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Peter N. Fowler

Leonard Graff

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Cover Page Footnote

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GAY ALIENS AND IMMIGRATION: RESOLVING THE CONFLICT BETWEEN *HILL* AND *LONGSTAFF*

Peter N. Fowler* & Leonard Graff**

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."***

I. INTRODUCTION

There is no area of the law affecting gays in which the decisions of the United States Supreme Court are less equivocal or more deferential to legislative intent than the field of immigration law.¹ While lower courts have struggled recently with the various practical issues of whether gay aliens should be excluded, deported, or denied citizenship, the Supreme Court has neither elaborated upon nor modified its 1967 opinion in *Boutilier v. Immigration & Naturalization Service*.² In upholding the deportation of a Canadian national as a person afflicted with a "psychopathic personality,"³ the Court in *Boutilier* construed section 212(a)(4) of the Immigration and Nationality (McCarran-Walter) Act⁴ and held that the language barring "aliens afflicted with psychopathic personality" included "all homosexuals and other sex perverts."⁵

* Law Clerk to Justice E.M. Gunderson of the Supreme Court of Nevada. B.A., John Carroll University (1973); M.A., University of Alabama (1977); M.A., Ball State University (1979); J.D., Golden Gate University School of Law (1984). Member, California Bar.

** Legal Director, National Gay Rights Advocates. B.S., Michigan State University (1973); J.D., Thomas M. Cooley Law School (1976). Member, California, New York, District of Columbia, and Michigan Bars. The authors wish to thank Professor Nancy Carol Carter, of Golden Gate University School of Law; William E. Benemann, Scott B. Pagel, and Glen Buries of the Golden Gate University Law Library staff; and Jeffrey Levi of the National Gay Task Force.

*** L. CARROLL, THROUGH THE LOOKING GLASS 94 (Random House ed. 1946).

1. The broad power of Congress to legislate in matters of immigration is well established. See, e.g., *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893); *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889).

2. 387 U.S. 118 (1967).

3. *Id.* at 119.

4. Pub. L. 414, 66 Stat. 163, 182 (codified as amended at 8 U.S.C. § 1182(a)(4) (1982)).

5. *Boutilier*, 387 U.S. at 122.

Despite the obvious progress of the gay rights movement in gaining social and legal tolerance at all levels of government,⁶ in virtually all segments of society,⁷ and throughout all geographic regions of the country,⁸ the Court has allowed its decision in *Boutilier* to stand—unmodified and unexplained—for nearly two decades. The Court has even avoided a clear opportunity to resolve a highly publicized conflict between two circuits.⁹ By denying a petition for certiorari in a Fifth Circuit case, the Court left unsettled a conflict between the Fifth Circuit's *In re Longstaff*¹⁰ decision (which upheld the denial of a petition for naturalization on medical grounds despite the absence of a medical certificate) and the Ninth Circuit's *Hill v. United States Immigration & Naturalization Service*¹¹ decision (which held that absent a medical certificate, a gay alien could not be excluded on medical grounds).

This article will explore the legal and public policy arguments which might move the Court beyond the *Boutilier* result by demonstrating that the continued exclusion of gay aliens from lawful entry and from citizenship can only be accomplished through a procedure that may no longer be available to the Immigration and Naturalization Service (INS): Public Health Service certification. Using the *Hill* and *Longstaff* conflict as the starting point for analysis, this article will contend that the legislative intent behind the medical grounds exclusion provisions of the Immigration and Nationality Act requires the issuance of a medical certificate by qualified medical personnel before any alien can be excluded on the basis of a medical exclusion. And by deferring to the medical profession to make a medical determination whether gays fit within the grounds for medical exclusions, the Court will be carrying out the intent of Congress. While this article will also explore possible legislative and executive actions which could resolve the issue of the exclusion of gay aliens, the major focus will be on the development of a strategy which will allow the Court to enforce the

6. See, e.g., Jost, *Lawyers and the Gay Rights Movement*, L.A. Daily J., Aug. 15, 1983, at 2, col. 6 ("The gay rights movement has emerged as the major civil rights issue for this decade.") For a complete list of gay rights legislation which has been adopted at various levels of government, see NATIONAL GAY TASK FORCE, *GAY RIGHTS PROTECTIONS IN THE UNITED STATES AND CANADA* (1984).

7. See G. GALLUP, *THE GALLUP POLL: PUBLIC OPINION 1982*, at 253 (1983); *Gay America in Transition*, NEWSWEEK, Aug. 8, 1983, at 30; L.A. Times, Jan. 1, 1984, at 1, col. 1; N.Y. Times, July 3, 1977, at 32, col. 1 (78% of the delegates at the United Church of Christ General Synod favored full and equal rights for homosexuals).

8. NATIONAL GAY TASK FORCE, *supra* note 6.

9. See, e.g., Nat. L.J., Oct. 17, 1983, at 3, col. 2.

10. 716 F.2d 1439 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2668 (1984).

11. 714 F.2d 1470 (9th Cir. 1983).

congressionally mandated procedure for the exclusion of aliens on medical grounds and to prohibit any administrative evasion of this procedure by the INS. The result may well be that, in light of current medical opinions with respect to homosexuality, gays cannot legitimately be excluded under the Immigration and Nationality Act as it is now written.

This article is not intended to be an exhaustive analysis of the practical problems encountered by gay aliens in attempting to immigrate to this country.¹² Nor will it review all of the cases concerning gays and immigration, which are well-known to practitioners and more than adequately covered in the literature.¹³ Rather, this article will construct a legally sound argument which gives the Court the necessary latitude to place the resolution of the gay exclusion issue within the medical framework Congress intended. Such a strategy could make reform in this political and intensely emotional area palatable to even a conservative Court.¹⁴

12. See C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* § 2.4a (1984). See generally STATE BAR OF CAL., *VOLUNTARY LEGAL SERVS. PROGRAM, IMMIGRATION LAW AND DEPORTATION DEFENSE MANUAL FOR VOLUNTEER ATTORNEYS* (2d ed. 1983); Berry & Appleman, *Excludability of Homosexuals under Section 212(a)(4)*, 3 *IMMIGRATION J.* 5 (1980). For a discussion of the rights of aliens in deportation and exclusion proceedings, see Lopez & Lopez, *The Rights of Aliens in Deportation and Exclusion*, 20 *IDAHO L. REV.* 731 (1984); Comment, *Ensuring Due Process in Alien Exclusion Proceedings after Landon v. Plasencia*, 34 *HASTINGS L.J.* 911 (1983).

13. See generally Reynolds, *The Immigration and Nationality Act and the Rights of Homosexual Aliens*, 5 *J. HOMOSEXUALITY* 79 (1979-80); Note, *The Immigration and Nationality Act and the Exclusion of Homosexuals: Boutilier v. INS Revisited*, 2 *CARDOZO L. REV.* 359 (1981); Note, *The Exclusion and Expulsion of Homosexual Aliens*, 15 *COLUM. HUM. RTS. L. REV.* 295 (1984) [hereinafter cited as Note, *Exclusion and Expulsion*]; Note, Adams v. Howerton: *Avoiding Constitutional Challenges to Immigration Policies through Judicial Deference*, 13 *GOLDEN GATE U.L. REV.* 318 (1983); Comment, Nemetz v. INS: *The Rights of Gay Aliens under the Constitutional Requirement of Uniformity and Mutable Standards of Moral Turpitude*, 16 *N.Y.U. J. INT'L L. & POL.* 881 (1984); Note, *Immigration—Naturalization—“Good Moral Character” Requirement Is a Question of Federal Law*, Nemetz v. INS, 6 *SUFFOLK TRANSNAT'L L.J.* 383 (1982); Note, *Immigration—Aliens—The Invalidation of a Homosexual Marriage for Immigration Purposes*, Adams v. Howerton, 7 *SUFFOLK TRANSNAT'L L.J.* 267 (1983); Note, *Yes, Virginia, There Is a Uniform Rule of Naturalization Clause: Nemetz v. Immigration and Naturalization Service*, 3 *U. BRIDGEPORT L. REV.* 197 (1981); Note, *Recent Decisions—Aliens—Immigration and Naturalization Service Policy of Excluding Homosexual Aliens without a Medical Certificate Is Invalid*, Hill v. United States Immigration and Naturalization Service, 16 *VAND. J. TRANSNAT'L L.* 698 (1983).

14. For an exhaustive analysis of the conservative trend of the Burger Court, see Galloway, *The First Decade of the Burger Court: Conservation Dominance (1969-1979)*, 21 *SANTA CLARA L. REV.* 891 (1981). For a discussion of the Burger Court's approach to individual rights, see Comment, *Cases That Shock the Conscience: Reflections on Criticism of the Burger Court*, 15 *HARV. C.R.-C.L. L. REV.* 713 (1980). For a discussion of the political or judicial philosophies of individual justices, see Kleven, *The Constitutional Philosophy of Justice William H. Rehnquist*, 8 *VT. L. REV.* 1 (1983); Pollack, *Thurgood Marshall: Lawyer and Justice*, 40 *MD. L. REV.* 405 (1981); Sofaer, *Justice William Brennan after Twenty-Five Years*, 1981 *ANN. SURV. AM. L.* xii;

II. HISTORY OF THE EXCLUSION OF HOMOSEXUAL ALIENS

A. *The Development of American Immigration Policy and Law*

America's immigration laws have tended to reflect the political and sociological conditions of the time in which they were enacted. Factors influencing provisions in the immigration laws include, but are certainly not limited to, domestic labor needs, racial and ethnic prejudices, and the international political concerns which were at the forefront when the legislation was adopted.¹⁵

In its first century as a nation, the United States permitted virtually unlimited immigration. Only in the latter half of the nineteenth century were any restrictions on immigration imposed.¹⁶ Immigration from Europe, drawn mostly from eastern and southern Europe, "became associated with anarchism and radicalism, slums, poverty, and social unrest."¹⁷ While the forces favoring restrictions were initially unsuccessful—mostly due to the increased demand for cheap labor at the turn of the century—eventually a persuasive coalition formed, aligning nativist thinkers, trade unionists fighting job competition and strike-breaking, and southerners and westerners pressing for racial restrictions,¹⁸ the latter reflecting the strong anti-Oriental sentiment on the West Coast.¹⁹ The result was the passage in 1882 of the first general immigration laws.²⁰

In 1917, over the veto of President Woodrow Wilson, Congress passed a comprehensive revision of the immigration laws,²¹ excluding all Asians and all members of revolutionary or radical organizations, and establishing a literacy requirement for all new immigrants. Congress again increased the restrictions in 1921 by imposing nationality quota restrictions on groups other than Asians.²² Entry was to be lim-

The Symposium in Honor of Justice Lewis F. Powell, Jr., 68 VA. L. REV. 161-458 (1982); Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717 (1983).

15. See generally Goodpaster, *Illegal Immigration*, 1981 ARIZ. ST. L.J. 651; McClain, *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CALIF. L. REV. 529 (1984); Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984); Seller, *Historical Perspectives on American Immigration Policy: Case Studies and Current Implications*, LAW & CONTEMP. PROBS., Spring 1982, at 137.

16. Higham, *American Immigration Policy in Historical Perspective*, 21 LAW & CONTEMP. PROBS. 213, 216 (1956).

17. See Goodpaster, *supra* note 15, at 655.

18. Higham, *supra* note 16, at 225-26.

19. See Kim & Kim, *Asian Immigrants in American Law: A Look at the Past and the Challenge Which Remains*, 26 AM. U.L. REV. 373, 376-89 (1977); see also McClain, *supra* note 15, at 534-39, 543-45.

20. Chinese Exclusion Acts, ch. 141, 18 Stat. 477 (1875), ch. 126, 22 Stat. 58 (1882); ch. 376, 22 Stat. 214 (1882).

21. Immigration Act of 1917, ch. 29, 39 Stat. 874 (1917).

22. Quota Law of 1921, ch. 8, 42 Stat. 5 (1921).

ited to numbers equivalent to a percentage of foreign-born persons of that nationality residing in the United States in 1910.²³ The result, since the resident population of the nation was then overwhelmingly drawn from northern and western Europe, was racial and ethnic discrimination against southern and eastern Europeans, most notably Italians, Greeks, Slavs, and Jews. In 1924, Congress promulgated yet another immigration formula to preserve the racial and ethnic status quo of the country.²⁴

While post-World War II concerns centered on making refugee admission a part of the national foreign policy and immigration law,²⁵ most amendments to the immigration laws reflected the new Cold War ideological and political preoccupation with excluding and deporting subversives.²⁶ In 1952, over President Truman's veto, Congress enacted the Immigration and Nationality (Walter-McCarran) Act,²⁷ a major revision of the then-existing immigration laws which continues to be the basis of American immigration law today. The Immigration and Nationality Act retained immigration quotas, a preference system of admission, and a complex system for excluding undesirables on the basis of health, prior criminal activities, immoral behavior, or certain political beliefs.²⁸ In 1965, major changes were made in the act through the abolition of the national origins quota system and the immigration restrictions on Asians, and the addition of a provision which prohibited discrimination in immigration.²⁹ The act also created a hemispheric quota system, exempted immediate relatives of United States citizens from the overall worldwide quota restrictions, and changed the focus of admission preferences to reflect policies in favor of family reunification and useful professional and labor skills.³⁰

B. *The Exclusion of Gay Aliens*

Gay aliens were first excluded from entry into the United States by the Immigration and Nationality Act of 1917,³¹ which denied entry to persons certified by an examining physician as "mentally defective"

23. *Id.*

24. Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924).

25. Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009 (1948), amended by Act of June 16, 1950, ch. 262, 64 Stat. 219 (1950). See C. GORDON & H. ROSENFELD, *supra* note 12, § 1.2d.

26. See Alien Registration Act of 1940, ch. 439, 54 Stat. 670 (1940); Internal Security Act of 1950, ch. 1024, 64 Stat. 987 (1950).

27. Immigration & Nationality Act, Pub. L. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-525 (1982)).

28. 8 U.S.C. § 1182(a)(6), (7), (9), (10), (28).

29. *Id.* § 1152(a).

30. See C. GORDON & H. ROSENFELD, *supra* note 12, § 1.4c.

31. Pub. L. No. 64-301, ch. 29, § 3, 39 Stat. 874-75 (1917).

or afflicted with a "constitutional psychopathic inferiority."³² The INS and the Public Health Service both classified gay aliens as constitutional psychopathic inferiors or mental defectives to be excluded under the act.³³

In 1947, the Senate began an investigation into the entire immigration system that eventually recommended the addition of "homosexuals and other sex perverts" to the class of medically excludable aliens.³⁴ A bill incorporating these recommendations was introduced by Senator McCarran.³⁵ The Senate Judiciary Committee revised the proposed immigration bill³⁶ by dropping the phrase "homosexuals and sex perverts" primarily in response to the concern of the Public Health Service that some difficulty would be encountered in substantiating the diagnosis of homosexuality and sexual perversion.³⁷ The report of the Senate Judiciary Committee accompanying the bill, however, stated that the change was in response to the Public Health Service's assertion that "the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect . . . [was] sufficiently broad to

32. *Id.* The 1917 act added "persons of constitutional psychopathic inferiority" to the list of mental disabilities set forth in earlier statutes. Although no court had ever determined that the term encompassed homosexuality, the Board of Immigration Appeals held that homosexuality came within the meaning of "constitutional psychopathic inferiority." *In re Rochelle*, 11 I. & N. Dec. 436 (1965). Nonetheless, prior to the 1952 Act the Board of Immigration Appeals only excluded aliens who confessed to committing or who had been convicted of homosexual acts which constituted crimes involving moral turpitude. *See, e.g., In re W—*, 5 I. & N. Dec. 578 (1953) (deportation for admission to crime of gross indecency). The Board of Immigration Appeal's "use of the 'crime of moral turpitude' ground rather than the 'constitutional psychopathic inferiority' clause as a means of denying admission to homosexuals seems to suggest that, prior to the 1952 act, the Board may have believed that homosexuality was not considered a 'constitutional psychopathic inferiority.'" Note, *The Propriety of Denying Entry to Homosexual Aliens: Examining the Public Health Service's Authority over Medical Exclusions*, 17 U. MICH. J.L. REF. 331, 333-34 n.20 (1984).

33. For a more extensive discussion of the interaction between the INS, the Public Health Service, and Congress, see Note, *Exclusion and Expansion*, *supra* note 13; Note, *supra* note 32.

34. S. REP. NO. 1515, 81st Cong., 2d Sess. 345 (1950). The subcommittee recommended that "constitutional psychopathic inferiority" be replaced by "psychopathic personality," and that the classes of mentally defectives be enlarged to include "homosexuals and other sex perverts." *Id.*

35. S. 3455, 81st Cong., 2d Sess. (1950). Senator McCarran introduced substantially the same bill in the next session. S. 716, 82d Cong., 1st Sess. (1951). Representative Walter submitted a similar bill to the House of Representatives, H.R. 2379, 82d Cong., 1st Sess. (1951). Representative Cellar introduced a competing bill which did not include "persons afflicted with psychopathic personality," "homosexuals," or "sex perverts" as classes of excludable aliens. H.R. 2816, 82d Cong., 1st Sess. (1951). Note, *supra* note 32, at 335 n.33.

36. S. 2550, 82d Cong., 1st Sess. (1951).

37. H.R. REP. NO. 1365, 82d Cong., 2d Sess. 47 [hereinafter cited as PUBLIC HEALTH SERVICE REPORT]. The Public Health Service noted that although some psychological tests may help to uncover homosexuality of which the individual is unaware, there are not reliable laboratory tests for diagnosing homosexuality, and an individual may therefore successfully conceal a history of homosexuality.

provide for the exclusion of homosexuals and sex perverts.”³⁸ The report also specified that the “change in nomenclature [was] not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates.”³⁹ The bill, as revised, was passed by Congress to become the Immigration and Nationality Act.⁴⁰

The Immigration and Nationality Act was enacted at a time when the American Psychiatric Association and a majority of the medical profession considered homosexuality to be a mental disorder.⁴¹ The Public Health Service, apparently influenced by then-current psychiatric nomenclature, classified homosexuality as a “psychopathic personality with pathologic sexuality.”⁴² Consequently, the INS considered homosexuality a sufficient reason to deny admission to an alien by reasoning that such an alien was afflicted with “psychopathic personality” and thus statutorily barred from entry into the United States.⁴³

The issue of whether the expression “psychopathic personality” included homosexuality was soon raised, and initially there was little doubt that it did. Following several administrative decisions by the Board of Immigration Appeals,⁴⁴ the Second Circuit in *Quiroz v. Neelly*⁴⁵ looked to the legislative history of the Immigration and Nationality Act and concluded that Congress intended to include homosexuality within the term “psychopathic personality,” regardless of the medical profession’s understanding of the term.⁴⁶ Soon a consensus that the term included homosexuality within its purview began to form among the courts.⁴⁷

38. S. REP. NO. 1137, 82d Cong., 1st Sess. 9 (1951).

39. *Id.*

40. H.R. 5678, 82d Cong., 1st Sess. (1951). The bill, which was introduced by Representative Walter, was passed by Congress on June 27, 1952, and became the Immigration and Naturalization (McCarran-Walter) Act, ch. 2, 66 Stat. 166 (codified as amended at 8 U.S.C. §§ 1101–525 (1982)).

41. See AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 38–39 (DSM-I) (1952); Friedman, *Sexual Deviations*, in 1 AMERICAN HANDBOOK OF PSYCHIATRY 589–96 (1959).

42. PUBLIC HEALTH SERV. REPORT, *supra* note 37, at 47.

43. S. REP. NO. 748, 89th Cong., 1st Sess. 18 (1965); H. REP. NO. 745, 89th Cong., 1st Sess. 16 (1965) (official legislative history of the 1965 amendments, citing the 1952 Senate report); S. REP. NO. 1137, 82d Cong., 2d Sess. 9 (1952).

44. See, e.g., *In re S—*, 8 I. & N. Dec. 409 (1959); *In re P—*, 7 I. & N. Dec. 258 (1956).

45. 291 F.2d 906 (5th Cir. 1961).

46. *Id.* at 907. The court stated that “[w]hatever ‘psychopathic personality’ may mean to the psychiatrist, to Congress it was intended to include homosexuals and sex perverts.” *Id.*

47. See, e.g., *United States v. Flores-Rodriguez*, 237 F.2d 405, 412–13 (2d Cir. 1956) (Frank, J., concurring) (the legislative history of the expression “psychopathic personality” plainly indicates that homosexuals were encompassed within that term); *Ganduxe y Marino v. Murff*, 183 F. Supp. 565, 567 (S.D.N.Y. 1959) (where an alien convicted of solicitation of another male misrepresented this information, the court deemed the misrepresentation material since had the information been known earlier, an attempt would have been made to exclude him as a homosex-

In *Fleuti v. Rosenberg*,⁴⁸ though, the Ninth Circuit held that the expression "psychopathic personality" was unconstitutionally void for vagueness⁴⁹ as it did not provide a "sufficiently definite warning that homosexuality and sexual perversion are embraced therein."⁵⁰ The Ninth Circuit subsequently applied *Fleuti* in *Lavoie v. United States Immigration & Naturalization Service*⁵¹ and set aside a deportation order on the ground that homosexual aliens could not be excluded as "persons afflicted with psychopathic personality."⁵² In 1965, Congress responded to *Fleuti* by amending section 212(a)(4) to add the term "sexual deviation" to the list of excludable medical afflictions, thus clarifying its intent to exclude homosexual aliens.⁵³

The Supreme Court's decision in *Boutilier v. Immigration & Naturalization Service*⁵⁴ clearly eliminated any confusion lower courts may have had regarding the use of the term "psychopathic personality" to exclude gay aliens. The Court held that Congress intended the expression to include homosexuality⁵⁵ and stated that Congress had not used the term in any clinical sense, but as a term of art designed to effectuate its goal to exclude homosexuals.⁵⁶

The Court's interpretation of the legislative intent of Congress in *Boutilier* is open to at least some debate, for a close reading of the documents and the application of accepted legislative intent construction could have led to another result.⁵⁷ By placing the homosexual alien exclusion with other medical grounds for exclusion and couching the exclusion of homosexuals in then-current medical and psychological terminology, Congress presumably intended that the exclusion of homosexuals rest on demonstrable medical reasons. While there can be little doubt that Congress intended to exclude homosexuals as a class of

ual), *aff'd per curiam mem. sub. nom.* Ganduxe y Marino v. Esperdy, 278 F.2d 330 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960).

48. 302 F.2d 652 (9th Cir. 1962), *vacated and remanded on other grounds*, 374 U.S. 449 (1963).

49. *Id.* at 658.

50. *Id.*

51. 360 F.2d 27 (9th Cir. 1966), *vacated and remanded per curiam*, 387 U.S. 572 (1967), *on remand*, 418 F.2d 732 (1969).

52. *Id.* at 28.

53. Act of Oct. 3, 1965, Pub. L. No. 83-236, § 15(b), 79 Stat. 911, 919 (codified as amended at 8 U.S.C. § 1182(a)(4) (1982)); S. REP. NO. 748, 89th Cong., 1st Sess. 19 (1965). The statute now provides that excludable categories of aliens include "Aliens afflicted with psychopathic personality, sexual deviation, or a mental defect." 8 U.S.C. § 1182(a)(4) (1982).

54. 387 U.S. 118 (1967).

55. *Id.* at 120.

56. *Id.* at 122.

57. *Id.* at 134-35 (Douglas, J., dissenting). See also Note, "Psychopathic Personality" and "Sexual Deviation": Medical Terms or Legal Catch-Alls—Analysis of the Status of the Homosexual Alien, 40 TEMP. L.Q. 328, 337-39 (1967).

mentally disordered aliens, the crucial question is whether Congress also intended the system of medical certification for exclusion to apply to suspected homosexual aliens. Given the extensive and detailed provisions in the Immigration and Nationality Act for medical certification of excludable grounds,⁵⁸ it can be persuasively argued that Congress intended that the INS and the Public Health Service follow the procedures dictated by the act in making the determination that an alien is excludable on medical grounds. The critical issue, then, is not whether the term "psychopathic personality" is constitutionally infirm on account of vagueness,⁵⁹ but whether Congress intended to provide procedural safeguards for the exclusion process.

Case law in this area established that the procedural safeguard of the issuance of a "class A" certificate—a medical determination of psychopathic personality, sexual deviation, mental defect, or other disability—is an integral part of the statutory scheme.⁶⁰ The United States Supreme Court addressed the question of the procedural enforceability of the medical exclusion ground in *United States ex rel. Johnson v. Shaughnessy*,⁶¹ in which no "class A" certificate issued by the Public Health Service was introduced into evidence by the INS in the exclusion proceedings. The Court held that an order of exclusion could not be issued without the requisite Public Health Service certificate in a case based upon a medical ground of excludability.⁶² Yet, in *Boutilier* the Court did not address the procedural issue of whether the INS could exclude homosexuals without the Public Health Service furnishing the proper medical certification.⁶³

After *Boutilier*, the classification of homosexuality as an illness came under increasing criticism and attack by the medical and scientific communities.⁶⁴ The American Psychiatric Association in 1973 re-

58. 8 U.S.C. § 1224 (1982).

59. Though the Court did not reach the issue of vagueness in *Fleuti*, 374 U.S. at 451, it considered and rejected that challenge in *Boutilier*. See *Boutilier*, 387 U.S. at 123–24.

60. See, e.g., *United States ex rel. Johnson v. Shaughnessy*, 336 U.S. 806, 814 (1949) (construing provisions of the 1917 act, the Court held that an alien could not be excluded for mental defect in the absence of a valid medical examination); accord *United States ex rel. Saclarides v. Shaughnessy*, 180 F.2d 687, 688 (2d Cir. 1950); *In re Hollinger*, 211 F. Supp. 203, 206 (E.D. Mich. 1962).

61. 336 U.S. 806.

62. *Id.* at 809–10, 814.

63. The Court did not discuss the petitioner's claim that he was entitled to a medical examination. *Boutilier*, 387 U.S. at 125.

64. See W. CHURCHILL, *HOMOSEXUAL BEHAVIOR AMONG MALES, A CROSS-CULTURAL AND CROSS-SPECIES INVESTIGATION* 36–69 (1967); T. SZASZ, *THE MANUFACTURE OF MADNESS* 169 (1970); G. WEINBERG, *SOCIETY AND THE HEALTHY HOMOSEXUAL* ix–xi, 21–39 (1972); D. WEST, *HOMOSEXUALITY* 29 (3d ed. 1968). Courts have accepted that homosexuality is not a disease or mental disorder, sometimes even when justifying discrimination against the individual. See *Aumiller v. University of Del.*, 434 F. Supp. 1273, 1291 n.53 (D. Del. 1977) ("The experts were in
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moved homosexuality from the class of mental disorders known as "sexual deviation."⁶⁵ In 1979, the United States Surgeon General, stating that there existed "no medically rational basis"⁶⁶ for the continued exclusion of homosexuals under section 212(a)(4), notified the INS that the Public Health Service would no longer provide the required medical certification that had been the basis for the exclusion of gay aliens,⁶⁷ and instructed Public Health Service medical officers that they should not certify gay aliens as sexual deviates or psychopathic personalities solely on the basis of their homosexuality.⁶⁸

The result was that the INS was unable to obtain the medical certification necessary to exclude gay aliens. So the INS, in response to legal advice from the Justice Department that it was still required to enforce the exclusion of gay aliens,⁶⁹ established a new procedure to deal with gay aliens.⁷⁰ The INS has adopted the practice of only excluding aliens who are identified as homosexual by a third party arriving at the same time, or who offer an unsolicited, unambiguous admission of homosexuality and repeat that admission in a second

agreement that homosexuality is not a mental disorder. . . ."); *Gaylord v. Tacoma School Dist.* No. 10, 88 Wash. 2d 286, 296, 559 P.2d 1340, 1345 ("Homosexuality is not a disease . . . [but a] psychological or acquired orientation"), *cert. denied*, 434 U.S. 879 (1977). *But see* C. SOCARIDES, *THE OVERT HOMOSEXUAL* 3-8 (1968); SOCIETY OF AMERICAN PSYCHOANALYSTS, *HOMOSEXUALITY: A PSYCHOANALYTIC STUDY* 303-06 (1962).

65. N.Y. Times, Dec. 16, 1973, at 1, col. 1. The full membership of the American Psychiatric Association approved the action of the Board of Trustees in April, 1974. *Id.*, Apr. 9, 1974, at 12, col. 3. The position that homosexuality is not a mental disorder has been endorsed by the American Psychological Association, the American Public Health Association, the American Nurses' Association, and the Council of Advanced Practitioners in Psychiatric and Mental Health Nursing of the American Nurses' Association. Memorandum from Julius Richmond, assistant secretary for Health, United States Department of Health, Education and Welfare, and Surgeon General, to William Foege and George Lythcott (Aug. 2, 1979), *reprinted in* 56 INTERPRETER RELEASES 398-99 (1979) [hereinafter cited as Memorandum of the Surgeon General.].

66. *See* Memorandum of the Surgeon General, *supra* note 65.

67. *Id.*

68. *Id.*

69. *See* Memorandum from John M. Harmon, assistant United States attorney general, to David L. Crossland, acting commissioner, Immigration and Naturalization Service (Dec. 10, 1979), *reprinted in* 56 INTERPRETER RELEASES 572-81 (1979) [hereinafter cited as Memorandum of the Attorney General]; Department of Justice Press Release, *reprinted in* 57 INTERPRETER RELEASES 441-42 (1980) [hereinafter cited as Press Release]; *see also* 57 INTERPRETER RELEASES 440-41 (1980); 56 INTERPRETER RELEASES 569-71 (1979).

70. Out of deference to an individual's right to privacy, the INS has decided that it will not question entrants about their sexual preference. Yet the agency still maintains that it has a statutory duty to exclude self-proclaimed homosexuals. *See* Letter from Lydia Moore on behalf of Irvin Klavan, assistant commissioner, Immigration and Naturalization Service, to Virginia Apuzzo, executive director, National Gay Task Force (Apr. 17, 1984) [hereinafter cited as Klavan letter]; *see also* Letter from D. Lowell Jensen, acting deputy United States attorney general, to Dr. Edward N. Brandt, Jr., assistant secretary for Health, Department of Health and Human Services (Apr. 5, 1984).

interview.⁷¹ Only if the alien in the second interview affirmatively proclaims that he or she is homosexual will a formal exclusionary hearing be triggered, which may result in the denial of entry.⁷² This procedure allows for section 212(a)(4) exclusions absent a medical examination and certificate⁷³ in direct contradiction of the statutory scheme. Moreover, this procedure is difficult to reconcile with the Justice Department's interpretation of the Immigration and Nationality Act as imposing a congressionally mandated "legal obligation" on the INS to exclude all homosexuals.⁷⁴

III. THE CURRENT CONFLICT BETWEEN THE CIRCUITS: HILL AND LONGSTAFF

A. *Hill v. United States Immigration & Naturalization Service: No Medical Certification, No Exclusion*

In *Hill v. United States Immigration & Naturalization Service*,⁷⁵ the Ninth Circuit Court of Appeals unanimously affirmed the determination by the United States District Court for the Northern District of California⁷⁶ that the INS may not exclude self-declared gay aliens absent medical certification. The Ninth Circuit found that the INS procedure had allowed medically untrained INS officers to make psychiatric determinations concerning psychopathic personality, sexual deviation, or mental defect. The court reasoned that this procedure violated the intent of Congress to require a medical examination and certificate issued by the Public Health Service before excluding an alien on medical grounds. While never disputing the basic intent of Congress to exclude homosexual aliens under section 212(a)(4), the court concluded that "[t]he legislative history of the Act reinforces our opinion that a medical certificate is required for the exclusion of an individual as a psycho-

71. See DEP'T OF HEALTH AND HUMAN SERV., PUB. HEALTH SERV., DIV. OF QUARANTINE IDENTICAL MEMORANDUM No. 84-8 (June 8, 1984) [hereinafter cited as PUBLIC HEALTH SERV. MEMORANDUM]; see also Memorandum of Attorney General, *supra* note 69.

72. *Id.*

73. *Id.*

74. *Id.* One can readily see the inconsistency under which the INS is operating. It maintains that it has a statutorily imposed obligation to exclude gay aliens from entry into the United States, yet it has devised a procedure by which it will interrogate or examine self-proclaimed gay aliens only. If Congress intended that all gay aliens should be denied entry, it cannot be appropriate for the INS to formulate a procedure which penalizes only those gay aliens who offer an unsolicited admission of their homosexuality. For a discussion of the current INS policy, see *Longstaff*, 716 F.2d at 1439-50 & nn.53-54 (1983). A recent commentator has criticized the procedure as a product of the INS's incorrect interpretation of the Public Health Service's authority under the Immigration and Nationality Act. See Note, *supra* note 32, at 355-57, 359.

75. 714 F.2d 1470 (9th Cir. 1983).

76. *Lesbian/Gay Freedom Day Comm., Inc. v. United States Immigration & Naturalization Serv.*, 541 F. Supp. 569 (N.D. Cal. 1982), *aff'd sub nom. Hill*, 714 F.2d 1470. Published by eCommons, 1984

pathic personality or sexual deviate.”⁷⁷ The Ninth Circuit held that since Congress intended that the medical examination and certificate be an indispensable part of the exclusion process,⁷⁸ INS officers could not exclude even a professed homosexual without a medical certification of psychopathic personality, sexual deviation, or mental defect.⁷⁹

B. In re Longstaff: Congress Unbounded, Courts Bound by Congress

The issue of whether a medical certificate was a prerequisite to determining whether an alien fell within a medically excludable class was before the Fifth Circuit Court of Appeals in a naturalization case, *In re Longstaff*,⁸⁰ only three weeks after the Ninth Circuit’s decision in *Hill*. Resting its decision on the “unbounded power” of Congress to exclude aliens from admission to the United States,⁸¹ a divided court found that Longstaff did not meet the requirement of having been “lawfully admitted” into the United States since he had, by his own admission, engaged in homosexual activity prior to his entry into the United States. Longstaff was, therefore, not eligible for naturalization since he had been excludable at the time of his entry. The court noted the broad plenary power of Congress to legislate in the area of immigration, a power that may legitimately be used for reasons which “might be condemned as a denial of equal protection or due process if used for purposes other than immigration policy to draw distinctions among people physically present within the borders of the United States.”⁸² The court emphasized that “the constraints of rationality imposed by the constitutional requirement of substantive due process and of nondiscrimination . . . do not limit the federal government’s power to regulate either immigration or naturalization.”⁸³

The Fifth Circuit interpreted the procedural protection of medical certification as “demonstrating congressional intent that only competent evidence of medical excludability be adduced in exclusion proceedings.”⁸⁴ The court determined, however, that there is no reason why an informed applicant’s admission that he or she falls within an excludable class is not competent evidence on which to base an exclusion deci-

77. *Hill*, 714 F.2d at 1475.

78. *Id.* at 1480.

79. *Id.* at 1472, 1480.

80. 716 F.2d 1439 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2668 (1984). The issue of the exclusion of gays arose since one of the requirements for approval of a naturalization petition is that the individual was lawfully admitted at the time of entry into the United States.

81. *Id.* at 1442.

82. *Id.*

83. *Id.* at 1442–43.

84. *Id.* at 1448.

sion.⁸⁵ The court noted that although in *Boutilier* the Public Health Service had, in fact, issued a "class A" certificate, "there is no indication in the opinion that the INS would have been required to ignore an admission by Boutilier that he was a homosexual."⁸⁶ *Boutilier*, the court stated, did not hold that the issuance of a certificate was indispensable.⁸⁷ Such a prerequisite, the court commented, requiring the INS and the court to disregard "the most reliable source of information, the statements of the person involved, would be to substitute secondary evidence for primary."⁸⁸ While suggesting that the result in Longstaff's case may be perceived as unfair,⁸⁹ the court concluded that it was bound by the law and stated that, "If Congress's policy is misguided, Congress must revise that policy. If the result achieved by the policy is unfair . . . the injustice must be corrected by lawmakers."⁹⁰

The dissent in *Longstaff* invoked the reasoning of the Ninth Circuit in *Hill* and expressed a reluctance to infer that Congress intended to allow nonmedical personnel of an administrative agency to use "medical" classifications to exclude persons for mental defects or other "medical conditions."⁹¹ While recognizing that the court was bound by *Boutilier* to the extent that homosexuality was included within the phrase "psychopathic personality," the dissent saw no reason to distinguish homosexuality from other grounds for medical exclusion that are subject to medical examination and certification.⁹²

IV. AN ARGUMENT FOR DEFERENCE TO THE MEDICAL PROFESSION

There are two premises upon which a successful argument can be made for the Supreme Court to adopt the Ninth Circuit's *Hill* ruling. The first is that Congress intended to exclude from entry into the United States all gay men and women,⁹³ and the second is that there is currently a conflict between the circuits on the issue of the procedural basis for excluding gay aliens. Such a conflict should be eventually resolved by the Court;⁹⁴ yet having already established that gay aliens are excludable, the Court will be left with only one question: How is an

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 1451.

90. *Id.*

91. *Id.* at 1452 (Tate, J., dissenting).

92. *Id.*

93. *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 120-23 (1967).

94. While the Court has often allowed a conflict to exist among circuits on an inconsequential point of law, the conflict between *Hill* and *Longstaff* goes to the actual requirements of the exclusion process. In addition, the conflict threatens the constitutionally mandated uniform standard for naturalization.

individual determined to be a homosexual under the Immigration and Nationality Act for purposes of exclusion?

The Fifth Circuit Court of Appeals has answered the question by holding that an alien's admission of homosexuality will bring him or her within an excludable class.⁹⁵ The Ninth Circuit Court of Appeals has held that an alien may only be excluded for homosexuality after being examined by a Public Health Service physician and receiving a certification for "psychopathic personality," "sexual deviation," or "mental defect."⁹⁶ If the issue is brought before the United States Supreme Court, it should be asserted that the Fifth Circuit's ruling is unsound. The basis for such an argument is that an alien is statutorily incompetent to decide whether he or she, although homosexual, is within an excludable class. So while an alien may be homosexual in fact, he or she may not be an excludable homosexual as a matter of law until so certified by a Public Health Service medical officer as afflicted with either a "psychopathic personality," a "sexual deviation," or a "mental defect."

The Fifth Circuit responded to this argument in *Longstaff* by stating that such a proposition would allow a triumph of procedure over substance.⁹⁷ Yet the notion that one can have a particular status in fact, but not necessarily as a matter of law, is hardly a new or radical concept.⁹⁸ Congress established a mechanism for determining who is excludable under the Immigration and Nationality Act on medical grounds,⁹⁹ included gay aliens within that framework, and provided for a limited review process.¹⁰⁰ While there may not be a constitutional right of due process for aliens seeking admission to this country, in enforcing policies concerning the entry of aliens the executive branch "must respect the procedural safeguards of due process."¹⁰¹ This means the INS may exclude aliens on medical grounds only after such aliens have had their "process," i.e., an examination and certification by a Public Health Service physician. Since the "formulation of these poli-

95. *In re Longstaff*, 716 F.2d 1439, 1448 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2668 (1984).

96. *Hill v. United States Immigration & Naturalization Serv.*, 714 F.2d 1470, 1480 (9th Cir. 1983).

97. *Longstaff*, 716 F.2d at 1448.

98. For example, even when an individual would be considered bankrupt by every known accounting practice, such an individual is not bankrupt in the eyes of the law until he or she files a petition for bankruptcy and is so adjudicated. Likewise, the concept of establishing legal guilt, rooted in our common-law presumption of innocence, is so entrenched in our legal system that an individual who shoots and kills another human being in full view of numerous witnesses may be a murderer in fact, but is not so in law until a judge or jury renders a guilty verdict.

99. 8 U.S.C. §§ 1201(d), 1222, 1224, 1225, 1226(d) (1982).

100. *Id.* §§ 1224, 1226(d).

101. *Galvan v. Press*, 347 U.S. 522, 531 (1954).

cies is entrusted exclusively to Congress,"¹⁰² the executive branch, operating through the INS, may neither create a new policy of excluding only some homosexuals nor create a new procedure of excluding only those aliens who make an unsolicited admission of homosexuality.¹⁰³

Why would the Supreme Court accept this argument as persuasive instead of following the Fifth Circuit's approach in *Longstaff*? The answer may lie in an analysis of the Burger Court's handling of cases involving medicolegal issues. Through the following review of such cases, it can be seen that the Court has shown a propensity to allow the medical profession to resolve what the Court views as medical issues.¹⁰⁴ The Court has certainly not abandoned completely all legal analysis of the issues in such cases, but has instead attempted to provide a professional medical underpinning for the result.¹⁰⁵ This is an important point, not because the Court can be persuaded to overturn *Boutillier*, but because it may be convinced that INS agents are not competent to fill the role of Public Health Service physicians and to make the medical determinations that are a prerequisite to denying an alien entry on the basis of a medical exclusion. The practical result of such a holding, in view of the medical profession's rejection of homosexuality as a mental disorder or deviation, would be that gays simply cannot be excluded.

The Court's deference to the medical profession is exemplified by *Roe v. Wade*,¹⁰⁶ where the Court concluded that a decision regarding whether or not to have an abortion in the first trimester was entirely a matter of personal decision making between the individual woman and her physician. The result is that the issue of whether to have an abortion is essentially a medical decision, absent a demonstrable state interest. In its reasoning, the Court emphasized the general medical and medicolegal history of abortion,¹⁰⁷ both ancient and modern, and explored the positions of the American Medical Association, the American Public Health Association, and the American Bar Association on the issue of abortion.¹⁰⁸ The Court concluded that a decision regarding abortion was "inherently, and primarily a *medical* decision and basic responsibility for it must rest with the physician."¹⁰⁹

102. *Id.* at 531.

103. Memorandum of the Attorney General, *supra* note 69.

104. *See, e.g.*, *Jackson v. Indiana*, 406 U.S. 715 (1972).

105. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

106. 410 U.S. 113. For a current critique of the landmark case, see Coleman, *Roe v. Wade: A Retrospective Look at a Judicial Oxymoron*, 29 St. Louis U.L.J. 7 (1984).

107. *Wade*, 410 U.S. at 130-41.

108. *Id.* at 141-47.

109. *Id.* at 166 (emphasis added).

In another abortion case, *Planned Parenthood v. Danforth*,¹¹⁰ the Court held that it was not the business of the courts or the legislature to define "viability" since it was essentially a medical concept.¹¹¹ Announcing that the proper approach must be one of judicial deference, the Court held that viability was a matter for a physician to determine in his or her professional judgment.¹¹²

In another area of the law, the Court has also demonstrated its deference to the medical profession in determining medicolegal issues. From 1972 to 1982, the Court repeatedly wrestled with the issues inherent in the involuntary confinement of persons with mental defects. In these cases the Court established the standard of proof necessary to commit a person to a mental hospital,¹¹³ the length of time one could be committed prior to trial on the basis of being incompetent to stand trial,¹¹⁴ the amount of due process to which a minor is entitled before being committed to a mental institution,¹¹⁵ and the additional due process protections a prisoner is entitled to before being involuntarily transferred to a state mental hospital for treatment.¹¹⁶

In much the same way as Congress has plenary authority to establish policy in the area of immigration and naturalization, the Court has noted that parents have "plenary authority" to seek medical care for their children.¹¹⁷ Yet such authority is not absolute. The Court must be satisfied that there exist the adequate protections of an independent medical decision-making process before permitting parents to commit a minor child.¹¹⁸ Expressing "confidence in the medical decision-making process,"¹¹⁹ the Court has stated that "[t]he mode and procedure of medical diagnostic procedures is not the business of judges,"¹²⁰ and that "neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments."¹²¹

The common thread running through these cases is that, despite

110. 428 U.S. 52 (1976).

111. *Id.* at 63-65.

112. *Id.* at 64. Compare this sentiment with the INS's position that it has the right to instruct Public Health Service officers in the Ninth Circuit to make a medical examination and determination of the nonmedical condition of homosexuality.

113. *Addington v. Texas*, 441 U.S. 418 (1979).

114. *Jackson*, 406 U.S. 715.

115. *Parham v. J.R.*, 442 U.S. 584 (1979).

116. *Vitek v. Jones*, 445 U.S. 480 (1980).

117. *Parham*, 442 U.S. at 604.

118. *Id.* at 607-08.

119. *Id.* at 612.

120. *Id.* at 607-08.

121. *Id.* at 607 (quoting *In re Roger S.*, 19 Cal. 3d 921, 942, 569 P.2d 1286, 1299, 141 Cal. Rptr. 298, 311 (1977) (Clark, J., dissenting)). See also *Youngberg v. Romeo*, 457 U.S. 307, 322-23 (1982).

the requisite court approval of the commitment procedure used,¹²² the decision whether to commit an individual is essentially a medical decision,¹²³ and a conclusion by a physician that a person is mentally defective is both presumptively correct and is a finding that the courts should not lightly dispute.¹²⁴

These principles are arguably applicable to the statutory scheme for the exclusion of aliens on medical grounds.¹²⁵ Given that "within the medical discipline the traditional standard for 'factfinding' is a 'reasonable medical certainty,'" ¹²⁶ how can an INS agent make a determination to a "reasonable medical certainty" that an alien is a homosexual under the Immigration and Nationality Act and thus excludable for medical reasons? Allowing an alien's own admission of homosexuality to be the sole basis for a determination of excludability, while simplistically appealing, does not meet the act's requirement that the exclusions on the basis of "psychopathic personality," "sexual deviation," or "mental defect" be made pursuant to a medical certificate that has made an affirmative determination of the individual's disorder.

In light of the language in the abortion and confinement cases calling for deference to medical and psychiatric judgments, allowing an essentially medical determination to be made by an untrained and unlicensed INS agent as to a matter of psychiatric diagnosis is legally, medically, and ethically impermissible. The Court should be urged to hold the INS to both the letter and the spirit of the immigration law by mandating its adherence to the procedure which Congress set up for determining when a medical exclusion should take place.

122. The procedures invariably require an examination by one or more doctors and a certification of the patient's condition, a process quite similar to the statutory requirements for medical exclusions under the Immigration and Nationality Act. See 8 U.S.C. §§ 1201, 1222-26 (1982).

123. See, e.g., *Youngberg*, 457 U.S. at 321-23. In *Youngberg*, Justice Powell, writing for the Court, looked to the American Psychiatric Association for the definition of "habilitation." *Id.* at 309 n.1. Would it not also be proper for the Court to look to the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (DSM-III)* to discover that the condition of homosexuality per se is no longer classified as a mental disorder or sexual deviation? AMERICAN PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-III)* 281 (1980). It would seem, based on *Youngberg*, that a psychiatrist would be exposed to liability for making a diagnosis which was a "departure from accepted professional judgment, practice, or standards." *Youngberg*, 457 U.S. at 323. Because of the revised professional standards as embodied in *DSM-III*, physicians may well choose not to follow the most recent Public Health Service directive which mandates resumption of the medical certification of gay aliens as afflicted with an "excludable" medical condition.

124. See *Parham*, 442 U.S. at 607.

125. Chief Justice Burger has invited, perhaps, a comparison between the burden of proof in confinement cases and in immigration cases when the issue is one of psychiatric diagnosis. *Addington*, 441 U.S. at 424 (citing *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276 (1966) (deportation case) and *Schneiderman v. United States*, 320 U.S. 118 (1943) (denaturalization case)).

126. *Id.* at 430.

The current INS procedure regarding gay aliens, both by analogy to the abortion and confinement cases and in practical terms, is legally and medically deficient. As a result of *Hill*, the Ninth Circuit is the only one in which the INS requires that medical doctors certify gay aliens as being afflicted with a medical condition upon which to base an exclusion, a condition which is in fact no longer recognized by the majority of the medical profession as a mental or behavioral disorder.¹²⁷ In every other circuit, the INS allows its agents, who are not statutorily competent to make a medical determination on their own, to exclude an alien based solely on his or her admission of homosexuality, even though the individual is not competent to reach a conclusion about his or her excludability on medical grounds. This procedure directly violates congressional intent, for in order to guarantee that the medical exclusion grounds be used solely for medical reasons, Congress did not allow for lay opinions or self-diagnosis, but instead provided that only a physician could make a determination concerning excludability on medical grounds and issue the required medical certificate.¹²⁸

The intent of Congress, as manifested in both the 1952 and the 1965 provisions of the Immigration and Nationality Act, to exclude gay aliens from entry is not disputed. The proper approach, then, to urge on the Court is that any medically based exclusion must comply with the procedural framework of the act. The result would be that, given the medical profession's general rejection of the concept of homosexuality as an illness or sexual deviation—as demonstrated by the Public Health Service's refusal to certify aliens as homosexuals—the INS is powerless to enforce section 212(a)(4) unless Congress amends the act and creates a new mechanism for the exclusion of gay aliens.

V. ALTERNATIVE APPROACHES TO THE ISSUE OF EXCLUSION

A. Congressional Action

The broad power of Congress in matters of immigration is well established. Grounded in concepts of sovereignty, legislative power over immigration is justified as a necessary means for maintaining normal international relations, defending the country's borders, and regulating the nation's commerce.¹²⁹ The Court has interpreted the commerce

127. On June 8, 1984, the INS formulated a different certification procedure for "self-proclaimed homosexual aliens" in response to the *Hill* decision for ports of entry in the Ninth Circuit. See PUBLIC HEALTH SERV. MEMORANDUM, *supra* note 71.

128. *Hill*, 714 F.2d at 1477; *Longstaff*, 716 F.2d at 1452-53 (Tate, J., dissenting).

129. See, e.g., *Galvan v. Press*, 347 U.S. 522, 531-32 (1954) (Congress has plenary power concerning admission and exclusion of aliens, and courts must defer to its policies); *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895) (Congress delegated exclusive authority to determine whether an alien belongs in a class entitled to admittance to the executive branch);

clause as granting Congress the plenary power to regulate the admission and deportation of aliens.¹³⁰ These congressional powers, along with the executive's broad powers to conduct foreign affairs and negotiate treaties, have made the ingress and egress of aliens a political issue.¹³¹ As such, courts have consistently deferred to congressional and executive policies regulating the admission or exclusion of aliens.¹³²

The conclusion the Court reached in *Boutilier*—that Congress used the term “psychopathic personality” to effectuate its intent to exclude gay aliens—reflected what the Court perceived as congressional intent.¹³³ There have been indications, however, that the congressional attitude concerning the exclusion of gay aliens is no longer as firm and uniform as it was two decades ago when the Immigration and Nationality Act was last amended. In fact, while as of this writing there has been no finalized congressional action on the issue, there have been legislative initiatives to alter or revoke the current immigration policies regarding gays.

1. The Dixon Bill

A bill introduced in May, 1981, in the 98th Session of Congress by Representative Julian Dixon of California, would repeal sections of the Immigration and Nationality Act, eliminating “sexual deviation” as grounds for exclusion and leaving “aliens afflicted with psychopathic personality” as an excludable class on the basis of a medical diagnosis.¹³⁴ The intent behind the bill is to eliminate the use of the term “sexual deviation” as a means for excluding gay aliens. Yet critics have pointed out that, intent aside, by retaining the previously offensive language the bill encourages courts to reaffirm the conclusion of *Boutilier* that the terms are not used in a clinical sense but as terms of art to encompass all gay aliens. In any event, the bill has gained little support¹³⁵ since its introduction and is not considered a serious legislative

Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (commerce includes the admission of persons into ports).

130. See *Fiallo v. Bell*, 430 U.S. 787 (1977); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909); *Nishimura*, 142 U.S. at 659 (the power to regulate admission of aliens comes from the commerce clause).

131. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) (any policy towards aliens is political in nature). Cf. *Jalil v. Hampton*, 460 F.2d 923, 925 n.1 (D.C. Cir.) (it is a factual determination whether the regulation of aliens is political in nature), *cert. denied*, 409 U.S. 887 (1972).

132. See, e.g., *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118 (1967).

133. *Id.* at 123.

134. H.R. 2815, 98th Cong., 1st Sess. 2 (1984).

135. When introduced in 1981 in the House, the bill listed as cosponsors with Representatives Dixon only the following: Representatives Beilenson, Waxman, Frank, Weiss, Barnes, Bingham, Burton (J.L.), Burton (P.), Chisholm, Conyers, Dellums, Fautroy, Garcia, Green, Lowry, Published by eCommons, 1984

effort to resolve the issue of the exclusion of gay aliens.¹³⁶

2. The Cranston Bill

Senator Alan Cranston of California has repeatedly introduced bills in Congress which would remove homosexuality as a ground for the exclusion of aliens. His latest effort,¹³⁷ while winning editorial praise and support,¹³⁸ stands little chance of gaining passage, since it is viewed as a "clean bill" (unattached to other legislation), making support of the measure more politically problematic for some members of the Senate.¹³⁹

3. The Roybal Bill

Language contained in a bill introduced in 1984 by Representative Edward Roybal of California,¹⁴⁰ and strongly supported by the Hispanic Caucus, would have resolved the issue of the exclusion of gay aliens by requiring that medical examinations "be conducted in accordance with current medical standards."¹⁴¹ The effect of such language, though neutral on its face, would be to remove the exclusion of homosexuals without affecting other medical exclusion categories, because "current medical standards," as reflected in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (DSM-III)*, no longer classify homosexuality per se as a mental disorder or sexual deviation.¹⁴²

While the Roybal bill was defeated when introduced as an alternative to the Simpson-Mazzoli Immigration Reform Act,¹⁴³ it is significant that the language altering the homosexual exclusion was successfully inserted into the bill.

4. The Frank Bill

Representative Barney Frank of Massachusetts introduced a bill in the 98th Congress which would resolve the problem of the exclusion of gay aliens by effectively reformulating and revamping the entire exclu-

McKinny, Mikulski, Mitchell, Ottinger, Richmond, Sabo, Stark, and Studds. Several of these individuals are no longer in the House of Representatives.

136. Letter from Jeffrey Levi, Washington representative, National Gay Task Force, to Peter N. Fowler (Nov. 30, 1984) [hereinafter cited as Levi letter].

137. S. 1086, 98th Cong., 1st Sess. (1984).

138. See, e.g., L.A. Daily J., June 8, 1984, at 4, col. 4; Wash. Post, May 29, 1984, at 31, col. 1 (commenting that the exclusion of homosexuals "makes no sense in this day and age").

139. Levi letter, *supra* note 136.

140. H.R. 4909, 98th Cong., 2d Sess. (1984).

141. *Id.* at 66.

142. AMERICAN PSYCHIATRIC ASS'N, *supra* note 123, at 181.

143. See N.Y. Times, June 10, 1984, at E3, col. 1; CONGRESSIONAL RESEARCH SERV., MAJOR LEGISLATION OF THE CONGRESS MCL-064 (1984).

sion and deportation categories.¹⁴⁴ The legislation would remove the current provisions used to exclude gay aliens while redesignating the medical exclusion grounds as health-related grounds. The categories of excludable aliens under such health grounds would be limited to those afflicted with any dangerous contagious disease, or with any mental illness likely to result in the performance of acts which could endanger public safety. While the language in the section on criminal and moral grounds for exclusion continues to make excludable an alien convicted of a crime involving moral turpitude, the author of the bill believes that the measure is written in such a way as to make it unlikely that the provision could be used against gay aliens.¹⁴⁵

Most observers give the Frank bill the best chance of passing of any of the legislative attempts to deal with the problem of the exclusion of gay aliens.¹⁴⁶ Floor action on the Frank bill is expected sometime in 1985, and it is anticipated that there will be additional hearings on the bill prior to any action by the House Immigration, Refugees, and International Law Subcommittee of the Judiciary Committee, or before there is a vote by the full House of Representatives.¹⁴⁷ While such influential members of Congress as Subcommittee Chairman Romano Mazzoli of Kentucky have yet to see the exclusion of homosexual aliens as a significant problem in the area of immigration reform,¹⁴⁸ it is anticipated that further hearings will aid in educating uninformed legislators of the scope of the problem and its immeasurable impact on the American gay community. As Congressman Frank has stated, the anti-homosexual immigration law provisions are "a very grievous, unjustified insult to American citizens" and represent a "statement in the laws of the United States that people like themselves are not welcome in this country."¹⁴⁹

B. Executive Action

It is debatable whether executive action is the proper vehicle for ending discrimination against gays in immigration. While a particular president may personally disagree with a law, the president is sworn to uphold and faithfully execute all laws of the United States. Since the

144. H.R. 5227, 98th Cong., 2d Sess. (1984) (titled Immigration Exclusion and Deportation Amendments of 1984).

145. *Exclusion and Deportation Amendments of 1983: Hearings on H.R. 5409 and H.R. 5227 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 191 (1984) (statement of Representative Barney Frank).

146. Levi letter, *supra* note 136.

147. Wash. Blade, June 29, 1984, at 18, col. 4.

148. *See id.*

149. *Id.*

United States Supreme Court has clearly upheld the power of Congress to legislate in the area of immigration policy and naturalization, the issuance of an executive order prohibiting the exclusion of gay aliens is highly unlikely. Likewise, it is questionable whether the president could legally instruct any department or agency not to enforce the current immigration provision.¹⁵⁰ The only potentially available grounds for possible executive action rest upon the powers of the president in foreign affairs. Combining the historic deference the Court has shown the president in the field of foreign affairs with the traditional flexibility and discretion given the chief executive in the enforcement of the laws, the Court might find that an executive order or executive decision not to enforce a discriminatory provision of our country's immigration laws could be upheld as within the president's powers in foreign relations management. In a favorable political climate, such a constitutional framework might provide the rationale upon which the Court could sustain an executive decision not to enforce the exclusion of gay aliens from this country.

Another route for executive action would be initiation by the president of legislative change. Certainly, if the president felt strongly about the exclusion of gay aliens, the influence and prestige of the presidency and the resources of the executive branch could be used to introduce reforms in Congress. The president could exercise considerable influence on legislators and could help protect supporters from the potentially adverse political consequences of voting in support of such a revision in the laws.¹⁵¹ The growing political influence of gay political organizations¹⁵² and the realities of today's politics¹⁵³ suggest that such

150. Since the president is constitutionally responsible for faithfully executing the laws, it is unlikely that the chief executive could permissibly instruct any subordinate to violate the law. However, the courts recognize that the president must be given latitude in the area of foreign affairs, which includes policies concerning aliens. See Comment, *Aliens' Right to Work: State and Federal Discrimination*, 45 *FORDHAM L. REV.* 835, 856 (1977). But cf. Comment, *Federal Civil Service Employment: Resident Aliens Need Not Apply*, 15 *SAN DIEGO L. REV.* 171, 187 (1977) (questioning whether the possibility of giving the president diplomatic ammunition justifies negating the interest of aliens in equal employment opportunity in the federal civil service).

151. See L.A. Daily J., June 27, 1980, at 3, col. 6 (discussing the Carter administration's support for the admission of homosexual aliens).

152. See *Gay America in Transition*, *supra* note 7, at 35-40; L.A. Times, Jan. 1, 1984, at 1, col. 1.

153. The Justice Department supports pending legislation which would remove homosexuality as a ground for excludability. Klavan letter, *supra* note 70, at 2; see also Press Release, *supra* note 69, at 442. The national Democratic Party is in support of ensuring "that foreign citizens are not excluded from this country on the basis of their sexual orientation." 1984 Democratic Party Platform (adopted July 17, 1984), reprinted in 42 *CONG. Q.* 1747, 1768 (1984). Likewise, the Reagan Administration has gone on record in support of current congressional initiatives for immigration reform designed to eliminate discrimination against aliens on the basis of sexual orientation. Letter from John F. Scruggs, assistant secretary for Legislation, Department of Health and

a change in immigration law is both possible and inevitable.

VI. CONCLUSION

For three quarters of a century the federal government has maintained a policy of barring gay aliens from entry into the United States, whether for a short visit or permanent resettlement. The policy was grounded in medical and psychological thought which held homosexuality to be a sickness or disease, and a sociopolitical atmosphere which believed that those afflicted with such a "mental disorder" should be kept from our shores. The United States Supreme Court ratified this view in *Boutilier* by holding that congressional promulgation of such a policy is a valid exercise of Congress's plenary power in the field of immigration.

With respect to the procedural implementation of this policy, the Fifth and Ninth Circuits have reached contradictory conclusions concerning the Immigration and Nationality Act's requirement of a medical certificate in medical exclusion cases. If the conflict is presented to the Supreme Court, the most persuasive argument might be to urge the Court to both adhere to the letter of the act and hold that a medical certificate is indispensable, and to defer to the medical profession as the Court has in other cases. It could be successfully argued to the Court that deference to professional judgment and expertise as to a determination of homosexuality being a species of "psychopathic personality," "sexual deviation," or "mental defect" is the only approach that satisfies the alien's right to statutory due process.

It may be, however, that the issue will be resolved ultimately by Congress, either as a response to a Supreme Court decision or through one of the several legislative bills which have been introduced addressing the exclusion provision of the Immigration and Nationality Act. While all of the pending legislation faces an admittedly uphill battle in gaining passage, it is at least possible that the Frank bill could be voted on before the Court rules on the issue.

Because of the intense pressure by gay legal advocates and political organizations, the issue of the exclusion of gay aliens will simply not disappear. It will only be a matter of time before we are the only civilized country in the free world to arbitrarily and irrationally exclude individuals on the basis of their sexual orientation. If the United States is to be regarded as an international leader in the recognition

Human Services, to Representative Romano Mazzoli, chairman of the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary (Aug. 28, 1984), reprinted in *Exclusion and Deportation Amendments of 1983: Hearings on H.R. 4590 & H.R. 5227 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 98th Cong., 2d Sess.* 89.
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and enforcement of human rights, we must take pains to get our own house in order. The time has come when we as a nation can no longer justify excluding aliens from our shores on the basis of their sexual orientation.