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Schweiker v. Hansen: Equitable Estoppel Against the Government

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RECENT DEVELOPMENT

Schweiker v. Hansen: Equitable Estoppel Against the Government

The doctrine of equitable estoppel precludes a litigant who wrongfully induced another to change adversely his position from asserting a right or a defense.[1] Traditionally, courts have refused to apply this doctrine against the government,[2] holding that "erroneous, unauthorized, or illegal acts or advice" of government agents are insufficient bases for estoppel.[3] Consequently, individuals with claims against the government often have suffered wrongs that courts would not have tolerated if the litigants were both private parties.[4] Although some federal courts have shown a willingness to depart from this rule against estoppel,[5] no consistent theory of when the doctrine may be invoked against the government has emerged. The Supreme Court has indicated that "affirma-

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1 As defined in 3 J. POMEROY, EQUITY JURISPRUDENCE § 804 (5th ed. 1941), equitable estoppel is

> the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.

The six traditional elements of equitable estoppel are as follows:

> 1. There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts. 2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon by him. 4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party. . . . 5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. 6. He must in fact act upon it in such a manner as to change his position for the worse. . . .

Id. § 805 (emphasis omitted).

2 Although this discussion is limited to the federal government, the reluctance of courts to estop the government and the rationale that supports governmental estoppel, apply equally to state and local governments. *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 17.05-.06 (1958). *See generally* Comment, *Estoppel Against State, County, and City,* 23 WASH. L. REV. 51 (1948).

3 Comment, *Emergence of an Equitable Doctrine of Estoppel Against the Government—The Oil Shale Cases,* 46 U. COLO. L. REV. 433, 442-43 (1975). *See* notes 36-37 *infra*.

4 "When a private organization is involved, the only consideration in deciding an estoppel question is the relative equities between that organization and the party whom it has misled." Hansen v. Harris, 619 F.2d 942, 959 (2d Cir. 1980) (Newman, J., concurring) *rev'd sub nom.* Schweiker v. Harris, 450 U.S. 785 (1980).

5 *See* notes 46-47 *infra*.

tive misconduct" by a government agent may give rise to estoppel,[6] but has failed to elaborate on this analysis.

In *Schweiker v. Hansen*,[7] the Supreme Court reversed per curiam the Second Circuit's application of equitable estoppel against the government.[8] The Second Circuit had estopped the government from enforcing a statutory requirement of a written application for social security benefits.[9] The Second Circuit's application of equitable estoppel marked a departure from traditional notions of affirmative misconduct, and added a new twist to equitable estoppel by distinguishing actions involving substantive requirements from those involving procedural requirements. Although the Supreme Court correctly rejected the Second Circuit's standards for equitable estoppel, its summary disposition of *Hansen* was inappropriate in light of the confusion among lower courts regarding the requirement of affirmative misconduct. The Court, by factually distinguishing *Hansen* from other lower court decisions estopping the government,[10] once again avoided providing the lower courts with a workable standard that accounts for the interests of all parties affected by a particular application of equitable estoppel. This Note examines these interests and proposes a two-tiered analysis for determining when a court should apply equitable estoppel against the government.

I
HISTORICAL PERSPECTIVE

The government's immunity from equitable estoppel derives from the concept of sovereign immunity.[11] Courts feared that applying equitable estoppel against the government would interfere with policymak-

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6 *See* notes 25-34 and accompanying text *infra*.

7 450 U.S. 785 (1981).

8 *See* Hansen v. Harris, 619 F.2d 942 (2d Cir. 1980).

9 *Id.* at 948-49.

10 450 U.S. at 788-89.

11 *See, e.g.,* Trustees of Phillips Exeter Academy v. Exeter, 90 N.H. 472, 495, 27 A.2d 569, 586 (1940) ("[T]he principle of sovereignty . . . would seem to defeat a claim of estoppel. . . ."). The idea that the sovereign cannot be estopped originated in England. The justification was that " 'the King cannot be estopped, for it cannot be presumed the King would do wrong to any person. . . .' " 16 HALSBURY'S LAWS OF ENGLAND ¶ 1695 n.8 (4th ed. 1976) (quoting 3 M. BACON, NEW ABRIDGEMENT OF THE LAW 442). One commentator disputed this notion, and called it "a prerogative fallacy." Farrer, *A Prerogative Fallacy—"That the Crown is not Bound by Estoppel,"* 49 LAW Q. REV. 511, 511 (1933). Another has stated that "[t]here is no trace of a decision holding that the King is not bound by equitable estoppel." H. STREET, GOVERNMENTAL LIABILITY 157 (1953).

Early in the history of the United States, the government was liable neither for breaches of contract nor for its agents' torts. Estoppel of the government because of agents' acts was inconsistent with the doctrine of sovereign immunity. K. DAVIS, *supra* note 2, § 17.01; Berger, *Estoppel Against the Government,* 21 U. CHI. L. REV. 680, 683 (1959); Comment, *Never Trust a Bureaucrat: Estoppel Against the Government,* 42 S. CAL. L. REV. 391, 393-95 (1969).

ing and other necessary government functions.[12] Although the doctrine of sovereign immunity has eroded[13] and criticism of the government's immunity from equitable estoppel has grown,[14] courts have yet to develop a consistent approach for determining when they should apply estoppel against the government.[15]

Courts first encroached upon the government's immunity from estoppel when the government was acting in its proprietary rather than sovereign capacity.[16] In *Federal Crop Insurance Corp. v. Merrill,*[17] however, the Supreme Court rejected this distinction, stating that the "[g]overnment is not partly public or partly private, depending upon . . . a particular activity or the manner in which the Government con-

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12 *See, e.g.,* American Surety Co. v. United States, 112 F.2d 903, 906 (10th Cir. 1940) (estoppel rejected where its application would thwart public policy); Elrod Slug Casting Mach. Co. v. O'Malley, 57 F. Supp. 915, 920 (D. Neb. 1944) (estoppel against Internal Revenue officer would interfere with revenue assessment and collection).

13 In 1958, Professor Davis summarized this erosion:

> A century ago, sovereign immunity was strong and clear. During the past century, sovereign immunity has been largely crumbling, and today only remnants remain. True, some of the remnants seem likely to endure for some time to come. But the direction of movement is never in doubt. Among the remnants of sovereign immunity is the notion, which still usually prevails, that estoppel cannot run against the government.

K. DAVIS, *supra* note 2, § 17.01. In 1976, Professor Davis commented that the question was no longer whether estoppel could be applied against the government, but rather when it should be applied. 1 K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 17.01 (1976).

The Supreme Court has recognized "a steadily growing policy of governmental liability." Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 396 (1939). Federal statutes also have diminished the effect of sovereign immunity. *See, e.g.,* Federal Tort Claims Act of 1946, 28 U.S.C. §§ 2671-2680 (1976). *See also* 6 U. RICH. L. REV. 397 (1972). For many years, state courts have expressed their disfavor with sovereign immunity. *See, e.g.,* Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 387, 381 P.2d 107, 109 (1963) (state can be liable in tort actions); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961) (rejecting governmental immunity from tort liability); Evans v. Board of County Comm'rs, 174 Colo. 97, 482 P.2d 968 (1971) (defense of sovereign immunity judicially abrogated).

14 *See, e.g.,* Berger, *supra* note 11; Newman, *Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law,* 53 COLUM. L. REV. 374 (1953); Pillsbury, *Estoppel Against the Government,* 13 BUS. LAW. 508 (1958); Note, *Equitable Estoppel of the Government,* 79 COLUM. L. REV. 551 (1979); Note, *The Proper Case for Estoppel Against Federal Administrative Agencies,* 28 NOTRE DAME LAW. 234 (1953); Comment, *supra* note 11; Comment, *supra* note 3.

15 *See* notes 43-45 and accompanying text *infra*.

16 The Falcon, 19 F.2d 1009, 1014 (D. Md. 1927) (government may be estopped for "acts done in its proprietary capacity"); Elrod Slug Casting Maeh. Co. v. O'Malley, 57 F. Supp. 915, 920 (D. Neb. 1944) ("[T]he defense of . . . estoppel may be made sparingly . . . against the government in transactions involving its proprietary functions . . . ."); *see* Cooke v. United States, 91 U.S. 389, 398 (1875) ("[A] government may suffer loss through the negligence of its offieers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there."). For an explanation of how other restrictive rules invoked by courts have limited severely the impact of the sovereign-proprietary distinction, see Comment, *supra* note 3, at 442-44.

17 332 U.S. 380 (1947).

ducts it."[18] In *Merrill,* a farmer had relied upon a government agent's statement that the farmer's crop was insurable, when in fact it was not.[19] After drought destroyed his crop,[20] the farmer tried to recover from the government. Notwithstanding the agent's erroneous advice, the Court denied relief. Justice Frankfurter, writing for the majority, held that anyone dealing with the government "takes the risk of having accurately ascertained that [the government agent has stayed] within the bounds of his authority"[21] as that authority is defined by statutes and regulations. The Court found that the relevant regulations, published in the Federal Register,[22] had the force of law[23] and thus precluded the farmer from recovering.[24]

Although the Supreme Court has never expressly estopped the government,[25] it has left open the possibility that official misconduct may

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18 *Id.* at 383-84. Apparently ignoring the language in *Merrill,* courts have continued to distinguish between the government acting in a sovereign and a proprietary capacity. *See, e.g.,* United States v. Florida, 482 F.2d 205, 209 (5th Cir. 1973) (federal government conveyance of land is a governmental not proprietary act); Air-Sea Brokers, Inc. v. United States, 596 F.2d 1008, 1011 (C.C.P.A. 1979) (government acting in sovereign capacity when collecting or refunding duties on imports).

In United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970), the court applied the estoppel doctrine in a government suit to enforce a contract. The Ninth Circuit recognized that the distinction between sovereign and proprietary functions is not clear-cut:

> While it is said that the Government can be estopped in its proprietary role, but not in its sovereign role, the authorities are not clear about just what activities are encompassed by each. In its proprietary role, the Government is acting as a private concern would; in its sovereign role, the Government is carrying out its unique governmental functions for the benefit of the whole public.

Id. at 101.

19 A representative of the Federal Crop Insurance Corporation had assured the farmer that he could insure his reseeded winter wheat under the Federal Crop Insurance Act, 7 U.S.C. §§ 1501-1520 (1976) (original version at ch. 30, § 501, 52 Stat. 72 (1938)). The Corporation's regulations, however, had provided no protection for spring wheat planted on reseeded winter wheat acreage. *See* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 381 (1947).

20 332 U.S. at 382.

21 *Id.* at 384. Although the *Merrill* Court never mentioned equitable estoppel, several cases have cited *Merrill* as supporting a restrictive application of estoppel against the government. *See, e.g.,* Leimbach v. Califano, 596 F.2d 300, 305 (8th Cir. 1979); United States v. Lazy FC Ranch, 481 F.2d 985, 988 (9th Cir. 1973).

22 10 Fed. Reg. 1586, 1591 (1945).

23 332 U.S. at 384-85.

24 *Id.* at 386. The dissent argued that "it is an absurdity to hold that every farmer who insures his crops knows what the Federal Register contains or even knows that there is such a publication." *Id.* at 387 (Jackson, J. dissenting). For a criticism of *Merrill* and the cases upon which it relied, see Note, *Governmental Immunities - A Study in Misplaced Solicitude,* 16 U. CHI. L. REV. 128 (1948).

25 Some commentators and courts, however, have read Moser v. United States, 341 U.S. 41 (1951), as a case in which the Supreme Court estopped the government. *See, e.g.,* United States v. Lazy FC Ranch, 481 F.2d 985, 988-89 (9th Cir. 1973); K. DAVIS, *supra* note 2, § 17.02. In *Moser,* the petitioner had claimed exemption from military service as a neutral alien. Although a federal statute barred him from citizenship, the Court held that the petitioner could be naturalized because of "the misleading circumstances" that had led him to

justify its application. The petitioner in *Montana v. Kennedy*[26] was born in Italy because a United States official had denied his pregnant mother a passport to reenter the United States.[27] The petitioner argued that because of the official's misconduct, the government was estopped from asserting the petitioner's foreign birth in order to deny him citizenship.[28] The Court disagreed. Without elaboration, it held that the official's action fell "far short of misconduct" that could trigger estoppel.[29]

In *INS v. Hibi,*[30] the Supreme Court again suggested that affirmative misconduct by a government official might justify estoppel against the government. In *Hibi,* a Filipino alien requested naturalization under the Nationality Act of 1940[31] more than seventeen years after the time limit for such requests had expired.[32] He contended that the government was estopped from enforcing the Act's time limit because it had neither advised him of his rights nor stationed a naturalization official in the Philippines during the period of his eligibility.[33] The Court found no "affirmative misconduct" by the government, but failed to articulate the type of misconduct necessary to justify estoppel.[34]

Several federal courts of appeals have interpreted *Montana* and *Hibi* to require a finding of affirmative misconduct on the part of government officials as a precondition to applying equitable estoppel against the government.[35] Although they have yet to set the parameters of affirma-

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believe that the military exemption would not affect his eligibility for citizenship. 341 U.S. at 47. The Court, holding that the petitioner did not knowingly waive his rights to citizenship, found "no need to evaluate these circumstances on the basis of any estoppel of the Government." *Id.*

26 366 U.S. 308 (1961).

27 *Id.* at 314. Petitioner's American-born mother, whose husband was an Italian citizen, was residing in Italy during her pregnancy. She testified that an American consular officer's refusal to issue her a passport because of her pregnancy prevented her return to the United States. The Court noted that "the United States did not require a passport for a citizen to return to the country" at the time of her request. *Id.*

28 *Id.*

29 *Id.* at 314-15. Petitioner's mother further testifed that the official said, " 'I am sorry, Mrs., you cannot [return to the United States] in that condition.' " *Id.* at 314. In stating that the official's remarks to petitioner's mother might have been "well-meant advice," *id.*, the Court implied that the comment referred to health concerns rather than legal obligations, and concluded the official did not expect her to rely on his statement.

30 414 U.S. 5 (1973).

31 Nationality Act of 1940, ch. 876, 54 Stat. 1137 (repcaled 1952). The Act allowed aliens who served in the United States military during World War II to become naturalized citizens.

32 414 U.S. at 7.

33 *Id.* at 7-8.

34 *Id.* at 8-9. The three dissenting Justices argued that the failure by United States officials to publicize the rights of eligible aliens under the Act, and their deliberate failure to post a naturalization officer in the Philippines constituted misconduct sufficient to invoke the estoppel doctrine. *Id.* at 9-11 (Douglas, J., dissenting).

35 *See, e.g.,* Oki v. INS, 598 F.2d 1160, 1162 (9th Cir. 1979) (failure of government officials to inform alien of requirement not affirmative misconduct); Leimbach v. Califano, 596 F.2d 300, 305 (8th Cir. 1979) (Social Security Administration agent's misinforming applicant

tive misconduct, courts generally have held that mistakes of law,[36] erroneous advice, and misrepresentations by government agents do not constitute misconduct sufficient to estop the government.[37] This position parallels the notion that the unauthorized acts of its agents do not bind the government.[38] Federal agents may act only within the limits Congress has prescribed in its delegation of authority. Any action be-

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not affirmative misconduct); Simon v. Califano, 593 F.2d 121, 123 (9th Cir. 1979) (negligence of agent in incorrectly filling out applicant's application not affirmative misconduct); United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978) (government could not be estopped from asserting title to land absent showing of affirmative misconduct), *cert. denied,* 442 U.S. 917 (1979); Sun Il Yoo v. INS, 534 F.2d 1325, 1329 (9th Cir. 1976) (INS's delay in determining alien's correct status constituted affirmative misconduct); Corniel-Rodriguez v. INS, 532 F.2d 301, 306-07 (2d Cir. 1976) (agent's violation of regulation was affirmative misconduct); Santiago v. INS, 526 F.2d 488, 493 (9th Cir. 1975) (en banc) (admission of excludable alien did not constitute affirmative misconduct), *cert. denied,* 425 U.S. 971 (1976).

36 *See, e.g.,* Automobile Club v. Commissioner, 353 U.S. 180, 183 (1957) (equitable estoppel does not prevent Commissioner from correcting mistake of law); Schafer v. Helvering, 83 F.2d 317, 320 (D.C. Cir.) ("Whoever deals with the government does so with notice that no agent can, by neglect or acquiescence, commit it to an erroneous interpretation of the law."), *aff'd,* 299 U.S. 171 (1936). *But see* Schuster v. Commissioner, 312 F.2d 311, 317-18 (9th Cir. 1962) (Commissioner estopped from asserting tax liability of trustee that distributed assets of trust funds in reliance on Commissioner's determination that trust property was not taxable).

37 *See* Cheers v. HEW, 610 F.2d 463 (7th Cir. 1979), *cert. denied,* 449 U.S. 898 (1980) (incorrect information causing claimant to delay filing for Social Security Administration benefits did not estop government); Leimbach v. Califano, 596 F.2d 300 (8th Cir. 1979) (agent's erroneous statement did not estop government from enforcing written application requirement); Goldberg v. Weinberger, 546 F.2d 477 (2d Cir. 1976) (government could not be estopped from denying Social Security Administration benefits to plaintiff who became ineligible because of reliance on agent's representations), *cert. denied,* 431 U.S. 937 (1977); Parker v. Finch, 327 F. Supp. 193, 195 (N.D. Ga. 1971) (agent's misinformation will not estop government from enforcing written application requirement); Flamm v. Ribicoff, 203 F. Supp. 507, 510 (S.D.N.Y. 1961) (same); Brant v. United States, 597 F.2d 716, 720-21 (Ct. Cl. 1979) (agent's misrepresentation that retired military officers were eligible for housing allowance does not bind government). *See generally* Note, *supra* note 14, at 237-44.

38 Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947) ("[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."); United States v. San Francisco, 310 U.S. 16, 32 (1940); Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917) ("[T]he United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."). *See generally* Saltman, *Estoppel Against the Government: Have Recent Decisions Rounded the Corners of the Agent's Authority Problem in Federal Procurements?,* 45 FORDHAM L. REV. 497 (1976).

The Ninth Circuit has explicitly rejected the unauthorized act rule. In Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970), appellants had submitted a noncompetitive oil and gas lease offer to a regional Land Management Office. The Land Office rejected the offer because of an error in form, but allowed appellants 30 days to resubmit the offer. Relying on this promise, appellants chose to submit a revised offer instead of appealing the rejection. Subsequently, the Secretary of the Interior ruled that the Land Office's promise had been unauthorized and that the appellants' failure to appeal deprived them of any right to assert the validity of the original offer. *Id.* at 55. The court held that the Secretary was estopped from disclaiming the Land Office's promise even though the promise was "unauthorized by statute, regulation, or decision." *Id.* at 56. The court, however, based the estoppel on due process grounds, finding that the appellants were denied the right to appeal. *Id.* at 57.

yond such limits contravenes the principle of separation of powers.[39] Thus, if the government is estopped from enforcing a valid statute once a government agent acts outside the scope of his authority, then the agency represents, in effect, a legislative force.[40] Another related argument involves the preservation of the government's revenue functions;[41] particularly in tax cases, an estoppel against the government could seriously threaten the public treasury.[42]

The prevailing approach to equitable estoppel of the government fails to weigh adequately the interests of each party in a dispute. Although some courts have recognized governmental interests as legitimate, such as protection of the public treasury and enforcement of statutory requirements, they usually overlook the predicament of the individual who has relied on the government's error.[43] In addition, the

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39 *See* Berger, *supra* note 11, at 686. For a discussion of the constitutional considerations in the use of estoppel, see Note, *Equitable Estoppel of the Government,* 79 COLUM. L. REV. 551, 565-67 (1979).

40 Professor Berger observes:

> Administrators are clothed with authority to act and make rules by the exercise of legislative power; and such legislative power is exercisable only by Congress. It cannot be exercised by an administrator; no administrator may do that which is forbidden, nor exercise a power that was withheld. The fact that a citizen was injured by his action does not clothe an administrator with legislative power, i.e., with the power to assume an authority that has been withheld or prohibited.

Berger, *supra* note 11, at 686.

41 *See* Elrod Slug Casting Mach. Co. v. O'Malley, 57 F. Supp. 915, 920 (D. Neb. 1944) (estoppel against internal revenue officer would interfere with revenue assessment and collection); Couzens v. Commissioner, 11 B.T.A. 1040, 1151 (1928) (estoppel in tax cases should only be applied in "the most extraordinary case"). *See also* Automobile Club v. Commissioner, 353 U.S. 180, 183 (1957) ("The doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law."). Some courts have been willing to apply estoppel against the Internal Revenue Service (IRS). *See, e.g.,* Miller v. United States, 500 F.2d 1007 (2d Cir. 1974) (IRS estopped from raising statute of limitations); Walsonavich v. United States, 335 F.2d 96, 101 (3d Cir. 1964) (government estopped from raising statute of limitations because of Commissioner's agreement with taxpayer); Schuster v. Commissioner, 312 F.2d 311 (9th Cir. 1962) (Commissioner estopped from asserting liability of bank for unpaid estate taxes). For a discussion of why the IRS should be subject to estoppel, see Comment, *supra* note 11, at 398-99. *See generally* Manning, *The Application of the Doctrine of Estoppel Against the Government in Federal Tax Cases,* 30 N.C.L. REV. 356 (1952); Note, *The Emerging Concept of Tax Estoppel,* 40 VA. L. REV. 313 (1954).

42 In Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385 (1947), for example, the Supreme Court declared that it is "the duty of all courts to observe the conditions defined by Congress for charging the public treasury."

In one instance, the Supreme Court suggested that the availability of estoppel might engender acts of collusion between government officials and private parties. Lee v. Munroe, 11 U.S. (7 Cranch) 366 (1813). Collusion by federal officers, however, has been rare. Berger, *supra* note 11, at 684.

43 *See, e.g.,* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385 (regulations binding "regardless of actual knowledge . . . or of the hardship resulting from innocent iguorance"); Cheers v. Secretary of HEW, 610 F.2d 463, 469 (7th Cir. 1979), *cert. denied,* 449 U.S. 898 (1980); Leimbach v. Califano, 596 F.2d 300, 304-05 (8th Cir. 1979); Goldberg v. Weinberger, 546 F.2d 477, 481 (2d Cir. 1976), *cert. denied,* 431 U.S. 937 (1977); Flamm v. Ribicoff, 203 F. Supp. 507, 510 (S.D.N.Y. 1961).

current approach focuses on concerns unrelated to the governmental interests that courts seek to protect. The "unauthorized act" justification allows a court to dispose of a claim of estoppel without examining the actual threat to the public treasury or the statutory scheme.[44] Similarly, the requirement of affirmative misconduct fails to focus on the nature of the harm resulting from the misconduct.[45]

Although some courts have provided relief to private parties in cases of extreme injustice,[46] they have failed to improve upon the predominant modes of analysis.[47] In *Corniel-Rodriguez v. INS,*[48] for example, the Second Circuit carved an exception to the rule that misinformation

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44 *See* notes 38-40 and accompanying text *supra*.

45 *See* notes 25-34 and accompanying text *supra*. At least one court has implied that an agent's act does not constitute affirmative misconduct if the act is unauthorized. Leimbach v. Califano, 596 F.2d 300, 304-05 (8th Cir. 1979).

46 *E.g.,* Corniel-Rodriguez v. INS, 532 F.2d 301 (2d Cir. 1976) (government estopped from asserting alien's noncompliance with immigration requirement); United States v. Wharton, 514 F.2d 406 (9th Cir. 1975) (government estopped from asserting untimeliness of application for deed); Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970) (Secretary of the Interior estopped from disavowing Land Manager's statement); United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970) (government estopped from enforcing contract with lumber company); Gestuvo v. District Director of INS, 337 F. Supp. 1093 (C.D. Cal. 1971) (INS estopped from denying alien's preference classification); Emeco Indus., Inc. v. United States, 485 F.2d 652 (Ct. Cl. 1973) (government estopped from denying existence of supply contract).

47 The Ninth Circuit, while recognizing that Supreme Court precedent does not provide a clear standard for proper application of estoppel against the government, has found in that precedent an implicit rejection of "the contention that under no circumstances may estoppel lie against the government." United States v. Ruby Co., 588 F.2d 697, 702 (9th Cir. 1978), *cert. denied,* 442 U.S. 917 (1979). Consequently, the Ninth Circuit has exhibited a willingness to depart from traditional restrictions in estoppel cases. *E.g.,* United States v. Lazy FC Ranch, 481 F.2d 985, 989 (9th Cir. 1973) (government may be estopped even in its sovereign capacity); Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970) (government estopped from disavowing agent's unauthorized representation). Prior to the Supreme Court's decision in INS v. Hibi, 414 U.S. 5 (1973), the Ninth Circuit applied a two-part analysis to determine the appropriateness of estopping the government. First, the court required that four elements of estoppel be present:

> (1) The party to be estopped must know the facts;
> (2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;
> (3) The latter must be ignorant of the true facts; and
> (4) He must rely on the former's conduct to his injury.

United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978), *cert. denied,* 442 U.S. 917 (1979); *see* note 107 *infra*. In addition, the court applied a balancing test, weighing the potential for "the government's wrongful conduct . . . to work a serious injustice" against any damage to the public's interest that the application of estoppel might cause. United States v. Lazy FC Ranch, 481 F.2d 985, 989 (9th Cir. 1973). *See also* Comment, *Estoppel and Government,* 14 GONZ. L. REV. 597, 603-07 (1979); Comment, *supra* note 3, at 446-51. Since the *Hibi* decision, the Ninth Circuit has also required a showing of affirmative misconduct. *E.g.,* United States v. Ruby, 588 F.2d 697, 703-04 (9th Cir. 1978), *cert. denied,* 442 U.S. 917 (1979); Santiago v. INS, 526 F.2d 488, 492-93 (9th Cir. 1975) (en banc), *cert. denied,* 425 U.S. 971 (1976). The court, however, has failed to develop consistent standards for either the affirmative misconduct requirement or the balancing test. *See* note 86 *infra*. *See generally* 1976 UTAH L. REV. 371, 380-85.

48 532 F.2d 301 (2d Cir. 1976).

does not constitute affirmative misconduct. In *Corniel,* the government sought to deport an alien who had become ineligible for "special immigrant" status by marrying three days before her admission to the United States.[49] The consular officer had failed to warn her of a statutory requirement that she be unmarried, contrary to a federal regulation that required such advance warning. The Second Circuit emphasized the official's noncompliance with the regulation,[50] and held that his failure to warn constituted affirmative misconduct.[51] Nevertheless, the court carefully limited its holding to the "extraordinary circumstances" of the case.[52]

II

HANSEN V. HARRIS

In 1974, a Social Security field representative interviewed Ann Hansen, a divorced mother, to determine her eligibility for mother's insurance benefits.[53] Based on the information that Mrs. Hansen provided, the representative informed her that she was ineligible for the benefits.[54] Consequently, Mrs. Hansen did not file a written application for the benefits as required by statute.[55] One year later, Mrs. Hansen

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49 *Id.* at 302-03. The Immigration and Nationality Act requires that a minor alien applying for "special immigrant" status be "an unmarried person under twenty-one years of age." 8 U.S.C. § 1101(b)(1) (1976).

50 532 F.2d at 306-07. The regulation provides: "The consular officer shall warn an alien, when appropriate, that he will be inadmissible as such an immigrant if he is not unmarried at the time of application for admission . . . ." 22 C.F.R. § 42.122(d) (1981).

The court's emphasis on the officer's noncompliance with the regulation distinguishes *Corniel* from the *Merrill* line of cases, which maintain that misinformation or erroneous advice will not give rise to estoppel. *See* note 37 and accompanying text *supra*. Unlike the *Merrill* line of cases, the *Corniel* court found that the agent's failure to comply with the regulation constituted affirmative misconduct. The court's holding necessarily rejects the unauthorized act rule, because the official clearly was unauthorized to disobey the regulation.

51 532 F.2d at 306-07.

52 *Id.* at 307 n.18. The court noted that it did not intend that "noncompliance with any regulation, no matter how minor its impact or importance" would estop the government. *Id.* One factor that the court considered was the availability of a simple and inexpensive way to inform aliens of the nonmarriage requirement. *Id.* at 307 nn.17-18.

53 *See* 42 U.S.C. § 402(g)(1) (1976).

54 Hansen v. Harris, 619 F.2d 942, 946 (2d Cir.), *rev'd sub nom.,* Schweiker v. Harris, 450 U.S. 785 (1980). The only record of the meeting was the representative's daily log, which included Mrs. Hansen's name, the last name of her sons, and the notation "P/AD," an abbreviation for "post-adjudication action." This notation indicated that the representative thought that Mrs. Hansen's claim had already been determined adversely. *Id.* at 944. The only evidence of the content of Mrs. Hansen's interview was her own testimony before an administrative law judge. *Id.* at 944-45.

55 *Id.* at 946. 42 U.S.C. § 402(g)(1) (1976) provides in pertinent part:

discovered that she had been eligible and filed a written application.[56] The Social Security Administration (SSA), in accordance with the statute, granted her benefits retroactive one year from the date of written application.[57] Mrs. Hansen then filed a claim against the government to recover the additional benefits for the year preceding her initial interview with the representative.

Affirming the district court's award on other grounds,[58] a divided Second Circuit held that the government was estopped from requiring the application to be in writing. The court determined that the SSA representative's misinformation and his failure to encourage Mrs. Hansen to file a written application amounted to governmental "misconduct."[59] The majority noted that courts often distinguish between a "mere failure to provide accurate information" and affirmative misconduct in deciding whether to estop the government.[60] The Second Circuit found no affirmative misconduct in terms of an "intentional violation of a rule having the force of law."[61] Nonetheless, it concluded that where "misinformation provided by a Government official com-

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> The widow and every surviving divorced mother . . . of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—
>
> . . . .
>
> (D) has filed application for mother's insurance benefits. . . .
>
> . . . .
>
> shall . . . be entitled to a mother's insurance benefit for each month, beginning with the first month . . . in which she becomes so entitled. . . .

20 C.F.R. § 404.601 (1979) provides:

> (a) *Claimant defined.* The term "claimant" for purposes of this subpart refers to the individual who has filed on his own behalf, . . . an application for monthly benefits. . . .
>
> . . . .
>
> (d) *Filing of Application on prescribed form.* Except as provided . . . an individual has not "filed an application" for purposes . . . of the Act until an application on a form prescribed in § 404.602 has been filed . . . .

Cf. 20 C.F.R. §§ 404.602, 404.603, 404.610 (1981) (restructured version).

56 619 F.2d at 944-45.

57 *Id.* at 945. 42 U.S.C. § 402(j)(1) (1976) provides:

> An individual who would have been entitled to a benefit under . . . this section for any month after August 1950 had he filed application therefor prior to the end of such month shall be entitled to such benefit for such month if he files application therefor prior to the end of the twelfth month immediately succeeding such month.

Relying on the regulation and the statutory requirements, the administrative law judge denied Mrs. Hansen's claim for benefits retroactive to the time of her oral inquiry. The Appeals Council upheld this decision. 619 F.2d at 946.

58 The district court awarded the retroactive benefits to Mrs. Hansen on the ground that the regulation requiring a written application was "unreasonably restrictive." 619 F.2d at 946.

59 619 F.2d at 948-49. The court found that the agent's conduct "falls short of intentional deception but does constitute affirmative misinformation." *Id.* at 947.

60 *Id.* at 948.

61 *Id.* The court probably was referring to Corniel-Rodriguez v. INS, 532 F.2d 301 (2d Cir. 1976). *See* notes 48-52 and accompanying text *supra*.

bined with a showing of misconduct"[62] accompanies a "source of objective standards"[63] to guide such conduct, the government may be estopped from enforcing a procedural statutory provision.

The representative's only affirmative act was his statement to Mrs. Hansen that she was ineligible for benefits.[64] Although the evidence did not indicate clearly whether the representative was responsible for this error,[65] the court supported its finding of misconduct by relying on a provision of the Social Security Claims Manual that directs a representative not to deter an individual from filing because he is ineligible for benefits.[66] The court conceded that the provision lacked the force of law, but distinguished procedural and substantive statutory requirements:

> [H]ere we are talking about a procedural requirement: the necessity of filing a written as opposed to an oral application. [Mrs. Hansen] was at all times "substantively" eligible in the sense that she was in the class of people that Congress intended to benefit. . . . [T]here is a distinction between substantive ineligibility, on the one hand, and

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62 619 F.2d at 948.

63 *Id.* at 949.

64 *See id.* at 946-47.

65 The government argued that Mrs. Hansen failed to meet the prerequisite for eligibility in not telling the agent that her former husband was deceased. *Id.* at 947. The Appeals Council, which upheld the Administrative Law Judge's decision, concluded that the misinformation was Mrs. Hansen's fault. The Second Circuit did not resolve the issue, but speculated that the agent might not have been familiar with the applicable provision because it was relatively new. The court therefore based its finding of misconduct primarily on the agent's deterring Mrs. Hansen from filing. *Id.*

66 *Id.* The dissent added:

> It is worth noting how small Connelly's violation of the relevant passage of the Claims Manual actually was. This reads:
>
> 2003. Administrative Policy of Acceptance of Application.
>
> a) General
>
> Where an individual is inquiring about possible current entitlement to . . . benefits, his interests will ordinarily be best served by filing an application immediately so that retroactive . . . benefits will be better protected and a determination made on his entitlement. . . . The individual must make the actual decision of whether or not to file, but he should be fully informed of the application requirements and the advantages of filing. Unless filing is obviously disadvantageous or the question is one of filing for reduced . . . benefits only, it will be appropriate to suggest to the individual that he file an application. Resolve any doubtful situation in favor of suggesting that the individual file since he may withdraw his application later if he wishes.
>
> . . . . Do not deter an individual from filing solely on the basis that he is not eligible . . . . This is true even where he is clearly incligible. Every inquirer should receive an explanation of the application requirements and an application should be taken if he indicates that he wishes to file. If an individual makes no mention that he wishes to file but is not satisfied with the information about his eligibility, it should be suggested that he file an application so that a determination may be made.

619 F.2d at 957 n.10 (Friendly, J., dissenting).

Judge Newman concurred in the court's opinion, but disagreed with Judge Oakes' reliance on the claims manual, because he found that the representative's noncompliance with the provision was not "a dispositive factor." *Id.* at 961 n.6.

> the fulfillment of a procedural requirement by a person who is substantively eligible on the other. In our view, at least in the latter case, misinformation provided by a Government official combined with a showing of misconduct (even if it does not rise to the level of a violation of a legally binding rule) should be sufficient to require estoppel.[67]

Without pursuing further the reason for the procedural/substantive distinction, the majority concluded that the representative's statements and conduct justified the application of estoppel against the government. The court stressed, however, that its holding would only apply to circumstances in which a procedural rather than a substantive requirement was involved, and where a government employee had contravened some objective source of authority.[68]

The Supreme Court reversed per curiam,[69] dismissing *Hansen* as "another in [a] line of cases" in which the misconduct was inadequate to estop the government from enforcing a valid regulation.[70] The Court distinguished *Hansen* from cases in which the federal courts had estopped the government on the basis that those cases either involved a writing or posed no threat to the public fisc.[71] Because the Court found

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67 619 F.2d at 948.

The Second Circuit's standard of what misconduct sufficed to warrant estoppel implicitly rejects the theory that the government cannot be estopped because of an unauthorized act of its agent. *See* notes 38-40 and accompanying text *supra*. This rejection is desirable; otherwise the unauthorized act justification could preclude any application of equitable estoppel against the government because it would not authorize an agent to misrepresent facts or give erroneous advice. *See* Comment, *supra* note 3, at 443. *But see* Miller v. United States, 500 F.2d 1007, 1010-11 (2d Cir. 1974)(in taxpayer's refund action, Commissioner's issuance of disallowance notice was erroneous but not "unauthorized"). *See also* Berger, *supra* note 11, at 686-88; Saltman, *supra* note 38.

The doctrine of equitable estoppel is historically based upon "justice and conscience." J. POMEROY, EQUITY JURISPRUDENCE § 801 (5th ed. 1941). The unauthorized act justification not only contravenes the underlying purpose of equitable estoppel, but also promotes government mismanagement and incompetence. For a discussion of several social and economic advantages of allowing estoppel of the government, see Comment, *supra* note 11, at 402-06.

68 619 F.2d at 949.

69 Schweiker v. Hansen, 450 U.S. 785 (1981) (per curiam). Justices Marshall and Brennan dissented.

70 *Id.* at 788-89. The Court cited lower court refusals to estop the government when a government agent had misinformed a party of the nature of social security requirements. *See* note 35 *supra*.

71 450 U.S. at 788-89 & n.4. The Court emphasized " 'the duty of all courts to observe the conditions defined by Congress for charging the public treasury.'" *Id.* at 788 (quoting Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 385 (1947)). In approving the lower courts' reliance on *Merrill* for refusing to estop the government, *see* notes 17-24 and accompanying text *supra*, the Supreme Court suggested that these courts recognized the duty of protecting the public treasury. 450 U.S. at 788.

These courts, however, did not discuss this duty; instead, they cited *Merrill* for the propositions that regulations are binding regardless of actual knowledge or of the hardship resulting from innocent ignorance (*see, e.g.,* Cheers v. Secretary of HEW, 610 F.2d 463, 469 (7th Cir. 1979), *cert. denied,* 449 U.S. 898 (1980)), and that the government is not bound by the unauthorized acts of its agents. *See, e.g.,* Goldberg v. Weinberger, 546 F.2d 477, 480-81 (2d

these cases "easily distinguishable" from *Hansen*, it declined to consider their correctness.[72]

The Court rejected the Second Circuit's approach to estoppel against the government on three grounds. First, it did not believe that the SSA agent's error was serious because the agent's conduct "did not cause [Mrs. Hansen] to take action . . . or fail to take action . . . that [she] could not correct any time."[73] Second, the Court agreed with dissenting Judge Friendly that a breach of the claims manual is insufficient to estop the agency from asserting the written application requirement.[74] Finally, the Court found the Second Circuit's distinction between substantive eligibility and procedural requirements an inadequate basis for estoppel in this case because Congress expressly provided that only one who "has filed application" for benefits may receive them.[75]

III

THE NEED FOR A CLEAR STANDARD FOR GOVERNMENT ESTOPPEL

A. *The Supreme Court's Failure to Clarify the Affirmative Misconduct Requirement*

The issue presented in *Hansen* deserved more than the cursory treatment that the Supreme Court gave it. The dissent correctly pointed out that a "summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error."[76] Contrary to

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Cir. 1976), *cert. denied,* 431 U.S. 937 (1977). In another social security case that the Court did not mention, the Seventh Circuit did cite *Merrill* in support of the court's duty to protect the public treasury. Gressley v. Califano, 609 F.2d 1265, 1267 (7th Cir. 1979). In *Gressley*, an SSA agent allegedly told the plaintiff who had been correctly denied disability benefits several years earlier that he would be eligible for benefits if he filed amended tax returns for those years. After filing these returns, the plaintiff learned that according to statute, he had filed too late to establish his eligibility. *Id.* at 1266. *Gressley* is distinguishable from *Cheers* and *Goldberg* because the agent's misrepresentation did not cause the plaintiff to lose benefits that he otherwise would have received. Arguably, the plaintiff did not rely to his detriment on the alleged misrepresentation, a necessary condition for equitable estoppel. *See* note 1 *supra*.

72 609 F.2d at 1266.

73 *Id.*

74 If [the agent's] minor breach of such a manual suffices to estop [the government], then the Government is put "at risk that every alleged failure by an agent to follow instructions to the last detail in one of a thousand cases will deprive it of the benefit of the written application requirement which experience has taught to be essential to the honest and effective administration of the Social Security laws."

450 U.S. at 789-90 (quoting Hansen v. Harris, 619 F.2d 942, 956 (2d Cir. 1980) (Friendly, J., dissenting)).

75 450 U.S. at 790.

76 *Id.* at 791 (Marshall, J., dissenting).

the majority's assumptions, neither the facts in *Hansen,* nor the law regarding equitable estoppel of the government, is clear.

In *Hansen,* a factual dispute centered upon whether Mrs. Hansen had informed the agent that her former husband was deceased, a crucial prerequisite to eligibility.[77] Because the Second Circuit relied on the agent's breach of the claims manual rule to find misconduct,[78] it never resolved this issue.[79] The doctrine of equitable estoppel requires that the party accused of a misrepresentation know all the relevant facts;[80] the Supreme Court, therefore, should have considered the agent's knowledge of the relevant facts to determine whether to apply estoppel. The Court ignored this factual issue; because Mrs. Hansen could have filed the application on her own at any time, the Court believed that the agent's conduct did not cause Mrs. Hansen to act to her detriment.[81] This analysis of the effect of the agent's misinformation on Mrs. Hansen "blinks in the face of the obvious."[82] The vast majority of social security applicants are ignorant of the complex laws governing the Social Security system, and rely on the SSA agent's advicc and information.[83]

The majority was equally remiss in failing to articulate what type of misconduct triggers an estoppel against the governmcnt.[84] Federal courts have been wary of estopping the government,[85] and have not applied a consistent analysis when they do.[86] As a result, private parties

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77 Hansen v. Harris, 619 F.2d at 947; *see* note 65 *supra*.

78 619 F.2d at 947-49.

79 It may well be, as the Government argues and the Appeals Council found, that this misinformation resulted from [Mrs. Hansen's] failure to tell [the agent] that her former husband was dead, since this fact was a prerequisite of her eligibility. It could also be that, as the amendment affording benefits to [Mrs. Hansen] was relatively new, [the agent] was unfamiliar with it.

Id. at 947; *see* note 65 *supra*.

80 *See* note 1 *supra*.

81 It may be that [the agent] erred because he was unfamiliar with a recent amendment which afforded benefits to [Mrs. Hansen] . . . . Or it may be that [Mrs. Hansen] gave [the agent] too little information for him to know that he was in error . . . . But at worst, [his] conduct did not cause [Mrs. Hansen] to take action, . . . or fail to take action, . . . that [she] could not correct at any time.

450 U.S. at 789.

82 *Id.* at 794 (Marshall, J., dissenting).

83 *Id.* at 794-95.

84 The Court conceded that "[i]t has never decided what type of conduct by a Government employee will estop the Government from insisting upon compliance with valid regulations governing the distribution of welfare benefits." *Id.* at 788.

85 *See* cases cited in notes 33 & 36 *supra*.

86 For example, the Ninth Circuit's approach to estoppel against the government relies more on a case-by-case factual inquiry than a consistent application of the affirmative misconduct requirement. Two immigration cases illustrate this point. In Santiago v. INS, 526 F.2d 488 (9th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 971 (1976), the plaintiffs were aliens who had entered the country on a derivative preference visa that required them to be accompanied by a spouse or parent. *Id.* at 489. Despite knowledge of this requirement, immigration officials improperly admitted each plaintiff who preceded his spouse or parent. *Id.* at 490.

have suffered injustices and have not received evenhanded treatment by courts in estoppel cases involving the government.

The majority attempted to distinguish *Hansen* from other cases in which the government was estopped by distinguishing monetary from nonmonetary relief, and oral from written statements.[87] These distinctions, however, fail to provide a sound analytical basis for explaining why estoppel may be invoked against the government in some situations but not others, and heighten the confusion in this area of the law.[88] The Court neglected to explain why or how a request for monetary damages, as opposed to a request for nonmonetary relief, affects a determination of whether there was sufficient misconduct to justify estopping the government.[89] Furthermore, the governmental interest in protecting the public treasury from fraudulent claims does not justify a court's refusal to apply estoppel when a plaintiff seeks benefits that he would have received had the government agent not erred.

Similarly, the Court offered no explanation why a written but not an oral misrepresentation can support a claim of estoppel.[90] Most likely, the Court shared Judge Friendly's concern that those who do not qualify for benefits would obtain them by making fraudulent or frivolous

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The court rejected the plaintiffs' contention that the government should be estopped from asserting their excludability at entry as a basis for deportation. The court held that the failure to inform or inquire on the part of the immigration officials was insufficient to justify estoppel. *Id.* at 491-93 (Powell, J., concurring). In Sun Il Yoo v. INS, 534 F.2d 1325 (9th Cir. 1976), the alien plaintiff had applied for labor certification based on his employment, but was denied it 10 months later because of misinformation that his employer gave the INS. *Id.* at 1327. The plaintiff, however, had sent a statement from his employer to the INS correcting the error in the plaintiff's employment status nine months before the INS decision, but for unknown reasons the INS did not receive the letter for three months. *Id.* at 1329 (Wright, J., dissenting). The INS reconsidered the application, but denied it because the plaintiff's company no longer existed. *Id.* at 1327. The plaintiff then filed an application for permanent residence status, but INS denied this application because the plaintiff never received labor certification. *Id.* The court characterized the INS' 10-month delay as "affirmative inaction," and estopped the government from denying him the benefit of labor certification in considering his application. *Id.* at 1329. Arguably, *Sun Il Yoo* does not present any stronger a case for estoppel than *Santiago,* for in *Sun Il Yoo* the INS received conflicting evidence on the plaintiff's employment status and a change in the law was at least partly responsible for the plaintiff's misfortune. *See* 534 F.2d at 1330 (Wright, J., dissenting). Although the Ninth Circuit attempted to distinguish *Santiago, see id.* at 1328, it failed to provide a methodology for defining conduct that would satisfy the affirmative misconduct requirement.

87 450 U.S. 785, 788-89 & n.4 (1981).

88 The majority . . . suggest[s] that estoppel may be justified in some circumstances. Yet rather than address the issue in a comprehensive fashion, the Court simply concludes that this is not such a case. The apparent message of today's decision—that we will know an estoppel when we see one—provides inadequate guidance to the lower courts in an area of the law that, contrary to the majority's view, is far from settled.

Id. at 791-92 (Marshall, J. dissenting).

89 *Id.* at 788-89 & n.4; *see id.* at 794 (Marshall, J., dissenting).

90 *Id.* at 788-89 & n.4.

allegations of official misconduct.[91] This concern, however, is relevant only to the burden of proving the agent's misconduct,[92] not to the issue of whether the misconduct justified estopping the government.

The Court's oral/written and monetary/nonmonetary distinctions find no support in prior case law. Few, if any, federal courts have made the existence of a written misrepresentation or agreement a prerequisite for applying estoppel against the government.[93] Federal courts also have invoked estoppel where the public treasury was affected.[94] Moreover, some of the cases that the Court cited as so clearly distinguishable from *Hansen* arguably are not.[95]

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91 [T]he majority opens the door of the federal fisc not simply to Mrs. Hansen, whom we at least know to have visited the HEW office and said something, but to thousands who merely will make a detailed claim that they have done so and whom there is no effective means of rebutting. Millions of dollars will have to be expended simply to ascertain whether conditions of eligibility claimed in a subsequent written application existed at the time of the alleged oral one.

Hansen v. Harris, 619 F.2d 942, 949 (2d Cir. 1980) (Friendly, J., dissenting) (footnote omitted).

92 Schweiker v. Hansen, 450 U.S. at 793 (Marshall, J., dissenting).

93 The Supreme Court had never before stated that the lack of a writing had a bearing on its decision, even in prior decisions involving oral misrepresentations. *See* Montana v. Kennedy, 366 U.S. 308 (1961); Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947). *See also* notes 17-29 and accompanying text *supra*.

The Court also overlooked the fact that federal courts have applied estoppel where there was no misrepresentation, written or oral. *E.g.*, Villena v. INS, 622 F.2d 1352, 1361 (9th Cir. 1980) (because it took four years to respond to alien's petition for preference classification, INS estopped from claiming that alien failed to pursue his claim for preference classification); Sun Il Yoo v. INS, 534 F.2d 1325 (9th Cir. 1976) (INS' nine-month delay in acting properly upon alien's petition for labor certification estopped INS from denying alien's labor certification in subsequent petition for permanent resident status); Corniel-Rodriguez v. INS, 532 F.2d 301 (2d Cir. 1976) (immigration official's failure to inform alien of marital status requirement estopped INS from asserting alien's noncompliance with requirement in deportation proceedings).

94 *E.g.*, Miller v. United States, 500 F.2d 1007 (2d Cir. 1974)(IRS estopped from raising statute of limitations in taxpayer's refund action); Walsonavich v. United States, 335 F.2d 96, 101 (3d Cir. 1964)(government estopped from raising statute of limitations because of Commissioner's agreement with taxpayer); Schuster v. Commissioner, 312 F.2d 311 (9th Cir. 1962)(Commissioner estopped from asserting liability of bank for unpaid estate taxes).

Private parties have also recovered from the government in contract cases. *E.g.*, Emeco Indus., Inc. v. United States, 485 F.2d 652 (Ct. Cl. 1973)(government estopped from denying existence of supply contract).

95 The Court cited Semaan v. Mumford, 335 F.2d 704 (D.C. Cir. 1964), as an example of a case that did not threaten the public treasury. Schweiker v. Hansen, 450 U.S. at 788-89 n.4. In *Semaan*, a government employee alleged that he was discharged illegally from his position because he was treated as a probationary instead of a permanent employee. 335 F.2d at 704-05. The court held that the government may be estopped from denying the plaintiff's permanent employee status because of certain actions of his superiors. *Id.* at 705-06. The dissent in *Schweiker* correctly noted that estoppel in *Semaan* would affect the public fisc if the plaintiff ultimately won reinstatement. 450 U.S. at 792 n.2 (Marshall, J., dissenting).

The Court also cited United States v. Fox Lake State Bank, 366 F.2d 962 (7th Cir. 1966), as a case distinguishable from *Hansen*. 450 U.S. at 788-89 n.4. In *Fox Lake State Bank*, the court estopped the government from bringing an action against a bank under the Civil False Claims Act, 31 U.S.C. §231 (1964), because the bank, which had improperly filed certain

The majority's failure to expand on the significance of the oral/written and monetary/nonmonetary distinctions will force lower courts to speculate on what weight, if any, they should be given in estoppel cases. Without a clear standard, courts will continue to reach inconsistent and unfair results. For example, a court might conclude that a certain act by a government official constitutes affirmative misconduct justifying an estoppel in a case where the plaintiff seeks nonmonetary relief; yet in a subsequent case involving the same conduct, but where plaintiff seeks monetary recovery, a court might refuse to apply equitable estoppel. This anomalous result could also occur where a misrepresentation was in writing in one case, but was made orally in another. The doctrine of equitable estoppel is based upon "justice and good conscience";[96] the government's interests in adhering to statutory requirements and protecting the public fisc from fradulent claims do not warrant a per se rule that precludes plaintiffs injured by the misconduct of government officials from invoking this doctrine merely because of the type of relief sought or the form of the misrepresentation.

B. *The Supreme Court's Rejection of the Second Circuit's Analysis*

Although the Court's treatment of *Hansen* suffers from several defects, some of the Court's criticisms of the Second Circuit's analysis are well-founded. First, the Court was correct in rejecting the Second Circuit's reliance on the claims manual.[97] As the Court recognized, the manual is an internal procedural guide, not a legally binding regulation.[98] Judicial recognition of the manual's housekeeping rules as objective standards of official conduct would discourage agencies from creating such guidelines.[99]

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claims, could not get the necessary information from the government. 366 F.2d at 965-66. This claim of estoppel, however, does not significantly differ from the claim in *Hansen* of estoppel for misinformation. *See* Schweiker v. Hansen, 450 U.S. at 793 (Marshall, J., dissenting)("I trust that the majority does not intend to suggest that a claim of estoppel is more likely to prevail when raised by a bank rather than by a person eligible for social security benefits, but I do not believe that . . . the Government['s] fail[ure] to provide the information necessary to file correct applications . . . is substantively different from the Government's failure in this case to supply [Mrs. Hansen] with correct information. . . .").

96 3 J. POMEROY, *supra* note 1, § 802, at 180.

> The claim of the government to an immunity from estoppel is in fact a claim to exemption from the requirements of morals and justice. As such, it needs to be jealously scrutinized at every step. Confidence in the fairness of the government cements our social institutions. No pinch-penny enrichment of the government can compensate for an impairment of that confidence, for the affront to morals and justice involved is the repudiation of a governmental representation.

Berger, *supra* note 11, at 707.

97 Schweiker v. Hansen, 450 U.S. at 789-90.

98 *Id.*

99 Clearly it is in the public interest for an agency with over 80,000 employees, making more than 1,250,000 disability determinations alone a year, with

Second, the Court perceived correctly that the Second Circuit's "distinction between [Mrs. Hansen's] 'substantive eligib[ility]' and her failure to satisfy a 'procedural requirement' does not justify estopping [the government] in this case."[100] As the Court observed, the written application provision is one of the eligibility requirements for benefits under the Social Security Act. Unless a claimant has "filed application for . . . benefits," she is ineligible under the statute.[101] Finally, the Second Circuit's procedural/substantive distinction is an unworkable standard; laws do not always fit comfortably into one category.[102] More importantly, the procedural/substantive distinction, like the Supreme Court's oral/written and monetary/nonmonetary distinctions, is irrelevant to the central question—whether the agent's misconduct sufficed to justify estoppel. If the conduct does justify estopping the government, then a plaintiff's redress should not depend upon whether the government is being estopped from enforcing a "procedural" or "substantive" requirement.[103]

> 215,300 reconsiderations . . . to issue housekeeping instructions to its employees in the interest of uniform, fair and efficient administration. But it is perplexing why an agency that issues such instructions should be held to a higher legal standard of dealing with its clients than one that does not.

Hansen v. Harris, 619 F.2d at 956 (Friendly, J., dissenting)(citations omitted).

Furthermore, judicial reliance on internal administrative procedural manuals would produce anomalous results. A court might conclude that an act constitutes misconduct because the official involved did not comply with his manual; in a subsequent case presenting similar facts and conduct, but involving an agency that has no such manual or guideline, the court would be compelled to conclude that the same act does not constitute official misconduct.

100 Schweiker v. Hansen, 450 U.S. at 790.

Three explanations could explain why the Second Circuit distinguished procedural and substantive statutory requirements. First, the court might have been attempting to circumvent its earlier decision in Corniel-Rodriguez v. INS, 532 F.2d 301 (2d Cir. 1976), which appeared to limit affirmative misconduct to noncompliance with a rule having the force of law. *See* text accompanying notes 48-52 *supra*. No such violation was present in *Hansen,* and the court may have believed that it could justify a less restrictive standard of affirmative misconduct in misinformation cases by limiting the application of estoppel to "procedural" requirements.

Second, the Second Circuit may have created the distinction to limit the applicability of its holding to cases involving misinformation by government agents. *See* Hansen v. Harris, 619 F.2d at 949. Aware of the government's difficulty in rebutting a charge of oral misinformation, the court may have been trying to prevent persons ineligible for benefits from obtaining them through fraudulent or frivolous allegations of official misconduct.

Third, the court may have been striving to protect the public treasury by limiting the application of estoppel to cases in which the claimant is "substantively" a member of the class to which Congress has awarded benefits. *Id.* at 948.

101 42 U.S.C. § 402(g)(1)(D)(1976); *see* Schweiker v. Hansen, 450 U.S. at 790. The Second Circuit's assertion that "[i]t would fulfill the fundamental legislative goal to grant [Mrs. Hansen] the benefits she seeks," 619 F.2d at 948, finds no support in the statute. *See* note 55 *supra*. Moreover, the court cited no legislative history to support its assertion.

102 *See* Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956)(discussing substance and procedure in regard to *Erie* doctrine); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)(same); Guaranty Trust Co. v. York, 326 U.S. 99 (1945)(same).

103 Comparing *Hansen,* an example of "procedural" ineligibility, to Goldberg v. Weinberger, 546 F.2d 477 (2d Cir. 1976), *cert. denied,* 431 U.S. 937 (1977), a case involving "sub-

IV

A Proposed Methodology for Estoppel

A standard for the proper application of equitable estoppel against the government must ensure justice and fairness, the underlying purposes of equitable estoppel, without impairing governmental functions and policies.[104] This Note proposes such a standard. The test clarifies the misconduct requirement and suggests a uniform approach to the application of equitable estoppel against the government.

A court presented with a claim requesting equitable estoppel against the government first must decide whether the conduct in question constitutes official misconduct.[105] The court should determine whether the conduct was inconsistent with the fundamental objectives and functions of the particular agency.[106] After these objectives and functions are initially determined, future questions of official misconduct can be resolved consistently. If the court finds official misconduct,

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stantive" ineligibility, illustrates the potential unfairness of the Second Circuit's distinction. In *Goldberg,* a Social Security agent informed the plaintiff incorrectly that remarriage before the age of 60 would reduce but not terminate her widow's disability benefits. 541 F.2d at 480. Relying on the misrepresentation, she remarried two months prior to her sixtieth birthday, and consequently lost her benefits. *Id.* at 478-79. The Second Circuit held that the government was not estopped from asserting the statutory age requirement in denying her benefits. *Id.* at 481. Reliance on the misrepresentation in *Goldberg* terminated the plaintiff's benefits, while reliance on the alleged misrepresentation in *Hansen* only caused Mrs. Hansen to lose one year's benefits. *See* Hansen v. Harris, 619 F.2d 942, 949 (2d Cir. 1980). Under the Second Circuit's analysis, Mrs. Hansen is entitled to retroactive benefits while the *Goldberg* plaintiff, who suffered the greater harm, is entitled to no redress.

104 For a proposed statutory solution, see Newman, *Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law,* 53 Colum. L. Rev. 374 (1953). Professor Newman recognized the need to improve government agencies' accountability for prior representations. His proposal attempts to protect parties who relied in good faith on government advice. The statutory proposal, however, is overly restrictive. It would only estop the government from imposing damages or penalties upon a party whose "conduct was in conformity with and in good faith reliance on a rule, order, opinion, or other written statement of an agency responsible for administering that law. . . ." *Id.* at 389. The requirement of a writing is too narrow and would preclude estoppel in cases of oral misrepresentations. The courts can protect the government from fraudulent claims and defenses by requiring sufficient extrinsic evidence to substantiate a claim of oral misrepresentation. *See* notes 109-10 and accompanying text *infra*. Professor Newman did leave open the possibility that courts could retain the power to estop the government in circumstances not covered by the statutory proposal. *Id.* at 389 n.77.

105 The term "official misconduct" is preferable to "affirmative misconduct" because the latter term gencrates too much confusion. *See, e.g.*, Santiago v. INS, 526 F.2d 488 (9th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 971 (1976). In *Santiago* the court distinguished nonfeasance and misfeasance and suggested that only misfeasance could constitute affirmative misconduct. *Id.* at 493. The court described the officials' misconduct as failure to inform the immigrants of the requirement, characterized the conduct as nonfcasance, and thus refused to estop the government. *Id.* Had the court described the conduct as an improper admission of the aliens, it could have found misfeasance and affirmative misconduct.

106 Courts should examine the enabling statute, legislative history, relevant regulations, and any other evidence of the agency's functions and objectives.

it should then look for the traditional elements of estoppel:[107] (1) the official involved knew the facts; (2) he intended that his conduct would be acted upon, or his conduct was such that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting the estoppel was unaware of the true facts; and (4) he detrimentally relied on the official's conduct.[108] If official misconduct is accompanied by these traditional elements, the court should estop the government. This approach protects the interests of innocent parties by preventing the government from repudiating its prior statements or actions, yet does not hamper important governmental activities.

To supplement the foregoing standard, courts should allocate evidentiary burdens in a manner that protects the government from frivolous allegations of official misconduct. In misinformation cases, for example, courts should require the party alleging the misconduct to substantiate the allegation of oral misrepresentation with extrinsic evidence. In *Hansen,* written documentation such as the representative's daily log,[109] testimony by the representative admitting his error, or testimony by a disinterested third party[110] would have satisfied this requirement.

Under the foregoing analysis, the propriety of applying equitable estoppel in *Hansen* depends upon whether the agent was actually responsible for misinforming Mrs. Hansen.[111] If the misinformation was the agent's own fault, the Second Circuit should have found official misconduct. An important function of the Social Security Administration is to

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107 *See* notes 1 & 47 *supra*. Many courts have modified the elements of equitable estoppel. Some courts have used the term "quasi-estoppel" to indicate the absence of one or more traditional elements of estoppel. Robbins v. United States, 21 F. Supp. 403, 407 (Ct. Cl. 1937)("[Q]uasi estoppel . . . [is] the doctrine . . . extended by the modern courts to prevent a wrong being done 'wherever, in good conscience and honest dealing' a party ought not to be permitted to repudiate his previous statements, declarations, or actions."); Note, 28 NOTRE DAME LAW., *supra* note 14, at 236. *See generally* Lynn & Gerson, *Quasi-Estoppel and Abuse of Discretion as Applied Against the United States in Federal Tax Controversies,* 19 TAX L. REV. 487, 487-89 (1964).

108 *See* United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979); note 1 *supra*.

109 In *Hansen*, the notes in the representative's log were insufficient to substantiate a claim of misrepresentation. They indicated only that he believed that Mrs. Hansen's claims had already been adversely determined. The notes contained no information regarding the substance of the interview. Hansen v. Harris, 619 F.2d at 946; *see* note 54 *supra*.

110 Mrs. Hansen's mother testified that she had accompanied her daughter to the Social Security office, but she was not present during the interview. 619 F.2d at 945.

111 *See* notes 65, 79, 81 and accompanying text *supra*. Justice Marshall, dissenting, argued persuasively that only the agent could have been responsible for the misinformation. First, he noted that the amendment that the Court characterized as "recent" had been in effect for a year and a half at the time of Mrs. Hansen's inquiry. 450 U.S. 785, 794 (1981). Second, he found the majority's view that Mrs. Hansen may have failed to provide all the relevant facts "wholly implausible" because the benefits in question are available only to those with deceased spouses, and beeause the agent's questions indicated his mistaken belief that Mrs. Hansen would be ineligible if she were divorced at the time of her former husband's death. *Id.* at 794 n.3.

advise the public of the eligibility requirements for Social Security benefits;[112] and misinformation provided by a representative would constitute official misconduct because it impedes the fundamental advisory functions of the agency. The facts of *Hansen* would have presented the traditional elements of estoppel if the agent were responsible.[113] On the other hand, if the court found that the representative was not aware of all of the facts, a necessary element of the doctrine would be absent,[114] and the court could not estop the government.

CONCLUSION

Courts have failed to develop a workable approach to requests for equitable estoppel of the government. The Supreme Court's failure to clarify the standard of "affirmative misconduct" and to examine thoroughly the facts in light of the traditional elements of estoppel has restricted the invocation of estoppel against the government. Although

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112 Similarly, the Immigration and Naturalization Service (INS) acts in an advisory capacity. Aliens rely on the INS for information regarding immigration procedures and citizenship requirements. Rather than estopping the government in citizenship status cases, courts have found instead that the individuals have not voluntarily relinquished their citizenship. *E.g.*, Moser v. United States, 341 U.S. 41, 46-47 (1951)(beeause of official misinformation, signing of military cxemption did not constitute waiver of citizenship rights); Podea v. Acheson, 179 F.2d 306, 309 (2d Cir. 1950)(foreign military service did not cause voluntary expatriation because of State Department's erroneous advice). *See also* Gordon, *Finality of Immigration and Nationality Determinations—Can the Government be Estopped?*, 31 U. CHI. L. REV. 433, 456 (1964).

In contrast to the SSA and INS, a regulatory agency's misinformation would not constitute official misconduct. For example, in an enforcement action, the Securities and Exchange Commission would not be estopped from asserting that an issuer's registration statement containcd a misleading material fact because of an SEC agent's representation to the issuer that his registration statement was satisfactory. Apart from § 23 of the Securities Exchange Act of 1933, 15 U.S.C. § 77w (1976), which protects the SEC from unlawful representations, several factors support this conclusion. First, the function of the SEC is to protect investors, not issuers, seeking registration. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 861 (2d Cir. 1968)(en banc), *cert. denied*, 404 U.S. 1005 (1971); SEC v. Kaplan, 397 F. Supp. 564, 567 (E.D.N.Y. 1975). Second, the issuer is in a far better position than the SEC to know the truth of the information disclosed in the registration statement. *See* Doman Helicopters, Inc., 41 S.E.C. 431, 441 (1963)("The burden of seeing to it that a registration statement filed with [the SEC] neither includes any untrue statement of a material fact nor omits any material fact . . . always rests on the registrant itself, and it never shifts to [the SEC]."). Third, the issuers of public offerings are corporations or persons in control of a corportion. *See* Securities Exchange Act of 1933, 15 U.S.C. §§ 77b(4) & (11) (1976). They therefore possess financial and legal resources far greater than most individuals who deal with the INS and SSA. *Cf.* Corniel-Rodriguez v. INS, 532 F.2d 301, 306 (2d Cir. 1976)(noting that petitioner who had not been informed properly by INS agent was "a naive and poorly educated alien").

The role of the Internal Revenue Service (IRS) poses a more difficult case than that of the SEC because it fulfills both regnlatory and advisory functions. The IRS is responsible for enforcing federal tax laws and collecting revenues. It also provides information and advice to taxpayers. *See* note 41 *supra*. Some commentators have supported the view that the doctrine should apply to the IRS. *See* Manning, *supra* note 41, at 383; Comment, *supra* note 11, at 398-99.

113 *See* notes 65 & 81 *supra*.

114 *See* note 1 *supra*.

the Supreme Court was justified in rejecting the Second Circuit's approach to equitable estoppel, its own cursory analysis in *Hansen* may exacerbate the deficiencies prevalent in prior case law. Instead of perpetuating the confusion that surrounds the affirmative misconduct requirement, the Supreme Court should adopt a test that (1) examines the government's misconduct as it relates to the objectives and functions of the relevant agency, and (2) evaluates the evidence in terms of the traditional elements of equitable estoppel.

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