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IMMIGRATION LAW

THE RIGHT OF ASYLUM: THE NINTH CIRCUIT ADOPTS THE SUBSTANTIAL EVIDENCE TEST FOR THE REFUGEE ACT OF 1980

A. INTRODUCTION

In *McMullen v. Immigration and Naturalization Service*,[1] the Ninth Circuit held that the Refugee Act of 1980[2] (Refugee Act) requires that Board of Immigration Appeals' (BIA) factual findings be reviewed under the substantial evidence test. Under this standard, the court found that the evidence failed to support the BIA's determination that petitioner was unlikely to suffer persecution if deported to the Republic of Ireland (Ireland).

Petitioner, a former Provisional Irish Republican Army (PIRA)[3] member, faced possible execution by the PIRA for refusing to carry out the kidnapping of an American bar owner.[4] Petitioner used an assumed name to obtain a visa and fled to the United States.[5] Hoping to obtain asylum, he offered to cooperate with federal authorities upon his arrival.[6]

The Immigration and Naturalization Service (INS) then

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1. 658 F.2d 1312 (9th Cir. 1981) (per Choy, J.; the other panel members were Hug and Schroeder, JJ.).

2. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980). *See infra* text accompanying notes 18-32.

3. The Provisional Irish Republican Army is an offshoot of the paramilitary Irish Republican Army (IRA). The PIRA was formed to protest the perceived inefficacy of the IRA to protect the Catholic population in Northern Ireland from British Army and Protestant assaults. Both groups purport to use terrorism to attain the unification and independence of Ireland. They are not officially supported by any government. In September of 1974, petitioner formally resigned from the PIRA because of ideological differences. 658 F.2d at 1314.

4. *Id.* Petitioner testified at the deportation proceedings that a friend warned him that he would be murdered by the PIRA due to his non-cooperation in the kidnapping. Petitioner had had a complicated involvement with the PIRA since his desertion from the British Army. *Id.*

5. *Id. See infra* note 8 for the grounds of petitioner's deportation.

6. Petitioner cooperated with the Bureau of Alcohol, Tobacco and Firearms and with Scotland Yard investigators in the United States. *Id.*

brought deportation proceedings against petitioner. The immigration judge found that petitioner was not deportable as charged,[7] pursuant to the Immigration and Nationality Act (the Act).[8]

Based upon petitioner's oral testimony[9] and documentary evidence,[10] the immigration judge withheld deportation because the government of Ireland was unable to control the PIRA activities, and "[i]f [petitioner] were to be returned to that country, he would suffer persecution within the meaning of the [United Nations] Convention,[11] Protocol,[12] and section 243(h)[13] [of the Act]."[14] Further, the judge found that petitioner was not a security risk to the United States and that therefore deportation should be withheld.[15]

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7. *In re* McMullen, No. A-23054818, Decision of Immigration Judge at 1 (Jan. 10, 1980).

8. Petitioner was charged with violating the following Immigration & Nationality Act sections: (1) § 241(a)(1), 8 U.S.C. § 1251(a)(1) (1976) (alien excludable at entry upon the order of the Attorney General); (2) § 212(a)(19), 8 U.S.C. § 1182(a)(19) (1976) (obtained visa or other documentation by fraud, or willfully misrepresenting a material fact); and (3) § 212(a)(26), 8 U.S.C. § 1182(a)(26) (1976) (not in possession of a valid nonimmigrant visa). 658 F.2d at 1314-15.

9. Petitioner testified that the PIRA was aware of his cooperation with authorities, and that he was considered a traitor who should be executed. 658 F.2d at 1314.

10. "McMullen submitted over 100 pages of exhibits consisting of newspaper and magazine articles, scholarly reports and other publications documenting PIRA terrorist activities." *Id.*

11. The United Nations Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 189 U.N.T.S. 150. The United States has never adhered to the Convention, which accorded protection to the refugees at that time. The relevant portion of Article 33 reads as follows: "No contracting state shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *See generally* Note, *The Right of Asylum Under United States Law,* 80 COLUM. L. REV. 1125 (1980). [hereafter *Right of Asylum*]

12. The United Nations Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6260, T.I.A.S. No. 6577, 606 U.N.T.S. 268. The Protocol espouses all of the substantive provisions of the Convention and defines "refugee" as a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country." Convention article 1 is adopted by Protocol article 1. The United States adhered to the Protocol effective November 1, 1968. *See Right of Asylum, supra* note 11, at 1126.

13. 8 U.S.C. § 1253(h) (1976).

14. *In re* McMullen, *supra* note 7, at 5.

15. *Id.* at 9. The immigration judge based his decision primarily on the United States' adherence to the principles of the United Nations Protocol Relating to the Status of Refugees, *supra* note 12. The relevant part of article 33 of the Protocol reads as

The BIA reversed on the ground that petitioner failed to show a sufficient likelihood that he would suffer persecution if deported to Ireland.[16] On appeal, the Ninth Circuit, conceding that the question was one of first impression, held that under the provisions of the Refugee Act, the BIA's finding was not supportable under the substantial evidence test.[17]

This note will discuss the significance of the Refugee Act, its influence on the Ninth Circuit's reasoning, and analyze the potential impact of the *McMullen* decision.

B. Background — The Refugee Act of 1980

The Refugee Act is a comprehensive measure designed to deal with the admission of refugees, the granting of political asylum, and the provision of assistance to such persons.[18] "[The Refugee Act] reflects one of the oldest themes in America's history — welcoming homeless refugees to our shores. It gives statutory meaning to our national commitment to human rights and humanitarian concerns . . . ."[19] The term "refugee" now means

> any person who is outside any country of such person's nationality . . . and is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[20]

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follows:

> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

16. 658 F.2d at 1315.

17. *See* Calhoun v. Bailer, 626 F.2d 145, 148 (9th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981) ("[T]he substantial evidence test is quintessentially a case-by-case analysis requiring review of the whole record.").

18. *See generally* 57 Interpreter Releases (American Council for Nationalities Serv.) 133 (March 20, 1980) for a detailed analysis of the Refugee Act. *See also* Note, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9 (1981).

19. S. Rep. No. 256, 96th Cong., 2d Sess. 2, *reprinted in* 1980 U.S. Code Cong. & Ad. News 141.

20. The Refugee Act of 1980, *supra* note 2 [hereafter Refugee Act], at § 201(a), 8

The new definition brings United States law into conformity with international treaty obligations under the United Nations Protocol[21] and Convention.[22] There is now a clear-cut distinction between refugees, aliens outside the United States,[23] and asylees, aliens who are physically present in the United States or at a land border or port of entry.[24]

Since petitioner had entered the United States illegally, he could apply for asylum if the Attorney General determined that he was a refugee within the meaning of the Refugee Act.[25] Additionally, the power to grant asylum lay within the discretion of the immigration judge.[26]

Prior to the enactment of the Refugee Act, the decision to withhold deportation was a matter solely within the Attorney General's discretion.[27] Now, however, the amended section 243(h) states that "[t]he Attorney General *shall not deport or return an alien* . . . to a country if the Attorney General determines that such alien's *life or freedom would be threatened* in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."[28] Once eligibility has been shown, relief is mandatory, not discretionary,

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U.S.C. § 1101(a)(42)(a) (1976 & Supp. 1982).

21. *See supra* note 12.

22. *See supra* note 11. The Refugee Act expanded the grounds of persecution to include nationality and membership in a particular social group. *See supra* text accompanying note 20.

23. Refugee Act § 201(a), 8 U.S.C. § 1101(a)(42)(a) (1976 & Supp. 1982).

24. Refugee Act § 208, 8 U.S.C. § 1158(a) (1976 & Supp. 1982).

25. *Id.*

26. *See* Matter of Lam, 18 I & N Dec. 2857 (BIA 1981). Interim regulations promulgated pursuant to the Refugee Act similarly provide that asylum applications made after the institution of exclusion or deportation proceedings shall be considered by immigration judges. *In re McMullen, supra* note 7, at 6 n.4. *See also* 8 U.S.C. § 1158(a) (1981) (the alien may be granted asylum at the discretion of the Attorney General).

27. Immigration & Nationality Act, Pub. L. No. 89-236, § 11f, 8 U.S.C. § 1253(h) (1965) *amended by* Pub. L. No. 96-212, tit. II, § 203(e) (1980). The section formerly read:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which *in his opinion* the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as *he deems to be necessary* for such reason.

(emphasis added).

28. Refugee Act of 1980, § 243(h), 8 U.S.C. § 1253(h)(1) (1976 & Supp. 1982) (emphasis added).

unless an alien is excludable under section 243(h)(2).[29] Nationality and membership in a particular social group have also been added to the bases of persecution within the definition of "refugee." Thus, in *McMullen,* the INS conceded that persecution within the meaning of section 243(h) can include persecution by non-governmental groups such as the PIRA.[30]

Past decisions indicate that the Ninth Circuit gave extreme deference to the Attorney General's decisions.[31] Under former section 243(h), the Ninth Circuit searched only for a lack of due process or an abuse of discretion by the immigration judge or the BIA. Before *McMullen,* the Ninth Circuit had explicitly refused to apply substantial evidence review to a BIA finding of ineligibility for section 243(h) relief.[32]

C. The Ninth Circuit's Reasoning

In *McMullen,* the Ninth Circuit needed only to review the BIA's finding that petitioner was not likely to suffer persecution

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29. 8 U.S.C. § 1253(h)(2) (1976 & Supp. 1982). This section reads in relevant part:

> Paragraph (1) shall not apply to any alien if the Attorney General determines that —
> (A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
> (B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
> (C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or
> (D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

30. 658 F.2d at 1315 n.2 (petitioner must show that the government of the country he would be deported to is unwilling or unable to control that group).

31. *See, e.g.,* Kasravi v. Immigration & Naturalization Serv., 400 F.2d 675 (9th Cir. 1968) (in reviewing special inquiry officer's decision at deportation hearing, court of appeals could not substitute its opinion for that of Attorney General); Asghari v. Immigration & Naturalization Serv., 396 F.2d 391 (9th Cir. 1968) (there was no lack of due process or abuse of discretion when the record amply supported the refusal of the Attorney General to withhold deportation); Namkung v. Boyd, 226 F.2d 385 (9th Cir. 1955) (under statute authorizing Attorney General to withhold deportation of an alien to a country where he would be subjected to physical persecution, withholding deportation for such reason rests wholly in Attorney General's or his delegate's administrative judgment and opinion and the court may not substitute its own judgment).

32. 658 F.2d at 1316. *See* cases cited *supra* note 31.

by the PIRA.[33] Since the Refugee Act amended section 243(h) of the Act, the Ninth Circuit recognized the urgent need to devise an appropriate standard of review. The court agreed with the petitioner's contention that the new mandatory language of section 243(h) justified replacing the abuse-of-discretion standard with the substantial evidence standard.[34] Because the charge to the agency changes from *discretionary* to *imperative,* the court recognized that its role as a reviewing court necessarily must change.[35]

The Ninth Circuit reasoned that with the removal of absolute discretion formerly vested with the BIA, a factual determination is now required. Thus, the BIA must withhold deportation if "certain facts exist."[36] Indeed, the Ninth Circuit had previously recognized that "if such a finding of fact were required by the statute, the decision of the Attorney General would be subject to review in order to determine whether such findings were supported by *reasonable, substantial,* and *probative evidence."*[37] The *McMullen* court indicated that the substantial evidence standard of review has normally been applicable to agency findings arising from public, record-producing

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33. 658 F.2d at 1315. The elements necessary to withhold peitioner's deportation were:

[1] A likelihood of persecution; a threat to life or freedom.

[2] Persecution by the government or by a group which the government is unable to control.

[3] Persecution resulting from petitioner's political beliefs.

[4] Petitioner is not a danger or a security risk to the United States.

Id. Although the Immigration Judge found all four elements present, the BIA reversed on the ground that the first two elements were not proven. Thus, *McMullen* limited its review to the first two elements. The Ninth Circuit court stated that it need not and did not reach the question of whether the BIA's rejection of petitioner's alternate claim—that he would be persecuted by the government of Ireland—was supported by substantial evidence. *Id.* at 1320 n.6.

34. *Id.* at 1316.

35. *See supra* text accompanying notes 18-32.

36. 658 F.2d at 1316.

37. Kasravi v. Immigration & Naturalization Serv., 400 F.2d 675, 677 (9th Cir. 1968) (emphasis added).

proceedings.[38] Because the substantial evidence test follows from legislative changes in the section, it does not conflict with prior Ninth Circuit precedent.[39]

In light of the new standard, the court reviewed the BIA's finding that there was no likelihood of petitioner being subject to persecution. The court first categorized the evidence[40] according to the elements petitioner sought to prove: first, that the PIRA systematically tortures and murders traitors; second, that petitioner is perceived as a traitor; and finally, that the government of Ireland is unable to control the PIRA.[41]

After close scrutiny of the extensive documentation of PIRA activities,[42] the court was convinced that the PIRA regularly maims and executes informers and defectors.[43] Since the evidence clearly indicated a pattern in the PIRA's activities and since the INS did not challenge the accuracy of the evidence, the court concluded that the PIRA is a clandestine, terrorist organization, not subject to government control.[44]

The court further found that the burden is on the alien to prove the likelihood of persecution and that petitioner met this burden.[45] The main thrust of the court's determination was that

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38. 658 F.2d at 1315. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

39. 658 F.2d at 1316.

40. Petitioner had presented the following evidence: His lengthy and detailed testimony, both written and delivered at the hearing under direct and cross-examination, newspaper and magazine articles, book excerpts, investigative reports and transcripts of related proceedings. *Id.* at 1317.

41. *Id.*

42. Petitioner's extensive documentation contained, *inter alia*, reports of PIRA executions and torture of informers and opponents from the *London Sunday Times, Time* magazine, the *Informer, Newsweek,* the *Los Angeles Times,* the *New York Times,* a study by the Institute for Military studies, University of Lancaster, England, the Amnesty International Reports on the Republic of Ireland, and Deutsch & Magowan, Northern Ireland, 1968-74, A Chronology of Events. These reports specified names, dates and places of the PIRA's persecution of defectors. *Id.* at 1318 n.4. The Ninth Circuit stated that the evidence was relevant in determining whether petitioner was likely to face persecution upon deportation. *Id.* at 1319.

43. *Id.* at 1318.

44. *Id.* at 1319.

45. *Id.* at 1317. The BIA found that petitioner's personal testimony was not credible because it was self-serving. The BIA also disregarded the evidence of PIRA terrorism because it did not refer specifically to persecution directed at petitioner. The INS did not, however, submit independent evidence showing petitioner's lack of credibility and

the INS failed to submit any evidence contradicting petitioner's claim.[46] It emphasized that the INS never seriously disputed the truth of petitioner's claimed history of PIRA association and defection.[47]

The Ninth Circuit noted that the immigration judge found petitioner's testimony credible after having petitioner testify and observing his demeanor.[48] The court then considered the judge's findings because it conflicted with those of the BIA.[49] Further, the court made clear that its role is not to make an independent finding of credibility,[50] but to review petitioner's evidence to determine whether the BIA's rejection of it was reasonably supported.[51] The Ninth Circuit concluded that the BIA's finding was unsupported by substantial evidence.[52]

Finally, the Ninth Circuit recognized the plight of asylum seekers[53] by expressing its concern about the lack of guidance from the BIA in the proof required in a case of alleged persecu-

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inaccuracy of his claim. *Id.* at 1317-18.

46. *Id.* at 1317. The Ninth Circuit engaged in a lengthy review of petitioner's testimony that the PIRA had specifically threatened his life, that he defected by fleeing to the United States, that he cooperated with federal authorities and Scotland Yard, and that the PIRA considered him a traitor. *Id.*

47. *Id.* at 1317-18. Indeed, the INS simply argued that petitioner's testimony was inherently unbelievable because a petitioner in a deportation case is motivated to lie in support of his own case. The INS neither argued that the testimony was inherently inconsistent nor that it lacked veracity.

48. *Id.* at 1318.

49. *Id. Cf.* Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951) (recognizing that in applying the substantial evidence test in a labor context that "evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board.").

50. 658 F.2d at 1318.

51. *Id. See* Carter Products, Inc. v. FTC, 268 F.2d 461, 493 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959) (reviewing court applying substantial evidence test must consider evidence contravening the agency's determination).

52. 658 F.2d at 1319. The Ninth Circuit found that petitioner's desire, expressed in earlier proceedings, to be deported to the Republic of Ireland rather than the United Kingdom, had little or no probative value. Also, the court did not refute petitioner's claim of possible harm simply because his family safely resides in the Republic of Ireland; there was no evidence to indicate that the informer's family would be attacked. Rather the court chose to believe that the PIRA operates under its own well developed code of justice, and that it is very specific in its choice of victims. *Id.* at 1318-19.

53. *Id.* at 1319. The court noted that if petitioner, a well known former PIRA member with an extensively documented claim of probable persecution, failed to present sufficient proof, then it would be nearly impossible for anyone in petitioner's position to make out a case under § 243(h). *Id.*

tion by a clandestine, terrorist group.[54]

D. ANALYSIS

The *McMullen* decision signals an end to the often narrow abuse-of-discretion standard of review.[55] However, the Ninth Circuit adopted a substantial evidence test to review BIA factual findings narrower than that used in reviewing factual findings of other government agencies.[56] The decision could have set a more forceful precedent had the court delineated the test in clearer language and based its holding directly on the statutory amendment. Instead the Ninth Circuit cited only one ruling,[57] without more, to guide the BIA and immigration practitioners in applying the test. Indeed the test as explained in *McMullen* offers only a vague case-by-case analysis.[58]

As one commentator has observed, the differences between

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54. *Id. See* United Nations High Commissioner for Refugees Handbook on Procedure and Criteria for Determining Refugee Status, ¶ 196, p.47 (1979), which reads in relevant part:

> [A]n applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases, a person fleeing from persecution will have arrived with barest necessities and very frequently even without personal documents.

55. *See* Hosseinmandi v. Immigration & Naturalization Serv., 405 F.2d 25 (9th Cir. 1969) (decision of special inquiry officer denying stay of deportation to citizen of Iran, who applied for stay on ground that he would face persecution in Iran because of his political beliefs and activities in the United States, was not an abuse of discretion). Under this standard, if the BIA has employed the correct legal standard and followed the proper procedures, its decision will stand unless arbitrary, capricious or based upon invidious classifications. *See, e.g.*, Pereira-Diaz v. Immigration & Naturalization Serv., 551 F.2d 1149, 1154 (9th Cir. 1977). Thus, national, domestic or foreign policy concerns may have improperly played a role in the BIA decisions, even though they are illegitimate components of an asylum decision under the Protocol. *See also Right of Asylum,* supra note 11, at 1133; S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 184 (1979).

56. *Cf.* Espinoza-Espinoza v. Immigration & Naturalization Serv., 554 F.2d 921, 926 (9th Cir. 1977) (with regard to the standard of review on appeal, this court has held that the test is whether "the agency's order is supported by reasonable, substantial and probative evidence on the record considered as a whole."). Although this case did not deal with § 243(h), the Ninth Circuit, in *McMullen*, recognized the change to mandatory language in the Refugee Act and made the test applicable to BIA factual findings. 658 F.2d at 1316.

57. Calhoun v. Bailer, 626 F.2d 145 (9th Cir. 1980), *cert. denied,* 452 U.S. 906 (1981).

58. 626 F.2d at 148.

the abuse-of-discretion and substantial evidence standards have been and still are blurred.[59] Thus, literal interpretation of the formulas as applied to a section 243(h) case cannot always produce sensible or consistent results.[60] Most important, the "key to scope of review is not the choice of formulas or standards . . . . The key lies in the prevailing judicial choice of what content to put into the concept of *reasonableness.*"[61]

Now that withholding of deportation is no longer a matter of discretion, judicial review must focus on whether the BIA *reasonably* determined that the alien would not be persecuted upon deportation. From this standpoint, the Ninth Circuit's reliance on general principles of administrative law[62] was not only misplaced but unnecessary. The better view requires the adoption of the standard applicable to the Act itself.[63] Although the legislative history of the Refugee Act is silent on the reviewability standard,[64] it does indicate the legislative intent to conform United States law with the Protocol. Since the Refugee Act mandates a factual determination of the possibility that a petitioner will be subject to persecution upon deportation, the Refugee Act would be a proper standard to follow.[65] By engaging in an intensive review of evidence supporting a section 243(h) decision, the Ninth Circuit played a leading role in giving the full effect to the principles and language of the Protocol and the Refugee Act.[66]

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59. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.00-1 (Supp. 1982).

60. S. BREYER & R. STEWART, *supra* note 55, point out that "if administrative agencies were totally free to find whatever facts they pleased, without regard to the evidence or the reasonableness of inferences that might be drawn from the evidence, agencies could so alter the operation of statutes or legal rules as to effectively change their meaning." *Id.* at 184.

61. K. DAVIS, *supra* note 59, at 528 (emphasis added).

62. 658 F.2d at 1316. Presumably, the Ninth Circuit means that under the Administrative Procedure Act, 5 U.S.C. § 706(2)(E) (1976), the substantial evidence test is used only for questions of fact that have been the subject of a hearing with a determination on the record. Since the test has already been spelled out in the Act itself, *see infra* note 63, reliance on the Administrative Procedure Act is unnecessary.

63. Refugee Act § 106(a)(4), 8 U.S.C. § 1105(a)(4) (1976 & Supp. 1982). This statute provides that administrative findings of fact must be supported by reasonable, substantial and probative evidence on the record considered as a whole.

64. H.R. REP. No. 212, 96th Cong., 2d Sess. 141 (1979). *Cf.* S. REP. No. 256, 96th Cong., 1st Sess. 9 (1979), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 523.

65. *See supra* note 63.

66. One other Circuit has followed the Ninth Circuit's interpretation. *See* Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982), where the Second Circuit reversed the BIA, holding that it employed too onerous a standard in requiring asylum claimants to show a "clear

E. SIGNIFICANCE

The *McMullen* decision is of significant precedential value and therefore of importance to immigration practitioners. First, the Ninth Circuit espoused the United Nations' concern that refugees fleeing political persecution are often unable to present sufficient evidence to support their claims.[67] Therefore, newspaper articles and other secondary evidence are now relevant in evaluating a claim of feared persecution.[68]

Second, the language of *McMullen* strongly indicates the Ninth Circuit's dissatisfaction with the INS' failure to submit independent evidence to contradict a petitioner's claim.[69] It therefore follows that the burden shifts to the INS to attack a petitioner's claim by presenting its own evidence once the petitioner meets his burden of proof. This aspect of the opinion, however, remains unclear since the court did not specify how much evidence is needed to prove that a petitioner would be persecuted upon deportation.[70]

In *McMullen,* the Ninth Circuit took a positive step in interpreting the Refugee Act consistent with its legislative intent. Indeed, Congress' adoption of the Refugee Act clearly evinces the United States' continued commitment to welcome and provide assistance to homeless refugees. The *McMullen* decision, if applied with reasonableness and care, can provide relief to petitioners whose claims of likely persecution have merit while also

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probability" of persecution. *Id.* at 409.

67. *See supra* notes 52-53.

68. For the list of evidence submitted by petitioner, see *supra* notes 40 and 42. In *McMullen,* the Ninth Circuit recognized that in political asylum cases, it is difficult to imagine what other forms of testimony a petitioner could present other than his own statements and those of his family members. 658 F.2d at 1319. *See also* Matter of Sihasale, 11 I. & N. Dec. 531 (1966) for the proposition that a petitioner's own affidavit is usually not only the best evidence available, but often the only evidence of a persecution claim. *See generally* Note, Corolian v. Immigration & Naturalization Service: *A Closer Look at Immigration Law and The Political Refugee,* 6 SYRACUSE J. INT'L. L. & COM. 133 (1978-79).

69. *See supra* notes 42-47 and accompanying text.

70. *See* 658 F.2d at 1319-20. The Ninth Circuit conceded that in *McMullen,* petitioner was a well known former member of PIRA with an extensive claim of probable persecution. Thus, the opinion leaves uncertain the weight of the burden of proof imposed on future petitioners. It therefore remains to be determined whether a meritorious claim can be made with evidence not as extensive as that presented in *McMullen.*

allowing room for deference to the expertise of the BIA.

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ADAMS V. HOWERTON: AVOIDING CONSTITUTIONAL CHALLENGES TO IMMIGRATION POLICIES THROUGH JUDICIAL DEFERENCE

A. INTRODUCTION

In *Adams v. Howerton*,[1] the Ninth Circuit confronted the issues of whether a citizen's spouse within the meaning of the Immigration and Nationality Act of 1952[2] (the Act) must be an individual of the opposite sex, and, whether the statute, if so interpreted, was constitutional. Relying on and exercising deference to congressional intent and power over immigration matters,[3] the court held that spousal status under the Act was conferred only upon parties to a heterosexual marriage.[4] The court further found that Congress' decision to limit spousal status to heterosexual marriages had a rational basis and comported with the due process clause and its equal protection requirements.[5]

Plaintiff, an American male, and Sullivan, an alien male, were married in Colorado following the expiration of Sullivan's visitor's visa. Shortly thereafter, plaintiff petitioned the Immigration and Naturalization Service (INS) for classification of Sullivan as an immediate relative based on Sullivan's alleged status as plaintiff's spouse. This petition was denied, and the denial was affirmed on appeal by the Board of Immigration Appeals. Plaintiff and Sullivan then challenged the Board's decision on both statutory and constitutional grounds in the district court. The district court granted summary judgment in favor of

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1. 673 F.2d 1036 (9th Cir.) (per Wallace, J., the other panel members were Tang, J., and Turrentine, D. J., sitting by designation), *cert. denied*, 102 S. Ct. 3494 (1982).
2. 8 U.S.C. §§ 1101-1503 (1976).
3. 673 F.2d at 1040.
4. *Id.* at 1042.
5. *Id.* at 1041.

the INS.[6]

B. Background—The Immigration and Nationality Act

As originally conceived, the Act provided a system for annual immigration quotas, and a comprehensive scheme for the admission and exclusion of aliens.[7] In 1965, the Act was amended, and the former quota system replaced by a scheme qualifying aliens for admission based on (1) the date of application, and (2) the preference category into which the alien fell by reason of his relationship to a United States citizen or resident, employment, skill or lack thereof.[8]

Spouses and unmarried children of United States citizens have long been admitted without regard to numerical limitation, and are granted automatic preference status. Section 201(b) of the Act provides for this preference and confers "immediate relative status" which qualifies for admission purposes the children, spouses, and parents of a citizen of the United States.[9] Neither the Act nor its 1965 amendments directly define the term "spouse", and only one restriction on this term is contemplated within the Act. Section 101(35) excludes from preferential status a wife or husband spouse who are not in the physical presence of each other, unless the marriage has been consummated.[10] Thus, the Act is silent on whether or not the term would include a spouse of the same sex.

A related provision, section 204(c), provides for the non-approval of preferred immigrant status to spouses of United States citizens or permanent alien residents who, as determined by the Attorney General, are found to have entered into marriage for the purpose of evading immigration laws.[11] In conjunction with

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6. 486 F. Supp. 1119, 1125 (C.D. Cal. 1980).

7. 8 U.S.C. §§ 1151-1230 (1976).

8. 8 U.S.C. § 1151 (1976).

9. 8 U.S.C. § 1151(b) (1976) provides: "The 'immediate relatives' referred to in subsection (a) of this section shall mean the children, spouses, and parents of a citizen of the United States . . . ."

10. 8 U.S.C. § 1101(a)(35) (1976) provides: "The term [sic] 'spouse', 'wife', or 'husband' do not include a spouse, wife or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consumated."

11. 8 U.S.C. § 1154(c) (1976).

section 212(a)(19),[12] the Ninth Circuit has upheld the denial of admission of spouses who enter the marriage relationship for the purpose of acquiring "immediate relative status" and evading immigration laws.[13]

Also modified by the 1965 amendments were the provisions requiring the mandatory exclusion of certain classes of aliens. Section 212(a) specifies the various classes of aliens who are ineligible to receive visas, and are excludable from admission into the United States. Subsection four of this provision was modified to exclude "[a]liens afflicted with psychopathic personality, or sexual deviation, or a mental defect."[14] The phrase "sexual deviation" was added to this category and, based on its legislative history, was intended to exclude homosexuals.[15] Prior to the addition of this phrase, the term "psychopathic personality" was interpreted by the courts as including homosexuals as an excludable alien class.[16] Based on the Act's legislative history, the Fifth Circuit found, in *Quiroz v. Neelly*,[17] that "[w]hatever the phrase 'psychopathic personality' may mean to the psychiatrist, to the Congress it was intended to include homosexuals and sex perverts."[18] Following the 1965 amendments, the United States Supreme Court, in *Boutilier v. Immigration & Naturalization Service*,[19] concluded that "Congress used the phrase 'psychopathic personality' not in the clinical sense, but to effectuate its purpose to exclude from entry all homosexuals and other sex perverts."[20]

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12. 8 U.S.C. § 1182(a)(19) (1976) provides for exclusion from admission: "Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact . . . ."

13. Garcia-Jaramillo v. Immigration & Naturalization Serv., 604 F.2d 1236 (9th Cir. 1979).

14. 8 U.S.C. § 1182(a)(4) (1976).

15. S. REP. No. 748, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 3328, 3343.

16. *See* Lavoie v. Immigation & Naturalization Serv., 418 F.2d 732 (9th Cir. 1969); Boutilier v. Immigration & Naturalization Serv., 363 F.2d 488 (2d Cir. 1966), *aff'd*, 387 U.S. 118 (1967); United States v. Flores-Rodriguez, 237 F.2d 405 (2d Cir. 1956).

17. 291 F.2d 906 (5th Cir. 1961).

18. *Id.* at 907.

19. 387 U.S. 118 (1967).

20. *Id.* at 122. This interpretation of congressional intent was challenged in a recent district court opinion, Lesbian Gay Freedom Day Comm., Inc. v. United States Immigration and Naturalization Service, 541 F. Supp. 569 (N.D. Cal. 1982). The court found that § 212(a)(4) was not intended as a per se exclusion of homosexual aliens because, by its

The question presented in *Adams* was how to reconcile the apparently conflicting provisions of the Act, one granting spouses preferential status, the other treating homosexuals as a nonpreferred class and automatically excludable.

C. THE COURT'S ANALYSIS

The *Adams* case presented two major issues concerning the constitutionality of a federal statute pertaining to immigration. The first issue required the interpretation of the term "spouse" within the meaning of the Act.[21] If the term "spouse" was defined as including only heterosexual spouses, the second issue, the constitutionality of the interpretation, would follow.[22]

In determining whether a citizen's spouse within the meaning of the Act must be an individual of the opposite sex, the Ninth Circuit applied a two step analysis: first, whether the marriage was valid under state law; and second, whether the state approved marriage would qualify under the Act.[23]

Reviewing the Colorado statutes governing marriage,[24] the court concluded that Colorado neither expressly permitted nor prohibited homosexual marriages.[25] However, the court did note that these statutes appeared to contemplate the marriage relationship as solely being between a man and a woman.[26] Yet, the court found it unnecessary to determine the validity of the plaintiff's marriage under Colorado laws. Within constitutional limits, the court reasoned, Congress has plenary power to deter-

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express language, the section was an exlusionary provision based on medical grounds. Congress could not have intended § 212(a)(4) as an exclusion of individuals who had no medically recognized mental disorder or sexual deviation. The court noted that the medical community no longer views homosexuality as a mental illness, mental disorder or sexual deviation. 541 F. Supp. at 585.

21. 673 F.2d at 1038.

22. *Id.*

23. *Id.* This analysis was derived from cases interpreting the Act and its various provisions. *See* United States v. Sacco, 428 F.2d 264, 270 (9th Cir.), *cert. denied*, 400 U.S. 903 (1970) (construing statutes pertaining to registration and revocation of naturalization, 8 U.S.C. §§ 1302, 1306(a) and 1415(a)(3) (1970)).

24. COLO. REV. STAT. §§ 14-2-101—14-2-104 (1973).The Board of Immigration Appeals has held that, in a visa petition proceeding, the validity of a marriage is governed by the laws of the place of celebration. *See In re* Gamero, 14 I. & N. Dec. 674 (1974). *See also* Gee Chee On v. Brownell, 253 F.2d 814, 817 (5th Cir. 1958).

25. 673 F.2d at 1039.

26. *Id.*

mine the conditions under which immigration visas are issued. "Therefore, the intent of Congress governs the conferral of spouse status under section 201(b), and a valid marriage is determined only if Congress so intends."[27]

That Congress did not intent to confer spousal status to parties in a homosexual marriage for the purpose of acquiring "immediate relative status" was premised on three considerations.[28] First, the INS had interpreted the term "spouse" to exclude a person entering a homosexual marriage.[29] Because the INS was the agency empowered by Congress to implement its immigration directives, the court was required to follow the agency's finding. Further, there was no indication found within the Act, its 1965 amendments, or its legislative history which reflected an intent to include such individuals within the spousal exemption provisions of the Act. Conversely, the court found its support for concluding that Congress had intended to exclude homosexual marriages from the protective sanctions of the spousal exemption provisions in the Act's mandatory exclusion provisions. Section 212(a)(4), excluding homosexuals from admissions, aptly served to reflect Congress' intent to apply the term "spouse" only to parties in a heterosexual marriage.

The court further maintained that to ascertain and apply the intent of Congress, it was required to interpret each sanction within the Act consistently with the language of the other sections, and in light of the purposes of the Act as a whole.[30] Thus, a consistent construction of the provisions granting spouses preferential status and the provision excluding homosexuals from admissions led the court to conclude "that Congress intended that only partners in heterosexual marriages be considered spouses under section 201(b)."[31]

Recognizing Congress' plenary power to admit or exclude

27. 673 F.2d at 1039.

28. *Id.* at 1040.

29. The court noted its obligation to accord substantial deference to the statutory construction given by the agency charged by Congress with its enforcement, and to follow it "unless there are compelling indications that it is wrong." New York Dep't of Social Serv. v. Dublino, 413 U.S. 405, 421 (1973).

30. *See* Philbrook v. Goldgett, 421 U.S. 707, 713 (1975).

31. 673 F.2d at 1041.

aliens from entry,[32] the Ninth Circuit declined to address the nature of plaintiff's claimed constitutional right and whether it was implicated in the case.[33] The court's position of nonreview gleaned support from the established principle of applying only a limited judicial review to congressional decisions pertaining to all matters concerning immigration.[34] Additional support was found in prior cases upholding the broad power of Congress to determine immigration policies in the face of other constitutional challenges.[35]

The court did, however, note the lack of clarity regarding the scope of its limited review, and questioned whether the rational basis test must be met to validate legislation such as section 201(b) of the Act. Despite these unanswered questions, the court held that "Congress' decision to confer spouse status under section 201(b) only upon the parties to heterosexual marriages has a rational basis."[36] Congress rationally intended to deny preferential status to spouses of homosexual marriages; thus, the court maintained, "we need not further probe and test the justifications for the legislative decision."[37] Based on congressional power in immigration matters, and a rational basis for excluding homosexual spouses from the Act's spousal exemption provision, the court held that section 201(b) was not unconstitutional because it denied spouses of homosexual marriages the preference accorded spouses of heterosexual marriages.[38]

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32. Fiallo v. Bell, 430 U.S. 787 (1977); Kleindienst v. Mandel, 408 U.S. 753 (1972); Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909).

33. 673 F.2d at 1041. Appellants argued that the statute, so interpreted, violated the equal protection clause and abridged their fundamental right to marry. This right was first considered a right of fundamental importance in Zablocki v. Redhail, 434 U.S. 374 (1978), a case involving a traditional heterosexual marriage.

34. 673 F.2d at 1041.

35. *See* Fiallo v. Bell, 430 U.S. 787 (1977) (rejecting challanges based on sex discrimination and denial of constitutional interest in family relationships); Kleindienst v. Mandel, 408 U.S. 753 (1972) (rejecting a first amendment free speech challenge); Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118 (1967) (rejecting a due process challenge). *But see Lesbian/Gay Freedom Day Comm., supra* note 20 (per se exclusion of homosexual aliens from entry into United States violated first amendment rights of free speech and association of homosexual citizens).

36. 673 F.2d at 1042.

37. *Id.* at 1043, quoting Fiallo v. Bell, 430 U.S. at 799.

38. *Id.*

D. CRITIQUE

In *Adams*, the Ninth Circuit limited its inquiry to statutory interpretation. In so doing, the court cautiously adhered to well sanctioned notions of "limited review" and "judicial deference" to congressional decision-making power over immigration matters. This position carefully avoided discussion of the real issues in *Adams*—whether section 201(b) violated the equal protection clause because it discriminated on the basis of sex and homosexuality, and/or whether it abridged plaintiff's fundamental right to marry. The decision presents troubling questions concerning the use of "limited" review and "judicial deference" where constitutional claims and personal rights of American citizens are asserted.

The court's interpretation of the controlling provisions within the Act was undeniably correct. Spouses of American citizens are granted "immediate relative status" under section 201(b),[39] and based on judicial interpretation of congressional intent, homosexuals are among the class of excludable aliens under section 212(a)(4).[40] It is therefore not unlikely that Congress intended to exclude homosexual spouses from section 201(b) immediate relative status. However, this limited statutory analysis, in combination with the practice of judicial deference, effectively assures that plaintiff's asserted constitutional rights, and those similarly situated, will never receive judicial review. Thus, the use of limited review and judicial deference in the area of immigration legislation is questionable when it results in the effective denial of asserted constitutional claims.

The broad power of Congress in matters of immigration is well established. In *Oceanic Navigation Co. v. Stranahan,* the United States Supreme Court found that "over no conceivable subject is the legislative power of Congress more complete than it is over [the admission of aliens]."[41] This power is grounded in notions of sovereignty, and justified as a necessary means to maintain normal international relations and to defend the the country against foreign encroachment and danger.[42] Immigration

39. 8 U.S.C. § 1151(b) (1976).
40. 8 U.S.C. § 1182(a)(4) (1976).
41. 214 U.S. 320, 339 (1909).
42. *See* Foo Yue Ting v. United States, 149 U.S. 698 (1893); The Chinese Exclusion

policies, by nature, invoke international political questions and disputes. Thus, the power of policy determination and implementation must be concentrated exclusively within the legislative branch of government.[43] That this concentration of power is well established is evidenced by the high degree of judicial deference, and limited judicial review, accorded to legislation involving immigration decisions. The Supreme Court has consistently sustained Congress' plenary power to determine immigration policies.[44] The Court has conceded altogether that Congress could enact statutes which if applied to citizens would be found unconstitutional.[45]

Though the practice of judicial deference and limited review properly serve to avoid selective enforcement of important policy considerations, at some point it must be questioned what, if any, policy considerations truly are served if there is no real or apparent correlation between the exercise of congressional power in an immigration decision and the traditional justification for its use. Assuming, *arguendo,* the Act's treatment of denying homosexuals admission into the United States neither assisted nor abated the traditional bases for congressional power to mold immigration policies, i.e., maintenance of normal international relations, the exercise of congressional power would seemingly be without justification. Within this context, the traditional practice of limited judicial review would effectively grant to Congress an absolute, but baseless, power over all immigration decisions. The traditional practice of judicial deference would dissolve into judicial abdication.

Though it is clear that aliens have no constitutional right to compel admission into the United States,[46] the court's position summarily denies the existence of plaintiff's asserted constitutional right to marry. The Supreme Court has confirmed that the right to marry is of fundamental importance to all individuals.[47] Further, the Court has recognized "that freedom of *per-*

Case, 130 U.S. 581, 609 (1889).

43. *Foo Yue Ting,* 149 U.S. at 706.

44. *Boutilier,* 387 U.S. at 123.

45. *Mandel,* 430 U.S. at 792.

46. Alvarez v. District Director of United States Immigration & Naturalization Serv., 539 F.2d 1220 (9th Cir. 1976).

47. Zablocki v. Redhail, 434 U.S. 374 (1978).

sonal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[48] Because of its fundamental nature, the abridgment of the right to marry is given strict scrutiny and demands a compelling state interest.[49]

Though whether or not the fundamental right to marry similarly extends to those individuals entering into nontraditional homosexual marriages has not been reviewed by the Court,[50] presumably the right to enjoy "freedom of personal choice" in matters of family life should be afforded to all Americans. If this is so, the enactment and the Ninth Circuit's interpretations of sections 201(b) and 212(a)(4), as applied to American citizens, would have to be found unconstitutional. Yet, through cautious adherence to the position of limited review and judicial deference, the court in *Adams* afforded constitutional sanctions a potentially unconstitutional statute.

The court's recognition of this problem is seen in its citation to the Supreme Court's dicta "that a statute could be so baseless as to be violative of due process, and therefore beyond the power of Congress."[51] Conversely, the *Adams* court noted that some questions pertaining to immigration matters could be so political in nature as to be nonjusticiable.[52] Yet, without deciding whether plaintiff's claim fell within either of these categories, the court simply stated that the exact outer boundaries of its limited judicial review need not be delineated.[53]

The statutes relied upon in *Adams,* sections 201(b) and in particular 212(a)(4), are not based on concerns relating to immi-

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48. Roe v. Wade, 410 U.S. 113, 169 (1973) (Stewart, J., concurring) (emphasis added). Plaintiff's claim technically arose under the due process clause of the fifth amendment. However, in Bolling v. Sharpe, 347 U.S. 497 (1954), the Court found that the Federal Government bears the same duty to uphold equal protection guarantees as required by state governments under the fourteenth amendment.

49. *Zablocki,* 434 U.S. at 386.

50. The Supreme Court has dismissed cases challenging state statues authorizing heterosexual, but not homosexual marriages. Its dismissal of these cases was on grounds of the lack of a substantial federal question. *See* Baker v. Nelson, 409 U.S. 810 (1972). However, this dismissal was prior to the *Zablocki* decision articulating the fundamental right to marry.

51. 673 F.2d at 1042, quoting Galvan v. Press, 347 U.S. 522, 529 (1956).

52. 673 F.2d at 1042, citing Fiallo v. Bell, 430 U.S. at 793 n.5.

53. 673 F.2d at 1042.

gration policies, and appear potentially violative of an alien's right to due process. By their nature, these statutes also affect the constitutional and personal rights of American citizens. Thus, the question presented is not merely one of congressional power in immigration matters, but one of congressional power, albeit indirect, to resolve constitutional claims of American citizens. In other contexts, the dilemma of whether a statute violates a citizen's due process rights would be given close judicial scrutiny and these rights minimally deserve judicial inquiry in the context of immigration. Similarly, whether the *Adams* case presents a political question requires judicial consideration and recognition before it is determined to be nonjusticiable. Plaintiff's claim was not, however, afforded either one of these limited judicial inquiries.

E. Conclusion

Though the court's reliance on "limited review" and "judicial deference" is well sanctioned, its position leaves unchallenged the boundaries of congressional power over immigration decisions. More significantly, the court's position denies a citizen's right to test his constitutional claim. Because the Supreme Court has not addressed whether homosexual marriages are constitutionally protected, a review of a claim such as that presented in *Adams* could potentially lead to identical results. However, this potentiality does not serve to justify, nor to excuse, the summary denial of a citizen's asserted constitutional claim.

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