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IMMIGRATION LAW

INTRODUCTION

The majority of immigration law cases decided by the Ninth Circuit during the past survey term dealt with the harboring and transportation of illegal aliens.[1] The court also examined the definition of a presumptive permanent resident[2] and reviewed the denial of an alien employment certificate.[3] Finally, the Ninth Circuit considered the application of the defense of estoppel to the actions of the federal government in two cases,[4] both of which are discussed extensively below.

I. OVERVIEW

A. TRANSPORTING AND HARBORING ILLEGAL ALIENS

Four cases decided by the Ninth Circuit during the past term involved the transporting or harboring of aliens who were not legally admitted to the United States.[5] Each case charged a violation of section 1324[6] or section 1325[7] of the Immigration and Nationality Act (INA),[8] which provides criminal penalties for those

1. *See* United States v. Gonzalez-Hernandez, 534 F.2d 1353 (9th Cir. Apr., 1976) (per curiam); United States v. Bunker, 532 F.2d 1262 (9th Cir. Mar., 1976) (per Hufstedler, J.); United States v. Acosta de Evans, 531 F.2d 428 (9th Cir. Feb., 1976) (per Choy, J.); Cuevas-Cuevas v. Immigration & Nat. Serv., 523 F.2d 883 (9th Cir. Oct., 1975) (per curiam).

2. *See* Quijencio v. Immigration & Nat. Serv., 535 F.2d 501 (9th Cir. Apr., 1976) (per Koelsch, J.).

3. *See* Seo v. United States Dep't of Labor, 523 F.2d 10 (9th Cir. Sept., 1975) (per Solomon, D.J.).

4. *See* Sun Il Yoo v. Immigration & Nat. Serv., 534 F.2d 1325 (9th Cir., Feb., 1976) (per Ely, J.); Santiago v. Immigration & Nat. Serv., 526 F.2d 488 (9th Cir. Oct., 1975) (per Sneed, J.) (en banc), *cert. denied*, 96 S. Ct. 2167 (1976).

5. *See* United States v. Gonzalez-Hernandez, 534 F.2d 1353 (9th Cir. Apr., 1976) (per curiam); United States v. Bunker, 532 F.2d 1262 (9th Cir. Mar., 1976) (per Hufstedler, J.); United States v. Acosta de Evans, 531 F.2d 428 (9th Cir. Feb., 1976) (per Choy, J.); Cuevas-Cuevas v. Immigration & Nat. Serv., 523 F.2d 883 (9th Cir. Oct., 1975) (per curiam).

6. 8 U.S.C. § 1324 (1970) penalizes those persons who bring in and harbor certain aliens. Section 1324(a) describes four specific activities which are punishable, while section 1324(b) gives exclusive authority to the officers and employees of the immigration service to arrest illegal aliens.

7. *Id.* § 1325 penalizes aliens who enter the United States at an improper time and place.

8. The popular name of the Immigration and Nationality Act (INA) is the

persons who transport or harbor illegal aliens. Section 1324(a) states that any person who brings, transports, harbors or encourages entry of an alien into the United States with knowledge that the alien's presence here is in violation of the law shall be guilty of a felony.[9]

United States v. Bunker[10] involved a United States citizen who employed Mexican laborers. Bunker was convicted, after a jury trial, of violating section 1324(a)(1) as a result of having driven the Alvarez family from their home in Mexico to Gandy, Utah, in order to employ them at his ranch. The Alvarez family possessed only nonimmigrant border crossing cards which allowed them to stay in the United States no longer than seventy-two hours. The major issue on appeal was Bunker's state of mind at the time of the border crossing. Knowledge that the aliens are not entitled to reside in the United States is a crucial element of a section 1324(a)(1) violation.[11] Bunker urged that he had no knowledge of

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McCarran-Walter Act of 1952, ch. 477, 66 Stat. 166 (codified at 8 U.S.C. §§ 1101-1503 (1970)). The history and purpose of the Act are set forth in [1952] U.S. CODE CONG. & AD. NEWS 1653.

9. 8 U.S.C. § 1324(a) (1970) states:

> (a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—
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> (1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;
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> (2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;
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> (3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or
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> (4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—
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> any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished . . . .

10. 532 F.2d 1262 (9th Cir. Mar., 1976) (per Hufstedler, J.).

11. In Bland v. United States, 299 F.2d 105 (5th Cir. 1962), the jury, in considering a

their illegal status. However, the evidence introduced indicated the contrary, and, as a result, the conviction was affirmed by the *Bunker* court.

Illegal entry is at the heart of any prosecution under section 1324.[12] Any person who arranges for the illegal alien's transportation,[13] as well as anyone who actually "brings in" an alien,[14] is punished for assisting in the illegal entry. Decisions such as *Bunker* achieve two purposes: (1) preventing illegal entry by aliens; and (2) protecting aliens from potential abuse by employers.[15] Once here illegally, aliens may be employed under working conditions which violate United States labor laws (*e.g.*, aliens may be paid less than the minimum wage), yet may be left without legal recourse because of the constant threat of deportation by immigration authorities. Section 1182 of the INA[16] expressly excludes from the United States aliens who enter to perform skilled or

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defendant's guilt under a charge of violating section 1324, requested an additional reading of the statute. The judge read the statute to the jury, but failed to remind them that knowledge was a material element of the offense, even though the defense counsel had so requested. The failure to remind the jury of the knowledge requirement resulted in a reversal of conviction.

12. The purpose of section 1324 has been discussed in several cases. *See, e.g.*, United States v. Washington, 471 F.2d 402, 404 (5th Cir. 1973) (to prevent aliens from entering or remaining illegally in the United States); United States v. Orejel-Tejeda, 194 F. Supp. 140, 144 (N.D. Cal. 1961) (to strengthen the law in preventing aliens from entering or remaining in the United States illegally).

13. *See, e.g.*, United States v. Washington, 471 F.2d 402 (5th Cir. 1973) (defendant took money from three aliens, provided them with identification, arranged airline transportation and accompanied them to the United States and was convicted for assisting the illegal entry because she helped provide the aliens with transportation).

14. *See, e.g.*, Bland v. United States, 299 F.2d 105 (5th Cir. 1962) (defendants who piloted the airplane which brought two anti-Castro Cubans from Cuba to a private airport in Florida were charged with bringing in aliens illegally).

15. The *Bunker* court stated that "preventing the importation of aliens known to intend to remain and to work protects both the United States labor market and the exploitable aliens." 532 F.2d at 1266.

16. 8 U.S.C. § 1182(a)(14) (1970) provides in pertinent part:

> Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

For a discussion of the problems involved in administering this section see Note, *Alien Labor Certification Proceedings: The Personal Preference Doctrine and the Burden of Persuasion*, 43 GEO. WASH. L. REV. 914 (1975).

unskilled labor unless the Secretary of Labor shows there is a shortage of United States workers able to perform such labor. Since the Alvarez family was excludable under this section of the INA, the *Bunker* court noted in its conclusion that "it would be anomalous to punish them and not hold culpable the person who brings them in . . . ."[17]

United States v. Gonzalez-Hernandez[18] involved an appeal from a conviction for violation of section 1324(a)(2) of the INA. This section punishes those persons who transport illegal aliens within the United States (as distinguished from those who transport illegal aliens across the border) with knowledge of the alien's illegal status. In *Gonzalez-Hernandez*, the defendant transported illegal aliens from California to Washington. The court enumerated the five elements of the crime that must be proven to sustain a conviction under the statute: (1) the defendant must have transported the alien within the United States; (2) the alien was not lawfully admitted or entitled to enter; (3) the defendant knew that the alien's presence was illegal; (4) the defendant must have known that the alien's last entry into the United States was within the last three years; and (5) the defendant must have acted willfully and in furtherance of the alien's violation of the law.[19] The court in *Gonzalez-Hernandez* was convinced that the government had met its burden of proof and therefore affirmed the conviction of the defendant.

Section 1324(a)(3) of the INA punishes those persons who willfully harbor aliens with knowledge that their presence in the United States is illegal. *United States v. Acosta de Evans*[20] upheld the conviction of a defendant who was found to have "harbored" her cousin, an illegal alien. *Acosta de Evans* focused on the definition of "harbor" as used in this section. The court construed "harbor" as signifying "affording shelter to" rather than as acting "to prevent detection."[21] It also stated that the harboring need not be clandestine, as stated in previous decisions,[22] nor need it be associated with the smuggling or concealing of aliens.[23]

17. 532 F.2d at 1266.

18. 534 F.2d 1353 (9th Cir. Apr., 1976) (per curiam).

19. *Id.* at 1354.

20. 531 F.2d 428 (9th Cir. Feb., 1976) (per Choy, J.).

21. *Id.* at 430. The defendant's central contention was that the term "harbor" meant "to prevent detection by law enforcement agents." If the court had adopted this definition, the defendant would have been acquitted, as there was insufficient evidence to find that she deliberately attempted to prevent the detection by immigration agents of her cousin, an illegal alien who was living with her.

22. Harboring an alien was previously defined as "clandestine sheltering" in Susnjar v. United States, 27 F.2d 223 (6th Cir. 1928).

23. *See* United States v. Lopez, 521 F.2d 437 (2d Cir.), *cert. denied*, 423 U.S. 995

A problem frequently encountered in relation to the harboring of aliens under section 1324(a)(3), and raised in *Acosta de Evans*, is the special statutory exemption from punishment of the employers of such illegal aliens.[24] Employment of illegal aliens is not deemed to constitute harboring. A large-scale employer in a business which, by its nature, does not employ alien laborers may actually be ignorant of a worker's resident status.[25] However, illegal aliens are frequently employed en masse in some industries and, in some instances, are closely identified with the field in which they are involved (*e.g.*, Mexican farm workers or Chinese garment workers).[26] Since such employers are specifically protected from prosecution for harboring illegal aliens, it has been argued that they are encouraged by the statutory exemption to hire illegal aliens at substandard wages, while persons who harbor illegal aliens for humanitarian reasons may be punished under the statute.[27] The *Acosta de Evans* court recognized the basic inequities of this situation, but declared that only Congress, and not the courts, could fashion an appropriate remedy.[28] Although employers are presently exempted from punishment for harbor-

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(1975). In this case the defendant argued, relying on Susnjar v. United States, 27 F.2d 223 (6th Cir. 1928) as authority, that the government must prove that the harboring was part of an operation to smuggle aliens clandestinely. The court rejected this argument and found that no connection with smuggling was necessary to establish harboring.

24. 8 U.S.C. § 1324(a) (1970) provides in pertinent part: "That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

25. The policy reason given for exempting employers from "harboring" illegal aliens is predicated on the assumption that an employer has no way of knowing whether certain employees are in the United States illegally. Therefore, no presumption can be made that the employer is willfully and knowingly employing an illegal alien.

A recent Supreme Court decision, De Canas v. Bica, 424 U.S. 351 (1976), discussed the constitutionality of section 2805 of the California Labor Code, which requires an employer who knowingly hires an illegal alien to pay a civil penalty. For a comprehensive discussion of the issues surrounding this case see Note, *Regulation of Illegal Aliens: Sanctions Against Employers Who Knowingly Hire Undocumented Workers*, 4 W. ST. U.L. REV. 41 (1976).

26. *See* Hadley, *A Critical Analysis of the Wetback Problem*, 21 LAW & CONTEMP. PROB. 334 (1956) (wherein the author draws a close connection between Mexican aliens and cheap farm labor); *Immigration, Alienage & Nationality—Chinatown Sweatshops: Wage Law Violations in the Garment Industry*, 8 U.C.D.L. REV. 63 (1975) (wherein illegal Chinese aliens are closely associated with the garment industry).

27. For a discussion of the manner in which illegal aliens are used as a scapegoat for United States economic problems see Foster & Zoloth, *Like Outlaws, Like Thieves: How "Illegal Aliens" Take the Rap for our Economic Problems*, MOTHER JONES, April, 1976, at 14.

28. Judge Choy commented:

> [The defendant] argues that . . . the exemption of employment is invidious. There may be something unfair about the exemption of employment from harboring—many of the aliens enter this country in search of jobs; the statute allows those who exploit their labor to escape punishment while

ing aliens under section 1324(a)(3) of the INA, section 1324(a)(4),[29] which punishes those persons who encourage or induce illegal entry, could be utilized to prosecute employers who hold jobs open to illegal aliens. By holding jobs open to illegal aliens, an employer is certainly willfully, knowingly and directly encouraging aliens to illegally enter the United States. Although no private right of action against such employers was created by section 1324(a)(4),[30] the government could certainly invoke this section to prosecute employers who habitually employ aliens who have entered the country illegally.

Section 1251(a)(13)[31] of the INA provides for the deportation of any alien who, at the time of his or her entry into the United States, assists another alien in entering the United States in violation of the law. *Cuevas-Cuevas v. Immigration & Naturalization Service*[32] involved a situation where a permanent resident alien, Cuevas, went to Mexico for a short visit and then, on his return to the United States, aided the unlawful entry of other aliens. The illegal entry of both Cuevas and the other aliens resulted in Cuevas' being charged with a violation of section 1325,[33] which provides for the punishment of any alien who enters the United States without inspection or examination by an immigration offi-

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> penalizing persons who, in some instances, may be acting in a neighborly and humane fashion—but it is the kind of unfairness which it is for Congress, not courts, to cure.

531 F.2d at 430.

29. 8 U.S.C. § 1324(a)(4) (1970).

30. *See* Chavez v. Freshpict Foods, Inc., 456 F.2d 890 (10th Cir. 1972), which held that 8 U.S.C. section 1324(a)(4) created no private right of action against employers who hired Mexican illegal aliens. The *Chavez* court determined that no private right of action was intended under section 1324(a)(4) by Congress and that the penal sanctions of the Act were exclusive. *Accord*, Flores v. George Braun Packing Co., 482 F.2d 279 (5th Cir. 1973).

31. 8 U.S.C. § 1251(a)(13) (1970) provides that any alien shall be deported who

> prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law . . . .

32. 523 F.2d 883 (9th Cir. Oct., 1975) (per curiam).

33. 8 U.S.C. § 1325 (1970) provides in pertinent part:

> Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished . . . .

cer. Cuevas pled guilty to this charge, which led to the institution of deportation proceedings against him.

The main focus of the *Cuevas-Cuevas* court was on what constitutes an entry into the United States by an alien who is a permanent resident of the United States, but then leaves for some reason. Where the departure is meaningfully interruptive of the alien's residence, on return, the alien's entrance is regarded as a new entry. When the entrance is found to be a new entry, the alien is once again subject to all the entrance requirements of the INA. If the requirements are not met, the alien may be excluded, regardless of the life he or she had already established in the United States. However, if the return is not deemed to be a new entry, the requirements are inapplicable.[34] Section 1101(a)(13)[35] of the INA defines the term "entry." The courts originally adopted a very strict interpretation of the term, but a more flexible standard is utilized today—a departure is seen as meaningfully interruptive of permanent residence only if the purpose of the departure was contrary to immigration law policy.[36] The policy articulated in *Cuevas-Cuevas* requires that the alien's departure from the United States be for an innocent purpose; otherwise, the departure is considered to be meaningfully interruptive of the alien's resi-

34. For a critical discussion of the re-entry doctrine see Comment, *Exclusion and Deportation of Resident Aliens: The Re-entry Doctrine and the Need for Reform*, 13 SAN DIEGO L. REV. 192 (1975) [hereinafter cited as Comment, *Deportation*]. The earlier and harsher re-entry doctrine is discussed in Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 327 (1956), where the author advocates the abolition of the re-entry doctrine altogether.

35. 8 U.S.C. § 1101(a)(13) (1970) provides in pertinent part:

> An alien . . . shall not be regarded as making an entry into the United States for the purposes of the immigration laws . . . if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port . . . was not intended or reasonably to be expected by him or . . . was not voluntary.

36. In Rosenberg v. Fleuti, 374 U.S. 449 (1963), the Supreme Court found that an innocent, brief excursion of only an afternoon's duration by a resident alien outside the United States was not intended as a disruptive departure. Therefore, the Court found that his return was not to be considered an entry into the United States. *Fleuti* was a clear break from prior cases which had stated that each return of an alien from abroad was to be deemed a new entry. For a comprehensive analysis of the *Fleuti* case see Comment, *Deportation*, *supra* note 34, at 197-207. Earlier cases upheld a more strict interpretation of the term "entry." *See* Schoeps v. Carmichael, 177 F.2d 391 (9th Cir. 1949), *cert. denied*, 339 U.S. 914 (1950); Schlimmgen v. Jordan, 164 F.2d 633 (7th Cir. 1948).

Recent cases find an "entry" pursuant to section 1101 where there is proof of an alien's unlawful conduct while abroad. *See* Palatian v. Immigration & Nat. Serv., 502 F.2d 1091 (9th Cir. 1974); Martin-Mendoza v. Immigration & Nat. Serv., 499 F.2d 918 (9th Cir. 1974).

dence. The Ninth Circuit found that Cuevas' departure lost its innocent purpose when he decided to aid the other aliens' illegal entry and was therefore meaningfully interruptive of his residency. Thus, his return to the United States constituted a new entry, and Cuevas was found deportable as a result of his violation of section 1251(a)(13).

B. The Civil Nature of Deportation Hearings

Two cases of the past survey term involved the Ninth Circuit in an examination of the civil nature of deportation hearings. Courts have frequently articulated the view that deportation is not a punishment. They reason that since it is within the inherent power of every sovereign entity to exclude or expel aliens, the deportation of an alien cannot be considered a punishment.[37] Deportation proceedings have been consistently characterized as civil, rather than criminal, in nature.[38] The result of this characterization is clearly detrimental to any alien who is a potential deportee.[39] For example, the constitutional safeguards required in the criminal process are, for the most part, not required in the deportation process.[40] The fifth amendment requirements of due

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37. Courts have frequently articulated the view that deportation is not punishment. *See* Galvan v. Press, 347 U.S. 522 (1954); United States v. Gasca-Kraft, 522 F.2d 149 (9th Cir. 1975). *See generally* Note, *Resident Aliens and Due Process: Anatomy of a Deportation*, 8 Vill. L. Rev. 556 (1963) [hereinafter cited as *Anatomy of a Deportation*]. However, the courts have also frequently alluded to the hardship that a deportation may produce in the life of a deportee. *See* Harisiades v. Shaughnessy, 342 U.S. 580 (1952), where Justice Douglas, dissenting, noted: "Banishment is a punishment in the practical sense. It may deprive a man and his family of all that makes life worthwhile." *Id.* at 600. The punishment aspect of deportation has been recognized by legal commentators as well. *See, e.g.*, 13 San Diego L. Rev. 454 (1976). One commentator has suggested that the courts should employ a flexible standard in this situation, *i.e.*, they should look to the effect of a deportation on an alien in order to determine if the deportation constitutes a punishment. *See Anatomy of a Deportation, supra* at 580.

38. *See* Bilokumsky v. Tod, 263 U.S. 149 (1923) (deportation proceedings are civil in nature); Zakonaite v. Wolf, 226 U.S. 272 (1912) (the enforcement of immigration regulations is not a criminal prosecution); United States v. Gasca-Kraft, 522 F.2d 149 (9th Cir. 1975) ("a deportation proceeding is a civil proceeding, not a criminal one . . . .").

39. There are currently 18 general classes of deportable aliens listed under 8 U.S.C. section 1251(a)(1)-(18) (1970). These 18 general classes are, unfortunately, broad enough to allow for literally hundreds of grounds for deportation. For an explanation of the statutory scheme see Wasserman, *The Undemocratic, Illogical and Arbitrary Immigration Laws of the United States*, 3 Int'l Law. 254 (1968).

40. *See Immigration, Alienage & Nationality–Due Process and Deportation–Is There a Right to Assigned Counsel?*, 8 U.C.D. L. Rev. 289 (1975) [hereinafter cited as *Due Process & Deportation*], wherein the author draws an analogy between probation revocation and deportation.

process are part of deportation procedures,[41] but the alien has the burden of proving that a lawful entry or re-entry has occurred, as well as demonstrating his or her right to remain in this country.[42] The only basic safeguard of a petitioner's rights in a deportation hearing is the fairness of the hearing itself.[43]

Less stringent rules of evidence are also applicable in deportation hearings.[44] For example, hearsay is admissible at a deportation hearing.[45] The grounds for review of a Bureau of Immigration Appeals decision are very limited. Therefore, the basic question before any court on review of a deportation decision is whether the deportation order is supported by clear, unequivocal and convincing evidence.[46]

Miranda *Warnings Not Required*

In *Trias-Hernandez v. Immigration & Naturalization Service*,[47] the Ninth Circuit held that an alien's statement given to an immigra-

41. *See* United States v. Gasca-Kraft, 522 F.2d 149, 152 (9th Cir. 1975).

42. 8 U.S.C. § 1361 (1970) states in pertinent part:

> In any deportation proceeding . . . the burden of proof shall be upon such person to show the time, place and manner of his entry into the United States . . . . If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law.

43. In Schoeps v. Carmichael, 177 F.2d 391 (9th Cir. 1949), *cert. denied*, 339 U.S. 914 (1950), the Ninth Circuit noted that although deportation is not criminal action, its serious consequences to the potential deportee require close judicial scrutiny of the substantive fairness of the administrative hearing.

44. *See* Bilokumsky v. Tod, 263 U.S. 149 (1923).

45. *See, e.g.*, Trias-Hernandez v. Immigration & Nat. Serv., 528 F.2d 366 (9th Cir. Dec., 1975) (per Wright, J.).

46. *See* Woodby v. Immigration & Nat. Serv., 385 U.S. 276 (1966). In *In re* Flores, 524 F.2d 627 (9th Cir. Oct., 1975) (per curiam), the District Director of the Immigration and Naturalization Service (INS) was found to have abused his discretion in denying the petitioners' applications for an extension of their voluntary departure date. The *Flores* court found an abuse of discretion in the District Director's failure to articulate any reasons for denying the requested extension.

47. 528 F.2d 366 (9th Cir., Dec., 1975) (per Wright, J.). *Trias-Hernandez* involved an alien who was apprehended by the INS ten days after he entered the United States. While in the custody of an immigration officer, the alien admitted that he last entered the United States without inspection or documents. This information was recorded on INS Form 1-213. The information on this form provided the basis for an Order to Show Cause charging the illegal entry and the deportability of petitioner. Without this information, the government would have been unable to prove the illegal entry because petitioner had earlier been issued a permanent resident visa in 1958. Only by these admissions did the interrogating officer learn that the alien had left the United States in 1961 due to illness and that he did not successfully re-enter the United States until 1972, when he was interrogated and charged with the illegal entry which was the basis for this prosecution.

tion agent while in custody, without counsel, was admissible in a subsequent deportation hearing. The defendant argued that when he was taken into custody, he was not given his *Miranda* rights.[48] However, *Miranda* warnings have never been required in investigatory immigration proceedings,[49] nor have they been mandated in circumstances similar to *Trias-Hernandez*[50] where an alien is interrogated while in the custody of immigration officials. *Miranda* warnings have been required only where the alien would also have been subject to criminal sanctions.[51] Thus, the Ninth Circuit found Trias-Hernandez' statements to be admissible despite the absence of a *Miranda* warning.

Limitations on the Right-to-Counsel

Trias-Hernandez also reviewed the alien's right-to-counsel during immigration interrogations.[52] Section 287.3 of the Code of Federal Regulations[53] provides for an alien's right to retain coun-

48. 384 U.S. 436 (1966).

49. *See* Gonzalez-Gomez v. Immigration & Nat. Serv., 450 F.2d 103 (9th Cir. 1971), which reiterated the view that *Miranda* warnings were inapplicable to a person responding to an Order to Show Cause for a deportation hearing. *Id.* at 105n.4. For other instances where *Miranda* warnings have been held inapplicable in an immigration context *see* Lavoie v. Immigration & Nat. Serv., 418 F.2d 732 (9th Cir. 1969), *cert. denied*, 400 U.S. 590 (1971) (statement sworn to before INS investigator); Nason v. Immigration & Nat. Serv., 370 F.2d 865 (2d Cir. 1967) (statement made to INS investigator where resident alien appeared voluntarily); Ah Chiu Pang v. Immigration & Nat. Serv., 368 F.2d 637 (3d Cir. 1966), *cert. denied*, 386 U.S. 1037 (1967) (voluntary appearance at INS office where statement was made).

50. Gonzalez-Gomez v. Immigration & Nat. Serv., 450 F.2d 103 (9th Cir. 1971) left open the question of whether *Miranda* applied to one under arrest and subject to custodial interrogation by an immigration officer. However, in Chavez-Raya v. Immigration & Nat. Serv., 519 F.2d 397 (7th Cir. 1975), the court held that where the lack of *Miranda* warnings would make an alien's statement which was made during a custodial interrogation inadmissible in a criminal prosecution for violation of immigration laws, such a statement would not be inadmissible in deportation proceedings.

51. *See* United States v. Campos-Serrano, 430 F.2d 173 (7th Cir. 1970), *cert. denied*, 404 U.S. 1023 (1972) (*Miranda* warning should have been given to an alien interrogated by federal agents about his possession of a forged registration card, a criminal offense). It should be noted that 8 C.F.R. § 287.3 (1976) requires that

> [a]n alien . . . be advised of the reason for his arrest and his right to . . . counsel . . . at no expense to the Government. He shall also be advised that any statement he makes may be used against him in a subsequent proceeding and that a decision will be made within 24 hours or less as to whether he will be continued in custody . . . .

However, this warning falls far short of the statement required by *Miranda*. *See* Miranda v. Arizona, 384 U.S. 436, 473-74 (1966).

52. 528 F.2d at 367.

53. 8 C.F.R. § 287.3 (1976), the text of which may be found at note 51 *supra*.

sel after arrest by immigration officers or during deportation proceedings. However, there is no right-to-counsel during routine immigration investigations, even where deportation may follow from the investigation. *Trias-Hernandez* affirmed the widely held view that the presence of counsel during interrogations held prior to deportation proceedings was not required by the sixth amendment.[54]

Deportation Not Precluded by Illegal Arrest

Medina-Sandoval v. Immigration & Naturalization Service[55] examined the validity of a deportation order which was preceded by a stop and detention of questionable legality. Section 1357 of the INA confers almost unlimited power on immigration officers to stop any persons they believe to be an alien and to question them as to their right to remain in the United States.[56] The defendant in *Medina-Sandoval* was stopped on the street by immigration officers and asked to produce a "green card"[57] which would demonstrate that he was in the country legally.[58] After replying that he did not have one, he was taken to an immigration office.

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54. *See, e.g.*, Lavoie v. Immigration & Nat. Serv., 418 F.2d 732, 734 (9th Cir. 1969); Nason v. Immigration & Nat. Serv., 370 F.2d 865, 867-68 (2d Cir. 1967). For a discussion of an alien's right to assigned counsel see *Due Process & Deportation, supra* note 40, wherein the author concludes that due process incorporates the right to be assigned counsel in alien deportation hearings.

55. 524 F.2d 658 (9th Cir. Oct., 1975) (per curiam).

56. The relevant portion of 8 U.S.C. § 1357 (1970) states:

> (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States.

The broad and discretionary language of this statute makes it possible for officers of the INS to stop and question a person solely because of their ethnic appearance, as opposed to their alien status. The courts should require INS officers to articulate specific reasons for their belief that a person is in the United States illegally before permitting stops under authority of this statute. *See generally* United States v. Brignoni-Ponce, 499 F.2d 1109 (9th Cir. 1974), *quoting* United States v. Mallides, 473 F.2d 859 (9th Cir. 1973), which involved a stop of an automobile with Mexican-American occupants:

> [T]here is nothing suspicious about six persons riding in a sedan. The conduct does not become suspicious simply because the skins of the occupants are non-white . . . .

Id. at 861.

57. An alien assigned a green card has been admitted into the United States for permanent residence but has chosen to keep a home in Canada or Mexico and to cross daily or seasonally into the United States for work. *See* Gooch v. Clark, 433 F.2d 74, 76 (1970), *cert. denied*, 402 U.S. 995 (1971).

58. 8 U.S.C. § 1357(a)(1) (1970) confers unlimited authority to immigration officials to

When interrogated, Medina-Sandoval admitted that he had entered the United States without being inspected by an immigration officer. He was arrested and detained, and then deportation proceedings were instituted against him.[59]

The Ninth Circuit upheld the validity of the deportation order and noted that the Immigration and Naturalization Service had not relied on any statements made by Medina-Sandoval during his interrogation at the immigration office. The court stressed that he was found deportable because of his admissions at the deportation hearing, which were given voluntarily and with the advice of counsel.[60] The *Medina-Sandoval* court stated that even if Medina-Sandoval's stop and subsequent arrest were unlawful, the commencement of deportation hearings against him would not be barred.[61] The court reasoned that since an illegal arrest will not invalidate a subsequent criminal prosecution and conviction, an unlawful stop would certainly not prevent the initiation of a civil deportation hearing. The Ninth Circuit, with its holding in *Medina-Sandoval*, aligned itself with the positions of at least three other circuits in circumstances similar to those of the instant case.[62]

II. ESTOPPEL APPLIED TO THE GOVERNMENT

A. INTRODUCTION

Equitable estoppel is a rule of fairness by which courts seek to protect the reliances and expectations of innocent persons from defeat by those who have induced such reliances and expectations.[1] The law of contracts has long recognized this principle,

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stop and question any person whom they believe may be in the United States illegally. *See* note 56 *supra*.

59. 524 F.2d at 659.

60. It appears that Medina-Sandoval's counsel erred in allowing his client to voluntarily make statements containing information so prejudicial to his client's interest.

61. 524 F.2d at 659.

62. *See* Guzman-Flores v. United States Immig. & Nat. Serv., 496 F.2d 1245 (7th Cir. 1974); La Franca v. Immigration & Nat. Serv., 413 F.2d 686 (2d Cir. 1969); Klissas v. Immigration & Nat. Serv., 361 F.2d 529 (D.C. Cir. 1966).

1. *See* Russell v. Texas Co., 238 F.2d 636 (9th Cir. 1956), *cert. denied*, 354 U.S. 938 (1957). *Russell* involved a grantee of land who claimed title to mineral rights that his grantor had expressly reserved to himself. The grantee asserted that the grantor had no right to reserve title to these mineral rights. Equitable estoppel was used to prevent the grantee from asserting that the mineral rights thereby passed to him in the conveying grant. *Id.* at 640.

applying it to avoid injustice and to aid in equalizing the balance of bargaining power among contracting parties. Traditionally, public policy has dictated that a loss be placed on the party contributing to produce it when one of two innocent persons must suffer a loss.[2]

Historically, courts have been very reluctant to invoke ordinary principles of estoppel against the government or one of its agencies.[3] In those infrequent instances where it has been applied, a distinction has been drawn between the government's "proprietary" and "sovereign" functions.[4] In the former, the government is treated more as a private party while in the latter, "the government is carrying out its unique governmental functions for the benefit of the whole public."[5] In the past, the defense

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2. *See* Pompton Township v. Cooper Union, 101 U.S. 196 (1879). The four elements which must be present to establish the defense of estoppel were reiterated in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970):

> (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Id. at 96. *Georgia-Pacific* involved an action by the government to compel the defendant to convey part of its timberland to the government, to extend the boundaries of the Siskiyou National Forest, under an agreement made between the government and defendant's predecessor over thirty years earlier. The four elements enunciated were found to have been met; therefore the defendant was found to be entitled to raise the estoppel defense. This four-step test has been used at least once in the immigration context. *See* Gestuvo v. District Director, Immig. & Nat. Serv., 337 F. Supp. 1093 (C.D. Cal. 1971).

3. *See* Wackerli v. Morton, 390 F. Supp. 962 (D.C. Idaho 1975) (in a dispute over title to real property in which the United States claimed an interest, equitable defense of estoppel would not lie against the United States); Sheff v. United States, 325 F. Supp. 1082 (N.D. Cal. 1971) (in an action under the Federal Tort Claims Act for personal injury sustained in a collision with a member of the California National Guard, estoppel would not lie against the government); Brooke v. United States, 300 F. Supp. 465 (D. Mont. 1969) (ordinary doctrines of estoppel are inapplicable in income tax refund disputes); United States v. Herman, 186 F. Supp. 98 (E.D.N.Y. 1960) (equitable estoppel could not be invoked against the government as a result of its delay in foreclosing a mortgage); United States v. Glens Falls Indem. Co., 152 F. Supp. 840 (S.D.N.Y. 1957) (government was not estopped from collecting on a bond to guarantee surrender of an alien for deportation even though the alien deported himself).

The use of equitable estoppel against the government is discussed in Saltman, *Estoppel Against the Government: Have Recent Decisions Rounded The Corners of the Agent's Authority Problem in Federal Procedures?*, 45 FORDHAM L. REV. 497 (1976).

4. *See* United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970) (government can be estopped in its proprietary role but not in its sovereign role); United States v. County of Lawrence, 173 F. Supp. 307, 314 (W.D. Pa. 1959), *rev'd on other grounds*, 364 U.S. 628 (1961) (equitable estoppel may only be invoked against the government acting in its proprietary capacity).

5. United States v. Georgia-Pacific Co., 421 F.2d 92, 101 (9th Cir. 1970).

of estoppel has been available to a party only when the government was performing a proprietary function;[6] however, the impact of this distinction is diminishing in the Ninth Circuit.[7]

B. *Santiago v. Immigration & Naturalization Service*

This past term, in *Santiago v. Immigration & Naturalization Service*,[8] the Ninth Circuit dealt with the applicability of the doctrine of equitable estoppel to the actions of the Immigration and Naturalization Service (INS). Each of the petitioners in *Santiago*[9] held a preference visa under a section of the Immigration and Nationality Act (INA) which provides that a spouse or child seeking immigrant status is entitled to the same status as the relative they derive their preference from if the spouse or child is "accompanying, or following to join, his spouse or parent."[10] Unfortunately, each of these petitioners preceded the spouse or parent

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6. *See* authorities cited at note 4 *supra*.

7. In United States v. Lazy FC Ranch, 481 F.2d 985, 989 (9th Cir. 1973), the court stated that even when the government acts in a capacity traditionally described as sovereign (as distinguished from proprietary), estoppel is available as a defense. This proposition was further discussed in United States v. California, 403 F. Supp. 874 (E.D. Cal. 1975), wherein the court noted: "Equitable estoppel may, under certain circumstances, be applied against the United States without regard to its 'capacity,' whether proprietary or sovereign." *Id.* at 899. Earlier, in Gestuvo v. District Director, Immig. & Nat. Serv., 337 F. Supp. 1093 (C.D. Cal. 1971), an immigration case, the district court discussed estoppel as applied to the government in its proprietary and sovereign capacities and noted that the doctrine of sovereign immunity has begun to erode, as have the rules insulating the government from estoppel. *Id.* at 1098.

In California, no distinction is made between the proprietary and sovereign functions of the government. *See* Cruise v. City & County of San Francisco, 101 Cal. App. 2d 558, 225 P.2d 988 (1st Dist. 1951), wherein the court held that the same rules of estoppel apply against the government as those applicable to private persons. *See also* Market St. Ry. Co. v. California State Bd. of Equalization, 137 Cal. App. 2d 87, 290 P.2d 20 (1st Dist. 1955); Baird v. City of Fresno, 97 Cal. App. 2d 336, 217 P.2d 681 (4th Dist. 1950).

8. 526 F.2d 488 (9th Cir. Oct., 1975) (per Sneed, J.) (en banc), *cert. denied*, 96 S. Ct. 2167 (1976).

9. Four separate cases were consolidated in *Santiago* due to the similar fact situations and legal issues involved. Santiago's wife was entitled to a fourth-preference visa as a married daughter of a United States citizen, but Santiago came to the United States ahead of her in order to earn the money to pay her passage. The wives of petitioners Catam and Paglinawan were also entitled to preference visas but, because of illness, they did not enter the United States with their husbands. Petitioner Khan's father held a fifth-preference visa as the brother of a United States citizen. As a result of the fact that Khan was about to reach 21 years of age, at which time his status as "child" of one holding a preference visa would become invalid, he left Pakistan ahead of his father to avoid the birthday deadline. Khan's father died while he was en route to the United States. 526 F.2d at 490.

10. 8 U.S.C. 1153(a) (1970) provides in pertinent part:

> Aliens who are subject to the numerical limitations specified

from whom their preference was derived, and the illness or death of the relative with preferred status prevented the relative from following each of the petitioners. Yet, at entry, the petitioners were admitted by an immigration officer who either failed to inform them of the requirement that they could not enter without the prior entry of the person from whom their preference was derived or failed to inquire as to the whereabouts of that person. There was no evidence presented by the INS which demonstrated that any of the petitioners understood the requirement of "accompanying" or "following" or were seeking to fraudulently avoid it. The Ninth Circuit held that the failures of immigration officers to inform did not amount to affirmative misconduct so as to estop the government from asserting excludability on entry as a basis for deportation.[11] An examination of the Supreme Court decision in *Immigration & Naturalization Service v. Hibi*,[12] upon which the court in *Santiago* relied, is necessary to gain an understanding of the result reached by the Ninth Circuit.

Affirmative Misconduct Defined

Hibi involved a petition for naturalization by a Filipino citizen who had served in the United States Armed forces during World War II. His petition was filed in September, 1967. The Nationality Act of 1940[13] provided for overseas naturalization of aliens who served honorably in the United States armed forces during World War II if a petition was filed prior to December 31, 1946. The twenty-year delay alone would seem sufficient to preclude any judicial review of this case. However, Hibi raised the defense of estoppel as a result of the government's failure to advise him of his right to apply for naturalization when he was eligible and for

> in section 1151(a) of this title shall be allotted visas or their conditional entry authorized, as the case may be, as follows:
>
> . . . .
>
> (9) A spouse or child as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa or to conditional entry under paragraphs (1) through (8) of this subsection, be entitled to the same status, and the same order of consideration provided in subsection (b) of this section, if accompanying, or following to join, his spouse or parent.

11. 526 F.2d at 493.

12. 414 U.S. 5 (1973).

13. Act of Oct. 14, 1940, ch. 876, §§ 501-907, 54 Stat. 1137 (1940), *as amended by* Act of Mar. 27, 1942, ch. 199, §§ 701-705, 56 Stat. 182 (1942) (current version at 8 U.S.C. § 1440 (1970)).

its failure to provide a naturalization representative in the Philippines during the time period required by Congress. The government's failure to provide an INS representative was the result of a concern expressed by the Philippine government that many young people would desire to leave the Philippines for the United States. Thus, in the interest of promoting diplomatic relations between the United States and the Philippines, the United States Attorney General revoked the authority of the naturalization representative to process emigration requests in the Philippines and thereby denied many Filipinos their right to be naturalized.[14] The Supreme Court held that the particular conduct by the government did not amount to affirmative misconduct which can give rise to the defense of estoppel and denied Hibi's petition for naturalization. The Court did not articulate exactly what type of actions by the government would be construed as affirmative misconduct.[15]

The Ninth Circuit took the position that the actions of immigration officials in failing to inform the petitioners in *Santiago* of immigration requirements did "not appear more blameworthy

14. *See* Justice Douglas' dissent in *Hibi*, 414 U.S. at 10-11.

15. The most important Supreme Court decision in the equitable estoppel area prior to *Hibi* was Moser v. United States, 341 U.S. 41 (1951). Moser, a Swiss citizen, applied for American citizenship and also claimed exemption from military service as a neutral alien in the United States. The Selective Service Act at that time provided that an alien who claimed such an exemption was barred from citizenship. The Court held Moser could not be barred from citizenship as a result of "misleading circumstances"—a letter from the Swiss Legation to Moser stating that Moser would not waive his right to apply for American citizenship by applying for exemption from military service. The Swiss Legation had partially relied on advice from the State Department in giving advice to Moser. The Court never expressly used the language of estoppel in *Moser*, but, at the time, the decision was viewed as the most important instance in which estoppel had been applied against the government. *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 17.02, at 501 (1958).

Prior to the *Hibi* decision, the federal courts applied the doctrine of equitable estoppel, in theory though not by name, in a wide variety of situations. In one series of cases, aliens were granted American citizenship at birth in a foreign country where one parent of the alien was a United States citizen. However, citizenship was conditioned upon the alien's residency in the United States by the age of sixteen. The courts consistently held that where unnecessary delay by American consulate officials in issuing travel documents to the aliens prevented the commencement of their residency prior to age sixteen, no loss of citizenship rights would result. *See* Lee Wing Hong v. Dulles, 214 F.2d 753 (7th Cir. 1954); Lee Hong v. Acheson, 110 F. Supp. 60 (N.D. Cal. 1953). It should be noted that all of these decisions involved a potential denial of citizenship, a right which has been held to be particularly worthy of protection by courts. The rights of aliens to remain in the United States have not been accorded the same type of status in the courts, as the cases discussed in the text of this Note clearly demonstrate.

Other cases implicitly applied the doctrine of equitable estoppel where aliens demonstrated they were actually misled by or relied on the erroneous advice of a United

than those [failures] in *Hibi*."[16] The *Santiago* court emphasized that the officials involved in *Hibi* had acted in derogation of express legislative duties, while the actions in *Santiago* involved no such express breach of legislative duties. In addition, the court characterized the governmental failures in *Santiago* as of a less serious nature than the failures in *Hibi*. Finally, the Ninth Circuit emphasized that Santiago, as opposed to Hibi, had lost no right to which he was entitled under the immigration laws, because at the time of Santiago's admission he had no right to enter the United States.[17] Hibi, on the other hand, lost his opportunity to be naturalized as a United States citizen, a right granted by an act of Congress. By virtue of the fact that the Supreme Court found estoppel to be unavailable in the *Hibi* situation, the *Santiago* court concluded that the defense could not be raised in Santiago's case.[18]

C. *Sun Il Yoo v. Immigration & Naturalization Service*

The concept of affirmative misconduct as defined in *Hibi* and applied in *Santiago* was also relied on in another survey case this term, *Sun Il Yoo v. Immigration & Naturalization Service*.[19] The *Yoo* court, with Judge Ely writing for the majority, appeared to retreat from *Santiago's* strict interpretation of *Hibi*. In *Yoo*, the Ninth Circuit held the government to be estopped from denying a sixth-preference visa[20] to petitioner due to a one-year delay in process-

States immigration officer. *See* Tejeda v. Immigration & Nat. Serv., 346 F.2d 389 (9th Cir. 1965); Podea v. Acheson, 179 F.2d 306 (2d Cir. 1950). The *Tejeda* court noted:

> [To] deny any form of relief from the order of deportation . . . would result in the punishment of a poorly educated alien for his reliance on the advice of a presumptively well-informed official of the United States government. This we would deem improper.

346 F.2d at 393. For decisions preceeding *Hibi* which found no detrimental reliance by an alien on the actions of the government see Peignand v. Immigration & Nat. Serv., 440 F.2d 757 (1st Cir. 1971); Talanoa v. Immigration & Nat. Serv., 397 F.2d 196 (9th Cir. 1968); Manguera v. Immigration & Nat. Serv., 390 F.2d 358 (9th Cir. 1968); Kalatjis v. Rosenberg, 305 F.2d 249 (9th Cir. 1962); Tang v. District Director, Immig. & Nat. Serv., 298 F. Supp. 413 (C.D. Cal. 1969).

16. 526 F.2d at 493.

17. It could be argued that once aliens are allowed to enter the United States by an immigration officer, their right to enter has vested as a consequence of the officer's action in permitting them to enter. Consequently, they have lost a right to which they are entitled under the immigration laws—the right to remain in this country after attempting lawful admission.

18. 526 F.2d at 493.

19. 534 F.2d 1325 (9th Cir. Feb., 1976) (per Ely, J.).

20. 8 U.S.C. 1153(a)(6) (1970) permits immigrants who are capable of performing a specified skill, not of a temporary or seasonal nature, to enter the United States, as long as a shortage of employable persons with that skill exists in the United States.

ing his petition for adjustment of status[21] from a nonimmigrant student to a sixth-preference immigrant.[22] The INS' affirmative misconduct consisted of ignoring significant and undeniable evidence which would have corroborated Yoo's application for a preference classification.

In distinguishing *Yoo* from *Hibi* and *Santiago*, the *Yoo* panel stated that Yoo had done all he legally could do to obtain the labor certificate to which he was entitled. The petitioners in *Hibi* and *Santiago*, on the other hand, had not made diligent efforts to discover all of their rights and all of the legal requirements that they were to fulfill for immigration. The *Yoo* court determined that no duty existed on the part of the immigration officers to inform the aliens of matters the aliens themselves had primary responsibility for knowing; thus, there was no affirmative misconduct in *Hibi* or *Santiago* which would give rise to an estoppel against the government.[23] The court's suggestion that immigrants should bear the burden of taking affirmative steps to learn of their rights at the time of their entry into the United States is unrealistic, especially in light of its own recognition of the "hectic atmosphere surrounding the processing and admitting of large numbers of aliens . . . ."[24] To impose such a burden on immigrant aliens, and not on the immigration officers charged with enforcement of our

21. *Id.* § 1255 discusses the procedures to be followed for the adjustment of the status of nonimmigrant aliens.

22. 534 F.2d at 1328. The facts in *Yoo* involved an alien who sought classification as a sixth-preference immigrant due to his occupation as a machinist. That occupation was listed, at the time, as pre-certified by the Labor Department under Schedule C, 29 C.F.R. § 60 (1976), so that Yoo could have obtained visa preference without showing that he had a specific job offer. However, in his application, Yoo stated that he had previously been employed by a Korean company as a machinist. In investigating this claim, the INS was told by a representative of the Korean employer that Yoo had never been employed at the company. Yoo's counsel wrote to inform the INS that the information they had received was inaccurate, enclosing a letter from a former representative of the employer stating that Yoo had worked for the employer. The misunderstanding arose because the representative originally contacted by the INS had not known of this employment. Ten months later, the INS denied Yoo's application anyway on the ground that he had given false information regarding his prior employment. Yoo appealed, calling attention to the letter his counsel had sent, but the INS still denied the application, this time because Schedule C had been withdrawn by the Labor Department, so that Yoo could not obtain certification without a specific job offer. After unsuccessfully appealing to the proper administrative boards, Yoo filed a petition which resulted in this Ninth Circuit opinion. The court characterized the one-year delay by the INS in processing Yoo's application as "oppressive." 534 F.2d at 1328. For a discussion of alien labor certification requirements see Mancini & Rubin, *An Overview of the Labor Certification Requirement for Intending Immigrants*, 14 SAN DIEGO L. REV. 76 (1976).

23. 534 F.2d at 1328.

24. *Id.*

immigration laws, appears to be an inequitable allocation of a primarily governmental responsibility.[25]

Judge Wright joined in the majority opinion in *Santiago*, but dissented in *Yoo*. In his dissent, he reconciled the one-year delay in *Yoo* with the *Hibi* failure to comply with a congressional mandate. The basic rationale for Judge Wright's dissent in *Yoo* was premised on his belief that the *Yoo* conduct was even less harmful than the conduct in *Hibi*. First, he disagreed that the delay in processing Yoo's application constituted affirmative misconduct because various portions of it could be justified.[26] Second, in *Santiago*, estoppel was held to be available to a petitioner only if the acts and omissions of the government were more blameworthy than those in *Hibi*. Weighing the seemingly extreme governmental negligence of *Hibi* against the more simple negligence of the INS in *Yoo*, Judge Wright felt that the application of an estoppel was unjustified.

Affirmative misconduct was also defined by the Ninth Circuit in an adverse possession case, *United States v. Wharton*.[27] In *Wharton*, the Bureau of Land Management gave a family erroneous advice on how to obtain title to land they had occupied for over forty years. The Bureau had falsely indicated that title could not be acquired. The same misrepresentation was made to the family through a third party before the land was actually reclassified so that title could not be acquired. The *Wharton* court stated that a serious injustice would have occurred had estoppel not been imposed against the government. In distinguishing *Wharton* from *Hibi*, Judge Wright stated that *Hibi* involved a failure to inform an individual of his or her rights, whereas in *Wharton*, the defendant was misinformed as to what his rights were after he affirmatively sought to discover them. Thus, Judge Wright would make estoppel available only where an individual has actually sought infor-

25. In Gordon, *The Need to Modernize our Immigration Laws*, 13 SAN DIEGO L. REV. 1 (1975), the author notes that even experienced attorneys may have difficulty interpreting our current "obscure" and "cumbersome" immigration laws. *Id.* at 2.

26. The letter from Yoo's counsel which included the letter from his Korean employer's representative corroborating his story was dated March 23, 1970, but the date of receipt by the State Department was June 22, 1970, accounting for three months of the delay. Judge Wright found this delay in processing unexplainable, but stated it amounted to no more than "simple negligence" which was found not to support estoppel in *Santiago*. 529 F.2d at 1329.

27. 514 F.2d 406 (9th Cir. 1975). *Wharton* concerned an action for ejectment of the defendants who had claimed title to the plaintiff's land under the doctrine of adverse possession.

mation about his or her legal rights and was subsequently misinformed by the government about those rights. He would not apply estoppel where individuals fail to make any effort to discover their legal rights, even though the government has affirmatively failed to supply information regarding those rights.

The Second Circuit Approach

The Second Circuit recently interpreted affirmative misconduct in *Corniel-Rodriguez v. Immigration & Naturalization Service.*[28] In this case, the petitioner applied for a visa as the "child of a special immigrant."[29] To qualify as a child, one must be an unmarried person under twenty-one years of age.[30] Due to the special eligibility provisions of the statute governing one's status as a "child of a special immigrant," the State Department has made it mandatory to warn aliens of the "child" limitation by issuing a child a special form when an application for a visa is made.[31] Although the petitioner was given an immigrant visa by the American consul in the Dominican Republic, the official failed to warn her, as required, that her visa would automatically become invalid if she married prior to her arrival in the United States. She married three days prior to her departure from the Dominican Republic and, as a result, the INS found her to be deportable. The court determined that the government's failure to give her this warning amounted to affirmative misconduct and hence concluded that the government was estopped from deporting her. To act otherwise, the court stated, "would be to sanction a manifest injustice occasioned by the Government's own failures."[32] The Second Circuit briefly distinguished *Santiago* and *Hibi* on the ground that the State Department regulation which required aliens to be informed of the marriage limitation carried "the force of law that must be respected and enforced by the government,"[33] while no such duty to inform existed in *Santiago* or *Hibi*.

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28. 532 F.2d 301 (2d Cir. 1976).

29. 8 U.S.C. § 1101(a)(27)(A) (1970) defines "special immigrant" as "an immigrant who was born in any independent foreign country of the Western Hemisphere or in the Canal Zone and the spouse and children of any such immigrant, if accompanying or following to join him . . . ."

30. *Id.* § 1101(b)(1).

31. 22 C.F.R. § 42.122(d) (1975) states in pertinent part:

> The consular officer shall warn an alien [issued a visa as a child], when appropriate, that he will be inadmissible as such an immigrant if he is not unmarried at the time of application for admission . . . .

32. 532 F.2d at 307.

33. *Id.*

D. Conclusion

The courts have had difficulty in characterizing exactly what type of actions by the government may be deemed to be affirmative misconduct, absent any guidance from the Supreme Court. The courts in *Santiago*, *Yoo*, *Wharton* and *Corniel-Rodriguez* have drawn distinctions between the following in making a determination of the applicability of equitable estoppel: (1) citizens who have taken affirmative action to learn of their rights and are subsequently misinformed; (2) the government's failure to inform citizens of their rights absent an express statutory duty to inform; and (3) the government's breach of an express statutory duty to publicize. However, these distinctions ignore the fundamental principle which forms the basis of the doctrine of equitable estoppel: "[N]o one [should] be permitted to . . . take advantage of his own wrong."[34] Public policy considerations mandate that the enforcement of laws should be estopped only in limited circumstances, due to the danger of damaging interests of the public which far outweigh those of the individual parties injured through reliance on the conduct of public officials. However, courts should utilize a balancing approach[35] in determining whether the defense of estoppel may be raised against the government in any particular case and should avoid adherence to the artificial distinctions presently being drawn in characterizing governmental conduct.

In each case where the defense of equitable estoppel may be applicable, a court should balance the potential hardship experienced by an individual against the public interest to be protected. Recognition of this type of interest balancing would explain the result in *Hibi*. Although the Attorney General was acting in a manner directly contrary to the mandate of Congress, he was carrying out the foreign policy objectives of the executive branch of the government, which was attempting to improve diplomatic relations between the United States and the Philippines. Thus, the important public interests involved in this delicate diplomatic situation prevented the court from finding the doctrine of equitable estoppel to be available to the plaintiff. However, no such compelling policy reasons can justify the results reached in *Santiago*. In this case, the harm suffered by the immigrants far outweighed any

34. R.H. Stearns Co. v. United States, 291 U.S. 54, 61-62 (1934) (Cardozo, J.).

35. *See* Santiago v. Immigration & Nat. Serv., 526 F.2d 488, 496 (9th Cir. Oct., 1975) (Choy, J., dissenting).

administrative inconvenience suffered by the INS in admitting them, and equitable estoppel should have been made available to the petitioners. The fundamental considerations of fair play and substantial justice demand no less.[36]

K. Franza Turner

36. *See* Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680, 707 (1964).