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Amnesty and Affirmative Misconduct by the Executive Branch: Does INS v. Pangilinan Leave Room for Equitable Remedies under the Immigration Reform and Control Act of 1986

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"Amnesty" and Affirmative Misconduct by the Executive Branch: Does *INS v. Pangilinan* Leave Room for Equitable Remedies Under the Immigration Reform and Control Act of 1986?

I. INTRODUCTION

The United States Supreme Court has upheld Congress' plenary power over immigration and naturalization for over one hundred years.[1] During this period, Congress enacted a variety of immigration-related statutes and delegated significant administrative authority over immigration matters to certain executive agencies.[2] The present legislative and regulatory scheme limits immigration through a system of quotas[3] and individual qualification requirements.[4] These quotas and qualification requirements restrict general immigration to 270,000 immigrants per year.[5] As a result, permanent legal resident status, and subsequent naturalization,[6] eludes many aliens who desire to live in the United States.

Some aliens, however, are fortunate. For varying policy reasons, Congress has historically enacted preferential residency statutes, allowing certain eligible aliens to bypass the standard residency requirements in the naturalization process. For instance, in 1942, Congress

1. *See Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1312 (1983) [hereinafter *Immigration Policy*]. The Supreme Court first articulated Congress' authority to establish substantive conditions of entry in The Chinese Exclusion Case, 130 U.S. 581 (1889).

2. C. GORDON & S. MAILMAN, IMMIGRATION LAW AND PROCEDURE § 1.03 (1988).

3. *Id.* § 1.03[2][e]. Federal law limits general immigration to 270,000 immigrants per year. *Id.* § 1.03[2][e][ii]. Further, no more than 20,000 immigrants may be lawfully admitted from a single foreign country. *Id.*

4. *Id.* § 1.03[2][d]. Individual aliens may be barred for several reasons, including: (1) improper documentation upon entry; (2) poor health; (3) economic insufficiency; (4) prior criminal or moral offenses; (5) prohibited political affiliations; (6) draft evasion; (7) illiteracy; (8) infancy; and (9) physical or mental disability. *Id.* § 1.03[2][d][ii]-[vii].

5. *Id.* § 1.03[2][e].

6. Ordinarily, naturalization is only available to those aliens who hold permanent resident status in the United States for at least five years and exhibit good moral character. *Id.* § 1.03[9][e].

passed the Second War Powers Act[7] ("1942 Act"), which amended the Nationality Act of 1940[8] to make United States citizenship more readily available to foreign nationals serving in the United States armed forces during World War II.[9] In another statute, Congress provided preferential immigration status for certain alien children of parents who were United States citizens or lawful permanent residents.[10] Most recently, Congress passed the Immigration Reform and Control Act of 1986 ("IRCA"),[11] which creates an amnesty program whereby undocumented aliens may enjoy permanent resident status upon satisfaction of certain conditions.[12]

II. BACKGROUND OF THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

A. The Scope of Illegal Immigration Prior to the IRCA

As noted above, hundreds of thousands of aliens legally immigrate to the United States every year.[13] Many more aliens illegally enter the United States. Exact statistics on the total number of undocumented immigrants are probably impossible to obtain. However, the United States Border Patrol typically apprehends over one million undocumented immigrants each year.[14] In addition to those immigrants who enter the United States illegally, many others legally enter on non-immigrant visas but proceed to live and work in the United

7. Second War Powers Act, 8 U.S.C. §§ 1001-1006 (1942).

8. Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137 (1940).

9. INS v. Pangilinan, 108 S. Ct. 2210, 2213 (1988). The 1942 Act provided that aliens, while on active military duty, could bypass various residency, literacy, and education requirements prior to naturalization. In passing the 1942 Act, Congress sought to make naturalization possible for many veterans who were ineligible under the standard immigration and naturalization laws. *Id.*

10. 8 U.S.C. § 101(b) defined a child as "an unmarried person under 21 years of age who is a legitimate or legitimated child, a stepchild, an adopted child, or an illegitimate child seeking preference by virtue of his relationship with his natural mother." Fiallo v. Bell, 430 U.S. 787, 789-90 (1977).

11. Immigration Reform & Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.).

12. *See id.* § 245A(b), 8 U.S.C. § 1255a(b) (Supp. 1989).

13. *See supra* note 5 and accompanying text.

14. *Immigration Control and Legalization Amendments Act of 1986: Report on H.R. 3810 Before the Committee on the Judiciary*, H.R. REP. No. 682, 99th Cong., 2d Sess., at 47-48 (1986) [hereinafter *Judiciary Committee Report*]. The Immigration and Naturalization Service ("INS") projected that the Border Patrol would apprehend approximately 1.8 million undocumented aliens in 1986. In 1985, the Border Patrol apprehended approximately 1.2 million undocumented aliens. According to the INS, the Border Patrol apprehended over one million persons between 1976 and 1985. *Id.*

States in violation of their visa restrictions.[15]

Most undocumented aliens come from countries plagued by enormous population growth and few employment opportunities.[16] Accordingly, the vast majority of undocumented aliens immigrate to the United States for one simple reason—to find a job.[17] Many immigrants come to the United States believing that the economic opportunities in the United States are better than in their homelands.

In formulating the IRCA, Congress realized that these immigrants come to the United States with the highest of motives—to seek a better life for themselves and their families.[18] Congress further recognized that many undocumented immigrants have lived in the United States for several years and have become integrated parts of their communities.[19] Over time, these people have contributed—among other things—their talent, labor and tax dollars to the United States.[20]

B. Congressional Concerns

The steady arrival of large numbers of undocumented immigrants in the United States gave rise to several public policy concerns in Congress. First, Congress feared that the U.S. economy may be unable to continue absorbing a large influx of unskilled workers.[21] Second, Congress was worried that the influx of undocumented workers would harm minority groups already living in the United States who typically compete with undocumented aliens for unskilled employment.[22] Third, Congress noted the resentment that virtually unchecked immigration could generate against all immigrants—whether documented or not.[23]

Along with the above concerns, there was also some general con-

15. Ayuda, Inc. v. Meese, 687 F. Supp. 650, 652 (D.D.C. 1988), *rev'd sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989). This group commonly consists of aliens who work in violation of a student or work-restricted visa and aliens who fail to file requisite annual or quarterly alien administration reports. *Id.* at 674.

16. *Judiciary Committee Report*, *supra* note 14, at 47.

17. *Id.* at 46-47.

18. *Id.* at 46.

19. *Id.* at 49.

20. *Id.* The Judiciary Committee report also notes that undocumented immigrants have contributed to the United States in a "myriad of ways." *Id.*

21. *Id.* at 47. The Judiciary Committee report expressly noted that the unemployment rate stood at approximately seven percent when the IRCA was debated. *Id.*

22. *Id.*

23. Although the history of race relations in the United States is well documented and need not be discussed here, the Judiciary Committee report implies that racial tension would

cern about the dilution of United States sovereignty. Specifically, the House Judiciary Committee, expressing concern that the United States was quickly losing control over its own borders, reiterated the following comments made by former Attorney General Meese: "[r]egaining control of our borders is an essential goal of any true immigration reform. We cannot fairly speak of ourselves as a sovereign nation if we cannot responsibly decide who may cross our borders . . . ."[24]

Finally, Congress expressed concern that the existing situation harms the undocumented immigrants themselves.[25] It reasoned that, due to their undocumented status, these immigrants live in constant fear of persecution and abuse.[26] Consequently, undocumented aliens typically do not seek help when their rights are violated by unscrupulous employers or landlords.[27] In fact, many are even reluctant to seek the most basic medical attention for themselves and their families.[28]

C. Reforms Provided by the IRCA

Congress passed the IRCA in response to these concerns.[29] After extensive congressional debate,[30] Congress enacted the IRCA in an attempt to restore order and integrity to United States immigration matters. As passed, the IRCA is essentially a compromise between two competing policy goals. First, Congress passed the IRCA with compassion for those undocumented aliens already present in the United States, who have developed strong community ties and who have made significant contributions to the United States.[31] Congress recognized that continuing to ignore this hidden underclass would harm both the undocumented immigrants and the United States.[32]

Second, the IRCA reflects the government's desire to prospec-

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be heightened between existing minority groups and new immigrants competing for the same jobs. *See id.* at 46-48.

24. *Id.* at 46.

25. *Id.*

26. *Id.* at 49.

27. *Id.* Undocumented aliens are even afraid to seek help if victimized by crime. *Id.* Due to this fear, law enforcement is more difficult in areas with high concentrations of illegal immigrants.

28. *Id.* at 49.

29. *See generally Judiciary Committee Report, supra* note 14.

30. *Id.* at 49.

31. *Id.*

32. *Id.*

tively control illegal immigration.[33] With limited resources at its disposal, Congress sought the most efficient and effective method of controlling illegal immigration.[34] Congress rejected the option of interior enforcement of existing immigration laws and mass deportation of aliens in violation of these laws. Indeed, Congress determined that the expulsion of undocumented aliens would waste significant manhours and prove very costly.[35]

Taking a more realistic approach, Congress understood that relaxed enforcement of prior immigration laws was the primary reason that undocumented aliens were able to enter the United States.[36] Congress reasoned that, by diverting government resources away from attempting to deport undocumented aliens already in the United States, federal officials could concentrate on preventing new flows of undocumented aliens from entering the United States.[37] In light of these two competing goals, Congress decided that—for one time only—the federal government should liberally grant amnesty to undocumented aliens who meet certain conditions.[38] President Reagan subsequently signed the IRCA into law on November 6, 1986.[39]

D. Key Statutory Provisions of the IRCA's Amnesty Program

The IRCA's major amnesty program is divided into two tiers.[40] Initially, qualified undocumented aliens may apply for temporary res-

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33. *Id.* at 46.

34. *Id.*

35. *Id.* The Judiciary Committee expressly noted that "the alternative of intensifying interior enforcement or attempting mass deportations would be both costly, ineffective, and inconsistent with our immigrant heritage." *Id.*

36. *Id.*

37. *Id. See also* Catholic Social Services, Inc. v. Meese, No. 86-2907, 1987 WL 61013 (9th Cir. Apr. 3, 1987) (WESTLAW, CTA9 database), *vacated*, 820 F.2d 289 (9th Cir. 1987). Although this ruling was subsequently vacated, Circuit Judge Anderson properly summarized Congress' intent in formulating the IRCA when he said:

> the purpose of the IRCA is to control our border to target its enforcement efforts. To do this, the INS is attempting to concentrate on stemming new flows of undocumented aliens attempting to cross the United States borders rather than ferreting out aliens in the interior who may have lived within the country for some time.

38. *Judiciary Committee Report*, *supra* note 14, at 49. The Judiciary Committee expressly noted that "a one-time legalization program is a necessary part of an effective enforcement program and . . . a generous program is an essential part of any immigration reform legislation." *Id.*

39. Ayuda, Inc. v. Meese, 687 F. Supp. 650, 651 (D.D.C. 1988), *rev'd sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989).

40. *See* Immigration Reform & Control Act § 245A(a)-(b), 8 U.S.C. § 1255a(a)-(b) (Supp. 1989).

ident status.[41] In order to qualify for this lawful temporary resident status, alien applicants must satisfy four statutory prerequisites. First, aliens must timely apply for legal status.[42] Second, aliens must have entered the United States prior to January 1, 1982, and unlawfully resided in the United States continuously since that date.[43] This second IRCA provision adds that either: (1) an alien's non-immigrant visa—such as a travel or student visa—must have expired before January 1, 1982; or (2) the alien must have violated the terms of his non-immigrant visa *and* the alien's unlawful status must have been "known to the [g]overnment" as of January 1, 1982.[44] Third, the IRCA's temporary resident provisions require that an alien must have been physically present in the United States continuously since November 6, 1986.[45] Fourth, all aliens must demonstrate that they are admissible under general immigration requirements.[46]

Even after satisfying the above four requirements and obtaining temporary resident status, an alien's road to citizenship under the

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41. *Id.* § 245A(a), 8 U.S.C. § 1255a(a).

42. Section 245A(a)(1)(A) provides than an "alien must apply for [amnesty] during the 12-month period beginning on a date (not later than 180 days after [November 6, 1986]) designated by the Attorney General." *Id.* § 245A(a)(1)(A), 8 U.S.C. § 1255a(a)(1)(A). Pursuant to the IRCA, the Attorney General designated that the 12-month period would begin on May 5, 1987 and end on May 4, 1988. 65 INTERPRETER RELEASES 818 (Aug. 15, 1988).

43. Section 245A(a)(2)(A) provides that an "alien must establish that he entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date and through the date the application is filed under this subsection." Immigration Reform & Control Act § 245A(a)(2)(A), 8 U.S.C. § 1255a(a)(2)(A) (Supp. 1989).

44. Section 245A(a)(2)(B) provides:

> In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the Government as of that date.

Id. § 245A(a)(2)(B), 8 U.S.C. § 1255a(a)(2)(B).

45. Section 245A(a)(3)(A) provides that an "alien must establish that the alien has been continuously physically present in the United States since November 6, 1986." *Id.* § 245A(a)(3)(A), 8 U.S.C. § 1255a(a)(3)(A).

46. Section 245A(a)(4) provides:

> The alien must establish that he—
>
> (A) is admissible to the United States as an immigrant . . .
>
> (B) has not been convicted of any felony or of three or more misdemeanors committed in the United States,
>
> (C) has not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinion, and
>
> (D) is registered or registering under the Military Selective Service Act . . . if the alien is required to be so registered under the Act.

Id. § 245A(a)(4), 8 U.S.C. § 1255a(a)(4).

IRCA is not complete. After a certain period of time,[47] temporary residents may seek adjustment to permanent resident status.[48] As previously noted, permanent resident status is usually a prerequisite to obtaining United States citizenship.[49] Temporary residents must satisfy four requirements to gain lawful permanent resident status under the IRCA. First, aliens must timely apply for permanent resident status.[50] Second, aliens must have continuously resided in the United States during their period of temporary residence.[51] Third, aliens must show that they are admissible as immigrants.[52] Fourth, aliens must possess basic citizenship skills.[53]

E. The Controversy

Pursuant to the IRCA,[54] the United States Attorney General—through the Immigration and Naturalization Service ("INS")—issued

47. *See id.* § 245A(b)(1)(A). This section requires applicants for permanent residency under the IRCA to seek adjustment during a one-year period "beginning with the nineteenth month that begins after the date the alien was granted such temporary resident status." *Id.* § 245A(b)(1)(A), 8 U.S.C. § 1255a(b)(1)(A).

48. *See id.* § 245A(b), 8 U.S.C. § 1255a(b).

49. *See supra* note 6 and accompanying text.

50. Section 245A(b)(1)(A) provides that an "alien must apply for such adjustment during the one-year period beginning with the nineteenth month that begins after the date the alien was granted such temporary resident status." Immigration Reform & Control Act § 245A(b)(1)(A), 8 U.S.C. § 1255a(b)(1)(A) (Supp. 1989).

51. Section 245A(b)(1)(B)(i) provides that an "alien must establish that he has continuously resided in the United States since the date the alien was granted such temporary resident status." *Id.* § 245A(b)(1)(B)(i), 8 U.S.C. § 1255a(b)(1)(B)(i).

52. Section 245A(b)(1)(C) provides that an "alien must establish that he (i) is admissible to the United States as an immigrant . . . and (ii) has not been convicted of any felony or three or more misdemeanors committed in the United States." *Id.* § 245A(b)(1)(C), 8 U.S.C. § 1255a(b)(1)(C).

53. Section 245A(b)(1)(D) lists several basic citizenship skills which are required to obtain permanent resident status under the IRCA. According to this provision,

> (i) The alien must demonstrate that he either—
> (I) meets the requirements of section 312 (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States), or
> (II) is satisfactorily pursuing a course of study (recognized by the Attorney General) to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States.
> (ii) The Attorney General may, in his discretion, waive all or part of the requirements of clause (i) in the case of an alien who is 65 years of age or older.
> (iii) In accordance with regulations of the Attorney General, an alien who has demonstrated under clause (i)(I) that the alien meets the requirements of section 312 may be considered to have satisfied the requirements of that section for purposes of becoming naturalized as a citizen of the United States under title III.

Id. § 245A(b)(1)(D), 8 U.S.C. § 1255a(b)(1)(D).

54. *See id.* § 245A(g)(1), 8 U.S.C. § 1255a(g)(1).

several regulations in an attempt to implement the IRCA.[55] In some instances, however, the INS improperly interpreted certain provisions of the IRCA. As a result, many undocumented aliens were actually discouraged from applying for legalization under the IRCA's temporary residence requirements.[56] A great deal of litigation has recently arisen over the power of the judiciary to forge equitable remedies where INS regulations fail to properly execute the enabling provisions of the IRCA.[57]

This Comment first examines the reasoning behind two recent federal cases which attempted to forge equitable remedies after finding that undocumented aliens were injured by the INS's faulty interpretation of the IRCA. This Comment then surveys the history of judicial involvement in the field of immigration and naturalization law, contrasting this history with a recent United States Supreme Court decision, *INS v. Pangilinan*.[58] The government argues that the *Pangilinan* case forecloses all equitable relief against the executive branch in immigration and naturalization law. However, this Comment distinguishes *Pangilinan* from the great weight of judicial authority and demonstrates that this case does not foreclose the equitable remedy of extending the filing deadline for temporary residence under the IRCA when the INS fails to properly implement the statute.

III. CASES WHERE ALIENS HAVE SUCCESSFULLY CHALLENGED THE INS REGULATIONS UNDER THE IRCA

In two recent cases, federal courts determined that INS regulations failed to properly execute Congress' express public policy as set out in the IRCA.[59] In each of these cases, the respective district courts found that the INS regulations were inconsistent with the IRCA's plain language or the express legislative history behind the

55. *See, e.g.*, 8 C.F.R. § 245a.1(d) & (g) (1989).

56. For example, the INS's improper regulations defining when an amnesty applicant is likely to become a "public charge" under the IRCA may impact as many as 56,000 persons. 66 INTERPRETER RELEASES 876 (Aug. 7, 1989).

57. *See* Ayuda, Inc. v. Meese, 687 F. Supp. 650 (D.D.C. 1988), *rev'd sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989). *See also* Zambrano v. INS, No. S-88 Civ. 455 EJG (E.D. Cal. Aug. 9, 1988); League of United Latin American Citizens v. INS, No. 87 Civ. 4757 WDK (C.D. Cal. Aug. 12, 1988); Catholic Social Services, Inc. v. Meese, 685 F. Supp. 1149 (E.D. Cal. 1988), *enforcing* No. S-86 Civ. 1343 LKK (E.D. Cal. Aug. 11, 1988).

58. 108 S. Ct. 2210 (1988).

59. *See Ayuda*, 687 F. Supp. at 650. *See also Catholic Social Services*, 685 F. Supp. at 1149.

IRCA.[60]

A. The Ayuda *Case*

The temporary residence provisions of the IRCA require undocumented aliens who apply for temporary resident status to establish that they have resided in the United States illegally since January 1, 1982.[61] In addition, those aliens who entered on non-immigrant visas must also establish that, either: (1) their period of authorized stay expired before January 1, 1982; or (2) they violated the terms of their visa and that their "unlawful status was known to the [g]overnment" as of January 1, 1982.[62]

Before discussing the legal aspects of the INS's regulation that purported to define the statutory phrase "known to the government,"[63] some factual background on the agency's drafting process is necessary. In March 1987, the INS issued public notice that it intended to promulgate rules and regulations to administer the IRCA.[64] In this notice, the INS proposed a restrictive interpretation of the phrase "known to the government" which would require that an alien's illegal status be known to the INS, regardless of whether the alien's status was known to other federal agencies.[65] In response to the proposal, the INS received ninety-one comments addressing this issue.[66] Each response criticized the INS's restrictive interpretation and favored a broader view of the term "government" that encompassed all federal agencies.[67] Nevertheless, in drafting the regulation, the INS disregarded public comment and adhered to its original definition that the term "government" referred only to the INS in the

60. *Id.*

61. *See supra* note 43 and accompanying text.

62. *See* Ayuda, Inc. v. Meese, 687 F. Supp. 650, 652-53 (D.D.C. 1988), *rev'd sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989). *See also supra* note 44 and accompanying text.

63. Specifically, this section shall concentrate on the INS's interpretation of the "known to the Government" language in section 245A(a)(2)(B) of the IRCA. Immigration Reform & Control Act § 245A(a)(2)(B), 8 U.S.C. § 1255a(a)(2)(B) (Supp. 1989). The INS eventually defined this term in 8 C.F.R. § 245a.1(d) (1989).

64. Adjustment of Status for Certain Aliens, 52 Fed. Reg. 8,752 (1987).

65. *Ayuda*, 687 F. Supp. at 653.

66. *Id.*

67. Ayuda, Inc. v. Meese, 687 F. Supp. 650, 653 (D.D.C. 1988), *rev'd sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989). According to the INS, many of the responses favored expanding the definition of "known to the government" to include state and local agencies. *Id.*

context of the phrase "known to the government."[68]

The INS regulation specified four alternative methods by which an alien's unlawful status could be "known to the government" within the terms of the IRCA. Under the regulation, if an alien satisfies any of these tests, he or she meets the IRCA's "known to the government" requirement.[69] First, the INS must have received factual information of the alien's violation of his or her status *and* this information must have been stored in the INS's "official" file prior to January 1, 1982.[70] Second, the INS must have made a determinative finding, prior to January 1, 1982, that the alien was deportable.[71] Third, the INS, in response to another government agency request, must have decided that the particular alien had no legal status in the United States.[72] Fourth, the INS must have received proof from certain

68. *See* 8 C.F.R. § 245a.1(d) (1989). As a matter of construction, although an undocumented alien's status may be known to other federal agencies, under the INS's restrictive view, this fact is irrelevant for those who violated non-immigrant visas prior to January 1, 1982, and resided in the United States continuously since that date.

69. *See id.*

70. *See Ayuda*, 687 F. Supp. at 653. In addition, 8 C.F.R. § 245a.1(d)(1) states:

> The [INS] received factual information constituting a violation of the alien's nonimmigrant status from any agency, bureau or department, or subdivision thereof, of the Federal government, and such information was stored or otherwise recorded in the official [INS] alien file, whether or not the [INS] took follow-up action on the information received. In order to meet the standard of "information constituting a violation of the alien's nonimmigrant status," the alien must have made a clear statement or declaration to the other federal agency, bureau or department that he or she was in violation of nonimmigrant status . . . .

8 C.F.R. § 245a.1(d)(1) (1989).

71. *See Ayuda*, 687 F. Supp. at 653. In addition, 8 C.F.R. § 245a.1(d)(2) states:

> An affirmative determination was made by the [INS] prior to January 1, 1982 that the alien was subject to deportation proceedings. Evidence that may be presented by an alien to support an assertion that such a determination was made may include, but is not limited to, official [INS] documents issued prior to January 1, 1982, i.e., Forms I-94, Arrival-Departure Records granting a period of time in which to depart the United States without imposition of proceedings; Form I-210, Voluntary Departure Notice Letter; and Forms I-221, Order to Show Cause and Notice of Hearing. Evidence from [INS] records that may be used to support a finding that such a determination was made may include, but is not limited to, record copies of the aforementioned forms and other documents contained in alien files, i.e., Forms I-213, Record of Deportable Alien;
>
> Unexecuted Forms I-205, Warrant of Deportation; Forms I-265, Application for Order to Show Cause and Processing Sheet; Form I-541, Order of Denial of Application for Extension of Stay granting a period of time in which to depart the United States without imposition of proceeding, or any other [INS] record reflecting that the alien's nonimmigrant status was considered by the [INS] to have terminated or the alien was otherwise determined to be subject to deportation proceedings prior to January 1, 1982, whether or not deportation proceedings were instituted . . . .

8 C.F.R. § 245a.1(d)(2) (1989).

72. *See* Ayuda, Inc. v. Meese, 687 F. Supp. 650, 653 (D.D.C. 1988), *rev'd sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989). In addition, 8 C.F.R.

schools that a student-alien violated the terms of his or her non-immigrant status prior to January 1, 1982.[73]

The INS's interpretation of the phrase "known to the government" was challenged in *Ayuda, Inc. v. Meese*.[74] In *Ayuda*, five individuals and four organizational plaintiffs filed a class action suit asking the district court to enjoin the INS's restrictive interpretation of the IRCA's "known to the government" requirement.[75] The case was filed in the United States District Court for the District of Columbia where Judge Sporkin presided.[76] Over time, the class grew to encompass as many as 6,000 aliens.[77]

The plaintiffs in *Ayuda* contended that the INS's restrictive regulations unlawfully precluded INS officials from relying on relevant evidence not in the direct possession of the INS.[78] Further, the plaintiffs pointed out that the INS regulations proscribed the use of many government records which could satisfy the "known to the government" language in the IRCA.[79]

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§ 245a.1(d)(3) states that "[a] copy of a response by the [INS] to any other agency which advised that agency that a particular alien had no legal status in the United States or for whom no record could be found." 8 C.F.R. § 245a.1(d)(3) (1989).

73. See 8 C.F.R. § 245a.1(d)(4) which states:

> The applicant produces documentation from a school approved to enroll foreign students under § 214.3 which establishes that the said school forwarded to the [INS] a report that clearly indicated the applicant had violated his or her nonimmigrant student status prior to January 1, 1982. A school may submit an affirmation that the school did forward to the [INS] the aforementioned report and that the school no longer has available copies of the actual documentation sent. In order to be eligible under this part, the applicant must not have been reinstated to nonimmigrant student status.

8 C.F.R. § 245a.1(d)(4) (1989).

An INS witness confirmed that, under this exception only, the "INS will accept such information showing the unlawful status of the nonimmigrant submitted by the institution *after* January 1, 1982, so long as the information pertained to the period before January 1, 1982." 65 INTERPRETER RELEASES 347 (Apr. 4, 1988).

74. 687 F. Supp. 650 (D.D.C. 1988), *rev'd sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989).

75. *Id.* at 654. The five individual plaintiffs were part of "a nationwide class consisting of aliens who would otherwise be eligible for legalization except for the INS's interpretation of the 'known to the government' requirement in the IRCA." *Id.* The organizational plaintiffs' activities were primarily devoted to immigration assistance. *Id.*

76. *Id.* at 650.

77. 65 INTERPRETER RELEASES 1131 (Oct. 31, 1988). As of the date of publication, this newsletter reported that about 6,000 persons had applied for legalization under *Ayuda*. Plaintiffs' counsel expected more persons to apply before the November 15, 1988 filing deadline due to a report on *Ayuda* that was broadcast on a national Spanish cable television network. *Id.*

78. *See Ayuda*, 687 F. Supp. at 651.

79. Ayuda, Inc. v. Meese, 687 F. Supp. 650, 651 (D.D.C. 1988), *rev'd sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989). The plaintiffs specifically noted that 8

Initially, the plaintiffs sought a preliminary injunction against the INS's enforcement of the allegedly erroneous regulations.[80] In deciding whether to issue a preliminary injunction, the court applied the standard four-part test for injunctive relief.[81] For a preliminary injunction to issue, the party seeking relief must demonstrate that "(1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if the preliminary relief is not granted; (3) harm to others will not result if the relief is granted; and (4) granting the injunction is in the public interest."[82]

The plaintiffs raised two major arguments in order to satisfy the first prong of the preliminary injunction test. First, the plaintiffs claimed that the INS's interpretation violated the plain meaning of the IRCA.[83] Second, the plaintiffs asserted that the INS unlawfully and unreasonably excluded individuals protected by the IRCA from seeking legal immigrant status.[84]

In rebuttal, the INS argued various points. First, the INS maintained that the IRCA *required* the INS to interpret the phrase "known to the government" to mean "known to the INS."[85] Second, the INS asserted that Congress did not distinguish between the terms "government" and "statute" within the IRCA.[86] Finally, the INS contended that Congress did not intend to legally admit the class of aliens bringing the action in *Ayuda*.[87]

Concerning the plaintiffs' likely success on the merits, Judge Sporkin narrowed the legal issue before him to whether the INS's interpretation of the provision was lawful.[88] To determine whether the interpretation was lawful, Judge Sporkin applied the two-step statutory construction analysis prescribed by the United States Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,*

C.F.R. § 245a.1(d) precludes the use of records from the Internal Revenue Service and the Social Security Administration to satisfy the "known to the government" language in 8 U.S.C. § 1255a(a)(2)(B). *Ayuda*, 687 F. Supp. at 651.

80. *Ayuda*, 687 F. Supp. at 651.

81. *Id.* at 660. The court adopted the four-part test established by the District of Columbia Circuit. *See* Washington Metropolitan Transit Commission v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977).

82. *Ayuda*, 687 F. Supp. at 660.

83. *See id.* at 651.

84. Ayuda, Inc. v. Meese, 687 F. Supp. 650, 651 (D.D.C. 1988), *rev'd sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989).

85. *Id.*

86. *Id.* at 661.

87. *Id.* at 664.

88. *Id.* at 660.

Inc.[89]

According to the Supreme Court,[90] federal courts must consider two questions when analyzing the administration of congressional acts.[91] First, courts should consider whether Congress has directly spoken to the contested issue.[92] If Congress' intent is clear from the statute, that is the end of the inquiry since congressional intent controls.[93] Second, if Congress has not specifically addressed the issue, courts should consider whether the administrative agency's construction of the statute is permissible.[94] The judiciary must apply a strong presumption favoring the administrative agency's interpretation unless the interpretation is contrary to the expressed legislative intent.[95]

Judge Sporkin found the regulation deficient under the first prong of the *Chevron* test. He noted that there is a "powerful presumption" favoring the plain meaning of the words that Congress uses in a statute.[96] Judge Sporkin reasoned that "the ordinary meaning of the word '[g]overnment' is not usually taken to mean 'INS.' "[97]

Judge Sporkin also noted that the statute as a whole undercuts the INS's interpretation.[98] He asserted that Congress exhibited its ability to differentiate between the two terms throughout the IRCA.[99] While Congress made numerous references to the INS in the IRCA, Judge Sporkin found it significant that, in this instance, Congress chose to use the term "[g]overnment."[100] Moreover, Judge Sporkin found that the INS could not overcome its burden of proof in the absence of evidence contradicting the plain meaning of the IRCA.[101]

Judge Sporkin reinforced his ruling by addressing the second prong of the *Chevron* test and found that the INS failed to support its

89. Ayuda, Inc. v. Meese, 687 F. Supp. 650, 660 (D.D.C. 1988), *rev'd sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989).

90. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

91. *Id.*

92. *Ayuda*, 687 F. Supp. at 660.

93. *See id.* at 661.

94. Ayuda, Inc. v. Meese, 687 F. Supp. 650, 661 (D.D.C. 1988), *rev'd sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989).

95. *Id.* at 663.

96. *Id.* at 661.

97. *Id.*

98. *See id.*

99. Ayuda, Inc. v. Meese, 687 F. Supp. 650, 661 (D.D.C. 1988), *rev'd sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989).

100. *Id.*

101. *Id.* at 662.

contention that Congress intended to exclude plaintiffs from becoming citizens.[102] Judge Sporkin determined that the legislative history clearly suggested that Congress did not intend for the phrase "known to the government" to be construed in an unduly restrictive fashion.[103] Rather, Judge Sporkin noted, Congress inserted the phrase to safeguard against fraud.[104] By placing the burden of proof on applicants to show that a government agency had documented his or her illegal status, Congress established an easily enforceable statutory "bright line" that would help prevent fraudulent claims.[105] Congressional authorization of increased criminal penalties for fraudulent claims bolsters Judge Sporkin's reasoning.[106] Moreover, the IRCA's legislative history shows that members of Congress felt that a liberally administered, one-time legalization program was an essential part of any enforceable immigration reform.[107]

Under Judge Sporkin's reading of the legislative history, the court found that the scope of the INS's interpretation was impermissibly narrow. Judge Sporkin noted that "under the interpretation of 'known to the government' urged by INS, no alien would ever be eligible; he would either have been deported or would not be able to document his presence due to gaps in INS's record keeping."[108]

As this language suggests, Judge Sporkin ultimately viewed the INS's regulation as effectively dismissing all amnesty claims under this regulation.[109] First, Judge Sporkin found the requirement that the INS must possess factual information in its official file unrealistic because it virtually required a non-immigrant alien to confess his or her unlawful status to a federal agency.[110] Second, Judge Sporkin found that few aliens, deemed deportable by the INS but still residing in the United States, were in a position to benefit from the provisions

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102. *Id.* at 663.

103. *Id.* at 664.

104. Ayuda, Inc. v. Meese, 687 F. Supp. 650, 664 (D.D.C. 1988), *rev'd sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989).

105. *Id.*

106. *See Judiciary Committee Report, supra* note 14, at 94. Section 102 of the IRCA increases fines—from $2,000 to $5,000—for knowing use of fraudulent identification documents and false statements made to satisfy the employment verification process of the IRCA. Immigration Reform & Control Act § 102, 18 U.S.C. § 1546 (Supp. 1989).

107. *Judiciary Committee Report, supra* note 14, at 49.

108. *Ayuda*, 687 F. Supp. at 665 (citing Farzad v. Chandler, 670 F. Supp. 690, 694 (N.D. Tex. 1987)).

109. Ayuda, Inc. v. Meese, 687 F. Supp. 650, 664-65 (D.D.C. 1988), *rev'd sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989).

110. *Id.* at 664.

of the IRCA.[111] Finally, Judge Sporkin found that the third requirement—that the INS must have affirmatively advised another agency that an alien did not have legal status—added little to the first two conditions.[112]

Thus, Judge Sporkin held that the INS improperly construed the "known to the government" requirement and that the plaintiffs were likely to succeed on the merits.[113] The plaintiffs also demonstrated to the court that the other three prerequisites to the issuance of a preliminary injunction were satisfied.[114] As a result, the court enjoined the INS from enforcing its definition of the statutory phrase "known to the government."[115]

After Judge Sporkin's decision in *Ayuda*, the proper interpretation of the phrase "known to the government" appeared to be settled. In fact, within weeks of Judge Sporkin's initial ruling, the government accepted the ruling and announced that it would not appeal this issue.[116]

Besides granting injunctive relief, Judge Sporkin also retained jurisdiction over the case to grant prospective relief to undocumented aliens who were misled or dissuaded from applying for temporary resident status due to the INS's erroneous interpretation of the IRCA.[117]

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111. *Id.*

112. *Id.* at 665. The INS added a fourth possible method of satisfying the "known to the government" language in 8 U.S.C. § 1255a(a)(2)(B) after the district court decided *Ayuda*.

113. *Ayuda*, 687 F. Supp. at 665.

114. *See* Ayuda, Inc. v. Meese, 687 F. Supp. 650, 665-66 (D.D.C. 1988), *rev'd sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989). The *Ayuda* court found that failure to issue a preliminary injunction would irreparably injure the plaintiffs. *Id.* at 665. The court further reasoned that the INS's faulty regulations would continue to deter many undocumented aliens from applying for amnesty since they reasonably believed that filing an application would be a futile act. *Id.*

The *Ayuda* court also found that the INS would not be prejudiced by the issuance of a preliminary injunction. *Id.* at 666. The court reasoned that "the substantial injury that will be suffered by organizational plaintiffs and the beneficiaries of [the IRCA]" outweighed any minor inconvenience to the INS. *Id.*

Finally, Judge Sporkin noted that the issuance of a preliminary injunction was "clearly in the public interest because it carries out the purposes of [the IRCA] and strikes down an interpretation of [the IRCA] that is contrary to law." *Id.*

115. *Id.* at 666-67. Judge Sporkin issued a preliminary injunction on March 30, 1988. *Id.* at 666. Sporkin issued a supplemental order on April 7, 1988, that permanently enjoined the INS from any further application of the phrase "unlawful status was known to the government," as used in 8 U.S.C. § 1255a, except as permitted by the court. *Id.* at 667.

116. 65 INTERPRETER RELEASES 590 (June 6, 1988).

117. *See id.* at 785 (Aug. 8, 1988). The court certified three classes of aliens who were eligible to apply for prospective remedies under *Ayuda*. The three categories were: (1) aliens admitted to the United States as non-immigrants and who violated the conditions of their

Because the May 4, 1988 application deadline for temporary resident status expired soon after his decision in *Ayuda*,[118] Judge Sporkin explored other methods of providing relief for the injured classes of plaintiffs.[119]

Under the terms of his supplemental order to *Ayuda*, Judge Sporkin placed the initial burden of individually applying for relief on the eligible aliens.[120] One or more Special Masters would then review the individual claims by conducting investigations and making nonbinding recommendations to the court on what relief, if any, would be appropriate.[121] Before the case went up on appeal, Judge Sporkin began to implement extensive procedures to consider appropriate prospective relief. However, the *Ayuda* court has delayed granting any affirmative prospective relief until after the appeal.[122]

B. The Catholic Social Services *Case*

The "known to the government" provision in the IRCA is not the only statutory term in the IRCA improperly defined by the INS. As previously noted, in order for undocumented aliens to gain tempo-

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admission; (2) aliens who lived in the United States before January 1, 1982, but wilfully failed to file the required quarterly or annual alien registration forms with the INS during that time; and (3) aliens absent from the United States whose legalization application had been denied by the INS under the prior construction of the "known to the government" provisions or who were informed that their applications would be denied based on the INS's construction. *Id.*

118. *Ayuda* was decided on March 30, 1988. The filing deadline to seek temporary resident status under the IRCA was May 4, 1988. *Id.*

119. Ayuda, Inc. v. Meese, 687 F. Supp. 650, 673-74 (D.D.C. 1988), *rev'd sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989). Judge Sporkin announced that applicants were to submit declarations explaining why they missed the May 4, 1988 deadline. *Id.* Such declarations were required to establish one of the following reasons for delay: (1) the INS, or one of its duly authorized agents, advised the alien that he or she was not eligible for legalization; (2) the INS, or any of its agents, misled the alien in some way; or (3) the alien was unaware of the changes in the INS's regulation. *Id.* Also, to assist in providing relief, Judge Sporkin appointed a Special Master, pursuant to Federal Rule of Civil Procedure 53. *See* Supplemental Order of September 27, 1988, in 65 INTERPRETER RELEASES 1012-14 (Oct. 3, 1988).

120. *Id.* at 1131 (Oct. 31, 1988). Sporkin eventually extended the deadline to apply for possible relief until November 15, 1988. By late October, approximately 6,000 undocumented aliens actually applied for relief based on *Ayuda*. *Id.*

121. *See supra* note 119.

122. The District of Columbia Circuit, in a split decision, subsequently reversed the case due to the lack of subject matter jurisdiction. *See* Ayuda v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1988). The panel also denied the plaintiffs' request for rehearing on this issue. 67 INTERPRETER RELEASES 34 (Jan. 8, 1990). Finally, the full District of Columbia Circuit, sitting *en banc*, rejected the plaintiffs' rehearing request. *Id.* Nevertheless, this litigation is not yet final because the plaintiffs recently petitioned for certiorari with the Supreme Court on December 27, 1989. *Id.* at 33.

rary resident status under the IRCA, they must have been continuously physically present in the United States since November 6, 1986.[123] However, the IRCA expressly permits aliens to take "brief, casual and innocent" absences from the United States without disrupting their continuous physical presence for purposes of the IRCA.[124]

The INS, pursuant to its regulatory authority, adopted a regulation purporting to define the IRCA's reference to a "brief, casual, and innocent" absence.[125] The regulation narrowly defined "brief, casual, and innocent" absences as those absences that were: (1) after May 1, 1987; (2) for not greater than thirty days; (3) for legitimate emergency or humanitarian purposes; and (4) expressly authorized by the INS.[126] Under this regulation, undocumented aliens who left the United States for any length of time without INS permission could not take advantage of the amnesty provisions of the IRCA.[127]

In *Catholic Social Services, Inc. v. Meese*,[128] the plaintiffs challenged the INS's interpretation of the "brief, casual, and innocent" language in the IRCA.[129] As in *Ayuda*, the court applied the two-tiered statutory construction analysis applied by the Supreme Court

123. *See supra* note 45 and accompanying text. This provision is distinct from the IRCA's continuous residency requirement contested in *Ayuda*. That provision demanded continuous residence beginning in 1982. In contrast, section 245A(a)(3)(A) applies a stricter requirement of physical presence for a much shorter period of time (since November 6, 1986). Immigration Reform & Control Act § 245A(a)(3)(A), 8 U.S.C. § 1255a(a)(3)(A) (Supp. 1989).

124. Section 245A(a)(3)(B) states that "[a]n alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of [8 U.S.C. § 1255a(a)(3)(A)] by virtue of brief, casual, and innocent absences from the United States." *Id.* § 245A(a)(3)(B), 8 U.S.C. § 1255a(a)(3)(B).

125. *See* 8 C.F.R. § 245a.1(g) which states:

> "Brief, casual, and innocent" means a departure authorized by the [INS] (advance parole) subsequent to May 1, 1987 of not more than thirty (30) days for legitimate emergency or humanitarian purposes unless a further period of authorized departure has been granted in the discretion of the district director or a departure was beyond the alien's control.

8 C.F.R. § 245a.1(g) (1989).

126. *Id.* Note that the INS regulation did not require express authorization for absences from the United States between November 6, 1986 and April 30, 1987. *See* Catholic Social Services, Inc. v. Meese, 685 F. Supp. 1149, 1151 (E.D. Cal. 1988).

127. *Catholic Social Services*, 685 F. Supp. at 1155-56.

128. 685 F. Supp. 1149 (E.D. Cal. 1988). The certified plaintiff class was defined as "all persons prima facie eligible for legalization under [8 U.S.C. § 1255a] who departed and reentered the U.S. without INS authorization (i.e. advance parole) after the enactment of the IRCA following what they assert to have been a brief, casual, and innocent absence from the U.S." 65 INTERPRETER RELEASES 1011 (Oct. 3, 1988). The class includes an estimated 25,000 undocumented aliens. *Id.* at 611 (June 13, 1988).

129. *Catholic Social Services*, 685 F. Supp. at 1152.

in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[130] Using this analysis, the court first looked to the plain meaning of the statutory language "brief, casual, and innocent."[131] United States District Judge Lawrence Karlton, who presided over the case, noted that the terms "brief, casual, and innocent" lacked any clear and ordinary meaning,[132] and held that the provision's plain meaning was inconclusive.[133]

Since the provision's plain meaning was inconclusive, the court turned to the second prong of the *Chevron* test.[134] Under this prong, as Judge Karlton noted, courts must defer to an administrative agency's statutory interpretation unless the agency's view is clearly contrary to the expressed legislative intent.[135]

As in *Ayuda*, Judge Karlton determined that Congress intended that the legalization program in the IRCA should be generously and liberally construed.[136] Consequently, the court found that the INS's regulation improperly applied the statute for several reasons.[137] The first of these reasons was that there was no statutory basis to distinguish between "brief, casual, and innocent" absences which took place before May 1, 1987, from absences that occurred after that date.[138]

Judge Karlton also stated that the regulation would lead to results that were inconsistent with the congressional purpose.[139] He found that Congress understood that illegal aliens naturally fear the INS.[140] Since Congress intended to liberally apply the legalization program, an administrative regulation requiring undocumented aliens who briefly leave the United States to obtain INS permission would

130. *Id.* The *Catholic Social Services* court noted that this test was subsequently followed, in an immigration law context, by the Supreme Court in INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). *Catholic Social Services*, 685 F. Supp. at 1152.

131. *Catholic Social Services*, 685 F. Supp. at 1152.

132. *Id.* at 1153.

133. Catholic Social Services v. Meese, 685 F. Supp. 1149, 1153 (E.D. Cal. 1988). Moreover, Judge Karlton found no prior binding statutory construction of the contested terms evident within the IRCA. *Id.*

134. *Id.*

135. *Id.* at 1152.

136. For the court's discussion of the legislative history underlying the IRCA's legalization provisions, see *Catholic Social Services*, 685 F. Supp. at 1153-55. The court's appraisal is similar to Judge Sporkin's analysis in *Ayuda*.

137. *Id.* at 1155.

138. Catholic Social Services, Inc. v. Meese, 685 F. Supp. 1149, 1155 (E.D. Cal. 1988).

139. *Id.*

140. *Id.* at 1156.

effectively read "the 'brief, casual, and innocent' absence exception out of the statute entirely."[141] Moreover, the court noted that Congress could have imposed an INS consent restriction, but chose not to add such a constraint.[142] Judge Karlton further rejected the INS's argument that an undocumented alien's reentry into the United States was unlawful within the meaning of the IRCA, thereby violating the "innocent" factor of the statutory phrase.[143] The court cited several decisions holding that mere unlawful entry was not "non-innocent" conduct.[144]

Finally, the court reasoned that deference was not appropriate due to the executive branch's inconsistent application of the phrase "brief, casual, and innocent."[145] First, the interpretation was not consistent with the historic context of the phrase.[146] When Congress passed the IRCA, it recognized that this phrase had a historic meaning and used the phrase consistently with that meaning.[147] Second, the INS failed to consistently apply the phrase within the IRCA's statutory scheme.[148] In other IRCA provisions authorizing "brief, casual, and innocent" absences, a lack of INS consent does not automatically harm undocumented aliens.[149]

After determining that the INS's definition of "brief, casual, and innocent" was contrary to the congressional purpose behind the IRCA, Judge Karlton enjoined the INS from enforcing the regulation.[150] As in *Ayuda*, mere retrospective relief was not an adequate

141. *Id.* Judge Karlton noted Congress' "express recognition of and concern about the problem of getting undocumented aliens to come forward to participate in the program makes it highly unlikely that Congress intended to require such aliens to seek INS permission to leave the country prior to the time their legalization applications were filed." *Id.*

142. *Id.* at 1156-57.

143. Catholic Social Services, Inc. v. Meese, 685 F. Supp. 1149, 1158 (E.D. Cal. 1988).

144. *Id.* at 1158-59. The court cited several cases, including Git Foo Wong v. INS, 358 F.2d 151, 153-54 (9th Cir. 1966), and de Gallardo v. INS, 624 F.2d 85, 87 (9th Cir. 1980). The court distinguished examples of implicitly deceptive reentry—which violated public immigration policy—as violative of the "innocent" factor in the IRCA. *Catholic Social Services*, 685 F. Supp. at 1158-59.

145. *Catholic Social Services*, 685 F. Supp. at 1157.

146. *Id.* at 1158.

147. *Id.*

148. Catholic Social Services, Inc. v. Meese, 685 F. Supp. 1149, 1157 (E.D. Cal. 1988).

149. *Id.* For example, 8 U.S.C. § 1244 included "brief, casual, and innocent" language in a suspension of deportation statute. However, the INS admitted that "brief, casual, and innocent" absences without INS consent did not automatically make aliens ineligible for suspension of deportation. *Catholic Social Services*, 685 F. Supp. at 1157.

150. *Id.* at 1153. The court upheld the plaintiffs' motion for summary judgment and invalidated the regulation. *Id.* The INS did not challenge the district court's decision to invalidate

remedy for those undocumented immigrants who were deterred from applying for temporary resident status due to the INS's faulty interpretation.[151] In a supplemental order, Judge Karlton ordered the INS to accept legalization applications from members of the plaintiff class for several months after the May 4, 1988 filing deadline had expired.[152]

IV. THE HISTORICAL ROLE OF THE JUDICIARY IN IMMIGRATION AND NATURALIZATION LAW

The judiciary's historical role in immigration and naturalization law matters is unique. Our constitutional system provides for judicial review of the executive and legislative branches.[153] Nevertheless, the courts have developed certain judicial rules out of respect for the separation of powers which thereby provide heightened deference to the political branches when individuals challenge congressional statutes or the administrative branch's lawful enforcement of such statutes.

A. Judicial Deference to the Political Branches

To a certain extent, immigration law and naturalization law are distinct.[154] While immigration law regulates the entry of aliens, naturalization law prescribes terms for non-citizens to obtain citizenship.[155] Nevertheless, these fields are closely related and interdependent.[156] While naturalization and immigration powers are both inherent sovereign powers,[157] the federal government's naturalization powers are also expressly set forth in the Constitution.[158]

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the INS's construction of the "brief, casual, and innocent" provision of IRCA § 245A(a)(3)(B). *Catholic Social Services*, 685 F. Supp. at 1159-60.

151. Since *Catholic Social Services* was decided only one day before the amnesty deadline expired, injured plaintiffs clearly had an insufficient amount of time to apply for amnesty.

152. 65 INTERPRETER RELEASES 1011 (Oct. 3, 1988). Under the supplemental order, the INS could require applicants to show prima facie eligibility for legalization under *Catholic Social Services*. *Id.* The court confirmed its order despite the intervening Supreme Court opinion in INS v. Pangilinan, 108 S. Ct. 2210 (1988). 65 INTERPRETER RELEASES at 1011.

153. *See* Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803).

154. C. GORDON & S. MAILMAN, *supra* note 2, § 14.1.

155. *Id.*

156. *Id.* § 11.2. Due to this interrelationship, the federal government combined the administration of immigration and naturalization law through the Immigration and Nationality Act of 1952.

157. *Id.* § 14.1.

158. U.S. CONST. art. I, § 8, cl. 4.

1. The Naturalization Clause Does Not Require Absolute Judicial Deference

The United States Constitution provides that "Congress shall have Power To . . . establish an Uniform Rule of Naturalization."[159] To discern the Framers' intended meaning of this clause, one must first examine the provision's historical purposes. During the early years of the Republic, this country was governed under the Articles of Confederation.[160] Under the Articles, each state separately regulated naturalization procedures.[161] This situation resulted in varied naturalization regulations and proved unsatisfactory.[162] Therefore, in order to promote uniformity, the Framers shifted naturalization powers from the states to the federal government.[163]

The Constitution, in article I, section 8, enumerates various congressional powers.[164] These powers are, however, subject to traditional standards of judicial review.[165] Therefore, the mere enumeration of a congressional power in the Constitution cannot override the separation of powers doctrine.[166] For example, article I, section 8, clause 4—which includes the naturalization clause—also establishes that "Congress shall have Power To . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[167] The courts, however, do not completely defer to the political branches in the bankruptcy context.

In contrast, the judiciary grants heightened deference for nonconstitutional reasons. For example, courts defer to the political branches in the war powers arena because of compelling national interests.[168] Courts do not defer to the political branches in this context because the war powers are specifically enumerated in the Constitu-

159. *Id.*

160. C. GORDON & S. MAILMAN, *supra* note 2, § 14.1.

161. *Id.*

162. *Id.*

163. *Id.*

164. *See* U.S. CONST. art. I, § 8, cl. 4 (bankruptcy clause) and U.S. CONST. art. I, § 8, cl. 1 (taxing clause).

165. *See infra* notes 167-169 and accompanying text.

166. *See* U.S. CONST. art. I, § 8, cl. 1 (providing Congress with the taxing power). *See also* U.S. CONST. art. I, § 8, cl. 2 (providing Congress with the power to borrow funds with the backing of the federal government); U.S. CONST. art. I, § 8, cl. 3 (providing Congress with the exclusive power to make copyright and patent laws).

167. U.S. CONST. art. I, § 8, cl. 2.

168. *See* Gilligan v. Morgan, 413 U.S. 1, 6-8 (1973). Congress' war powers are enumerated in U.S. CONST. art. I, § 8, cls. 11-16.

tion, but rather because the power is incidental to sovereignty.[169] Therefore, as in the war powers context, any heightened deference to the political branches must be incidental to sovereignty.

The historical background of the naturalization clause establishes that the Framers sought uniformity in naturalization law.[170] In drafting the naturalization clause, the Framers did not permit the political branches to circumvent the separation of powers doctrine in the Constitution. Consequently, any heightened deference to the political branches in this field must be incidental to sovereignty.

2. Immigration and Naturalization Case Law

Because heightened judicial deference to the political branches in this area is incidental to the sovereignty of the federal government, it is essential to look at relevant common law. A significant amount of immigration-related case law deals with exclusion cases in which aliens are denied initial entry into the United States. Generally, most naturalization provisions are closely tied to compliance with immigration criteria established by Congress and various administrative agencies.[171] Due to this close relationship, the Court's findings in the exclusion context are relevant to naturalization matters.

During the United States' first one hundred years, the federal government did not formally regulate immigration.[172] By the late nineteenth century, however, Congress passed the first laws excluding aliens from the United States.[173] These initial laws excluded Chinese aliens based solely on their race. For example, these laws required lawfully admitted persons of Chinese ancestry to carry proper documentation, or obtain the affirmance of a "white" person, in order to avoid the risk of deportation.[174] Early landmark Supreme Court decisions, such as *The Chinese Exclusion Case*[175] and *Lem Moon Sing v.*

169. *See id.* at 11-12. The suit in *Gilligan* was brought in the aftermath of the shootings at Kent State University. The plaintiffs sought a declaratory judgment and injunctive relief against the governor of Ohio and the leadership of the Ohio National Guard. The Court refused to make a ruling since it found that the case constituted a nonjusticiable political question.

170. C. GORDON & S. MAILMAN, *supra* note 2, § 14.1.

171. *Id.* § 1.02[1]. The commentators note that it is difficult to draw a "bright line" distinguishing immigration and naturalization law as they are traditionally treated as counterparts of each other.

172. *Immigration Policy*, *supra* note 1, at 1290.

173. *Id.* at 1289.

174. *See* Kwock Jan Fat v. White, 253 U.S. 454, 455 (1920).

175. 130 U.S. 581 (1889). In this case, the Supreme Court first articulated "the govern-

United States,[176] upheld these laws, deferring to the legislative and executive branches.

Since these early cases, courts have developed distinct themes in immigration and naturalization jurisprudence to justify deference to the political branches.[177] These themes include the sovereign power doctrine and the right-privilege distinction.[178] Each of these themes, however, lacks continuity with general case law.

a. The Sovereign Power Doctrine

The sovereign power doctrine states that the power to exclude aliens is "an inherent attribute of sovereignty—a power necessary to preserve orderly international relations and to protect the country from foreign encroachments and dangers."[179] The Supreme Court has stated that "over no conceivable subject is the legislative power of Congress more complete" than over immigration matters.[180] Thus, the Court holds this power to be largely immune from constitutional review.[181] However, this immunity does not extend to executive

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ment's authority to establish the substantive conditions of entry." *See Immigration Policy*, *supra* note 1, at 1312.

176. 158 U.S. 538 (1895). In *Lem Moon Sing*, the alien appellant lived and operated a business in San Francisco. *Id.* at 539. Prior to congressional passage of the Chinese Exclusion Act, the appellant departed on a temporary visit to his native China. *Id.* The government denied him reentry upon his return to the United States after the Chinese Exclusion Act took effect. *Id.* at 540.

The Supreme Court upheld enforcement of the Chinese Exclusion Act against the appellant. *Id.* at 549-50. Justice Harlan reasoned that the broad language of the statute evidenced congressional intent to apply the act to all Chinese nationals entering the United States; even those previously domiciled in the United States. *Id.* at 547. Moreover, the Supreme Court refused to question congressional wisdom in this matter. *Id.* at 549-50.

177. *Immigration Policy*, *supra* note 1, at 1314.

178. *Id.*

179. *Id.* at 1315. *See* Kleindienst v. Mandel, 408 U.S. 753, 765 (1972). In *Kleindienst*, the Supreme Court upheld the Attorney General's denial of a non-immigrant visa to Mandel, a self-described "revolutionary Marxist," who wished to publicly speak at several universities in the United States. The Court cited a line of cases supporting the proposition that aliens have no constitutional right of entry. *Id.* at 762. *See, e.g.*, Galvan v. Press, 347 U.S. 522, 530-32 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904).

The *Kleindienst* Court also rejected the respondent's alternative argument that his potential audience had a first amendment right to listen to him. The Court reasoned that, although the right to listen implicated some first amendment concerns, these concerns were outweighed by the United States' inherent sovereign power. *Kleindienst*, 408 U.S. at 755-66.

180. Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Navigation Co. v. Stramahan, 214 U.S. 320, 339 (1909)).

181. *Immigration Policy*, *supra* note 1, at 1315 n.12.

branch conduct when it contravenes an express congressional statute.[182]

The sovereign power doctrine is premised on the federal government's need to protect the nation from foreign dangers.[183] For example, in *Fiallo v. Bell*,[184] the Supreme Court analyzed a federal immigration statute that prohibited preferential immigration status for illegitimate children of fathers who were United States citizens or lawful permanent residents.[185] Thus, these children could only apply for citizenship through standard immigration statutes and regulations.[186] In contrast, the statutory provision in *Fiallo* did confer preferential status on children born out of wedlock to mothers lawfully present in the United States.[187] The natural fathers and their illegitimate children brought suit claiming the statutory scheme deprived them of their equal protection and due process rights. The *Fiallo* Court nevertheless rejected the plaintiffs' challenge of Congress' power to exclude aliens.[188] The Court reasoned that since congressional authority in the immigration law context is political in character, such power is subject to narrow judicial review.[189]

The sovereign power doctrine's failure is that it obscures the prospect of finding a workable constitutional limitation.[190] In addition, the doctrine cannot be reconciled with well-grounded cases holding that the judicial branch plays a constitutional role in immigration and naturalization law matters where the executive branch fails to execute the will of Congress. For example, in *Kwock Jan Fat v. White*,[191] the Supreme Court intervened when it found that non-judicial proceedings were "manifestly unfair."[192] In *Kwock*, the petitioner left the United States on a temporary visit to China.[193] He left the United States only after documenting his status as United States citi-

182. *See infra* notes 206-209 and accompanying text.

183. *See Kleindienst*, 408 U.S. at 753. This justification was also put forth in the Congressional Record as a policy basis behind the IRCA. *See supra* note 24 and accompanying text.

184. 430 U.S. 787 (1977).

185. *Id.* at 788-90.

186. *Id.* at 791.

187. *Id.* at 788.

188. *Id.* at 799-800.

189. The *Fiallo* Court cited several cases for this proposition. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893).

190. *Immigration Policy*, *supra* note 1, at 1318.

191. 253 U.S. 454 (1920).

192. *Id.* at 457.

193. *Id.* at 456.

zen by birth.[194] However, upon the petitioner's return, the Commissioner of Immigration denied the petitioner reentry to the United States merely because "the claimed American citizenship is not established to [the Commissioner's] satisfaction."[195] The petitioner subsequently filed for habeas corpus relief.[196] The Court found that the inspector's report contained no material evidence supporting exclusion.[197] Despite the judiciary's concededly narrow scope of review, the Court held that the Commissioner's decision was an abuse of discretion.[198] Thus, the Court reasoned, the investigator exceeded his statutory authority.[199]

As the *Fiallo* Court subsequently affirmed, the sovereign power doctrine does not completely foreclose all judicial review in the immigration law arena.[200] The Supreme Court cited several cases affirming the sovereign power doctrine.[201] However, as this line of cases illustrates, the courts only apply this doctrine when individuals directly challenge a congressional statute or an administrative branch action that is authorized pursuant to Congress' legislative power.[202]

In sum, the *Fiallo* Court demanded heightened deference to the "political departments" based on the sovereign power doctrine.[203] However, the Court did not give the executive branch heightened deference in the IRCA cases because the executive branch failed to properly execute Congress' statutorily defined public policy.

This distinct situation, which does not call for the invocation of the sovereign power doctrine, is illustrated by the fact that the cases the *Fiallo* Court cited in support of the doctrine did not involve executive misconduct contrary to the intent of Congress.[204] Moreover, in

194. *Id.* at 455.

195. *Id.* at 456.

196. Kwock Jan Fat v. White, 253 U.S. 454, 458 (1920).

197. *Id.*

198. *Id.* at 464.

199. *Id.* (citing Low Wah Suey v. Backus, 225 U.S. 460 (1912)).

200. Fiallo v. Bell, 430 U.S. 787, 792 (1977). The Court expressly left open a "narrow [degree of] judicial review." *Id.*

201. *Id.* The *Fiallo* Court cited several cases in support of the sovereign power doctrine. *See, e.g.*, Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Lem Moon Sing v. United States, 158 U.S. 538 (1895); Fong Yue Ting v. United States, 149 U.S. 698 (1893); The Chinese Exclusion Case, 130 U.S. 581 (1889).

202. *Fiallo*, 430 U.S. at 792.

203. *Id.*

204. *Id. See, e.g.*, Shaughnessy v. Mezei, 345 U.S. 206, 208, 210 (1953) (petitioner excluded since Congress expressly authorized the President to impose exclusion conditions pursuant to Passport Act); Lem Moon Sing v. United States, 158 U.S. 538, 548 (1895) (executive branch acted under congressional charge to exclude petitioner under the Chinese Exclusion

Harisiades v. Shaughnessy,[205] which the *Fiallo* Court cited, the Supreme Court expressly rejected the petitioner's contention that the INS failed to comply with the "letter, spirit and intention" of one congressional statute.[206] Ultimately, the *Harisiades* Court upheld the INS's exclusion power[207] since the agency duly executed the authorizing statute, the Alien Registration Act of 1940.[208]

b. The Right-Privilege Distinction

The Supreme Court also occasionally defers to the political branches by citing the right-privilege distinction.[209] Under this doctrine, admission to the United States is a *privilege* granted by the legislative branch—on its own terms—rather than a *right* subject to constitutional protection.[210] The right-privilege distinction was originally espoused by Justice Holmes in 1895.[211] The dichotomy was gradually picked up by state and federal courts in a variety of contexts.[212]

The right-privilege distinction has been strongly criticized[213] as an inadequate basis for constitutional review because the distinction is based on circular reasoning.[214] Moreover, the distinction provides no

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Act); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) (petitioners excludable since immigration law was regulated statute and executed by administrative branch); The Chinese Exclusion Case, 130 U.S. 581, 589 (1889) (petitioner excluded as challenge to congressional power to promulgate Chinese Exclusion Act failed).

205. 342 U.S. 580 (1952).

206. *Id.* at 583-84. Two petitioners challenged the validity of the Administrative Procedure Act, 5 U.S.C. § 1011, which, at that time, authorized their deportation proceedings. *Harisiades*, 342 U.S. at 583 n.4. But the Court rejected this claim since deportation proceedings against the petitioners were instituted prior to the effective date of this statute. *Id.*

207. *Harisiades*, 342 U.S. at 595-96.

208. 8 U.S.C. § 137 (1940).

209. *See Immigration Policy*, *supra* note 1, at 1318.

210. *Id.*

211. *See* Commonwealth v. Davis, 162 Mass. 510, 39 N.E. 113 (1895).

212. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1440 (1968). *See, e.g.*, Barsky v. Board of Regents, 347 U.S. 442 (1954) (suspension of medical license upheld as physician's "right" to practice medicine was subject to conditions of the state); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950) (summary dismissal of federal civil servant suspected of disloyalty upheld—despite first amendment concerns—because no constitutional guarantee of government employment); Scopes v. State, 289 S.W. 363 (Tenn. 1927) (teacher had no constitutional right to serve the state).

213. *See* Van Alstyne, *supra* note 212, at 1440.

214. *Id.* at 1460. To illustrate the tautology, Van Alstyne substituted Holmes' definition of a "right" for the word itself, "[b]ecause the public force will not be brought to bear upon those who discharged petitioner, he has no right to be a policeman. And because petitioner has no right to be a policeman, the public force will not be brought to bear upon those who

substantive explanation of why constitutional review should be extinguished in particular circumstances.[215]

One commentator noted how the judiciary has gone to great lengths to emasculate the distinction.[216] For example, courts have developed the doctrine of unconstitutional conditions.[217] Under this principle, the government cannot indirectly force people to waive their constitutional rights as a condition to receipt of government benefits or privileges.[218] Courts have also limited the right-privilege distinction on procedural due process[219] and equal protection grounds.[220]

Despite the criticism, this eroded distinction occasionally surfaces in immigration case law, warranting further discussion.[221] The seminal case adopting this justification in the immigration law context is *United States ex rel. Knauff v. Shaughnessy*.[222] In *Shaughnessy*, the Court upheld the government's absolute power to exclude aliens on the grounds that such persons have no constitutional right to enter the United States.[223] The *Shaughnessy* Court reasoned that since Congress could freely exclude all aliens, that the privilege of admission need only be available "upon such terms as the United States shall prescribe."[224]

Nonetheless, the judiciary's continued use of the right-privilege distinction in the immigration law arena is incompatible with subsequent Supreme Court rulings recognizing that other so-called privileges cannot be unconstitutionally denied based on the right-privilege distinction.[225] In *Goldberg v. Kelly*,[226] for example, the Court refused

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discharged him." *Id.* (quoting McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892)).

215. *Id.*

216. *Id.* at 1445-57.

217. *Id.* at 1445.

218. *Id.* at 1446-47. *See* Camara v. Municipal Court, 387 U.S. 523 (1967) (housing code regulation which provided for warrantless administrative searches struck down).

219. Van Alstyne, *supra* note 212, at 1451-54. The constitutional right to procedural due process can operate independently of substantive due process rights. *Id.* at 1452.

220. *Id.* at 1454-57. The author noted that, under the equal protection clause, "it seemingly makes no difference that the threatened interest is a privilege rather than a right." *Id.* at 1454.

221. *See Immigration Policy*, *supra* note 1, at 1318-20.

222. 338 U.S. 537 (1950). The *Shaughnessy* Court upheld the Attorney General's decision to deny a public hearing and to exclude the petitioner—a foreign national married to a United States citizen—on the ground that such a hearing would be prejudicial to the United States.

223. *Id.* at 543.

224. *Id.* at 542.

225. *Immigration Policy*, *supra* note 1, at 1318.

226. 397 U.S. 254, 262 (1970).

to withhold minimal due process protection for a welfare benefit recipient based on the meaningless label that such benefits are "a privilege and not a right."[227] The Supreme Court's ruling in *Goldberg*, invalidating the right-privilege distinction, should apply with equal force to modern immigration and naturalization matters.

B. The "Affirmative Misconduct" Exception and the Survival of Equitable Relief

1. Several Cases Affirm the "Affirmative Misconduct" Exception

The sovereign power doctrine and the right-privilege distinction illustrate the judiciary's heightened deference to the political branches in the immigration and naturalization law context. However, the courts reject the proposition that the judiciary has no constitutional role in this area. As illustrated above, the Supreme Court established long ago that aliens could seek relief in federal courts where the executive branch abused its discretion and failed to properly execute congressional policy.[228] Moreover, several recent decisions illustrate that the federal courts continue to play an active role in immigration and naturalization law matters. These decisions have upheld estoppel claims and equitable relief in immigration and naturalization law matters when the actions of executive branch officials have amounted to "affirmative misconduct."

One case where the judiciary granted relief under estoppel principles was *Corniel-Rodriguez v. INS*.[229] In *Corniel-Rodriguez*, an immigrant sought a visa that would grant her entry into the United States as an unmarried child of a parent who had already obtained permanent resident status.[230] A United States Consul, in violation of State Department regulations, failed to warn the immigrant that her visa would be invalidated if she married prior to her arrival in the United States.[231] Unaware of this restriction, the immigrant married three days before departing for the United States and she was denied entry by the INS.[232] The court of appeals reversed the INS decision and held that the Consul's noncompliance with regulations constituted affirmative misconduct.[233] Accordingly, the court exercised its equity

227. *Id.* *See also* Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969).
228. *See supra* notes 190-208 and accompanying text.
229. 532 F.2d 301 (2d Cir. 1976).
230. *Id.* at 303.
231. *Id.* at 304.
232. *Id.*
233. *Id.* at 306-07.

powers and prohibited the INS from deporting the immigrant.[234]

Another example of a federal court granting equitable relief is *In re La Voie*.[235] In that case, La Voie, a French national who was married to a United States citizen, filed a petition under a federal law permitting naturalization after three years of continuous residence.[236] La Voie then inquired whether her leaving the United States would jeopardize her continuous resident status.[237] The INS assured La Voie that her absence from the country would not affect her naturalization proceedings.[238] However, upon her return, the INS denied La Voie citizenship because her absence from the United States violated the continuous residency requirement.[239] As a result, La Voie sued to compel the INS to naturalize her.[240] The judge found that the petitioner's good-faith reliance on the government's faulty advice prevented her from bringing her naturalization petition within the letter of the law.[241] As a result, the *La Voie* court, while recognizing the general reluctance to grant estoppel claims against the government, held that La Voie was entitled to naturalization.[242]

V. *INS v. PANGILINAN*: A POTENTIAL STUMBLING BLOCK FOR EQUITABLE RELIEF UNDER THE IRCA

As the previous cases indicate, courts may enjoin the INS's prospective use of an improper regulation.[243] However, in light of the Supreme Court's recent ruling in *INS v. Pangilinan*,[244] the INS has argued that courts lack the equitable authority to provide retrospective relief to undocumented aliens who are precluded or deterred from seeking temporary resident status under the IRCA due to the INS's

234. Corniel-Rodriguez v. INS, 532 F.2d 301, 307 (2d Cir. 1976).

235. 349 F. Supp. 68 (D.V.I. 1972).

236. *Id.* at 69.

237. *Id.*

238. *Id.*

239. *Id.*

240. *In re* La Voie, 349 F. Supp. 68, 70 (D.V.I. 1972).

241. *Id.* The judge ruled that the petitioner did not seek to take personal advantage of government inaction.

242. *Id.* at 74.

243. 65 INTERPRETER RELEASES 958 (Sept. 19, 1988). This point is well settled. In *Ayuda*, the INS implemented new regulations pursuant to Judge Sporkin's order. *Id.* In *Catholic Social Services*, the INS did not challenge the court's invalidation of the "brief, casual, and innocent" provision. *Id.* at 1010 (Oct. 3, 1988).

244. 108 S. Ct. 2210 (1988).

erroneous execution of the statute.[245]

The *Pangilinan* case concerned the 1942 Act,[246] which authorized the INS Commissioner to designate representatives to "receive petitions, conduct hearings, and grant naturalization outside the United States" for foreign veterans serving in the United States armed forces.[247] Furthermore, the 1942 Act directed the INS Commissioner, with the approval of the Attorney General, to implement regulations to carry out the 1942 Act's provisions.[248] The 1942 Act specified that these special naturalization arrangements would expire on December 31, 1946.[249]

In three separate cases, sixteen Filipino nationals, who served in the United States Armed Forces during World War II, petitioned for naturalization under the 1942 Act in various federal district courts.[250] The petitions were opposed by the INS and denied by the district courts because the petitions were filed after the 1942 Act's deadline expired.[251] On appeal, the Ninth Circuit Court of Appeals consolidated two of these cases and ruled that fifteen of these Filipino veterans were entitled to United States citizenship as an equitable remedy, due to the Attorney General's wrongful administration of the 1942

245. *See* 65 INTERPRETER RELEASES 769 (Aug. 1, 1988). *See also* 65 INTERPRETER RELEASES 1010 (Oct. 3, 1988).

246. *See supra* notes 7-9 and accompanying text.

247. *See Pangilinan*, 108 S. Ct. at 2213. The Court referred to section 702 of the 1942 Act, which provided:

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

Id. at n.3.

248. *Id.* at 2213. Section 705 of the 1942 Act provided that "[t]he Commissioner, with the approval of the Attorney General, shall prescribe and furnish such forms, and shall make such rules and regulations, as may be necessary to carry into effect the provisions of the Act." *Id.* at n.4.

249. Second War Powers Act, 8 U.S.C. § 1001 (1942).

250. INS v. Pangilinan, 108 S. Ct. 2210, 2212 (1988).

251. *Id.* at 2214-15.

Act.[252] The Supreme Court heard the appeal on all these cases.[253] In reversing the court of appeals, the Court rejected the Ninth Circuit's assertion that a court's equitable powers could allow the judiciary to confer citizenship in the absence of an express statutory provision.[254]

A. Relevant Facts and Procedural History

1. History of the 1942 Act

In 1942, Congress amended the Nationality Act of 1940.[255] Between 1943 and 1945, the INS dispatched its officials to overseas military posts to naturalize eligible aliens in the United States military.[256] However, the conditions in the Philippines presented a unique situation.[257] The Japanese occupation of the Philippines during this period precluded all United States naturalization efforts there. Nevertheless, during this three year span, approximately 7,000 Filipino soldiers were naturalized as United States citizens by either: (1) the federal courts in the United States; or (2) the INS officials stationed abroad but outside of the Philippines.[258] The INS officials were appointed pursuant to Section 702 of the 1942 Act.[259] In August 1945, after the United States Army liberated the Philippines, the Attorney General appointed George Ennis, the United States Vice Consul in Manila, to naturalize eligible Filipinos seeking United States citizenship pursuant to the 1942 Act.[260]

Political considerations soon affected the executive branch's enforcement of the 1942 Act. Philippine government officials expressed concern that their fledgling nation, scheduled for independence on July 4, 1946,[261] would suffer a serious manpower drain if the 1942 Act

252. Pangilinan v. INS, 796 F.2d 1091, 1097 (9th Cir. 1986), *rev'd*, 108 S. Ct. 2210 (1988).

253. *Pangilinan*, 108 S. Ct. at 2212.

254. *Id.* at 2217. In dicta, the Court also stated that any due process rights the Filipino veterans possessed were not violated by the actions of the administrative branch. *Id.* at 2216. Furthermore, the Court held that the government's conduct did not violate the equal protection component of the fifth amendment's Due Process Clause. *Id.* at 2217.

255. Pub. L. No. 76-853, 54 Stat. 1137 (1940). The Nationality Act of 1940 contained general naturalization provisions which preceded the modern statutory scheme of naturalization law.

256. INS v. Pangilinan, 108 S. Ct. 2210, 2213 (1988).

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *See* Philippine Independence Act of 1934, Pub. L. No. 73-127, § 10(a), 48 Stat. 456, 463 (1934).

were fully implemented.[262] "Apparently concerned that the naturalization program would adversely affect United States relations with the new Philippine government, the INS Commissioner requested the Attorney General to revoke all naturalization authority of the INS representative in the Philippines."[263] Consequently, on October 26, 1945, the Attorney General revoked Ennis' naturalization authority. The INS and the Attorney General apparently believed that Congress authorized, but did not require, the INS to use its naturalization powers under the 1942 Act.[264]

Between October 1945 and August 1946, the INS refused to naturalize Filipino war veterans in the Philippines.[265] Although INS officials implemented the 1942 Act elsewhere in the world, the INS purposely did not station a person with naturalization authority in the Philippines for that nine month period.[266] Moreover, Filipinos who were discharged from the armed forces during this period were not allowed to apply for naturalization when the program was reinstated because the 1942 Act only covered individuals *presently* serving in the armed forces.[267] The INS recognized that the revocation of Ennis' authority would deprive many veterans of their legal rights to seek naturalization under the 1942 Act.[268]

After a new section 702 official[269] was designated in August 1946, the INS naturalized approximately 4,000 more Filipinos prior to the 1942 Act's expiration on December 31, 1946.[270] The revocation of naturalization authority "during those nine months of 1945 and 1946 has led to a stream of litigation involving efforts by Filipino veterans to obtain naturalization under the expired [1942] Act."[271]

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262. INS v. Pangilinan, 108 S. Ct. 2210, 2214 (1988).

263. Comment, *Naturalization of Filipino War Veterans*, 22 SAN DIEGO L. REV. 1171, 1173 (1985).

264. *In re* 68 Filipino War Veterans, 406 F. Supp. 931, 936 (N.D. Cal. 1975).

265. *Pangilinan,* 108 S. Ct. at 2214.

266. *Id.*

267. Comment, *supra* note 263, at 1173.

268. *See In re* 68 Filipino Veterans, 406 F. Supp. 931 (N.D. Cal. 1975). An internal INS memorandum from Edward J. Shaughnessy, Special Assistant to the commissioner of the INS to Ugo Carusi, the INS Commissioner, maintained that the revocation of the vice consul's naturalization authority left "the rather anomalous situation that while we recognize in law the legal right of these persons to the benefits under the Act we have, from an administrative standpoint, made it impossible for such persons to acquire these benefits." *Id.* at 936 n.6.

269. INS v. Pangilinan, 108 S. Ct. 2210, 2214 (1988). These officials were authorized to naturalize foreign nationals serving in the United States Army who applied for citizenship under the Act.

270. *Pangilinan*, 108 S. Ct. at 2213.

271. *Id.* In fact, the United States government estimates that between 60,000 to 80,000

2. Plaintiffs' Backgrounds

Pangilinan arose from three separate lawsuits brought against the INS. The first group ("Pangilinan respondents") included fourteen individuals who were eligible for naturalization under the 1942 Act.[272] They sued the INS in the United States District Court for the Northern District of California,[273] alleging that they were eligible for naturalization although they had not taken affirmative steps toward naturalization prior to the expiration of the 1942 Act.[274] The district court, following *Olegario v. United States*,[275] a Second Circuit case with similar facts, denied the Pangilinan respondents' naturalization requests, stating that the Attorney General's revocation of an immigration authority in the Philippines for a nine month period was a proper exercise of his discretion.[276]

Another respondent, Mario Valderrama Litonjua, served in the United States Navy from May 1941 through April 1946.[277] Although Litonjua had made no effort to apply for naturalization while on active duty, he did attempt to obtain citizenship as a civilian employee of the United States Army.[278] However, Litonjua failed to complete the proper paperwork prior to the December 31, 1946 expiration date.[279] The district court rejected Litonjua's claim "for reasons similar to those adopted by the district court in *Pangilinan*."[280]

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eligible Filipino war veterans were affected by the INS' administration of the 1942 Act. *See* Comment, *supra* note 263, at 1173.

272. *Pangilinan*, 108 S. Ct. at 2214.

273. *Id.*

274. INS v. Pangilinan, 108 S. Ct. 2210, 2214 (1988).

275. Olegario v. United States, 629 F.2d 204 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981). In *Olegario*, the petitioner served in the Philippine Army from December 20, 1942 through December 2, 1945, which made him eligible for naturalization under the 1942 Act up until his December discharge. However, as in *Pangilinan*, no INS official was empowered to naturalize Filipino soldiers after Ennis' authority was revoked on October 26, 1945. Olegario made no effort to apply for naturalization while Ennis was duly empowered to naturalize active Filipino soldiers. *Id.* at 211.

Olegario asserted that the Attorney General's action violated his constitutional rights and precluded him from seeking naturalization. The Second Circuit determined that the 1942 Act did not confer citizenship upon the petitioner, but merely an opportunity to apply for United States citizenship. *Id.* at 223-24. The Second Circuit concluded that the Attorney General properly exercised the executive's inherent limited discretion under the 1942 Act in light of foreign policy concerns regarding the lost manpower to the soon-to-be independent Philippine republic. *Id.* at 228.

276. *Pangilinan*, 108 S. Ct. at 2212.

277. *Id.* at 2214.

278. *Id.*

279. INS v. Pangilinan, 108 S. Ct. 2210, 2214 (1988).

280. *Id.*

Bonifacio Lorenzana Manzano was the final respondent.[281] Manzano claimed that, after completing his military service in July 1946, he specifically inquired at the United States Embassy in the Philippines about obtaining United States citizenship.[282] However, Manzano was told that nobody at the embassy could properly assist him.[283] Manzano filed suit in the Southern District of California.[284] The court denied Manzano citizenship for reasons similar to those cited by the district courts that heard the naturalization claims of Litonjua and the Pangilinan respondents.[285]

The Ninth Circuit consolidated the appeals of the Pangilinan respondents and Litonjua.[286] In direct conflict with the Second Circuit (*Olegario*), the Ninth Circuit reversed the district courts' holdings[287] and ruled that the revocation of Ennis' authority violated the *mandatory* character of the language of sections 702 and 705 of the 1942 Act.[288] As a result, the court exercised its "broad remedial powers" and naturalized the respondents.[289] After the Ninth Circuit denied INS petitions for rehearing, the United States Supreme Court granted certiorari[290] and consolidated Manzano's case for review with the Ninth Circuit's decision.[291]

B. The Reasoning of the Pangilinan *Court*

Concluding that the veterans lacked a statutory basis for naturalization,[292] the Court's primary basis for reversing the Ninth Circuit's decision was that the judiciary lacked the equitable power to disre-

281. *Id.*
282. *Id.*
283. *Id.*
284. INS v. Pangilinan, 108 S. Ct. 2210, 2214 (1988).
285. *Id.* at 2214-15.
286. *Id.* at 2215.
287. Pangilinan v. INS, 796 F.2d 1091, 1103 (9th Cir. 1986), *rev'd*, 108 S. Ct. 2210 (1988).
288. *Id.* at 1099.
289. INS v. Pangilinan, 108 S. Ct. 2210, 2215 (1988).
290. Pangilinan v. INS, 796 F.2d 1091 (9th Cir. 1986), *cert. granted*, 484 U.S. 814 (1987).
291. *Id.* The Court allotted a maximum of one hour—the typical allowance—for oral arguments on these consolidated claims.
292. *Pangilinan*, 108 S. Ct. at 2215-16. This particular issue was not presented to the Court; nevertheless, Justice Scalia pointed out that the respondents had no statutory right to naturalization. *Id.* at 2215. Justice Scalia concluded that section 701 of the 1942 Act precluded naturalization of anyone failing to complete all filing procedures prior to December 31, 1946. *Id.* Justice Scalia also reasoned that Congress did not intend to extend the deadline since Congress did not include provisions for Filipino servicemen in 1948 legislation, the Nationality Act of 1952, or subsequent amendments to the Nationality Act of 1952. *Id.* at 2216.

gard a congressionally-mandated filing deadline.[293] Justice Scalia, writing for the Supreme Court, pointed out that article I, section 8, clause 4 of the Constitution expressly vests Congress with all naturalization powers.[294] Justice Scalia added that Congress failed to expressly provide the judicial branch with equitable powers in naturalization matters.[295] He went on to cite language from the denaturalization proceedings of a Nazi war criminal which stated: "[o]nce it has been determined that a person does not qualify for citizenship, . . . the district court has no discretion to ignore the defect and grant citizenship."[296] While admitting that private litigants may seek equitable remedies against the government in other contexts, Justice Scalia wrote that normal rules of equity and estoppel do not apply when a government agency, such as the INS, enforces "a public policy established by Congress."[297]

In support of its reasoning, the *Pangilinan* Court compared the case before it with *INS v. Hibi*.[298] In that case, Hibi, a Filipino, enlisted in the United States Army and served with a military unit known as the Philippine Scouts.[299] The Japanese Army captured and imprisoned Hibi during its occupation of the Philippines.[300] With the retaking of the Philippine Islands by Allied Forces, Hibi was released and rejoined the Scouts.[301] Hibi continued to serve with the Scouts until December 1945.[302] Approximately twenty years later, while in the United States on a visitor-for-business visa, Hibi petitioned the

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293. *Id.* at 2215.

294. INS v. Pangilinan, 108 S. Ct. 2210, 2215 (1988).

295. *Id.* at 2216.

296. *Id.* (quoting Fedorenko v. United States, 449 U.S. 490, 517 (1981)). In *Fedorenko*, the petitioner served as an armed guard at various Nazi concentration and labor camps. Aware that his wartime activities rendered him ineligible to emigrate to the United States under the Displaced Persons Act ("DPA"), he falsified his visa and naturalization applications. *Fedorenko*, 449 U.S. at 496.

The United States government brought a denaturalization action charging the petitioner with willfully concealing material information in applying for his DPA visa and, subsequently, for citizenship. The *Fedorenko* Court stated that all statutory prerequisites to citizenship must be complied with in order to obtain naturalization. *Id.* at 506. Since the petitioner falsified facts that would have led to the denial of his visa application, the Court affirmed the petitioner's denaturalization. *Id.* at 515.

297. *Pangilinan*, 108 S. Ct. at 2215.

298. 414 U.S. 5 (1973).

299. *Id.* at 5-6.

300. *Id.* at 5.

301. *Id.*

302. *Id.* at 6.

INS for naturalization under the provisions of the 1942 Act.[303]

Hibi argued that, during the eligibility period, the INS failed to: (1) advise him that he was eligible for naturalization under the 1942 Act; and (2) provide a naturalization official in the Philippines.[304] The *Hibi* Court rejected Hibi's argument that the INS should be estopped from denying him citizenship because it failed to properly advise him of his rights.[305] Furthermore, the Court rejected his estoppel argument based on the government's failure to continuously provide a naturalization representative in the Philippines after World War II ended.[306] The Court referred to the general rule that, in cases of estoppel, the sovereign is not similarly situated to private litigants when attempting to enforce congressional mandates.[307]

The *Hibi* Court further held that, as a general rule, the government may not be estopped in immigration matters.[308] However, the Court recognized that *Montana v. Kennedy*[309] held open the prospect of an "affirmative misconduct" exception to the general rule.[310] In *Hibi*, the Court found that the government's failure to assign a naturalization official in the Philippines on a continuous basis did not constitute affirmative misconduct.[311] Thus, the *Hibi* Court held that the official acts, which happened to be the same as those complained of in *Pangilinan*, could not give "rise to an estoppel that prevented the Government from invoking the December 31, 1946, cutoff in the [1942] Act."[312] Unfortunately, the *Hibi* Court failed to define what actions constitute affirmative misconduct, leaving the lower federal courts to speculate as to the proper standard.

The *Pangilinan* controversy involved the same alleged executive misconduct as *Hibi*. However, the sixteen veterans in *Pangilinan* tried to distinguish their claim by raising a subtly distinct remedial theory. While the *Hibi* Court rejected an estoppel argument which sought to render the December 1946 cutoff invalid,[313] in *Pangilinan*, the petitioners' claims rested on the judiciary's authority to grant eq-

303. INS v. Hibi, 414 U.S. 5, 7 (1973).
304. *Id.* at 6-7.
305. *Id.* at 7.
306. *Id.* at 8.
307. *Id.*
308. INS v. Hibi, 414 U.S. 5, 8 (1973).
309. 366 U.S. 308, 314-15 (1961).
310. *Hibi*, 414 U.S. at 8.
311. *Id.* at 8-9.
312. INS v. Pangilinan, 108 S. Ct. 2210, 2215 (1988).
313. INS v. Hibi, 414 U.S. 5, 8-9 (1973).

uitable relief despite the validity of the December 1946 naturalization deadline.[314] Justice Scalia rejected this distinction because the Court's reasoning in both cases "clearly produces the same result."[315] Therefore, the *Pangilinan* Court ruled that the judiciary lacked the equitable power to confer citizenship on individuals who failed to timely file their naturalization applications under the 1942 Act.[316]

In *Pangilinan*, the Court appeared to devise a blanket rule that courts may never use their equity powers to grant citizenship by extending a statutory petition deadline.[317] In establishing this rule, the majority completely ignored the "affirmative misconduct" exception previously recognized in *Hibi*. As a result, lower courts may improperly infer that *Pangilinan* advocates a far narrower judicial role in immigration and naturalization matters than previously mandated by the *Hibi* Court.

C. Pangilinan *Does Not Foreclose Equitable Relief*

1. *Pangilinan* Is Distinct from Cases Involving "Affirmative Misconduct" by the Executive Branch

Those who attempt to apply *INS v. Pangilinan* to the context of the temporary residence provisions of the IRCA must consider more than a single ruling; rather, they should take a broad view of immigration and naturalization jurisprudence. The Supreme Court's ruling in *Pangilinan* does not foreclose judicial review by denying courts the ability to forge equitable remedies in any case that happens to pertain to immigration or naturalization law. Rather, the Supreme Court merely followed the sovereign power doctrine in the immigration law context and held that the judicial branch must allow the INS to carry out statutorily defined public policy.

In *Pangilinan*, the Supreme Court reiterated that Congress had the "exclusive constitutional power" to provide for naturalization requirements.[318] The veterans in *Pangilinan* conceded that they were not entitled to naturalization under the 1942 Act or any other statute.[319] However, based on considerations of fairness, the veterans ar-

314. *Pangilinan*, 108 S. Ct. at 2215.
315. *Id.*
316. *Id.* at 2216.
317. INS v. Pangilinan, 108 S. Ct. 2210, 2215 (1988).
318. *Id.* In full, the Court stated, "Congress has again exercised its exclusive constitutional power to provide that any petition for naturalization filed on or after September 26, 1961, will be heard and determined under the 1952 Nationality Act." *Id.*
319. *Id.*

gued that the Court should exercise its equitable authority and order the INS to naturalize them.[320] The Court rejected this argument and restated the settled doctrine that the judiciary lacks the power to fashion equitable remedies which run counter to Congress' express intent.[321] *Hibi* had already demonstrated that the INS's failure to warn the veterans, or make naturalization officials available in the Philippines, did not constitute "affirmative misconduct."[322] Thus, the *Pangilinan* Court did not perceive a need to address a similar factual situation in which the INS failed to carry out Congress' express public policy.

In *Fiallo v. Bell*, the Supreme Court refused to overturn a discriminatory immigration statute.[323] The petitioners only challenged the statute's constitutional validity, they did not contend that the executive branch failed to properly administer the statute in question.[324] Thus, based on the sovereign power doctrine, the *Fiallo* Court found that the plaintiffs' claims were similar to prior immigration cases subject to heightened judicial deference.[325]

In *Harisiades v. Shaughnessy*, as in *Pangilinan*, the Supreme Court rejected the immigrants' assertion that the INS failed to comply with the immigration statute that the INS was executing.[326] Therefore, the Court refused to substitute its judgment for a legislative mandate.[327] Indeed, *Pangilinan* flows from a settled line of cases, based upon the sovereign power doctrine, which refuse to question legislative judgment or the executive branch's permissible execution of that judgment.

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320. *Id.*

321. *Id.* at 2216.

322. INS v. Hibi, 414 U.S. 5, 8 (1973).

323. Fiallo v. Bell, 430 U.S. 787, 789-91 (1977). Three sets of unwed natural fathers and their children argued that 8 U.S.C. § 1182(a)(14) discriminated against them by only allowing illegitimate natural mothers to seek preferential immigration status for their offspring abroad. *Id.*

324. *Id.* at 791. The petitioners' original complaint challenged the constitutionality of the statute. *Id.* They argued that the statute denied them equal protection, due process and their right of privacy. *Id.*

325. *Id.* at 793.

326. Harisiades v. Shaughnessy, 342 U.S. 580, 583-84 (1952).

327. *Id.* at 580. The *Harisiades* Court expressly rejected the petitioners' contentions that certain hearing procedures did not comply with the Administrative Procedure Act.

2. The Sovereign Power Doctrine Does Not Apply When an Administrative Agency Fails To Properly Execute Statutory Public Policy

The judiciary only applies heightened deference under the sovereign power doctrine when the executive branch properly executes a congressional statute. In *Kwock Jan Fat v. White*, the Supreme Court established that the judiciary may overturn administrative proceedings in which the executive officers abuse their statutorily authorized discretion.[328] In *Kwock*, unlike *Pangilinan*, the Court found that the applicable statute did not authorize the executive official's conduct.[329] As a result, the *Kwock* Court did not apply heightened deference to the executive officer's unauthorized actions pursuant to the sovereign power doctrine.

In *INS v. Hibi*, the Supreme Court validated the "affirmative misconduct" exception to the sovereign power doctrine.[330] Moreover, various federal court cases have granted equitable relief when lower level INS officials have affirmatively failed to execute a statute pursuant to the intent of Congress. For instance, in *Corniel-Rodriguez v. INS*, the court, pursuant to its equitable power, enjoined the INS from deporting an alien.[331] In that case, a low-level INS official violated regulations that were adopted pursuant to the applicable statute.[332] Further, in *In re La Voie*, a low-level INS official gave the immigrant faulty advice which directly prevented her from complying with a congressional statute.[333] As an equitable remedy, the *La Voie* court ordered the INS to naturalize the petitioner.[334]

In *Corniel-Rodriguez* and *La Voie*, both courts found affirmative misconduct by the INS officials and held that the INS failed to foster the statutory policies they were empowered to uphold. In contrast, in *Pangilinan* and *Hibi*, the Supreme Court found no such "affirmative misconduct" by INS officials and the Attorney General in failing to: (1) advise veterans that they were eligible for naturalization under the 1942 Act; and (2) provide naturalization officials in the Philippines.[335]

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328. Kwock Jan Fat v. White, 253 U.S. 454, 458 (1920).

329. *Id.* at 464.

330. INS v. Hibi, 414 U.S. 5, 8 (1973).

331. Corniel-Rodriguez v. INS, 532 F.2d 301, 307 (2d Cir. 1976).

332. *Id.* at 306-07.

333. *In re* La Voie, 349 F. Supp. 68, 69 (D.V.I. 1972).

334. *Id.* at 74.

335. *See Hibi*, 414 U.S. at 6-7. In *Pangilinan*, the Court did not expressly discuss this factual question. However, the *Pangilinan* Court noted the virtual similarity between the two

The lack of affirmative misconduct found in *Pangilinan* and *Hibi* distinguishes these cases from *Corniel-Rodriguez* and *La Voie*. As a result, the sovereign power doctrine, which applied to the former cases, should not apply to the latter.

VI. *PANGILINAN* Does Not Hinder the Judiciary's Ability to Forge Equitable Remedies In Cases Involving "Affirmative Misconduct"

Although the Supreme Court denied equitable relief in *Pangilinan*, that result does not apply in cases of "affirmative misconduct," such as *Ayuda, Inc. v. INS* and *Catholic Social Services, Inc. v. INS*. As noted above, *Ayuda* and *Catholic Social Services* involved executive branch actions that were inconsistent with the purposes behind the IRCA. In each of the cases, the courts have found that the INS affirmatively acted in an improper manner.[336] Moreover, the INS yielded to each courts' criticism of the service's misconduct.[337]

A. Ayuda *and* Catholic Social Services *Are Consistent with Case Law Granting Equitable Relief from the Affirmative Misconduct of INS Officials*

The recent litigation involving the INS's wrongful administration of the IRCA favorably compares to case law which has upheld the judiciary's power to forge equitable remedies in cases of affirmative misconduct. In *Corniel-Rodriguez* and *La Voie*, low-level INS officials committed affirmative acts that deprived aliens of their statutory rights. In *Corniel-Rodriguez*, the INS official failed to follow INS regulations—passed pursuant to congressional mandate—that required the official to notify the alien of certain visa restrictions.[338] In *La Voie*, the INS official wrongly assured the petitioner that certain conduct would not violate her statutory residence requirement.[339] In both of these cases, the courts found affirmative misconduct that justified the courts' exercise of equitable authority.[340]

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cases when it stated that the use of a subtly distinct equitable theory "clearly produces the same result." INS v. Pangilinan, 108 S. Ct. 2210, 2215 (1988).

336. *See* 65 INTERPRETER RELEASES 590 (June 6, 1988). *See also* 65 INTERPRETER RELEASES 1010 (Oct. 3, 1988).

337. *Id.* In both cases, the INS did not appeal the district courts' injunction of the proceedings.

338. *See supra* notes 229-234 and accompanying text.

339. *See supra* notes 235-242 and accompanying text.

340. *See supra* notes 229-242 and accompanying text.

In *Ayuda* and *Catholic Social Services*, high-level executive officials promulgated regulations which construed the IRCA in an unduly narrow manner.[341] Thousands of undocumented aliens suffered as a result of the INS's faulty interpretation of the IRCA.[342]

Although the IRCA litigation is arguably distinct because it involves administrative discretion by high-level INS officials, this argument is unpersuasive. First, courts only defer to reasonable administrative interpretations of statutes.[343] The judiciary only invalidates regulations when the challenging parties can prove that the regulations are either: (1) contrary to the plain language of the underlying statute; or (2) the regulation leads to a result that is inconsistent with the congressional purpose.[344] There is no basis for the judiciary to defer to high-level administrative officials who abuse their discretion in promulgating such regulations. Second, if this distinction is the basis for greater deference, then top executive branch officials could never be estopped for flagrant noncompliance with congressional mandates that they are sworn to uphold.

Conversely, the recent IRCA litigation is not comparable to *Pangilinan*. The *Pangilinan* Court found no affirmative misconduct by the executive branch in carrying out the 1942 Act.[345] In administering the IRCA, the INS has occasionally failed to properly implement certain key statutory provisions.[346] In erroneously implementing certain IRCA provisions, the INS deterred many undocumented aliens from applying for temporary resident status under the IRCA.[347] Such action involves "affirmative misconduct" which allows courts to forge equitable remedies to correct the injustice and carry out congressional mandates. In these instances, the INS loses

341. *See supra* notes 96-116 & 136-149 and accompanying text.

342. *See* 65 INTERPRETER RELEASES 375 (Apr. 11, 1988) (plaintiffs' attorneys estimated that up to 50,000 aliens could benefit from Judge Sporkin's order in *Ayuda*). *See also* 65 INTERPRETER RELEASES 611 (June 13, 1988) (25,000 aliens estimated as members of the plaintiff class in *Catholic Social Services v. Meese*).

343. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

344. *Id.* at 843. Courts shall not substitute their judgment for that of the administrative agency. If the statute is silent or ambiguous on the specific issue, courts defer to the administrative interpretation. *Id.*

345. *See supra* notes 308-316 and accompanying text.

346. Judge Sporkin applauded the INS's handling of the legalization program. Despite his ruling in *Ayuda*, Judge Sporkin commended the INS for taking steps to carry out Congress' mandate in the IRCA. Ayuda, Inc. v. Meese, 687 F. Supp. 650, 666 n.20 (D.D.C. 1988), *rev'd sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989).

347. *See supra* notes 117 & 150 and accompanying text.

the shelter of the sovereign power doctrine and cannot argue that the courts are precluded from granting equitable remedies.

B. Ayuda *and* Catholic Social Services *Are Distinguishable from Cases Upholding the Sovereign Power Doctrine*

Traditional Supreme Court cases never expressly refer to an "affirmative misconduct" exception. Rather, these cases focused on the scope of the sovereign power doctrine. In prior challenges to administrative regulations, the sovereign power doctrine largely precluded judicial review in cases where the executive official or agency *properly* carried out a congressional mandate.[348] In contrast, other cases overturned unauthorized executive actions by reasoning that such acts were not protected by the sovereign power doctrine.[349]

Ayuda and *Catholic Social Services* are factually distinct from these older cases which applied the sovereign power doctrine. The IRCA litigation involves INS regulations which frustrated Congress' policy of focusing government resources on controlling illegal immigration rather than attempting to ferret out undocumented aliens who have settled in, and contributed to, the United States.[350] By seeking to expel aliens based on unnecessarily rigid demands, the INS acted improperly and contrary to congressional intent.[351] Therefore, the improper actions taken by the INS in *Ayuda* and *Catholic Social Services* are precisely the kind of affirmative misconduct supporting invocation of equitable remedial power rather than the sovereign power doctrine.

VII. CONCLUSION

In sum, interpreting the Supreme Court's recent opinion in *INS v. Pangilinan* as absolutely precluding the judiciary from forging equitable remedies is inaccurate. In *Ayuda* and *Catholic Social Services*, among other cases,[352] the INS affirmatively frustrated congressional

348. In Harisiades v. Shaughnessy, 342 U.S. 580 (1952), the Supreme Court upheld the INS's power to exclude aliens pursuant to its proper execution of the Alien Registration Act, 8 U.S.C. § 137 (1940). In Fiallo v. Bell, 430 U.S. 787 (1976), the Court upheld congressional power to exclude aliens since Congress possesses the inherent sovereign power to control immigration.

349. *See* Kwock Jan Fat v. White, 253 U.S. 454, 455 (1920).

350. *See supra* notes 33-38 and accompanying text.

351. Ayuda, Inc. v. Meese, 687 F. Supp. 650, 663 (D.D.C. 1988), *rev'd sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989).

352. Courts have held that the INS has improperly construed other IRCA provisions. In Zambrano v. INS, Civ. S-88 No. 455 EJG (E.D. Cal. Aug. 9, 1988), Judge Edward Garcia

policy through its unduly narrow construction of the IRCA.[353] In contrast, in expressly following *Hibi*, the Supreme Court reasserted that the INS's failure to continuously station a naturalization official in the Philippines, or notify veterans of their rights under the 1942 Act, did not constitute affirmative misconduct.[354] Consequently, the fact that equitable relief was denied in *Pangilinan* does not mean that equitable relief is never available in the IRCA litigation involving affirmative misconduct by INS officials.[355]

The INS's assertion that *Pangilinan* should be extended to apply in the context of the IRCA lacks any sound legal basis. As previously noted, the sovereign power doctrine only requires the judiciary to apply heightened deference to executive branch decisions when executive officials are fulfilling congressional mandates.[356] However, in *Ayuda* and *Catholic Social Services*, the INS regulations affirmatively frustrated Congress' purposes in passing the IRCA.[357]

Moreover, the right-privilege distinction adds little to the INS's argument that it is entitled to unfettered discretion. This conclusory distinction has been continuously criticized by the bench and bar.[358] Although this distinction has occasionally been cited, in the immigration context, in some older cases,[359] its continued use in light of more recent Supreme Court rulings which expressly reject this rationale in connection with other privileges is suspect.[360]

In light of the case law in this field, it is doubtful that the Supreme Court intended to foreclose all equitable remedies in immigration and naturalization matters. Such a ruling would reverse "200 years of Anglo-American jurisprudence governing the equitable pow-

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enjoined the INS regulation in 8 C.F.R. § 245a.2(d)(4), which set forth an unduly narrow definition of a "public charge" under 8 U.S.C. § 1255a(d)(2)(B)(iii). 65 INTERPRETER RELEASES 818 (Aug. 15, 1988). In League of United Latin American Citizens v. INS, Civ. 97 No. 4757 WDK (C.D. Cal. Aug. 12, 1988), Judge William Keller enjoined the INS legalization policy under 8 C.F.R. § 245a.2(b)(8) which, contrary to congressional policy underlying the IRCA, distinguished between reentries documented on Form I-94 and those not so documented. 65 INTERPRETER RELEASES 818 (Aug. 15, 1988).

353. *See supra* notes 96-116 & 136-149 and accompanying text.

354. *See supra* notes 299-317 and accompanying text.

355. INS v. Pangilinan, 108 S. Ct. 2210, 2216 (1988).

356. *See supra* notes 180-208 and accompanying text.

357. *See supra* notes 96-116 & 136-149 and accompanying text.

358. *See supra* notes 209-227 and accompanying text.

359. *See supra* notes 211-212 and accompanying text.

360. *See supra* notes 213-227 and accompanying text.

ers of courts to redress injuries for which there is no adequate remedy at law."[361]

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361. 65 INTERPRETER RELEASES 819 (Aug. 15, 1988) (quoting Catholic Social Services, Inc. v. Meese, No. S-86 Civ. 1343 LKK (E.D. Cal. Aug. 11, 1988), *enforcing* 685 F. Supp. 1149 (1988)).

* This Comment is dedicated to my family with gratitude for all of their support throughout law school.