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In Re Longstaff - Lesbian and Gay Aliens Denied Naturalization

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COMMENT

In Re Longstaff— Lesbian and Gay Aliens Denied Naturalization

I. INTRODUCTION

In *In re Longstaff*, the Fifth Circuit held that a resident alien may be denied naturalization if he or she was homosexual when admitted to the United States. The court based its holding on the assumption that an alien who was homosexual at the time of entry was admitted unlawfully.[1] The holding allows the Immigration and Naturalization Service (INS) to deny lesbian and gay aliens naturalization and admittance.[2] The court's decision follows a 1979 policy change by the Surgeon General, who had issued a memorandum advising the INS officers to stop referring aliens to the Public Health Service (PHS)[3] for mental examinations solely to determine whether they were homosexuals.[4] Prior to the Surgeon General's policy change,

1. *In re* Longstaff, 716 F.2d 1439 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2668 (1984). The court based its holding on its construction of the Immigration and Nationality (McCarran-Walter) Act of 1952 and its amendments. The court found that Congress' clear intent was to exclude homosexuals.

2. The INS was the first of three agencies to administer the U.S. immigration laws. The service was created by the Act of March 3, 1891, ch. 551, 26 Stat. 1084. The INS operates as a branch of the Justice Department, under the Attorney General. The General Counsel of the INS is responsible for the legal advisory, legislative, litigation and trial attorney activities. The special inquiry officers of the INS conduct exclusion and deportation hearings. Immigration officers of the INS are responsible for the first line enforcement of the law. *See* E. HARPER, IMMIGRATION LAWS OF THE UNITED STATES, 60-63 (3d ed. 1975).

3. Physicians of the agency that later became the PHS have been medical advisors for the immigration agencies since 1891. Act of March 3, 1891, ch. 551, 26 Stat. 1084. The PHS is now part of the Department of Health and Human Services. The responsibility of the PHS for the physical and mental examinations of aliens is defined in Section 325 of the Public Health Service Act of July 1, 1944, ch. 373, 58 Stat. 697, which provides that "[t]he Surgeon General shall provide for making, at places within the United States or in other countries, such physical and mental examinations of aliens as are required by the immigration laws, subject to administrative regulations prescribed by the Attorney General and medical regulations prescribed by the Surgeon General with the approval of the Administrator." *See* E. HARPER, *supra* note 2, at 69-70.

4. Memorandum from Julius Richmond, Assistant Secretary for Health, United States Dept. of Health, Education and Welfare, and Surgeon General, to William Foege and George Lythcott (Aug. 2, 1979) *quoted in* Memorandum Opinion for the Acting Commissioner, Immigration and Naturalization Service, No. 79-85, 3 Op. Office of Legal Counsel 457, 458 (1979).

the PHS had routinely certified aliens as homosexual.[5] These aliens were then excluded from admittance to the United States based on section 212(a)(4) of the Immigration Act, which "exclude[s] from admission into the United States . . . [a]liens afflicted with psychopathic personality, or sexual deviation, or a mental defect."[6] In response to the Surgeon General's policy change, the INS unilaterally developed a policy of excluding these aliens based solely on their admission of homosexuality.[7]

The Fifth Circuit used *In re Longstaff* to discuss the legality of the INS policy of denying entry to lesbian and gay aliens without PHS certification. In construing the Immigration and Nationality (McCarren-Walter) Act of 1952[8] [the Immigration Act] to allow the INS to continue its new policy, *In re Longstaff* directly conflicts with the Ninth Circuit case, *Hill v. INS*.[9] The Supreme Court recently denied certiorari to *Longstaff*, leaving the future of immigration for lesbian and gay aliens uncertain.[10]

This note analyzes the court's decision in light of the statute's history, the statute's language and structure, prior judicial decisions, and past INS practice. The note further analyzes the methods the court applies in finding that Congress intended to exclude lesbian and gay aliens without a PHS certificate. Specifically, this note examines the court's method of reasoning and its application of statutory construction rules. The note concludes that the Fifth Circuit's decision was unwarranted.

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5. *See, e.g., In re* Longstaff, 716 F.2d at 1446 & n. 43. "[T]he administrative practice has been to exclude for homosexuality only those persons for whom a [PHS] certificate was issued."

6. Immigration and Nationality (McCarren-Walter) Act of 1952, 8 U.S.C. § 1182(a)(4) (1976) (The first "or" does not appear in the codification of the Act.) [hereinafter cited as Immigration Act].

7. *See* Memorandum from John Harmon, Assistant Attorney General, to David Crossland, Acting Commissioner, INS (Dec. 10, 1979); Department of Justice Press Release (Sept. 9, 1980). For an in-depth treatment of this history, *see also* Bogatin, *The Immigration and Nationality Act and the Exclusion of Homosexuals:* Boutilier v. INS *Revisited*, 2 CARDOZO L. REV. 359, 369-72 (1981) [hereinafter cited as *Boutilier Revisited*] (The note examines the Immigration Act and its predecessor and determines that the Surgeon General has the authority to define the Immigration Act's medical terms).

8. Immigration Act, 8 U.S.C. § 1101 *et. seq.* (1976).

9. Hill v. INS, 714 F.2d 1470 (9th Cir. 1983) (holding that Congress intended to require the INS to obtain a PHS medical certificate before excluding homosexuals from the United States under the psychopathic personality provision of the Immigration Act).

10. Longstaff v. INS, 104 S. Ct. 2668 (1984).

II. THE FACTS OF *IN RE LONGSTAFF*

Richard John Longstaff, a native of the United Kingdom, was admitted to the United States as a permanent resident on November 14, 1965. In his "Application for Immigrant Visa and Alien Registration," he answered "no" to the question, "Are you now or have you ever been afflicted with psychopathic personality, epilepsy, mental defect, fits, fainting spells, convulsions or a nervous breakdown?"[11] The INS application based the question on Section 212(a)(4) of the Immigration Act.[12]

Longstaff eventually settled in Texas, established a business, and sought naturalization after fifteen years in this country. Ignoring the naturalization examiner's recommendation, the district court denied Longstaff's application for naturalization. It found that Longstaff had violated the Texas Penal Code by engaging in homosexual activity, had exhibited a lack of candor in answering questions about his activities, and had failed to carry his burden of establishing good moral character as required by 8 U.S.C. § 1427(a)(3) (1976).[13] The Fifth Circuit affirmed on the ground that Longstaff had failed to carry his burden of proof on the issue of good moral character.[14] The court remanded, however, to allow Longstaff to present additional evidence on this point.[15] On remand, an INS examiner interrogated Longstaff and concluded that he had met his burden of proving good moral character but that he should nevertheless be denied naturalization because he had engaged in homosexual activity before he entered the United States. The court concluded that because of Longstaff's homosexual activities, he had not been lawfully admitted.[16] On this basis the trial court again denied Longstaff's petition for

11. *In re* Longstaff, 716 F.2d at 1440.

12. The section "exclude[s] from admission into the United States . . . [aliens] afflicted with psychopathic personality, epilepsy, or a mental defect." In 1965, Congress amended this section to provide that aliens afflicted with "sexual deviation" were to be forbidden entry into the United States. Immigration Act, 8 U.S.C. § 1182 (1976). Congress took this action in response to the 1962 Ninth Circuit holding in Fleuti v. Rosenberg, 302 F.2d 652 (1962), that "psychopathic personality" was unconstitutionally vague as applied to a particular homosexual alien. For an analysis of this change, *see Boutilier Revisited*, *supra* note 7, at 366.

13. For an analysis of the "good moral character" requirement vis-á-vis homosexual aliens, *see* Hexter, *"Good Moral Character" Requirement is a Question of Federal Law*, Nemetz v. INS, 6 SUFFOLK TRANS. L.J. 383 (1982).

14. *In re* Longstaff, 631 F.2d 731 (5th Cir. 1980).

15. *In re* Longstaff, 634 F.2d 629 (5th Cir. 1980) (on rehearing).

16. *In re* Longstaff, 538 F. Supp. 589 (N.D. Texas 1982). "Petitioner has not met his burden of proof that he has been lawfully admitted for permanent residence." *Id.* at 591.

naturalization.[17] On appeal the Fifth Circuit affirmed the lower court.[18]

III. THE REASONING OF THE COURT

The court first stated that no person may be naturalized unless lawfully admitted to the United States for permanent residence according to all provisions of the Immigration Act.[19] The court found that "lawfully admitted" denotes compliance with the substantive requirements of the Immigration Act, not mere procedural regularity. The court used the deportation provisions of the Act, which provide for deportation of any alien excludable by any law existing at the time of entry, to buttress this argument.[20] It also pointed out that the Immigration Act lists thirty-three classes of aliens excludable from the United States.[21] The court felt that it would be paradoxical if a person ineligible to receive a visa should become lawfully admitted simply because an error allowed him to enter.[22] It noted that the Immigration Act enumerates aliens afflicted with "psychopathic personality" within its list of excluded aliens[23] and that in *Boutilier v. INS* the Supreme Court held that the Act's legislative history shows a congressional intent to include homosexuals under the term "psychopathic personality."[24] The court also noted that Congress has unbounded power to exclude aliens from admission to the United States and that it may therefore exclude aliens for arbitrary and discriminatory reasons without violating the Constitution.[25]

The court next addressed Longstaff's argument that the Act only

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17. *Id.* at 593.

18. *In re* Longstaff, 716 F.2d at 1440. "[B]eing excludable on the ground of his homosexuality when he arrived here, he was not lawfully admitted to the United States."

19. *In re* Longstaff, 716 F.2d at 1441 (citing 8 U.S.C. § 1429 (1976)).

20. *Id.* at 1441-42 (citing 8 U.S.C. § 1251(a)(1)(2) (1976)).

21. *Id.* at 1442 (citing 8 U.S.C. § 1182(a) (1976 & Supp. V 1981)).

22. *Id.*

23. *Id.* (citing 8 U.S.C. § 1182(a)(4) (1976)).

24. *Id.* at 1442 (construing *Boutilier*, 387 U.S. at 120. "The legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals . . . .").

25. *Id.* "Congress can bar aliens from entering the United States for discriminatory and arbitrary reasons, even those that might be condemned as a denial of equal protection or due process if used for purposes other than immigration policy. . . ." U.S. CONST. art. 1, § 8, cl. 3 gives Congress authority to formulate U.S. policy regarding immigration and naturalization. The clause provides that Congress shall have the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." *See Immigration Laws, supra* note 2, at 4.

excludes those homosexuals whom a PHS medical officer determines to be afflicted with "psychopathic personality" or "sexual deviation." The court stated that Longstaff premised his argument on the Act's separation of medical reasons from other reasons for exclusion.[26] The court further explained the history of the medical exclusions and pointed out that a 1952 PHS report suggested that medical exclusions be grouped separately. The report proposed grouping together excludable "conditions related to the field of mental disorders and subject to medical determination."[27] "Psychopathic personality" and "sexual deviation" fall under the medical reasons for exclusion.[28] The court nevertheless refused to find that a PHS determination was a prerequisite for all exclusions based on medical reasons as defined by the Immigration Act.

The court then scrutinized the Immigration Act itself, noting that it provides for detaining aliens at the border while "immigration and medical officers examine them for 'physical and mental defects and disabilities' that warrant exclusion,"[29] and that it further specifies that PHS doctors "shall conduct all medical examinations and shall certify . . . any physical and mental defect or disease observed by such medical officers in any such alien."[30] The court evaluated Longstaff's argument, which construed "shall" to mean "must be," in light of the history and structure of the Immigration Act.[31] The court recognized that the Act provides that a medical officer's certification of "any mental disease, defect, or disability" of an enumerated class is

26. *In re* Longstaff, 716 F.2d at 1443. "Longstaff argues [that] [b]ecause these conditions are 'subject to medical determination'. . . only a medical officer has the power to determine whether any of them exists." *Id.*

27. *Id.* (citing REPORT OF THE PUBLIC HEALTH SERVICE ON THE MEDICAL ASPECTS OF H.R. 2379, A BILL TO REVISE THE LAWS RELATING TO IMMIGRATION, NATURALIZATION, AND NATIONALITY, AND FOR OTHER PURPOSES, *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS 1653, 1700).

28. Immigration Act, 8 U.S.C. § 1182(a) (1976).

29. *In re* Longstaff, 716 F.2d at 1444 (citing 8 U.S.C. § 1222 (1976)).

30. *Id.* (citing 8 U.S.C. § 1224 (Supp. V 1981)).

31. *Id.* at 1445. The court found that homosexuals were first denied admission in 1917. Act of Feb. 5, 1917, Ch. 29, § 3, 39 Stat. 874 (1917) (repealed 1952). The Act prohibited the admission of "persons of constitutional psychopathic inferiority" certified by a physician to be "mentally . . . defective." The court further found that Congress renewed the ban in 1952. Immigration and Nationality Act, § 212(a)(4), 66 Stat. 163 (1952). This Act excluded homosexuals from U.S. entry as persons with "psychopathic personality." Finally, the court noted that in 1965 Congress added "sexual deviation" to the enumerated list. 8 U.S.C. § 1182(a)(4) (1976).

conclusive evidence of excludability.[32] It held that this does not necessarily mean that the absence of a certificate is conclusive evidence of admissibility.[33]

The court then took notice that the administrative practice had been to exclude only those aliens found to be homosexual through a PHS certificate. It nevertheless found that a medical certificate was not indispensable to bar a professed homosexual from entering the United States because *Boutilier* inferred from the statute a clear congressional intent to exclude homosexuals, and because Congress declared its intention by amending the Immigration Act in 1965 to bar "sexual deviates." To hold otherwise, the court reasoned, would be to allow the Surgeon General to "effectively checkmate Congressional Policy."[34] It found that in the instant case, Longstaff was admittedly homosexual and understood the meaning of the word.

The court concluded that the procedural systems built into the exclusion process merely demonstrate that Congress intended that only competent evidence of medical excludability be adduced in exclusion proceedings.[35] It further concluded that there was no reason why an informed applicant's confession that he fell within an excludable class was not competent evidence.[36] The court relied on section 1226(d) of the Immigration Act, which does not expressly forbid an immigration judge to exclude an alien based on evidence other than medical certification,[37] and that *Boutilier* does not indicate that the INS would have been required to ignore an admission of homosexuality.[38] The court also found that administrative practice and judicial precedent both disclose the error of Longstaff's argument that his admission into the United States eighteen years ago bars inquiry into his

32. *In re* Longstaff, 716 F.2d at 1446 (citing United States *ex rel.* Shaughnessy, 336 U.S. 806, 809 (1949)).

33. *Id.* (citing 8 U.S.C. § 1226(d) (1976)).

34. *Id.* at 1447. The court is commenting on the 1979 PHS policy to not medically certify aliens as homosexual.

35. *Id.* at 1448.

36. *Id.*

37. *Id.* "[Section 1226(d)] specifies that, if an immigration judge in an exclusion hearing is presented with a medical certificate 'that an alien is afflicted . . . with any mental disease, defect, or disability,' his decision 'shall be based solely on such certification.' It merely makes clear that the petitioner has no right to introduce evidence rebutting the certificate. It does not expressly forbid an immigration judge to find an applicant excludable on the basis of evidence other than a medical certificate." *Id.*

38. *Id.* "Although in *Boutilier*, the Public Health Service had issued a class A medical certificate . . . at the time of his admission, there is no indication in the opinion that the INS would have been required to ignore an admission by Boutilier that he was a homosexual." *Id.*

excludability.[39]

The court took notice of the fact that the INS now excludes for homosexuality if the alien admits to it.[40] It thus reasoned that the administrative agency had interpreted the Immigration Act so as not to require a PHS certificate, and stated that the INS interpretation was entitled to deference.

The court concluded that, although the Surgeon General no longer considers homosexuality a psychopathic condition, it was bound by *Boutilier's* ruling that "psychopathic personality" is a term of art, and by Congress' intent to bar persons "afflicted with . . . sexual deviation."[41] The court considered itself bound to uphold homosexual exclusion until Congress changes the law.[42]

IV. DISSENT'S REASONING

The dissent concluded that, for the reasons extensively detailed in *Hill v. INS*, the INS may not lawfully deny a homosexual admission to the United States unless it first obtains a PHS medical certificate.[43] The dissent based its conclusion on the statutory framework of the Immigration Act. It found that the statute contemplates a medical-personnel diagnosis and certification of any medical cause as a prerequisite to alien deportation or exclusion.[44] The dissent argued that by making medical certification the sole evidence for these exclusions, Congress intended to avoid allowing the INS to exclude aliens from admission at the initial interview. More importantly, the dissent found that Congress intended to protect aliens from later being

39. *Id.* at 1448-49. "In numerous . . . cases, aliens have been deported on the basis of post-admission determinations that they should have been excluded because of physical or mental problems." *Id.*

40. *Id.* at 1449-50 (citing Press Release of the Department of Justice (Sept. 9, 1980)). "[The new INS] statement provides that an arriving alien will not be asked any questions regarding his sexual preference. If an alien 'makes an unambiguous oral or written admission of homosexuality' . . . or if a third person who is also presenting himself for inspection 'voluntarily states, without prompting or prior questioning, that an alien who arrived in the United States at the same time . . . is a homosexual,' the alien may be examined privately by an immigration officer and asked to sign a statement that he is homosexual. That statement forms the evidentiary basis for exclusion." *Id.*

41. *Id.* at 1450-51.

42. *Id.* at 1451. "We are . . . bound to decide according to a law made in the exercise of a power that is plenary." *See supra* note 25.

43. For a discussion of the *Hill* case, *see infra* accompanying text at note 65 *et seq.*

44. *In re* Longstaff, 716 F.2d at 1452 (dissent) (construing 8 U.S.C. § 1224, which provides that the PHS or civil surgeons *shall* conduct the physical and mental examinations of aliens excludable under Section 1182(a)(1)-(5), which includes "sexual deviation" and "psychopathic personality").

brought to trial for deportation on a charge that the alien had a "medical" basis for exclusion at the time of his admission to the United States.[45] The dissent stressed that it did not base its conclusion on an interpretation of current medical opinion, but noted adherence to *Boutilier's* holding that homosexuality is a term of art included in the phrase "psychopathic personality."[46] The majority and dissent differed not on whether Congress intended to exclude homosexuals, but on the proper procedure by which that exclusion may take place. The dissent argued that Congress must alter the Immigration Act's statutory scheme if it wishes to continue to exclude homosexuals in light of the Surgeon General's ban on PHS certification for homosexuality.[47]

V. HISTORICAL FRAMEWORK

A. History of the Statute[48]

The Immigration Act of 1917, the predecessor of current immigration law, denied entry to "persons of constitutional psychopathic inferiority" and to persons certified by an examining physician to be "mentally . . . defective."[49] The PHS and INS classified homosexuals as constitutional psychopathic inferiors and/or mental defectives,

45. *Id.* "[M]edical conditions that allegedly existed at the time of presumably lawful admission could later be administratively misused to deport persons unpopular in actuality for non-medical reasons. Thus I believe that Congress intended the medical certification procedure to be interposed as an important safeguard against abusive 'medical' exclusions of deportations by introducing the independent factor of a professional medical examination into this aspect of the exclusion and deportation process." *Id.*

46. *Id.* at 1452 (dissent) (citing *Boutilier*, 387 U.S. at 124).

47. *Id.* at 1453. "The importance of adhering to the congressional intent that only professional medical determinations be made, so as to avoid the improper non-medical administrative classification of a person as 'medically' excludable or deportable, requires that the courts respect these stringent statutory standards by not creating procedural exceptions only for certain 'medical' conditions." *Id.*

48. The first federal legislation regulating immigration was the Alien Enemies Act of June 25, 1798, ch. 58, 1 Stat. 570. The measure authorized the President to deport any alien that he deemed dangerous to the U.S. The law expired two years after its enactment. Congress enacted no new immigration statutes until the Act of March 3, 1875, ch. 141, 18 Stat. 477. The Act was the first of many to list excludable aliens. It excluded criminals and prostitutes and entrusted administration to the collectors of the ports. In 1917, Congress codified all previously enacted exclusion provisions and added to the inadmissable classes. Act of February 5, 1917, ch. 29, 39 Stat. 874. The First Quota Law of May 19, 1921, ch. 8, 42 Stat. 5, was passed, limiting the number of total aliens allowed to enter. On May 26, 1924, a Permanent Immigration Quota Act, ch. 190, 43 Stat. 153, was passed, which, in conjunction with the Act of 1917, governed U.S. immigration policy until the Immigration and Nationality Act of 1952. *See Immigration Laws, supra* note 2, at 4-13.

49. Ch. 29, 39 Stat. 874 (1917) (repealed 1952).

making them ineligible for admission.[50] When Congress instituted a comprehensive revision of immigration laws in 1947, it sought advice from the PHS with the intent of modernizing the medical portions of the law concerning medical exclusions.[51] In response, the PHS provided the drafters with definitions of clinical terms such as "psychopathic personality" and "mental defect."[52] These terms became the language of the Immigration Act.[53] Shortly before passage of the Act, homosexuality was classified by PHS physicians as a "psychopathic personality" and by the American Psychiatric Association (APA) as a "mental disorder."[54]

In 1965, Congress amended the Act to include "sexual deviation" as another basis for excluding aliens.[55] Significantly, at that time the medical profession no longer considered homosexuality a psychopathic personality but a sexual deviation.[56]

B. Boutilier v. INS

In 1967, the Supreme Court decided *Boutilier v. INS*[57] and held that the INS could deport an alien for homosexuality under the "psychopathic personality" section of the Immigration Act. Boutilier was

50. "Constitutional psychopathic inferior" was a contemporary medical classification for individuals "who show a lifelong and constitutional tendency not to conform to the customs of the group." They were people who "habitually misbehave, . . . have no sense of responsibility to their fellow men or to society as a whole . . . succumb readily to the temptation of getting easy money through a life of crime . . . [and] fail to learn by experience." State *ex rel.* Pearson v. Probate Court, 205 Minn. 545, 549, 287 N.W. 297, 300 (1939), *aff'd sub nom.* Minn. *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940) (quoting Draper, *Mental Abnormality in Relation to Crime*, 2 AM. J. MED. JURIS. 161, 163 (1939)).

51. H.R. REP. NO. 1365, 82d Cong., 2d Sess. 45-46 (1952), *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS 1653, 1699.

52. *Id.* at 46-48, *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS 1699-1702. An individual with psychopathic personality was defined as "a person whose behavior is predominantly amoral or antisocial and characterized by impulsive, irresponsible actions satisfying only immediate and narcissistic interests without concern for obvious and implicit social consequences accompanied by minimal outward evidence of anxiety or guilt." COMMITTEE ON PUBLIC INFORMATION, AMERICAN PSYCHIATRIC ASSOCIATION, A PSYCHIATRIC GLOSSARY 55 (1st ed. 1957).

53. Immigration Act, 8 U.S.C. § 1182(a)(4) (1976).

54. *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2d ed. 1968), *reprinted in* READINGS IN LAW AND PSYCHIATRY 54 (R. Allen, E. Ferster & J. Rubin eds. 1968) (hereinafter cited as DSM II).

55. Congress acted in response to Fleuti v. Rosenberg, 302 F.2d 652 (9th Cir. 1962), which found the term "psychopathic personality" to be unconstitutionally vague as applied to a particular homosexual alien.

56. *See* DSM II, *supra* note 54; Friedman, *Sexual Deviations*, 1 AMERICAN HANDBOOK OF PSYCHIATRY 589-96 (S. Arieti ed. 1959).

57. *Boutilier*, 387 U.S. 118.

deported following an INS order which was based on a PHS medical certificate stating that Boutilier was a "psychopathic personality, sexual deviate" at the time of his entry.[58] The certificate was issued in response to an affidavit in which Boutilier described his history of homosexuality. Boutilier brought his own private physicians to challenge the diagnosis.[59]

The Supreme Court held that the legislative history of the Act indicated "beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals such as petitioner."[60] The court discussed H.R. Rep. No. 1365: "It quoted at length, and specifically adopted, the Public Health Service report which recommended that the term 'psychopathic personality' be used to 'specify such types of pathologic behavior as homosexuality or sexual perversion.' "[61] The court found that the testimony of Boutilier's doctors was irrevelant because the PHS doctors found him to be afflicted with psychopathic personality.[62]

The *Boutilier* case is significant to *Longstaff* because the *Longstaff* majority ruled to exclude homosexual aliens regardless of any change in the medical definition of homosexuality based on *Boutilier's* ruling that "Congress used the phrase 'psychopathic personality' not in the clinical sense, but to effectuate its purpose to exclude from entry all homosexuals and other sex perverts."[63] The majority construed *Boutilier* to hold that the term "psychopathic personality" is "a term of art, not dependent on medical definition."[64]

C. Hill v. INS

In 1983, the Ninth Circuit held that the INS abused its discretion by excluding Hill on the grounds of sexual deviation without first obtaining a medical certificate.[65] The court found that, although the Act does not specifically call for a PHS certificate, the language and structure of the Act make it clear that Congress intended to require medical certification as a prerequisite to alien exclusion under section

58. *Id.* at 120.

59. *Id.*

60. *Id.* It is significant in this context that Boutilier had been PHS certified.

61. *Id.* at 122. The Court's analysis of the Immigration Act's legislative history makes clear that Congress' intent was attributed to PHS recommendations. *Id.* at 121-23.

62. *Id.* In effect, then, the Supreme Court deferred interpretation of section 212(a)(4) of the Immigration Act to the PHS.

63. *Id.*

64. *In re* Longstaff, 716 F.2d at 1450.

65. Hill v. INS, 714 F.2d 1470 (9th Cir. 1983).

1182(a)(4). The court first looked at 8 U.S.C. § 1222, which provides that aliens suspected of having a mental disability "shall be detained" before entry to allow for observation and examination. It found this section to be "convincing evidence that Congress intended that such examinations take place and be a prerequisite to exclusion on such grounds."[66] The court next examined 8 U.S.C. § 1224, which provides that "physical and mental examination of arriving aliens . . . shall be made by medical officers of the United States Public Health Service, who shall conduct all medical examinations and shall certify . . . any physical and mental defect . . . ." The court pointed out that "shall" is generally construed to denote a mandatory requirement.[67] It further found that it would violate congressional intent to allow INS officers, not medically trained, to determine psychopathic personality, sexual deviation or mental defect by interrogating aliens.

The court next construed 8 U.S.C. § 1226(d) to show that the language and structure of the Act evidence a medical certificate requirement.[68] This section specifies that if an alien afflicted with one of the diseases enumerated in section 1182(a)(6) is certified by a medical officer, then the decision to exclude the alien "shall be based solely upon such certification."[69] Finally, the court looked at 8 U.S.C. § 1225(a), which provides that "the inspection, other than the physical and mental examination . . . shall be conducted by immigration officers."[70] It interpreted this section to mean that immigration officers are not to perform physical and mental examinations by obtaining admissions. These examinations must be performed by doctors. The court found that, although any of these sections standing alone leaves some ambiguity, viewed as a whole they show a clear Congressional intent to establish a procedure for medical examinations and certification as a prerequisite to excluding aliens under the medical exclusions.[71]

The court then turned to the legislative history to corroborate its reading of the statute. It found that Congress organized section 1182 into two categories, medically determined and nonmedically determined exclusions. It further found that the PHS report adopted into

66. *Id.* at 1474.

67. *Id.* at 1475 (citing United States v. Machado, 306 F. Supp. 995, 997 (N.D. Cal. 1969)).

68. *Id.*

69. *Id.* (citing 8 U.S.C. § 1226(d)).

70. *Id.*

71. *Id.*

the Act referred to homosexuality as medically determined.[72] The report referred to "the diagnosis of homosexuality" and to the utility of "psychological tests [which] may be helpful in uncovering homosexuality of which the individual, himself, may be unaware."[73] The court reasoned that the report showed Congress and the PHS thought homosexuality was diagnosable, and that the PHS would make any medical determinations. The court turned to the House Report's procedures for exclusion, and found that the procedure explicitly required at least one qualified medical officer to make medical examinations.[74]

The court then focused on the INS interpretation of the statute. It cited the proposition that courts show great respect for a statute's construction given by the agents of the administrative agency charged with its administration.[75] The court took notice of the fact that prior to the change in the PHS policy regarding homosexual certification, the INS had consistently required a medical examination and certificate for alien exclusion on medical grounds.[76] Furthermore, it found that the INS, in deferring the manner of conducting the medical examinations, evidenced its understanding that this procedure is a medical matter outside of its expertise.[77]

The court also found that other courts have consistently interpreted the Immigration Act to require medical-examination procedures.[78] It found the most significant decision to be *United States ex rel. Johnson v. Shaughnessy*,[79] which held that an alien could not be excluded for mental defect without a medical examination.[80] It also relied on *United States ex rel. Wulf v. Esperdy*.[81] In that case, when

72. *Id.* at 1476. "The PHS recommendation that 'conditions related to the field of mental disorders and subject to mental determination, be grouped together . . .' was adopted."

73. *Id.* at 1701.

74. *Id.* at 1476-77.

75. *Id.* at 1477 (citing Udall v. Tallman, 380 U.S. 1, 16 (1982)).

76. *Id.*

77. *Id.* at 1478.

78. *Id.*

79. *Id.* (citing United States *ex rel.* Johnson v. Shaughnessy, 336 U.S. 806 (1949)).

80. The court was construing section 16 of the 1917 Immigration Act, which is substantially identical to 8 U.S.C. § 1224 of the current Act. Specifically, the court in *Shaughnessy* found that "[i]n order that further safeguards might be provided, Congress authorized the Surgeon General of the Public Health Service to prescribe additional regulations [continued by 8 U.S.C. § 1224 of the current Act] governing the procedure to be observed in the exercise of that Service's *exclusive authority over medical questions.*" *Shaughnessy*, 336 U.S. at 810 (emphasis supplied).

81. United States *ex rel.* Wulf v. Esperdy, 277 F.2d 537 (2d Cir. 1960).

the PHS diagnosed the alien as having tuberculosis, he sought to introduce evidence rebutting the certificate. The court held that the statute required a PHS certificate to exclude the alien.[82]

The *Hill* case is significant because it directly conflicts with the *Longstaff* case. While both cases agree that Congress intended to exclude homosexuals, they disagree as to whether a medical certificate is the sole procedure for that exclusion.[83]

VI. ANALYSIS

A. The Court's Method of Reasoning

Fundamentally, the court's choice came down to making one of two conclusions about congressional intent vis-á-vis the Immigration Act. Either Congress intended to require the INS to obtain a PHS certificate as a prerequisite to excluding lesbian and gay aliens or it did not. The court found that Congress intended to exclude these aliens, and that therefore the INS could use any procedure to facilitate that exclusion. Rather than addressing the issue of whether Congress mandated a procedure by which lesbian and gay aliens are to be excluded, the court consistently focused on Congress' intent to exclude these aliens.

The court first analyzed Longstaff's assertion of eligibility for naturalization because he was admitted in a procedurally regular fashion.[84] It pointed out that "[n]o person may be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of the Act."[85] The court found that "lawfully admitted" must mean compliance with "substantive legal requirements" and not "mere procedural regularity."[86] The court's analysis is an exercise in tautology. The real issue facing the court was whether the substantive law as embodied in the Act requires a congressionally mandated procedure for homosexual exclusion. Neglecting this issue, the court subtly set up a false opposi-

82. *Id.* at 538.

83. The two cases may be distinguishable. *Hill* relied on the Surgeon General's directive in holding that the INS no longer had a basis for excluding lesbian and gay aliens. *In re* Longstaff, on the other hand, relied on the illegality of Mr. Longstaff's entry at a time when the PHS conducted medical examinations for homosexuality. *See* Lauter, *Two U.S. Circuits Disagree On Admission of Gay Aliens*, NAT'L L. J., Oct. 17, 1983, at 2, col. 1.

84. *In re* Longstaff, 716 F.2d at 1441.

85. *Id.* (construing 8 U.S.C. § 1429 (1976)).

86. *Id.*

tion betweeen "substantive legal requirements" and "mere procedural regularity" as the basis for the rest of its analysis.

The court attempted to prove its theory by citing the deportation provisions of the Act. These provisions subject an alien to deportation if he or she meets both tests of being in "the classes of aliens excludable by the law"[87] and "in the United States in violation of [the Act]. . . ."[88] The court found that "[i]t would be paradoxical if a person who was ineligible to receive a visa and should have been excluded from admission became lawfully admitted simply because, by error, he was not excluded."[89] Again, the court's analysis merely begs the question. Does the statute require certain minimum procedural requirements for exclusion or does it not? If the Act requires a PHS certificate as a prerequisite to exclude lesbian and gay aliens, this procedure would be a substantive requirement of the Act and the alien would have been legally admitted. Whether the Act does in fact require a PHS certificate is the question to be decided. The court's distinction between procedure and substance only obfuscated the issue.

The court, having determined that Longstaff must prove he had been "lawfully admitted," turned to Longstaff's argument that he was not excludable at entry. The court relied on the Supreme Court decision in *Boutilier* to show that "Congress intended the phrase 'psychopathic personality' to include homosexuals . . . ."[90] The court's use of *Boutilier* at this point deflects attention from the real issue. Longstaff did not contest the proposition that "psychopathic personality" includes homosexuals. Congress' definition of this term as construed in *Boutilier* adds nothing to the analysis. The question is whether that exclusion must be preceded by the procedural requirement of a PHS certificate. In this regard the court failed to give *Boutilier* its proper precedential value. The *Boutilier* court effectively held that the PHS has the power to create working definitions that are binding on prospective entrants.[91] In upholding the deportation order, the court ruled that the medical reports prepared by *Boutilier* psychiatrists were irrelevant to the question of psychopathic personality because it found the PHS construction controlling.[92]

87. Immigration Act, 8 U.S.C. § 1251(a)(1) (1976).

88. Immigration Act, 8 U.S.C. § 1251(a)(2) (1976).

89. *In re* Longstaff, 716 F.2d at 1442.

90. *Id.* (citing *Boutilier*, 387 U.S. at 120).

91. *Boutilier*, 387 U.S. at 122. *See Boutilier Revisited*, *supra* note 7, at 365-66.

92. A pertinent rule of statutory construction requires that courts give deference to a contemporaneous construction placed on a statute, especially if such a construction has been in

The court discussed in detail the procedures by which administrative officials have examined and certified entering aliens.[93] Curiously, however, it summarily passed over those points most vital to ascertaining whether or not the administrative officials' statutory construction supports or precludes Longstaff's argument. For instance, the court claimed that "[p]resumably, if an applicant for a visa answered 'yes' to the psychopathic personality question, he would be denied a visa."[94] Similarly, it also claimed that "[t]here is no evidence in the record regarding the procedure followed when an alien who arrived in the United States with a visa affirmatively disclosed at that time that he was a homosexual."[95] Without any evidentiary basis, the court made assumptions that enabled it to hold that an alien's own admission should provide sufficient evidence for exclusion in the absence of a PHS certificate.

While the court admitted that the administrative practice has been to require a PHS certificate,[96] it rejected the import of this fact, alluding to the *Boutilier* court's finding of a "clear congressional intent to exclude persons who are homosexuals at the time they seek entry."[97] Furthermore, the court found that even absent *Boutilier*, "Congress declared its intention unmistakably by amending the statute to bar 'sexual deviates.' "[98] The court confused the issue as one of substance versus procedure. Congressional intent to exclude is not the crucial issue. The court's use of congressional intent at the point where it should be analyzing the importance of past administrative procedural practice serves only to mask the importance of that practice. The past INS practice is crucial. Prior to the Surgeon General's policy change whereby lesbian and gay aliens were no longer certified, the INS routinely relied on PHS certification for all medically-based exclusions.[99]

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accordance with judicial decisions acquiesced in Norwegian Nitrogen v. U.S., 288 U.S. 294 (1933). For a discussion of judicial interpretation of medical-procedure requirements in the Immigration and Nationality Act, *see* Hill v. INS, 714 F.2d at 1478. "The courts have consistently interpreted the Act as setting up procedures for medical examination and certification that must be complied with."

93. *In re* Longstaff, 716 F.2d at 1445-47.

94. *Id.* at 1445.

95. *Id.* at 1446.

96. *Id.* "Apparently the administrative practice has been to exclude for homosexuality only those persons for whom a certificate was issued."

97. *Id.* at 1447.

98. *Id.*

99. *See Hill*, 714 F.2d at 1477. "Since the adoption of the 1952 Act and continuing consistently up until the INS' recent change of heart, it has required a medical examination

The court assumed that it "need not search committee reports or read legislative debates to learn the congressional mandate."[100] The court need not search for Congress' intent to exclude lesbians and gays, but it should ascertain whether Congress mandated a procedure for that exclusion. Both the House and the Senate published reports accompanying the passage of the Immigration Act.[101] The Senate report standing alone appears to support a total exclusion of lesbian and gay aliens. It stated that although the PHS term "psychopathic personality" was "sufficiently broad" to include these aliens, "[t]his change in nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates."[102] The House Report, however, specifically adopted the definition of psychopathic personality supplied by the PHS.[103] The PHS relied on contemporary medical definitions for its own definition.[104] The PHS report stated that the label "*frequently* . . . include[s] those groups of individuals suffering from . . . sexual deviation."[105] The legislative history, though lacking unequivocal support for or against total exclusion, lends strong support to a medical interpretation of the section under consideration.

The Immigration Act as a whole clearly separates medical from nonmedical criteria for alien exclusion. The 1952 Act lists certain classes of aliens that shall be excluded from admission to the United States.[106] The first seven classes of excludable aliens describe physical and mental conditions.[107] The pertinent subsection in this case ex-

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and certificate for exclusion on medical grounds." *See also In re* Longstaff, 716 F.2d at 1446. "Apparently the administrative practice has been to exclude for homosexuality only those persons for whom a certificate was issued."

100. *In re* Longstaff, 716 F.2d at 1447.

101. H.R. REP. NO. 1365, 82d Cong., 2d Sess. 45-56 (1952), *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS 1653, 1699 [hereinafter cited as H.R. REP. NO. 1365]; S. REP. NO. 1137, 82d Cong., 2d Sess. 9 (1952) [hereinafter cited as S. REP. NO. 1137].

102. S. REP. NO. 1137, *supra* note 101, at 9.

103. H.R. REP. NO. 1365, *supra* note 101, at 46-48.

104. *Id.*

105. Public Health Service, Report on the Medical Aspects of H.R. 2379, in H.R. REP. NO. 1365, 82d Cong., 2d Sess. 46-47 (1952), *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS 1653, 1700.

106. Immigration Act, 8 U.S.C. § 1182(a) (1976).

107. *Id.* "(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: (1) Aliens who are mentally retarded; (2) Aliens who are insane; (3) Aliens who have had one or more attacks of insanity; (4) Aliens afflicted with psychopathic personality, or sexual deviation, or a mental defect; (5) Aliens who are narcotic drug addicts or chronic alcoholics; (6) Aliens who are afflicted with any dangerous contagious disease; (7) Aliens not comprehended

cludes "[a]liens afflicted with psychopathic personality, epilepsy, or a mental defect."[108] Congress neither defined those terms in the Act, nor did it specifically segregate the physical and mental conditions from the other excludable criteria. Nevertheless, other portions of the Act imply a clear congressional intent to treat the physical and mental conditions as medical conditions deserving different procedures for exclusion than nonmedical criteria. For example, section 234 requires that "[t]he physical and mental examination of arriving aliens . . . shall be made by medical officers of the United States Public Health Service, who shall conduct all medical examinations and shall certify . . . any physical and mental defect or disease observed by such medical officers in any such alien."[109] The section further specifies that PHS medical officers with special training in the diagnosis of insanity and mental defects "shall be provided with suitable facilities for the detention and examination of all arriving aliens who it is suspected may be excludable under paragraphs (1), (2), (3), or (5) of section 212(a)."[110] Finally, this section provides that any certified alien under paragraphs (1) through (5) "may appeal to a board of medical officers of the United States Public Health Service."[111] The next two sections also imply a distinction between medical and nonmedical criteria for alien exclusion. In section 235, Congress provided that "[t]he inspection, *other than the physical and mental examination*, of aliens . . . shall be conducted by immigration officers."[112] Finally, section 236 provides that if an alien is certified under these medical exclusions, "the decision of the special inquiry officer shall be based solely upon such certification."[113]

The Justice Department has also specifically recognized the distinction between medical and nonmedical criteria for alien exclusion. The departmental regulations affecting the INS refer to "medical grounds for eligibility" and cite to section 212(a)(1) through (6) of the

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within any of the foregoing classes who are certified by the examining surgeon as having a physical defect, disease, or disability, when determined by the consular or immigration officer to be of such a nature that it may effect the ability of the alien to earn a living, unless the alien affirmatively establishes that he will not have to earn a living." *Id.*

108. Immigration Act, 8 U.S.C. § 1182(a)(4) (1976). Congress amended the subsection in 1965. "Sexual deviation" now replaces "epilepsy." *See supra* note 12.

109. Immigration Act, 8 U.S.C. § 1224 (1976).

110. *Id.*

111. *Id.*

112. Immigration Act, 8 U.S.C. § 1225(a) (1976) (emphasis added).

113. Immigration Act, 8 U.S.C. § 1226(d) (1976).

Immigration Act.[114] Seen in this light, Congress intended the physical and mental exclusions to be considered as a separate, medical category.

When the court did finally address the central question of whether a PHS certificate is required, it again reduced the analysis to mere tautology: "If only certification of homosexuality by a medical officer could warrant exclusion of homosexuals, then the Surgeon General would have effectively checkmated Congressional policy."[115] Congressional policy should be that which the court seeks to discover. The court's unstated premise was that the PHS should be without power to influence congressional policy in this area. Its assumption of this premise, however, ignored the role played by the PHS.

If the court had looked at the evidence, it would have concluded that the PHS had the power to change the congressional policy. The administrative and judicial decisions have consistently required a PHS certificate to exclude these aliens.[116] Furthermore, Congress has consistently relied on PHS formulations in developing its immigration policy.[117] The PHS, with the concurrence of the courts and the INS, classified lesbian and gay aliens as psychopathic inferiors and/or mental defectives, making them ineligible for admission under the 1917 Immigration Act.[118] When Congress sought to revise the immigration laws in the late forties, it sought PHS advice and formulations in an effort to modernize the medical portions of the Immigration Act.[119]

The PHS has regularly devised its own definitions in the Immigration Act for terms which it has the responsibility to enforce.[120] Apparently these definitions have never been reviewed by the courts, the INS, or Congress.[121] For instance, the Immigration Act's exclusion of aliens afflicted with epilepsy has been interpreted by the PHS to apply only to those aliens with idiopathic epilepsy. Idiopathic epilepsy encompasses only convulsive disorders of unknown origin, not those traceable to known causes.[122] Similarly, the PHS must certify

114. 22 C.F.R. § 42.91(1-6) (1985). The regulations explicitly bind a consular officer to the PHS determination.

115. *In re* Longstaff, 716 F.2d at 1447.

116. *See supra* notes 76-82 and accompanying text.

117. *See supra* notes 51-54 and accompanying text.

118. *See Boutilier Revisited*, *supra* note 7, at 361-62.

119. *Id.* at 362-63.

120. *Id.* at 384.

121. *Id.*

122. *Id.*

those aliens with a dangerous contagious disease. Originally, the PHS included nineteen diseases. In 1961 the list grew to twenty-one. In 1970, that list was reduced to fourteen ailments.[123]

Under the circumstances, the court should not have focused on whom Congress intended to exclude when it enacted the statute. The central question should have been whether Congress mandated a procedure to exclude lesbian and gay aliens, and whether the PHS had the authority to reshape congressionally-mandated definitions.

B. The Court's Application of Statutory Construction Rules

The court found that, although a medical certificate is conclusive evidence that an alien is to be excluded, "neither the premise nor the inference leads to the conclusion that non-excludability is conclusively established by the absence of any examination at all."[124] The court assumed that the procedural protections built into the statute merely demonstrate a congressional intent that only competent evidence of medical excludability would be admissable.[125]

The court's assumptions were not based on rules of statutory construction. One such rule requires that every word, sentence and provision should be given effect because it was intended for some useful purpose.[126] Section 1226(d) of the Act provides in pertinent part that "[i]f a medical officer . . . has certified . . . that an alien is afflicted . . . with any mental disease, defect, or disability *which would bring such alien within any of the classes excluded* . . . [under the medical exclusions] of this title, the decision of the special inquiry officer shall be based solely upon such certification."[127] It is the certificate that brings an alien within one of the medical classes that may be excluded, and PHS certification is the sole evidence admissible at a hearing. Although the clause is susceptible to the court's interpretation, when taken together with the section 1224 certification requirement, Congress' intention becomes clearer.[128] Congress requires PHS

123. *Id.* at 384-85.

124. *In re* Longstaff, 716 F.2d at 1448.

125. *Id.*

126. *See, e.g.*, Pac. Gas & Elec. Co. v. Sec. & Exch. Comm'n, 139 F.2d 298, 307 (9th Cir.), *aff'd*, 324 U.S. 890 (1943).

127. Immigration Act, 8 U.S.C. § 1226(d) (1976) (emphasis added).

128. Immigration Act, 8 U.S.C. § 1224 (1976). "The physical and mental examination of arriving aliens . . . shall be made by medical officers of the United States Public Health Service, who shall conduct all medical examinations and shall certify . . . any physical and mental defect or disease observed by such medical officers in any such alien."

certification as the sole exclusion procedure.[129]

Another rule of construction states that where no exceptions are made to the general language of the statute, it will be presumed that no exceptions were intended.[130] The rule of *expresso unius est exclusio alterius* states that where the statute specifies performance of certain things by specified means or a particular manner, it implies that the performance shall not be done in another manner.[131] These prescriptions fly in the face of the court's presumption that the absence of a PHS certificate did not prevent exclusion of lesbian and gay aliens.[132]

In holding that Congress intended to allow any competent evidence of medical excludability, the court acknowledged that in *Boutilier* and other cases the courts relied solely on the medical certificates. Nevertheless, the court felt that these decisions "do not establish that the certificate is indispensable."[133] Rules of statutory construction require great deference to these judicial decisions.[134]

In response to the policy change whereby the PHS stopped certifying lesbian and gay aliens, the INS changed its policy to exclude these aliens if they or a third person voluntarily state that an alien arriving in the United States is a homosexual. A signed statement avowing homosexuality forms the evidentiary basis for exclusion. According to the court, "the administrative agency charged with enforcement of the Act has interpreted it as not requiring a medical certificate as a condition for the exclusion of homosexuals. This interpretation is entitled to deference."[135] The court misapplied the pertinent rule of statutory construction. Statutes are to be construed in light of circumstances existing at the time of the statute's enactment, not in light of subsequent developments.[136] More specifically, rules of

129. Section 1224 in pertinent part states that PHS physicians "shall conduct all medical examinations and shall certify . . . any physical and mental defect." Immigration Act, 8 U.S.C. § 1224 (1976).

130. *See, e.g.*, Lynch v. Alworth-Stevens Co., 294 F. 190, 194 (8th Cir.), *aff'd*, 267 U.S. 364 (1923).

131. Knapp-Monarch Co. v. Comm'r, 139 F.2d 863, 864 (8th Cir. 1944) (citing Botany Worsted Mills v. United States, 278 U.S. 282 (1928)); Raleigh & Gaston R. Co. v. Reid, 80 U.S. 269, 270 (1872); Martin v. Comm'r, 61 F.2d 942, 944 (2d Cir. 1932); Jones v. H.D. & J.K. Crosswell, Inc., 60 F.2d 827, 828 (4th Cir. 1932). *See also* Continental Casualty Co. v. United States, 314 U.S. 527 (1942) (holding that an affirmative description of powers granted implies a denial of nondescribed powers).

132. *In re* Longstaff, 716 F.2d at 1448.

133. *Id.*

134. *See supra* note 92 and accompanying text.

135. *In re* Longstaff, 716 F. 2d at 1450.

136. Fogarty v. U.S., 340 U.S. 8 (1950).

statutory construction require courts to give weight to the *contemporaneous construction*[137] of officers and departments charged with the duty of executing the statute.[138] Furthermore, when the language of a statute is uncertain, the construction placed on it by contemporaries should not be overturned except for cogent reasons. This is especially true where the statute has been in force for a substantial period of time and the contemporaneous construction has been accepted during that time.[139] Here, not only did the INS enforce the present statute for almost thirty years by requiring a PHS certificate, but it enforced the original immigration statute on which the present one was modeled in the same manner.[140]

The court concluded that because Congressional power over immigration and naturalization is plenary, only Congress can change its policy. Ironically, the court used this basis to find that the new INS policy was a legitimate exercise of its power. It is clear however that, while the PHS has the power to grant or deny certification to those aliens arguably within a medical basis for exclusion, the INS is constrained by the provisions of the Immigration Act to require PHS certification as a prerequisite to alien exclusion on medical grounds.

VII. CONCLUSION

Exclusion of lesbian and gay aliens can no longer be considered anything but arbitrary.[141] The history, language and structure of the

137. "Contemporaneous construction" within the meaning of the rule is the construction that executive officers and departments give a statute at or near the time of its enactment. 82 C.J.S. *Statutes* § 359 (1953). The "contemporaneous construction" doctrine has long been specifically applied to immigration and naturalization. *See, e.g.*, Wong Yang Sung v. McGrath, 339 U.S. 33 (1949).

138. Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315 (1938) (citing Fox v. Standard Oil Co., 294 U.S. 87, 96 (1934)). For a discussion on administrative practice in this area, see *In re* Longstaff, 716 F.2d at 1445 & n. 43. *See also Hill*, 714 F.2d at 1477-78; *Boutilier Revisited, supra* note 2, at 379.

139. Dismuke v. U.S., 297 U.S. 167, 174 (1935). *See also* Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, 315 (1933).

140. *See In re* Longstaff, 716 F.2d at 1444 & n. 28.

141. One commentator has argued that in a case such as this one, the results can only be attributable to what he calls "judicial homophobia." J. Dressler, *Judicial Homophobia: Gay Rights Biggest Roadblock*, 5 CIV. LIB. REV. 19 (1979). This same commentator points out that "[i]t is the goal of the American judiciary to be , as Felix Frankfurter put it, 'as free, impartial, and independent as the lot of humanity will admit.' Such a goal is especially important when civil liberties or rights are at stake." *Id.* at 20. Here nothing less is at stake than one's ability to become a citizen of this nation. This court relegates to a footnote what is likely the essential basis for its holding: "[I]t is evident that moral as well as medical reasons underlay the congressional decision to exclude homosexuals." *In re* Longstaff, 716 F.2d at 1450. In making

Act clearly point to a medical basis for excluding lesbian and gay aliens. That basis is no longer tenable in light of the changing medical opinions toward homosexuality that culminated in the Surgeon General's change of policy regarding lesbian and gay immigration. Congress delegated to the Surgeon General the procedural basis for medical exclusions. Congress is free to change the procedures for excluding lesbian and gay aliens. It is imperative that the judiciary adopt sound judgment and clear headed reasoning over ignorance and prejudice.

Mickey Wheatley

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this pronouncement the court neglects to offer any evidence to substantiate its rationalization. Perhaps it is the court that finds a moral rationale for excluding these aliens. The court should not substitute its own morality for that of Congress. Even if Congress did have moral reservations about lesbian and gay aliens, it realized that any exclusions must be achieved under the strictest scrutiny by medical and psychiatric professionals.