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Ayuda, Inc. v. Thornburgh: Did Congress Give the Executive Branch Free Rein to Define the Scope of Legislation

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Abstract

The Note argues that the Ayuda decision is inconsistent with the congressional intent behind IRCA and prior case law. The Note further argues that the purposes underlying IRCA will best be served by prompt judicial resolution of policy disputes about legalization.

COMMENT

AYUDA, INC. v. THORNBURGH: DID CONGRESS GIVE THE EXECUTIVE BRANCH FREE REIN TO DEFINE THE SCOPE OF LEGALIZATION?*

INTRODUCTION

Congress enacted the Immigration Reform and Control Act of 1986 ("IRCA") after years of debate about illegal immigration.[1] IRCA sought to redress the phenomenon of illegal immigration into the United States[2] by legalizing certain undocumented aliens and imposing sanctions against employers

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1. Immigration Reform and Control Act of 1986 (codified in scattered sections of 8 U.S.C. (1988)); *see* 35 IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, INS REPORTER: WORKING FOR A BETTER AMERICA 4 (Jan. 1988) [hereinafter INS REPORTER].

2. Statement by President Ronald Reagan upon Signing S. 1200, 22 WEEKLY COMP. PRES. DOC. 1534 (Nov. 10, 1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5856-1. President Reagan took the opportunity to discuss the background and the goals of the Immigration Reform and Control Act upon the law's enactment:

> In 1981 this Administration asked the Congress to pass a comprehensive legislative package, including employer sanctions, other measures to increase enforcement of the immigration laws, and legalization. The act provides these three essential components. The employer sanctions program is the keystone and major element. It will remove the incentive for illegal immigration by eliminating the job opportunities which draw illegal aliens here.
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> We have consistently supported a legalization program which is both generous to the alien and fair to the countless thousands of people throughout the world who seek legally to come to America. The legalization provisions in this act will go far to improve the lives of a class of individuals who now must hide in the shadows, without access to many of the benefits of a free and open society. Very soon many of these men and women will be able to step into the sunlight and, ultimately, if they choose, they may become Americans.

Id.; *see* H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 45 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649. The House Judiciary Committee noted that the law was intended to "control illegal immigration to the United States, make limited changes in the system for legal immigration, and provide a controlled legalization program for certain undocumented aliens who have entered this country prior to 1982." *Id.*; *see* 132 CONG. REC. S16,893 (daily ed. Oct. 17, 1986) (statement of Sen. Simpson). Senator Simpson emphasized the need for border control as an impetus for the enactment of IRCA, referring to it as a "national issue that will never go away

who hire undocumented workers.[3] IRCA provides for judicial review of legalization determinations under section 106 of the Immigration and Nationality Act (the "INA").[4] Section 106 permits judicial review of individual deportation orders by U.S. courts of appeals only after aliens have exhausted all of their administrative remedies.[5] In *Ayuda, Inc. v. Thornburgh,*[6] the U.S. Court of Appeals for the District of Columbia found that

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. . . called sovereignty. . . . [T]he first duty of a sovereign nation is to control its borders." *Id.*

IRCA does not address the issue of refugee arrivals into the United States. *See* H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 49, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5653. For further information on administrative and legislative responses to refugees, see generally U.S. COMM. FOR REFUGEES, REFUGEES AT OUR BORDERS: THE U.S. RESPONSE TO ASYLUM SEEKERS (1989); *Law on Aliens Fails to Halt Salvadorans*, N.Y. Times, Dec. 21, 1987, at A3, col. 3; and *No Refuge From Haitians' Horror*, Miami Herald, Dec. 13, 1987, at 1A, col. 3.

3. H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 45, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649; GENERAL ACCOUNTING OFFICE, ILLEGAL ALIENS: INFORMATION ON SELECTED COUNTRIES' EMPLOYMENT PROHIBITION LAWS, Pub. No. GGD-86-17BR (Oct. 1986) (concluding that employer sanctions can deter illegal immigration, although they have not proven effective in some countries); 132 CONG. REC. S16,884 (daily ed. Oct. 17, 1986) (statement of Sen. Moynihan). Senator Moynihan noted that the law's benefits to undocumented aliens already resident in the United States included "the dignity and honor of supporting themselves and their families free from the fear of deportation." *Id.*; D. MEISSNER, D.G. PAPADEMETRIOU, & D. NORTH, LEGALIZATION OF UNDOCUMENTED ALIENS: LESSONS FROM OTHER COUNTRIES 20 (1986) (estimating that probable size of U.S. population to be legalized was between 1.5 and 2.7 million); Immigration and Naturalization Service, *Provisional Legalization Statistics* (Jan. 9, 1990) (as of January 9, 1990, INS had received 1,768,316 legalization applications and 1,301,970 applications for the Special Agricultural Worker ("SAW") program). For a description of the SAW program, see *infra* note 13 and accompanying text.

4. Immigration Reform and Control Act of 1986 § 245A, 8 U.S.C. § 1255a(f)(1)-(4) (1988). The relevant parts of section 245A's judicial review provisions are (f)(1) and (f)(4)(A). Section (f)(1) states that "[t]here shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection." *Id.* § 245A, 8 U.S.C. § 1255a(f)(1). Section (f)(4)(A) states, in reference to limiting judicial review to deportation, that "[t]here shall be judicial review of . . . a denial only in the judicial review of an order of deportation under 1105a of this title." *Id.* § 245A, 8 U.S.C. § 1255a(f)(4)(A).

5. Immigration and Nationality Act of 1952 § 106, 8 U.S.C. § 1105a (1988). Section 106 states in relevant part:

> (a) The procedure prescribed by, and all the provisions of chapter 158 of Title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States . . ..
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> . . . .
>
> (c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to

federal jurisdiction over legalization regulations, promulgated by the Immigration and Naturalization Service (the "INS"), was also limited to individual deportation challenges under section 106.[7] The *Ayuda* decision is contrary to a number of cases that have implicitly or explicitly upheld district court jurisdiction over challenges to INS policies and practices.[8]

This Comment argues that the *Ayuda* decision is inconsistent with the congressional intent behind IRCA and prior case law. Part I examines IRCA, federal court jurisdiction over INS decisions, and judicial interpretations of the issue. Part II analyzes the *Ayuda* decision. Part III argues that IRCA permits judicial review of INS legalization regulations by the district courts. This Comment concludes that the purposes underlying IRCA will best be served by prompt judicial resolution of policy disputes about legalization.

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him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.

Id.

6. 880 F.2d 1325 (D.C. Cir. 1989), *petition for cert. filed,* 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018).

7. 880 F.2d at 1337-38.

8. *See, e.g.,* National Center for Immigrants Rights v. INS, 743 F.2d 1365, 1369 (9th Cir. 1984) (holding that because plaintiffs did not seek review on merits of any individual determination by INS, district court jurisdiction to examine merits of plaintiffs' challenges was proper under 28 U.S.C. § 1331 and 8 U.S.C. § 1329); Haitian Refugee Center v. Smith, 676 F.2d 1023, 1033 (5th Cir. Unit B 1982) (recognizing that courts of appeals have exclusive jurisdiction over final orders of deportation, but establishing an exception "insofar as the [complaint] set[s] forth matters alleged to be part of a pattern and practice by immigration officials to violate the constitutional rights of a class of aliens"); *see* Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1503 (C.D. Cal. 1988). *Orantes* distinguished between challenges under section 106 and challenges to INS policies:

> These claims do not assert irregularities in individual deportation hearings, but rather a pattern and practice by immigration officers to violate the constitutional and statutory rights of a class of aliens. . . . To require plaintiffs to raise claims relating to transfer of class members after arrest, inadequate access to counsel and lack of notice of asylum in deportation proceedings would effectively ensure that some class members would never be able to raise the claims or secure redress.

Id.; *see* Ali v. INS, 661 F. Supp. 1234 (D. Mass. 1986); Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984), *aff'd on other grounds,* 472 U.S. 846 (1985).

I. *INS DECISIONS: FEDERAL COURT JURISDICTION AND JUDICIAL REVIEWABILITY*

A. *IRCA and Its Legislative History*

As part of a comprehensive overhaul of U.S. immigration laws,[9] Congress sought to stop illegal immigration by legalizing certain undocumented aliens and enacting employer sanctions.[10] The legalization program, under section 245A of the INA, offered resident status to eligible aliens who had entered the United States before January 1, 1982 and had continually resided in this country since that time.[11] Employer sanctions impose civil and criminal penalties on employers who knowingly hire illegal aliens.[12] Additionally, Congress offered legal status under the Special Agricultural Worker ("SAW") program to certain aliens who had worked in perishable crops.[13] The SAW program was intended to address the labor needs of agricultural growers, who have traditionally relied on undocumented aliens for a labor supply.[14]

An important goal of IRCA was to concentrate the limited resources of the INS on border enforcement and on employ-

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9. Gordon, *New Immigration Legislation: The Immigration Reform and Control Act of 1986, the Marriage Fraud Act, and the State Department Efficiency Bill,* 1 GEO. IMMIGR. L.J. 641 (1986).

10. *See supra* notes 1-2 (discussing congressional and administrative intent behind IRCA).

11. Immigration Reform and Control Act of 1986 § 245A, 8 U.S.C. § 1255a (1988).

12. *Id.* § 274A, 8 U.S.C. § 1324a.

13. *Id.* § 210, 8 U.S.C. § 1160. The program provided for adjustment of status of certain aliens who had performed 90 man-days of seasonal agricultural services in the twelve-month period ending on May 1, 1986. *Id.* § 210, 8 U.S.C. § 1160(a)(1)(B)(ii). The application window was the eighteen-month period from June 1, 1987 to November 30, 1988. *Id.* § 210, 8 U.S.C. § 1160(a)(1)(A). Although the eligibility criteria for this program differed from the legalization criteria in many respects, the standard for judicial review was identical. *Id.* § 210, 8 U.S.C. § 1160(e)(1)-(3); *see* Haitian Refugee Center, Inc. v. Nelson, 872 F.2d 1555 (11th Cir. 1989) (upholding a challenge to INS implementation of SAW program), *petition for cert. filed sub nom.* McNary v. Haitian Refugee Center, Inc., 58 U.S.L.W. 3566 (U.S. Feb. 20, 1990) (No. 89-1332).

14. *See* H.R. CONF. REP. No. 1000, 99th Cong., 2d Sess. at 95-97, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5840, 5850-53. Although agricultural growers' use of undocumented workers was undisputed, it was unclear whether they would suffer as a result of IRCA's enactment. *See Immigration Reform Hasn't Dried Up Pool of Farm Labor,* Los Angeles Times, Aug. 27, 1989, at 3, pt.1, col. 3; *Amnesty Program Has Hurt Growers,* The San Diego Union, Aug. 6, 1989, at A1, col. 1.

ers' compliance with sanctions.[15] Its success depended on a generous, one-time-only legalization program that would allow long-term, undocumented residents of the United States to emerge from situations of fear and exploitation and enable them to become full participants in society.[16]

Among those eligible for legalization were aliens who had entered the country legally as non-immigrants, but whose status subsequently became unlawful through the passage of time or some violation such as unauthorized employment.[17] These aliens could be legalized if their unlawful status became "known to the government" before January 1, 1982,[18] and if they resided continuously and unlawfully in the country since that time.[19] To be eligible for legalization, all aliens had to apply to the INS or a community organization known as a "qualified designated entity" ("QDE")[20] between May 5, 1987 and May 4, 1988.[21]

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15. INS REPORTER, *supra* note 1, at 18.

16. *See, e.g.*, 132 CONG. REC. S16,880 (daily ed. Oct. 17, 1986) (statement of Sen. Simpson). Senator Simpson emphasized the need for legalization as a "necessity if we are going to preserve our scarce INS resources, to deter future illegal immigration, and to remove a fearful, easily exploited subclass from our society. These things will only happen along with employer sanctions and more immigration enforcement." *Id.; see* 132 CONG. REC. S16,914 (daily ed. Oct. 17, 1986) (statement of Sen. Biden). In his statement during floor debate about the immigration bill, Senator Biden expressed his hope that legalization would resolve the problems of undocumented people: "Hopefully, this will move a growing underclass living in the shadows into the daylight of citizenship and opportunity. These individuals must become full partners in government and full participants in our society . . . ." *Id.*

17. Immigration Reform and Control Act of 1986 § 245A, 8 U.S.C. § 1255a(a)(2)(B) (1988).

18. *Id.*

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

20. *Id.* § 245A, 8 U.S.C. § 1255a(c)(1)-(4). Congress was aware that many aliens would be afraid to apply for legalization and, therefore, established "qualified designated entities," community organizations trusted by the undocumented population that would encourage aliens to apply and assist them in the process. The QDEs' statutory mandate was to serve as an intermediary between the INS and the applicants. *Id.*

21. *Id.* § 245A, 8 U.S.C. § 1255a(a)(1)(A); H.R. REP. No. 682, 99th Cong. 2d Sess., pt. 1, at 72 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5676. The House Judiciary Committee report explained that legalization was to be a generous, but also unique and time-limited opportunity: "The Committee intends that the legalization program should be implemented in a liberal and generous fashion . . . . Such implementation is necessary to ensure true resolution of the problem and to ensure that the program will be a one-time only program." *Id.*; *see* 132 CONG. REC. S16,888-89 (daily ed. Oct. 17, 1986) (statements of Sen. Simpson). Senator

In enacting legalization, Congress recognized that the presence of an underground population in U.S. communities was detrimental to the well-being of society as a whole.[22] Unwilling to risk exposure, undocumented individuals were afraid to seek needed services such as emergency medical care, treatment for contagious diseases, or protection from crime.[23]

Simpson explained that Congress hoped and expected that undocumented aliens would come forth and apply for legalization:

> This is the first call, and the last call, a one-shot deal. Come on out. . . . We are actually here to say if you come forward, you will be legalized if you can show that you have been in the United States since before January 1, 1982.
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> . . . .
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> . . . This is a generous nation responding; instead of going hunting for you and going through the anguish of that in the cities and communities of America, this is it. It is one time. You either show up on this one or you will be rejected by the employers . . . .

Id.; *see* IMMIGRATION AND NATURALIZATION SERV., PROCEDURES MANUAL FOR THE LEGALIZATION AND SPECIAL AGRICULTURAL WORKER PROGRAMS OF THE IMMIGRATION REFORM AND CONTROL ACT OF 1986 II-11 (1987) (discussing application period).

22. *See, e.g.*, GENERAL ACCOUNTING OFFICE, ILLEGAL ALIENS: INFLUENCE OF ILLEGAL WORKERS ON WAGES AND WORKING CONDITIONS OF LEGAL WORKERS, Pub. No. GAO/PEMD-88-13BR (March 1988); GENERAL ACCOUNTING OFFICE, UNDOCUMENTED ALIENS: ESTIMATING THE COST OF THEIR UNCOMPENSATED HOSPITAL CARE, Pub. No. GAO/PEMD-87-24BR (Sept. 1987); GENERAL ACCOUNTING OFFICE, ILLEGAL ALIENS: LIMITED RESEARCH SUGGESTS ILLEGAL ALIENS MAY DISPLACE NATIVE WORKERS, Pub. No. GAO/PEMD-86-9BR (April 1986); *see* 132 CONG. REC. S16,895 (daily ed. Oct. 17, 1986) (statement of Sen. Wilson). In advocating legalization, Senator Wilson expressed his belief that the presence of illegal immigrants has a negative impact on other U.S. residents:

> Do these illegal immigrants pose a threat to employment for U.S. citizens? Have they increased crime and burdens upon law enforcement? Have they increasingly burdened local governments that provide health care, various types of welfare assistance? Have they finally, even in a hospitable nation, reached such a saturation point that they have deteriorated the attitude of hospitality and replaced it with resentment and with fear?
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> The unhappy answer to all these questions is "Yes!"

Id.

23. H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 4, at 7, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5817, 5818. The House Committee on Energy and Commerce was concerned with the public health implications stemming from the existence of undocumented communities and wanted to alleviate the fears that prevent undocumented persons from seeking medical care. The Committee noted that

> [a]lthough poor undocumented aliens may be particularly vulnerable to communicable diseases, they may not, as a practical matter, have access to needed public health or medical services. Living illegally in this country with the fear of being detained or deported, many undocumented aliens are unwilling to consult public clinics, and are unable, due to their inability to pay, to consult private physicians. . . . The fear of being apprehended, combined with lack of health coverage and the inability to pay, combine effectively to deny poor undocumented aliens access to needed immunization

They were easy targets for exploitation in the workplace, housing, and elsewhere.[24] Ultimately, the uneasy coexistence of two classifications of people, one living outside the full protection of U.S. laws and the other within, was inconsistent with fundamental U.S. notions of equality.[25]

To address the presence of an illegal population in the United States, IRCA adopted the two-pronged approach of employer sanctions and legalization.[26] Legalization would adjust the status of those aliens who had firmly established themselves in the United States, while sanctions and border enforcement would prevent more recent illegal immigrants from setting down roots.[27] The enactment of employer sanctions

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services and primary care. Not only does this circumstance jeopardize the health status of these individuals and their children, it undermines public health efforts to contain contagious diseases.

Id.; *see* 132 CONG. REC. S16,893 (daily ed. Oct. 17, 1986) (statement of Sen. Simpson). In describing the exploitation of undocumented aliens by unscrupulous employers, Senator Simpson pointed out that

> [w]e have people who chose to take these people, have them here, use them, exploit them, and I think we fought a war about that about 120 years ago when we had people called slaves. It is what you got [sic] in the United States when you have a whole subculture of human beings who are afraid to go to the cops, afraid to go to a hospital, afraid to go to their employer who says "One peep out of you, buster, and you are down the road."

Id.

24. 132 CONG. REC. S16,896 (daily ed. Oct. 17, 1986) (statement of Sen. Wilson). Senator Wilson described the abominable living conditions of some undocumented farmworkers, noting that

> a subclass of workers [exists in the U.S.] who are by their illegality vulnerable to exploitation. As an example, agricultural workers for whom housing is provided by growers are often afraid to live in that housing for fear they will be an easy target for the INS and the Border Patrol. So instead they literally go to earth, to live like animals in holes in a way that no one in America or elsewhere should be forced to live.

Id. Apparently, the problem has not disappeared since IRCA's enactment. *See* GENERAL ACCOUNTING OFFICE, "SWEATSHOPS" IN NEW YORK CITY: A LOCAL EXAMPLE OF A NATIONWIDE PROBLEM, Pub. No. GAO/HRD-89-101BR (June 1989).

25. *See supra* notes 23-24 and accompanying text (describing exploitation and living conditions of undocumented persons).

26. 132 CONG. REC. H10,584 (daily ed. Oct. 15, 1986) (statement of Rep. Rodino). House Judiciary Committee Chairman Rodino described legalization and employer sanctions as IRCA's interlinked components, stating that they "have been in every Judiciary Committee bill since 1975 and any bill that does not contain both cannot be called immigration reform." *Id.* Chairman Rodino also expressed his strong conviction that neither component could be enacted or prove effective independently of the other. *Id.*

27. *Id.*; *see supra* note 16 (discussing connection between legalization and employer sanctions).

mandated the creation of a legalization program[28] because, for the first time, the employment of undocumented workers would become a legally punishable offense.[29] Persons unable to acquire legal status would be exposed to severe economic hardship as a consequence of their inability to obtain, or loss of, employment.[30]

Congress was aware that legalization had to be generous in order to succeed.[31] At the same time, it knew that undocumented aliens feared coming forward and identifying themselves to the INS.[32] Consequently, Congress included safeguards in the legalization program to encourage maximum participation by all eligible aliens.[33] These safeguards in-

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28. 132 CONG. REC. H10,591 (daily ed. Oct. 15, 1986) (statement of Rep. Shaw). Representative Shaw noted that legalization was the only practical option if sanctions were to be enacted, explaining that

> you are not going to send them back. There are millions and millions of illegal aliens in this country . . . .
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> . . . .
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> . . . [W]hat is the alternative? The alternative is to have our INS people continue to labor, overwhelmed by numbers, being able only to keep up with the paperwork, and then say to them, "Go out and enforce employer sanctions."

Id.

29. Immigration Reform and Control Act of 1986 § 274A, 8 U.S.C. § 1324a (1988) (mandating civil and criminal penalties for employment of unauthorized workers).

30. 132 CONG. REC. S16,884 (daily ed. Oct. 17, 1986) (statement of Sen. Moynihan). In addressing the consequences of enacting employer sanctions without legalization, Senator Moynihan pointed out that "[i]mposing such penalties without providing some degree of amnesty will leave millions of these individuals with no means of support. Inevitably, then, the American taxpayer will be forced to foot the bill." *Id.*

31. *See supra* note 21 (describing congressional intent regarding legalization); H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 49, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5653. In introducing legalization, the House Judiciary Committee expressed its strong belief that "a one-time legalization program is a necessary part of an effective enforcement program and that a generous program is an essential part of any immigration reform legislation." *Id.*

32. H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 73, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5677. The House Judiciary Committee described its study of legalization programs in other countries and noted that in many of these programs the alien turnout was significantly lower than expected, a phenomenon at least partly attributable to aliens' fears of coming forth to apply. *Id.*

33. *Id.* The House Judiciary Committee adopted certain safeguards to alleviate the fears of potential applicants, including complete confidentiality of legalization applications, establishment of a public education program, and designation of community organizations to assist applicants in filing with the INS. *Id.*

cluded a nationwide public education program,[34] absolute confidentiality of legalization applications,[35] and creation of QDE status for certain community organizations that provided counseling assistance to aliens in pursuing legalization.[36] Furthermore, Congress mandated that applicants who presented a *prima facie* legalization claim could not be deported[37] and could receive temporary work authorization until a final determination on their application was made by the INS.[38]

Congress was also emphatic about the one-time-only character of legalization.[39] All those eligible had to apply within the twelve-month window of opportunity or forfeit the right to obtain legal status.[40] Therefore, it was important that all statutorily eligible individuals come forth before the application deadline to achieve Congress' goal of eliminating the undocumented underclass.[41]

B. *Reviewability of INS Decisions: Federal Court Jurisdiction*

1. Statutory Authority

Section 279 of the INA gives federal district courts jurisdiction over civil and criminal causes that arise under the INA.[42] In addition, federal courts may also review controversies involving the INS under federal question jurisdiction.[43] Based on these jurisdictional foundations, many federal district courts have entertained challenges to INS policies and

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34. Immigration Reform and Control Act of 1986 § 245A, 8 U.S.C. § 1255a(i) (1988); H.R. CONF. REP. No. 1000, 99th Cong., 2d Sess. at 93, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5848.

35. Immigration Reform and Control Act of 1986 § 245A, 8 U.S.C. § 1255a(c)(5) (1988).

36. *Id.* § 245A, 8 U.S.C. § 1255a(c)(2)(A).

37. *Id.* § 245A, 8 U.S.C. § 1255a(e)(2)(A).

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

39. *See supra* note 21 and accompanying text (discussing congressional intent in enacting legalization).

40. *See supra* note 21 and accompanying text (discussing congressional intent in enacting legalization).

41. *See supra* notes 2, 16, 21, 26, 31-33 and accompanying text (discussing congressional intent in enacting legalization).

42. Immigration and Nationality Act of 1952 § 279, 8 U.S.C. § 1329 (1988). The statute grants broad jurisdiction to the federal district courts: "The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter." *Id.*

43. 28 U.S.C. § 1331 (1988).

regulations.[44]

Section 106 of the INA governs the judicial review of final orders of deportation.[45] Section 106, which supercedes the jurisdictional mandate of section 279, limits judicial review of deportation orders to the U.S. courts of appeals.[46] Such review is available only after the individual has exhausted all administrative remedies, a process that can take years.[47] Thus, district courts do not have jurisdiction to review individual deportation orders.

IRCA provides that judicial review of "a determination respecting an application" for legalization will only be provided in the context of an order of deportation under section 106.[48] The judicial review provisions of the legalization process, however, do not expressly address district court jurisdiction over INS programs and policies.[49]

2. Judicial Interpretation

Although IRCA does not specifically address federal district court jurisdiction over challenges to INS legalization policies, a number of federal district courts have assumed such jurisdiction,[50] basing it on the federal question statute[51]or on

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44. *See supra* note 8 and accompanying text (discussing pre-IRCA decisions that address immigration challenges).

45. Immigration and Nationality Act of 1952 § 106, 8 U.S.C. § 1105a (1988). For the relevant text of section 106, see *supra* note 5.

46. Immigration and Nationality Act of 1952 § 106, 8 U.S.C. § 1105a (1988).

47. *Id*; *see infra* note 127 (discussing length of deportation proceedings).

48. Immigration Reform and Control Act of 1986 § 245A, 8 U.S.C. § 1255a(f)(1)-(4) (1988). For the relevant text of legalization's judicial review provisions, see *supra* note 4.

49. Immigration Reform and Control Act of 1986 § 245A, 8 U.S.C. § 1255a(f)(1)-(4) (1988). For the relevant text of legalization's judicial review provisions, see *supra* note 4. Most U.S. courts, therefore, have assumed that Congress did not intend to speak to district court jurisdiction over legalization regulations and that these regulations remain governed by section 279 of the INA, 8 U.S.C. § 1329 (1988). For the relevant text of section 279, see *supra* note 42.

50. *See, e.g.*, Order Granting Plaintiffs' Motion for Partial Summary Judgment, Permanent Injunction and Redefinition of Class at 4, Zambrano v. INS, No. S-88-455 (E.D. Cal. July 31, 1989). The court differentiated between judicial review of a denial of legalization and the review sought in district court, pointing out that the "[p]laintiffs' complaint challenged defendants' policies and practices and was not an attempt to gain judicial review of individual denials of legalization applications." *Id.*; *see, e.g.*, Order Granting in Part and Denying in Part Defendants' Motion to Dismiss at 12, Immigration Assistance Project v. INS, 709 F. Supp. 998 (W.D. Wash. 1989). In granting partial relief to plaintiffs, the court reasoned that "[p]laintiffs allege that the

section 279 of the INA.[52] These legalization cases are consistent with a series of pre-IRCA immigration decisions.[53] Fed-

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INS has denied legalization to its members and clients—a significant deprivation. Denial of judicial review would as a practical matter, completely foreclose any opportunity to present plaintiffs' claims." *Id.; see, e.g.,* Haitian Refugee Center, Inc. v. Nelson, 694 F. Supp. 864, 874 (S.D. Fla. 1988) (challenging INS administration of SAW program), *aff'd,* 872 F.2d 1555 (11th Cir. 1989), *petition for cert. filed sub nom.* McNary v. Haitian Refugee Center, Inc., 58 U.S.L.W. 3566 (U.S. Feb. 20, 1990) (No. 89-1332). In *Haitian Refugee Center,* the district court explained that "the plaintiffs allege that the defendants have exceeded their authority by illegal implementation of stated congressional intent. To deny jurisdiction would be to allow illegal agency action to go unchallenged." *Id.*; *see, e.g.,* Ayuda, Inc. v. Meese, 687 F. Supp. 650, 665-66 (D.D.C. 1988) (challenging INS definition of "known to the government"), *vacated sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989), *petition for cert. filed,* 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018). In discussing its reasons for granting jurisdiction, the district court in *Ayuda* said that

> [u]nless this court issues a preliminary injunction, plaintiffs will be irreparably injured. The evidence is clear that the INS' . . . regulations have deterred many aliens who would otherwise qualify for legalization from applying. If the current regulations remain in force . . . the vast majority of these potential applicants will fail to file before the May 4 deadline . . . . If an otherwise eligible alien does not submit an application prior to May 4, 1988, he or she may well be forever barred from applying for legalization.

Id.; *see, e.g.,* Doe v. Nelson, 703 F. Supp. 713, 721 (N.D. Ill. 1988). In *Doe,* the plaintiffs challenged an INS regulation requiring aliens who had been issued orders of deportation to apply within the first 30 days of the legalization application period or within 30 days of issuance of an Order to Show Cause. *Id. Doe* distinguished the type of relief sought in district courts:

> [T]he INS cannot seriously argue that a pattern of constitutional violations becomes intolerable only once a threshold number of people are victimized. . . . Success on the claims in this court will not automatically predetermine the result of their legalization application. . . . [I]t will only require that the application be evaluated according to statutory provisions.

Id.; *see, e.g.,* Catholic Social Services, Inc. v. Meese, 664 F. Supp. 1378 (E.D. Cal. 1987) (action to enjoin the exclusion of aliens eligible for SAW program who had not yet filed applications); Vargas v. Meese, 682 F. Supp. 591, 597 (D.D.C. 1987) (challenging INS regulation that limited filing for the SAW program within the United States to applications submitted by individuals who entered the United States before June 26, 1987). The court in *Vargas* affirmed the judiciary's role in interpreting congressional intent: "Although courts often defer to the expertise of agencies in interpreting statutes that they administer, it is for the courts to determine whether an agency's interpretation of a statute is inconsistent with the intent of Congress." *Id.*

51. 28 U.S.C. § 1331 (1988).

52. 8 U.S.C. § 1329 (1988). For the relevant text of section 279, see *supra* note 42.

53. *See supra* note 8; *see also* Haitian Refugee Center, Inc. v. Nelson, 872 F.2d 1555, 1561 (11th Cir. 1989), *petition for cert. filed sub nom.* McNary v. Haitian Refugee Center, Inc., 58 U.S.L.W. 3566 (U.S. Feb. 20, 1990) (No. 89-1332). In *Haitian Refugee Center,* the plaintiffs challenged the SAW program, which is subject to the same judicial review provisions as legalization. The court of appeals determined that

> the individual plaintiffs here do not seek substantive review of any individual

eral courts have generally distinguished between challenges to individual orders of deportation under section 106 and broad policy challenges that affect the rights of many aliens.[54] Recent district court rulings have affirmed this premise and found that under IRCA, challenges to individual legalization determinations may only be brought in the courts of appeals in the context of challenges to deportation orders.[55] Federal district courts, however, may review general INS policies, programs, and regulations.[56]

Recently, the U.S. Court of Appeals for the Eleventh Circuit in *Haitian Refugee Center, Inc. v. Nelson*[57] specifically affirmed district court jurisdiction over a claim involving INS implementation of the SAW amnesty program.[58] The judicial review language provided in the SAW program is identical to that provided in the legalization program under section 245A[59]—it also limits the judicial review of "determination[s] respecting an application" to section 106 of the INA.[60]

Several Supreme Court decisions have also addressed challenges to immigration regulations, policies, and statutes in the context of section 106.[61] The Court has permitted such

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> ruling respecting their status. Rather, they challenge the adequacy of the procedures employed in the processing of their SAW applications. Accordingly, the exhaustion requirement imposed by section 1105a has no bearing on the district court's jurisdiction in this action.
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> . . . .
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> . . . Exhaustion is not required . . . where the administrative remedy will not provide relief commensurate with the claim.

Id. (footnote omitted).

54. *See supra* notes 8, 50 & 53 and accompanying text (discussing federal court decisions in immigration challenges).

55. *See supra* notes 8, 50 & 53 and accompanying text (discussing federal court decisions in immigration challenges).

56. *See supra* notes 8, 50 & 53 and accompanying text (discussing federal court decisions in immigration challenges).

57. 872 F.2d 1555 (11th Cir. 1989), *petition for cert. filed sub nom.* McNary v. Haitian Refugee Center, Inc., 58 U.S.L.W. 3566 (U.S. Feb. 20, 1990) (No. 89-1332).

58. *Id.* at 1563.

59. Immigration Reform and Control Act of 1986 § 210, 8 U.S.C. § 1160(e)(1)-(3) (1988).

60. *Id.*; *see* Immigration and Nationality Act of 1952 § 106, 8 U.S.C. § 1105a (1988).

61. *See, e.g.*, INS v. Chadha, 462 U.S. 919 (1983); Cheng Fan Kwok v. INS, 392 U.S. 206 (1968) (finding that courts of appeals do not have exclusive jurisdiction under section 106 over discretionary suspension of deportation decisions not made in course of deportation proceeding); Foti v. INS, 375 U.S. 217 (1963) (finding that courts of appeals have original jurisdiction under section 106 over discretionary deci-

challenges to be adjudicated by the U.S. courts of appeals in the context of section 106 review because the challenges were directly incident to deportation proceedings or were governed by the regulations applicable to deportation proceedings.[62] In each case, the plaintiff was subject to a final order of deportation.[63] While the Supreme Court has not specifically decided that federal district court jurisdiction exists over challenges to INS policies that have no direct bearing on a deportation order, it has said that in situations where section 106 does not apply, an alien's proper remedy lies in an action brought in district court.[64]

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sions relating to suspension of deportation). *Chadha* clarifies that court of appeals jurisdiction under section 106 is limited to matters on which the validity of a final deportation order depends. *Chadha,* 462 U.S. at 938-39. In *Chadha,* the Supreme Court held that because the plaintiff's challenge to his deportation order stood or fell on the challenged veto's validity, court of appeals jurisdiction under section 106 was proper. *Id.* These decisions suggest that matters on which an individual order of deportation does not directly depend, such as challenges to general policies and practices, are not properly reviewable by courts of appeals under section 106. *See* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989), *petition for cert. filed,* 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018). The dissent in *Ayuda* distinguished *Chadha* and *Foti*:

> In both *Foti* and *Chadha,* the alien seeking court of appeals review was subject to an outstanding final order of deportation. . . . The Supreme Court predictably held that an alien *who is subject to a final order of deportation* can challenge all matters on which the validity *of that final order* is contingent in his appeal of the order under § 106 . . . . This is quite different, however, from holding that under no circumstances can the legality, or presumably even the constitutionality, of INS regulations and policies be directly challenged outside the § 106 procedure.

Ayuda, 880 F.2d at 1358 (Wald, C.J., dissenting) (emphasis in original).

62. *See supra* note 61 (discussing Supreme Court decisions that address section 106).

63. *See supra* note 61 (discussing Supreme Court decisions that address section 106).

64. *See supra* note 61 (discussing Supreme Court decisions that address section 106). The Court, however, has considered a policy challenge by undocumented Haitians who had been denied parole in *Jean v. Nelson,* 472 U.S. 846 (1985). Although the Court in *Jean* did not consider the issue of district court jurisdiction, it affirmed the Eleventh Circuit's remand of the case to the district court. *Id.* at 848. In addition, the Supreme Court has affirmed district court jurisdiction in immigration matters. In *Cheng Fan Kwok v. INS,* the Court affirmed district court jurisdiction outside the scope of section 106 of the INA. 392 U.S. 206 (1968). The Court said that "[i]n situations to which the provisions of § 106(a) are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court." *Id.* at 210.

II. AYUDA, INC. v. THORNBURGH

Four immigrant counseling organizations, two of them QDEs, and five individual plaintiffs[65] initiated *Ayuda, Inc. v. Thornburgh*[66] less than two months before the legalization application filing deadline of May 4, 1988.[67] In *Ayuda,* the plaintiffs challenged the INS interpretation of "known to the government."[68] The INS narrowly defined "government" to encompass only the "INS,"[69] thus barring from eligibility aliens whose unlawful status may have been known to other federal agencies such as the Social Security Administration or the Internal Revenue Service.[70] The plaintiffs filed the *Ayuda* action six months after the U.S. District Court for the Northern District of Texas found that the INS regulation was inconsistent with IRCA and exceeded the scope of the authority of the INS.[71] The Texas suit was not a class action, and the INS chose not to modify its regulation to conform with the court decision.[72]

On March 30, 1988, the district court in *Ayuda* found that the INS definition of "known to the government" violated the clear statutory language of IRCA.[73] The government did not appeal this decision.[74] The court, however, retained jurisdiction over the matter and subsequently issued several supplemental orders.[75]

On April 21, 1988, twelve additional immigrant counseling organizations moved to intervene in the case as plaintiffs.[76]

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65. Ayuda, Inc. v. Meese, 687 F. Supp. 650, 654-55 (D.D.C. 1988), *vacated sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989), *petition for cert. filed,* 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018).

66. Ayuda, Inc. v. Meese, 687 F. Supp. 650 (D.D.C. 1988), *vacated sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989), *petition for cert. filed,* 58 U.S.L.W. 3480 (U.S. Dec. 27, 1990) (No. 89-1018).

67. *Ayuda,* 880 F.2d at 1327.

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

69. *See* 8 C.F.R. § 245a.1(d) (1989).

70. *Id*; *see Ayuda,* 687 F. Supp. at 653, 663-64.

71. *See* Farzad v. Chandler, 670 F. Supp. 690 (N.D. Tex. 1987).

72. *See* Ayuda, Inc. v. Meese, 687 F. Supp. 650, 653-54 (D.D.C. 1988), *vacated sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989), *petition for cert. filed,* 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018).

73. *Ayuda,* 687 F. Supp. at 662-64.

74. *Ayuda,* 880 F.2d at 1328.

75. *Ayuda,* 687 F. Supp. at 666.

76. Brief of Plaintiffs-Appellees at 4-5, Ayuda, Inc. v. Thornburgh, 880 F.2d

They sought to extend "known to the government" legalization eligibility to aliens who violated section 265 of the INA.[77] Until it was amended in December 1981, section 265 required that aliens file quarterly or annual reports with the INS, giving their address.[78] The proposed intervenors withdrew their motion after the plaintiffs adopted the section 265 arguments as their own.[79] Two days before the legalization deadline of May 4, the district court entered a supplemental order, extending legalization eligibility to aliens who willfully violated section 265 because their non-compliance with the law was, or should have been, known to the INS.[80] The government appealed that supplemental order and questioned the court's jurisdiction over the section 265 issue.[81] In effect, the government thereby challenged all district court jurisdiction over INS decisions regarding the legalization program.[82]

The U.S. Court of Appeals for the District of Columbia vacated the lower court's decision,[83] finding that the district court lacked jurisdiction to review INS legalization policies under IRCA.[84] The majority agreed with the government that Congress expressly limited jurisdiction over legalization policies to the courts of appeals under section 106.[85] Thus, only an applicant who had been denied legalization, placed in deportation proceedings, and issued a final order of deportation could challenge INS legalization regulations.[86] However, such

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1325 (D.C. Cir. 1989) (citing Defendants' Opposition to Plaintiffs' Motion for Entry of Supplemental Order VIII at 9).

77. Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1328 (D.C. Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018).

78. Immigration and Nationality Act of 1952 § 265, 8 U.S.C. § 1305, *amended by* Pub. L. No. 97-116, § 11, 95 Stat. 1611, 1617 (1981). Until the law was changed in 1981, aliens were required to submit regular address reports regardless of whether their address had actually changed. *Id.*

79. Brief of Plaintiffs-Appellees at 5, Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989).

80. Ayuda, Inc. v. Meese, 687 F. Supp. 650, 668 (D.D.C. 1988), *vacated sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018).

81. *Ayuda*, 880 F.2d at 1329.

82. *Id.*

83. *Id.* at 1326.

84. *Id.*

85. *Id.* at 1337-38.

86. *See infra* note 136 (describing what a denied legalization applicant must do to challenge regulation).

an applicant must pursue deportation voluntarily because IRCA's confidentiality provision would protect the applicant from deportation as a consequence of a legalization denial.[87] Although the majority recognized the unusually restrictive nature of this standard of review,[88] it nevertheless concluded that Congress intended to bar district court jurisdiction over challenges to legalization regulations.[89]

The majority's reasoning referred to the fundamental purposes behind the enactment of section 106—to prevent exploitation of the judicial process by skillful attorneys attempting to buy time for their clients and to minimize frustration of the deportation process by devices such as forum shopping.[90] Moreover, the court reasoned that because Congress did not require the INS to promulgate legalization regulations,[91] Congress must have assumed that statutory interpretations by the INS would only be reviewed in the context of individual deportation orders.[92] The court noted that if Congress had intended the INS' interpretations of the statute to be reviewed by the courts,[93] Congress would have required the promulgation of

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87. *See* Immigration Reform and Control Act of 1986 § 245A, 8 U.S.C. § 1255a(c)(5) (1988). The text states, in relevant part:

> Confidentiality of information. — Neither the Attorney General, nor any other official or employee of the Department of Justice . . . may . . . use the information furnished pursuant to an application filed under this section for any purpose other than to make a determination on the application.

Id.

88. Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1329-30 (D.C. Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018).

89. *Id.*

90. *Id.* at 1331 n.5 (citing H.R. REP. No. 1086, 87th Cong. 1st Sess. at 23, 28-29, *reprinted in* 1961 U.S. CODE CONG. & ADMIN. NEWS 2967, 2972-73).

91. *See* Immigration Reform and Control Act of 1986 § 245A, 8 U.S.C. § 1255a(g)(1) (1988). The statute only requires that the INS establish a definition of the term "resided continuously," and "such other regulations as may be necessary." *Id.* § 245A, 8 U.S.C. § 1255a(g)(1)(A)-(B).

92. *Ayuda*, 880 F.2d at 1332-33.

93. *Id.*; *see* H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 73, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5677. In reference to continuous residence, the Judiciary Committee report said that "some flexibility may be necessary in accepting documents in proof of continuous residence. . . . [M]any undocumented aliens have been clandestinely employed and thus may not have the usual trail of records." *Id.* The Committee went on to say that

> [u]nnecessarily rigid demands for proof of eligibility for legalization could seriously impede the success of the legalization effort. Therefore, the Committee expects the INS to incorporate flexibility into the standards for

regulations covering the statute's possible applications and created a mechanism for their judicial review.[94]

The majority also relied on Senate deliberations about judicial review before IRCA's enactment.[95] The Senate's original proposed language would have permitted no judicial review under the legalization program.[96] The majority concluded that the Senate acquiesced to the final statutory language only because it did not permit judicial review to reach beyond the limited scope of section 106.[97]

The majority buttressed its argument that section 106 provided the sole means of review of INS policies under IRCA by referring to several Supreme Court opinions concerning section 106.[98] These cases involved plaintiffs who were subject to final orders of deportation and who had sought judicial relief from deportation.[99] These plaintiffs challenged general immigration policies or decisions that were directly relevant to the outcome of their deportation orders and were permitted by the Supreme Court to do so in the context of section 106.[100] According to the majority in *Ayuda*, these rulings suggest that section 106 provides the only appropriate forum for judicial re-

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> legalization eligibility . . . taking into consideration the special circumstances relating to persons previously living clandestinely in this country.

Id.

94. Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1333 (D.C. Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018).

95. *Id.* at 1334-35.

96. *See* S. 1200, 99th Cong., 1st Sess. § 202(f)(1) (1985); *Ayuda*, 880 F.2d at 1334-35. *But see* H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 74, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5678. The House Judiciary Committee report discusses only judicial review of individual legalization determinations and does not contemplate federal court jurisdiction over INS policy decisions: "The bill provides for limited . . . judicial review of denials of applications for legalization. . . . [T]he applicant can appeal a negative decision within the context of judicial review of a deportation order." *Id.* The House language was adopted in full by the Senate in conference. H.R. CONF. REP. No. 1000, 99th Cong., 2d Sess. at 92, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5840, 5847.

97. *Ayuda*, 880 F.2d at 1334-35.

98. *Id.* at 1335-36. For a discussion of some of the cases considered by the *Ayuda* majority, see *supra* note 61.

99. *See supra* note 61 (discussing Supreme Court decisions that address section 106).

100. *See supra* note 61 (discussing Supreme Court decisions that address section 106).

view of INS policies.[101]

The *Ayuda* court relied on *Heckler v. Ringer*[102] to demonstrate the need to exhaust all administrative remedies before seeking review in the federal courts.[103] The plaintiff in *Ringer* sought declaratory judgment to ascertain whether a specific medical treatment would be reimbursable under Medicare.[104] The U.S. Supreme Court found that the plaintiff could not challenge the Medicare regulation before obtaining the treatment sought.[105] By analogy, the *Ayuda* court suggested that a legalization regulation cannot be challenged before a final order of deportation has been issued.[106]

In addition, the *Ayuda* court discussed several lower court cases that distinguished between section 106 review of individual deportation orders and district court review of INS policies that violate the statutory rights of aliens.[107] It dismissed these cases, however, as inappropriate attacks on the ability of the

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101. Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1335-36 (D.C. Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018).

102. 466 U.S. 602 (1984).

103. *Ayuda*, 880 F.2d at 1336.

104. Heckler v. Ringer, 466 U.S. at 609-10, 620.

105. *Id.* at 627. In *Ringer*, the Supreme Court also discussed the need to exhaust administrative remedies:

> In the best of all worlds, immediate judicial access for all these parties might be desirable. But Congress . . . struck a different balance, refusing declaratory relief and requiring that administrative remedies be exhausted before judicial review of the Secretary's decisions takes place. Congress must have felt that cases of individual hardship resulting from delays in the administrative process had to be balanced against the potential for overly casual or premature judicial intervention in an administrative system that processes literally millions of claims every year.

Id. (footnote omitted).

106. *See* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1336 (D.C. Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018). The government also challenged the district court's order on the ground that the issue presented was not ripe for judicial review. *Id.* at 1341. To determine ripeness, the *Ayuda* court adopted the balancing test set forth in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). *Ayuda*, 880 F.2d at 1341-42. In *Abbott*, the Court balanced the issue's fitness for judicial review with the hardship that the parties will suffer if it is withheld: "The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 149. The *Ayuda* court concluded that the INS policy in question had not been firmly formulated and, therefore, did not constitute final agency action. 880 F.2d at 1341-42.

107. *Ayuda*, 880 F.2d at 1336-38. For a discussion of some of the cases considered by the *Ayuda* majority, see *supra* notes 8 & 50.

INS to carry out its functions effectively.[108] Without further elaboration, the *Ayuda* court also implied that a distinction may exist between challenges to the INS under IRCA and other challenges under the INA:[109] while IRCA challenges do not fall within district court jurisdiction, other challenges under the INA may be reviewable by the district courts.[110]

III. *INS IMPLEMENTATION OF THE LEGALIZATION PROGRAM IS NOT BEYOND JUDICIAL REVIEW:* AYUDA *MISREAD CONGRESSIONAL INTENT AND PRIOR CASE LAW*

In repudiating district court jurisdiction over legalization policy decisions, the *Ayuda* court is inconsistent with the U.S. Court of Appeals for the Eleventh Circuit.[111] Specifically, *Ayuda* conflicts with the Eleventh Circuit's decision in *Haitian Refugee Center, Inc. v. Nelson*,[112] which upheld district court jurisdiction in a challenge to INS policies under the IRCA farmworker amnesty program.[113] The court in *Haitian Refugee Center* agreed with previous decisions that distinguished between section 106 review of individual deportation orders and broad challenges to regulations implementing a statutory scheme.[114] In addition to the Eleventh Circuit, several district courts have applied this established distinction to IRCA.[115] These district court decisions found that IRCA's judicial review language plainly referred to individual denials of legaliza-

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108. *Ayuda*, 880 F.2d at 1336. The court complained that "the application of *HRC v. Smith* has proliferated to the point where it now more nearly resembles a gaping hole in the middle of the INS's defensive line." *Id.*

109. *Id.* at 1337.

110. *Id.* The court addressed the issue of district court jurisdiction. It stated that "[i]t is arguable, for example, that certain INS actions—other than those under IRCA—taken before initiation of deportation proceedings are reviewable in the district court under APA standards, despite the exclusivity provision of section 106." *Id.*

111. Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 9-13, 15-18, 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018), Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989).

112. 872 F.2d 1555 (11th Cir. 1989), *petition for cert. filed sub nom.* McNary v. Haitian Refugee Center, Inc., 58 U.S.L.W. 3566 (U.S. Feb. 20, 1990) (No. 89-1332).

113. *Haitian Refugee Center*, 872 F.2d at 1563.

114. *Id.* at 1560. For a discussion of cases considered by the *Haitian Refugee Center* court, see *supra* note 8.

115. *See supra* note 50 and accompanying text (discussing federal court decisions that address IRCA).

tion.[116] Accordingly, they found jurisdiction present under section 279 of the INA[117] and the federal question statute.[118]

Substantial support exists for the necessity of judicial review of legalization regulations.[119] In enacting IRCA, Congress intended to create an effective, generous legalization program.[120] Evidence of congressional intent included the establishment of QDEs to provide counseling in a non-threatening environment,[121] a mandated public education program,[122] and a guarantee of absolute confidentiality to all who came forth to apply in good faith.[123]

Moreover, the substantial number of successful challenges to legalization regulations during the program further evinces the need for judicial review in the district courts.[124] These challenges resulted in the extension of legalization eligibility to new groups of aliens who had previously been unjustly excluded from the program.[125] Had district court jurisdiction been denied in these cases, thousands of aliens may have lost the opportunity to apply for legalization because they would have missed the application deadline.[126] Obtaining judicial re-

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116. *See supra* notes 8 & 50 and accompanying text (discussing immigration challenges in federal courts before and after IRCA's enactment).

117. *See supra* note 50 and accompanying text (discussing federal court decisions that address IRCA); Immigration and Nationality Act of 1952 § 279, 8 U.S.C. § 1329 (1988). For the relevant text of section 279, see *supra* note 42.

118. *See supra* note 50 and accompanying text (discussing federal court decisions that address IRCA); *see* 28 U.S.C. § 1331 (1988).

119. *See supra* notes 8 & 50 and accompanying text (discussing immigration challenges in federal courts before and after IRCA's enactment).

120. *See supra* notes 21 & 31 (expressing congressional intent that legalization be generous).

121. *See* Immigration Reform and Control Act of 1986 § 245A, 8 U.S.C. § 1255a(c)(2)(A)-(B) (1988).

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

123. *Id.* § 245A, 8 U.S.C. § 1255a(c)(5).

124. *See supra* note 50 and accompanying text (discussing federal court decisions that address IRCA). Extensive media coverage throughout the legalization program demonstrated a high level of judicial activity as well as public interest. *See Court Bars Deportation of Aliens Until Amnesty Cases Are Settled,* N.Y. Times, Sept. 22, 1988, at A26, col. 1; *Judge Overturns INS Rules on Denial of Amnesty,* Wash. Post, Aug. 11, 1988, at A9, col. 1; *Lawsuit: Amnesty Rule Penalizes Legal Entrants,* Miami Herald, Sept. 17, 1987, at 7B, col. 1.

125. *See supra* note 50 (discussing federal court decisions that address IRCA).

126. Plaintiffs-Appellees' Response to Court's November 3, 1988 Order Requesting Further Briefing at 2, Catholic Social Services, Inc. v. Thornburgh, Nos. 88-15046, 88-15127, 88-15128 (9th Cir. Nov. 14, 1988). Plaintiffs summarize the potential consequences of *Ayuda,* stating that

view of a deportation order under section 106 can take years.[127] Thus, judicial resolution of regulatory disputes under section 106 would have come after May 4, 1988.[128] Significantly, courts may lack the ability to reopen an application window for immigration benefits.[129] As a result, any remedy that courts provide to improperly excluded applicants after May 4 may be meaningless.

Therefore, the *Ayuda* decision effectively allowed the INS to disregard congressional intent in implementing the legalization program. In enacting section 106, Congress did not intend to frustrate its own goals or the claims of *bona fide* legaliza-

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> [i]f section 1255a(f) could be read to deprive the federal courts of jurisdiction over statutory and constitutional challenges to the INS's implementation of IRCA, it would mean that the agency could violate with impunity the legislative scheme and even the fundamental constitutional rights enjoyed by statutory beneficiaries. The INS could issue regulations that denied legalization to all aliens from Europe, or to all aliens whose native tongue was Tagalog, and there could be no meaningful review of those plainly unlawful regulations. . . . Congress could not have intended such an absurd result.

Id.; *see* Brief For Appellees at 19, LULAC v. INS, No. 88-6447 (9th Cir. Feb. 16, 1989).

127. *See, e.g.*, Matter of Rusin, I. & N. Interim Dec. 3123 (Oct. 31, 1989) (adjudicating case wherein alien was issued Order to Show Cause in 1981 and found deportable in 1984); *see also* Plaintiffs-Appellees' Petition For Rehearing and Suggestion for Rehearing En Banc at 11-12, Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989).

128. *See infra* note 129 (discussing whether courts may extend legalization deadline); Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1366 (D.C. Cir. 1989) (Wald, C.J., dissenting), *petition for cert. filed*, 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018).

129. *See* INS v. Pangilinan, 486 U.S. 875 (1988). In *Pangilinan*, the Supreme Court ruled that a court could not extend a congressionally established application deadline by estoppel or through equitable means. *Id.* at 883. The plaintiffs in *Pangilinan* were Filipino nationals who sought citizenship under a 1942 U.S. statute that authorized certain Filipino veterans of the U.S. Armed Forces to apply for U.S. citizenship over a five-year period. *Id.* at 877-78. The application deadline was December 31, 1946. *Id.* at 880. Plaintiffs filed suit almost forty years later. *Id.* at 877. Whether the fact situation of most legalization challenges in the district courts, including *Ayuda*, is distinguishable from *Pangilinan* has not been decided. Arguably, *Pangilinan* and *Ayuda* are distinguishable because potential beneficiaries of the *Ayuda* ruling did not have a reasonable opportunity to file and may not even have been aware of their eligibility for legalization, whereas plaintiffs in *Pangilinan* had ample opportunity to apply for naturalization. *In Re* Thornburgh, 869 F.2d 1503, 1514-16 (D.C. Cir. 1989) (denying government's mandamus petition in *Ayuda* because it could not establish "inescapability of *Pangilinan's* vise"). In addition, unlike the statute challenged in *Pangilinan*, IRCA itself makes no specific reference to a May 4, 1988 deadline. *See* 8 U.S.C. § 1255a(a)(1)(A). The scope of *Pangilinan*, however, remains uncertain. Therefore, it is conceivable that *Pangilinan* forecloses any possibility of a judicial extension of the legalization deadline.

tion beneficiaries.[130]

Equally important in assessing the *Ayuda* opinion is IRCA's guarantee of absolute confidentiality.[131] To encourage aliens to apply, IRCA expressly protected applicants from any threat of deportation,[132] created the QDEs as a buffer between the undocumented alien and the INS,[133] and granted applicants permission to work while a determination was made on their application.[134] No enforcement action could be taken on a denied application unless it was fraudulent, no matter how easily information contained in the application could prove an alien's deportability.[135] The *Ayuda* court undermined these guarantees. Under the *Ayuda* court's interpretation, denied legalization applicants must voluntarily place themselves in deportation proceedings to test the legality of an INS regulation.[136] Alternatively, they may remain illegally in the United States, unable to obtain jobs because of employer sanctions, awaiting eventual apprehension by the INS.[137]

Thus, under *Ayuda*, deportation proceedings would provide the sole avenue for legalization applicants to seek judicial

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130. *See* Cheng Fan Kwok v. INS, 392 U.S. 206, 215 (1968). In analyzing congressional intent behind section 106, the Supreme Court decided that "Congress quite deliberately restricted the application of § 106(a) to orders entered during [deportation] proceedings . . . or [actions] directly challenging deportation orders themselves." *Id.*

131. *See* Immigration Reform and Control Act of 1986 § 245A, 8 U.S.C. § 1255a(c)(5) (1988).

132. *Id.* § 245A, 8 U.S.C. § 1255a(e)(2)(A).

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

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

135. *Id.* § 245A, 8 U.S.C. § 1255a(c)(5)(A).

136. Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1356 (D.C. Cir. 1989), *petition for cert. filed,* 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018). The dissent in *Ayuda* described the plight of undocumented aliens wishing to determine whether they are statutorily eligible for legalization despite regulations that exclude them. The dissent explained that

> [a]n illegal alien told that he is ineligible under INS regulations must decide which regulations may be unauthorized and step forward to submit his application anyway and become a test-case. And not just one such courageous act would be required; all aliens wishing to avail themselves of the benefits of a ruling against the regulation must submit applications to the INS . . . [because] judicial review of the first wave of applications would almost certainly not take place until long after the twelve-month period had lapsed.

Id. (Wald, C.J., dissenting).

137. *See supra* notes 21 & 30 (describing IRCA's consequences for aliens who remain undocumented).

review of allegedly illegal or unconstitutional regulations.[138] In addition, because legalization applicants are specifically protected from deportation by the statute's confidentiality guarantee, they must demand deportation.[139] In turn, seeking deportation requires them to waive their right to the confidentiality of their application.[140] The chilling effect on potential applicants in similar straits would be significant: persons whose greatest fear is deportation would be unlikely to seek it affirmatively to determine their rights and may instead choose to forego legalization and its attendant risks entirely.[141]

The *Ayuda* court also argued that Congress did not intend INS regulations to be reviewed by the courts because Congress did not require regulations to be promulgated.[142] In fact, the legislative history of IRCA indicates that Congress was motivated by a concern for the ability of legalization applicants to produce adequate documentation and by a desire to achieve greater flexibility in eligibility requirements.[143] Unnecessarily rigid INS regulations could only frustrate Congress' intent to make legalization accessible to a population that had previously made every effort to remain anonymous.

Moreover, the *Ayuda* court's reliance on a rejected congressional proposal was inappropriate.[144] The Senate had proposed that judicial review be unavailable under the legalization program.[145] The Senate's proposal, however, was rejected in

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138. *See supra* note 136 (describing effort a denied legalization applicant must make to challenge regulation).

139. *See* Immigration Reform and Control Act of 1986 § 245A, 8 U.S.C. § 1255a(c)(5). For the relevant text of section 245A, see *supra* note 87.

140. *See* Immigration Reform and Control Act of 1986 § 245A, 8 U.S.C. § 1255a(c)(5).

141. *See supra* note 136 (describing effort a denied legalization applicant must make to challenge regulation).

142. Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1332-33 (D.C. Cir. 1989), *petition for cert. filed,* 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018).

143. *See supra* note 93 (describing congressional intent regarding promulgation of legalization regulations).

144. *See Ayuda,* 880 F.2d at 1352. In characterizing the majority's understanding of congressional intent, the *Ayuda* dissent stated that "[t]he problem with [the majority's interpretation of congressional intent with regard to judicial review] is that the majority can point to absolutely no evidence whatsoever that Congress in fact valued nonuniformity, uncertainty and slowness in getting major legalization questions settled." *Id.*

145. S. 1200, 99th Cong., 1st Sess. § 202(f)(1) (1985); *see Ayuda,* 880 F.2d at 1334-35.

conference.[146] Instead, the House language that ultimately became law limits only the judicial review of individual legalization determinations to section 106, but it is otherwise silent in reference to judicial review.[147]

Furthermore, the *Ayuda* majority's analysis of judicial precedent is flawed. The majority dismissed a series of cases, beginning with *Haitian Refugee Center v. Smith,* because it reasoned that these cases inappropriately erode INS's authority.[148] In fact, these cases stand on a firm judicial foundation.[149] Before *Haitian Refugee Center v. Smith,* the Supreme Court established that claims that are collateral to a substantive claim of entitlement to benefits are properly brought in district courts.[150] Collateral claims are not subject to the same administrative exhaustion requirements as a substantive claim for benefits.[151] The Supreme Court's holding seems applicable in the immigration area—a challenge to an INS regulation only seeks to establish the eligibility of a class of aliens for immigration benefits. It does not demand that the benefits be granted, and it is therefore collateral to a substantive claim such as an individual deportation challenge.

In the immigration arena, the court in *Haitian Refugee Center v. Smith* followed *Cheng Fan Kwok v. INS,*[152] a Supreme Court decision that limited the exclusive jurisdiction of the courts of appeals under section 106 to challenges directly incident to a deportation hearing.[153] Subsequent Supreme Court

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146. *See* H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 74, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5678. For the relevant text of the House Report's discussion of judicial review, see *supra* note 96.

147. *See* Immigration Reform and Control Act of 1986 § 245A, 8 U.S.C. § 1255a(f)(1)-(4) (1988). For the relevant text of section 245A's judicial review provisions, see *supra* note 4.

148. Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1336 (D.C. Cir. 1989) (citing Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. Unit B 1982)), *petition for cert. filed,* 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018).

149. *See supra* note 61 (discussing Supreme Court cases that address section 106).

150. Matthews v. Eldridge, 424 U.S. 319, 330-32 (1976).

151. *Id.* at 330.

152. Haitian Refugee Center v. Smith, 676 F.2d 1023, 1032-33 (5th Cir. Unit B 1982) (citing Cheng Fan Kwok v. INS, 392 U.S. 206 (1968)).

153. Cheng Fan Kwok v. INS, 392 U.S. 206 (1968); *see supra* note 61 (discussing Supreme Court cases that address section 106).

decisions have affirmed this limitation on section 106.[154] These Supreme Court decisions involved individuals in deportation proceedings, and they permitted exclusive court of appeals review under section 106 of challenges that would directly affect the outcome of a deportation order.[155]

The *Ayuda* court's reasoning failed when it decided that these cases stood for the proposition that INS policies in general could be challenged only pursuant to section 106.[156] Specifically, the *Ayuda* majority agreed with the Supreme Court that review of immigration policies directly relevant to a deportation hearing or deportation order was proper in the context of section 106.[157] The majority, however, ignored both the Supreme Court's careful limitation of the exclusive jurisdiction of courts of appeals under section 106 to challenges that have a direct effect on the outcome of a deportation order and the Court's recognition that an alien's remedy lies in district court when section 106 is not applicable.[158]

Similarly, the *Ayuda* court's comparison of IRCA and a Medicare statute in *Heckler v. Ringer* to demonstrate the need for exhaustion of all administrative requirements is unpersuasive.[159] In *McKart v. United States*,[160] the Supreme Court explained the policies behind the exhaustion requirement.[161] These include avoiding premature interruption of the administrative process, which allows the agency to develop needed factual information and to apply its expertise.[162] Concern for judicial efficiency mandates that an agency should complete its action or exceed its jurisdiction before courts intervene.[163] Finally, judicial restraint permits the agency to remedy its own

154. *See supra* note 61 (discussing Supreme Court cases that address section 106).

155. *See supra* note 61 (discussing Supreme Court cases that address section 106).

156. *See* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1335-38 (D.C. Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018).

157. *See Ayuda*, 880 F.2d at 1335-38.

158. *Id.*; *see supra* notes 61 & 64 (discussing Supreme Court cases that address section 106).

159. *See Ayuda*, 880 F.2d at 1336 (discussing Heckler v. Ringer, 466 U.S. 602 (1984)).

160. 395 U.S. 185 (1969).

161. *Id.* at 193-95.

162. *Id.*

163. *Id.*

mistakes and avoids unnecessary public exposure of its weaknesses.[164]

Plaintiffs in *Ayuda*, however, challenged the legality of INS' own regulation, not a violation of an established regulation or policy.[165] Therefore, administrative review could not provide a remedy.[166] At each step of the administrative process, the INS could only review the facts of the individual case before it.[167] The agency, internally, could not overturn the regulation by which it had bound itself.[168]

In addition, in *Matthews v. Eldridge*,[169] the Supreme Court established that the administrative exhaustion requirement is waivable.[170] Such a waiver is particularly applicable when exhaustion would be inadequate or futile,[171] as in *Ayuda*.[172] The Court has also noted that agency reversal of a policy would be highly unlikely at the behest of a single plaintiff.[173]

Moreover, even *Heckler v. Ringer*, the case cited by the *Ayuda* majority, appears to support district court jurisdiction over challenges to unjust regulations.[174] The Court in *Ringer* pointed out that the claims before it were closely interconnected with the plaintiff's claim for benefits.[175] The Court also noted that the plaintiff was seeking to establish a right to future

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164. *Id.*

165. *See* Ayuda, Inc. v. Meese, 687 F. Supp. 650, 651 (D.D.C. 1988), *vacated sub nom.* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018).

166. *See* Haitian Refugee Center v. Smith, 676 F.2d 1023, 1035-36 (5th Cir. Unit B 1982).

167. *Id.*

168. *See* U.S. v. Nixon, 418 U.S. 683, 696 (1974). In reference to the ability of the executive branch to disregard a valid regulation, the court stated that

> [i]t is theoretically possible for the Attorney General to amend or revoke the regulation. . . . But he has not done so. So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and enforce it.

Id.

169. 424 U.S. 319 (1976).

170. *Id.* at 328.

171. *Id.* at 330-31 (distinguishing Weinberger v. Salfi, 422 U.S. 749, 766-67 (1975)).

172. *See* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1361-64 (D.C. Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018).

173. Matthews v. Eldridge, 424 U.S. 319, 330 (1976).

174. *See* Heckler v. Ringer, 466 U.S. 602, 614, 621 (1984).

175. *Id.* at 614.

benefits.[176] In *Ayuda,* on the other hand, plaintiffs were attempting to gain the right to apply for legalization, rather than to receive legalization.[177] This crucial distinction differentiates the two cases.

Furthermore, the statutory language in the two cases is not comparable,[178] indicating that congressional intent behind the two laws is different.[179] While IRCA's purpose was to encourage the maximum number of eligible people to come forth and legalize during a short time period,[180] the Medicare statute attempted to regulate and manage the flow of claims.[181] The nature of exhausting remedies is also distinguishable. In *Ayuda,* the plaintiff must pursue deportation and face the potential detrimental consequence of being forced to leave the United States, while in *Ringer,* the plaintiff must obtain the medical treatment that he seeks, resulting in his improved health.[182] Thus, *Ayuda*'s reliance on *Ringer* is inappropriate.

Finally, potential hardship and irreparable harm to the plaintiffs and other applicants mandates district court jurisdiction. Final regulations were in place.[183] These regulations precluded certain aliens from eligibility.[184] At the same time,

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176. *Id.* at 621. The Court noted that the plaintiff was "clearly seeking to establish a right to future payments should he ultimately decide to proceed with . . . surgery." *Id.*

177. *See* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989), *petition for cert. filed,* 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018).

178. The statute discussed in *Ringer* mandated that "[n]o action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter." 466 U.S. at 630 n.8 (quoting 42 U.S.C. § 405(h)). The *Ayuda* dissent dismisses the two laws as not analogous, explaining that "[u]nlike the Medicare act, IRCA nowhere attempts to define and prescribe the method of review for 'all claims arising under' the Act." *Ayuda,* 880 F.2d at 1359 (Wald, C.J., dissenting).

179. *Ayuda,* 880 F.2d at 1359 (Wald, C.J., dissenting).

180. *See supra* notes 2, 21 & 31 (discussing congressional intent in enacting legalization program).

181. *See Ayuda,* 880 F.2d at 1359 (Wald, C.J., dissenting).

182. *See* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1356 (D.C. Cir. 1989) (Wald, C.J., dissenting), *petition for cert. filed,* 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018); Heckler v. Ringer, 466 U.S. 602, 614 (1984).

183. *See* 8 C.F.R. § 245a.1(d) (1989).

184. Opening Brief for Plaintiffs-Appellants at 14, Immigration Assistance Project v. INS, Nos. 89-35613 & 89-35706 (9th Cir. Dec. 22, 1989). Plaintiffs in *Immigration Assistance Project,* who were challenging the same regulation as the *Ayuda* plaintiffs, claimed that "[a]pplicants who went directly to the INS, seeking legalization without the assistance of a QDE or other representation, regularly had their applications re-

the INS was unwilling to modify the regulations,[185] and the application deadline was rapidly approaching.[186] Quite apart from its probable futility, pursuit and exhaustion of administrative remedies before seeking judicial review under section 106 may have taken years.[187] Prompt judicial review of INS policies was necessary to ensure that all eligible aliens had an opportunity to apply for legalization.

Congress provided for judicial review of a "determination respecting *an* application" for legalization[188] under section 106.[189] The *Ayuda* court took this to refer to all challenges to INS legalization decisions, including regulatory language.[190] This assumption is incorrect. Congress was presumably cognizant of judicial precedent in the immigration policy arena prior to enacting IRCA.[191] If it intended to bar federal court jurisdiction over INS legalization policies, it would have done so more explicitly.[192] Yet, Congress was silent about judicial review of legalization programs and policies.[193] When it spoke of legalization determinations, Congress contemplated only individual decisions.[194] Had it intended to overrule prior case

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jected out of hand. In other words, *no* formal filing took place." *Id.* (emphasis in original).

185. *See* Brief of Plaintiffs-Appellees at 3, Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989), *petition for cert. filed,* 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018).

186. *Id.* at 6.

187. *See supra* note 127 (discussing length of deportation proceedings).

188. Immigration Reform and Control Act of 1986 § 245A, 8 U.S.C. § 1255a(f)(1) (1988) (emphasis added).

189. Immigration and Nationality Act of 1952 § 106, 8 U.S.C. § 1105a (1988).

190. *See* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1331-32 (D.C. Cir. 1989), *petition for cert. filed,* 58 U.S.L.W. 3480 (U.S. Dec. 27, 1989) (No. 89-1018).

191. *See, e.g.,* Lindahl v. OPM, 470 U.S. 768, 782 n.15 (1985); Cannon v. University of Chicago, 441 U.S. 677, 698-99 (1979); Lorillard v. Pons, 434 U.S. 575, 580 (1978); *cf.* Foti v. INS, 375 U.S. 217, 223 (1963) (deciding that courts of appeals have original jurisdiction over discretionary decisions regarding suspension of deportation). In addressing section 106, the Supreme Court presumed awareness of past congressional intent. *Id.* The Court stated that "[i]t must be concluded that Congress knew of this familiar administrative practice and had it in mind when it enacted § 106(a)." *Id.*

192. *See* Tai Mui v. Esperdy, 371 F.2d 772, 777 (2d Cir. 1966). While discussing congressional intent in another section 106 case, the court noted that "[i]f Congress had wanted to go that far, presumably it would have known how to say so." *Id.*

193. *See* Immigration Reform and Control Act of 1986 § 245A, 8 U.S.C. § 1255a(f)(1)-(4) (1988); *supra* note 96 and accompanying text (discussing congressional intent regarding judicial review).

194. *See supra* notes 96, 191-92 (discussing congressional intent regarding judi-

law, Congress would have expressed this intent.[195]

Denial of district court jurisdiction would, in effect, place the INS above the law in determining legalization eligibility and defining the scope of the program. Therefore, neither the interests of Congress nor of the judiciary would be served by delaying resolution of policy disputes until after legalization had ended: statutorily eligible applicants could not be helped, and courts may not be able to provide a remedy.[196]

CONCLUSION

IRCA is the product of extensive congressional debate and deliberation. It represents a major revision of U.S. immigration laws. Its purpose is to stem illegal immigration into the United States, and its success depends on effective implementation. Denial of efficient judicial resolution of regulatory conflicts would only foster uncertainty and frustrate IRCA's goals. The stakes are too high, both for the nation's sovereign interest in controlling its borders and for the individual person whose commitment to the United States is unquestioned, but whose future hangs in the balance.

Zdenka Seiner Griswold *

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cial review and presumption of congressional awareness of judicial and administrative precedent).

195. *See supra* notes 96, 191-92 (discussing congressional intent regarding judicial review and presumption of congressional awareness of judicial and administrative precedent).

196. *See supra* note 129 (discussing whether courts may extend legalization deadline).

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