

# Nonacquiescence in Immigration Decisions of the U.S. Courts of Appeals

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Perhaps at no other time is the conflict between administrative agencies and courts placed in starker terms than in instances of nonacquiescence. In general, nonacquiescence refers to an agency's refusal to follow a U.S. court of appeals precedent in subsequent factually similar cases arising within ("intracircuit") or outside ("intercircuit") the circuit which produced the adverse ruling. A nonacquiescence policy reflects a tension between an agency's mandate to achieve uniformity and expediency in its administrative adjudications and the court's obligation to safeguard equally the rights of litigants and nonlitigants. These basic issues have been the subject of considerable academic<sup>1</sup> and legislative<sup>2</sup> attention. To date, however, there has been no examination in academic circles of the policy and practice of nonacquiescence by the Immigration and Naturalization Service ("INS" or the "Service").

Such an explication is warranted for three reasons. First, as suggested above, scarce resource allocation and fundamental fairness are competing interests in nonacquiescence. Such concerns intensify where administrative agencies face heavy adjudicative burdens; the sheer number of actual and potential litigants ensures that nonacquiescence will impact many lives.<sup>3</sup> During fiscal year 1990, some 87 immigration judges adjudicated 105,768 of the 112,314 deportation cases received, 13,795 of the 14,633 exclusion cases

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1. See, e.g., Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1990); Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831 (1990) [hereinafter Estreicher & Revesz, *Reply*]; Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) [hereinafter Estreicher & Revesz, *Federal Agencies*]; Deborah Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471 (1986); Burt Neuborne, *The Binding Quality of Supreme Court Precedents*, 61 TUL. L. REV. 991 (1986); Joshua I. Schwartz, *Nonacquiescence, Crowell v. Benson, and Administrative Adjudication*, 77 GEO. L.J. 1815 (1989); Joseph F. Weis, Jr., *Agency Non-Acquiescence—Respectful Lawlessness or Legitimate Disagreement?*, 48 U. PITT. L. REV. 845 (1987); Efrat M. Cogan, Note, *Executive Nonacquiescence: Problems of Statutory Interpretation and Separation of Powers*, 60 S. CAL. L. REV. 1143 (1987); Note, *Collateral Estoppel and Nonacquiescence: Precluding Government Relitigation in the Pursuit of Litigant Equality*, 99 HARV. L. REV. 847 (1986); Christopher C. Taintor, Note, *Federal Agency Nonacquiescence: Defining and Enforcing Constitutional Limitations on Bad Faith Agency Adjudication*, 38 ME. L. REV. 185 (1986).

2. See *infra* part IV. See generally, Carolyn A. Kubitshek, *Social Security Administration Nonacquiescence: Need For Legislative Curbs on Agency Discretion*, 50 U. PITT. L. REV. 399 (1989).

3. See, e.g., *Lopez v. Heckler*, 713 F.2d 1432, 1436-38 (9th Cir. 1983) (Social Security Administration's rejection of circuit court precedent will result in thousands of claimants being denied benefits to which the court has previously held they are entitled).

## Nonacquiescence in Immigration Decisions

received and 2,737 of the 2,823 motions to reopen received.<sup>4</sup> These figures total to 122,300 completed adjudications in 1990, at a rate of 5.4 per day per immigration judge.<sup>5</sup> Where justice is applied on such a truly massive scale, the impact of an agency policy to disregard circuit precedent is clearly far-ranging.

The second reason to examine nonacquiescence in immigration law is that, compared to most administrative decisionmaking, the interests implicated in immigration adjudications tend to be particularly fundamental. While a Social Security Administration (SSA) case might involve questions of eligibility for certain benefits,<sup>6</sup> the everyday deportation or exclusion adjudication puts the most basic liberties at stake. An alien who is forcibly deported loses not only access to U.S. government services, but also the fundamental rights and privileges enjoyed by those residing in this country. As Justice Brandeis noted, the devastating consequences of a deportation order may deprive a person of "all that makes life worth living."<sup>7</sup> Therefore, a litigant's access to any potentially favorable circuit precedent is especially urgent.

Finally, the courts traditionally have been reluctant to scrutinize administrative decisionmaking in the immigration context. This deference has primarily been the result of a statutory framework which entrusts immigration functions to the executive branch. For example, immigration statutes have long declared that the decisions of executive branch officers in deportation and exclusion cases "shall be final,"<sup>8</sup> and did not explicitly provide for judicial review until 1961.<sup>9</sup> Where courts have exercised jurisdiction to review immigration cases, the review has been highly deferential to administrative agency discretion.<sup>10</sup> Even today, the Supreme Court explicitly warns courts of appeals against second-guessing administrative discretion.<sup>11</sup> In light of this

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4. Executive Office of Immigration Review Statistical Summary For Fiscal Year 1990 (on file at EOIR).

5. In comparison, the 55 U.S. District Court judges in the Second Circuit completed 696 criminal trials during 1990 for an average of 12.65 criminal trials *per year* per judge. 1990 U.S. COURTS FOR THE SECOND CIRCUIT REP. 13.

6. See 42 U.S.C. §§ 401-33 (Supp. V 1987) (SSA disability benefits program).

7. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). The Supreme Court has also acknowledged that deportation is "the equivalent of banishment." *Barber v. Gonzales*, 347 U.S. 637, 642 (1954) (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

8. See generally *Heikkila v. Barber*, 345 U.S. 229, 233-35 (1953) (quoting Immigration Act § 8, 26 Stat. 1085 (1911)). This somewhat remarkable directive continues to exist in 8 U.S.C. § 1252(b) (1988) (in all cases of deportation, "the decision of the Attorney General shall be final") and 8 U.S.C. § 1226(c) (1988) ("the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General").

9. 8 U.S.C. § 1105(a) (Supp. V 1987), as amended by § 5, Act of Sept. 26, 1961, P.L. 87-301, 75 Stat. 651.

10. See, e.g., *Mathews v. Diaz*, 426 U.S. 67 (1976); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Boutilier v. INS*, 387 U.S. 118 (1967); *Abel v. United States*, 362 U.S. 217 (1960); *Flemming v. Nestor*, 363 U.S. 603 (1960).

11. See, e.g., *INS v. Rios-Pineda*, 471 U.S. 444, 452 (1985) ("[I]t is not for the judiciary to usurp Congress' grant of authority to the Attorney General by applying what approximates *de novo* appellate review."); *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981) ("[T]he Court of Appeals improvidently

historical relationship, understanding the extent to which the INS adheres to judicial precedent is especially important; the balance of power between court and agency is directly at issue.<sup>12</sup>

Part I will outline the basic framework under which immigration cases are resolved, describe a recent policy statement prepared by the INS for the Author, and discuss in greater detail the competing interests involved in INS nonacquiescence.<sup>13</sup> Next, part II will review reported decisions of the Board of Immigration Appeals (the "Board") and the U.S. courts of appeals. Particular attention will be focussed on instances of nonacquiescence which suggest an underlying INS program of nonacquiescence. Last, part III will examine the most recent legislative responses to administrative agency nonacquiescence that balance the needs and obligations of administrative justice against the ideal of the rule of law.<sup>14</sup>

Before proceeding, it will be useful to identify in concrete terms the impact that a nonacquiescence policy may have on individual litigants. For example, both *Maldonado-Cruz v. U.S. Department of Immigration and Naturalization*<sup>15</sup> and *Perlera-Escobar v. Executive Office for Immigration*<sup>16</sup> involved claims for political asylum by Salvadoran aliens who had deserted guerrilla groups in what they contended was an expression of political neutrality. These aliens argued that by statute, their neutrality amounted to a political opinion which formed the basis for a well-founded fear of persecution if they were forced to return.<sup>17</sup> The Board rejected these arguments in both cases, thereby denying asylum and leaving the aliens with no other option but to appeal to the court

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encroached on the authority which the [Immigration and Nationality] Act confers on the Attorney General and his delegates.") *But see* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 73 (1984) ("The courts' almost complete deference to Congress and the immigration authorities, long a keystone of the classical structure, is beginning to give way to a new understanding and rhetoric of judicial role, as unusual in immigration cases as it is now commonplace in other domains of public law.") (footnote omitted); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (arguing that the so-called "plenary power" doctrine, which vests exclusive immigration authority in Congress and the executive branch, is undermined by courts through statutory interpretation); *McNary v. Haitian Refugee Center*, 111 S.Ct. 888 (1991) (holding that district court has federal question jurisdiction to hear constitutional and statutory challenges to INS procedures governing "Special Agricultural Workers" application program).

12. In other words, the degree to which the courts are able to constrain administrative discretion is presented in dramatic terms when an agency challenges its obligation to abide by a precedent in a particular case.

13. Although the terms "nonacquiescence" and "to nonacquiesce" may be somewhat cumbersome and ambiguous for the reader, they are terms of art employed in the relevant literature, *see supra* note 1, and hence are used throughout this Article.

14. By "rule of law," this Article simply refers to the general notion that ours is a society governed by laws which are applied not as a matter of discretion but as a matter of principle.

15. 883 F.2d 788 (9th Cir. 1989).

16. 894 F.2d 1292 (11th Cir. 1990).

17. 8 U.S.C. § 1158(a) (1988) provides the Attorney General discretion to grant political asylum where the alien has met the definition of "refugee" under 8 U.S.C. § 1101(a)(42)(A) (1988), which requires proof of persecution on account of "race, religion, nationality, membership in a particular social group, or political opinion."

## Nonacquiescence in Immigration Decisions

of appeals.<sup>18</sup> In *Maldonado-Cruz*, the U.S. Court of Appeals for the Ninth Circuit held that political neutrality *did* constitute a political opinion and reversed the contrary Board decision.<sup>19</sup> Conversely, *Perlera-Escobar*, an Eleventh Circuit case decided less than six months after *Maldonado-Cruz*, not only declined to adopt the Ninth Circuit rule, but also expressly favored the Board decision as “persuasive.”<sup>20</sup> Subsequent decisions from the First and Fourth Circuits have refused to follow the Ninth Circuit’s statutory interpretation.<sup>21</sup>

From this basic fact pattern, any number of possibilities could arise in future litigation, depending on the nonacquiescence policy adopted. If an alien in similar circumstances later applied for asylum in the Ninth Circuit, the administrative decisionmaker could engage in intracircuit nonacquiescence by applying the Eleventh Circuit rule and thus deny the alien the benefit of the *Maldonado-Cruz* precedent. Alternatively, if the case arose in the Second Circuit, the decisionmaker could opt for intercircuit nonacquiescence and choose to apply the Ninth Circuit rule over the Eleventh Circuit rule, or vice versa, or apply the rule of the First, Fourth, or *Xth* Circuit. Finally, regardless of the circuit in which a case arose, a decision could be made to acquiesce nationwide to one circuit’s view, essentially ignoring any contrary interpretations. Thus, deciding which nonacquiescence policy to apply in immigration law is not an academic exercise but instead a determination that has a direct impact on thousands of individuals litigating immigration claims.<sup>22</sup>

### I. INS POLICY ON NONACQUIESCENCE

#### A. *The Statutory and Regulatory Framework*

Immigration adjudications are handled both within the INS, by district directors, and in the independently established Executive Office of Immigration Review (“EOIR”),<sup>23</sup> by immigration judges. District directors generally adjudicate more mundane disputes,<sup>24</sup> while the primary responsibility of

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18. The appellate review procedure is discussed *infra* part I.A.

19. 883 F.2d at 791.

20. 894 F.2d at 1297 n. 4.

21. See *Alvarez-Flores v. INS*, 909 F.2d 1, 6 n. 4 (1st Cir. 1990); *Cruz-Lopez v. INS*, 802 F.2d 1518, 1520 n. 3 (4th Cir. 1986).

22. The existence of venue choice provisions, discussed *infra* at text accompanying notes 28-32, complicates matters further.

23. The EOIR was established in 1983 as an independent adjudicatory body within the Justice Department and made accountable only to the Associate Attorney General. See 8 C.F.R. §§ 1, 3, 100 (1991) and 28 C.F.R. § O (1990). The Board was created by administrative regulations, not by statute. See 8 C.F.R. §§ 3.0-3.8 (1991).

24. For instance, district directors decide applications for the extension of tourist visas, for a change of schools by student visa-holders, for adjustment of status from resident alien to lawful permanent resident, and for visa petitions based on family relationship. See THOMAS ALEXANDER ALEINIKOFF & DAVID A.

immigration judges is to make the more substantial and consequential deportation and exclusion decisions.<sup>25</sup> Appellate jurisdiction over these adjudications may be had by either the EOIR's Board of Immigration Appeals, or the INS' Associate Commissioner for Examinations. While the Board tends to review the decisions of immigration judges, no easy line of demarcation exists between the two tribunals.<sup>26</sup> Since the Board will typically review the more significant administrative decisions, this Article will focus solely on the caselaw within the Board's jurisdiction. The following discussion will examine the appellate review procedure in the context of an immigration judge's order of deportation.

Regulations grant deportable aliens a right of appeal to the Board.<sup>27</sup> Upon an adverse decision of the Board, a deportable alien may file a petition for review either in the circuit in which the hearing before the immigration judge occurred or in the circuit in which the alien resides.<sup>28</sup> These jurisdictions will often be different because of the migration of aliens once they have entered the country.<sup>29</sup> As a result of this "venue choice" provision, the Board can never be entirely sure which circuit precedent will be applicable in a subsequent appeal. Board members generally assume that an appeal will be taken in the circuit in which the hearing occurred and, to the extent possible, apply the caselaw of that circuit.<sup>30</sup> The Board generally construes circuit precedent conservatively, preferring to leave the extension of a case's logic to the circuit court.<sup>31</sup> A number of Board opinions are published as "precedent decisions" and serve to bind "all officers and employees of the Service or Immigration Judges in the administration of the [Immigration and Nationality] Act."<sup>32</sup>

Review by a U.S. court of appeals is limited strictly by statute to the administrative record, and the Board position is conclusive "if supported by reasonable, substantial, and probative evidence on the record."<sup>33</sup> The only remaining avenue of direct review for an unsuccessful alien is by petition for certiorari to the Supreme Court.<sup>34</sup> If the INS is unsuccessful, it too must

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MARTIN, IMMIGRATION PROCESS AND POLICY 84 (1985).

25. 8 U.S.C. §§ 1226(a), 1252(b) (1988).

26. See ALENIKOFF & MARTIN, *supra* note 24, at 93 (advising litigants to refer to regulations in order to make sense of "mystifying" rules of appellate jurisdiction).

27. 8 C.F.R. § 242.21 (1991). In comparison, the right to appeal an exclusion order is statutory. 8 U.S.C. § 1226(b) (Supp. V 1987).

28. 8 U.S.C. § 1105a(a)(2) (Supp. V 1987). For a detailed overview of judicial review procedures, see 3 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE Ch. 81 (1991).

29. For instance, Mexican aliens sometimes enter the country illegally through the U.S.-Mexico border in Texas or New Mexico to work as migrant workers. These workers then follow the harvests wherever they occur, often picking crops in states as distant as Washington and Florida.

30. Interview with Michael Heilman, Board of Immigration Appeals Member, in New Haven, Conn. (Apr. 16, 1990) [hereinafter Heilman Interview] ("We generally adjudicate from the point of view of the deportation hearing's circuit. This makes sense because the immigration judge will be applying that circuit law. Our general rule is to try to apply the individual twist of the expected reviewing circuit if possible.").

31. *Id.*

32. 8 C.F.R. § 3.1(g) (1991).

33. 8 U.S.C. § 1105a(a)(4) (1977).

34. 28 U.S.C. § 2350 (1988).

## Nonacquiescence in Immigration Decisions

consider whether to seek further review of its position. While the ultimate authority to appeal rests with the Solicitor General,<sup>35</sup> the INS nevertheless must make the initial determination to appeal. In a letter prepared for this Author, representing the only available written statement on INS nonacquiescence, the INS Acting General Counsel Paul Virtue described the administrative decisionmaking process as one of overlapping discretion:

[Upon receipt of an adverse circuit court decision, the INS General Counsel's Office] will then consult with agency personnel from the operating unit(s) affected by the decision. We will inform them of the decision and solicit their views as to the decision's impact upon their operations. We will also attempt to ascertain the views and recommendations of the local and regional INS offices under the jurisdiction of the particular circuit court at issue.

After consulting with the various parties, this office will then prepare a recommendation on behalf of the INS which is forwarded to the Office of Immigration Litigation. That office prepares its own recommendation which, if adopted, becomes the recommendation of the Civil Division [of the Justice Department]. The Civil Division's recommendation in turn is forwarded to the Office of the Solicitor General. If the U.S. Attorney's office has assumed responsibility over the litigation, that office will also submit a recommendation which is forwarded to the Solicitor General's office. The Solicitor General's office then makes the final decision regarding further review of adverse circuit court cases.<sup>36</sup>

In determining whether to pursue certiorari, the INS weighs many factors, including the precedential effect of a decision, the impact on agency resources, and the likelihood of success before the Supreme Court.<sup>37</sup>

When the decision is made not to appeal, or the Solicitor General denies a request to petition for further review, the question of nonacquiescence arises. What will be the stance of the INS in comparable, subsequent cases? Will the INS acquiesce in the circuit decision nationwide, acquiesce within the circuit producing the unfavorable ruling while preserving its position in other circuits, or nonacquiesce in all circuits? The INS General Counsel's office provides

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35. See Robert L. Stern, *The Solicitor General's Office and Administrative Agency Litigation*, 46 A.B.A. J. 154 (1960), reprinted in 21 LOY. L.A. L. REV., at 1073, 1075 (1988) ("[N]o agency can take a case to the Supreme Court without the Solicitor General's authorization."). See also Eric Schnapper, *Becket at the Bar—The Conflicting Obligations of the Solicitor General*, 21 LOY. L.A. L. REV. 1187 (1988) (identifying five distinct responsibilities).

36. Letter from Paul Virtue, Acting General Counsel, Immigration and Naturalization Service, to Author (Jan. 28, 1991) [hereinafter INS Letter] (on file with Author).

37. *Id.* Similarly, in Social Security cases, the Government strategy will be to appeal only those cases with fact patterns most sympathetic to the Government. For example, consider the following statement of Deputy Assistant Attorney General Carolyn B. Kuhl before the Senate Finance Committee:

[Sen.] Long: Is it not a fact that on some of these cases you just say, well, that's a very poor situation in which to present this issue? We would like to present it where we think the facts are more neutral. Doesn't that apply to some of those decisions?

[Ms.] Kuhl: [Y]ou are quite correct, Senator, in your suggestion that the Government does to some extent, at least, pick and choose the cases that we appeal.

*Social Security Disability Insurance Program: Hearings on S. 476 Before the Committee on Finance*, 98th Cong., 2d Sess. 135-36 (1984).

some insight into these queries. But before continuing, it should be pointed out that because Board decisions govern agency policy,<sup>38</sup> nonacquiescence does not in fact occur until the Board sanctions it. In other words, the INS may very well decide to nonacquiesce only to have its position effectively vetoed by the Board. Therefore, this Article actually explores two phenomena: one where the INS adopts a posture of nonacquiescence and is rejected by the Board and the other where the Service and Board concur on a nonacquiescence position.<sup>39</sup>

### B. *INS Statement on Nonacquiescence*

Acting General Counsel Paul Virtue has stated that “[t]he INS does not have a policy of nonacquiescence.”<sup>40</sup> That no formal policy statement exists is not surprising. It is possible for agencies to assume a posture of nonacquiescence on a case-by-case basis through agency opinions, briefs and rulings.<sup>41</sup> In fact, this ad hoc method of resolving nonacquiescence issues is quite common among federal agencies and departments. In response to a 1975 inquiry by the Hruska Commission, six governmental bodies responded that nonacquiescence was considered on a case-by-case basis.<sup>42</sup> A 1987 study by Professors Samuel Estreicher and Richard Revesz for the Administrative Conference of the United States reached similar conclusions.<sup>43</sup>

While neither study surveyed practices in immigration law,<sup>44</sup> it appears that the INS proceeds in a like manner. As Mr. Virtue explained, “[a] decision to not acquiesce would be made in consultation with the Solicitor General’s office and the Office of Immigration Litigation.”<sup>45</sup> He added that no written statements, pronouncements or procedures governed the INS decisionmaking process.<sup>46</sup> The Office of Immigration Litigation concurred that the process of consultation is decidedly informal.<sup>47</sup>

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38. See *supra* text accompanying note 32.

39. See *infra* text accompanying note 77.

40. INS Letter, *supra* note 36.

41. See John L. Radder, Note, *Agency Nonacquiescence: Implementation, Justification and Acceptability* 42 WASH. & LEE L. REV. 1233, 1234 (1985).

42. These organizations were the Veterans Administration, Comptroller of the Currency, Customs Service, Federal Power Commission, Department of the Army, and Bureau of Alcohol, Tobacco and Firearms. COMM’N ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, 67 F.R.D. 195, 358-59 (1975) [hereinafter HRUSKA COMMISSION].

43. See Estreicher & Revesz, *Federal Agencies*, *supra* note 1, at 716 (finding that federal agencies have a “tendency to consider acquiescence in court of appeals rulings on an ad hoc basis”).

44. See HRUSKA COMMISSION, *supra* note 42; Telephone Interview with Samuel Estreicher, Professor, New York University School of Law (May 4, 1990).

45. INS Letter, *supra* note 36.

46. *Id.*

47. Telephone Interview with Robert Bombaugh, Director, Office of Immigration Litigation (Feb. 22, 1991).

## Nonacquiescence in Immigration Decisions

A practical impetus for maintaining an informal nonacquiescence policy may be that formal statements evoke the harshest judicial criticism and greatest academic scrutiny. Because the Social Security Administration (SSA), National Labor Relations Board (NLRB) and Internal Revenue Service (IRS) have, to varying degrees, explicitly acknowledged a policy of nonacquiescence, courts and commentators alike have focussed attention on them in particular.<sup>48</sup> However, this is not to suggest that a covert approach to nonacquiescence is any more acceptable or defensible. Instead, as one commentator submits, "informal nonacquiescence evokes no comment, perhaps because it simply goes unnoticed."<sup>49</sup> Part II will explore in greater detail how this ad hoc nonacquiescence is reflected in INS briefs and the decisions of the Board. Before continuing to that discussion, an overview of the pragmatic and philosophical factors at issue in INS nonacquiescence is in order.

### C. Competing Interests in Nonacquiescence

Nonacquiescence may be categorized as either intercircuit, in which an agency declines to follow the caselaw of a particular circuit except in cases arising within that circuit, or intracircuit, in which an agency refuses to follow the caselaw of a circuit even in cases arising within that circuit. Any discussion of nonacquiescence must distinguish between intercircuit and intracircuit nonacquiescence because the degree of acceptance among courts and commentators varies markedly between the two. Virtually all observers agree that

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48. For commentary on SSA nonacquiescence, see *Lopez v. Heckler*, 725 F.2d 1489, 1503 (9th Cir.), vacated on other grounds, 469 U.S. 1082 (1984); *Stieberger v. Heckler*, 615 F. Supp. 1315, 1367 (S.D.N.Y. 1985), *prelim. inj. vacated sub. nom.*, *Stieberger v. Bowen*, 801 F.2d 29, 34-36 (2d Cir. 1986); Carolyn B. Kuhl, *The Social Security Administration's Nonacquiescence Policy*, 4 DET. C.L. REV. 913 (1984) (excerpts from a statement delivered before the Senate Finance Committee, Jan. 25, 1984); James Roy Williams, *The Social Security Administration's Policy of Non-acquiescence*, 12 N. KY. L. REV. 253 (1985); W. Gordon Dobie, Note, *Nonacquiescence: Health and Human Services' Refusal to Follow Federal Court Precedent*, 63 WASH. U. L.Q. 737 (1985); Bernard P. Matthews, Jr., Comment, *Social Security Continuing Disability Reviews and the Practice of Nonacquiescence*, 16 CUMB. L. REV. 111 (1985); Ann Ruben, Note, *Social Security Administration in Crisis: Non-Acquiescence and Social Insecurity*, 52 BROOK. L. REV. 89 (1986).

For commentary on NLRB nonacquiescence, see *Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 382-83 (D.C. Cir. 1983); *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980); Donald L. Dotson & Charles M. Williams, *NLRB v. the Courts: The Need for an Acquiescence Policy at the NLRB*, 22 WAKE FOREST L. REV. 739 (1987); Scott Kafkaer, *Nonacquiescence by the NLRB: Combat Versus Collaboration*, 3 LAB. LAW. 137 (1987); Lynn Paul Mattson, *The United States Circuit Courts and the NLRB: "Stare Decisis" Only Applies If The Agency Wins*, 53 OKLA. B.J. 2561 (1982); Lee Modjeska, *The NLRB Litigational Processes: A Response to Chairman Dotson*, 23 WAKE FOREST L. REV. 399 (1988); Edward Silver & Joan McAvoy, *The National Labor Relations Act at the Crossroads*, 56 FORDHAM L. REV. 181, 199-205 (1987).

For commentary on IRS nonacquiescence, see *Keasler v. United States*, 766 F.2d 1227, 1233 (8th Cir. 1985); Gary L. Rodgers, *The Commissioner "Does Not Acquiesce,"* 59 NEB. L. REV. 1001 (1980); Comment, *The Commissioner's Nonacquiescence*, 40 S. CAL. L. REV. 550 (1967); Edward F. Zwick, Comment, *Treasury Department's Practice of Non-acquiescence to Court Decisions*, 28 ALB. L. REV. 274 (1964).

49. Maranville, *supra* note 1, at 484.



intercircuit nonacquiescence is consistent with, and even complementary to, our system of judicial review.<sup>50</sup> This appellate structure rejects intercircuit *stare decisis* in favor of a process of intercircuit dialogue.<sup>51</sup> Rather than establishing a nationwide rule whenever a single court of appeals decides an issue, the courts are free to pursue, and subsequently follow, a "law of the circuit" until the circuits reach a consensus or the Supreme Court makes a final decision. Intracircuit nonacquiescence, on the other hand, is a topic of considerable debate.<sup>52</sup>

1. *Arguments Against INS Intracircuit Nonacquiescence.* The most damning criticism of intracircuit nonacquiescence is the near certainty of grievous disparities: where agencies refuse to adhere to circuit precedent in subsequent factually similar cases, the only litigants able to benefit from a favorable precedent are those capable of litigating up to the circuit court.<sup>53</sup> For the vast majority of aliens subject to deportation or exclusion, there is neither the sophistication, money nor time to continue, let alone commence, litigation.<sup>54</sup> In one court's words, the result is that "one [litigant] is governed by one legal standard but his neighbor, lacking in either financial resources, litigational persistence, or physical or mental stamina, is governed by another."<sup>55</sup> Critics argue persuasively that this is precisely what the rule of law is intended to

50. See, e.g., *U.S. v. Mendoza*, 464 U.S. 154, 160-63 (1984); SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* 48 (1986). But see James C. Riley, *Limiting the Impact of Intercircuit Nonacquiescence*, *JUDGES' J.*, Summer 1990, at 6, 6 (arguing that "only reviewing bodies that are independent of program administration and adjudication should be empowered to determine when intercircuit nonacquiescence can be applied").

51. See, e.g., 1B, JAMES W. MOORE, ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 0.402(1) (2d ed. 1991); SUP. CT. R. 17(a) (review and certiorari). Four benefits of intercircuit dialogue are identifiable: legal reasoning of the courts of appeals improves; empirical evidence increases as courts pursue different legal theories; the Supreme Court is signalled regarding when to grant certiorari; and the experiences of the courts of appeals aid the Supreme Court in deciding on the merits. See Estreicher & Revesz, *Federal Agencies*, *supra* note 1, at 736-37.

These advantages may be slightly more attenuated in the immigration context because the majority of immigration-related cases arise in the Ninth and Fifth Circuits. See, e.g., 1989 *STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE* xlv, 128 (observing that great majority of inspections and deportations occurred in states under jurisdiction of Ninth and Fifth). Thus, substantial dialogue occurs only between a limited number of circuits. Conversely, it can be argued that these courts have become more expert in immigration cases and are therefore better equipped to proceed with meaningful dialogue.

52. See generally, sources cited *supra* note 1.

53. See Diller & Morawetz, *supra* note 1, at 814-15; Michael J. Froehlich, Note, *Administrative Nonacquiescence in Judicial Decisions*, 53 *GEO. WASH. L. REV.* 147, 149 (1984-85).

54. That is, it is reasonable to assume that most aliens will not be aware of applicable caselaw and even if they are, will not have the resources to proceed through all levels of adjudication. In addition, the temporal aspect of intracircuit nonacquiescence is distressing. While it is true that the practical goal of immigration advocacy is often delay, see ALEINIKOFF & MARTIN, *supra* note 24, at 85-87, aliens who have been waiting years for a final deportation or exclusion decision are nevertheless psychologically affected. The knowledge that at some point in the near future they may be forced to leave the U.S. makes assimilation into society immensely difficult.

55. *Stieberger v. Heckler*, 615 F. Supp. 1315, 1363 (S.D.N.Y. 1985), *prelim. inj. vacated sub. nom.*, *Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986).

## Nonacquiescence in Immigration Decisions

prevent,<sup>56</sup> aliens should not be required to relitigate an issue that has already been decided in their favor.

A related point is that an alien who is denied the precedential effect of a previous circuit decision has every incentive to press his claim vigorously. The alien, or more precisely the alien's attorney, will recognize that beyond the administrative adjudicatory structure lies a federal court ready to honor the doctrine of *stare decisis*. The burden of this phenomenon upon judicial resources is undeniable.<sup>57</sup> Potentially, "[i]f all disappointed parties before the agencies pursued their rights, the courts would be crushed by the burden of adjudicating repetitive identical cases."<sup>58</sup>

2. *Arguments in Favor of INS Intracircuit Nonacquiescence.* While blanket intracircuit nonacquiescence is troublesome, some contend that in a limited form it may be entirely appropriate,<sup>59</sup> offering three primary justifications. First, intracircuit nonacquiescence, like intercircuit, aids dialogue and hence the thoughtful and reasoned development of the law.<sup>60</sup> Where a circuit has struck down an INS position and two other circuits have subsequently upheld the position, conceivably the INS should be permitted to present the original circuit with an opportunity to reconsider.<sup>61</sup> Underlying this argument for "percolation" is a broader view that administrative agencies and circuit courts are partners in the development of national law. Until either the Supreme Court or Congress has spoken definitively, agencies should maintain their view because "[t]hey are more a part of the policymaking, politically accountable branches of government than they are part of a system of adjudication."<sup>62</sup>

Second, the practice of intracircuit nonacquiescence furthers the important goal of uniformity in the administration of an agency's statutory mandate. By refusing to acquiesce to a circuit decision, an agency is able to apply the same

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56. See, e.g., Diller & Morawetz, *supra* note 1.

57. Even those who support some limited intracircuit nonacquiescence recognize the burdens upon the judicial system. See Estreicher & Revesz, *Federal Agencies*, *supra* note 1, at 750.

58. Diller & Morawetz, *supra* note 1, at 817 (citing as example tremendous increase in rate of judicial filings following SSA's adoption of nonacquiescence policy).

59. See, e.g., Schwartz, *supra* note 1, at 1865-72; Estreicher & Revesz, *Federal Agencies*, *supra* note 1, at 753-58; William Wade Buzbee, Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582, 604-07 (1985).

60. Stephen P. Eichel, Comment, "Respectful Disagreement": *Nonacquiescence By Federal Administrative Agencies in United States Courts of Appeals Precedents*, 18 COLUM. J.L. & SOC. PROBS. 463, 467 (1985).

61. See Estreicher & Revesz, *Reply*, *supra* note 1, at 743-44; Schwartz, *supra* note 1, at 1868-72; Buzbee, *supra* note 59, at 605-06.

62. Estreicher & Revesz, *Reply*, *supra* note 1, at 840. See also, Maranville, *supra* note 1, at 491 (agency may be under political pressure to reduce program expenditures or to achieve broader goals which seem incompatible with adhering to particular judicial precedent).

To summarize the legal development argument for nonacquiescence: "[T]he legitimacy of intracircuit nonacquiescence flows from the congressional choice of administrative government and from the judicial system's commitment to intercircuit dialogue." Estreicher & Revesz, *Reply*, *supra* note 1, at 841.

standards nationwide and achieve horizontal uniformity.<sup>63</sup> Thus, where an INS position has been rejected by a circuit which hears only a handful of immigration cases a year, the INS perhaps should not be required to abandon its stance in that circuit.<sup>64</sup> Instead, as the INS pursues relitigation in that circuit, or in other circuits, to create a proper vehicle for Supreme Court review, it could assure uniform outcomes in the interim.

Forsaking uniformity impacts significantly upon the cost-effectiveness of agencies whose operations are already constrained by limited budgets. A bar on intracircuit nonacquiescence would essentially require an agency to have circuit-specific instructions for administrative judges, as well as circuit-specific operations manuals and training systems for enforcement officers.<sup>65</sup> This differential administration would be particularly burdensome for the INS. The immigration regulations governing EOIR and INS officers are voluminous.<sup>66</sup> Moreover, the thirty-three U.S. district offices of the INS, which are governed by four regional offices, do not correspond with the geographical jurisdiction of the courts of appeals.<sup>67</sup> As a result, an immigration judge responsible for one INS district would often be required to conform to the precedents of more than one judicial circuit.<sup>68</sup>

Third, when circuit panels conflict, the law of the circuit is unsettled and administrative agencies are reasonably justified in maintaining intracircuit nonacquiescence. This situation occurs occasionally in the Ninth Circuit. For instance, in claims for asylum and withholding of deportation,<sup>69</sup> panels have split regarding the Board's policy of automatically denying withholding of deportation when the less stringent standard required for asylum is not met. Ninth Circuit panels in *Rodriguez-Rivera v. INS* and *Diaz-Escobar v. INS* agreed that failure to demonstrate a "well-founded fear" of persecution for asylum purposes meant, *a fortiori*, that an alien had not met the standard of a "clear probability" of persecution required for withholding of deportation.<sup>70</sup> On the other hand, the panel in *Montecino v. INS* remanded the case to the

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63. Uniformity may be a particularly compelling interest in immigration matters. For instance, it is inconceivable that Congress intended that an alien's excludability should depend on the fortuity of the circuit in which he was apprehended or the circuit in which he was given a hearing.

64. Heilman Interview, *supra* note 30.

65. See Estreicher & Revesz, *Federal Agencies*, *supra* note 1, at 748-49.

66. 8 C.F.R. § 1.1-499.1 (1991); Appendix 2 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE (1991) (INS Operations Instructions).

67. 8 C.F.R. § 100.4 (1991).

68. Similarly, 16 of the NLRB's 33 regional offices straddle 2, 3, and even 4 circuits. See Estreicher & Revesz, *Federal Agencies*, *supra* note 1, at 691 n. 41.

69. 8 U.S.C. § 1253(h) (withholding of deportation); 8 U.S.C. § 1158(a) (asylum). The Ninth Circuit has interpreted § 1253(h) to entitle an alien to withholding of deportation upon proof of a clear probability of persecution, and § 1158(a) to permit asylum where an alien proves a well founded fear of persecution. See *Diaz-Escobar v. INS*, 782 F.2d 1488, 1491 (9th Cir. 1986); *De Valle v. INS*, 901 F.2d 787, 790 (9th Cir. 1990).

70. *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1007 (9th Cir. 1988); *Diaz-Escobar*, 782 F.2d at 1491-92.

## Nonacquiescence in Immigration Decisions

Board for failing to proceed to the question of withholding of deportation after denying asylum.<sup>71</sup> Absent an en banc decision or definitive Supreme Court ruling, the INS should arguably be allowed to adhere to its own policy in a circuit with inconsistent interpretations.

Fourth, intracircuit nonacquiescence may simply be an inadvertent consequence of the fact that the INS must take a position *before* it knows which circuit will review its decision. For example, review of a deportation order may be available in either the First or Second Circuit,<sup>72</sup> where the First has rejected an INS position and the Second has either upheld it or not yet addressed it. For the agency to maintain its view would amount to intracircuit nonacquiescence if the First Circuit ultimately hears the case. However, if the Second Circuit were the eventual venue, to require the INS to abandon its stance would result in either nonacquiescence or the needless abdication of an agency position. Thus, in the presence of venue choice, the INS should perhaps continue to adhere to its position, regardless of the fact that intracircuit nonacquiescence may subsequently arise.<sup>73</sup>

To conclude, the controversy over nonacquiescence boils down to a debate over the competing interests of administrative efficiency and fairness. The tension between these two goals is encountered throughout immigration law: how can accurate and humane application of the law be reconciled with the need to keep a massive bureaucratic structure operating efficiently?<sup>74</sup> In the end, resolution of this conflict requires a choice “between the perspective of the agency and that of the courts, between rule of law values and bureaucratic values.”<sup>75</sup> Part III argues that administrative agencies, courts and Congress

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71. 915 F.2d 518, 520 (9th Cir. 1990).

On some subjects, panels have expressed displeasure with the holdings of other panels, leaving the law of the circuit in doubt. For example, on the question of whether a neutral political opinion qualifies as a political opinion for asylum purposes, one Ninth Circuit panel criticized, in a disparaging tone, recent decisions by other panels:

We have held that political neutrality is a political opinion, or in other words, that the absence of a political opinion is a political opinion. *See, e.g.,* *Arteaga v. INS*, 836 F.2d 1227, 1231-32 (9th Cir. 1988); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286-87 (9th Cir. 1984). . . . Other circuits have declined to follow. *See, e.g.,* *Alvarez-Flores v. INS*, 909 F.2d 1, 6 n. 4 (1st Cir. 1990) (“Only the Ninth Circuit clearly has held that neutrality is a political opinion within the meaning of the Act.”); *Perlera-Escobar v. Executive Office for Immigration*, 894 F.2d 1292, 1297-98 (11th Cir. 1990) (pointing out that acceptance of neutrality as a political opinion “would create a sinkhole that would swallow the rule.”); *Cruz-Lopez v. INS*, 802 F.2d 1518, 1520 n. 3 (4th Cir. 1986) (declining to follow the Ninth Circuit rule).

*Arriaga-Barrientos v. INS*, 925 F.2d 1177, 1179 (9th Cir. 1991).

72. *See supra* text accompanying notes 28-29.

73. *See Buzbee, supra* note 59, at 604-05, *Estreicher & Revesz, Federal Agencies, supra* note 1, at 741-43.

74. *See ALENIKOFF & MARTIN, supra* note 24, at 561-62.

75. *Maranville, supra* note 1, at 528. *Maranville* predicts that this value conflict will remain unresolved because it has not been solved generally in administrative law. *Id.* at 528-29. It is well beyond the scope of this Article to proffer a solution to the basic value conflict. However, given the particular context of

are all responsible for reaching an appropriate compromise. Before that, it is necessary to understand the extent to which the INS does engage in practices of nonacquiescence.

## II. CASELAW SUMMARY

A discussion of the caselaw will serve to illustrate the development of nonacquiescence issues in immigration law. Given the ad hoc approach taken by the INS,<sup>76</sup> the only method of identifying an instance of nonacquiescence is to survey decisions of the Board and the courts of appeals for a description of the INS posture. However, because Board decisions govern the INS,<sup>77</sup> an INS decision to nonacquiesce may be denied effect by the Board. Therefore, the following discussion identifies both occasions in which nonacquiescence actually occurs by reason of Board approval and occasions in which there is only an INS position in favor of nonacquiescence. The latter instances, while not determinative of subsequent immigration law, are nevertheless illustrative of the INS position on this critical issue of agency-court relations.

### A. Intercircuit Nonacquiescence

1. *INS Practice.* The Service and the Board have been explicit regarding their prerogative to deny the precedential effect of a particular circuit court decision in factually comparable cases arising in other circuits. While the Board has acquiesced nationwide to unfavorable circuit precedents,<sup>78</sup> the usual approach is to engage in intercircuit nonacquiescence.<sup>79</sup> This practice appears to have arisen during the 1960s when the Board, faced with hostile district court opinions,<sup>80</sup> asserted its privilege to affirm INS positions in all cases arising outside of the jurisdictions of those district courts.<sup>81</sup> For instance, in *Matter of Lim*, while agreeing to acquiesce, the Board reasoned:

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immigration law, part III explores potential legislative responses.

76. See *supra* text accompanying note 45-47.

77. See *supra* text accompanying note 32.

78. For example, in *Matter of McMillan*, the Board agreed to follow nationwide a Ninth Circuit decision, *Palmer v. Reddy*, 622 F.2d 463 (1980), concerning visa preferences for certain stepchildren. 17 I. & N. Dec. 605, 607 (BIA 1981). In making this decision, the Board gave weight to the fact that "[t]he Government appears to have acquiesced in the Ninth Circuit's interpretation." *Id.*

79. See cases cited *infra* notes 85-86.

80. See, e.g., *Andrade v. Esperdy*, 270 F. Supp. 516 (S.D.N.Y. 1967); *In re Yuen Lan Hom*, 289 F. Supp. 204 (S.D.N.Y. 1968).

81. See, e.g., *Matter of Amado and Monteiro*, 13 I. & N. Dec. 179, 181 (BIA 1969); *Matter of Lim*, 13 I. & N. Dec. 169, 170 (BIA 1969). The Board has continued to adhere to this position. See, e.g., *Matter of Moreira*, 17 I. & N. Dec. 370, 373 (BIA 1980); *Matter of Fakalata*, 18 I. & N. Dec. 213, 218 (BIA 1982). Interestingly, in an earlier decision in *Matter of Moreira*, the INS urged the Board to acquiesce to the district court decision nationwide. 17 I. & N. Dec. 41, 43-44 (BIA 1979).

## Nonacquiescence in Immigration Decisions

The fact that a lower federal court has rejected a legal conclusion of this Board does not of itself require us to recede from that conclusion. The Service's jurisdiction is nationwide and we hear appeals from Service decisions in all parts of the country. The contrary ruling of a reviewing court in one district is not necessarily dispositive of the issue; a conflicting view may be expressed by a court in another jurisdiction.<sup>82</sup>

This reasoning was expressly adopted later in the context of circuit court decisions. Thus, in the 1971 case *Matter of Yee*, the Board quoted the language of *Lim* while holding that the INS was not bound to follow a Ninth Circuit deportation decision<sup>83</sup> in similar cases in other circuits.<sup>84</sup> A number of other Board decisions have ruled likewise on a variety of issues.<sup>85</sup> In practically equivalent judgments, the Board has also regularly decided to acquiesce to recent adverse circuit opinions only in those particular circuits, while leaving the law unsettled elsewhere.<sup>86</sup>

In contemplating intercircuit nonacquiescence, the Board does not consider the failure of the INS to appeal to be controlling.<sup>87</sup> The Board has held that the absence of appeal of a circuit decision is not indicative of acquiescence because "[t]he determination not to appeal may be based on other considerations, such as the inadequacy of the record as a vehicle for appeal or factors outside of the record which render an appeal undesirable."<sup>88</sup> The Board has not addressed the issue of whether the Solicitor General's refusal to authorize the INS to petition for certiorari requires the Board to acquiesce nationwide to the circuit decision. However, if one is convinced by the dialogue argument for intercircuit nonacquiescence,<sup>89</sup> it follows that the Solicitor General's

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82. 13 I. & N. Dec. 169, 170 (BIA 1969) (citations omitted).

83. *Lee Fook Chuey v. INS*, 439 F.2d 244 (9th Cir. 1971).

84. 13 I. & N. Dec. 785, 789 (BIA 1971).

85. *See, e.g.*, *Matter of Fede*, Int. Dec. 3106 (BIA 1989) (attorney's fees pursuant to Equal Access to Justice Act); *Matter of Torres*, Int. Dec. 3010 (BIA 1986) (excludability of aliens returning to U.S. on grant of advanced parole); *Matter of Waldei*, Int. Dec. 2981 (BIA 1984) (request for hearing by stowaway seeking asylum); *Matter of Santos*, Int. Dec. 2969 (BIA 1984) (right to counsel in deportation proceeding); *Matter of Newton*, 17 I. & N. Dec. 133, 134-35 (BIA 1979) (lawful domicile requirement for relief from deportation); *Matter of Anwo*, 16 I. & N. Dec. 293, 298 (BIA 1977) (lawful domicile requirement for relief from deportation); *Matter of Singh*, 13 I. & N. Dec. 439, 442 (BIA 1969) (tolling of statute of limitations provision governing adjustment of status).

86. In other words, the cases in note 85 involve situations where the Board refuses to follow a precedent from a circuit that is not expected to review its determination. The following cases, on the other hand, find the Board requiring acquiescence to a precedent of the expected reviewing circuit while permitting nonacquiescence elsewhere. As a practical matter the result is the same—intercircuit nonacquiescence. *See, e.g.*, *Matter of Herrera*, 18 I. & N. Dec. 4, 5 (BIA 1981) (physical presence requirement for relief from deportation); *Matter of Patel*, 17 I. & N. Dec. 597, 601 (BIA 1980) (exemption from labor certification); *Matter of Bonnette*, 17 I. & N. Dec. 587, 588 (BIA 1980) (visa preference for stepchildren); *Matter of Kondo*, 17 I. & N. Dec. 330, 330 (BIA 1980) (rescission of adjustment of status for nonviable marriage); *Matter of Cienfuegos*, 17 I. & N. Dec. 184, 185-186 (BIA 1979) (defining adultery).

87. *See, e.g.*, *Matter of Amado and Monteiro*, 13 I. & N. Dec. 179, 181 (BIA 1969); *Matter of Lim*, 13 I. & N. Dec. 169, 170 (BIA 1969).

88. *Matter of Singh*, 13 I. & N. Dec. 439, 442 (BIA 1969).

89. *See supra* text accompanying notes 50-51.

refusal to seek review should require acquiescence because a controlling Supreme Court ruling cannot be forthcoming.

2. *Judicial Response.* The few judicial comments regarding inter-circuit nonacquiescence in the area of immigration law have been unfailingly supportive of the practice. As one court stated:

Even were the INS to acquiesce in an unfavorable judicial interpretation in one circuit, it would surely not be obliged to do so in other circuits that had not decided the question. And, of course, an unfavorable ruling in one circuit would not prevent the INS from continuing to follow its interpretation of the statute in other cases nationwide.<sup>90</sup>

Undergirding the judiciary's acceptance of INS inter-circuit nonacquiescence is an appreciation of the beneficial effect on legal development afforded by circuit dialogue. For example, in *Matter of Waldei*,<sup>91</sup> the Board decided to acquiesce to the Second Circuit decision in *Yiu Sing Chun v. Sava*<sup>92</sup> and in similar cases arising in the Second Circuit, but to engage in nonacquiescence elsewhere. Subsequently, in the Second Circuit case *Azzouka v. Sava*,<sup>93</sup> a majority of the panel denied Judge Friendly the opportunity to reconsider the previous opinion in *Chun*. In dissent, Judge Friendly clearly took solace in the fact that "some other court of appeals will doubtless have an opportunity to decide the point determined by us in *Chun* in light of the decision of the Board of Immigration Appeals not to consider *Chun* as a controlling precedent outside of the Second Circuit."<sup>94</sup>

The Supreme Court has embraced the practice by the INS for the same reason. In *United States v. Mendoza*, a unanimous court reflected that, "[a]llowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari."<sup>95</sup>

3. *Venue Choice Intracircuit Nonacquiescence.* It is important to note that many Board decisions permitting inter-circuit nonacquiescence may become intracircuit in nature as a result of a venue choice provision. The Board's approach has been to apply the precedent of the circuit in which the case arises, regardless of where the alien resides.<sup>96</sup> As a result, if a liberal venue

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90. *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325, 1330-31 (D.C. Cir. 1989) (footnote and citation omitted), *vacated and remanded*, 59 U.S.L.W. 3580 (U.S. Feb. 26, 1991). See also *Castillo-Felix v. INS*, 601 F.2d 459 (9th Cir. 1979) ("It is elementary that the decisions of one Court of Appeals cannot bind another.")

91. Int. Dec. 2981 (BIA 1984).

92. 708 F.2d 869 (2d Cir. 1983).

93. 777 F.2d 68 (2d Cir. 1985).

94. *Id.* at 77 (Friendly, J., concurring in result in part and dissenting in part).

95. 464 U.S. 154, 160 (1984). The Court adopted wholeheartedly the dialogue justification for inter-circuit nonacquiescence by stating: "We think our conclusion will better allow thorough development of legal doctrine by allowing litigation in multiple forums." *Id.* at 163.

96. See cases cited *supra* notes 85-86. In deportation cases, the Board assumes venue will be in the same circuit in which the hearing before the immigration judge occurred. See *supra* text accompanying note 30.

## Nonacquiescence in Immigration Decisions

provision permits appellate review in a circuit other than the circuit contemplated by the Board, a conflict may emerge. If the actual reviewing circuit's caselaw differs from that of the anticipated reviewing circuit, the Board and Service will thereby end up in a posture of intracircuit nonacquiescence.

An instructive case in point is *Maldonado-Cruz v. INS*, in which an alien was apprehended in the Ninth Circuit for illegal possession of a concealed weapon, transferred to a detention center in the Fifth Circuit for a deportation hearing, and then released on bond to return to reside in the Ninth Circuit.<sup>97</sup> Because the deportation hearing occurred in the Fifth Circuit, the Board declined to follow relevant Ninth Circuit precedent in its holding that *Maldonado-Cruz* was not entitled to political asylum.<sup>98</sup> At that stage, a statute<sup>99</sup> provided the alien with the option of appealing either in the Ninth Circuit, whose caselaw favored his position, or in the Fifth Circuit, whose precedents would likely require his deportation. As might be expected, *Maldonado-Cruz* chose to appeal to the Ninth Circuit, which then predictably reversed the Board on the basis of Ninth Circuit caselaw.<sup>100</sup> Though inadvertent, the Board had therefore engaged in intracircuit nonacquiescence.<sup>101</sup>

In sum, intercircuit nonacquiescence occurs frequently in immigration law and is regularly upheld by the Board and the courts. Through intercircuit nonacquiescence, the INS is able to enjoy the benefits of increasing intercircuit dialogue and maintaining a uniform policy in all circuits which have not expressly rejected that policy. At times, because of venue choice rules, a Board decision permitting INS intercircuit nonacquiescence can result in intracircuit nonacquiescence, the subject of the next part.

### B. Intracircuit Nonacquiescence

1. *The INS Practice.* The Board has permitted the INS to engage in "intradistrict" nonacquiescence. For example, the Board case of *Matter of Melendez*<sup>102</sup> arose in the jurisdiction of the New Jersey district court which

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97. 883 F.2d 788, 789-90 (9th Cir. 1989).

98. *Matter of Maldonado-Cruz*, Int. Dec. 3041 (BIA 1988).

99. 8 U.S.C. § 1105(a)(2) (Supp. V 1987).

100. 883 F.2d at 790-93. A similar result was reached in *Rios-Berrios v. INS*, 776 F.2d 859 (9th Cir. 1985).

101. While there are no statistics available to determine the extent to which aliens engage in forum shopping through liberal venue provisions, it is at least clear that the right to choose among forums often creates problems in the administrative law context. See, generally, Note, *Venue for Judicial Review of Administrative Decisions: A New Approach*, 93 HARV. L. REV. 1735 (1980). One attorney at a federal immigration agency, who requested anonymity, explained to this Author that aliens regularly invent a residence at hearings before the immigration judge in anticipation of appeal and that the government usually does not challenge the sham for lack of resources. He even suggested, half jokingly, that forum shopping is so common that a prima facie case for malpractice could be made if an alien's attorney failed to identify the alien's residence as being located in a circuit with caselaw favorable to the alien.

102. 16 I. & N. Dec. 54 (BIA 1976).



had previously decided *Acosta v. Gaffney*.<sup>103</sup> Despite the fact that the decision in *Acosta* clearly bore on the situation in *Melendez*, the Board ruled that it was not obliged to follow *Acosta*.<sup>104</sup> It reasoned that because the INS had subsequently appealed *Acosta* to the Third Circuit, the district court's decision was not dispositive even within its own jurisdiction.<sup>105</sup> Similarly, the Board, on occasion, has sanctioned INS intracircuit nonacquiescence.

In *Matter of Mangabat*, the Board once again adopted the language of *Lim*<sup>106</sup> in ruling, contrary to Ninth Circuit decisions, that an alien who entered the United States as a nonimmigrant was not entitled to discretionary relief from deportation under the applicable statutory provision.<sup>107</sup> Despite the fact that *Mangabat* had arisen in the Ninth Circuit, the Board proffered a number of justifications for its holding allowing nonacquiescence even in the Ninth Circuit. The Board first recognized that courts in the Second, Sixth and Seventh Circuits had endorsed the Board view and that no other circuit had followed the Ninth. It then continued, "[w]here a reviewing court rejects our construction of a statute, in treating the same issue in subsequent cases we try to reach an accommodation compatible both with respect for the court's judgment and with the needs of effective administration of the law."<sup>108</sup> In resolving this fundamental conflict, the Board decided to uphold its position and await consideration by the Supreme Court.<sup>109</sup> Finally, it noted that INS efforts to petition for certiorari negated any notion of acquiescence.<sup>110</sup>

2. *Board Denial of INS Nonacquiescence Posture.* Since the early-1970s decisions, like *Mangabat*, the Board has often declined to follow suggestions by the INS that it engage in intracircuit nonacquiescence.<sup>111</sup> While these opinions ultimately permitted only intercircuit nonacquiescence, they make

103. 413 F. Supp. 827 (D. N.J. 1976), *rev'd*, 558 F.2d 1153 (3d Cir. 1977).

104. *Matter of Melendez*, 16 I. & N. 54, 55 (BIA 1976).

105. *Id.* Instead, the Board ruled that it would retain the doctrine it had previously enunciated in *Matter of Anaya*, Int. Dec. 2243 (BIA 1973) and *Matter of Lopez*, Int. Dec. 2224 (BIA 1973).

106. *See supra* text accompanying note 82.

107. 14 I. & N. Dec. 75, 77-78 (BIA 1972), referring to 8 U.S.C. § 1251(f).

108. *Id.* at 77.

109. *Id.* at 78. The Board stated: "In declining to apply the cited Ninth Circuit decisions in this and other cases reviewable in that circuit, we mean no disrespect for that court. Since the issues have already been crystallized, briefed and defined in the cited cases, our action now should pave the way for prompt decision in that court and prompt review in the Supreme Court." *Id.* at 76.

110. *Id.* The Board had originally withheld action because the Solicitor General had authorized the INS to petition for certiorari in a comparable case and the Supreme Court had granted. *Id.* at 76. However, in that case, the alien left the country and so the Court simply remanded with directions to dismiss the petition for review. *INS v. Vitales*, 405 U.S. 983 (1972). Rather than continue to withhold action and wait for a definitive Supreme Court decision to be made, the Board opted to decide *Matter of Mangabat*. 14 I. & N. Dec. at 76.

A year later, under very similar circumstances, the Board once again sanctioned intracircuit nonacquiescence. *See Matter of Perez-Echeverria*, 14 I. & N. Dec. 347, 348 (BIA 1973).

111. *See, e.g., Matter of Gonzalez*, 16 I. & N. Dec. 134, 136 (BIA 1977) ("The instant case does not contain the persuasive factors present in *Matter of Mangabat*."); *Matter of Bowe*, 17 I. & N. Dec. 488, 499-500 (BIA 1980); *Matter of Anselmo*, Int. Dec. 3105, at 9-11 (BIA 1989).

## Nonacquiescence in Immigration Decisions

clear the willingness of the INS to pursue nonacquiescence nationwide. In *Matter of Anselmo*, the INS submitted a brief arguing for nonacquiescence to a Ninth Circuit en banc decision<sup>112</sup> which held that the Equal Access to Justice Act (EAJA) applied to proceedings before immigration judges and the Board. It wrote:

[T]he Service is in the strongest disagreement with the Court's ruling on the applicability of EAJA to deportation proceedings and will not comply with the statement, even in the Ninth Circuit, in order to bring the matter before the Supreme Court at the earliest possible moment.<sup>113</sup>

While the Board agreed substantively with the INS position, it decided to acquiesce, concluding that the Board had "historically followed a court's precedent in cases arising in that circuit."<sup>114</sup>

3. *Judicial Attitudes*. Perhaps surprisingly, the courts have not been especially critical of the prospect of INS intracircuit nonacquiescence.<sup>115</sup> In *Ayuda v. Thornburgh*, the D.C. Circuit expressly declined to disapprove of intracircuit nonacquiescence and even hinted that it might be permissible. It stated:

Whether an agency is *required* as a matter of law to acquiesce in an unfavorable ruling when future cases arise in the same circuit court of appeals is a matter of much debate. . . . Although some courts have expressed disapproval of intracircuit nonacquiescence, we have never decided the issue. Even the most vociferous critics of intracircuit nonacquiescence have conceded the validity of the policy in at least some instances.<sup>116</sup>

The Ninth Circuit, which regularly clashes with the INS over immigration issues, went a step further in *Castillo-Felix v. INS* and asserted that the INS has a right to nonacquiesce intracircuit (though it praised the INS for not exercising this right).<sup>117</sup> With regard to the Second Circuit decision in *Lok v. INS*<sup>118</sup> the court stated:

Although the INS *could refuse* to adopt the *Lok* interpretation in the Second Circuit and thereby achieve consistency of application, to do so would only invite

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112. *Escobar-Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988).

113. INS Brief, reprinted at 65 INTERPRETER RELEASES 900 (Sept. 2, 1988). Interestingly, the INS technically prevailed in *Escobar-Ruiz*, because the court, while finding the EAJA applicable to deportation proceedings, denied fees to the particular alien in the case. 838 F.2d at 1029. As the "winner," the INS was unable to appeal the decision to the Supreme Court. See 65 INTERPRETER RELEASES at 900.

114. *Matter of Anselmo*, Int. Dec. 3105, at 10 (1989). The Board noted the "unusual fact setting" in *Matter of Mangabat*, described at notes 106-110, to distinguish that case from *Matter of Anselmo*. *Id.* at 11.

115. Compare some of the harsh criticism in sources cited *supra* note 48. There can be little doubt that the lack of judicial criticism is in some way a result of the traditional deference courts have displayed in the immigration context. See *supra* text accompanying notes 8-11.

116. 880 F.2d 1325, 1330-31 n.4 (D.C. Cir. 1989) (citations omitted), *vacated and remanded*, 59 U.S.L.W. 3581 (U.S. Feb. 26, 1991). See also *id.* at 1334 ("A decision by a court of appeals against an agency in an individual case does not bind the agency in other circuits, and perhaps not even in other cases within the same circuit.") (citation omitted). *But see id.* at 1352 (Wald, J., dissenting) ("The majority can point to absolutely no evidence whatsoever that Congress in fact valued nonuniformity, uncertainty and slowness in getting major legalization questions settled.")

117. 601 F.2d 459, 467 (9th Cir. 1979).

118. 548 F.2d 37 (2nd Cir. 1977).

appeal and reversal. The agency's decision to apply the *Lok* interpretation in the Second Circuit avoids futile appeals, costly to both the agency and to petitioners seeking relief. We find avoidance of this unnecessary process of appeal to be a sound and rational basis for the agency's action.<sup>119</sup>

To summarize, the INS engages, to some degree, in all forms of nonacquiescence. The prevalence of INS intercircuit nonacquiescence, while theoretically not objectionable,<sup>120</sup> presents serious practical concerns for litigants and for the courts. Because the Supreme Court actually resolves very few inter-circuit conflicts, there is a high likelihood of disuniformity.<sup>121</sup> In addition, intracircuit nonacquiescence, both venue certain and uncertain, raises basic concerns which should be addressed by Congress.

### III. RECENTLY PROPOSED AND POTENTIAL LEGISLATIVE RESPONSES

Although Congress has never turned its attention to INS nonacquiescence, considerable efforts have been made with regard to the Social Security Administration. The lessons that can be drawn from examining the response to the SSA are also applicable to a study of INS nonacquiescence, since both involve comparable legal and policy issues.<sup>122</sup> In 1984, both the House and Senate passed SSA reform legislation, including provisions aimed at prohibiting or controlling SSA nonacquiescence.<sup>123</sup> Nevertheless, these provisions were not incorporated into the final legislation<sup>124</sup> because the House and Senate Conference Committee felt "the legal and Constitutional issues raised by nonacquiescence can only be settled by the Supreme Court."<sup>125</sup> Whereas Congress may be unwilling, it has been suggested that the courts are not particularly well suited to combatting nonacquiescence.<sup>126</sup> As one commentator has written, "[i]n the final analysis, courts are reluctant and basically ill-equipped to use

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119. *Castillo-Felix*, 601 F.2d at 467 (emphasis added).

120. Intercircuit nonacquiescence is presumably merely a way of facilitating circuit dialogue which eventually results in a consensus or definitive Supreme Court decision. See *supra* text accompanying notes 50-51.

121. See *infra* text accompanying notes 141-42.

122. In fact, the discussion of INS nonacquiescence pros and cons, see *supra* part I.C and accompanying sources, is based in large part on similar analyses of SSA nonacquiescence.

123. H.R. 3755, 98th Cong., 2d Sess. § 302, 130 CONG. REC. H1990-91 (daily ed. Mar. 27, 1984); S. 476, 98th Cong., 2d Sess. § 7, 130 CONG. REC. S.6204 (daily ed. Mar. 24, 1984). For an overview of these bills, see Kubitshek, *supra* note 2; Froelich, *supra* note 53, at 164-66.

124. Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 1984 U.S. CODE CONG. & AD. NEWS 98 Stat. 1794 (codified generally at 42 U.S.C. §§ 401, 1381).

125. H.R. REP. NO. 1039, 98th Cong. 2d Sess. 38 (1984).

126. Circuit-wide injunctive relief is possible. See *Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986); *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir. 1983). But as some observers note, these cases are "presently conducted on a plane of warring absolutism, which deflects careful consideration of the respective roles of agency and reviewing court." Estreicher & Revesz, *Federal Agencies*, *supra* note 1, at 761. See also Maranville, *supra* note 1, at 488-90 ("A series of direct challenges to nonacquiescence have been filed . . . but the question has not been definitively resolved.") In any case, it is at least clear in the immigration context that the courts have been reluctant to take any action. See cases cited *supra* notes 90-95, 116-117.

## Nonacquiescence in Immigration Decisions

sanctions against other branches of government or against government minions authorized to implement questionable policies.”<sup>127</sup>

The discussion below examines the contributions that the renewed efforts by Congress in 1990 and the recommendations of the blue-ribbon Federal Courts Study Committee (FCSC) can make towards a legislative response to INS nonacquiescence. However, the central point here is not to craft comprehensive legislation but to suggest that it is necessary for Congress to provide *some* response.<sup>128</sup> Unstructured and unregulated nonacquiescence should not remain the status quo. Rather, the conflict that nonacquiescence embodies, namely the balancing of administrative efficiency and justice values, should be resolved by Congress in a manner sensitive to both court and agency.

### A. *The Social Security Justice Act of 1990*

To combat the “contemptuous behavior” of SSA nonacquiescence, Representatives Austin J. Murphy, Jack Brooks and Robert W. Kastenmeier introduced the Social Security Justice Act of 1990 (Act).<sup>129</sup> According to these sponsors, the Act would “protect[ ] all our constituents from unfair procedures, and reestablish[ ] the rule of law against unfair regulatory practices.”<sup>130</sup> More specifically, the bill proposed to require intracircuit acquiescence unless the case was being appealed to the Supreme Court.<sup>131</sup> Furthermore, the bill required the SSA to request the Solicitor General to file a petition for certiorari whenever it was unsuccessful in two circuits on the same question of law.<sup>132</sup> Finally, nationwide acquiescence was mandated upon failure to obtain Supreme Court review in a given case.<sup>133</sup>

The proposed Act was overly restrictive of administrative agency litigation practices in at least two ways. First, it would force an agency to appeal the

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127. Austin J. Murphy, *When the Government Ignores the Law: Relitigation, Nonacquiescence & Contempt Are Orwellian Doublepeak for Consequences that Are Deadly*, JUDGES' J., Summer 1990, at 2, 5.

128. The main focus of this part is not on statutory details because, given Congress' reluctance to address the much more notorious SSA nonacquiescence, a law aimed at the INS is not a realistic expectation. Instead, broader suggestions concerning the thrust and basic provisions of a statute relating to administrative nonacquiescence are more appropriate.

129. 136 CONG. REC. E1481-02 (daily ed. May 10, 1990) (statement of Rep. Brooks). The Act grew out of a Federal Courts Study Committee recommendation, *see infra* notes 137-47 and accompanying text, but is more detailed and contains additional features. Telephone Interview with Mike Johns, Legislative Assistant to Congressman Murphy (Mar. 6, 1991) [hereinafter Johns Interview].

130. H.R. 4797, 101st Cong., 2d Sess.; 136 CONG. REC. E1481-02 (daily ed. May 10, 1990) (statement of Rep. Brooks).

131. *Id.* This provision would effectively require the SSA either to appeal a decision adverse to its position or to acquiesce within the circuit producing the adverse opinion. The option of not appealing, yet continuing to adhere to its position, would be eliminated.

132. *Id.*

133. *Id.*

first adverse circuit decision or face immediate disuniformity of administration.<sup>134</sup> Second, and equally important, it placed far too much weight on the discretion of the Solicitor General to seek review and the Supreme Court to grant certiorari. The massive number of petitions for certiorari, combined with the Supreme Court's limited resources, eliminates the likelihood that many, or even a substantial minority of, important and controversial administrative law cases will be adjudicated in any given year.<sup>135</sup>

In any event, the Act was never adopted by Congress, which once again opted not to pass legislation on nonacquiescence.<sup>136</sup> This choice not to resolve nonacquiescence issues was unfortunate. While the Act's balancing may have been excessively unfavorable to the SSA, it did provide a vehicle by which the Congress could debate and arrive at a reasonable compromise.

### B. *Federal Courts Study Committee (FCSC) Recommendations*

On SSA intracircuit nonacquiescence, the FCSC<sup>137</sup> was similarly severe. Citing the "unnecessary tension" between the executive and judicial branches created by nonacquiescence, the FCSC unanimously recommended mandatory SSA intracircuit acquiescence.<sup>138</sup> The only exemption allowed was where a case had been designated by the Solicitor General to be a "test case" and final judgment had not been reached.<sup>139</sup> Again, this proposal, while restrictive, was beneficial in that it directed the attention of Congress to the issue. In fact, the FCSC also advised Congress to "explore whether 'non-acquiescence' policies in other federal branch agencies are in need of legislative control."<sup>140</sup>

A more interesting recommendation was aimed at the broad problem of intercircuit conflicts. Researchers for the FCSC found that the steady rise in appeals had caused Supreme Court review of federal appeals to fall from 7.4% in 1900, 6.2% in 1915, 2.9% in 1950, 1.0% in 1970 to an estimated 0.4%

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134. More generally, all the arguments proffered in support of intracircuit nonacquiescence, *see supra* notes 59-73 and accompanying text, are rejected. Intercircuit dialogue would be limited, the agency would face severe administrative costs and most crucially, the agency would be treated as absolutely inferior to the circuit court in developing national law. In addition, the Act gives short shrift to the practical factors that enter into an agency's decision to appeal. *See supra* note 37 and accompanying text.

135. *See infra* text accompanying notes 141-42.

136. The bill was referred to the Committee on Ways and Means during the 101st Congress and a decision has not been made on whether to reintroduce during this Congress. Johns Interview, *supra* note 129.

137. Congress enacted the Federal Courts Study Act in 1988 which mandated the creation of the FCSC. Pub. L. No. 100-702, Title I, 102 Stat. 4642, 4644 (1988). Chief Justice Rehnquist appointed the members of the FCSC, a group of 15 distinguished judges, Congressmen and practitioners, who conducted a fifteen-month study to respond to "mounting public and professional concern with the federal courts' congestion, delay, expense, and expansion." *See* FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 3, 193-96 (1990) [hereinafter FCSC REPORT].

138. *Id.* at 59-60.

139. *Id.* at 60.

140. *Id.*

## Nonacquiescence in Immigration Decisions

in 1989.<sup>141</sup> In addition, they estimated that between sixty and eighty inter-circuit conflicts remained unresolved by the Supreme Court in 1988 alone.<sup>142</sup> The result was that

the Supreme Court's ability to influence and control the system, by itself deciding most all of the important precedential cases, has diminished. Many of those cases are instead now decided finally by one of the circuit courts of appeals. . . . [T]here can be no question that the law-declaring functions of the courts of appeals vis-a-vis the Supreme Court have grown enormously.<sup>143</sup>

Therefore, the FCSC recognized that the federal judicial system "must be able within a reasonable time to provide a nationally binding construction of these acts of Congress needing a single, unified construction in order to serve their purpose."<sup>144</sup> It first proposed that Congress study the number and frequency of unresolved inter-circuit conflicts with particular emphasis on issues including venue choice provisions and nonacquiescence.<sup>145</sup> Second, the FCSC suggested a five-year, experimental pilot project in which the Supreme Court could choose to refer inter-circuit conflicts to an en banc court of appeals for disposition and enunciation of a national precedent.<sup>146</sup> The reviewing circuit would be randomly chosen from among the circuits not party to the conflict and reconsideration would only be available in the Supreme Court.<sup>147</sup>

This program offered a workable solution to the problems of unresolved inter-circuit conflicts and long-standing nationwide disuniformity caused by inter-circuit nonacquiescence. Unfortunately, Congress chose not to implement either the pilot program or the bar on SSA intracircuit nonacquiescence.<sup>148</sup> Agency pressure may have been responsible in part for this result. For example, Gwendolyn S. King, Commissioner of SSA, wrote to Representative Kastenmeier to "urge that Congress exercise the same restraint employed in 1984 and avoid any legislative intervention in an area in which innovative and responsive administrative action has already been taken."<sup>149</sup>

On a positive note, however, Congress did commission a study to address a number of the same issues discussed in this Article. Congress required the

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141. Levin H. Campbell & Denis J. Hauptly, *A Preliminary View of the Problems That Have Led to Proposals for Change*, in 2 FEDERAL COURTS STUDY COMMITTEE: WORKING PAPERS AND SUBCOMMITTEE REPORTS Part III(A), 3 (1990).

142. Jeffrey Barr, *Intercircuit Conflicts: An Overview*, in 2 FEDERAL COURTS STUDY COMMITTEE: WORKING PAPERS AND SUBCOMMITTEE REPORTS Part II(C), 5 (1990).

143. Campbell & Hauptly, *supra* note 141, at 3-4.

144. FCSC REPORT, *supra* note 137, at 125.

145. *Id.*

146. *Id.* at 125-26. The FCSC also recommended that the Judicial Conference of the United States monitor the project. *Id.* at 126.

147. *Id.* at 126.

148. See Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, Title III, 104 Stat. 5089, 5104 (1990).

149. Letter from Gwendolyn S. King, Commissioner of Social Security, to Congressman Robert W. Kastenmeier (Oct. 31, 1990) (on file with Author). The action to which Commissioner King refers is a set of regulations which the SSA recently drafted on nonacquiescence. See *infra* note 157 and accompanying text.

Federal Judicial Center to submit by January 1, 1992, a study of intercourt conflicts which considers, *inter alia*, whether such a conflict

- (2) encourages forum shopping among circuits;
- (3) creates unfairness to litigants in different circuits, as in allowing Federal benefits in one circuit that are denied in other circuits; or
- (4) encourages nonacquiescence by Federal agencies in the holdings of the courts of appeals for different circuits. . . .<sup>150</sup>

This may signal a new willingness on the part of Congress to solve issues underlying administrative agency nonacquiescence.

### C. *Some Thoughts on a Legislative Solution*

The Congressional and FCSC efforts demonstrate that practicable legislation is conceivable. The following brief discussion suggests a few features of legislation that could be aimed generally at agency nonacquiescence and more specifically at the particular situation of the INS. First, a source of intracircuit nonacquiescence may be eliminated by restricting venue choice provisions. As discussed above,<sup>151</sup> venue choice represents statutorily authorized forum-shopping which places the Board in a difficult adjudicative position and raises the distinct likelihood of intracircuit nonacquiescence. In deportation cases, for example, one possibility would be to limit venue to the circuit in which the hearing occurred.<sup>152</sup>

Second, as a general matter, intercourt nonacquiescence should be accepted as part of an agency litigation strategy that seeks eventually to achieve nationwide uniformity of administration. The problem, of course, is that the intercourt conflicts that are created<sup>153</sup> do not get resolved by the Supreme Court in a timely fashion. Here, the FCSC's experimental program could be most beneficial. If the Supreme Court had discretion to decide which conflicts deserve immediate resolution by review in the Supreme Court or an en banc court of appeals, it would be able to determine whether more dialogue is desirable or whether immediate resolution is justified.<sup>154</sup> This solution is both

150. Pub. L. No. 101-650, 104 Stat. 5104 (1990).

151. See *supra* notes 96-101 and accompanying text.

152. To mitigate the possibility of INS forum-shopping, see *Maldonado-Cruz v. INS*, 883 F.2d 788, 791 (9th Cir. 1989) (espousing a "general policy of preventing forum shopping by the INS"), the agency should be required to bring an alien to the district office nearest the point of apprehension for the deportation hearing. Otherwise, it is conceivable that the INS could transport the alien to a circuit which had produced rulings favorable to the agency.

153. It is evident from the cases cited *supra* notes 85-86 that intercourt conflicts are common in immigration law.

154. "[T]he Supreme Court's active participation in the experiment will make it possible to find out whether there are many or only a few conflicts that are both unsuitable for Supreme Court review and nonetheless deserve national resolution. This is a judgment call which the Court is uniquely suited to make." FCSC REPORT, *supra* note 137, at 127.

## Nonacquiescence in Immigration Decisions

responsive to the need of the INS to shoulder its massive administrative burdens and society's interest in establishing nationwide uniformity.<sup>155</sup>

Third, intracircuit nonacquiescence could be addressed by drawing from both the Act and the FCSC's pilot program. Intracircuit nonacquiescence could be permitted where the INS claims in good faith that it is seeking further review of a particular legal issue.<sup>156</sup> However, if the INS is unsuccessful in two circuits on the same question of law, it would be required to request the Solicitor General to file a petition for certiorari and be subject to an en banc review process. Thus, under limited circumstances, the agency would be entitled to maintain its position but the courts would be empowered to act quickly to limit any undesirable effects of the intracircuit nonacquiescence.

Finally, the INS should establish regulations to govern its nonacquiescence practice. The SSA recently published just such a set of regulations.<sup>157</sup> While unsatisfactory to some,<sup>158</sup> the regulations at least made the SSA position explicit and provided a forum for public comment. By self-imposing certain restrictions, an agency perhaps gains respectability with the courts, and both litigants and the general public are informed.

Thus, a solution to nonacquiescence should involve Congress, courts and administrative agencies. This multilateral approach ensures that the relevant viewpoints are represented and encourages a satisfactory balance between bureaucratic and rule of law values. With a little luck, the data to be accumulated by the Federal Judicial Center<sup>159</sup> will prompt Congress to initiate this process.

## IV. CONCLUSION

While nonacquiescence is the subject of a great deal of legal scholarship, there can be little doubt that its significance extends far beyond the pages of law reviews. In any one of the several forms of nonacquiescence, an individual litigant is denied the benefit of a legal rule, and in the case of immigration matters, the consequences can be devastating. This Article has attempted to

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155. While concerns exist about any given circuit's expertise in immigration matters, *see supra* note 51, that should not be a reason to reject the en banc process and deny the circuit an opportunity to gain expertise.

156. Thus, an agency would not be required, as the Act mandates, to appeal the first adverse decision or be forced to acquiesce nationwide. Instead, the agency could choose to appeal a different case which presents the same legal question. Evidence of good faith could be supplied, for example, by a request that the Solicitor General assist in selecting a proper vehicle for review. Given the previously identified costs of intracircuit nonacquiescence, *see supra* notes 53-58 and accompanying text, the standards here should be strict.

157. 20 C.F.R. § 404.985 (1990).

158. *See, e.g.*, Murphy, *supra* note 127, at 4 ("crabbed and contemptuous" regulations).

159. *See supra* note 150 and accompanying text.



describe the phenomenon of nonacquiescence in immigration law and suggest the contours of a permissible nonacquiescence policy.

In concluding, it is important to recognize the broader implications of the nonacquiescence debate in the immigration context. Immigration issues pose the most basic questions of societal identity. Immigration law is, after all, the method by which we decide who may become part of our nation. The responsibility for adjudicating what the law is falls ultimately on the courts, while the duty of efficiently executing a far-reaching and complicated statute lies with the INS. Nonacquiescence embodies the conflicts that arise between the two institutions. While it is indisputable that both the courts and the INS have a role to play in developing immigration law, it remains unclear how best to balance their equally critical mandates. How the conflict is resolved will determine in large measure the relative power of court and administrative agency, the manner in which immigration laws will be interpreted and applied, and ultimately, the make-up of American society.