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JUDICIAL REVIEW OF "PATTERN AND PRACTICE" CASES: WHAT TO DO WHEN THE INS ACTS UNLAWFULLY

Robert Pauw*

There is no doubt that the decisions made under our immigration laws can visit tragic personal consequences upon individuals living in our communities. Deportation may deprive a person of "all that makes life worth living;"[1] it is "a sanction which in severity surpasses all but the most Draconian criminal penalties."[2] In some cases, the decisions made by the Immigration Service mean the difference between living with loved ones and living in exile; between economic well-being and total impoverishment; between refuge and torture or execution. For this reason, few, if any, will gainsay that a system of judicial review is essential in the immigration context.

The question, however, is when and how such judicial review should occur. As to review of orders of deportation, under § 106(a) of the Immigration and Nationality Act (INA),[3] review occurs on an individual, case-by-case basis, after all administrative appeals have been exhausted.[4] Generally, judicial review is limited to review in the federal courts of appeals, and the district courts lack jurisdiction.[5]

The decisions of interest in this article—decisions made by the Immigration and Naturalization Service (INS or Immigration Service) in implementing the legalization program[6]—are generally subject to judicial review in the courts of appeal under § 106.[7] The courts of appeal review these decisions on a case-by-case basis after the completion of administrative reviews, and the district courts generally lack jurisdiction to review them.

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1. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
2. Lok v. INS, 548 F.2d 37, 39 (2d Cir. 1977).
3. INA § 106(a), 8 U.S.C. § 1105a(a) (1994).
4. INA § 106(c), 8 U.S.C. § 1105a(c).
5. INA § 106(a), 8 U.S.C. § 1105a(a).
6. *See* INA § 245A, 8 U.S.C. § 1255a; INA § 210, 8 U.S.C. § 1160.
7. INA § 245A(f), 8 U.S.C. § 1255a(f)(4); § 210(e)(3), 8 U.S.C. § 1160(e)(3).

Several district and appellate courts, however, have recognized a "pattern and practice" exception to § 106.[8] This pattern and practice exception is not universally recognized,[9] and in the circuits that do not recognize the exception each individual subject to the allegedly unlawful pattern and practice must seek judicial review on an individual basis, appealing to the court of appeals pursuant to the provisions of § 106 after exhaustion of administrative remedies.

Many such pattern and practice cases have been filed in the past,[10] and we can expect that such cases will continue to arise in the future.[11] At this point, it is unsettled whether and under what circumstances district courts have jurisdiction to hear pattern and practice cases. In this article, I consider the case law that has developed in the context of the legalization program. In part I, I describe the legalization program established by Congress and explain the unlawful manner in which the program was implemented by the Immigration Service, adversely affecting hundreds of thousands of applicants. In part II, I argue that these unlawful policies are best addressed in pattern and practice lawsuits in the district courts rather than in individual case-by-case review. Finally, in part III, I describe the case law that has limited the district courts' jurisdiction to hear such pattern and practice cases, arguing that the cases have not gone far enough in recognizing the benefits of pattern and practice lawsuits.

8. By a "pattern and practice" lawsuit, I mean a lawsuit in which a plaintiff or plaintiffs allege that an agency has adopted or follows an unlawful policy or practice that adversely affects a whole class of individuals. *See, e.g.*, Haitian Refugee Ctr., Inc. v. Smith, 676 F.2d 1023 (5th Cir. 1982); National Ctr. for Immigrants Rights v. INS, 743 F.2d 1365 (9th Cir. 1984).

9. *See, e.g.*, Ayuda, Inc. v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989), *vacated*, 498 U.S. 1117 (1991); 948 F.2d 742, 751 n.6 (D.C. Cir. 1991).

10. *See, e.g.*, Campos v. Nail, 940 F.2d 495 (9th Cir. 1991); Montes v. Thornburgh, 919 F.2d 531 (9th Cir. 1990); Jean v. Nelson, 472 U.S. 846 (1985); ABC v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991); Alfaro-Orellana v. Ilchert, 720 F. Supp. 792 (N.D. Cal. 1989); Ramos v. Thornburgh, 732 F. Supp. 696 (E.D. Tex. 1989); Roshan v. Smith, 615 F. Supp. 901 (D.D.C. 1985); Haitian Refugee Ctr., Inc. v. Gracey, 600 F. Supp. 1396 (D.D.C. 1985), *aff'd*, 809 F.2d 794 (D.C. Cir. 1987).

11. At least two commentators have expressed the view that INS is institutionally incapable of providing fair adjudication and effective services to immigrants. This problem is inherent in the agency because INS is charged with both enforcement duties and service duties, and because INS has predominantly an enforcement orientation. *See* Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts*, 45 Stan. L. Rev. 115, 154, 177 n.296 (1992).

I. THE LEGALIZATION PROGRAM

The legalization program, created when Congress passed the Immigration Reform and Control Act of 1986 (IRCA),[12] was the result of a growing awareness of the social problems caused because millions of individuals were living in the United States in an unlawful immigration status.[13] IRCA had the dual purpose of legalizing many of those individuals already living in the United States in an unlawful immigration status and also making it more difficult for new immigrants to enter the United States unlawfully. To accomplish the latter objective, Congress adopted the so-called employer sanction provisions, requiring all employers to verify that their workers have authorization to work in the United States.[14] To accomplish the former objective, Congress created the legalization program.

The major purpose of the legalization program was to grant legal immigration status to a large class of individuals who had been living in the United States in an undocumented status for several years. The House Judiciary Committee explained:

> The United States has a large undocumented alien population living and working within its borders. Many of these people have been here for a number of years and have become a part of their communities. Many have strong family ties which include U.S. citizens and lawful residents. They have built social networks in this country. They have contributed to the United States in myriad ways, including providing their talents, labor and tax dollars. However, because of their undocumented status, these people live in fear, afraid to seek help when their rights are violated, when they are victimized by criminals, employers or landlords or when they become ill.
>
> The Committee believes that the solution lies in legalizing the status of aliens who have been present in the United States for

12. Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.).

13. According to most estimates, there were between four million and six million individuals living in the United States without proper immigration documents, with at least a couple hundred thousand being added to that number each year. John Crewdson, *The Tarnished Door* 105–06 (1983). *See also* Select Commission on Immigration and Refugee Policy (SCIRP), *U.S. Immigration Policy and the National Interest* 73 (Jt. Comm. Print 1981) [hereinafter Final Report].

14. INA § 274A requires employers to verify that workers have proper work authorization, and subjects employers to monetary penalties for the failure to verify employment authorization and for hiring workers knowing that they are not authorized to work. INA § 274A(e)(4),(5), 8 U.S.C. § 1324(a)(e)(4), (5) (1994).

several years, recognizing that past failures to enforces [sic] the immigration laws have allowed them to enter and to settle here.[15]

A. *The Basic Eligibility Requirements for Legalization*

In creating the legalization program, Congress established a cut-off date of January 1, 1982 and indicated its desire to legalize as many persons as possible who had been living unlawfully in the United States since before that date.[16] Generally, the only persons to be excluded from the program were those who had been convicted of certain criminal offenses or who had engaged in the persecution of others.[17] In order to accomplish the goals of the legalization program, Congress established four basic and straightforward eligibility requirements.

In order to qualify for legalization an applicant had to establish unlawful immigration status as of January 1, 1982, and continuous residence in the United States since that date. For persons who crossed the border surreptitiously and without inspection, it was enough to prove the date of entry to the United States and continuous residence. Persons who entered the United States in a lawful status before January 1, 1982,

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15. H.R. Rep. No. 682(I), 99th Cong., 2d Sess. 49 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5653 [hereinafter 1986 U.S.C.C.A.N.]. In its Final Report to Congress, SCIRP made similar findings:

> The Select Commission holds the view that the existence of a large undocumented/illegal migrant population should not be tolerated. The costs to society of permitting a large group of persons to live in illegal, second-class status are enormous. Society is harmed every time an undocumented alien is afraid to testify as a witness in a legal proceeding (which occurs even when he/she is the victim), to report an illness that may constitute a public health hazard or disclose a violation of U.S. labor laws.

Final Report, *supra* note 13, at 72.

A second purpose of legalization was to ameliorate the enforcement problems INS was facing. If a large class of undocumented immigrants living in the United States could be legalized, then the INS would be able to concentrate its resources more effectively on preventing new illegal entries into the United States. Congress believed that the alternative of attempting mass deportations would be costly, ineffective and inconsistent with this country's immigrant heritage. 1986 U.S.C.C.A.N., *supra*, at 5653. *See also* Final Report, *supra* note 13, at 74–75.

16. The Act "requires the Attorney General to grant legal status to those aliens who have been in the United States a substantial number of years . . . ." 1986 U.S.C.C.A.N., *supra* note 15, at 5675. Congress expected that one of the main difficulties facing potential applicants would be their ability to document residence in the United States since 1981. "Unnecessarily rigid demands for proof of eligibility for legalization could seriously impede the success of the legalization effort." *Id.* at 5677. Therefore, Congress expected the INS to "incorporate flexibility into the standards for legalization eligibility, permitting the use of affidavits of credible witnesses and taking into consideration the special circumstances relating to persons previously living clandestinely in this country." *Id.*

17. *Id.* at 5676.

such as persons who entered with a nonimmigrant visa, were required to prove either that the period of authorized stay expired before January 1, 1982, or that they violated their status in a manner that was "known to the Government."[18]

IRCA also required that applicants maintain continuous physical presence in the United States after November 6, 1986 (the date of enactment of IRCA), with the exception of "brief, casual and innocent" departures from the United States.[19]

An applicant for legalization was required to be "admissible as an immigrant," that is, not subject to the grounds of exclusion specified in INA § 212(a).[20] In adopting this requirement, Congress was primarily concerned with disqualifying those who had been convicted of certain serious crimes or had persecuted others.[21] Thus Congress specified that certain of these grounds of exclusion were not applicable for purposes of the legalization program,[22] and many of the grounds of exclusion could be waived.[23] Only certain grounds of exclusion, primarily those relating

18. INA § 245A(a)(2), 8 U.S.C. § 1255a(2) (1994). *See infra* notes 30–33 and accompanying text. Thus, nonimmigrants who worked without authorization and who had tax records or social security records to prove it, would be eligible because the violation of status was "known to the Government." *See* Doris M. Meissner & Demetrios G. Papademetriou, *The Legalization Countdown: A Third Quarter Assessment* 31–32 (1988). Similarly, students who dropped out of school before January 1, 1982, would have violated status in a manner "known to the Government" because schools were required to report such violations to INS. *See* 8 C.F.R. § 214.3(g) (1995).

19. The term "brief, casual and innocent" is a term of art in immigration law, first coined by the Supreme Court in Rosenberg v. Fleuti, 374 U.S. 449 (1963). In *Fleuti* the Court held that a lawful permanent resident of the United States who travelled to Tijuana for an afternoon had maintained continuous physical presence in the United States for immigration purposes and was not subject to exclusion upon his return to the United States. The term has been interpreted and explained by the lower courts in many cases since *Fleuti. See, e.g.*, Toon-Ming Wong v. INS, 363 F.2d 234 (9th Cir. 1966) (6-month absence to Canada by a minor); Itzcovitz v. Selective Service Local Board No. 6, 447 F.2d 888 (2d Cir. 1971) (3-week trip out of the U.S. to attend a training course for employer); Kamheangpatiyooth v. INS, 597 F.2d 1253 (9th Cir. 1979) (30-day trip to Thailand to visit relatives); Jubilado v. INS, 819 F.2d 210 (9th Cir. 1987) (3-month absence from U.S. to wind up affairs in Philippines and bring family to the United States); Molina v. Sewell, 983 F.2d 676 (5th Cir. 1993) (departure while under deportation proceedings may be "innocent, casual, and brief").

20. 8 U.S.C. § 1182.

21. 1986 U.S.C.C.A.N., *supra* note 15, at 5676.

22. Technical and documentary grounds of exclusion were automatically waived. INA § 245A(d)(2)(A), 8 U.S.C. § 1255a(d)(2)(A).

23. For example, Congress made waivers available for applicants who were excludable because they had been previously deported, who had committed fraud in obtaining immigration documents, and who had unlawfully smuggled aliens into the United States. INA § 245A(d)(2)(B)(i), 8 U.S.C. § 1255a(d)(2)(B)(i). Congress specifically directed that these waivers should be generously granted, and normally approved unless the applicant also falls under a non-waivable ground of exclusion. H.R. Rep. No. 115, 98th Cong., 1st Sess., pt. 4, at 69–70 (1983).

to criminal convictions and persecution, could not be waived and constituted an absolute basis for disqualification from the program.[24]

Finally, Congress required that applicants file applications for legalization during a one year application period,[25] which the Immigration Service designated to be from May 5, 1987, to May 4, 1988.[26]

B. INS's Implementation of the Legalization Program

In enacting IRCA, Congress directed the Immigration Service to implement the legalization program "in a liberal and generous" manner.[27] The program was targeted at the millions of individuals who had been living in the United States since before the cut-off date of January 1, 1982, and Congress believed that it was important that as many of these individuals as possible be legalized in order to "ensure true resolution of the problem and to ensure that the program will be a one-time-only program."[28]

INS's implementation of the legalization program was anything but "liberal and generous" and in fact was designed, at every step along the way, to disqualify as many individuals as possible. The Immigration Service interpreted the eligibility requirements in an extremely restrictive manner, reading the statute unfavorably against the applicant at every possible juncture and providing few procedural safeguards to prevent inaccurate determinations. In the words of one court, the interpretation given by the Immigration Service "is truly remarkable in the violence it does to the spirit and purpose of the Act it purports to implement. . . . [T]he INS view . . . goes beyond a narrow reading; it is almost overtly hostile to the legalization program itself."[29]

24. There were no waivers available for persons convicted of crimes of moral turpitude or of controlled substance violations. INA § 245A(d)(2)(B)(ii), 8 U.S.C. § 1255a(d)(2)(B)(ii). In addition, persons convicted of one felony or three or more misdemeanors and persons who had assisted in the persecution of others were disqualified from the legalization program. INA §§ 245A(a)(4)(B), (C), 8 U.S.C. §§ 1255a(a)(4)(B), (C).

25. INA § 245A(a)(1), 8 U.S.C. § 1255a(a)(1).

26. 8 C.F.R. § 245a.2(a) (1995).

27. 1986 U.S.C.C.A.N., *supra* note 15, at 5676.

28. *Id.*

29. Gutierrez v. Ilchert, 682 F. Supp. 467, 474 (N.D. Cal. 1988).

1. *Violation of Status "Known to the Government"*

Congress provided that persons who entered the United States on nonimmigrant visas could establish eligibility by showing that they violated their status in a manner that was "known to the Government." This provision was designed to include students and other nonimmigrants who violated their status before January 1, 1982, for example, by working without authorization, and could verify such violation through records from the government.[30]

The Immigration Service took the position that there was no "government" other than itself. According to INS regulations, "known to the government" meant "known to the Immigration Service,"[31] and a person's unlawful status was not "known to the Government" unless, prior to January 1, 1982, (1) the applicant had made a "clear statement" to a federal agency that he or she was unlawfully in the United States, and that information was transferred to INS and maintained in the applicant's immigration file; or (2) INS had made an "affirmative determination" that the person was unlawfully in the United States.[32] By means of this regulation, the INS effectively disqualified almost every applicant who had entered the United States before January 1, 1982, on a nonimmigrant visa, except for those whose period of authorized stay expired before January 1, 1982.[33]

2. *Continuous Unlawful Residence*

IRCA provides that in order to qualify for legalization, an applicant must establish that he or she entered the United States before January 1, 1982, and "has resided continuously in the United States in an unlawful status" since that date.[34] The Immigration Service used the requirement of continuous unlawful status as a perverse basis for disqualifying otherwise eligible individuals. According to INS policy, any legalization

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30. *See, e.g.*, Meissner & Papademetriou, *supra* note 18.

31. 8 C.F.R. § 245a.1(d) (1995).

32. 8 C.F.R. § 245a.1(d)(1), (2).

33. According to one estimate, up to 50,000 persons may have been disqualified from legalization. *See* Meissner & Papademetriou, *supra* note 18, at 32. The INS regulation defining "known to the Government" was struck down in Ayuda, Inc. v. Meese, 687 F. Supp. 650 (D.D.C. 1988). *Accord* Immigration Assistance Project of the L.A. County Fed'n of Labor v. INS, 709 F. Supp. 998, 717 F. Supp. 1444 (W.D. Wash. 1989), *aff'd sub nom.* Legalization Assistance Project of the L.A. County Fed'n of Labor v. INS, 976 F.2d 1198 (9th Cir. 1992), *vacated and remanded*, 113 S. Ct. 2637 (1993).

34. INA § 245A(a)(2)(A), 8 U.S.C. § 1255a(a)(2)(A) (1994).

applicant who travelled outside the United States after January 1, 1982, and returned with a nonimmigrant visa or other border crossing card would be deemed to have been, at least momentarily, in a lawful status and therefore disqualified from the legalization program.[35]

This interpretation was completely at odds with the law that had developed prior to IRCA. Traditionally, by violating one's status as a nonimmigrant, for example, by working without authorization, and remaining in the United States, an applicant would be regarded as having remained in an unlawful status at all times. This would be true even though the person held a visa that was facially valid and even if the person departed from the United States and reentered with a nonimmigrant visa or other entry document.[36]

As a result of the INS's interpretation of the requirement to maintain continuous unlawful status, thousands of individuals otherwise eligible for legalization were automatically disqualified from the program.[37]

3. *"Brief, Casual and Innocent" Absences*

Where Congress provided that "brief, casual and innocent" departures after November 6, 1986, would not break an applicant's continuous physical presence, the Immigration Service inexplicably specified that an applicant who had departed from the United States would be disqualified unless he or she had first obtained advance permission from the Immigration Service to travel outside the United States.[38] This interpretation was clearly inconsistent with the case law that had developed interpreting the term "brief, casual and innocent,"[39] and as a

35. 8 C.F.R. § 245a.2(b)(8).

36. *See, e.g.*, Matter of Longstaff, 716 F.2d 1439, 1441–42 (5th Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984); United States v. Shaughnessy, 221 F.2d 262, 264 (2d Cir. 1955); Del Castillo v. Carr, 100 F.2d 338 (9th Cir. 1938); Matter of I.L., 7 I. & N. Dec. 233 (BIA 1956); In the Matter of M, 6 I. & N. Dec. 752 (BIA 1955); Matter of H, 1 I. & N. Dec. 166 (BIA 1941); Matter of Martinez-Lopez, 10 I. & N. Dec. 409 (Atty. Gen. 1964).

37. This policy was challenged in LULAC v. INS, Civ. No. 87-4757-WDK (C.D. Cal. 1988), and as a result of the lawsuit the Immigration Service changed its position. *See* 8 C.F.R. § 245a.2(b)(9), 52 Fed. Reg. 43,843, at 43,845–46 (1987); 64 Interpreter Releases 1307, 1308 (1987).

38. 8 C.F.R. § 245a.1(g).

39. *See supra* note 19. Under the established case law, an absence would be determined to be "brief, casual and innocent" depending on the purpose of the departure, the length of the absence from the United States, and whether the departure reflected a meaningful interruption of the applicant's stay in the United States. *See, e.g.*, Kamheangpatiyooth v. INS, 597 F.2d 1253 (9th Cir. 1979). No court has ever held that an absence fails the "brief, casual and innocent" test merely because the applicant failed to obtain advance parole from the Immigration Service before the departure.

result, thousands of individuals who might otherwise have been eligible for legalization were disqualified from the program.[40]

4. *Waivers for Grounds of Exclusion*

In enacting IRCA, Congress was aware that many potential applicants would have been previously apprehended by the Immigration Service and deported from the United States. Congress created a special waiver for such persons, as well as for the benefit of other applicants who fell under one or more of the grounds of exclusion, and determined that such applicants could be approved for purposes of preserving family unity, humanitarian reasons, or when it was otherwise in the public interest. Congress explained:

> The Committee expects the Attorney General to examine the legalization applications in which there is a waivable ground of exclusion carefully, but sympathetically . . . . In most case [sic], denials of legalization on the basis of the waivable exclusions should only occur when the applicant also falls within one of the specified nonwaiverable grounds of exclusion.[41]

In implementing the legalization program, the Immigration Service took the position that certain applicants who fell under the waivable grounds of exclusion, such as those persons who had been previously deported from the United States, were not eligible for legalization, and their waiver requests would automatically be denied.[42]

5. *Receipt of Public Assistance*

A person who had previously received public assistance could potentially be disqualified from the legalization program on the basis of a finding that he or she was "likely at any time to become a public charge."[43] Such a finding would make the applicant excludable under INA § 212(a) and therefore not "admissible as an immigrant."[44] Instead

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40. The INS regulation defining "brief, casual and innocent" was struck down in Catholic Social Services, Inc. v. Meese, 685 F. Supp. 1149 (E.D. Cal. 1988).

41. H.R. Rep. No. 115, 98th Cong., 1st Sess., pt. 1, at 69–70 (1983).

42. This policy was invalidated in Proyecto San Pablo v. INS, 784 F. Supp. 738 (D. Ariz. 1991), *appeal pending*.

43. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) (1994).

44. *See* INA § 245A(a)(4), 8 U.S.C. § 1255a(a)(4); *see also* INA § 212(a)(5), 8 U.S.C. § 1182(a)(5); INA § 244A(a)(4), 8 U.S.C. § 1254a(a)(4).

of disqualifying these applicants, Congress adopted a "special rule" for purposes of determining public charge. According to this special rule an applicant would not be disqualified if he or she could demonstrate a history of employment showing self-support without the receipt of public cash assistance.[45]

The Immigration Service, in implementing this provision, required an applicant to show not only self-support, but also the capacity to maintain his or her entire family without public cash assistance.[46] As a result, many individuals who were able to support themselves but who had U.S. citizen family members who had received public assistance were disqualified from the legalization program.[47]

II. JUDICIAL REVIEW

As a result of INS's improper implementation of IRCA, literally hundreds of thousands of individuals were improperly disqualified from legalization, individuals whom, according to the courts, Congress intended to legalize.[48] Although several of these courts determined that the federal district courts have jurisdiction to review INS regulations and policies, the orders in these cases are not yet final and it is still an open question whether and to what extent the district courts have jurisdiction to entertain pattern and practice lawsuits.

It is the thesis of this article that the issues that arise in pattern and practice cases are best addressed in the context of pattern and practice lawsuits before the federal district court. This thesis is consistent with the

45. INA § 245A(d)(2)(B)(iii), 8 U.S.C. § 1255a(d)(2)(B)(iii).

46. Under INS regulations, the public charge ground of exclusion would be lifted only for an applicant who could "show[] the ability to support himself *and his or her family* . . . [and] the capacity to exist on his or her income *and maintain his or her family* without recourse to public cash assistance." 8 C.F.R. § 245a.2(k)(4) (1995) (emphasis added). The regulations deemed an applicant "likely to become a public charge" unless he or she "demonstrat[ed] a history of employment in the United States evidencing self-support without the receipt of public cash assistance." 8 C.F.R. § 245a.2(d)(4). "Public cash assistance" was defined to mean any "income or needs-based monetary assistance . . . received by the alien *or his or her immediate family members*." 8 C.F.R. § 245a.1(i) (emphasis added).

47. Again, INS's policies were challenged in federal district court on behalf of the thousands of applicants adversely affected. The courts determined that INS's regulation was inconsistent with IRCA and therefore unlawful, and ordered INS to change its policy. Perales v. Thornburgh, 967 F.2d 798 (2d Cir. 1992), *vacated*, 113 S. Ct. 3027 (1993), *decision on remand*, 48 F.3d 1305 (1995) (holding that INS did not violate statutory and due process rights); Zambrano v. Meese, Civ. No. S-88-455EJG (E.D. Cal. Aug 9, 1988), *aff'd*, Zambrano v. INS, 972 F.2d 1122 (9th Cir. 1992).

48. In all of the cases described above, the courts determined that the Immigration Service acted unlawfully in implementing the legalization program.

overall goals of administrative and judicial review. First, however, it is necessary to describe the scheme established in the INA for the judicial review of orders of deportation and legalization decisions.

A. *Judicial Review of Orders of Deportation and Legalization Decisions*

If the Immigration Service believes that an alien is deportable from the United States, it must issue an order to show cause and initiate deportation proceedings before an immigration judge.[49] If the immigration judge determines that the person is deportable and denies any relevant relief from deportation,[50] the person can appeal the decision to the Board of Immigration Appeals (BIA).[51] A final order of deportation entered by the BIA is appealed directly to the appropriate federal circuit court of appeals pursuant to § 106.[52]

In enacting IRCA, Congress established a special mechanism for judicial review of legalization decisions that dovetails with the review system established in § 106. An individual applying for legalization first files an application and is interviewed at a local INS office. The application is filed on a confidential basis, and the Immigration Service is not permitted to use the information contained in an application to locate and deport the applicant.[53] If the application is denied, the

49. 8 C.F.R. § 242.1(a). In many cases, the Immigration Service does not institute formal deportation proceedings, but instead convinces the alien to accept "voluntary departure" pursuant to INA § 242(b), 8 U.S.C. § 1252(b). If the Immigration Service wants to have the alien formally deported, deportation proceedings must be initiated under INA § 242, 8 U.S.C. § 1252, and an immigration judge makes a determination whether the person is deportable from the United States, and if so, whether he or she is eligible for relief from deportation.

50. A person in deportation proceedings who is found to be deportable may be eligible for a variety of forms of relief from deportation, including political asylum, withholding of deportation, suspension of deportation, voluntary departure, and adjustment of status. INA §§ 208, 243 (h), 244(a), 244(e), 245; 8 U.S.C. §§ 1158, 1253(h), 1254(a), 1254(e), 1255.

51. 8 C.F.R. § 242.21.

52. The system for judicial review established in INA § 106, 8 U.S.C. § 1105a, is "the sole and exclusive procedure for the judicial review of all final orders of deportation." INA § 106(a), 8 U.S.C. § 1105a(a). The statute does allow for district court review of an order of deportation pursuant to a writ of habeas corpus if the alien has been taken into custody under an order of deportation. INA § 106(a)(10), 8 U.S.C. § 1105a(a)(10). Orders of exclusion entered pursuant to INA § 236, 8 U.S.C. § 1226, as opposed to orders of deportation entered pursuant to INA § 242, 8 U.S.C. § 1252, are appealed from the BIA to the federal district court.

53. INA § 245A(c)(5), 8 U.S.C. § 1255a(c)(5). The Immigration Service created an exception if the applicant was deemed to be have committed fraud in the application or if the applicant was "clearly ineligible." INS Legalization Wire #1, *reprinted in* 63 Interpreter Releases 1074 app. at 1087 (1986).

applicant can file an appeal to the INS Legalization Appeals Unit (LAU).[54] Judicial review of the decision made by the LAU is delayed until after the applicant is apprehended, placed in deportation proceedings, ordered deported, exhausts administrative review in the BIA, and eventually appeals to the court of appeals pursuant to § 106.[55]

Thus, because the application is filed on a confidential basis, applicants whose applications are denied will generally be able to remain in the United States until they are later apprehended during an independent encounter with the INS. Only later, if the Immigration Service initiates deportation proceedings, the applicant is ordered deported by the immigration judge, the order is affirmed by the BIA, and the decision of the BIA is appealed to the court of appeals, will the individual be able to obtain judicial review of the denial of the legalization application in the court of appeals.[56]

B. *Goals of Administrative and Judicial Review*

There are three primary goals of a system of administrative and judicial review: efficiency, accuracy, and acceptability.[57] The role of the district courts in pattern and practice litigation, and in particular the issue of whether the district courts have jurisdiction to hear such cases, should be determined by a consideration of whether these three goals are impeded or facilitated by such review. As explained below, the pursuit of all three of these goals weighs heavily in favor of district court review of pattern and practice cases.

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54. 8 C.F.R. § 103.3(a)(3). The LAU was one department within the INS's Administrative Appeals Unit.

55. According to the special review mechanism established in IRCA, there is no judicial review of "a determination respecting an application" except in the judicial review of an order of deportation under § 106. INA § 245A(f)(4), 8 U.S.C. § 1255a(f)(4).

56. The immigration judge and the BIA have no jurisdiction to consider legalization applications. On appeal to the court of appeals, presumably the administrative record created in deportation proceedings will be consolidated with the administrative record created for purposes of the legalization application, and both records will be available for review by the court of appeals.

57. Stephen Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 Iowa L. Rev. 1297, 1313 (1986) (citing Roger Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rule Proceedings*, 16 Admin. L. Rev. 108, 111–12 (1964)). Legomsky identifies consistency as a fourth goal of administrative and judicial review. *Id.* For purposes of this paper, I will assume that the goal of consistency in decisions is subsumed under the third goal of acceptability or fairness.

1. *Efficiency*

The goal of efficiency includes not only the objective of minimizing monetary costs to the parties and to the public but also the objective of reducing the waiting time for a final decision. These considerations support district court review of pattern and practice cases.[58]

First, the regulations and policies being challenged in pattern and practice cases affect thousands of applicants. It is much more efficient to deal with all of these cases in one pattern and practice lawsuit than to have thousands of individual cases resolved on a case-by-case basis.

Second, there are special efficiency concerns under IRCA because judicial review in individual cases is delayed until the review of a final order of deportation. Because the legalization application process is confidential, the applicant may remain in the United States for years after the denial of the legalization application before the Immigration Service locates the applicant and commences deportation proceedings. By that time the applicant will have resided in the United States for well over seven years and thus will be eligible to apply for suspension of deportation.[59] Hence, when deportation proceedings are initiated against a denied legalization applicant, the applicant will be entitled to a full individual hearing concerning the application for suspension of deportation. These hearings are time-intensive and require the participation of an immigration judge, an INS trial attorney, and, if the applicant can afford it, an attorney representing the applicant. If the

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58. Initially, of course, it must be recognized that allowing jurisdiction in the district courts opens up the possibility that plaintiffs will file lawsuits, and there will be costs associated with such litigation in the district court. However, it is not likely that this will open a "floodgate" of pattern and practice litigation. In fact, fewer than a dozen such pattern and practice cases have been filed throughout the United States under IRCA. In Traynor v. Turnage, 485 U.S. 535, 544 (1988), the Supreme Court rejected the argument that allowing review of plaintiff's statutory claims against the Veterans' Administration would "burden the courts . . . with expensive and time-consuming litigation," noting that in the four circuits allowing judicial review of statutory challenges to V.A. regulations, only eight such challenges had been filed. *Id.* at 545 n.9. *See also* Devine v. Cleland, 616 F.2d 1080, 1085 (9th Cir. 1980) (class action lawsuit challenging regulations under Veterans Administration Act "will not spawn 'an inevitable increase in litigation with consequent burdens upon the courts' . . . . [T]he matter will be settled in one lawsuit for more than 400 members.") (quoting Johnson v. Robinson, 415 U.S. 361, 371 (1974)).

59. To be eligible to apply for suspension of deportation an applicant must have been physically present in the United States for the preceding seven years, with the exception of brief, casual and innocent departures; have good moral character during that period; and show that deportation would cause extreme hardship. INA § 244(a), 8 U.S.C. § 1254(a). Legalization applicants who have resided in the United States continuously, from a period prior to January 1, 1982, until the present, will generally be eligible to apply for suspension of deportation, unless disqualified because of criminal convictions.

application is denied by the immigration judge, the case can be appealed to the Board of Immigration Appeals, where the application is reviewed by a panel of BIA board members.[60] During this entire process, there is no judicial review of the lawfulness of the policies and practices adopted in the legalization program. Thus, there will be no judicial review of the validity of the INS regulation or practice until five, ten, or twenty years later, which would be years after the closing of the legalization program and the denial of thousands of applications.

Further, any relief granted at this remote time will accrue only to the benefit of one single applicant. In such cases, the court of appeals is incapable of granting class-wide relief, even when it becomes clear that thousands of other similarly situated applicants were wrongfully denied. Those individuals, whom Congress intended to legalize, will continue to remain in an undocumented immigration status.[61]

Thus, if there is no district court review of pattern and practice cases, thousands of cases will have to be reviewed on a case-by-case basis, many of which will involve lengthy administrative proceedings regarding benefits other than legalization. This flood of litigation is avoidable if district courts are allowed jurisdiction over the pattern and practice lawsuits. In terms of allocation of resources and minimizing costs to the parties, it is more sensible to allow district courts to hear one case at the outset and resolve the issue for a class of applicants, than to force each applicant to litigate the same issue on a case-by-case basis after lengthy proceedings involving other immigration benefits.

Another efficiency-related concern relates to the record for review. At least in some cases, because of procedural defects in the manner INS has processed applications, the administrative record created is not adequate for judicial review in individual cases.[62] In each individual case, it would

60. In contrast, the application for legalization is adjudicated in a much more informal manner. The applicant is initially interviewed informally by an INS examiner, who is not an attorney. A formal hearing with examination and cross-examination is not required. The immigration judge and INS trial attorneys are not involved. If the application is approved, that is the end of the case.

61. The inefficiency of this system is all the more evident in light of INS's practice of non-acquiescence. *See* Steve Y. Koh, *Nonacquiescence in Immigration Decisions of U.S. Courts of Appeal*, 9 Yale L. & Pol'y Rev. 430 (1991). Thus, the fact that a circuit court of appeals has held that INS's regulation or policy is unlawful does not necessarily mean that the INS will follow that decision on an intercircuit or intracircuit basis. The INS may refuse to apply the law established in one circuit to cases arising in another circuit. *Id.* at 442–45. The INS also may not follow the law that has developed in cases arising within a circuit. *Id.* at 445–48.

62. For example, in McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479 (1991), the plaintiffs alleged that under INS procedures, applicants were not informed of adverse information and were given no opportunity to respond to such information, that applicants were not allowed to present witnesses on their own behalf, and that non-English speaking applicants were not able to

be possible for the court of appeals to remand the case for a new decision, requiring the agency to follow proper procedures. However, it is much more efficient for the district court to address the issues immediately on a class-wide basis, correcting the defective procedures at the outset.

Finally, it should be clear that immediate review in federal district court of the pattern and practice lawsuit is more efficient because it reduces the waiting time for a final decision. The district court is equipped and authorized to hear class action lawsuits involving regulations and policies affecting many applicants and can render a decision expeditiously. In contrast, if district courts are held to have no jurisdiction over pattern and practice lawsuits, then final decisions may come years later, at different times and in different circuits, with the regulation or practice remaining effective pending the final decisions.

2. *Accuracy*

Accuracy, as a goal of the administrative and judicial process, includes the objective of ascertaining the truth and making correct factual determinations.[63] But it is broader; it encompasses the goal of making accurate legal determinations, in other words interpreting the relevant statutory and constitutional provisions correctly.[64] Whether this consideration favors district court review or review in the court of appeals may depend on the particular case and issue being resolved. In the context of the legalization pattern and practice cases, though, considerations of accuracy favor review in the federal district court.

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communicate effectively with the interviewers because there were no competent translators. Under these procedures, the administrative record created was inadequate for judicial review. *Id.*

63. In individual legalization cases, where the adjudicator is called upon to make specific factual determinations, such as when the applicant first entered the United States, where the applicant has been living, or whether the applicant has been engaged in employment, the best forum for making an accurate determination may be in the district court. *See* Legomsky, *supra* note 57, at 1323. Where there is a mechanism for discovery, procedures are formal, and the credibility of witnesses can be tested through cross-examination. These considerations favoring accuracy are offset, however, by concerns for efficiency because review in a district court is obviously more expensive than the informal administrative review established by IRCA.

64. I do not mean to suggest that there is always a "correct" legal interpretation of the relevant statute or the Constitution. In many cases a statute is ambiguous and susceptible of various interpretations. It is clear, however, that some interpretations are better or more accurate than others and that some decisionmakers are more likely to interpret a statute correctly than others. Professor Legomsky, for example, is more likely to offer a correct interpretation of § 245A(a)(3) than my 12-year-old daughter.

In the context of the pattern and practice legalization cases, the relevant issues that the courts have been called upon to resolve include the following: (1) whether there is a pattern or practice of unfair or unlawful adjudication;[65] (2) whether INS regulations are lawful and proper, given underlying facts concerning agency practice;[66] and (3) whether INS regulations are lawful as a matter of statutory interpretation.[67]

In the first two types of cases, a hearing before the district court is essential because the administrative record created in the legalization process is inadequate for purposes of making the required factual determinations.[68] For example, in *McNary v. Haitian Refugee Center, Inc.*, the court noted:

> To establish the unfairness of the INS practices, [plaintiffs] in this case adduced a substantial amount of evidence, most of which would have been irrelevant in the processing of a particular individual application. Not only would a court of appeals reviewing

65. For example, in LULAC v. INS, Civ. No. 87-4757-WDK (C.D. Cal. 1988), plaintiffs alleged that INS had a policy of denying legalization to individuals who reentered the United States on a nonimmigrant visa or other reentry permit after January 1, 1982. *See also* Campos v. Nail, 43 F.3d 1285, 1291 (9th Cir. 1994) ("[Plaintiffs] alleged a pattern of conduct that was not readily apparent in individual deportation proceedings. Only after comparing the results of numerous cases was the unlawful policy discernible.").

66. For example, in Legalization Assistance Project of the L.A. County Fed'n of Labor v. INS, 976 F.2d 1198 (9th Cir. 1992), plaintiffs challenged, *inter alia*, the INS's interpretation of the term "known to the Government" as used in INA § 245A(a)(2)(B). *See* 8 C.F.R. § 245a.1(d) (1995); *supra* notes 32–33 and accompanying text. In particular, the Immigration Service had defined that term so that an applicant's unlawful status was "known to the Government" only if there was evidence showing the unlawful status in the applicant's INS A-file. Plaintiffs were able to establish, through discovery mechanisms not available in the legalization application process, that there were other records maintained by the Immigration Service and available to INS officers that might include evidence showing a violation of status. The fact that the Immigration Service maintained these records was relevant to the determination that the INS's regulation was improper. *See, e.g.*, *Legalization Assistance Project*, 976 F.2d at 1209.

67. *See, e.g.*, Reno v. Catholic Social Services, Inc., 113 S. Ct. 2485 (1993) (challenging the validity of an INS regulation defining "brief, casual and innocent" absences for purposes of INA § 245A(a)(3)); Naranjo-Aguilera v. INS, 30 F.3d 1106 (9th Cir. 1994) (challenging the validity of an INS regulation defining the "one felony/three misdemeanor rule" for purposes of legalization under INA § 210).

68. The administrative record created in an individual legalization application includes only the original legalization application and supporting documentation (evidence of residence in the United States since 1981, copy of the medical exam, etc.); notes made by the INS legalization officer at the time of the informal interview; a report from the FBI fingerprint check; and any other additional information incorporated into the record by the Immigration Service. *See* McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 493 (1991). There is no opportunity for discovery and there is no opportunity to develop and present facts outside the particular application being presented.

> an individual . . . determination therefore most likely not have an adequate record as to the pattern of INS' allegedly unconstitutional practices, but it also would lack the factfinding and record-developing capabilities of a federal district court.[69]

In several lawsuits, plaintiffs have alleged a pattern and practice of unlawful "front-desking" by the Immigration Service. During the legalization application period, applicants appearing at INS's front desk to file applications were told that they were not eligible for the program, and INS refused to accept their applications. In these cases, no administrative record is created because the applications were never accepted by the Immigration Service. Thus, the only way that a factual record can be developed is in proceedings before the district court.[70]

In *Legalization Assistance Project of the Los Angeles County Federation of Labor v. INS*,[71] the plaintiffs challenged the INS's definition of "known to the Government." In the course of litigation, the plaintiffs were able to prove the existence of records maintained by the government from which it was possible to determine that a violation of status had occurred.[72] This would have been impossible to establish in the context of an individual legalization application, where there is no opportunity for discovery. Thus, for purposes of determining whether INS's interpretation of the statute was lawful, review in the district court was essential.

As to the last category, cases in which the only issue is the validity of a regulation, which depend only on legal analysis and not underlying factual matters, it is arguable that the court of appeals is ultimately the best tribunal for judicial review.[73] However, as to these cases the issue of accuracy also hinges on the timing of judicial review.

In the legalization program, final regulations were issued on May 1, 1987, at the outset of the legalization application period.[74] The decisions embodied in these regulations interpreting the statute were made by INS policymakers who were probably familiar with a range of immigration issues but who were not necessarily lawyers nor experienced in issues of

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69. 498 U.S. at 497.

70. *See Reno*, 113 S. Ct. 2485.

71. 976 F.2d 1198 (9th Cir. 1992), *vacated and remanded*, 113 S. Ct. 2637 (1993).

72. *Id.* at 1209, 1212 n.31.

73. *See* Legomsky, *supra* note 57, at 1322 (arguing that legal issues are generally best handled by a collegial forum, such as a court of appeals, rather than a single decision maker, such as a district court).

74. 52 Fed. Reg. 16,195, at 16,204 (1987) (codified at 8 C.F.R. § 210).

statutory interpretation.[75] The decisions embodied in these regulations, if not reviewable in federal district court at the outset of the legalization program, will remain effective for many years before being challenged in the context of an appeal of an individual case.

Thus, early review by a judicial tribunal experienced in adjudicating a broad range of statutory interpretation cases is especially beneficial in order to help assure that the statute has been interpreted accurately.[76] Because judicial review in the court of appeals is delayed for many years, the only judicial forum available for reviewing the legality of INS regulations and policies is a federal district court. For this reason, considerations of accuracy of the interpretation of the statute argue in favor of judicial review in the federal district court.

3. *Acceptability*

In addition to an efficient and accurate process, it is also desirable that the procedures adopted be recognized by the litigants and the general public as fair.

According to some commentators, the system established in IRCA for the review of individual cases does not meet the goal of acceptability.[77] Judicial review is conditioned on risk because an applicant can obtain judicial review only by subjecting oneself to deportation. If the applicant is correct and the INS's denial of the legalization application was improper, legalization will be granted. If the applicant is incorrect, however, the applicant will be deported from the United States. Given this risk, it is unlikely that many undocumented applicants will step forward to obtain judicial review. As the Supreme Court noted, "[q]uite obviously, that price is tantamount to a complete denial of judicial review for most undocumented aliens."[78] According to some, such a mechanism for review of administrative decisions is not fair or

75. *See, e.g.*, Califano v. Sanders, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions.").

76. This is especially true if one accepts the assessment that because of INS's enforcement orientation, administrative performance is "deeply and systematically flawed." Schuck & Wang, *supra* note 11, at 176–77 n.295.

77. *See, e.g.*, Daniel Kanstroom, *Judicial Review of Amnesty Denials: Must Aliens Bet Their Lives to Get into Court?*, 25 Harv. C.R.-C.L. L. Rev. 53, 97 (1990).

78. McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496–97 (1991).

acceptable: "There is something fundamentally troubling about conditioning justice upon risk."[79]

Whatever one's views about the fairness or unfairness of the scheme established in IRCA for the review of individual legalization applications, clearly, precluding district court review of pattern and practice cases is unacceptable.

If judicial review is precluded, there will be no effective mechanism for correcting egregious and widespread unlawful agency action. For example, suppose the Immigration Service decided to restrict all legalization benefits to persons born on the Fourth of July.[80] Without review in the district court, there would be no means to challenge such a policy. Millions of applicants would be improperly denied. Millions would remain in the United States in an undocumented status, and the legalization program would be effectively destroyed.

The problem in the context of the pattern and practice cases actually filed is, perhaps, not as egregious as the Fourth of July problem, but the problem is clearly present and real. If there is to be no review in the federal district courts, there will be no means to correct unlawful policies and practices adopted by the agency which adversely affect thousands of individuals. The agency will be able to effectively frustrate the congressional intent of legalizing as many persons as possible.

Furthermore, a system of judicial review should promote consistency in decisions. In pattern and practice cases, the district court can certify a class of individuals, even a nationwide class if necessary, and treat all individuals in the class uniformly. In this and other contexts, the class action lawsuit provides an effective mechanism for resolving legal disputes consistently for all affected.

In contrast, if there is no jurisdiction in the district courts and the cases are reviewed on an individual case-by-case basis, there will be no consistency in the decisions reached. Even if the regulation or practice is overturned in one circuit, INS might not follow the decision in another circuit.[81] Moreover, there would be no means to obtain uniform results even within the same circuit. A court of appeals invalidating a regulation in one case has no jurisdiction to order the INS to change the decisions made in other cases. As a result, if the district court does not hear the

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79. Kanstroom, *supra* note 77, at 97.

80. *See* Marozsan v. United States, 852 F.2d 1469, 1478 (7th Cir. 1988) (discussing possible unlawful regulations in the context of benefits under the Veterans Administration Act).

81. *See* Koh, *supra* note 61.

challenge and decide the issue on a class-wide basis, there is the very real prospect of inconsistent results.

III. CASE LAW UNDER § 245A(F)

IRCA provides that there shall be no review of "a determination respecting an application" for legalization except in the context of judicial review of a final order of deportation pursuant to § 106.[82] Thus, when plaintiffs bring a pattern and practice case under IRCA, an initial question is whether § 245A(f) bars review in the district court. In particular, the question is whether the district court is called on to review "a determination respecting a [legalization application]," and whether §†245A(f) therefore prohibits review.

In *McNary v. Haitian Refugee Center, Inc.*,[83] the Supreme Court held that § 245A(f) does not preclude district court review of pattern and practice cases. The Immigration Service argued that the federal district court had no jurisdiction to hear the claims of the plaintiffs[84] because the policies it adopted constituted a "determination respecting an application" and therefore could be reviewed only by the court of appeals pursuant to § 245A(f) and § 106. The Supreme Court rejected this argument, stating:

> The critical words . . . describe the provision as referring only to review "of *a determination* respecting *an application*" for SAW [special agricultural worker] status. . . . [H]ad Congress intended the limited review provisions of § 210(e) [of the INA] to encompass challenges to INS procedures and practices, it could easily have used broader statutory language. . . . Because [plaintiffs'] action does not seek review on the merits of a denial of a particular application, the District Court's general federal-question jurisdiction under 28 U.S.C. § 1331 to hear this action remains unimpaired by § 210(e).[85]

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82. INA § 245A(f)(1), 8 U.S.C. § 1255a(f)(1) (1994).

83. 498 U.S. 479 (1991).

84. The plaintiff farmworkers applying for amnesty under § 210 raised objections to the manner in which INS processed legalization applications. Plaintiffs alleged that applicants were not apprised of or given the opportunity to respond to adverse information or to present witnesses on their own behalf, and that applicants were unable to communicate effectively with legalization adjudicators because competent interpreters were not provided. *Id.* at 487–88.

85. *Id.* at 491–94.

The rationale given for this decision relied primarily on accuracy concerns, concerns that without jurisdiction in district court, no record adequate for purposes of judicial review could be created:

> To establish the unfairness of the INS practices, [plaintiffs] in this case adduced a substantial amount of evidence, most of which would have been irrelevant in the processing of a particular individual application. . . . [S]tatutes that provide for only a single level of judicial review in the courts of appeals "are traditionally viewed as warranted only in circumstances where district court factfinding would unnecessarily duplicate an adequate administrative record—circumstances that are not present in 'pattern and practice' cases where district court factfinding is essential."[86]

The Court also alluded to concerns of acceptability:

> [B]ecause there is no provision for direct judicial review of the denial of SAW status unless the alien is later apprehended and deportation proceedings are initiated, most aliens denied SAW status can ensure themselves review in courts of appeals only if they voluntarily surrender themselves for deportation. Quite obviously, that price is tantamount to a complete denial of judicial review for most undocumented aliens.[87]

A system in which claims are effectively precluded from judicial review is not acceptable.[88]

The jurisdictional issue in pattern and practice cases should have been put to rest by the Court's decision in *McNary*. Nevertheless, the Court revisited the jurisdictional issue in *Reno v. Catholic Social Services, Inc.* (*CSS*)[89] and laid the groundwork for subsequent confusion.

In *CSS*, plaintiffs challenged INS regulations defining "brief, casual and innocent" departures from the United States for purposes of §†245A(a)(3)(B).[90] According to the INS regulations, a "brief, casual and

86. *Id.* at 497 (quoting from ABA, Amicus Curiae Brief).

87. *Id.* at 496–97.

88. The Court should not be taken to mean that whenever the review scheme is "tantamount to a complete denial of judicial review" jurisdiction in the district courts must be allowed. Such a result would, as the Court clearly recognized, be inconsistent with the statute. Rather, the Court indicates that in those types of cases where district court review is not clearly precluded by § 245A(f), district court review should be allowed if the claims would otherwise be effectively precluded from judicial review.

89. 113 S. Ct. 2485 (1993).

90. *Id.* at 2490.

innocent" departure required advance permission from the Immigration Service before the departure.[91] Plaintiffs alleged that many applicants had been "front-desked",[92] that is, deterred from filing because of INS's practices. At the district court level, the court not only invalidated the INS regulation but also extended the application deadline for the benefit of persons who had been deterred from filing because of INS's regulation. On appeal, the Immigration Service, while not contesting the fact that the regulation was unlawful, argued that the district court lacked jurisdiction.

The Supreme Court first reiterated its holding in *McNary*, stating that § 245A(f) does not preclude district court jurisdiction over pattern and practice cases.[93] The Court went on to hold, however, that as to individuals deterred from filing applications, there remained an issue of ripeness. Individuals challenging agency action can do so only if the controversy is ripe, and the Court felt that the mere promulgation of regulations does not create a sufficiently ripe controversy as to individuals who decided not to file an application for legalization. Injunctive and declaratory judgment remedies are discretionary, and "courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution."[94] The mere promulgation of regulations would not have prevented the plaintiffs from filing applications for legalization, and would not have given the plaintiffs a ripe claim.[95]

Of course, when the INS applies the regulation by denying an application, then the plaintiff's claim becomes ripe. However:

> A plaintiff who sought to rely on the denial of his application to satisfy the ripeness requirement . . . would then still find himself at least temporarily barred by the Reform Act's exclusive review provisions, since he would be seeking "judicial review of a determination respecting an application." . . . The ripeness doctrine and the Reform Act's jurisdictional provisions would thus dovetail neatly, and not necessarily by mere coincidence. Congress may well have assumed that, in the ordinary case, the courts would not hear a challenge to regulations specifying limits to eligibility before those regulations were actually applied to an individual, whose

91. *See supra* notes 38–40 and accompanying text.

92. *See supra* note 70 and accompanying text.

93. 113 S. Ct. at 2494–95.

94. *Id.* at 2495 (quoting Abbot Laboratories v. Gardner, 387 U.S. 136, 140 (1967)).

95. *Id.* at 2496.

challenge to the denial of an individual application would proceed within the Reform Act's limited scheme.[96]

This last passage has created confusion. In light of it, *CSS* can be interpreted in several ways, none of them satisfying. The first interpretation is that perhaps the Court is holding that the district court has jurisdiction under § 245A(f) whenever a plaintiff, an individual or a class, brings a lawsuit challenging a regulation or policy affecting many applicants. The Court is merely pointing out that in "the ordinary case," after an application has been denied, an individual will be seeking approval of his or her legalization application, which entails review of the "determination" made on the application, and thus will be subject to the review mechanism established in § 245A(f).[97] The second interpretation is that the Court may be holding that district courts have jurisdiction under § 245A(f) to hear a pattern and practice case only if a suit is brought by a class of plaintiffs. An individual seeking relief is barred by the judicial review provisions of IRCA, because relief in such a case is limited to the "determination" made in that case.[98] Third, the Court may be holding that whether review is available in the district court depends on the type of challenge brought by the plaintiffs. If the plaintiffs are challenging a collateral or procedural aspect of the legalization process, then the district court has jurisdiction. However, if plaintiffs are challenging a substantive eligibility requirement, then there is no jurisdiction.[99] Fourth, the Court may be holding that the district

96. *Id.* at 2497.

97. Under this interpretation, the district court has jurisdiction to hear the claims presented by an individual or by a class of individuals only if the plaintiffs are not seeking a determination on the merits of any individual legalization application, but are seeking only an order preventing the INS from implementing the unlawful regulation. This interpretation is consistent with the statutory language of § 245A(f), although it does open up the possibility of an unwanted plethora of lawsuits that can be filed on an individual basis.

98. This interpretation is consistent with the statutory language. Although it precludes piecemeal individual litigation, this does not significantly undermine the objectives of judicial review, and actually facilitates efficient handling of the cases to the extent that it forces plaintiffs to band together as a group to have the legal issues affecting them as a class resolved uniformly and simultaneously.

99. The only plausibility this interpretation has is that it is a facile way of distinguishing *McNary* (a procedural challenge) from *CSS* (a challenge to substantive eligibility requirements) on the facts. This interpretation makes no sense in terms of the statutory language used by Congress in § 245A. There is no reason to say that the procedures adopted by INS and applied generally do not constitute a "determination respecting an application" whereas regulations adopted and applied generally do. *See, e.g.*, McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 492–93 (1991) (abuse of discretion standard required under § 245A(f) for review of a "determination" applies neither to judicial review of procedures nor to judicial review of the legality of regulations). The interpretation makes even less sense in terms of the objectives of judicial review. *See supra* part II.B.

court's jurisdiction to hear pattern and practice cases is not limited by § 245A(f), but that the court should also take into account prudential considerations, such as ripeness. If there are significant prudential considerations counselling against jurisdiction, then the district court should decline to hear the case.[100] Finally, perhaps the Court is signalling, more generally, that pre-enforcement review of the substantive eligibility requirements of a government benefit program is disfavored, and that plaintiffs who seek to challenge the legality of such eligibility requirements do not have ripe claims unless they are "front-desked" or apply and are denied.[101]

The courts of appeals have interpreted *McNary* and *CSS* in two subsequent legalization cases. In *Ayuda, Inc. v. Reno*,[102] the Court of Appeals for the District of Columbia read *CSS* as holding that § 245A(f) permits pattern and practice challenges only if the plaintiffs raise "procedural" challenges that "could not receive practical judicial review" under § 245A.[103] Challenges to substantive eligibility requirements are not permissible.[104] In *Naranjo-Aguilera*,[105] the Ninth Circuit followed *Ayuda*:

> First, district courts have jurisdiction over "collateral," "procedural" challenges to INS practices in the processing of applications, such as the front-desking in *CSS* or the denial of interpreters in *McNary*. . . . Where plaintiffs challenge alleged INS application-processing practices on a nationwide scale, a class action lawsuit with district court discovery mechanisms is an

100. This interpretation is perhaps the most sensible way to reconcile *McNary* and *CSS*. In *McNary*, the Court quite clearly held that the district courts have jurisdiction to hear pattern and practice cases that present "constitutional or statutory claims." 498 U.S. at 493. *CSS* affirms this holding. However, in the context of a class of plaintiffs who did not file applications during the application period, *see* 113 S. Ct. at 2498 n.23, the court holds that such plaintiffs may not have ripe claims and remands to the district court for a determination of which class members do have ripe claims. 113 S. Ct. at 2500.

101. Under this interpretation, statutes such as § 245A(f), which limits judicial review, will continue to be interpreted narrowly. However, expanding the scope of the ripeness doctrine to preclude otherwise cognizable challenges to an agency's regulations undermines the goals of efficiency, accuracy, and acceptability. Early judicial review is beneficial particularly to programs with a limited application period. Where the agency has clearly stated the substantive eligibility requirements, with no doubts about how the regulations will be applied, there is no reason to delay judicial review until after specific applications have been denied or "front-desked".

102. 7 F.3d 246 (D.C. Cir. 1993).

103. *Id.* at 249.

104. *Id.*

105. Naranjo-Aguilera v. INS, 30 F.3d 1106 (9th Cir. 1994).

> appropriate, and indeed the most effective, method of judicial review.
>
> Second, however, the "neat dovetailing" of ripeness doctrine and IRCA's exclusive review provisions . . . forecloses aliens from challenging INS regulations or policies interpreting IRCA's substantive eligibility criteria, except on appeal from an order of deportation.[106]

Thus, the state of the law, at least in the D.C. Circuit and the Ninth Circuit, is that challenges going to INS procedures used in adjudicating legalization applications can be brought in the district court, whereas challenges to substantive eligibility requirements can be brought only on a case-by-case basis under § 106.[107]

The decisions in *Ayuda* and *Naranjo-Aguilera* are not well reasoned. The conclusion in these cases is clearly not mandated by the statutory language contained in § 245A(f). Nor is the result required under *McNary* and *CSS*, the relevant Supreme Court precedents. Furthermore, the effect of these decisions is that unlawful regulations and practices adopted by INS will remain in place for years, to be corrected only on an individual, case-by-case basis. In effect, Congress's desire to legalize broad classes of individuals will be thwarted. It is not likely that Congress intended this result when it enacted § 245A.

What is required but missing in these cases is an analysis of the considerations described above regarding whether review in the district court is appropriate given the considerations of efficiency, accuracy, and acceptability. Neither the *Ayuda* court nor the *Naranjo-Aguilera* court give consideration to these factors.[108] The better interpretation is to limit § 245A(f) to individual factual determinations dealing with "the denial of an individual application"[109] and to allow the district court to resolve pattern and practice cases affecting a large class of applicants.[110]

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106. 30 F.3d at 1112–13. More recently, the Second Circuit has followed this interpretation. *See* Perales v. Reno, 48 F.3d 1305 (2d Cir.1995).

107. The rule in the Ninth Circuit and the D.C. Circuit is at odds with the rule in the Seventh Circuit. *See* Morales v. INS, 952 F.2d 954, 956–57 (7th Cir. 1991) (challenge to regulation allowed).

108. The decisions in these two cases focus on only one of the relevant considerations: whether the administrative record created in the context of an individual application will be adequate for purposes of making a determination on the relevant factual inquiries. Other factors that should be considered are ignored.

109. McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 491 (1991).

110. *See* Kenneth C. Davis, 5 *Administrative Law* § 28:14, at 325 (2d ed. 1984) ("*A massive number of cases that fall into patterns affords opportunity not only for greater efficiency than what*

IV. CONCLUSION

The decisions made by an administrative agency are often shaped by political and bureaucratic forces which can be at odds with legislation passed by Congress. We have seen this scenario occur in the legalization program, where Congress's desire for a generous legalization program was to a large extent thwarted by an enforcement-minded agency. We are bound to see this occur in the future in other immigration contexts as well. Ultimately, it is the federal courts that force the agency to act in a lawful manner, within the scope of the authority delegated by Congress and consistently with the Constitution.[111] The fact that administrative action is constrained in this manner helps to legitimate the actions taken by the INS.

For this reason, judicial review of the policies and practices adopted by an administrative agency is essential. Of course, there are legitimate questions regarding the cost of judicial review, the best method of providing for judicial review, and the optimal mechanism for judicial review in individual cases. As argued above, though, district court review of pattern and practice lawsuits should generally be allowed.

Among the goals of a system of administrative and judicial review are efficiency, accuracy, and acceptability. In determining whether a district court has jurisdiction to hear pattern and practice cases, the court's role in the overall system of administrative and judicial review should be evaluated in light of these three goals. Where there is a pattern and practice of agency action adversely affecting many individuals, district courts should ordinarily be allowed to accept jurisdiction and to grant class-wide relief where the agency has been acting unlawfully. Such action will generally promote the efficiency, accuracy, and acceptability of the review process.

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is attainable through an ordinary court trial but also for greater accuracy in finding facts and applying law.") (emphasis in original).

111. "[A] main purpose of judicial review of administrative action is to assure that administrators do whatever is required for procedural and substantive justice. *Reviewing courts are the experts on the content of procedural and substantive justice.*" *Id.* § 28:7, at 285 (emphasis in original).