected. To compound the lower courts' problem, the Court resorted to vague, confusing language to cloak the misconstruction.

#### INTERPRETING *Fleuti*

The confusing language in *Fleuti* has contributed to the present uncertainty surrounding the re-entry doctrine. The Supreme Court rested its decision on the intent exception, and yet included within the holding factors unrelated to the concept of intent. *Di Pasquale* dealt with intent mainly in terms of knowledge. *Fleuti* abandoned a knowledge test but failed to create a meaningful substitute; the brevity, purpose, and documents factors suggested by the Court confuse the meaning of intent, rather than clarify the issue. The artificial process suggested by the Court for inferring intent has led to a number of interpretive problems. First, passages in *Fleuti* seem to support a subjective test based on whether an alien wants to relinquish his domicile in the United States.<sup>61</sup> Most decisions, however, have ignored the subjective intent of the alien and have primarily relied on objective factors independent of the alien's state of mind.<sup>62</sup>

Another problem created by *Fleuti* is the determination of the weight of each of the factors suggested by the decision. If the excursion must be "innocent, causal, and brief,"<sup>63</sup> it is unclear whether these three factors are mandatory, or whether one can be ignored in analyzing the factors necessary to imply intent. The essential difference is between "factors" and "prerequisites." The net effect of this confusion has rendered the *Fleuti* doctrine too flexible. By ignoring the express language in *Fleuti* and engaging in independent policy decisions, the Board of Immigration Appeals and the courts have been able to choose different rationalizations to justify different results in similar cases.<sup>64</sup>

The first factor suggested by the Court for determining when there is an intent to make a meaningfully interruptive departure is the brevity of the visit. This factor is only important when there is no misconduct associated with the "entry." Although one Board decision implied that *Fleuti* only applied to a person who "merely

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61. See, e.g., *Yanez-Jacquez v. INS*, 440 F.2d 701, 703 (5th Cir. 1971); *Zimmerman v. Lehmann*, 339 F.2d 943, 949 (7th Cir.), cert. denied, 381 U.S. 925 (1965).

62. See, e.g., *Palatian v. INS*, 502 F.2d 1091, 1094 (9th Cir. 1974); *In re Guimaraes*, 10 I. & N. Dec. 529, 531 (1964).

63. *Rosenberg v. Fleuti*, 374 U.S. 449, 461 (1963).

64. Compare *Palatian v. INS*, 502 F.2d 1091, 1093 (9th Cir. 1974), with *Vargas-Banuelos v. INS*, 466 F.2d 1371, 1374 (5th Cir. 1972).

stepped across the border,"<sup>65</sup> the decisions have generally been more lenient when the alien's condition or conduct at entry is not the grounds for the deportation or exclusion, but is a prerequisite for expulsion based on acts which occur before or after the "entry."<sup>66</sup>

The courts take a different approach to the first factor when misconduct is associated with the trip. An alien who returned the same day that he left made an "entry" because the trip itself was to smuggle illegal aliens.<sup>67</sup> A four-day trip to voluntarily appear before a Canadian court was too long.<sup>68</sup> In making the distinction between longer innocent trips and shorter excursions which have misconduct associated with the "entry," the decisions have, at times, confused the brevity factor with the purpose factor. In *In re Wood* the Board said:

We know of no instance in which it [the *Fleuti* doctrine] has been extended to cover an alien who is charged with being excludable or deportable because of an act or occurrence *arising during or directly connected with* the departure, absence or return.<sup>69</sup>

The Supreme Court in *Fleuti* wrote that if the "purpose of leaving the country" is to accomplish a proscribed objective the trip will be regarded as meaningfully interruptive of the resident alien's status.<sup>70</sup> Because this is a shorter time span than an act "arising during or directly connected with the departure, absence or return," the *Wood* standard places undue emphasis on the purpose factor. In principle this standard may be defensible, but it ignores the express language in *Fleuti*. *Fleuti* was meant to prevent the hardship of deportation or exclusion as the result of a short trip. Nevertheless, the central consideration has shifted from the first factor, the length of the visit, to a determination of the nature of the trip.

Another factor mentioned by *Fleuti* was the need to "procure travel documents."<sup>71</sup> This consideration is usually unimportant

65. *In re Abi-Rached*, 10 I. & N. Dec. 551, 552 (1964), *overruled on other grounds*, *Matter of Quintanilla-Quintanilla*, 11 I. & N. Dec. 432 (1965).

66. See *Itzcovitz v. Selective Serv. Local Bd. No. 6*, 447 F.2d 888 (2d Cir. 1971) (three-week trip); *In re Cardenas-Pinedo*, 10 I. & N. Dec. 341 (1963) (repeated short trips). Cf. *United States v. Bowles*, 331 F.2d 742, 750 (3d Cir. 1964).

67. *In re Valdovinos*, 14 I. & N. Dec. — (I.D. 2228 1973).

68. *In re Wood*, 12 I. & N. Dec. 170 (1967).

69. *Id.* at 175 (emphasis added).

70. 374 U.S. at 462.

71. *Id.*

because a federal regulation allows a resident alien to use his Alien Registration Receipt Card when returning from a trip of under a year's length.<sup>72</sup> In most situations where *Fleuti* applies, travel documents will not be needed because merely presenting the Alien Registration Receipt Card to gain entry does not trigger the documents factor.<sup>73</sup>

After stating the three factors, the Supreme Court in *Fleuti* added that the necessary intent could be found by the use of "other possibly relevant factors" to be identified by the lower courts.<sup>74</sup> The lower courts have added to the list of factors, but in so doing, they have added to the confusion. For example, one additional factor which has been supplied may be the subjective desire of the alien to retain his status as a resident of the United States. At first, the Board was reluctant to even view this as a factor,<sup>75</sup> but now it seems willing to consider whether the alien has a subjective intent to remain domiciled in the United States.<sup>76</sup> The real problem is determining the weight of this factor. In *Zimmerman v. Lehmann*,<sup>77</sup> the Seventh Circuit disposed of the case on a determination of the alien's subjective intent.

At the time of his 1952 visit to Canada, plaintiff had continuously maintained his status as a resident alien for some thirty-nine years. He was married to an American citizen, had three minor children who were born in this country, all dependent on him for support, and had a residence and business in Chicago. From the fact that he took his family on a harmless, innocent vacation trip to Canada, it would border on the absurd to ascribe to him an intention of impairing his status as a permanent resident of this country.<sup>78</sup>

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72. 8 C.F.R. § 211.1(b) (1975), but note exceptions for visits to communist countries. See *Lozano-Giron v. INS*, 506 F.2d 1073, 1079 n.25 (7th Cir. 1974).

73. See *In re Quintanilla-Quintanilla*, 11 I. & N. Dec. 432, 434 (1965), overruling, *In re Abi-Rached*, 10 I. & N. Dec. 551, 553 (1964), which stated that *Fleuti* dealt with whether an alien had "to obtain or present documents upon his return to the United States."

One potential problem is determining what type of documents are needed to meet the *Fleuti* test. In *de Bildao-Bastida v. INS*, 409 F.2d 820, 823 (9th Cir. 1969), the Ninth Circuit stated that procuring a Spanish passport and a Cuban visa in Mexico were sufficient acts to fulfill the documents factor. *Fleuti* does not expressly state whether foreign documents obtained in a foreign country are relevant to whether a meaningful departure has been made. Arguably, since *Fleuti* speaks of an "intent to depart," procuring foreign documents in a foreign country is irrelevant because this occurs after the alien has left the country.

74. 374 U.S. at 462.

75. See *In re Guimaraes*, 10 I. & N. Dec. 529, 531 (1964).

76. *In re Nakoi*, 14 I. & N. Dec. \_\_\_\_ (I.D. 2168 1972).

77. 339 F.2d 943 (7th Cir.), cert. denied, 381 U.S. 925 (1965).

78. *Id.* at 948-49.

But in *In re Nakoi*,<sup>79</sup> the Board made it clear that the circumstances considered in *Zimmerman* were not conclusive. The Seventh Circuit recently reaffirmed, in dicta, its emphasis on subjective intent:

[A]nother group of relevant factors would undoubtedly center on the effect of the uprooting caused by the deportation, that is, how long the alien had been a permanent resident of the United States, whether he had a wife and children living with him, whether he owned a business establishment or a home or other real estate in the United States, the nature of the environment to which he would be deported, and his relation to this environment.<sup>80</sup>

Unfortunately this statement was not footnoted because the courts have not followed this approach.

The lower courts have suggested numerous other factors. The Board considered it relevant in one case that a person going to Canada to answer criminal charges could not have known when he would return.<sup>81</sup> The alien made an "entry" even though he was only gone from the United States for a couple of days. The Seventh Circuit has stated that a departure to get married would be meaningfully interruptive of the alien's permanent residence.<sup>82</sup> A short visit will suffice as an "entry" if the legality of the alien's presence in the United States is being questioned in a deportation hearing when he leaves.<sup>83</sup> The trial court in *Palatian v. INS* considered "[t]he additional factors of his youth, of the absence of a former criminal record, and of the absence of prior departures from this country."<sup>84</sup> These considerations may be helpful in deter-

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79. 14 I. & N. Dec. — (I.D. 2168 1972).

80. *Lozano-Giron v. INS*, 506 F.2d 1073, 1077-78 (7th Cir. 1974). The trial court in *Palatian* considered the fact that the defendant would be deported to Bulgaria, a communist country. *Palatian v. INS*, 502 F.2d 1091, 1092 (9th Cir. 1974) (the Ninth Circuit paraphrasing the trial court). The Ninth Circuit rejected this factor when it stated, "[h]owever much we sympathize with his plight, the fact is that he foolishly brought it upon himself." *Id.* at 1094.

81. *In re Wood*, 12 I. & N. Dec. 176, 177 (1967).

82. *Lozano-Giron v. INS*, 506 F.2d 1073, 1079 (7th Cir. 1974).

83. *In re Becerra-Miranda*, 12 I. & N. Dec. 358 (1967). See *In re Alarcon-Acosta*, 14 I. & N. Dec. — (I.D. 2168 1972); *In re Caudillo-Villalobos*, 11 I. & N. Dec. 15 (1965), *aff'd*, 361 F.2d 329 (5th Cir. 1966) (although the alien did not fall within the statutory "entry" exception because he had to return to Mexico to answer legal process, the Board felt compelled to distinguish *Fleuti*).

84. 502 F.2d 1091, 1095 (9th Cir. 1974) (Hufstedler, J., dissenting, quoting

mining if it would be just to deport a resident alien, but they have little to do with whether an alien has intended a meaningful departure from the United States.<sup>85</sup>

All of the factors identified can be relevant. The problem is that the courts have not developed an overall framework for applying the *Fleuti* standard. Many decisions have turned on the purpose factor, but this is the most ambiguous of all the relevant factors and has caused a serious split in the circuits.

The *Fleuti* decision describes the purpose factor in this fashion:

Another [factor] is the purpose of the visit, for if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful.<sup>86</sup>

The ambiguities are evident. What state of mind is required,<sup>87</sup> and specifically, when does this state of mind have to exist?

Must the purpose be formed before leaving the country? *Fleuti* contains contradictory language. At one point the Court speaks of the "purpose of leaving the country."<sup>88</sup> At another place the Court declares "that an innocent, casual, and brief excursion"<sup>89</sup> is required to meet its test. The first quote implies that the purpose is to be judged at departure; the second implies that the whole trip is to be looked at to determine if it is innocent.

At first, the courts and the Board of Immigration Appeals assumed that it made no difference when the purpose was formed.<sup>90</sup> In

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from the trial court's opinion). See *Lozano-Giron v. INS*, 506 F.2d 1073, 1079 n.26 (7th Cir. 1974).

85. The Ninth Circuit in *Wadman v. INS*, 329 F.2d 812, 816 (9th Cir. 1964) suggested an approach which has been ignored by most courts when it stated, "[t]he question is whether the interruption, viewed in balance with its consequences, can be said to have been a significant one under the guides laid down in *Fleuti*."

86. 374 U.S. at 462.

87. There may be a problem if the alien has the necessary intent when he crosses the border but fails to complete a criminal act. *Fleuti* only requires that the "purpose" be against the policy of the immigration laws. The Ninth Circuit has impliedly rejected the idea that only a proscribed purpose is needed. See *Palatian v. INS*, 504 F.2d 1091, 1093 (1974), *rejecting Yanez-Jaquez v. INS*, 440 F.2d 701, 704 (5th Cir. 1971) which seemed to consider a purpose sufficient without an act.

88. 374 U.S. at 462.

89. *Id.* As will be shown, the decisions have not based their conclusions on the "excursion" language, but have misread the first quote.

90. See *In re Corral-Fragoso*, 11 I. & N. Dec. 478 (1966) and *Bufalino v. INS*, 473 F.2d 728 (3d Cir. 1973) (alien violated immigration laws on his return to the United States).

*Matter of Kolk*,<sup>91</sup> the Board modified the *Fleuti* language to make it appear that the purpose was to be judged by the whole trip when it stated that the pivotal question was, "[w]hether the alien by leaving the United States 'accomplish[ed]' some object which is itself contrary to some policy reflected in our immigration laws.'" <sup>92</sup>

In *In re Vargas-Banuelos*,<sup>93</sup> the problem of when the intent has to be present was squarely confronted. A resident alien had gone to Mexico to offer condolences to the family of a deceased relative. While in Mexico, he accepted money to help some aliens illegally enter the United States. The Board decided that the time when the alien formed his intent was irrelevant.<sup>94</sup> On appeal, the Fifth Circuit reversed the Board's determination, noting that

[t]he lesson of *Fleuti* is that a brief departure from this country should not give rise to grounds for deportation when the alien returns unless some element of the alien's state of mind *at the time of the departure* subjected him to the charge that he left the country with the intention to interrupt his residential status.<sup>95</sup>

The Ninth Circuit disagrees. In *Palatian v. INS*,<sup>96</sup> the Ninth Circuit held that the time when the intent is formed is unimportant.<sup>97</sup> Ignoring the language in *Fleuti*,<sup>98</sup> the court made its own determination that it would be irrational to draw a distinction based on when the intent was formed.<sup>99</sup> The Seventh Circuit, in indicating that it is ready to follow *Palatian*, stated

[i]t would perhaps be equally meaningful if the illegal purpose was formed after departure but before return . . . . *Fleuti*, however, does not limit the searching out of the purpose for leaving the country to the illegal purpose ultimately formed.<sup>100</sup>

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91. 11 I. & N. Dec. 103 (1965).

92. *Id.* at 105 (emphasis added).

93. 13 I. & N. Dec. 810 (1971).

94. *Id.* at 814.

95. *Vargas-Banuelos v. INS*, 466 F.2d 1371, 1374 (5th Cir. 1972) (emphasis by the court).

96. 502 F.2d 1091 (9th Cir. 1974).

97. *Id.* at 1093.

98. *Compare* *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963), which states that the intent exception means "an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence," with *Palatian v. INS*, 502 F.2d 1091, 1093 (9th Cir. 1974) which states "we do not think that the language in *Fleuti* which refers to 'an intent to depart' is or should be controlling."

99. 502 F.2d at 1094.

100. *Lozano-Giron v. INS*, 506 F.2d 1073, 1079-80 (7th Cir. 1974).

The net result is a sharp split of authority on the meaning of what seems to be the most important factor mentioned in *Fleuti*.

Finally, *Fleuti* creates the problem of determining the relationship between the "meaningful interruption" language and the purpose consideration. Most decisions have indicated that the purpose factor is conclusive of the meaningful interruption test.<sup>101</sup> However, the Fifth Circuit in *Yanez-Jacquez v. INS*<sup>102</sup> stated that at least in that case it did not consider the purpose factor controlling, and considered other elements.<sup>103</sup>

In summary, the brevity factor has become unimportant. The documents factor is inapplicable in most cases because of federal regulation, and the courts have failed to supply other meaningful guidelines. By default, the purpose factor has become the single most important consideration. Yet this consideration is the most confused factor, and has produced a sharp split of authority. Neither *Fleuti*, nor the cases purportedly applying *Fleuti*, have articulated meaningful guidelines for the critical determination of whether there is an "entry."

#### PROPOSALS FOR REFORM

A possible solution to this confused area of immigration law would be to abandon the re-entry doctrine completely.<sup>104</sup> If an alien is to be deported because of reprehensible conduct while in the United States, his expulsion should not rest on the tenuous thread of "entry." Rather than subjecting resident aliens who have made a re-entry to the unexpected hazards of "entry," it would be better to deport all aliens who act contrary to the immigration laws. The same sanction should be placed on all aliens that Congress thinks are undesirable, regardless of any prior departure from the United States. No resident alien should be subject to exclusion after his original entry into the United States.

If the re-entry doctrine is to remain part of the immigration laws, it should be more clearly defined. One way of doing this would be to base a determination of "entry" on either totally objective or totally subjective factors. An objective test would at least provide uniformity. Under the *Volpe* rule, the resident alien knew that he made an "entry" whenever he crossed the border. A subjec-

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101. See, e.g., *In re Scherbank*, 10 I. & N. Dec. 522 (1964).

102. 440 F.2d 701 (5th Cir. 1971).

103. *Id.* at 703.

104. See Maslow, *Recasting Our Deportation Laws: Proposals for Reform*, 56 COLUM. L. REV. 309, 328-29 (1956).

tive test has proved useful in the area of discretionary relief from deportation.<sup>105</sup> Under this theory, the determination of "entry" would turn on whether the alien subjectively intended to abandon his domicile in the United States.<sup>106</sup> It is reasonable to treat a resident alien as an immigrant if he has intended a permanent departure from this country. The subjective intent to leave this country could be implied if the alien has severed personal ties in the United States. This subjective approach could cause administrative problems and make a determination of "entry" more difficult, but considering the severe consequences to the resident alien involved, these inconveniences do not seem too great.

If the "nebulous"<sup>107</sup> *Fleuti* standard is to remain the test, the controversy surrounding the purpose factor should be resolved by making its boundaries clear. The stakes are too high for the alien, and the effort required of Congress or the Supreme Court is too minimal to justify further delay. If neither the Congress nor the Supreme Court decides to act, the actual language in *Fleuti*, which is the only binding authority in this area of immigration law, should be more closely followed by the lower courts and the Board of Immigration Appeals when making the critical determination of "entry."

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105. Immigration and Nationality Act § 244, 8 U.S.C. § 1254 (1970). See *Git Foo Wong v. INS*, 358 F.2d 151, 153 n.3 (9th Cir. 1966); *Wadman v. INS*, 329 F.2d 812 (9th Cir. 1964).

106. The Seventh Circuit may already consider this relevant. In *Lozano-Giron v. INS*, 506 F.2d 1073, 1079 (7th Cir. 1974), this court considered it relevant that "[t]he petitioner introduced no evidence as to property or employment ties within the United States . . . ."

107. 1 GORDON, *supra* note 11, § 4.6(c) (Supp. 1975).