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The Adequacy of Review for Aliens Denied Legalization Under the Immigration Reform and Control Act of 1986: A Due Process Analysis

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COMMENT

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INTRODUCTION

On November 5, 1986, President Reagan signed the Immigration Reform and Control Act of 1986 into law.[1] The IRCA was the most sweeping reform of immigration law in over thirty years.[2] The primary goal of the IRCA was to decrease illegal immigration by penalizing employment of undocumented aliens.[3] In addition, the IRCA provided for legalization of certain aliens already residing in the United States to reduce the detrimental effect of employer sanctions on them.[4] Now that the application period for legalization, or amnesty, has ended, it has been suggested that the program was unsuccessful because many resident aliens remain undocumented.[5]

Becoming legal is the only hope most aliens have of rising out of the exploited underclass that they live in. For most aliens, returning to their home countries is not a viable option, because it

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1. Pub. L. No. 99-603, 100 Stat. 3359 (1986). The statute [hereinafter IRCA] is codified in scattered sections of 8 U.S.C. Subsequent citations will be to both the Immigration and Nationality Act [hereinafter INA] and to 8 U.S.C.

2. The last comprehensive reform of immigration law occurred in 1952 when the Immigration and Nationality Act was passed [8 U.S.C. §§ 1101, 1151-1154, 1181-1182, 1251-1255]. The INA brought together the existing immigration laws into a unified set of statutes. It has been amended many times, most recently by the IRCA, and is still the basis for U.S. immigration law. Among other things, the original INA made the willful importation, transportation or harboring of undocumented aliens a felony.

3. *See infra* notes 30-32 and accompanying text (discussing the purpose of IRCA employer sanctions).

4. *See infra* notes 33-36 and accompanying text (discussing the purpose of legalization).

5. *Keep the Door Open*, AMERICA, April 16, 1988, at 396.

Although the Immigration and Naturalization Service originally predicted that 3.9 million aliens would apply for amnesty, fewer than half that number applied. Of the approximately 1.4 million people who applied for amnesty, approximately 57,000 were denied. INS statistics (September 3, 1988) (regarding the number of legalization applicants approved and denied). In addition, many aliens whose applications for the first stage of legalization were approved may not qualify for the second stage of legalization due to a requirement that they pass English language and U.S. history exams. *See infra* note 19 (discussing the history and language requirement).

means returning to even greater poverty and oppression.[6] A substantial number of aliens are here due to war and human rights violations in their own countries.[7]

Despite the compelling need for legalization, Congress made legalization more difficult to attain through the IRCA by severely limiting the opportunity to appeal a denial. The statute provides: "There 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."[8] An analysis of the current legalization appeals procedure reveals that it is a denial of due process, because the private interest in review outweighs the public interest in expediting appeals.[9] Judicial review of legalization denials is more appropriate than administrative review because it is more impartial, and better suited for statutory interpretation problems.

This Comment analyzes the due process implications of limiting judicial review for aliens denied amnesty under the IRCA. Part I discusses the legalization statute, its appeal procedure, and the purposes of legalization. The tendency of the INS to restrict legalization is discussed in Part II. Part II proposes that this tendency increases the need for impartial review of denials. Part III explains the due process rights of resident aliens, and analyzes the

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6. 130 CONG. REC. 17258 (1984) (statement of Mr. Kemp). "These people have fled their homes, leaving behind their own cherished families and communities, because the policies of the nations of their birth have not been directed toward growth, job creation and prosperity. People do not flee prosperity, they flee poverty, oppression and tyranny."

7. California Legislature Joint Committee on Refugee Resettlement, International Migration and Cooperative Development, *Hearings on Immigration Reform and Control Act: Implementation and Impact in California* 90 (1987)(statement of Ms. Carolina Casteneda of the Central American Community Mental Health Services Project).

The second largest nationality among legalization applicants were Salvadorans. INS statistics (Sept. 3, 1988). More than 500,000 Salvadorans have come to the United States since 1980. The war in El Salvador has resulted in 65,000 people killed, 6,000 disappeared and 30% of the population forcibly displaced. Legalization is especially important for Salvadorans and Guatemalans because the INS and State Department have a policy of denying them refugee status in spite of the conditions in those countries. *Hearings on Immigration Reform* at 90. *See also*, Hotel and Restaurant Employee's Union v. Smith, 846 F.2d 1499, 1501 (D.C. Cir. 1988) (in the vast majority of cases the INS has denied Salvadorans' applications for asylum).

8. INA § 245A(f)(1); 8 U.S.C. § 1255a(f)(1) (Supp. V 1987). The subsection further provides:

(2) "No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government."

(3) "The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of a determination described in paragraph (1)."

(4) "There shall be judicial review of such a denial only in the judicial review of an order of deportation under section 106 [8 U.S.C. § 1105a]."

9. *See infra* Section III(C) (discussing the competing public and private interests involved in legalization appeals).

adequacy of the current appeal procedure in view of those rights. In Part IV this Comment considers the advantages of judicial review for providing due process in the case of legalization denials. In conclusion this Comment proposes that the inadequacy of the current legalization appeal provision can be remedied by striking that provision from the statute as unconstitutional, and invoking the judicial review provisions of the Administrative Procedure Act in its place.

I. THE LEGALIZATION STATUTE: ITS PROVISIONS AND ITS PURPOSE

A. The Provisions of the Legalization Statute[10]

The legalization provision of the IRCA[11] set up a two-part application process for qualified aliens. The first application stage allowed aliens to obtain an adjustment of status to "temporary resident" by meeting the following requirements:

1. Timely application.[12]
2. Continuous unlawful residence since before January 1, 1982.[13]
3. Continuous physical presence since November 6, 1986, with the exception of "brief, casual and innocent" absences from the United States.[14]

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10. This Comment discusses the legalization and employer sanctions provisions of the IRCA exclusively. The IRCA also includes provisions for increased funding and staffing for Border Patrol, special legalization for agricultural workers, Cubans and Haitians, changes in immigration quotas, and other miscellaneous provisions beyond the scope of this article. For a comprehensive discussion of the legislative history and provisions of the IRCA, *see* Lundgren, *The Immigration Reform and Control Act of 1986*, 24 SAN DIEGO L. REV. 277 (1987).

11. INA § 245A; 8 U.S.C. § 1255a (Supp. V 1987).

12. INA § 245a(1)(A); 8 U.S.C. § 1255a(a)(1)(A) (Supp. V 1986), which provides: "Except as provided in subparagraph (B), the alien must apply for such adjustment during the 12-month period beginning on a date (not later that 180 days after the enactment of this section [enacted Nov. 6, 1986]) designated by the Attorney General." The application period ran from May 5, 1987 to May 4, 1988.

13. INA § 245A(a)(2)(A); 8 U.S.C. § 1255a(a)(2)(A) (Supp. IV 1986), which provides:

> The alien must establish that he entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date and through the date the application is filed under this subsection.

Alternatively, an alien can qualify under INA § 245A(a)(2)(B); 8 U.S.C. § 1255a(a)(2)(B) (Supp. V 1987), which provides "In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the Government as of such date."

14. INA § 245A(a)(3)(A) and (B); 8 U.S.C. § 1255a(a)(3)(A) and (B) (Supp. IV 1986), which provide:

> (A) The alien must establish that the alien has been continuously physically pre-

4. Admissability as an immigrant under INA § 212(a).[15]

An alien who obtains temporary resident status is authorized to work in the United States and travel abroad. These benefits expire after thirty-one months if the alien has not adjusted to the second stage of legalization, permanent resident status. The alien can adjust to permanent resident status by meeting the following requirements:

1. Timely application during the one year period beginning eighteen months after obtaining temporary resident status.[16]

2. Continuous physical residence since obtaining temporary resident status, excepting "brief, casual and innocent" absences.[17]

3. Admissability as an immigrant under INA sec. 212(a).[18]

4. Basic citizenship skills, including a minimal understanding of English and the history and government of the United States, or enrollment in a course of study to achieve those skills.[19]

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sent in the United States since the date of enactment of this section [enacted Nov. 6, 1986]. (B) An alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of subparagraph (A) by virtue of brief, casual and innocent absences from the United States.

15. INA § 245A(a)(4)(A), (B), (C) and (D); 8 U.S.C. § 1255a(a)(4)(A), (B), (C) and (D) (Supp. IV 1986), which provides:

> The alien must establish that he-(A) is admissible to the United States as an immigrant except as otherwise provided under subsection (d)(2), (B)-has not been convicted of any felony or of three or more misdemeanors committed in the United States, (C)-has not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinion, and (D)-is registered or registering under the Military Selective Service Act, if the alien is required to be so registered under that Act.

INA § 212(a); 8 U.S.C. § 1182a (Supp. V 1987), dealing with admissability as an immigrant, includes 33 categories of exclusion. For a list of those categories and discussion of how they apply to legalization, *see* Drake, *Sweeping Changes in Immigration Laws Affect Aliens' Rights to Work and Legalize Their Status*, 21 CLEARINGHOUSE REV. 83 (1987).

16. INA § 245A(b)(1)(A); 8 U.S.C. § 1255a(b)(1)(A) (Supp. V 1987), which provides: "The alien must apply for such adjustment during the one-year period beginning with the nineteenth month that begins after the date the alien was granted such temporary resident status."

17. INA § 245A(b)(1)(B); 8 U.S.C. § 1255a(b)(1)(B) (Supp. IV 1986), which provides:

> (i)-The alien must establish that he has continuously resided in the United States since the date the alien was granted such temporary resident status.
>
> (ii)-An alien shall not be considered to have lost the continuous residence referred to in clause (i) by reason of an absence from the United States permitted under paragraph (3)(A).

18. INA § 245A(b)(1)(C); 8 U.S.C. § 1255a(b)(1)(C) (Supp. IV 1986), which provides: "The alien must establish that he-(i) is admissable to the United States as an immigrant, except as otherwise provided under subsection (d)(2), and (ii) has not been convicted of any felony or three or more misdemeanors committed in the United States."

19. INA § 245A(b)(1)(D); 8 U.S.C. § 1255a(b)(1)(D) (Supp. V 1987), which provides:

> (i) The alien must demonstrate that he either-(I) meets the requirements of section 312 [8 U.S.C. § 1423], relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States, or (II) is satisfactorily pursuing a course of study (recognized by the At-

When the INS denies an application for legalization, the applicant receives a notice specifying the reasons for denial, and advising that he or she has thirty days to appeal the decision.[20] For most denials, the statute provides a single level of administrative review.[21] There is no judicial review available for an alien denied legalization, unless the alien is already under an order of deportation.[22]

Administrative appeals are heard by the Legalization Administrative Appeals Unit (LAU), which is part of the INS Administrative Appeals Unit.[23] On appeal, the LAU considers only the administrative record, and facts which were not available at the time the decision was made.[24] The LAU has the discretion to summarily dismiss any appeal based on a late filing, an appeal that does not specify its ground, or an appeal which the LAU deems "patently frivolous."[25]

The LAU, as a part of the Administrative Appeals Unit, is controlled by the INS.[26] In case decisions the INS has shown a ten-

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torney General) to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States. (ii) The Attorney General may, in his discretion, waive all or part of the requirements of clause (i) in the case of an alien who is 65 years or older.

20. 8 C.F.R. § 103.3(a)(2), which provides "Whenever an application for legalization or special agricultural worker status is denied or the status of a lawful temporary resident is terminated, the alien shall be given written notice setting forth the specific reasons for the denial or termination on Form I-692, Notice of Denial. Form I-692 shall also contain advice to the applicant that he or she may appeal the decision and that such appeal must be taken within 30 days after service of the notification of decision accompanied by any additional new evidence, and a supporting brief if desired. The Form I-692 shall additionally provide notice to the alien that if he or she fails to file an appeal from the decision the Form I-692 will serve as a final notice of ineligibility.

21. INA § 245A(f)(3)(A); 8 U.S.C. § 1255a(f)(3)(A) (Supp. V 1987). *See supra* note 8 for text.

22. INA § 245A(f)(4)(A); 8 U.S.C. § 1255a(f)(4)(A) (Supp. V 1987). *See supra* note 8 for text.

23. INA § 245A(f)(3)(A); 8 U.S.C. § 1255a(f)(3)(A) (Supp. V 1987) required the INS to establish a single level of administrative appellate authority to review denials of legalization. The LAU was designated as that appellate authority. 8 C.F.R. § 245a.2p.

24. INA § 245A(f)(3)(B); 8 U.S.C. § 1255a(f)(3)(B) (Supp. V 1987) which provides: "Such administrative appellate review shall be based solely on the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of the determination."

25. 8 C.F.R. § 103.3(a)(2)(iv) which provides: Any appeal which is filed that:

(A) Fails to state the reason for appeal;

(B) Is filed solely on the basis of a denial for failure to file the application for adjustment of status under section 210 or 245A in a timely manner; or

(C) Is patently frivolous; will be summarily dismissed.

26. Legomsky, *Forum Choices for the Review of Agency Adjudication; A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1308 (1986). The AAU consists of five appellate examiners and one Chief of the Unit, who are not attorneys. The Unit is directed by the Associate Commissioner for Examinations, who is an INS policymaking official. The authority of the Associate Commissioner is described in 8 C.F.R. § 103.1(f).

dency to limit legalization.[27] This restrictive tendency, combined with the broad discretion of the LAU, may reduce the number of successful legalization appeals. This reduction in successful applicants is counterproductive to the purpose of the legalization program.

B. The Purpose of the Legalization Statute

To understand the legalization statute, its relationship to employer sanctions must be considered. The employer sanctions provision of the IRCA establishes penalties for employers who knowingly hire undocumented aliens.[28] The provision is based on the premise that jobs and wages are the primary reasons illegal immigrants come here, and that foreclosing employment of aliens will discourage them from immigrating.[29] The employer sanctions provision is the heart of the IRCA, because the main intent of the IRCA was to increase control over illegal immigration.[30]

The employer sanctions legislation may deter future illegal immigration,[31] but it does not provide a solution for the problem of illegal aliens who are already here. The United States has a large, established population of undocumented aliens, which was estimated to include 3.5 to 6 million people in 1980.[32] They live in constant fear of being deported and are easily exploited by employers and others.[33] Congress recognized that this was an intolerable situation, especially in view of the proposed employer sanctions legislation which would foreclose employment of aliens.[34]

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27. *See infra* notes 58-87 and accompanying text (discussing the restrictive policy of the INS toward legalization).

28. INA § 274A(a)(1); 8 U.S.C. § 1324a(a)(1) (Supp. V 1987) which provides, "It is unlawful for a person or other entity to hire, or to recruit, or refer for a fee, for employment in the United States—(A) an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) with respect to such employment, or (B) an individual without complying with the requirement of subsection (b)."

According to subsection (h)(3), an unauthorized alien is one who is either not a lawful resident, or not authorized for employment by the INS.

29. Statement of President Ronald Reagan Upon Signing S. 1200 *reprinted in* 1986 U.S. Code Cong. & Admin. News 5856-1. "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."

30. Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest: Final Report of the Select Commission on Immigration and Refugee Policy* 12 (1981) [hereinafter *Select Commission Final Report*].

31. Enforcement of employer sanctions did not begin until June 1, 1988, and it remains unclear what effect the law will ultimately have.

32. *Select Commission Final Report*, *supra* note 30, at 73.

33. 128 CONG. REC. 31785 (1982) (statement of Mr. Rodino). "Undocumented aliens [are] being exploited by unscrupulous employers, by landlords and by many others who [are] quick to take advantage of their precarious immigration status and their fear of being turned over to the Immigration Service."

34. 130 CONG. REC. 17238-39 (1984) (statement of Mr. Fish). "We are not here

For this reason, they included a legalization program in the IRCA for certain established aliens.

In drafting the IRCA, Congress was greatly influenced by the Select Commission on Immigration and Refugee Policy.[35] The Select Commission was established in 1978 to study the existing immigration laws and recommend improvements.[36] The Commission found that bringing illegal immigration under control is essential, because it is impossible for the United States to absorb all of the potential immigrants of the world.[37] Therefore, the Commission recommended that Congress adopt employer sanctions legislation.

The Commission also recognized that undocumented aliens in the United States are vulnerable to exploitation, and employer sanctions could make them even more vulnerable. Illegal aliens in the United States live in constant fear of deportation. This fear forces aliens to live as fugitives, and makes aliens easily exploitable.[38] Aliens are primarily employed where the wages are lowest and working conditions are the worst, in agriculture and small nonunion businesses.[39] Despite the low pay and inhumane treatment imposed on aliens, they are unwilling to report violations of wage, hour and safety laws, because any contact with authorities can lead to deportation. Many aliens live in poverty due to their low wages.[40] They are often unwilling to contact police when they are the victim of crimes.[41] They are even reluctant to seek medical care for fear of deportation.[42]

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adopting legalization in a vacuum, but rather it is part of a bill that forecloses future employment opportunities. Legalization is needed for those who have equities in the U.S. to enable them to work."

35. Lundgren, *supra* note 10, at 280.

36. Act of October 5, 1978, Pub. L. No. 95-412 § 4, 92 Stat. 907 (establishing the Select Commission on Immigration and Refugee Policy).

37. *Select Commission Final Report*, *supra* note 30, at 10. "It is impossible for the United States to absorb even a large proportion of the 16 million refugees in this world and still give high priority to meeting the needs of its own poor. . . . We must be realistic about our obligations as a society to persons in need who already are in this country."

38. 128 CONG. REC. 31785 (1982) (statement of Mr. Rodino).

39. W. FOGEL, MEXICAN ILLEGAL ALIEN WORKERS IN THE UNITED STATES 88 (1979). One reported case of inhumane treatment of aliens involved an olive ranch in California, which hired aliens as olive pickers for $.75 to $7.00 per day. The aliens picked olives from pesticide covered branches with heavy buckets hanging from their necks. No drinking water or private toilet was available, and the workers slept in the field at night. To keep the workers from quitting, the employer refused to pay them on time. *Id.* at 92-93.

Employers have been known to exploit aliens by calling the INS right before payday and having the aliens taken away, so the employer can avoid having to pay them. 128 CONG. REC. 31785 (daily ed. Dec. 16, 1982) (statement of Mr. Rodino).

40. W. FOGEL, *supra* note 39, at 4. Aliens are primarily employed in the low wage market known as the "secondary labor market." Secondary labor markets are almost always associated with poverty, as well as unemployment, lack of job security and debilitating working conditions.

41. 132 CONG. REC. H9709 (daily ed. Oct. 9, 1986) (statement of Mr. Rodino).

42. *Select Commission Final Report*, *supra* note 30, at 72.

The Commission also concluded that this large population of undocumented aliens creates problems for Americans as well. Aliens compete with citizens for jobs and housing, and depress the wages and working conditions of many domestic workers.[43] Illegal aliens are generally unwilling to join unions, impeding unionization that could improve wages and working conditions for everyone.[44]

The Commission recommended legalization of certain aliens as a way to solve these problems associated with the undocumented alien population.[45] Legalization is the only humane and feasible way to reduce the illegal alien population. Many longtime resident aliens have U.S.-born children, pay taxes, and have developed substantial equities here.[46] Legalization will prevent the separation of families,[47] and will provide a haven from war and human rights violations for refugees. Further, legalization will allow the INS to concentrate its resources on preventing new illegal entries,[48] and will allow U.S. businesses that are dependent on alien labor to continue to hire them.[49] The only alternative to legalization is mass deportation, which is inhumane and impractical.[50]

The Commission recognized that unless a substantial number of resident aliens are legalized, the problems associated with the ille-

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43. 128 CONG. REC. 31785 (1982) (statement of Mr. Rodino). "[I]t is clear that some displacement of U.S. workers does occur, and that the presence of large numbers of such aliens has a direct effect on depressing wages and working conditions in a particular locality or industry."

44. Aliens are generally unwilling to join unions because of their fear of being discovered and deported. It is believed that legalized aliens will be willing to join unions, increasing union ranks and giving them more clout. BUREAU OF NATIONAL AFFAIRS, IMMIGRATION REFORM: A PRACTICAL GUIDE 48-49 (1987).

45. *Select Commission Final Report*, *supra* note 30, at 72. The Commission listed the following as reasons for supporting legalization:

1. Aliens would be able to contribute more to U.S. society once out in the open.
2. Aliens would no longer be exploited in the workplace, and would no longer contribute to depressed wages and working conditions.
3. Legalization will enable the INS to target enforcement resources on new illegal arrivals.
4. The U.S. will be able to obtain reliable information on sources and characteristics of undocumented aliens which will enhance future enforcement and deterrence. *Id.* at 74.

46. 128 CONG. REC. 31786 (1982) (statement of Mr. Rodino). "Many of these persons living in an underground subculture have been here for many years and have become assimilated in their communities. Many have U.S.-born children who are attending our schools and probably know no other language but English. Many are law-abiding, upstanding residents paying their taxes, and meeting their civic obligations, much as you and I are doing. We must address their situation with justice and fairness."

47. 129 CONG. REC. 12370 (1983) (statement of Mr. Kennedy).

48. 128 CONG. REC. 20862 (1982) (statement of Mr. Simpson); 128 CONG. REC. 21665 (1982) (statement of Mr. Percy).

49. 128 CONG. REC. 20862 (1982) (statement of Mr. Simpson).

50. 128 CONG. REC. 21665 (1982) (statement of Mr. Percy).

gal alien population will persist.[51] Immigration experts estimate that most aliens who did not qualify for amnesty will stay in the United States,[52] and will continue to be vulnerable to exploitation.[53] If most aliens remain after denial, as experts have predicted,[54] the resulting problems will be precisely the ones that the legalization statute was created to solve.

Now that the deadline for legalization applications has passed, the availability of adequate review is important to the success of many applicants. The rate of participation in the program was much lower than the INS had predicted, and a substantial number of aliens who applied for legalization were denied.[55] The only way that these individuals can still achieve amnesty is through appeal.

A review procedure that potentially limits participation in the program ignores the importance of maximum participation in the program. Nevertheless, Congress chose to preclude judicial review of legalization denials, and to allow only one level of administrative review for reasons of expediency.[56] Review of legalization denials is also important because the INS has demonstrated a restrictive policy toward legalization. This restrictive tendency is evident in several recent cases involving INS interpretation of the IRCA.

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51. *Select Commission Final Report, supra* note 30, at 80. The Commission stated in its report that legalization programs in Canada, Europe and Australia all had fewer applicants than expected. The Commission recommended measures to prevent this from happening in the United States, such as the use of volunteer and community organizations to encourage more eligible aliens to come forward.

Nevertheless, the number of amnesty applicants was less than half what the INS expected. *See supra* note 5. One reason for the disappointing turnout was that aliens were distrustful of the program. Many even believed that it was an INS scam to round up and deport aliens. *The United States Immigration Reform and Control Act of 1986: A Critical Perspective*, 8 NW. J. INT'L LAW & BUS. 503, 511 (1987) (citing *At Freddy's Cafe, Cuisine is Mexican, Clientele is Nervous*, WALL ST. J. June 15, 1987, at 1, col. 4). Many aliens did not have documentation to prove continuous residence, and it has been estimated that inability to comply with documentation requirements was the primary reason that eligible aliens did not apply. *Two Surveys Blame IRCA Snags on INS*, 65 INTERP. RELEASES 101 (1988).

52. Shapiro, *Getting in Before the Gate is Locked*, U.S. NEWS AND WORLD REPORT, May 9, 1988 at 25.

53. Kurzban, *Immigration Reform and Control: One Year Later*, 10 IMMIGR. J. 3 (1987).

54. *See supra* note 52.

55. *See supra* note 5.

56. 130 CONG. REC. 17230 (1984) (statement of Mr. McCollum). The position of those who supported limited review was that additional review would burden the court system and add considerable cost and time delay not necessary for fairness.

Senator Simpson, one of the sponsors of the IRCA, believed that to provide a judicial appeal level would "simply overwhelm the court system." 129 CONG. REC. 12813 (1983).

II. The Restrictive Legalization Policy of the INS

Recent cases involving interpretation of the IRCA demonstrate the tendency of the INS to interpret the legalization provisions of the statute restrictively. This restrictive policy is a result of institutional bias within the INS. Institutional bias is created by the conflicting enforcement and service roles of the INS, and the structure of the INS adjudication system.

Some ambiguous provisions of the IRCA have recently been the subject of litigation. In several cases, courts have held that INS interpretations of the IRCA are impermissably narrow.[57] The following examples illustrate the importance of judicial review in balancing the harsh interpretation that the INS tends to give the IRCA.

A. Narrow Interpretation of the IRCA

1. "Known to the Government"

The "known to the government" provision of the legalization statute is related to the requirement of "continuous unlawful residence since 1982."[58] For aliens who entered the United States as lawful nonimmigrants, such as students and tourists, the alien's nonimmigrant status must have either expired by January 1, 1982, or become unlawful in some other way which is "known to the government" by January 1, 1982.[59]

A narrow INS interpretation of "known to the government" was successfully challenged by an amnesty applicant in *Farzad v. Chandler*.[60] Masoud Farzad, a native and citizen of Iran, entered the United States as a nonimmigrant student in 1976. From December 1980 until April 1982, he was employed in violation of his nonimmigrant status. The Social Security Administration was aware of Farzad's violation. The issue in this case was whether Farzad's unlawful status was "known to the government" so that he would qualify for amnesty.

The INS determined that "known to the government" meant "known to the INS" for purposes of the IRCA, and denied Farzad's application for amnesty. The federal court rejected that interpretation as impermissably narrow, and not supported by the

57. *See infra* notes 58-87 and accompanying text (discussing cases in which the INS narrowly interpreted IRCA provisions).

58. INA § 245A(a)(2); 8 U.S.C. § 1255a(a)(2) (Supp. V 1987).

59. INA § 245A(a)(2)(B); 8 U.S.C. § 1255a(a)(2)(B) (Supp IV 1986).

60. Farzad v. Chandler, 670 F. Supp. 690 (N.D. Texas 1987). For a more detailed analysis of *Farzad see* Comment, *Out of the Shadows: Defining "Known to the Government" in the Immigration Reform and Control Act of 1986*, 11 Fordham Int'l. L.J. 641 (1988).

language of the statute.[61] The court added that the legalization statute must be broadly construed to allow the opportunity for legalization.[62]

A class action filed after the *Farzad* decision was also successful in challenging the INS interpretation of "known to the government."[63] In *Ayuda, Inc. v. Meese*, the court also held that the "known to the government" requirement is satisfied if any government agency knew of the alien's unlawful status before January 1, 1982.[64] The court emphasized the remedial purpose of the IRCA and the legislative intent that the statute be flexible to maximize participation.[65] The court enjoined the INS from further application of their restrictive interpretation of the provision, and ordered the INS to notify and assist all affected persons in reapplying.[66]

2. "Public Charge"

Under the IRCA, aliens who are "likely to become public charges"[67] are excluded from participation in the legalization program.[68] An exception is provided for aliens who can prove a history of employment evidencing that they have been self-supporting without receipt of "public cash assistance."[69]

INS regulations interpreted "public cash assistance" to include money received by the alien or his or her immediate family members.[70] The INS interpretation was successfully challenged in *Zambrano v. I.N.S.*[71] The *Zambrano* court held that the INS definition of "public cash assistance" was too restrictive because it

61. *Farzad, supra* note 60, at 693.
62. *Id.* at 694.
63. Ayuda, Inc. v. Meese, 687 F. Supp. 650 (D.D.C. 1988).
64. *Id.* at 666.
65. *Id.* at 663.
66. *Id.* at 668. For the unsuccessful INS challenge to the relief scheme for affected aliens, see *in re Thornburgh*, 869 F.2d 1503 (D.C. Cir. 1989).
67. Provisions excluding aliens "likely to become a public charge" have been incorporated into U.S. immigration laws since 1882. Such an exclusion requires a prediction of whether the alien is likely to require public support, such as welfare, at a future time. *How the Receipt of Public Benefits Can Endanger an Alien's Immigration Status*, 21 CLEARINGHOUSE REV. 126 (1987).
68. INA § 245A(a)(4); 8 U.S.C. § 1255a(a)(4) (Supp. IV 1986) which provides "The alien must establish that he (A) is admissable to the United States as an immigrant." INA § 212; 8 U.S.C. § 1182a (1982) provides 33 general classes of inadmissable aliens, one of which is "(15) Aliens, who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission, are likely at any time to become public charges."
69. INA § 245A(d)(2)(B)(iii); 8 U.S.C. § 1255a(d)(2)(B)(iii) (Supp. V 1987). Public cash assistance means income or needs based monetary assistance, such as welfare. It does not include food stamps, non-cash benefits or work related compensation. 52 Fed. Reg. 8755 (1987).
70. 8 C.F.R. § 245a.1(i).
71. Zambrano v. I.N.S., Civ. No. S-88-455 (E.D. Cal. Aug. 9, 1988).

allowed money received by family members to disqualify an applicant.[72] The court enjoined enforcement of that interpretation, and authorized late applications for those denied on that basis and those who were discouraged from applying on that basis.[73]

The same interpretation of "public cash assistance" was also challenged in *Perales v. Meese*.[74] The *Perales* court held the INS interpretation of the provision invalid and authorized late application for members of the plaintiff class.[75]

3. "Brief, Casual and Innocent"

To be eligible for legalization, an alien must prove continuous physical presence in the United States since November 6, 1986.[76] According to the IRCA, continuous physical presence is not broken by "brief, casual and innocent" absences.[77]

In *Gutierrez v. Ilchert*,[78] an amnesty candidate challenged the INS interpretation of "brief, casual and innocent." The applicant, Gutierrez, had been in the United States illegally since 1978.[79] He was supporting a family in the United States, and had never been arrested.[80] In May 1987, Gutierrez went to Mexico for three weeks to visit his seriously ill mother. He was taken into custody while attempting to reenter the United States.[81]

At his exclusion hearing, the INS held that Gutierrez was clearly ineligible for legalization because his three week absence was not "brief, casual and innocent."[82] The INS stated that an absence could not be "brief, casual and innocent" unless it was either authorized by the INS, or beyond the alien's control.[83] On appeal, the District Court held that the INS interpretation of "brief, casual and innocent" was invalid, and inconsistent with the language of the statute.[84] The court noted: "This interpretation of 'brief, casual and innocent' is truly remarkable in the violence it does to the spirit and purpose of the Act it purports to implement. The legislative history of the IRCA reflects a congressional intent

72. *Three Courts Extend Legalization Deadlines*, 65 INTERP. RELEASES 818 (1988).
73. *Id.*
74. Perales v. Meese, 685 F. Supp. 52 (S.D.N.Y. 1988).
75. *Id.* at 53; *Second Circuit Permits Continued Filing of Legalization Applications for Limited Period*, 65 INTERP. RELEASES 482 (1988).
76. INA § 245A(a)(3)(A); 8 U.S.C. § 1255a(a)(3)(A) (Supp. V 1987).
77. INA § 245A(a)(3)(B); 8 U.S.C. § 1255a(a)(3)(B) (Supp. IV 1986).
78. Gutierrez v. Ilchert, 682 F. Supp. 467 (N.D. Cal. 1988).
79. *Id.* at 468.
80. *Id.*
81. *Id.*
82. *Id.* at 469.
83. *Id.* at 469.
84. *Id.* at 474.

that the amnesty provisions be broadly applied, not construed in the narrowest manner consistent with the literal language of the statute."[85] The court further stated that the INS interpretation was "almost overtly hostile to the legalization program itself."[86] The court held that the determining factor in "brief, casual and innocent" is the purpose of the trip and whether or not it contravenes immigration laws. The court held that the District Director's decision was an abuse of discretion, because Gutierrez's trip was for a clearly innocent purpose.[87]

These decisions are extraordinary considering the deference that the courts must give to INS decisions. A court reviewing an INS decision can only consider the administrative record, and is bound to the findings in that record unless it can establish an abuse of discretion.[88] In these decisions the courts found that the INS abused its discretion. The courts then reinterpreted the statutory provisions broadly to correct the overly restrictive INS interpretations. In doing so, they allowed thousands more aliens to qualify for legalization.[89] These cases demonstrate the importance of judicial review as a check on INS discretion

B. Institutional Bias

The restrictive tendency of the INS toward legalization is caused by institutional bias. This institutional bias results from the conflicting roles of the INS, and the structure of the INS adjudication system.

The INS has two conflicting roles: service and enforcement. The INS provides aliens with services relating to immigration and

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85. *Id.* at 473.

86. *Id.* at 474.

87. *Id.* at 474-75. See also Bailey v. Brooks, 688 F. Supp. 575 (W.D. Wash. 1986). In that case, the court held that a British citizen's overnight trip to Canada to visit a friend was "brief, casual, and innocent." Bailey actually spent approximately fifty days outside the United States because he was denied reentry. However, the court held that being forced to remain in Canada did not transform the alien's intended brief absence into a lengthy one. *Id.* at 578.

88. INA § 245A(f)(4)(B); 8 U.S.C. § 1255a(f)(4)(B) (Supp. IV 1986) provides: "[J]udicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of the facts and determinations contained in such record *shall be conclusive* unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole" (emphasis added).

89. Attorneys in the *Ayuda* case estimated that the court's broader construction of "known to the government" would result in approximately 50,000 more aliens becoming eligible for legalization. *INS Loses Again on "Known to the Government"* 65 INTERP. RELEASES 334, 335 (1988).

Likewise, attorneys in the *Zambrano* case estimated that the broader construction of "public cash assistance" would affect the eligibility of at least 4,000 people. *Three Courts Extend Legalization Deadlines, supra* note 73, at 818.

citizenship, but it also deports aliens as criminals. These functions are inherently contradictory.[90] In response to this conflict, the INS puts emphasis on its enforcement function to the detriment of administrative and adjudicative activities.[91]

INS emphasis on enforcement results in most promotions being given to enforcement personnel, which leads to an "enforcement mentality" in management.[92] This enforcement mentality influences the legalization appeals process, because the Administrative Appeals Unit is managed directly by INS officials.[93]

In the previously discussed legalization cases, judicial review provided a needed balance to the restrictive legalization policy of the INS.[94] However, it should be noted that judicial review was available in those few cases due to unusual circumstances.[95] In most legalization cases, judicial review is not available. Some commentators have suggested that judicial review should be available to all legalization applicants as a matter of due process.[96]

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90. *Select Commission Final Report*, *supra* note 30, at 239.

91. U.S. COMMISSION ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 41 (1980) (quoting Williamson Testimony, Texas Open Meeting Transcript, vol. 3, pp. 170-71).

> This disproportionate emphasis on enforcement has resulted in the denial of services or benefits for which persons are eligible under the immigration laws. This problem is particularly evident at INS information counters . . . when a person seeking information in Houston is suspected by INS contact representatives of being illegally in the country, he or she is automatically turned over to enforcement personnel.

Id.

92. *Id.* at 42.

> [T]he INS career ladder is a major reason for the negative attitude towards and treatment of the public. Because the Service's career ladder is structured to promote officers who have enforcement experience, most Service employees obtain some job experience in enforcement activities. This enforcement experience tends to result in an 'enforcement mentality,' which remains with employees even when they are subsequently detailed to service jobs or promoted to policymaking positions.

Former INS Western Regional Commissioner Harold Ezell once said that his position on illegals was to "catch 'em . . . clean 'em . . . and fry 'em." Shapiro, *supra* note 52, at 23.

93. Legomsky, *supra* note 26, at 1308. The other adjudicative body which handles immigration appeals, the Board of Immigration Appeals, has been bifurcated from the INS so that it is not dependent on INS management. *Id.* at 1307-08. However, the AAU remains directly dependent on INS management, and is thereby subject to the influence of management policy.

94. *See supra* notes 58-87 and accompanying text (discussing cases in which the INS narrowly interpreted IRCA provisions).

95. For example, in *Farzad* and *Gutierrez* the petitioners were facing deportation, and in *Ayuda* the petitioners were not aliens but service agencies who were held to have special standing, as a class that could not pursue the normal route of appeal.

96. *Administrative and Judicial Review of Legalization Adjudications*, 9 IMMIGR. J. 21 (1986). Commentators Lory Rosenberg and Harvey Kaplan of the American Immigration Lawyer's Association (AILA) state, "An alien who is not subject to a deportation proceeding on independent grounds should be allowed to bring a separate federal action in order to challenge an administrative denial of his or her claim of eligibility for legalization.

Under such a theory unsuccessful legalization applicants could challenge the IRCA's limitation on judicial review as an unconstitutional denial of due process.

III. Due Process and the Current Legalization Appeals Procedure

A three part inquiry is necessary to determine whether the current legalization appeal procedure denies due process. First, the scope of a resident alien's due process rights must be determined. Second, a due process test which is appropriate for evaluating the legalization procedure must be identified. Finally, that due process test must be applied to the legalization appeal procedure.

A. The Due Process Rights of Resident Aliens

The fifth amendment to the U.S. Constitution provides: "No person shall be . . . deprived of life, liberty or property, without due process of law."[97] Legalization applicants are entitled to due process, because they are persons within the United States who have a liberty interest in legalization. In addition, although Congress is considered to have plenary power over aliens, the Supreme Court has held that resident aliens are nonetheless entitled to due process.

1. The Alien as a "Person"

In *Yick Wo v. Hopkins*,[98] the Supreme Court held that an alien within the United States is a "person" entitled to equal protection under the 14th amendment. The Court stated: "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."[99]

The protection of resident aliens as "persons" under the Constitution was extended to the fifth amendment in *Wong Wing v. United States*.[100] Referring to the fifth and sixth amendments, the Court stated: "[I]t must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be . . . deprived of life, liberty or property without due process of

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A regulation to this effect would be consistent with due process, as well as with the legislative intent that the legalization provisions serve an ameliorative purpose."

97. U.S. Const. amend. V, § 1.
98. 118 U.S. 356 (1886).
99. *Id.* at 369.
100. 163 U.S. 228 (1896).

law."[101] In *Wong Wing*, the Court clearly held that resident aliens have due process protection by virtue of being "persons" within the United States.

2. The Alien's Liberty Interest in Legalization

In addition to qualifying as "persons" under the Constitution, aliens must have a liberty interest in legalization in order to be entitled to due process.

The Supreme Court has never specifically defined the scope of "liberty," but it has indicated that it is much broader than physical freedom, and encompasses freedom of choice in significant human activities. In *Meyer v. State of Nebraska*,[102] the Supreme Court held that the right to learn a foreign language in public school involved a liberty interest. The Court stated:

> Liberty . . . denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[103]

In other cases the Supreme Court has held that the right to attend racially integrated schools,[104] the right to travel,[105] and the right to engage in a profession[106] all involve "liberty" interests.

Aliens denied legalization are deprived of free choice in many significant activities. The IRCA's prohibition on the employment of aliens will prevent undocumented aliens from earning a livelihood. Aliens denied amnesty are also severely limited in their ability to travel, because of the risk of detection and deportation. This can have the effect of cutting them off from family outside the United States. Legalization applicants are deprived of these liberty interests when they are denied legalization, therefore, the right to due process under the fifth amendment is invoked by legalization denials.

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101. *Id.* at 238.

102. 262 U.S. 390 (1923).

103. *Meyer*, 262 U.S. at 399.

104. Bolling v. Sharpe, 347 U.S. 497 (1954), *opinion supplemented* Brown v. Board of Educ. of Topeka, 349 U.S. 294 (1955).

105. Kent v. Dulles, 357 U.S. 116 (1958).

106. Withrow v. Larkin, 421 U.S. 35 (1975).

3. The Effect of the Plenary Power Doctrine

Congress is considered to have plenary power over aliens and immigration.[107] Regarding this plenary power over immigration, the Supreme Court has said, "Over no conceivable subject is the legislative power of Congress more complete."[108] At one time the Court held that this plenary power made Congressional action over aliens largely immune from judicial review.[109] However, legislation involving resident aliens has been increasingly subjected to constitutional restrictions despite the plenary power doctrine.[110] In *Yamataya v. Fisher*,[111] the Supreme Court held that administrative officers may not disregard the fundamental principals of due process when dealing with aliens who have already entered the United States.[112] Therefore, limited review for legalization denials cannot be justified by the plenary power doctrine. Legalization applicants are entitled to due process because they are "persons" with a liberty interest in legalization, who have already entered the United States.

B. A Test for Due Process

The Supreme Court has generally applied due process to resident aliens on a case by case basis, without articulating the due process analysis which was used.[113] Various courts have defined due process as "essential standards of fairness,"[114] "a meaningful opportunity to litigate the issues,"[115] "protection of the individual against arbitrary action of government,"[116] and a "bar from enactments that shock the sense of fair play."[117] A broad due pro-

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107. Chae Chan Ping v. United States, 130 U.S. 581, 606-07 (1889) (commonly known as *The Chinese Exclusion Case*).

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

109. *Id.*; Shaughnessy v. U.S. *ex rel.* Mezei, 345 U.S. 206, 216 (1953).

110. Legomsky, *Immigration Law and the Principal of Plenary Congressional Power*, SUP. CT. REV. 303-04 (1984).

In Abourezk v. Reagan, 592 F. Supp. 880, 884 n.10 (1984), the court stated, "Such 19th century decisions as the Chinese Exclusion Case have largely been ignored in favor of a more enlightened jurisprudence."

111. 189 U.S. 86 (1903) (commonly known as *The Japanese Immigrant Case*).

112. 189 U.S. at 100-01. That decision was followed by a series of cases placing various restrictions on legislative power in the case of resident aliens. Bridges v. Wixon, 326 U.S. 135, 154 (1945); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Galvan v. Press, 347 U.S. 522, 530 (1954); Nicholas v. INS, 590 F.2d 802, 809 (1979); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (1981).

113. Gardner, *Due Process and Deportation: A Critical Examination of the Plenary Power and Fundamental Fairness Doctrine*, 8 HASTINGS CONST. L.Q. 413 (1981).

114. Bridges v. Wixon, 326 U.S. at 154.

115. Nicholas v. INS, 590 F.2d at 809.

116. Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

117. Galvan v. Press, 347 U.S. at 530.

cess standard is necessary for flexibility, but difficult to apply to specific situations. Such broad standards have led to inconsistent results in the federal courts.[118]

In 1976 the Supreme Court used a balancing test for due process which recognized the need for flexibility while providing more precision than former standards. In *Matthews v. Eldridge*, a person whose social security benefits were terminated argued that the administrative procedure involved in that termination was unconstitutional because it did not provide an evidentiary hearing.[119] To determine whether an evidentiary hearing was required by due process, the Court used a balancing test involving three factors:

1. The private interest affected by the agency action.

2. The risk of erroneous deprivation of that private interest due to the procedure used.

3. The government interest, including fiscal and administrative burdens of the alternative procedures.[120]

The Court found that there was no deprivation of due process, because additional procedure would entail fiscal and administrative burdens which outweighed its benefits.[121]

Although many definitions and tests of due process exist, the *Matthews* test is appropriate for analyzing the legalization review process for several reasons. First, it was designed for analysis of an administrative problem. In *Matthews*, as in the present discussion, the issue was the appropriateness of an administrative hearing process. The test also considers the interests of the individual in the procedure in comparison to the interests of the public. These competing interests are at the heart of the legalization appeals issue. Finally, *Matthews* is an appropriate test for the legalization appeal analysis because it is a well accepted precedent. The Supreme Court used the test in subsequent cases,[122] and the test has been cited with approval in numerous recent decisions throughout the federal circuits.[123]

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118. Gardner, *supra* note 113, at 413.

119. 424 U.S. 319, 324-25 (1976).

120. 424 U.S. at 335.

121. Id. at 347-49.

122. Hewitt, et al. v. Helms, 459 U.S. 460 (1983).

123. Indus. Safety Equip. Assoc. Inc. v. EPA, 837 F.2d 1115, 1122 (D.C. Cir. 1988); Bundy v. Wilson, 815 F.2d 125, 131 (1st Cir. 1987); Faheem-El v. Klincar, 814 F.2d 461, 468 (7th Cir. 1987) *reh'g granted* 822 F.2d 35 (7th Cir. 1987), which described the *Matthews* test as the "algorithm for determining due process"; Glatz v. Kort, 807 F.2d 1514, 1517 (10th Cir. 1986), which states, "constitutionally required procedural protections . . . are analyzed through the application of the *Matthews* calculus"; Baugh v. Woodard, 808 F.2d 333, 336 (4th Cir. 1987); Ritter v. Cohen, 797 F.2d 119, 123 (3rd Cir. 1986); Baden v. Koch, 799 F.2d 825, 831 (2d Cir. 1986); Gibson v. Merced County Dept. of Human Resources, 799 F.2d 582, 588 (9th Cir. 1986).

C. *Due Process Analysis of the Legalization Appeals Procedure*

In *Matthews* the Supreme Court presumed that if government interests in a current procedure outweighed the private interests in an alternative procedure, there was no denial of due process. The same analysis can be applied to determine whether or not the IRCA's legalization appeals procedure provides due process.

1. The Private Interests in Legalization Appeals

In applying the *Matthews* test to the legalization appeals process, the first step is to identify the private interests which are at stake. The stakes of a legalization decision are extremely high for an alien who is assimilated in the United States. Any alien who can apply for legalization has been in the United States at least five years.[124] Legalization denials can lead to deportation of established aliens, who will lose jobs, friends, and property. Many have U.S.-born children who will be uprooted, and some will be separated from their families. Deportation may subject some persons to life threatening poverty, war and persecution.

Aliens who remain in the Untited States after being denied legalization will be foreclosed from legitimate employment by employer sanctions. This will cause aliens to be even more impoverished and vulnerable to exploitation than before.[125] Based on these considerations, the private interests in adequate legalization appeals are clearly substantial and compelling.

2. The Risks to Private Interests of the Current Procedure

The second step of a *Matthews* due process inquiry is to identify the risks to private interests that are posed by the current procedure. The primary risk of the current appeal process is that restrictive interpretation of the statute by the INS will lead to more denials. A single level of administrative appeal places the final legalization decision with the INS. This probably leads to more denials, because the INS tends to interpret the IRCA restrictively. Recent cases show that judicial review reduces the risk of unreasonable denials and results in more successful applicants.[126]

The current procedure creates additional problems by allowing

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124. INA § 245A(a)(2); 8 U.S.C. § 1255a(a)(2). (Supp. IV 1986). *See supra* note 13 for text.

125. Shapiro, *supra* note 52, at 25.

126. *See supra* notes 59-88 and accompanying text (discussing cases in which the INS narrowly interpreted IRCA provisions).

judicial review only in the context of a deportation proceeding. Aliens who believe their denials involve appealable issues will have to offer themselves up for deportation to obtain immediate judicial review. Others will simply wait until they are discovered, which may not happen for years. This would result in legalization appeals going on for many years after the original decisions. In summary, the current procedure threatens individual interests by resulting in more denials. In addition, the current procedure forces aliens who want impartial review to choose between risking deportation and remaining undocumented.

3. The Government Interest in Limiting Legalization Appeals

The final step in this due process inquiry is to identify the government interests in the current procedure and determine whether they are outweighed by the private interests in an alternative procedure allowing judicial review. Obviously, judicial review would add a step to the current procedure, which would involve substantial costs. As in the *Matthews* case, the primary government interest in this situation is the cost of the procedure.

However, the nature of the legalization program would limit the costs of judicial review in several ways. The narrow scope of the legalization program limits the number of persons who could potentially participate in appeals. The program was a one time only program which lasted one year, and which limited the number of aliens who could qualify with certain eligibility requirements. Of the approximately 57,000 aliens whose applications were denied, not all will pursue appeals.[127] In some cases such as the *Ayuda* case,[128] a single appeal will resolve an interpretation problem which affects many others. Therefore, the outcome of one appeal could eliminate the need for others. Finally, not all aliens who lose their administrative appeals would pursue judicial review even if it was available.

Another way in which the cost of judicial appeal might be offset is by an increase in the number of successful legalization applicants. Increasing the number of successful legalization applicants will allow those aliens to be more productive in society, and will lessen the costs to society of the underclass of undocumented aliens.[129]

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127. As of October 4, 1988, the INS reports that approximately 30,950 appeals have been filed with the LAU. INS Statistics (October 12, 1988) (listing applications received, total applications adjudicated, reasons for denials, reasons for waivers and appeals received).

128. *See supra* note 63 and accompanying text.

129. *Select Commission Final Report*, *supra* note 30, at 13.

In the *Matthews* case, the Supreme Court held that the social security hearing in question was not a denial of due process. The legalization appeal process is distinguishable from the social security process which was upheld in *Matthews* in three ways. First, the potential litigants for legalization appeals are few in number, but the potential litigants for social security appeals are limitless because it is a continuing program. The costs of legalization appeals would discontinue sometime in the future when all potential cases have been heard. Therefore, legalization appeals involve less cost overall than social security appeals. Second, there are economic advantages to increasing the number of successful legalization applicants which would offset the cost of appeals somewhat. By contrast, successful social security appeals result in greater cost to the social security system. Third, the private interests at stake in legalization cases are far more compelling than the property rights at issue in social security appeals. In the legalization process, the private interests in judicial review outweigh the economic interest in limiting judicial review. Therefore, precluding judicial review of legalization denials is a denial of due process.

IV. The Advantages of Judicial Review in the Administrative Process

Under a *Matthews* due process analysis, judicial review of legalization denials is necessary for providing due process. In addition, judicial review has two advantages over administrative review which makes it especially appropriate for legalization appeals.

The first advantage of courts is that they are independent from the INS, and would therefore be more likely than the LAU to make impartial decisions regarding legalization.[130] Second, the generalized knowledge of courts makes them better suited for statutory interpretation problems than administrative agencies.[131]

A. Impartiality

One advantage of judicial review of administrative procedure is the separation of powers that it provides.[132] Professor Jaffe[133] rec-

130. *See infra* Section VI(A) (discussing judicial review and the separation of powers that it provides).

131. *See infra* Section IV(B) (discussing the advantages of judicial review for statutory interpretation).

132. Jaffe, *The Right to Judicial Review*, 71 Harv. L. Rev. 404, 406-07 (1958).

133. Professor Louis L. Jaffe was a Professor of Administrative Law at Harvard University until his retirement in 1976. He is best known for his writings on the subject of judicial control of administrative action.

ognized this advantage when he wrote that judicial review of administrative action should be presumed, with no preclusion allowed except by the clearest statement of intent.[134] The belief that judicial review of administrative action should be presumed was embodied in the Administrative Procedure Act of 1946.[135] The APA was enacted to protect individuals from arbitrary acts of administrative agencies by regulating agency procedures.[136] At the time of the APA's enactment, there was widespread concern that administrative agency procedures were unfair and inconsistent.[137] Critics believed that agencies were acting both as prosecutor and judge, threatening the impartiality of hearings. In *Wong Yang Sung v. McGrath*, the Supreme Court stated: "A genuinely impartial hearing, conducted with critical detachment, is psychologically improbable if not impossible, when the presiding officer has at once the responsibility of appraising the strength of the case and of seeking to make it as strong as possible."[138]

To remedy this conflict, the APA provides that whenever a person is adversely affected by an agency action, that person is entitled to judicial review of the action.[139] The APA also provides that subsequent legislation can only supercede the APA judicial review provision by doing so expressly.[140] Therefore, if the IRCA had not expressly precluded judicial review of legalization decisions, it would have been available based on the APA's presumption of judicial review.

Courts interpreting the APA have agreed that judicial review of administrative action should be presumptively available. In *Kristensen v. McGrath,*[141] a district court held that an alien had the right to judicial review of an adverse naturalization decision under the APA. The court stated that the APA was intended to "simplify and make more flexible the avenues to judicial relief."[142]

The Supreme Court held that under the APA, judicial review can only be precluded expressly, or where statutes are drawn in such broad terms that there is "no law to apply."[143] In *Knoetze v.*

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134. Jaffe, *supra* note 132, at 401.

135. 5 U.S.C. §§ 701-706 (Supp. V 1987). These provisions deal with judicial review. Other provisions of the Administrative Procedure Act appear in scattered sections of 5 U.S.C. § [hereinafter APA].

136. United States v. Morton Salt Co., 338 U.S. 632, 644 (1950).

137. ROBINSON, GELLHORN & BRUFF, THE ADMINISTRATIVE PROCESS 34 (1980).

138. 339 U.S. 33, 44 (1950).

139. 5 U.S.C. § 702 (Supp. V. 1987), which provides, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

140. 5 U.S.C. § 701(a)(1) (Supp. V 1987).

141. 179 F.2d 796 (D.C. Cir. 1949).

142. *Id.* at 800.

143. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

United States,[144] this reasoning was applied by a federal court which held that judicial review was available in a case of visa revocation because the INA provided a "body of law" which could be applied on review.[145]

The Supreme Court also allowed judicial review even where statutory language appeared to preclude it. In *Shaughnessy v. Pedreiro*,[146] the Court held that an alien was entitled to judicial review of a deportation order even though the deportation statute expressly stated that such orders are "final."[147] The court held that this language did not preclude judicial review, reasoning that statutory language should be construed broadly, to be consistent with the APA.[148]

In *Brownell v. Tom We Shung*,[149] the Court reached a similar result with regard to an exclusion statute. In that case the exclusion statute also stated that such decisions are "final." The Court stated that cutting off judicial review would run counter to the APA, and that "exemptions from the APA are not lightly to be presumed."[150]

These cases and the APA demonstrate the strong presumption favoring judicial review of administrative action. One reason for this presumption is the impartiality that judicial review provides. Another reason why judicial review is favored is the generalized knowledge of courts, which provides consistency in decisions, and makes courts best suited for statutory interpretation.

B. Generalization

When courts interpret administrative law, they bring it into conformity with the totality of the law, preventing agencies from becoming "islands," and promoting consistency in the law.[151] In *Barlow v. Collins*, the Supreme Court stated that with regard to disputes about the meaning of statutory terms, "courts, and not administrators, are relatively more expert."[152] Federal courts have followed *Barlow*, holding that judicial review is especially appropriate when the controversy is over a statutory term.[153]

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144. 472 F. Supp. 201 (S.D. Fla. 1979), *cert. den.* 454 U.S. 823 (1981) (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).
145. *Knoetze*, 472 F. Supp. at 205.
146. 349 U.S. 48 (1955).
147. *Id.* at 51-52.
148. *Id.* at 51.
149. 352 U.S. 180 (1956).
150. *Id.* at 185 (quoting Marcello v. Bonds, 349 U.S. 302, 310 (1955)).
151. Jaffe, *supra* note 132, at 410.
152. 397 U.S. 159, 166 (1970) (quoting Hardin v. Kentucky Utilities, Co., 390 U.S. 14 (1967) (Harlan, J., dissenting).
153. State of Delaware v. Bender, 370 F. Supp. 1193, 1204 (D. Del. 1974); N.Y.

Professor Legomsky[154] has explained that the generalized knowledge of courts gives them an advantage over the specialized knowledge of administrative agencies for purposes of review.[155] Reviewing an agency's discretion requires judgment more than expertise in the subject matter.[156] In addition, the ability of courts to analogize to other areas of the law and approach specific problems without any preconceptions gives them an advantage over administrative agencies.[157] In contrast, an administrative body may be sympathetic to the agency whose decisions it reviews.[158]

Judicial review of legalization denials is important for several reasons. The impartiality of judicial review can offset institutional bias on the part of the INS.[159] In addition, legalization denials are best decided by courts because they involve issues of statutory interpretation. Finally, judicial review is necessary for due process, because the benefit of judicial review to legalization applicants outweighs the detriment of its added cost.

CONCLUSION

"No society is free where government makes one person's liberty depend upon the arbitrary will of another."[160]

As long as a large population of resident aliens remains illegal, the IRCA of 1986 has not accomplished its goals. Recognition that the legalization program did not accomplish its goals was evident in subsequent efforts by some members of Congress to extend the application deadline.[161]

The success of the legalization program would be improved if all legalization denials involved an opportunity for judicial review. Preclusion of judicial review denies legalization applicants due process because their private interest in impartial review outweighs the government's interest in saving money. Providing for judicial review would make the IRCA more consistent with ad-

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Racing Assoc. v. N.L.R.B., 708 F. 2d 46, 51 (2d Cir. 1983), *cert. den.* 464 U.S. 914 (1983).

154. Stephen H. Legomsky, Professor of Law at Washington University School of Law. Professor Legomsky has written extensively on the subject of the role of the judiciary in immigration.

155. Legomsky, *supra* note 26, at 1388-90.

156. *Id.* at 1389.

157. *Id.*

158. *Id.* at 1392.

159. *See supra* notes 58-87 and accompanying text (discussing cases in which the INS narrowly interpreted IRCA provisions).

160. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 217 (1953) (Black, J., dissenting).

161. *Senate Vote Dooms Amnesty Extension*, 65 INTERP. RELEASES 459 (1988). On April 28, 1988, the Senate killed a proposal to extend the program deadline for applications.

ministrative law principles and would be more consistent with the intent of the IRCA itself.

In order to provide the opportunity for judicial review under the IRCA, the current review provision could simply be voided as unconstitutional.[162] In its place the Administrative Procedure Act would apply by default, because the APA automatically applies to an administrative statute with no provision to the contrary.[163] The APA would allow judicial review for all aliens adversely affected by a legalization decision.[164] The APA would provide the required due process protection for aliens without unnecessary disruption of the statute.

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162. One district court has interpreted the judicial review limitation of INA § 245(A)(F) as applying only to individual decisions on the merits, and not to general constitutional challenges. Doe v. Nelson, 703 F. Supp. 713 UN.D. Ill 1988). Based on this reasoning it may be possible for a court to review the constitutionality of the provision.

163. *See supra* note 140.

164. *See supra* note 139.

* This article is dedicated to Rich Foster in appreciation for his love and encouragement.