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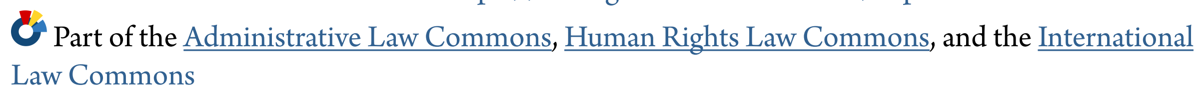
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JUDICIAL REVIEW OF AMNESTY DENIALS: MUST ALIENS BET THEIR LIVES TO GET INTO COURT?

*Daniel Kanstroom**

Introduction

The debate over American immigration policy has always reflected both high ideals and base impulses. This dialectic has affected immigration law doctrine in distinctive ways. Uncertainty about the constitutional rights of aliens, the power of Congress and the executive and the proper role of the judiciary have made immigration law concepts distinctly different from those in other areas of law.[1]

Three years ago, Congress once again entered this field. Passed by a weary legislature at the eleventh hour,[2] the Immigration Reform and Control Act of 1986 (IRCA)[3] represented

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[1] For a historical review of the basic contradictions in immigration law and an optimistic assessment of the long-term trend in this area, see Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1 (1984). *See also* Kurzban, *A More Critical Analysis of Immigration Law* (Book Review), 99 Harv. L. Rev. 1681 (1986) (reviewing E. Hull, Without Justice for All: The Constitutional Rights of Aliens (1985)) ("Imagine a legal system that permits the indefinite incarceration of persons who have not committed any crime, or the exclusion of people from a nation simply because of their beliefs and ideas . . . ."); *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 Harv. L. Rev. 1286 (1983) [hereinafter *Developments*] (an overview of the tension between the rights of aliens and the right of the state to limit immigration).

[2] *See, e.g.*, Lungren, *The Immigration Reform and Control Act of 1986*, 24 San Diego L. Rev. 277, 283–91 (1987) (describing the controversies and political maneuvering that accompanied the last-minute passage of IRCA).

[3] Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 8 U.S.C.). IRCA amends the Immigration and Nationality Act, Pub. L. No. 82-414, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1557 (1982)) [hereinafter INA]. This Article will cite by INA section number rather than U.S. Code section number.

the culmination of years of debate, acrimony and doctrinal confusion. The law that emerged was a pragmatic compromise.[4]

IRCA's two principal provisions—its grant of amnesty to certain long-term undocumented aliens (legalization), and its unprecedented sanctions against employers who hire aliens without permission from the Immigration and Naturalization Service (INS)—reflect a basic historical tension. The amnesty provision is generous and liberal, essentially rewarding those who have violated United States law for at least six years. Employer sanctions, on the other hand, respond to the conventional wisdom that the United States has lost control of its borders and that unprecedented measures are urgently needed.[5] These controversial sanctions were designed to force those aliens who could not obtain amnesty to leave the United States, and to dissuade others from coming.[6]

IRCA also contains an unusual restriction on judicial review of cases in which an amnesty application is denied by the INS. Judicial review can only take place after the entry of a "final order of deportation." An alien who desires prompt review of a legalization denial must voluntarily submit to deportation proceedings, face possible arrest and waive a variety of procedural due process rights. This limitation is not unusual in immigration cases.[7] But the unusual aspect of IRCA is that it prohibits

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[4] *See* Lungren, *supra* note 2; Isgro, *Administrative and Judicial Review of Denials of Temporary Resident Status*, 2 Geo. Immigr. L.J. 473 (1988) (describing tension which produced the bill as resulting in compromise judicial review provisions); Martin, *Judicial Review of Legalization Denials*, 65 Interpreter Releases (Federal Publications) No. 29, at 757–66 (August 1, 1988) (describing in detail the process by which an alien may gain review of a legalization denial). There was little controversy over the basic purpose of IRCA: "to close the back door on illegal immigration so that the front door on legal immigration may remain open." H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 46 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5649, 5650. The debate centered on how this goal could best be accomplished without undertaking measures which would be "inconsistent with our immigrant heritage." *Id.* at 5653.

[5] *See also* the 1981 testimony of Attorney General William French Smith before a joint congressional subcommittee: "[W]e have lost control of our borders. We have pursued unrealistic policies. We have failed to enforce our laws effectively." *Administration's Proposals on Immigration and Refugee Policy: Joint Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, and the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 6 (1981), *quoted in* Schuck, *supra* note 1, at 43 n.234.

[6] *See* Lopez & Lopez, *The Immigration Reform and Control Act of 1986—The Cure or Cause of Problems?*, 25 Idaho L. Rev. 329 (1988-89).

[7] *See infra* note 56 (discussing the existing systems for judicial review of asylum and adjustment applications).

Immigration Judges[8] (IJs) from hearing the applicant's amnesty claim in those deportation proceedings. The applicant must therefore undergo an administrative hearing she cannot win to appeal the denial in federal court. This Article explores whether Congress can so prevent judicial review. Despite the mass of litigation over many aspects of IRCA, this fundamental question has yet to be addressed by any court.[9] A related question—whether IRCA precludes district court review of challenges to INS rulemaking—was recently answered affirmatively in *Ayuda, Inc. v. Thornburgh.*[10] The *Ayuda* court did not consider the theoretical and practical problems caused by IRCA in individual cases. Nevertheless, the decision will significantly affect future IRCA litigation.[11]

Part I of this Article examines the system of administrative appeals and judicial review contained in IRCA. This analysis demonstrates the harsh and contradictory nature of the system in practice. It also reveals that the most troublesome aspect of IRCA—prohibiting the IJ from hearing the merits of the amnesty case—may not have been intended by Congress at all. Apart from this limitation, IRCA's judicial review provisions are very similar to the systems which have developed for review of denials of "adjustment of status" and "asylum" applications.[12] Part I therefore compares IRCA with these pre-1986 models.

Assuming Congress did intend that applicants exhaust a futile deportation proceeding to obtain review, Part II of this

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[8] Immigration Judges, also known as "Special Inquiry Officers," primarily adjudicate exclusion and deportation cases, though they are empowered to hear a wide variety of immigration matters. Their powers derive from the INA. *See* INA §§ 101(b)(4) (basic definition), 235(b) (exclusion), 236(a) (exclusion), 242(b) (deportation), 246 (recission of adjustment of status). A variety of regulations also define the precise role of these officers. *See, e.g.*, 8 C.F.R. §§ 236–242 (1989).

[9] The reasons for this, discussed more fully *infra* note 140 and accompanying text, have to do with the relative liberality of the INS in approving close cases, the length of time required to obtain a final denial, the difficulty in generating a theory to challenge the procedural aspects of IRCA, and the occasional success, to date, in achieving district court review of Justice Department rulemaking before a rule resulted in a denial in an individual case.

[10] 880 F.2d 1325 (D.C. Cir. 1989).

[11] *Ayuda* relegates challenges to regulations to the courts of appeals after the entry of final orders of deportation, broadly reads the preclusive effect of IRCA on district court review, and disregards IRCA's scheme for sending cases to the courts of appeals. The case will likely set the tone for much of the IRCA litigation to come. *See infra* notes 128–139 and accompanying text.

[12] The *Ayuda* court noted this similarity. *See* 880 F.2d at 1337; *see also id.* at 1354 (Wald, C.J., dissenting).

Article examines the constitutionality of this provision. This analysis requires a review of the historical relationship between Congress and the judiciary in the immigration field. The judiciary has tended to defer to Congress in immigration matters more than in almost any other area. Further, Congress has limited the jurisdiction of courts, especially district courts, to review immigration cases. As a result, doctrinal development has stagnated. This stagnation could limit the ability of courts to address the fundamental problems with IRCA. Further, a traditional method used by courts to avoid jurisdictional limitations—characterization of issues as constitutional—is particularly problematic in immigration cases.

Part II concludes with a prediction of how courts would approach IRCA under traditional immigration law doctrine. As a "quasi-admission" case, IRCA would be deemed constitutional by most courts, notwithstanding its apparent contradictions and unfairness. This prediction is based primarily upon the powerful tradition of judicial deference and the lack of a satisfactory theory of due process rights for aliens. It is further supported by a survey of recent cases construing a companion piece of legislation to IRCA, the Immigration Marriage Fraud Amendments of 1986 (IMFA).[13] The last section of Part II also seeks to explain why, despite its apparent unfairness, no challenges have yet been brought to IRCA.

Courts have considered the basic questions raised by IRCA when evaluating the impact of similar systems upon citizens. Part III therefore examines the judicial response to congressional limitations of review in other areas of law, especially Selective Service classification cases. This survey reveals the malleable nature of doctrine in these cases. It also indicates the extent to which jurisdictional decisions turn on underlying conceptions of the constitutional rights at issue. For courts fully to address the issues raised by IRCA, certain venerable postulates of immigration law must be modified. In particular, courts must decide whether the procedural due process rights of aliens are at least roughly equivalent to those of citizens receiving public benefits. If this question is answered affirmatively, then the

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[13] INA §§ 204(h), 245(e).

constitutional difficulties with IRCA are substantial. Its conditioning of judicial review on the alien's surrender to a futile administrative proceeding raises substantial theoretical difficulties. These are best resolved with an idealist approach to due process that yields powerful results with IRCA, and produces the specific suggestions with which this Article concludes.

I. The Administrative and Judicial Review Mechanisms of the IRCA Legalization Program

A. *A Primer on Legalization*

IRCA was primarily designed to address the problem of undocumented (illegal) immigration. Its basic structure of amnesty for certain undocumented aliens and employer sanctions to deter future undocumented entrants derived from proposals dating back at least to 1976.[14] The best-known provisions of IRCA[15] offered legalization to certain aliens who entered the United States before January 1, 1982. The requirements for legalization included:

1. Continuous unlawful residence in the United States from January 1, 1982, to the date of application;
2. Continuous physical presence in the United States from May 1, 1987, to the date of application, except for certain "brief, casual and innocent absences";
3. General admissibility as an immigrant; and

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[14] *See* Lungren, *supra* note 2, at 278.

[15] IRCA also offered an amnesty opportunity for so-called Special Agricultural Workers (SAWs). *See* INA § 210. The SAW provisions on judicial review basically mirror those of legalization. To be eligible under the SAW program, applicants may prove either:

1. That they performed "seasonal agricultural services" for at least 90 "man-days" [sic] during the 12-month period ending on May 1, 1986 and resided in the United States during that period; or

2. That they performed such services for "at least 90 man-days during each of the 12-month periods ending on May 1, 1984, 1985 and 1986," and resided in the United States for at least six months in each of the three years.

In addition, all applications must have been filed between June 1, 1987, and November 30, 1988. Finally, applicants must be "admissible to the United States as an immigrant," i.e., not subject to certain specific grounds for exclusion. *See* Isgro, *supra* note 4, at 474–75.

4. Application to INS within the period from May 5, 1987, through May 4, 1988, or within thirty days of the issuance of an Order to Show Cause (OSC).[16]

One of the most important aspects of the legalization program was its strict guarantee of confidentiality. Section 245A(c)(5) of IRCA provides as follows:

> Neither the Attorney General, nor any other official or employee of the Department of Justice, or bureau or agency thereof, may—
>
> (A) use the information furnished pursuant to an application filed under this section for any purpose other than to make a determination on the application . . . .[17]

As discussed in Part III, this guarantee, which was critical to the success of IRCA, is difficult to reconcile with mandatory passage through deportation proceedings to obtain judicial review of a legalization denial.[18]

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[16] *See* INA § 245A. Legalization is a two-stage process. The above requirements pertain to the first stage, known as temporary resident status. Temporary resident aliens must apply for permanent residence within a set time period, or they lose the benefit of amnesty entirely. To obtain permanent residence, a temporary resident must:

1. Have continuously resided in the United States since obtaining temporary resident status, except for "brief, casual and innocent absences";
2. Be physically present in the United States;
3. Not have been convicted of one felony or three misdemeanors in the United States;
4. Be admissible (with certain specific grounds of inadmissibility waivable); and
5. Demonstrate a knowledge of English and the history and government of the United States (this requirement may be met by completion of a special course of study).

See INA § 245A(b)(1) and regulations at 8 C.F.R. § 245a.3 (1989). Certain specific grounds of inadmissibility are waived by INA § 245A(d)(2). Others are waivable by the Attorney General. *See* INA § 245A(d)(2)(B)(i). INA § 245A(a)(4), however, adds three specific bases for denial. As is discussed more fully *infra* notes 33–34 and accompanying text, an OSC commences deportation proceedings. *See* Isgro, *supra* note 4, at 474–75.

[17] INA §§ 210(b)(6), 245A(c)(5). The only exception to this mandate is that information submitted with the legalization application may be used to enforce the criminal provisions of IRCA relating to false statements in the application. This information may be used to prosecute one who "knowingly and willfully falsifies, misrepresents, conceals, or covers up a material fact or makes any false, fictitious or fraudulent statements or representations." INA §§ 210(b)(7), 245(c)(6).

[18] *See infra* notes 35–38 and accompanying text.

B. *Administrative and Judicial Review Provisions*

1. *The Administrative Structure*

IRCA did not specify exactly how legalization cases[19] were to be initially processed. By regulations enacted pursuant to IRCA, however, the Attorney General created a straightforward mechanism for processing legalization cases.[20] Applications were preliminarily handled at "Legalization Offices" and then forwarded to "Regional Processing Facilities" for a final decision.[21]

The statute itself was much more specific about administrative appeals and judicial review of legalization denials. IRCA's scheme for administrative and judicial review is exclusive. The INA states: "[t]here shall be *no administrative or judicial review* of a determination respecting an application for adjustment of status under this section except in accordance with this subsection."[22] The Act then required the Attorney General to establish "an appellate authority to provide for a *single level* of administrative appellate review . . . ."[23] Administrative review of legalization cases was also supposed to be largely confined to the record created below.[24]

Pursuant to this statutory mandate, the INS established the Legalization Appeals Unit (LAU) to decide legalization and Special Agricultural Worker (SAW) appeals.[25] The regulations

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[19] Legalization applications are also generically referred to as "adjustment of status" applications, though they are different from the classic "adjustment of status" to permanent residency. *See infra* note 56.

[20] The Attorney General has delegated power under INA § 103 to promulgate regulations necessary to enforce the Act.

[21] *See* 8 C.F.R. §§ 210.1, 245a.1 (1989). Certain applicants were also permitted to file SAW applications at United States consular offices, ports of entry and embassies. *See* 8 C.F.R. § 210.2 (1989). *See also* 8 C.F.R. § 103.1(n)(2) (1989). For an overview of this administrative structure, see Isgro, *supra* note 4, at 475–83.

[22] INA § 245A(f)(1) (emphasis added). *See also* INA § 210(e)(1) (regarding SAWs).

[23] INA § 245A(f)(3)(A) (emphasis added).

[24] INA § 245A(f)(3)(B) states: "administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of the determination." As with many other provisions of IRCA, this section is somewhat unclear. The precise meaning of the terms "may not have been available" is hardly self-evident, and is not defined in IRCA.

[25] *See* 8 C.F.R. § 103.1(f) (1989). The regulations also provide that if an application is denied by the LAU, the applicant must be given a written statement containing the specific reasons for the denial. *See* 8 C.F.R. §§ 103.3, 210.2(f), 245a.2(o) (1989).

preclude further administrative appeals beyond the LAU. They also explicitly deny jurisdiction to IJs or the Board of Immigration Appeals (BIA) to hear legalization cases under any circumstances.[26] The position of the Justice Department seems to have been that proceedings before the IJs were encompassed by the terms "administrative review" and thus within the ambit of the INA's review restriction, which would prohibit any such review other than that described in IRCA itself.

2. *Judicial Review Provisions*

IRCA contains very specific limitations on judicial review of legalization cases. INA Section 245A(f)(2), for example, precludes all review, administrative or judicial, of legalization denials based upon "late" filings.[27] This section reflects the extreme concern felt by many in Congress that the INS and the federal courts could be swamped by potential applicants who missed the cutoff date.

As to all other denials, the statute provides: "There shall be judicial review of such a denial only in the judicial review of an order of deportation under section 106."[28] This concise provision masks great complexity. But deportation proceedings are completely separate from and unrelated to legalization applications. IRCA in no other way requires applicants to concede that they are "deportable,"[29] or to enter deportation proceedings at

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[26] *See* 8 C.F.R. § 103.3 (1989). The role of IJs is described *supra* note 8. The Board of Immigration Appeals is entirely a creature of regulations. It is the required avenue of administrative appeal for exclusion and deportation cases, though it is also empowered to hear other matters. *See* 8 C.F.R. § 3.1 (1989).

[27] SAW denials based upon late filings are not so barred from review. For a discussion of IRCA's judicial review provisions, see generally Isgro, *supra* note 4, and Martin, *supra* note 4.

[28] INA § 245A(f)(4)(A). INA § 106 provides, inter alia, that jurisdiction to review "final orders of deportation" is vested exclusively in the courts of appeals, and that petitions for such review must be filed within six months of the date of the final deportation order. Section 106 also mandates that habeas corpus review be the sole means of review of exclusion orders, that all administrative remedies be exhausted before review can occur, and that every petition for review or habeas corpus state whether the validity of the challenged order has been previously determined by any court. *See infra* notes 112–113 and accompanying text.

[29] Grounds for deportation range from being "excludable" at the time of entry, *see* INA § 241(a)(1), and entering illegally, *see* INA § 241(a)(2), to being a drug addict, *see* INA § 241(a)(11), or prostitute, *see* INA § 241(a)(12).

all.[30] IRCA seems to assume that an applicant whose legalization case is denied will have an order of deportation entered against her. But the INS is expressly prohibited by the confidentiality provisions from using the amnesty application to commence deportation. Thus, the statutory scheme could have been intended to work in one of two ways. Congress could have intended denied applicants simply to resume their illegal existence, with judicial review acting as a final level of protection if they happened to be caught. But such an approach contradicts the logic of employer sanctions: to force illegal aliens out. Since such aliens would lack employment authorization, they would immediately enter the class targeted by employer sanctions. It seems much more plausible that Congress believed that aliens whose cases were denied by INS would either surrender for deportation or leave the United States.[31] But this approach uses judicial review coercively to achieve policy goals, an idea which ought to be examined very closely by the judiciary.[32]

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[30] *See* INA § 245A(a)(1)(B). Even aliens subject to final orders of deportation were permitted to stay those proceedings if they were "prima facie" eligible under IRCA. *See* 8 C.F.R. §§ 245a.1(d), 245a.2(a)(2)(i) (1989). The problem faced by such applicants if they desire judicial review of a denial, however, is considerable, as described *infra* note 33.

[31] *See infra* note 53 and accompanying text.

[32] The statutory standard for judicial review of legalization denials is similarly perplexing:

> Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority, and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

INA § 245A(f)(4)(B). Although this Article does not analyze the meaning of this scope of review provision, it is important to note its ambiguities. Even the Department of Justice, Office of Legislative and Intergovernmental Affairs, in a letter dated June 4, 1986, pointed out the following:

> The provisions relating to administrative and judicial review are also ambiguous. Administrative review is to be limited to the record existing at the time an application is denied, but the record on review may be updated. Judicial review is to be based solely upon the administrative appellate authority. Its findings and determinations are to be conclusive, unless the court finds an abuse of discretion or that the "findings are directly contrary to clear and convincing facts." These standards of review are not the same, and will only invite controversy and litigation.

H.R. Rep. No. 682, 99th Cong., 1st Sess., pt. 1, at 116 (1986).

3. *Must Aliens Bet Their Lives to Get into Court?*

As noted above, an applicant whose legalization case has been denied must somehow commence deportation proceedings to obtain judicial review.[33] The only way to do this would be to present oneself to the INS and request the issuance of an OSC.[34] But the INS may be reluctant to process those who simply request a deportation proceeding. The INS could refuse to issue the OSC, thereby preventing prompt judicial review.

Another problem is that IRCA mandated complete confidentiality for legalization applicants. The INS cannot use the information in a legalization application to commence deportation proceedings. The confidentiality provisions encouraged participation by aliens who would otherwise fear deportation.[35] But an OSC cannot be issued unless the INS can state a precise ground of deportability.[36] As a practical matter, the only way the INS can obtain information to determine deportability is through the applicant.[37] Therefore, those who want timely judicial review of a legalization denial will likely have to provide the same information contained in the confidential amnesty application. It has been argued that "[t]he difficult choice the alien must make [between confidentiality and judicial review] simply mirrors the duality of purpose that runs all through IRCA . . . [l]egalize or leave."[38] But it is fundamentally unfair to include judicial review within this duality. IRCA, in effect, tells an alien

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[33] Applicants against whom final orders of deportation have already been entered do not face this particular dilemma. But they face another: how to get the case reactivated safely. For an overview of the procedural options available to such applicants, see Martin, *supra* note 4, at 763–65.

[34] As noted previously, an OSC commences deportation proceedings. *See* 8 C.F.R. § 242.1 (1989).

[35] *See* Comment, *Legalization Under the Immigration Reform and Control Act of 1986: Scope of Confidentiality Provisions and Problems in Proving Residence*, 41 U. Miami L. Rev. 1077 (1987).

[36] *See* 8 C.F.R. § 242.1(b) (1989).

[37] The INS must prove deportability by "clear, unequivocal and convincing evidence." Woodby v. INS, 385 U.S. 276, 277 (1966). Notwithstanding INA § 291, which shifts the burden to the alien to prove the "time, place and manner of entry," the government can almost never prove alienage, a critical part of its prima facie case, without some admission by the alien. *But see* Corona-Palomera v. INS, 661 F.2d 814 (9th Cir. 1981) (government procured foreign birth certificates and proved alienage by similarity of names). *See also* United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923) (adverse inference as to alienage may be drawn from alien's silence at hearing).

[38] Martin, *supra* note 4, at 760.

to accept such procedures as the INS deems appropriate. If you want judicial review, waive confidentiality and risk deportation, or leave.

Moreover, deportation proceedings are unpredictable. Although the last hundred years have witnessed a relatively consistent expansion of due process rights for aliens in deportation proceedings,[39] this development will be meaningless to the applicant who is compelled to view the proceedings as merely a means to judicial review. Both the applicant and the INS will likely strive for hearings that are as quick and simple as possible. The INS could use the proceedings as an investigatory mechanism: for example, to question the applicant about friends, family and employers.[40] But it gets worse. Although most INS offices take the informal position that those who walk in, walk

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[39] *See, e.g.*, Woodby v. INS, 385 U.S. 276 (1966) (INS must prove deportability by clear, unequivocal and convincing evidence); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) (deportation proceedings must conform to requirements of Administrative Procedures Act).

[40] Moreover, a tactical problem is also created by IRCA. Most applicants who are eligible for legalization will likely be at least prima facie eligible for suspension of deportation under INA § 244. Such applicants must:

1. Be deportable;
2. Have been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of application (excluding "brief, casual, and innocent" absences which do not "meaningfully interrupt the continuous physical presence"), INA § 244(b)(2);
3. Prove "good moral character" during the seven year period, INA § 244(a)(1);
4. Prove that their deportation would result in "extreme hardship to the alien or to his [sic] spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence," INA § 244(a)(1).

See also INA § 244(a), (a)(2), (f)(2), (f)(3) (special restrictions on suspension of deportation for aliens deportable under INA § 241(a)(4), (5), (6), (7), (11), (12), (14), (15), (16), (17), (18), (19), and aliens admitted pursuant to INA § 101(a)(15)(J)); 8 C.F.R. § 244.1 (1989) (IJ may authorize suspension of deportation).

Some might also be eligible for political asylum or withholding of deportation, in which case they could also be granted employment authorization *pendente lite*. *See* INA §§ 101(a)(42)(A), 208, 243(h). But the IRCA issue cannot be raised before the IJ. If the IRCA appeal seems more likely to succeed than other forms of relief, the applicant may be tempted not to prepare fully or present the suspension or political asylum case. This could be a major procedural mistake in light of the difficulty discussed below in having a deportation hearing reopened, should the IRCA denial be sustained. However, from the applicant's perspective, the primary purpose of the deportation hearing under IRCA is as a jurisdictional prerequisite to judicial review of the IRCA denial. Few would surrender to pursue suspension of deportation. And those with strong political asylum cases would generally be better off first presenting the case affirmatively to the District Director. *See* 8 C.F.R. § 208.1 (1989).

out, the authority to arrest is clear.[41] So, even to make the argument to an article III judge that the INS wrongly denied his amnesty application, the applicant must risk being confined in prison throughout the entire court proceeding.

An alien who is found deportable by an IJ has the right to appeal to the BIA.[42] In an amnesty case, however, there is no reason to undertake such an appeal, unless collateral remedies were available and denied. All the applicant wants is a final order of deportation. In this situation, the decision of the IJ would be final, and would permit judicial review within the meaning of INA Section 106.[43]

The statutory scheme for judicial review of legalization denials presents substantial hurdles to the applicant and raises a number of troubling questions. Do illegal aliens have sufficient due process rights to challenge the unfairness of this system? Is there a right to judicial review of a denial? If there is no such right to judicial review, is there a right to be free from procedures like these? The answers to these questions depend to a large extent upon the intent and power of Congress. Therefore, as a threshold matter, it is important to ascertain whether Congress intended to create the hall of trap doors and mirrors which

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[41] INA § 242(a) states: "Pending a determination of deportability of any alien . . . such alien may . . . be arrested and taken into custody . . . ." *See also* 8 C.F.R. § 242.2 (1989).

[42] *See* 8 C.F.R. §§ 3.1–3.8, 242.21 (1989); *see also* INA § 236(c); 8 C.F.R. § 236.7 (1989) (appeals of exclusion orders).

[43] *See* INA § 242(b); *see also* 8 C.F.R. §§ 3.37, 242.20 (1989). If the applicant has been denied other relief, however, a significant tactical dilemma emerges. An appeal to the BIA will be time consuming and may be expensive. The applicant may not have been granted employment authorization. Moreover, the IRCA administrative record, to which judicial review is confined, as noted above, will become "stale," leaving the reviewing court with few options and making further proof, in the event of a remand, very hard to obtain. Thus, the applicant will have to weigh all the factors and assess both the relative likelihood of success on the legalization case versus other remedies, and the relative benefits available from such remedies.

Applicants who had final orders of deportation entered before IRCA relief became available also face special problems in seeking judicial review of denials. *See* INA § 245A(e)(i), (g)(2)(B)(i); 8 C.F.R. § 245a.2(a)(2) (1989). If their amnesty applications are denied, such applicants must consider the prospect of being arrested and deported within as little as 72 hours. *See* INA § 242(c)–(e); 8 C.F.R. § 243.3 (1989).

Also, if the applicant attempts to petition a court of appeals for review of the legalization denial, using the old deportation order as a jurisdictional basis, the court could dismiss the petition. INA § 106(a)(1) mandates that "a petition for review may be filed not later than 6 months after the date of the issuance of the final deportation order . . . ."

has resulted from IRCA. The next section of this Article thus examines whether the IRCA labyrinth was intended by Congress and why that intent might matter.

C. *What Did Congress Intend?*

IRCA itself does not say that the IJ and BIA cannot decide legalization appeals. This preclusion was effected by regulation. Also, IRCA's guarantee of confidentiality and its requirement of deportation proceedings seem to conflict. It is therefore useful to ascertain Congress' intent on these two questions.[44] Unfortunately, determining congressional intent is difficult.

IRCA's legislative history shows the law was a compromise. Though most Congresspersons agreed that the country had a serious problem, the debate over the solution was intense.[45] Even the name "Immigration Reform and Control Act" implies two rather different approaches to immigration. One group primarily sought reform to help make long-term aliens citizens; the other sought more stringent controls on employers who hire illegal aliens.[46] Courts generally seek to construe a statute as a harmonious whole,[47] but this seems impossible with IRCA.[48] The lack of specific attention to the mechanisms of judicial review and a basic tension between sanctions and am-

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[44] The importance of Congressional intent to judicial statutory interpretation is a matter of much debate. Traditionally, the plain meaning of the text is considered of primary importance. *See* United States v. Missouri Pac. Ry., 278 U.S. 269, 278 (1929) ("where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended"). This rule generally seems to have been honored more in the breach, particularly in more recent cases. *See* Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 Colum. L. Rev. 1299, 1301 (1975); *see also* Comment, *Judicial Deference to the Chief Executive's Interpretation of the Immigration Reform and Control Act of 1986 Antidiscrimination Provision: A Circumvention of Constitutionally Prescribed Legislative Procedure*, 41 U. Miami L. Rev. 1057, 1062 n.27 (1987). For comprehensive overviews of various theories of statutory interpretation, see Eskridge, *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007 (1989); Aleinikoff, *Updating Statutory Interpretation*, 87 Mich. L. Rev. 20 (1988).

[45] *See* Lungren, *supra* note 2, at 273–91; Isgro, *supra* note 4, at 481–83.

[46] *See* Lungren, *supra* note 2, at 273–91.

[47] *See* Richards v. United States, 369 U.S. 1 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act.").

[48] *See supra* note 4 and accompanying text.

nesty make it very difficult to discern whether Congress intended to force applicants to undergo the system ultimately designed.

The legalization program and specifically the confidentiality provisions were intended to be liberally construed.[49] Yet the system was also designed to limit access to the courts.[50] Congress was well aware that there were large numbers of potential IRCA applicants.[51] The early versions of the bills that ultimately became IRCA were extremely restrictive as to judicial review.[52] Though Congress rejected the total preclusion of all judicial review, it wanted to streamline judicial review to some degree. But it is not clear whether anyone understood the statute to require an applicant effectively to waive confidentiality and pass through a threshold deportation proceeding in which she could not even ask for the relief that necessitated the hearing. It could

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> The Committee intends that the legalization program should be implemented in a liberal and generous fashion, as has been the historical pattern with other forms of administrative relief granted by Congress. Such implementation is necessary to ensure true resolution of the problem and to ensure that the program will be a one-time-only program . . . . The confidentiality of the records is meant to assure applicants that the legalization process is serious, and not a ruse to invite undocumented aliens to come forward only to be snared by the INS.

H.R. Rep. No. 99-682(I), 99th Cong., 2d Sess. 72, 73 (1986).

[50] *See* Isgro, *supra* note 4, at 482–83.

[51] *Id.*

[52] The Senate version of the bill specifically precluded all judicial review. The Senate Judiciary Committee explained that:

> A legalization program of the magnitude provided for in this section is unique in history. The program will provide a substantial benefit to large numbers of persons throughout the United States who are now unknown to government authorities. A major managerial effort will be required to review the applications and assure that applicants qualified to be legalized will actually receive this benefit and that other applicants will not. The Committee is concerned that efforts will be made, on behalf of many persons who are ineligible for the legalization program, to delay the final determinations of their applications . . . . It is for the purpose of helping to insure reasonably prompt final determinations that subsection (f) provides that there will be no judicial review of a decision or determination made with respect to the legalization program. Moreover, an alien denied adjustment of status under the legalization program may not raise a claim concerning such adjustment in any proceeding of the United States or any State involving the status of such alien . . . .

S. Rep. No. 132, 99th Cong., 1st Sess. 48 (1985).

be inferred that Congress understood and desired this strange result.[53] Also, the Congressional Record contains references to the generousness of amnesty,[54] implying that illegal aliens should be grateful rather than litigious. However, Congress never seriously puzzled through the exact workings of the program. Therefore, given that the provision forbidding the IJ from considering the merits of the amnesty case is only specified in regulation, one could argue that this provision was not intended by Congress.[55] Because Congress expressed a preference for the general idea of a streamlined system of judicial review, however, a court might conclude that Congress intended to create something like the current IRCA system.[56] Therefore, Part II assumes congressional intent in examining the law and regulations.

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[53] The House Judiciary Committee, with comments that were ultimately incorporated into the House Judiciary Report on H.R. 3810 (the bill that became IRCA), seemed to indicate an understanding that neither the IJ nor the BIA would review an IRCA denial: "[W]hen the administrative review is exhausted and also yields a negative decision, and when the applicant is in a deportation proceeding . . . the applicant can appeal a negative decision within the context of judicial review of a deportation order . . . ." H.R. Rep. No. 115 (I), 98th Cong., 1st Sess. 71 (1983).

[54] Congress intended a "generous program" to be "implemented in a liberal and generous fashion." H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 49, 72 (1986), *quoted in* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1355 (D.C. Cir. 1989) (Wald, C.J., dissenting).

[55] There is little statutory guidance as to judicial review of constitutional questions arising out of legalization denials. In the hearings on the bills that ultimately became IRCA, the preclusion of constitutional challenges to various immigration proposals was hotly debated. *See, e.g., Immigration Reform and Control Act of 1983: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the Comm. on the Judiciary, House of Representatives*, 98th Cong., 1st Sess. (1983) [hereinafter *Hearings*]. Courts will not likely infer that Congress intended to preclude judicial review of constitutional claims. *See* Webster v. Doe, 486 U.S. 592, 108 S.Ct. 2047 (1988).

Even with full consideration, unusual views seem to emerge in this area. "I believe that the provisions in this bill have struck a delicate balance between advocates in favor of streamlining the adjudication process and those in favor of providing a *full measure* of due process." *Hearings*, *supra* note 55, at 278 (testimony of Hon. Peter W. Rodino, Jr.) (emphasis added). Since the bill never became law, no court was required to determine the sufficiency of a "partial" measure of due process. *See also id.* at 949–52 (statement of Maurice A. Roberts, Editor, Interpreter Releases) for a persuasive rebuttal to the argument that limitations on judicial review will streamline deportation and asylum proceedings.

[56] The review system designed for legalization denials and the extant review systems for denials of adjustment of status and asylum are similar. Adjustment of status (adjustment) is a discretionary procedure whereby an alien under temporary or irregular status may, if eligible for an immigrant visa, apply for permanent residence. The adjustment procedure avoids the usual requirement of having to leave and reenter the United States. *See* INA § 245. Adjustment originated in the Immigration and Nationality

II. Congressional Limitations and the Judicial Choice Between Circumvention and Deference

The immigration problem Congress confronted in 1986 was extremely complex: how to offer millions of people an unprec-

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Act of 1952. Though its eligibility requirements have changed often since 1952, it still presents numerous financial, practical and legal advantages to the alien, such as:

a. The availability of counsel throughout all proceedings;
b. The right to work during all proceedings;
c. The right to have waivers adjudicated simultaneously with the adjustment application; and
d. The avoidance of possible exclusion at the border.

See 3 Immigration L. & Procedure at § 7.7a (1989) [hereinafter Immigration Law].

Congress effected major changes in adjustment in 1986. For example, prior to 1986, aliens who had entered as non-immigrants and for whom an immigrant visa later became available were eligible for adjustment even if their permission to remain had expired. After 1986, such aliens could adjust their status only if they were immediate relatives of United States citizens.

A similar review procedure also controls asylum cases. Asylum is a discretionary remedy available to refugees who have a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)42.

Affirmative asylum and adjustment applications are made directly to a local INS District Director. *See* 8 C.F.R. §§ 208.3 (asylum), 245.2 (adjustment). There is no initial requirement of conceding deportability. But there is also no guarantee of confidentiality. Thus, as a practical matter, an application for asylum or adjustment by a deportable alien entails some risk if the INS denies the application.

The INA does not specifically speak to appeals from adjustment denials. Justice Department regulations, however, permit no administrative appeal from a denial of affirmative adjustment applications. If an alien whose application is denied is then served with an OSC and thus placed in deportation proceedings, the application for adjustment may be administratively renewed de novo before the IJ. Courts have used basic exhaustion doctrine to determine whether this administrative scheme precludes pre-deportation judicial review. Some courts frame the analysis in terms of ripeness, ruling that an applicant's appeal was premature. As might be expected, the decisions have been inconsistent. *See, e.g.*, Randall v. Meese, 854 F.2d 472 (D.C. Cir. 1988) (no review granted, noting a lack of ripeness); Jain v. INS, 612 F.2d 683 (2d Cir. 1979) (no review granted), *cert. denied*, 446 U.S. 937 (1980); Augoustinakis v. INS, 693 F. Supp. 1554 (S.D.N.Y. 1988) (no review granted, noting a lack of ripeness); Nassan v. INS, 449 F. Supp. 244 (N.D. Ill. 1978) (review granted, citing INA § 279).

These procedures and the IRCA system are similar. Both involve immigration benefits whose denial cannot be reviewed by an article III judge until after the completion of deportation proceedings. The differences are subtle, but critical. First, there is no guarantee of confidentiality in adjustment, asylum or waiver cases, as there is with IRCA. Therefore, an alien who applies for these benefits knows the risk from the outset. Second, the deportation phase of an adjustment or asylum case is not merely a hurdle to be overcome; it offers a meaningful opportunity for review and rehearing.

As noted, many courts see the deportation prerequisite to review in adjustment cases as an exhaustion question. But a system expressly created by Congress may be different in theory from one implied by the courts or created by regulations. Where the IRCA mechanism is held not to have been required by statute, it seems to fall under the futility exception to exhaustion. *See, e.g.*, Rafeedie v. INS, 688 F. Supp. 729 (D.D.C.

edented benefit, guarantee confidentiality to induce them to apply for that benefit, turn the process over to an overburdened agency[57] and avoid filling the federal courts with thousands of appeals. In addition to these practical considerations, the drafters of IRCA faced an extraordinarily arcane body of law. IRCA's concise judicial review provisions incorporate important aspects of extant immigration law.[58] The system looks simple, and if one does not dig too deeply into the legal firmament, it is simple. To determine whether IRCA's "simple solution" is "wrong," it is first useful to consider why most judges, relying on well-accepted doctrine, would have difficulty in even appreciating the dilemma.

A. An Overview of the Approach of the Judiciary to Immigration Cases

Although immigration to America was, for the nation's first century, largely open and unrestricted, this changed drastically in the late nineteenth century.[59] Virtually from the moment when

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1988) (exhaustion provision of INA is inapplicable where immigrant cannot rebut confidential information and pursuit of administrative remedies would thus be futile).

[57] *See* Memorandum of former INS General Counsel Raymond M. Momboisse, *reprinted in* 66 Interpreter Releases (Federal Publications) No. 41, at 1169–70 (Oct. 23, 1989) ("The INS has not acted as a cohesive entity, but rather more like a feudal state with each region, district, and sector acting independently. . . . The incompetency at all levels of command render[s] many officials liable to disciplinary charges. . . . Recordkeeping and statistical reporting is fictional and designed more to protect an image of efficiency and performance than to report the truth.").

[58] *See supra* note 56.

[59] It is often argued that this change reflected a movement from "Lockean" liberalism to a more instrumentalist, restrictive and racist ideology. *See, e.g.*, Schuck, *supra* note 1, at 1–34 (describing "classical" immigration law). A full exploration of the underlying ideological or metaphysical bases for American immigration law is beyond the scope of this Article. But it is interesting to note that the early colonists' desires to emigrate were themselves based upon social and economic factors. The colonists were eager to populate and exploit the wealth of the new world. This goal did not preclude, but rather coexisted with, a generalized notion of inalienable human rights which may concomitantly have justified open borders. *See id.* at 2. But white European immigrants in particular sought to suppress slave revolts and to fight Native Americans, goals which seem to prove that the contradictions which became obvious in the nineteenth century were already firmly established in the earliest days of the nation. For a comprehensive overview of the history of United States immigration law, see Staff Report, Select Comm'n on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest (1981); T. Aleinikoff & D. Martin, Immigration: Process and Policy 1–59 (1985) [hereinafter Aleinikoff & Martin]; see generally J. Higham, Strangers in the Land: Patterns of American Nativism, 1860–1925 (1955) (general historical background on American immigration policies).

Congress first began to restrict foreign immigration seriously, it also sought to limit judicial review of immigration cases.[60] Before reviewing the specific history of these limitations, it is necessary to survey some of the unique principles of American immigration law.

1. The Exclusion/Deportation Distinction

The basic distinction in American immigration law is that made between those aliens seeking entry and those whom the government seeks to remove. Aliens within the United States who seek a benefit under the immigration laws, usually a change or regularization of status, occupy a gray zone.

As to the first group, the Constitution has been held largely irrelevant. In *United States ex rel. Knauff v. Shaughnessy*,[61] the Supreme Court held that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[62] This approach has lasted nearly one hundred years. Although the last decade has witnessed occasional recognition of the rights of excludable aliens, such recognition has been challenged and resisted.[63]

The doctrine that excludable aliens have virtually no constitutional rights derives from the idea that congressional power to control immigration is rooted in the concept of sovereignty.[64] In *Chae Chan Ping v. United States (The Chinese Exclusion Case)*,[65] Justice Field wrote, "[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers

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[60] *See infra* notes 98–102 and accompanying text.

[61] 338 U.S. 537 (1950).

[62] *Id.* at 544, *quoted in* Schuck, *supra* note 1, at 19 n.93. *See generally id.* at 18–21 (extra-constitutional status of exclusion).

[63] *See, e.g.*, Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. Unit B 1982) (federal question jurisdiction resides in district court where complaint alleges that procedures used violated alien's constitutional rights), *questioned in* Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc) (excludable aliens have no constitutional rights and may be denied admission on grounds that would otherwise be impermissible), *aff'd*, 472 U.S. 846 (1985); Fernandez-Roque v. Smith, 567 F. Supp. 1115 (N.D. Ga. 1983) (granting of procedural rights to excludable aliens on parole from administrative detention), *rev'd*, 734 F.2d 576 (11th Cir. 1984) (parole is part of admission).

[64] *See* Schuck, *supra* note 1, at 1–8.

[65] 130 U.S. 581 (1889).

delegated by the Constitution . . . ."[66] Justice Field justified this holding as follows:

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us.[67]

The plaintiff in the *Chinese Exclusion Case* apparently claimed no constitutional rights.[68] Nevertheless, over time, the doctrine that Congress possesses a plenary power to control external immigration despite the absence of specific constitutional authorization for this power[69] has expanded into the doctrine that, for aliens seeking admission for the first time, the power is not subject to any constitutional limitations at all.[70]

The first Supreme Court case to address the question of the source of the government's power to deport aliens was *Fong Yue Ting v. United States*.[71] In that case, the petitioner challenged an act passed in 1892[72] that required all Chinese laborers to obtain a "certificate of residence." An alien found without a

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[66] *Id.* at 609.

[67] *Id.* at 606.

[68] *See* Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and its Progeny*, 100 Harv. L. Rev. 853, 858 (1987).

[69] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316 (1936) (foreign affairs power held to derive from the nature of independence). *See also* Aleinikoff & Martin, *supra* note 59, at 15 (discussing how *Curtiss-Wright* encompasses the immigration power).

[70] Although the Supreme Court has never fully explored the outer limits of this doctrine, it appears to underlie a number of important decisions. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21 (1982) (returning resident alien has some due process rights in exclusion proceedings, as distinguished from first time arrivals, who have no constitutional rights); Kleindienst v. Mandel, 408 U.S. 753 (1972) (Attorney General need offer only a facially legitimate and bona fide reason to exclude alien on basis of likely content of speech); *see also* Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc) (aliens seeking admission held to have no constitutional rights), *aff'd*, 472 U.S. 846 (1985). The doctrine has been extensively criticized, however. *See Developments*, *supra* note 1, at 1339–48.

[71] 149 U.S. 698 (1893).

[72] Act of May 5, 1892, ch. 60, 27 Stat. 25 (repealed 1943).

certificate would be arrested and deported unless he could show that he was a resident at the time the Act was passed. But the latter requirement could only be proved "by at least one credible white witness."[73] The petitioners in *Fong Yue Ting* could not produce white witnesses and were therefore held to be deportable.

In considering the constitutional challenges, the Court began by asserting that "the right of a nation to expel or deport foreigners . . . rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."[74] Viewing the matter as essentially a political question, the Court declined to examine closely the government's deportation mechanism.[75]

2. *The Procedures of Deportation*

Although *Fong Yue Ting* would seem to end all judicial review of deportation matters, the procedures of deportation have been scrutinized more closely by the judiciary than the substance.[76] In *Yamataya v. Fisher (The Japanese Immigrant Case)*,[77] the Court drew a distinction that remains in the law today:

> [T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental prin-

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[73] *Id.* at 26.

[74] *Fong Yue Ting*, 149 U.S. at 707.

[75] Justice Field, who had authored the *Chinese Exclusion Case*, dissented in *Fong Yue Ting* on the grounds that the petitioners in *Fong Yue Ting* were lawful residents of the United States, protected by the Constitution, and that the 1892 Act imposed punishment without due process of law and violated the fourth, fifth, sixth and eighth amendments.

[76] *See* Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (Court upheld deportation of legal resident alien because of membership in the Communist party even though membership had terminated before Congress made it a ground for deportation).

[77] 189 U.S. 86 (1903). For an eloquent explanation of why this development was necessary, see Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953).

ciples that inhere in "due process of law" as understood at the time of the adoption of the Constitution.[78]

Thus, aliens in deportation proceedings have a constitutional right to a fundamentally fair hearing.[79] The Supreme Court, however, has indicated that some of the components of fundamental fairness could depend upon whether deportation is viewed as a quasi-criminal or civil proceeding.[80]

Courts have declined to invoke procedural due process in exclusion hearings to the same degree as in deportation hearings.[81] Exclusion cases involve both initial applicants for admission and returning resident aliens.[82] The Court has seen this distinction as crucial to the procedural rights available to the alien: "[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."[83]

This approach combines two distinct factors: long term residence in the United States and legal status. But legality makes little sense as a prerequisite for procedural due process. All aliens in deportation are accused of being illegal. The grounds of deportation range from defects in the manner of

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[78] *The Japanese Immigrant Case*, 189 U.S. at 100. Ms. Yamataya's breakthrough was of little help to her. The Court went on to hold that the fact that she apparently did not understand a word of the proceedings was no violation of due process.

[79] *See* Aquilera-Enriquez v. INS, 516 F.2d 565 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976). This concept probably includes a right to an adequate translation. *See* Tejeda-Mata v. INS, 626 F.2d 721 (9th Cir. 1980), *cert. denied*, 456 U.S. 994 (1982). It also probably requires timely notice of charges, opportunity to be heard and to produce evidence and witnesses, opportunity to cross-examine witnesses, the right to have the decision based on the evidence and the right to some review. *See* Immigration Law, *supra* note 56, at § 5.5. The statute provides for a number of these protections specifically at INA § 242(b). The extent to which these are all required by due process has never been determined by the Supreme Court, however. Aliens in exclusion hearings have substantially fewer procedural rights. *See* Immigration Law, *supra* note 56, at § 3.20(d).

[80] *See* INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (deportation is a civil proceeding and the fourth amendment exclusionary rule does not apply, except in unusual circumstances, though the basic right to a fair hearing under the fifth amendment remains).

[81] *See, e.g.*, Landon v. Plasencia, 459 U.S. 21 (1982) (returning resident alien held entitled to due process in exclusion hearing); Rosenberg v. Fleuti, 374 U.S. 449 (1963) (innocent, casual and brief departure from United States entitles resident alien to greater procedural protections and does not justify exclusion hearing upon return).

[82] *See* INA §§ 235, 236.

[83] *See Landon*, 459 U.S. at 32.

initial entry[84] to crimes committed many years later.[85] To base procedural due process on the legality of an alien's status would require a preliminary hearing to determine the process due at the deportation hearing. A more logical view is that procedural rights should be based upon an alien's stake in the community[86] or community ties.[87] Either of these approaches would certainly help IRCA applicants, who have lived in the United States for many years.

3. *Deference to the Legislature*

In addition to basing the scope of aliens' due process rights on technical immigration status, courts have followed a tradition of extreme deference in immigration cases. Given the lack of clear lines between substantive and procedural issues in admission, benefits and deportation cases,[88] the deference principle is often dispositive. As one commentator put it: "In the canon of classical immigration law, judges should be seen—if absolutely necessary—but not heard."[89]

The typical formulation of judicial deference in the immigration context is as follows: "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens . . . . Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments [which are] largely immune from judicial control.'"[90] Deference

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[84] *See* INA § 241(a)(1).

[85] *See* INA § 241(a)(4).

[86] *See* Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev. 165 (1983).

[87] *See* Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. Pitt. L. Rev. 237 (1983).

[88] *See supra* notes 78–89 and accompanying text.

[89] Schuck, *supra* note 1, at 14. *See generally id.* at 18–21.

[90] Fiallo v. Bell, 430 U.S. 787, 792 (1977) (citing Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953); *see e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Lem Moon Sing v. United States, 158 U.S. 538 (1895); Fong Yue Ting v. United States, 149 U.S. 698 (1893); The Chinese Exclusion Case, 130 U.S. 581 (1889)).

Recent Supreme Court "decisions have not departed from this long-established rule." *Fiallo*, 430 U.S. at 792 (citing Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976); Mathews v. Diaz, 426 U.S. 67, 81–82 (1976)).

is invoked in a wide range of situations.[91] Professor Peter Schuck speculates that such deference is largely based upon a reification of sovereignty as a source of governmental power, making expansion of rights by accretion more difficult.[92] Thus, even if a judge seriously entertains an immigration question, she will have to contend immediately with "not merely 'a page of history' . . . but a whole volume."[93] But reification of sovereignty does not necessarily exclude the judiciary from participating in defining the sovereign power.[94] Moreover, reification does not explain the continuing reliance on peculiar precedents that were expressly racist, like the *Chinese Exclusion Case*, or that have been otherwise extensively criticized.[95] If Professor Schuck's optimism about the trend in this area of law proves correct, it will not necessarily be because courts cease to rely on sovereignty as a foundational principle. Rather, it will be because other principles, such as basic procedural human rights, will assume more importance.[96]

B. A Brief History of Limitations on Judicial Review of Immigration Cases

Against the backdrop of extreme judicial deference and conflicting social, economic and ideological forces, Congress has often sought to limit judicial review of immigration matters. These limitations reflect two contradictory concerns: the asser-

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[91] *See, e.g.*, Smith v. INS, 684 F. Supp. 1113 (D. Mass. 1988) (rejecting due process and equal protection challenge to aspect of Immigration Marriage Fraud Amendments which would require alien who had married citizen to leave the United States for two years before obtaining permanent residence).

[92] *See* Schuck, *supra* note 1, at 18–21.

[93] Galvan v. Press, 347 U.S. 522, 531 (1954) (citation omitted).

[94] *See* Schuck, *supra* note 1, at 20.

[95] *See id.* at 87–89.

[96] There are, of course, positive reasons for judicial deference in some areas of immigration law. For example, substantive and political policy choices regulating the admission of aliens into the United States are generally not an appropriate subject for judicial review. But where those policy choices directly impact positive constitutional rights of citizens or resident aliens, courts should not reflexively defer to the political branches. *See* Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (certain INS border search practices considered subject to the fourth amendment). *See also* United States v. Brignoni-Ponce, 422 U.S. 873 (1975). Similarly, as recognized by the Court in the *Japanese Immigrant Case*, procedural unfairness should generally be reviewed by the judiciary.

tion by the legislature of largely unreviewable sovereign power and a concern that the courts not be overburdened by immigration cases. The concern of Congress with litigation seems somewhat surprising given that the courts themselves have so frequently deferred to the legislative and executive branches in immigration cases. A review of the history of congressional actions to limit review in immigration cases reveals a complex dialogue about which the best that can be said is that "[t]he best laid schemes o' *Mice* an' *Men*, Gang aft agley."[97]

1. From Habeas Corpus to the APA

As early as 1891, administrative decisions in immigration cases were defined by Congress as "final."[98] With the exception of the infamous Chinese Exclusion Laws, which provided for determinations by commissioners and district courts,[99] most immigration decisions were, at least until the passage of the Immigration and Nationality Act of 1952, considered to be immune from all but habeas corpus review.[100] Habeas review was not, however, available until the alien was physically taken into custody.[101] Thus, even though habeas review could provide

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[97] R. Burns, "To a Mouse," in The Kilmarnock Poems (Poems Chiefly in Scottish Dialect, 1786) (1985). "Agley" means "awry," according to the editor.

[98] *See* Immigration Act of 1891, ch. 551, § 8, 26 Stat. 1084, 1085 ("[a]ll decisions made by the inspection officers . . . shall be final unless appeal be taken to the [S]ecretary of [I]mmigration, whose action shall be subject to review by the Secretary of the Treasury."). *See also* Heikkila v. Barber, 345 U.S. 229, 233–35 (1952) (habeas corpus is the only means for challenging a deportation order).

[99] *See* An Act to execute certain treaty stipulations relating to Chinese, ch. 126, § 12, 22 Stat. 58, 61 (1882) (amended 1884, 1888, 1892).

[100] *See* Note, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 Yale L.J. 760 (1962). The passage of the Declaratory Judgment Act, 28 U.S.C. § 2201 (1982), in 1934 raised hopes that aliens might be able to challenge immigration decisions without first being imprisoned. In Perkins v. Elg, 307 U.S. 325 (1939), the Supreme Court held that a person threatened with deportation proceedings could bring a district court action under the Declaratory Judgment Act to determine her claim to citizenship. *See also* McGrath v. Kristensen, 340 U.S. 162, 169 (1950) ("Where an official's authority to act depends upon the status of the person affected, in this case eligibility for citizenship, that status, when in dispute, may be determined by a declaratory judgment proceeding after the exhaustion of administrative remedies."). *But see Heikkila*, 345 U.S. at 233–35 (upholding the exclusivity of habeas corpus jurisdiction to all cases arising under the Immigration Act of 1917 that involved outstanding orders of deportation and limiting *Elg* and *Kristensen* to claims of citizenship).

[101] Imprisonment is no longer necessarily a jurisdictional prerequisite for habeas corpus review in immigration cases. *See* Hensley v. Municipal Court, 411 U.S. 345 (1973) (release on own recognizance); Jones v. Cunningham, 371 U.S. 236 (1963) (par-

close scrutiny of deportation procedures,[102] the custody requirement limited its availability.

The enactment of the Administrative Procedure Act (APA)[103] in 1946 raised questions about the extent to which "final" meant "really final" under the immigration laws. In *Wong Yang Sung v. McGrath*,[104] the Supreme Court extended the APA and its judicial review mechanism to deportation proceedings, holding that immigration officers who also performed investigative and prosecutorial functions could not fairly act as impartial adjudicators. The decision seemed to base the right to an impartial hearing in the Constitution as well as the APA.[105] Congress, however, immediately responded by passing a law that specifically exempted exclusion and deportation proceedings from the relevant provisions of the APA.[106] One year later, that provision was repealed by the comprehensive Immigration and Nationality Act of 1952 (INA).[107] The INA permitted a hearing officer to act as both prosecutor and hearing officer, though she may not hear cases she investigated. In addition, the INA stated that the deportation procedure it created was to be "sole and exclusive."[108] These provisions were upheld by the Supreme Court in *Marcello v. Bonds*,[109] but the constitutional question was finessed.[110]

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ole); United States *ex rel.* Marcello v. District Director, 634 F.2d 964 (5th Cir.), *cert. denied*, 452 U.S. 917 (1981) (outstanding order of deportation held valid basis for habeas corpus jurisdiction even though alien not in custody).

[102] *See, e.g.*, Chin Yow v. United States, 208 U.S. 8 (1908) (alien entering and claiming citizenship entitled to fair hearing before deportation; habeas corpus review available to determine whether hearing was sufficient); Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86 (1903) (Court used habeas corpus jurisdiction to review the fairness of the deportation hearing); Nishimura Ekiu v. United States, 142 U.S. 651 (1892) (alien detained upon entry entitled to writ of habeas corpus; issue is whether government had "sufficient" reason to detain, not whether arrest and detention were flawed).

[103] 5 U.S.C. §§ 551–559 (1988).

[104] 339 U.S. 33 (1950).

[105] *See id.* at 50 ("When the Constitution requires a hearing, it requires a fair one.").

[106] *See* Supplemental Appropriations Act of 1951, ch. 1052, 64 Stat. 1044, 1048 (1950).

[107] Pub. L. No. 82-414, ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1557 (1988).

[108] INA § 242(b).

[109] 349 U.S. 302 (1955).

[110] *See* Schuck, *supra* note 1 at 32–34, for a strong critique of the Court's reasoning in *Marcello* (discussing how the Court ignored the question of how *Wong Yang Sung*'s constitutional fair hearing requirement could be overruled by Congress).

Notwithstanding its traditional reticence to involve the judiciary in immigration matters, the Supreme Court liberally construed the relationship between the APA and the INA. In *Shaughnessy v. Pedreiro*,[111] the Court held that deportation orders entered under the 1952 Act were reviewable under the rubric of the APA. Thus, beginning in 1956, the validity of deportation orders could be tested without the alien going to jail first.

2. Section 106

Judicial review of immigration cases based primarily on the APA was to last less than five years. In 1961, responding to the perception that aliens and their attorneys were abusing the judicial system with repetitious and unjustified delaying tactics,[112] Congress passed and the President signed an amendment to the INA which specified, for the first time, a systematic approach to review of deportation orders.[113]

Section 106 of the INA mandated:

1. That judicial review of "final" deportation orders could only be in the courts of appeals;

2. That all administrative remedies available "as of right" be exhausted;

3. That judicial review be based "solely upon the administrative record upon which the deportation order is based" and that administrative findings of fact, if supported by "reasonable, substantial and probative evidence" shall be conclusive;

4. That habeas corpus would again be the exclusive method of review of exclusion cases.

In enacting Section 106, Congress intended to limit access to the district courts in deportation matters, to avoid multiple

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[111] 349 U.S. 48 (1955). *See also* Brownell v. Shung, 352 U.S. 180 (1956) (exclusion orders could be similarly reviewed). These cases applied the APA only because the INA was deemed silent as to the particular types of cases presented. Thus, to this day, the APA applies to review of immigration matters only where review is not specifically precluded or defined in the immigration laws.

[112] *See* Note, *supra* note 100, at 760 n.4 ("This feeling is reflected on virtually every page of H.R. Rep. No. 565.").

[113] Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5, 75 Stat. 651, 660–62, INA § 106 (codified as amended at 8 U.S.C. § 1105a (1988)).

layers of appellate review and to require as much deference as possible to the INS hearing procedures. In spite of the clear congressional intent to streamline and simplify procedures, however, Section 106 has itself spawned a great deal of litigation.

One of the areas of greatest difficulty has involved the definition of the statutory term "final order of deportation."[114] In *Foti v. Immigration and Naturalization Service*, the petitioner applied for a suspension of his deportation hearing. When the application was denied, he appealed to the BIA, which also denied relief. He then commenced an action in district court, but the action was dismissed on the ground that Section 106 required review in a court of appeals. The Second Circuit, however, then dismissed his petition, holding that Section 106 did not apply to applications for discretionary relief. The Supreme Court reversed, holding that "all determinations made *during and incident to* the administrative proceeding" were included within Section 106.[115]

In *Cheng Fan Kwok v. Immigration and Naturalization Service*,[116] the Court held that jurisdiction to review the denial of a stay of deportation, which order had not been entered during the deportation proceeding itself, was not covered by Section 106 and could therefore be reviewed by the district court. Thus, after *Foti* and *Cheng Fan Kwok* there appeared to be a bright line test for Section 106: orders entered during deportation proceedings, and deportation orders themselves, could be challenged only in the courts of appeals. All other issues, even if integrally related to the deportation question,[117] were left for the district courts. In effect, the order the INS chose to enter determined where the petitioner could seek review.

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[114] *Compare* Foti v. INS, 375 U.S. 217 (1963) (denial of suspension of deportation is reviewable as part of a final order) *and* Giova v. Rosenberg, 379 U.S. 18 (1964) (denial of motion to reopen held reviewable by court of appeals) *with* Cheng Fan Kwok v. INS, 392 U.S. 206 (1968) (denial of stay of deportation by District Director pending adjustment application not part of final order; § 106(a) held to embrace only those determinations made during deportation proceedings).

[115] *Foti*, 375 U.S. at 229 (emphasis added).

[116] 392 U.S. 206 (1968).

[117] *See, e.g.*, Kavasji v. INS, 675 F.2d 236 (7th Cir. 1982) (denial by District Director of application for transfer of schools and extension of stay held to be outside the ambit of § 106 even though result was deportation).

Since *Immigration and Naturalization Service v. Chadha*,[118] the question has involved the meaning of the word "contingent" as well as that of the word "final." In *Chadha*, the Supreme Court was asked by both the alien and the Justice Department to consider whether a constitutional challenge to a one-House legislative veto of a suspension of deportation was reviewable under Section 106. To address the constitutional question, as both Chadha and the Justice Department requested, the Court expanded the jurisdictional test as follows: "[T]he term final orders in [Section] 106(a) includes all matters on which the validity of the final order is contingent, rather than only those determinations made at the hearing."[119]

The courts of appeals have continued to wrestle with the definitional conundrum of Section 106.[120] As a matter of policy, the *Chadha* formulation is puzzling. Opening the courts of appeals to the wide variety of immigration matters upon which an order may be contingent does not serve the policy of reducing the burden upon the federal courts. When Congress placed the IRCA judicial review mechanism within the framework of Section 106, it seems to have adopted the *Chadha* view of a final order. A final order of deportation is contingent upon the legalization application. Moreover, the notion that federal court jurisdiction may be completely dependent upon administrative practice, argued to be anomalous in *Cheng Fan Kwok*, is acutely problematic with IRCA, where the deportation component of the administrative process is completely severed from the legalization case. It appears that some of the procedural difficulties with IRCA actually derive from Section 106 and from the approaches taken by the judiciary in construing its terms.

In addition, district courts have used the exhaustion of remedies principle to deny review in a variety of settings.[121] The district court jurisdictional statutes do not explicitly require

[118] 462 U.S. 919 (1983).

[119] *Id.* at 938 (citation omitted).

[120] *See, e.g.*, Mohammadi-Motlagh v. INS, 727 F.2d 1450 (9th Cir. 1984) (court of appeals has no jurisdiction to determine whether INS properly denied an alien permission to transfer schools; denial was not a determination on which the final order of deportation was contingent).

[121] *See, e.g.*, Kashani v. Nelson, 793 F.2d 818 (7th Cir.) (upholding district court ruling that it lacked jurisdiction to review administrative denial of asylum request), *cert. denied*, 479 U.S. 1006 (1986).

exhaustion,[122] as do Section 106 and IRCA, and no immigration statute prior to IRCA has ever required exhaustion of a completely futile procedure. Thus, no court has considered the validity of this mechanism. Nevertheless, courts have declined to require exhaustion where the procedures that the alien is forced to undergo are themselves alleged to be unconstitutional. This argument can be made about the IRCA deportation requirement.

The most famous case involving allegedly unconstitutional immigration procedures is *Haitian Refugee Center v. Smith*,[123] a class action involving over 4000 Haitian applicants for asylum. The applicants alleged that the INS had carefully orchestrated a program to deny them their statutory and constitutional rights. In holding that the district court had jurisdiction to hear complaints of a "pattern and practice" by immigration officials to violate applicants' constitutional rights, the court stated:

> Although a court of appeals may have sole jurisdiction to review alleged procedural irregularities in an indi-

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[122] The most common basis for district court jurisdiction in immigration cases is INA § 279, providing that "[t]he district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter."

The term "this subchapter" refers to title II of the Act governing most immigration matters. Title I ("General") includes INA §§ 101–106, which, in addition to the jurisdictional matters discussed in this Article, contain definitions and powers of the Attorney General, the INS, and the Secretary of State. *See id.* at §§ 1101–1106. Title II governs Immigration. *See id.* at §§ 1151–1365. Title III governs Nationality and Naturalization; *see id.* at §§ 1401–1503; title IV, refugee assistance; *see id.* at §§ 1521–1525.

To obtain jurisdiction under § 279, plaintiffs must show that the claim arises under title II and is not subject to preclusion of review under statutes such as § 106. *See, e.g.*, Chen Chaun-Fa v. Kiley, 459 F. Supp. 762, 764 (S.D.N.Y. 1978) (court lacked jurisdiction to hear appeal of denial of pre-1980 asylum claim because statutory basis of claim was INA § 279). Typically, appellants also invoke 28 U.S.C. § 1331 (1982), which states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The Declaratory Judgment Act, 28 U.S.C. § 2201 (Supp. V 1987), is also often used. *See* Navarro v. INS, 574 F.2d 379 (7th Cir.), *cert. denied*, 439 U.S. 861 (1978).

Finally, the writ of habeas corpus remains available in the district courts pursuant to 28 U.S.C. § 2241 (1982). Since the passage of § 106, actual physical custody is not necessarily a jurisdictional prerequisite to habeas corpus relief. *See* Flores v. INS, 524 F.2d 627 (9th Cir. 1975); United States *ex.rel.* Pon v. Esperdy, 296 F. Supp. 726 (S.D.N.Y. 1969). *But see* Garcia v. Smith, 674 F.2d 838, 840 n.1 (11th Cir.) (upholding habeas corpus review of asylum claim), *modified on other grounds*, 680 F.2d 1327 (1982).

[123] 676 F.2d 1023 (5th Cir. Unit B 1982). *See also* Salehi v. INS, 796 F.2d 1286, 1290–91 (10th Cir. 1986) (allowing due process claim which is not a direct attack on deportation order).

> vidual deportation hearing *to the extent these irregularities may provide a basis for reversing an individual deportation order*, that is not to say that a program, pattern or scheme by immigration officials to violate the constitutional rights of aliens is not a separate matter subject to examination by a district court.[124]

The court further noted that exhaustion is not a jurisdictional requirement, but a matter of judicial discretion. Alhough the court allowed the action to proceed,[125] it warned that its holding was "not to be construed as permitting a constitutional challenge in the district court based on a procedural ruling in a deportation proceeding with which an alien is dissatisfied. We refuse to condone any such end-run around the administrative process."[126]

Although the Fifth Circuit was clear about the limits of its *Haitian Refugee Center* approach to immigration cases, both Congress and other circuits have expressed concern about its implications. Participants at hearings regarding IRCA's precursors extensively discussed the case and frequently expressed their desire to eliminate even this small loophole in the exhaustion requirement.[127]

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[124] *Haitian Refugee Center*, 676 F.2d at 1033.

[125] *Id.* at 1034. The court discussed the factors it considered in determining whether judicial review was appropriate:

> 1) allowing the agency to develop a more complete factual record;
> 2) permitting the exercise of agency discretion and expertise on issues requiring this;
> 3) preventing deliberate disregard and circumvention of established agency procedures; and
> 4) enhancing judicial efficiency and eliminating the need for judicial vindication of the rights by giving the agency the first opportunity to correct any error.

676 F.2d at 1034 (citing McKart v. United States, 395 U.S. 185, 193–95 (1969), and Ecology Center of Louisiana, Inc. v. Coleman, 515 F.2d 860, 866 (5th Cir. 1975)).

[126] 676 F.2d at 1033. Judge Posner recently echoed this warning in a concurring opinion in Marozsan v. United States, 852 F.2d 1469, 1479 (7th Cir. 1988) (en banc) (upholding judicial review of a due process challenge to procedures of the Veteran's Administration), when he expressed concern that "federal courts [will] be inundated with run-of-the-mine procedural challenges dressed up as constitutional claims." *Id.* at 1483 (Posner, J., concurring). Posner believes that such challenges can be preempted by vigorously enforcing Fed. R. Civ. P. 11 (sanctions upon persons who file frivolous suits). *See id.* at 1483 (Posner, J., concurring).

[127] *See Hearings*, *supra* note 55. The range of opinions on this matter was broad.

Moreover, in *Ayuda, Inc. v. Thornburgh*,[128] the District of Columbia Circuit referred to *Haitian Refugee Center* as "a gaping hole in the middle of the INS's defensive line."[129] *Ayuda* considered the question whether IRCA precluded judicial review of INS rulemaking regarding eligibility for amnesty. Four organizations that counsel aliens and five individual aliens sued in federal court claiming that the INS based its regulation defining the phrase "unlawful status known to the Government"[130] on an impermissible interpretation of the statute.[131] The court of appeals first considered IRCA's standard of review, noting that it is "about as restrictive as the Congress can fashion."[132] The court speculated that "even legal questions concerning the interpretation of IRCA are reviewable only under the abuse of discretion standard,"[133] though it seemed somewhat uncomfortable with this conclusion.[134]

The court then concluded that broad challenges to INS policy and rulemaking are not permitted under IRCA. The court stated that IRCA prohibited judicial review "of a determination respecting an application,"[135] explaining that "if anything, the legislative history suggests that Congress, rather than considering such extensive judicial monitoring of the legalization pro-

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Both Maurice Roberts, editor of Interpreter Releases, and John Shattuck of the ACLU questioned the basic assumption that judicial review was responsible for the backlog in asylum cases, blaming instead the INS itself. *See id.* at 952 (statement of Maurice Roberts); *id.* at 1071 (statement of John H.F. Shattuck) (urging that existing rights to judicial review be maintained, including district court review of allegations similar to those in *Haitian Refugee Center*). Otis L. Graham, of the Federation for American Immigration Reform ("FAIR"), argued that the House bill provided for "interminable appeals" and was "*a prescription for disaster.*" *Id.* at 733. Similarly, Rep. James H. Scheuer of New York wondered whether the legal system could handle "the load of 1 million or more people who can be expected . . . each entitled to long, detailed and expensive constitutional processes?" *Id.* at 1020. Many witnesses expressed concern about limitations on review of pattern and practice cases. *See, e.g.*, *id.* at 1259 (statement of Walter E. Fauntroy).

[128] 880 F.2d 1325 (D.C. Cir. 1989).

[129] *Id.* at 1336.

[130] IRCA grants amnesty to aliens who legally entered the United States before January 1, 1982, but whose authorized stay expired before that date or whose unlawful status was "known to the Government" by that date. *See* 8 U.S.C. § 1255a(a)(2)(B) (1988).

[131] *See* Ayuda, Inc. v. Meese, 687 F. Supp. 650, 660–66 (D.D.C. 1988).

[132] *Ayuda*, 880 F.2d at 1329 (citations omitted).

[133] *Id.*

[134] *See id.* at 1329–30 n.2.

[135] 8 U.S.C. § 1255a(f)(1) (1988).

gram, only grudgingly provided *any* judicial review even in the context of deportation orders."[136] Thus, *Ayuda* indicates an extreme judicial deference to INS actions under IRCA. But the case leaves important questions unanswered. The court does not carefully consider constitutional claims which, by their very nature, cannot be deferred under Section 106. Even assuming the *Ayuda* holding is correct, IRCA might still permit judicial review of claims that the procedure itself is unconstitutional.

The policy behind both Section 106 and IRCA, as noted by the dissent in *Ayuda*, was "to foreclose aliens from flooding the courts with suits seeking premature review of individual applications."[137] The policy, however, does not mean that all constitutional challenges are implicitly barred.[138] Moreover, the court in *Ayuda* failed to consider IRCA's mechanisms, with both majority and dissent simply taking for granted that denied applicants would complete deportation proceedings and seek review afterward.[139]

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[136] 880 F.2d at 1334. The court's linguistic analysis, however, is questionable. *See id.* at 1359 (Wald, C.J., dissenting).

The court opined that *Haitian Refugee Center* and its progeny were inconsistent with Heckler v. Ringer, 466 U.S. 602 (1984), a challenge to a ruling issued by the Secretary of Health and Human Services that precluded payment under Medicare for a particular surgical procedure. The Supreme Court refused to permit such challenges, holding that *Ringer* was "clearly seeking to establish a right to future payments." *Id.* at 621. The *Ayuda* court, however, noted that, unlike *Haitian Refugee Center*, *Ringer* did not present a constitutional claim. *See Ayuda*, 880 F.2d at 1336.

The court also cited with disapproval those cases where district courts had applied the *Haitian Refugee Center* approach to IRCA. *See id.* at 1337. *See infra* note 140 for a discussion of these cases. The court stated its opinion of IRCA as follows:

> We think that whatever the proper interpretation of section 106 as it relates to "final orders of deportation," IRCA's judicial review provisions, although employing the section 106 machinery, have a broader preclusive effect. It is arguable, for example, that certain INS actions other than those under IRCA taken before initiation of deportation proceedings are reviewable in the district court under APA standards, despite the exclusivity provision of section 106 . . . . IRCA, however, provides for an alien to seek review of a denial of legalization *only* in the context of a deportation proceeding.

Id. at 1337–38 (citations omitted); *but see id.* at 1357 (Wald, C.J., dissenting) (criticizing the majority's "flamboyant" reading of § 1255a(f)).

[137] *Id.* at 1354 (Wald, C.J., dissenting).

[138] *See* Webster v. Doe, 108 S.Ct. 2047, 2053 (1988) ("Where Congress intends to preclude review of constitutional claims its intent to do so must be clear.") (citing Johnson v. Robison, 415 U.S. 361, 373–74 (1974)).

[139] *See Ayuda*, 880 F.2d at 1339, 1354.

No litigant has yet challenged the constitutionality of an IRCA denial or of the mandatory deportation proceeding. The reasons for this absence of constitutional challenges are as follows:

1. Relatively few cases have been finally denied by the LAU; in fact, the INS has generally been liberal in its determinations of the facts of legalization cases;

2. The traditions of sovereign power and judicial deference present imposing obstacles to such challenges; and

3. Alternatives are readily available. A number of cases, for example, have already successfully challenged INS practices and procedures in IRCA cases, though never the statute itself.[140]

Notwithstanding *Ayuda*, the constitutional questions raised by IRCA will inevitably have to be addressed. Characterization of claims as constitutional is difficult in the immigration context

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[140] These collateral actions have arisen from a wide variety of situations. The first cases involved applicants with prior orders of deportation who claimed prima facie eligibility for legalization, but who were denied stays of deportation. Jurisdiction in cases of this type seems most properly based upon a writ of habeas corpus. *See, e.g.*, Hernandez v. Gregg, 813 F.2d 633 (3d Cir. 1987) (denying petition of Cuban parolee incarcerated during resolution of legalization case); Dor v. INS, 697 F. Supp. 694 (S.D.N.Y. 1988) (denying challenge to deportation proceedings due to failure to exhaust administrative remedies); Gutierrez v. Ilchert, 682 F. Supp. 467 (N.D. Cal. 1988) (petition conditionally granted regarding detention upon reentry from three week visit to Mexico); Farzad v. Chandler, 670 F. Supp. 690 (N.D. Tex. 1987) (upholding challenge to deportation order based on alleged INS misinterpretation of "known to the Government"); Bailey v. Brooks, 688 F. Supp. 575 (W.D. Wash. 1986) (petition for habeas corpus granted regarding detention upon reentry from brief trip to Canada).

In cases that did not involve immediate threats of imprisonment or deportation, applicants have generally sought relief pursuant to the Administrative Procedure Act and the Declaratory Judgment Act. Although such cases have involved a wide variety of specific challenges to INS actions, all were specifically distinguished from reviews of denials. For a case in which plaintiffs challenged the 30 day rule of 8 C.F.R. § 245a.2(a)(2)(i) (1989), see Doe v. Nelson, 703 F. Supp. 713 (N.D. Ill. 1988). The government argued, inter alia, that the suit was barred by INA § 245A(f)(2). The court, noting that plaintiffs challenged the methods of INS and not the specific denial, allowed the cause of action to go forward. *Doe*, 703 F. Supp. at 721 (quoting Marozsan v. United States, 852 F.2d 1469, 1472 (7th Cir. 1988) (en banc)). *See also* Haitian Refugee Center, Inc. v. Nelson, 694 F. Supp. 864 (S.D. Fla.), *aff'd*, 872 F.2d 1555 (1988); Vargas v. Meese, 682 F. Supp. 591 (D.D.C. 1987).

Cases which can be certified as class actions pursuant to Fed. R. Civ. P. 23 are less likely to be viewed as attempts to circumvent INA § 245A(f). *See* LULAC v. INS, No. 87-4757-WDK (C.D. Cal. 1988); Bamondi v. INS, No. 88-1410-KG (S.D. Cal. 1988); Catholic Social Services, Inc. v. Meese, 664 F. Supp. 1378 (E.D. Cal. 1987). *But see Doe*, 703 F. Supp. at 721 ("The INS cannot seriously argue that a pattern of constitutional violations becomes intolerable only once a threshold number of people are victimized.").

because courts have tended to make rights contingent on technical status. The next section of this Article explains how traditional immigration doctrine would likely be applied to this unique statute.

C. The Probable Judicial Approach to the Constitutionality of IRCA Under Traditional Immigration Law

As noted in Section A, the extent of aliens' rights, and the degree of judicial involvement in determining those rights, have traditionally depended upon the context in which the cases have arisen. Admission cases evoke minimal scrutiny and involve almost no recognized rights. At the other extreme, the judiciary becomes substantially involved with the procedures of deportation. Such threshold classification is largely dispositive of the outcome of the legal analysis in immigration cases. Although IRCA applies only to aliens already in the United States, it does not implicate the procedures of deportation.[141] Courts may view the statute as providing a benefit, deeming it, in immigration terms, a quasi-admission case.

To illustrate how this works in practice, two well-known examples of constitutional challenges to immigration laws, which encompass the different ways courts might approach IRCA, should be compared:

1. Challenges to substantive classifications such as the denial of benefits to the illegitimate children of permanent resident or citizen fathers, based upon due process or equal protection grounds;[142] and

2. Challenges to Section 5 of the Immigration Marriage Fraud Amendments of 1986 (IMFA).[143]

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[141] One could argue, however, that the statute involves procedures by prohibiting the introduction of relevant evidence. But the initial question of whether Congress had the power to force the proceeding remains.

[142] *See* Fiallo v. Bell, 430 U.S. 787 (1977) (rejecting argument that provision denying special immigration status to illegitimate children of citizen fathers while granting status to children of citizen mothers was violation of due process, equal protection, and ninth amendment). I would also include within this rubric challenges based upon arguably restrictive definitions of families. *See, e.g.*, INS v. Hector, 479 U.S. 85 (1986) (rejecting argument that alien's relationship with nieces was functional equivalent of parent-child relationship for preferential status purposes).

[143] INA §§ 204(h), 245(e). IMFA was a companion piece of legislation to IRCA. Its substantive provisions are discussed *infra* note 147 and accompanying text.

Because of the latitude given Congress in admission decisions and the tradition of judicial deference, challenges to substantive classifications have been uniformly unsuccessful.[144] Due process and equal protection considerations are too contingent upon balancing of government interests to overcome the tradition in this context. To define IRCA as an admission statute would virtually guarantee that its judicial review provisions would be upheld.[145]

The IMFA cases[146] are perhaps the best harbingers of future judicial rulings under IRCA. Section 5 of IMFA provides that any alien who marries a citizen during deportation proceedings must leave the United States and stay abroad for two years before her spouse can file a petition to obtain permanent residency for her. This foreign residency requirement, based upon a congressional perception of frequent fraud in this context,[147] applies to all marriages which take place after deportation pro-

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[144] *See, e.g.*, *Fiallo*, 430 U.S. 787 (Court declines to review substantive policy choices by Congress to determine which aliens may enter the United States). The mere fact that IRCA largely affects people already within the United States is also unlikely, as a practical matter, to sway courts from this paradigm. *See* Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980) (denying equal protection challenge to special requirements imposed on Iranian students). An example of a more vigorous invocation of due process is Francis v. INS, 532 F.2d 268 (2d Cir. 1976) (distinction between aliens who have left and returned, and those who never left U.S. held impermissible even under minimum scrutiny in context of statutory remedy). One should note, though, that *Francis* did not hold the statute unconstitutional on its face, but held it unconstitutional as applied by the agency.

[145] A related class of cases has been based on the alleged violation by the government of some other, more specific constitutional provision. INS v. Chadha, 462 U.S. 919 (1983), for example, involved separation of powers, and both the Justice Department and the plaintiffs argued that the statute was unconstitutional. The first amendment has also formed the basis for a variety of challenges, with only limited success. *See, e.g.*, Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987) (challenge to scope of executive authority to deny visa requests to aliens invited to speak in the United States as a violation of the first amendment; remanded to district court for hearing on whether exclusion may be based only on aliens' anticipated activities in the United States).

[146] *See* Almario v. Attorney General, 872 F.2d 147 (6th Cir. 1989) (IMFA held supported by facially legitimate and bona fide reason); Escobar v. INS, 700 F. Supp. 609 (D.D.C. 1988) (challenge to IMFA based upon equal protection and due process rejected); Anetekhai v. INS, 685 F. Supp. 599 (E.D. La. 1988), *aff'd*, 876 F.2d 1218 (5th Cir. 1989) (challenge to IMFA based on equal protection, due process, first, ninth and tenth amendments rejected); Smith v. INS, 684 F. Supp. 1113 (D. Mass. 1988) (challenge to IMFA based upon equal protection and due process rejected). *But see* Manwani v. United States Dep't of Justice, 1988 WL 149145 (W.D.N.C. 1988) (denial of defendant's motion to dismiss in IMFA challenge).

[147] *See* Santana, *The Proverbial Catch 22: The Unconstitutionality of Section Five of the Immigration Marriage Fraud Amendment of 1986*, 25 Cal. W. L. Rev. 1 (1988).

ceedings have been commenced. Prior to IMFA such marriages often resulted in the termination of deportation proceedings and the adjustment of status of the alien spouse.

In challenging Section 5, an attractive litigation strategy is to avoid characterizing the case as an attack upon the classification scheme itself to avoid confronting the principle of plenary, virtually unreviewable congressional power. One could distinguish classification cases by arguing that the INA itself provided the benefit, but that the subsequent burden created by IMFA was impermissibly based upon marriage. One court has even gone so far as to reject this distinction by holding that IMFA needs only to be supported by a "facially legitimate and *bona fide* reason."[148] The argument that IMFA burdens aliens who are in the United States was also rejected.[149]

One can also make the following equal protection and due process arguments:[150]

1. IMFA impermissibly burdens the marital relationship;
2. IMFA violates equal protection by classifying persons based upon marriage;
3. IMFA deprives plaintiffs of a liberty interest in marriage without due process of law; and
4. IMFA creates an invalid, irrebuttable legislative presumption, which violates due process.

A full analysis of these arguments is beyond the scope of this Article. But because the equal protection and due process considerations arise under IRCA, they merit some limited consideration.

1. Equal Protection

The equal protection argument regarding IMFA is essentially that classifications that burden the exercise of a fundamental right such as marriage must pass "strict scrutiny."[151]

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[148] *Almario*, 872 F.2d at 151.

[149] *See id.* at 152. This argument would be even more difficult to make in relation to IRCA, where all the aliens involved were illegal.

[150] *See, e.g.*, *id.*; *Smith*, 684 F. Supp. 1113.

[151] The equal protection requirements of the fourteenth amendment apply to the federal government through the due process clause of the fifth amendment. *See* Johnson v. Robison, 415 U.S. 361, 364 n.4 (1974).

However, the plenary power of Congress has been held to limit the constitutional protection afforded the marital relationship.[152] As the court in *Smith* wrote, "[t]he role of the courts in analyzing an equal protection challenge to a federal immigration statute is limited to determining whether the statute at issue is conceivably related to the achievement of a federal interest."[153] IMFA was held to meet this minimal standard.

An equal protection argument regarding IRCA would face even more formidable hurdles. First, the same plenary power would likely be invoked to reduce the level of scrutiny. Moreover, the IRCA restrictions on judicial review do not burden a fundamental right in any recognized sense. Thus, there seems little reason to think that an equal protection challenge to IRCA would prevail or even reach the fundamental problems with the statute.

2. *Due Process*

Due process seems to provide a better jurisprudential framework for IRCA. In IMFA cases, the procedural due process arguments proceed as follows:

1. The fifth amendment requires that due process be afforded whenever the government deprives any person of a constitutionally protected interest;
2. This rule applies in the immigration context as well; and
3. The nature of procedural protections required depends upon a balancing of interests, and due process is flexible.

Mathews v. Eldridge[154] requires a balancing of:

1. The private interest affected by the government's action;
2. The risk of erroneous deprivation inherent in the government's chosen process and the probable value of additional or substitute procedures; and

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[152] *See Smith*, 684 F. Supp. at 1119.

[153] *Id.* at 1116. In *Smith*, the Government went so far as to assert that "even mere rational basis may be too strict a standard." Memorandum in Support of Defendant's Motion for Summary Judgment at 9 n.6, *Smith*, 684 F. Supp. 1113 (on file with the *Harvard Civil Rights-Civil Liberties Law Review*).

[154] 424 U.S. 319 (1976).

3. The government's interest, including the burden that additional or substitute procedural requirements would entail.[155]

Although this line of argument is now well-entrenched in constitutional jurisprudence, it is not likely to succeed in the immigration context. The first problem arises in identifying the constitutionally protected interest affected. Prior to IMFA, the few cases that had any success in this regard focused upon substantial burdens on family relationships.[156] In the IMFA cases, courts regarded the right to marriage as fundamental.[157] Nevertheless, immigration principles providing minimal due process rights to aliens have been held to trump such interests.[158] With IRCA, the burden upon families is even more attenuated.[159]

Second, and more important, the approach of defining the right first and then determining the process due leaves the door open for a devaluation of the alien's right to fair procedures. A much criticized variant of this theory of due process was rejected by the Supreme Court in *Cleveland Board of Education v. Loudermill*.[160] The Court held that when accepting government employment or benefits, people are not required to take

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[155] *See id.* But in every case there must be an opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.* at 335. The *Mathews* formula itself raises questions in the immigration context. Immigration cases have distinguished the due process rights of arriving aliens in exclusion proceedings, returning residents in exclusion proceedings, respondents in deportation proceedings, and those seeking benefits under the immigration laws. The balancing of private and government interests in the immigration setting invokes an instrumentalist view of due process. Though this aspect of *Mathews* is latent in domestic situations as well, immigration doctrines exacerbate the instrumentalist tilt and indicate that, for a variety of historical and theoretical reasons, traditional due process analysis in the immigration mode will be unlikely to overturn IRCA's judicial review mechanism.

[156] *See* Ali v. INS, 661 F. Supp. 1234 (D. Mass. 1986) (INS marriage procedures must afford due process to those involved, though the requirements of due process are flexible subject to a balancing of competing interests); Stokes v. INS, 393 F. Supp. 24 (S.D.N.Y. 1975) (INS procedures to determine bona fide marriage held subject to constitutional scrutiny on fourth amendment grounds because they involve a protected liberty interest). But these cases involved challenges to the administration of the law, not the law itself.

[157] *See* Almario v. Attorney General, 872 F.2d 147, 151 (6th Cir. 1989) (holding that Congress could nevertheless interfere with marriage rights in the area of immigration).

[158] "[T]he Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in this country." *Id.*

[159] Congress, however, has apparently been moved by the plight of ineligible family members of successful amnesty applicants. A piece of immigration legislation recently passed by the Senate would protect such people from deportation. *See* S.358, 101st Cong., 1st Sess. (1989).

[160] 470 U.S. 532 (1984).

the bitter with the sweet. The Court explained that "the Due Process Clause provides that certain substantive rights—life, liberty and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct . . . . 'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty."[161]

Fair consideration of IRCA's judicial review mechanism, requires an extension of the *Loudermill* approach to immigration law. IRCA grants a benefit: amnesty. Its judicial review mechanism, however, as argued below, does not meet due process requirements.

III. The Serious Constitutional Questions Raised by Congressional Limitations of Access to Federal Courts

A. The Judicial Approach to Congressional Limitations of Review Outside of the Immigration Context

IRCA conditions judicial review upon completion of an ineffective administrative process. Legalization, a benefit, is offered within the context of a burden, for all who were eligible for legalization were subject to deportation. This approach evokes a line of cases involving the Selective Service, in which statutory benefits, exemptions, were available within the framework of a burden, general conscription. The Selective Service cases raised the same questions as IRCA:

1. To what extent will courts permit Congress to mandate exhaustion of futile pre-judicial procedures?
2. How does the characterization of a challenge to those procedures as constitutional affect the calculus?
3. To what extent can the procedures themselves or their collateral consequences, like imprisonment, raise constitutional problems?[162]

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[161] *Id.* at 541.

[162] *See, e.g.*, Johnson v. Robison, 415 U.S. 361 (1974) (statute prohibiting review of decisions of law and fact in the administration of a benefits system does not extend to challenges of benefits denial on constitutional grounds).

1. The Problem of Futile Pre-Judicial Procedures

In *Falbo v. United States*,[163] a Jehovah's Witness was classified by his local draft board as a conscientious objector and ordered to report to a civilian public service camp. When he failed to report, he was indicted under the Selective Service Training Act of 1940 for willful failure to perform a duty required by the Act. The mobilization system established by the Act provided for local boards to classify registrants based on information from a questionnaire and, where appropriate, a physical examination. The registrant could appeal his classification to a board of appeal and, in certain cases, to the President. Once the classification procedure was exhausted, the registrant was ordered either to report for induction or to a public service camp in the case of conscientious objectors.[164] The Supreme Court held that judicial review of the local board's classification was not available in the criminal prosecution for willful violation of the order to report, even though he had exhausted all administrative review of the classification issue itself. The majority avoided concluding that there is no constitutional right to judicial review of the validity of the local board's classification when it stated:

> Even if there were, as the petitioner argues, a constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention before final acceptance of an individual for national service.[165]

Falbo is important to the analysis of IRCA because the Court mandated exhaustion of an essentially unrelated procedure—application for admission to the camp. The Court suggested that Falbo, had he reported, might still have been rejected

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[163] 320 U.S. 549 (1944).

[164] *See id.* at 552–53. He further argued that the Act did not make criminal his failure to report for duty because the order to report was mistaken and there could be no duty to comply with a mistaken order.

[165] *Id.* at 554.

for physical or mental reasons,[166] even though there was nothing in the record to suggest that rejection was anything more than an abstract possibility. *Falbo* indicates, that absent some indication of congressional intent to permit judicial review, courts may require exhaustion of futile procedures.

But two years later, in *Estep v. United States*,[167] the Court allowed a registrant who had reported for induction, was accepted, but refused to report for duty, to obtain judicial review of the local board's classification. The Court acknowledged that in the absence of a constitutional requirement, Congress could grant or withhold judicial review. But the Court held that courts could consider whether a local board had acted beyond its jurisdiction by basing its classification on impermissible factors such as race, creed or color.[168] Justice Douglas distinguished *Falbo* as follows: "In the *Falbo* case the defendant challenged the order of his local board before he had exhausted his administrative remedies . . . . Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them."[169] The Court again did not hold that a constitutional right to judicial review existed in this context, but noted in dicta that "[j]udicial review may indeed be required by the Constitution."[170]

Taken together, *Falbo* and *Estep* demonstrate an approach that the Court might take with IRCA.[171] Since other relief might be available in deportation, the Court could decide that applicants can be compelled to undergo those proceedings. But this approach has two significant problems. First, it ignores the problem of confidentiality. Even if effective collateral relief could be granted in the deportation venue, the applicant's vulnerability to deportation is increased once confidentiality is breached.

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[166] *See id.* at 553.

[167] 327 U.S. 114 (1946).

[168] *See id.* at 120–21.

[169] *Id.* at 123.

[170] *Id.* at 120, citing Ng Fung Ho v. White, 259 U.S. 276 (1922). *Ng Fung Ho* held that in habeas corpus proceedings to test the validity of a judicial order, the petitioner was entitled to a de novo judicial trial on a claim of citizenship.

[171] It has been noted that *Falbo* and *Estep* are perhaps more properly viewed as involving the doctrine of ripeness than exhaustion. *See* Donahue, *The Supreme Court vs. Section 10(b)(3) of the Selective Service Act: A Study in Ducking Constitutional Issues*, 17 UCLA L. Rev. 908, 914–15 (1970). The important point is that both of these doctrines are judicial gatekeeping mechanisms, and as such are malleable.

Second, the mere possibility that a process might grant relief should not be dispositive. Courts should fairly consider the real prospects of a particular applicant obtaining relief that is equivalent to amnesty. But to make this determination a court would have to engage in extensive fact-finding. Thus, if it were to be conducted fairly, the *Falbo* approach to IRCA would likely involve as much of a judicial role as the review of a denial, with much greater hardship for the applicant.

The Court in *Falbo* and *Estep* implicitly accepted the notion that Congress' article III power to limit jurisdiction is not unlimited. Recent cases illustrate the complexity of this limitation. In 1967, Congress barred any pre-induction judicial review of "the classification or processing of any registrant by local boards . . . except as a defense to criminal prosecution [for failure to report for induction]."[172] This provision was first reviewed by the Supreme Court in *Oestereich v. Selective Service System Local Board No. 11*,[173] which involved the revocation of a statutory exemption in what was held to be a "blatantly lawless" manner.[174] Oestereich, a divinity student, was reclassified 1-A for turning in his registration certificate to protest the Vietnam war. He then sought pre-induction judicial review. His case was dismissed below. The Supreme Court held that the district court had jurisdiction to restrain his induction. The Court did not find the relegation of review to a criminal defense to be unconstitutional per se. Rather, the decision was based upon the conflict between Section 6(g) of the Act, which mandated the ministerial exemption, and the new Section 10(b)(3), which barred pre-induction review.[175] One commentator has speculated that *Oestereich* implicitly holds that Congress cannot create a substantive right without providing the holder of the right a civil means of vindication prior to being deprived of liberty.[176] But the *Oestereich* holding is ambiguous at best, based ostensibly upon the

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[172] Pub. L. No. 90-40, § 1(8), 81 Stat. 100, 104 (amending Military Selective Service Act, § 10(b)(3)) (codified as amended at 50 U.S.C. App. § 460(b)(3) (1982)). This provision responded to pre-induction relief granted to draft registrants reclassified 1-A for participating in antidraft demonstrations. *See* Wolff v. Selective Service Local Board No. 16, 372 F.2d 817 (2d Cir. 1967).

[173] 393 U.S. 233 (1968).

[174] *Id.* at 238.

[175] *See supra* note 172 and accompanying text.

[176] *See* Donahue, *supra* note 171, at 919.

clear departure of the Board from its statutory mandate.[177] Justice Harlan, however, in a concurring opinion, argued that Section 10(b)(3) could not bar review of claims that the statute or regulations were facially invalid, for "[t]o withhold pre-induction review in this case would thus deprive petitioner of his liberty without the prior opportunity to present to *any competent* forum—agency or court—his substantial claim that he was ordered inducted pursuant to an unlawful procedure. Such an interpretation . . . would raise serious constitutional problems . . . ."[178]

The ambiguity of *Oestereich* was exacerbated by *Clark v. Gabriel*,[179] a case decided the same day, in which the Court addressed the question of whether the local board's denial of a claim of classification as a conscientious objector could be judicially reviewed other than as required by Section 10(b)(3). The Court unanimously found no constitutional objection.[180] *Oestereich* was distinguished as having involved a challenge to the board's statutory authority to act, as opposed to a claim that the board reached a wrong decision in *Gabriel*.[181] The Court in *Oestereich* expanded a concept first raised in *Estep*: only orders of local boards "within their respective jurisdictions" are "final."[182]

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[177] "We deal with the conduct of a local board that is basically lawless . . . ." *Oestereich*, 393 U.S. at 237.

[178] *Id.* at 243 (Harlan, J., concurring).

[179] 393 U.S. 256 (1968) (per curiam).

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> We find no Constitutional objection to Congress' thus requiring that assertion of a conscientious objector's claims . . . be deferred until after induction, if that is the course he chooses, whereupon habeas corpus would be an available remedy, or until defense of the criminal prosecution which would follow should he . . . refus[e] to submit to induction.

Id. at 259.

[181] *See* Donahue, *supra* note 171, at 921. Subsequent cases did little to clarify matters. *See, e.g.*, Fein v. Selective Service System Local Board No. 7, 405 U.S. 365 (1972) (claim that the entire procedure for determining conscientious objector status violated due process rejected on the grounds that Fein did not claim an objection or deferment on the basis of objectively established and conceded status); Breen v. Selective Service Local Board No. 16, 396 U.S. 460 (1970) (student denied deferment based on unauthorized regulation held to have right to judicial review as board's order was a clear departure from its statutory mandate); Boyd v. Clark, 393 U.S. 316 (1969) (per curiam) (equal protection challenge to system of student deferments held barred by § 10(b)(3)).

[182] *Estep*, 327 U.S. at 120.

The doctrine, as expressed by case law in the area of congressional limitation of judicial review similar to IRCA, is non-predictive. The Selective Service cases demonstrate the following:

1. The judiciary is aware that the relationship between article III and the due process clause of the fifth amendment is complex;
2. Judges have strained statutory interpretation to avoid grappling with this constitutional complexity;
3. Claims that a statute or regulation is facially invalid are more likely to override congressional limitations than direct appeals;[183]
4. The standards for determining when a claim is truly constitutional are elusive;
5. A clear departure of an agency from its statutory mandate may give rise to a constitutional claim; and
6. War and wartime exigencies significantly affect the due process balancing engaged in by courts.[184]

B. The Constitution and IRCA: What Can and Should Be Done?

The IRCA judicial review scheme appears contradictory in guaranteeing confidentiality while demanding surrender by those

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[183] As one court has recently noted: "[I]n the entire history of the United States, the Supreme Court has never once held that Congress may foreclose all judicial review of the constitutionality of a congressional enactment." Bartlett v. Bowen, 816 F.2d 695, 704 (D.C. Cir. 1987). Thus, the Supreme Court has not addressed "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." Webster v. Doe, 108 S.Ct. 2047, 2056 (1988). *See* M. Redish & S. Bice, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 7–34 (1980); Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981). Even as to non-constitutional claims, however, the Supreme Court begins with a "strong presumption that Congress intends judicial review of agency action." Bowen v. Michigan Academy of Family Physicians, 470 U.S. 667, 670 (1986). "[C]lear and convincing evidence" is required to rebut this presumption. Johnson v. Robison, 415 U.S. 361, 373–74 (1974).

[184] As to IRCA, the possible analogy between the war power and the source of congressional and executive power to control immigration is worth considering. As discussed above, courts often have exhibited deference in immigration cases that is second only to that granted to war. But limiting judicial review in amnesty cases can hardly be considered equivalent to the issues confronting Congress during World War II.

who seek judicial review. Its requirement of exhausting an ineffective and dangerous administrative process is also uniquely harsh. Neither traditional immigration law nor traditional limitation of review doctrine seem easily able to reach the fundamental questions raised by this statute, since the immigration context implicates so many other concerns about the source of rights and the power of government. The basic question, then, is whether undocumented aliens can use due process as an idealistic trump of Congress' article III powers when those powers are exercised in a fundamentally unjust manner.

The injustice of IRCA seems patent. Consider the following paradigm:

1. You cannot play outside today. I don't have time to explain why now, but I have my reasons and it's up to me.

2. You can play outside today if you do all of your chores first. I will decide if you've done them properly.

3. You can play outside today if you do all of your chores. Your older brother will decide if you've done them properly. If you think your brother has decided unfairly, I will take a look.

4. You can play outside today if you do all your chores. Your older brother will decide if you've done them properly. If you think your brother has decided unfairly, and you want me to decide, you must confess something serious that you did wrong that I do not know about. If I decide your brother was wrong, I will let you play outside and forgive the other thing. But if I decide your brother was right, you cannot play outside and you will be punished further for the other thing.

There is something fundamentally troubling about conditioning justice upon risk. In light of this basic unfairness, it is disconcerting that the statute might withstand challenges which relied solely upon precedent or well-accepted doctrine. IRCA illustrates the importance of a theory of due process that views freedom from at least *extreme* adjudicative arbitrariness and irrationality as an inalienable right. It is not necessary finally to decide whether this right derives from the Kantian injunction to treat others as ends and not means, from a slightly expanded view of the "morality" that makes law possible,[185] from a mod-

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[185] *See* L. Fuller, The Morality of Law 33-94 (1964).

ified Kantian "constructivist" theory,[186] from a model that sees "law as integrity,"[187] or from a recognition of the development of a more "communitarian" order.[188] The important thing is that "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term."[189] The IRCA scheme of judicial review therefore not only implicates the appearance of justice, but the essence of justice itself.

There are three possible solutions to IRCA's problems:

1. The Justice Department can promulgate regulations which permit IJs to decide legalization cases de novo. This

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[186] *See* Rawls, *The Basic Liberties and Their Priority* in Liberty, Equality, and Law: Selected Tanner Lectures on Moral Philosophy 1–87 (S. McMurrin ed. 1987).

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> [T]he best defense of political legitimacy—the right of a political community to treat its members as having obligations in virtue of collective community decisions—is to be found not in the hard terrain of contracts or duties of justice or obligations of fair play that might hold among strangers, where philosophers have hoped to find it, but in the more fertile ground of fraternity, community, and their attendant obligations.

R. Dworkin, Law's Empire 206 (1986). This approach seems likely to help IRCA applicants, but less likely to accord any rights (within the integrity model) to newly arriving immigrants or refugees.

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> The legal order, animated by the emergence of new, "communitarian" public law norms, has gradually begun to generalize from [the] natural rights dimension of liberalism. These norms are expanding and transfiguring the sources of, and justifications for, legal obligation to individuals whom public and private law traditionally conceived of as "strangers." . . . They imply that socially accepted values should augment consent as a basis for imputing legal duties . . . .

Schuck, *supra* note 1, at 49–50. This communitarian approach, based upon "functional social linkages actually forged between aliens and the American people," *id.* at 50, would certainly appear to help IRCA applicants, but not detained incoming refugees. Like other theorists, Schuck distinguishes communitarianism from traditional individualistic liberalism. This results in his tacit acceptance of the due process right being weighed according to the amount of integration an alien has already achieved. *See* Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev. 165 (1983). Though better than rigid, formalistic distinctions based on technical status, this is a hard calculus to imagine working in practice. Nor does it seem especially satisfying in theory, especially as applied to refugees. *See* Aleinikoff, *Aliens, Due Process and "Community Ties": A Response To Martin*, 44 U. Pitt. L. Rev. 237, 240–45 (1983). *See also* Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 Stan. L. Rev. 69 (1982) for the argument that the right-privilege distinction partakes of valid and lasting legal norms. If Smolla is correct, then one must certainly be less optimistic about the *Loudermill* approach being extended to immigration law, perhaps the stronghold of the right-privilege dichotomy.

[189] Plyler v. Doe, 457 U.S. 202, 210 (1981).

procedure is not clearly prohibited by IRCA's limitation of administrative or judicial review, and is in keeping with the apparent reliance by Congress upon the adjustment model. The problem of confidentiality remains, however. The best solution to this dilemma would be regulations which create a special "final order of deportability" for cases in which legalization has been denied and the applicant desires judicial review. This special final order would incorporate IRCA's confidentiality guarantees. In addition, the regulation should require that, if the IRCA appeal is not sustained, motions to reopen would be granted to permit the applicant to request other available forms of relief from deportation. This regulatory solution maintains the primary congressional intent of limiting access to district courts for review of denials. Though it might burden the immigration courts to some extent, this burden seems reasonable under the circumstances.

2. Applicants who desire judicial review of amnesty denials can petition the district court for relief. If the district court were to find the judicial review scheme unconstitutional it could undertake a number of ameliorative actions: remand the case to the INS, decide the case, or most problematically, somehow send the case to the court of appeals for Section 106 review. This last possibility also raises the option of going directly to the court of appeals and arguing that the jurisdictional limitations contained in IRCA are unconstitutional and should be waived.

3. Congress can amend IRCA expressly to permit IJs to hear legalization cases under the conditions described in paragraph (1) above. This last suggestion is obviously the most elegant and direct. Practically, of course, it would be difficult to achieve. Moreover, in light of the historical problems created by Section 106, it would be wiser for Congress to take the opportunity to reconsider the mechanism of attempting to force all deportation cases into the court of appeals.

Conclusion

IRCA was the most significant congressional foray into immigration law in more than thirty years. The basic tensions underlying American immigration law are clearly reflected in

many of its substantive provisions. Its scheme for judicial review, however, is uniquely unfair. Whether the result of inadvertence, expediency or underlying assumptions about the due process rights of aliens, the IRCA system raises profound questions. To answer these questions, a reexamination of both immigration doctrine and the extent to which aliens are protected by the Constitution is required. In light of its harsh effects in practice, and its potential as precedent, IRCA warrants, if not immediate revision, at least this most serious and careful analysis.