NOTES

ADMINISTRATIVE PROCEDURE—IMMIGRATION—INAPPLICABILITY OF THE ADMINISTRATIVE PROCEDURE ACT TO ADJUDICATIONS BEFORE THE BOARD OF IMMIGRATION APPEALS—*Giambanco v. INS*, 531 F.2d 141 (3d Cir. 1976); *Cisternas-Estay v. INS*, 531 F.2d 155 (3d Cir. 1976).

Giuseppe Giambanco, a citizen of Italy, entered the United States on a visitor for pleasure visa.[1] According to the terms of his visa, Giambanco was authorized to remain in this country only for a period of one year.[2] He failed to leave when the visa expired,[3] and on April 26, 1971, in an uncontested hearing[4] before a special inquiry officer of the Immigration and Naturalization Service (Service or

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[1] Giambanco v. INS, 531 F.2d 141, 142 (3d Cir. 1976). The Immigration and Nationality Act (I.N.A.), 8 U.S.C. §§ 1101–1503 (1970 & Supp. V 1975), denominates that class of aliens known as visitors for business or pleasure. (Throughout this Note, citations to the Immigration and Nationality Act will give the I.N.A. section along with a parallel citation to the United States Code.) This "nonimmigrant alie[n]," I.N.A. § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1970), is considered to be one with a permanent foreign residence "which he has no intention of abandoning and who [has come to] the United States temporarily for business or" personal reasons. *Id.* § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B) (1970); *see* 22 C.F.R. § 41.25(a)–(c) (1976). Visa regulations are not located in the section of the Code of Federal Regulations relating to title 8 of the United States Code; rather, they may be found at 22 C.F.R. §§ 41–42 (1976) and 29 C.F.R. § 60 (1976).

[2] Giambanco v. INS, 531 F.2d 141, 142 (3d Cir. 1976).

[3] *Id.* There is nothing in the administrative record of the deportation proceedings, the briefs of the respective parties, or the decision of the court which would tend to shed light on the reasons why Giambanco overstayed his visa. The issue of whether he possessed a bona fide intent to remain for a short time as a visitor or was a mala fide nonimmigrant—one with a preconceived plan to overstay, formulated prior to entry—was not discussed. This question is of more than passing interest since, under the decision of Castillo v. INS, 350 F.2d 1, 3–4 (9th Cir. 1965), the Immigration and Naturalization Service may make use of an intent to overstay a visa to deny the discretionary relief of adjustment of status under I.N.A. § 245(a), 8 U.S.C. § 1255(a) (1970). *See* Ameeriar v. INS, 438 F.2d 1028, 1032, 1033 n.6 (3d Cir. 1971) (preconceived intent to evade normal consular procedures); Tonga, 12 I. & N. Dec. 212, 214 (B.I.A. 1967) (sale of business before entry indicative of intent to remain); Rubio-Vargas, 11 I. & N. Dec. 167, 169 (B.I.A. 1965) (intent to remain with permanent-citizen-wife); Azmitia, 10 I. & N. Dec. 774, 775 (Acting Regional Comm'r 1964) (ingenuous admission of intent to remain within the United States). It is possible that this factor will affect the eventual outcome of the *Giambanco* case, since the cause was remanded to the Board of Immigration Appeals for action consistent with the court's opinion. Giambanco v. INS, 531 F.2d 141, 149 (3d Cir. 1976).

[4] The uncontested hearing procedure is a variant of I.N.A. § 242(b), 8 U.S.C. § 1252(b) (1970). *Compare id. with* 8 C.F.R. § 242.16(a)–(c) (1976). Such hearings are conducted by a special inquiry officer (or "immigration judge"), *id.* § 1.1(*l*), whose pow-

INS),[5] he admitted his deportability.[6] In lieu of immediate deportation, however, Giambanco was granted one month's time during which he could depart voluntarily.[7]

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ers are delineated in the body of the statute itself and in the regulations which give operational effect to its dictates. I.N.A. § 101(b)(4), 8 U.S.C. § 1101(b)(4) (1970); 8 C.F.R. §§ 1.1(*l*), 242.8 (1976). Under the regulation governing these hearings, if an alien admits the factual allegations contained in the order to show cause by which the Immigration and Naturalization Service initiates the deportation process, the special inquiry officer is free to determine that the charges against the alien have been established. *Id.* § 242.16(a)–(b). Since the facts have been stipulated there need not be any presentation or rebuttal of evidence, and the officer's sole remaining duty is to apply the law to the particular circumstances of the case and grant whatever discretionary relief he deems warranted. *See id.* §§ 242.16, 244.1. The salient procedural distinction between contested and uncontested hearings is that in the former, the special inquiry officer is compelled by regulation to appoint a "trial attorney" to present the government's case. *Id.* § 242.16(c). Even contested hearings, despite their quasi-criminal nature, are procedurally analogous to civil trials. *See generally* Note, *Resident Aliens and Due Process: Anatomy of a Deportation*, 8 VILL. L. REV. 566, 576–85 (1963). Therefore, although the alien is permitted to be represented by counsel, he must bear the expense himself. I.N.A. § 242(b), 8 U.S.C. § 1252(b) (1970); 8 C.F.R. § 242.16(a) (1976); *see* Martin-Mendoza v. INS, 499 F.2d 918, 922 (9th Cir. 1974) (although an alien may be represented by counsel in deportation proceedings, this is not an absolute right which must be provided at government expense), *cert. denied*, 419 U.S. 1113 (1975). *But see* United States *ex rel.* Castro-Louzan v. Zimmerman, 94 F. Supp. 22, 25–26 (E.D. Pa. 1950). *See generally* Comment, *Deportation and the Right to Counsel*, 11 HARV. INT'L L.J. 177 (1970); Comment, *Due Process And Deportation—Is There a Right to Assigned Counsel?*, 8 U.C.D.L. REV. 289 (1975).

[5] It is the responsibility of the Attorney General to enforce all laws relating to exclusion or deportation. I.N.A. § 103(a), 8 U.S.C. § 1103(a) (1970). Pursuant to permission granted him in section 103(a), he has delegated these duties to the Immigration and Naturalization Service. 8 C.F.R. §§ 2.1, 103.1 (1976). For a brief description of the operation of the Service, see J. WASSERMAN, IMMIGRATION LAW AND PRACTICE 7–17 (2d ed. 1973). The following federal agencies play relatively minor roles in execution of the immigration laws: (1) Department of Labor, *see* I.N.A. § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1970); 29 C.F.R. § 60.1–.6 (1976); (2) Department of State, *see* I.N.A. §§ 104–105, 8 U.S.C. §§ 1104–1105 (1970); (3) Public Health Service, *see* I.N.A. §§ 234, 236(d), 8 U.S.C. §§ 1224, 1226(d) (1970); 42 U.S.C. § 252 (1970); 8 C.F.R. § 232.1 (1976); 42 C.F.R. § 34.1–.14 (1976).

[6] Giambanco v. INS, 531 F.2d 141, 142 (3d Cir. 1976). Giambanco admitted deportability (as defined in I.N.A. § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1970)) in that he overstayed the time period permitted by his visa. 531 F.2d at 142.

[7] Giambanco v. INS, 531 F.2d 141, 142 (3d Cir. 1976). Since it was possible that Giambanco might once again fail to depart voluntarily, the INS concurrently issued an alternate order of deportation. *Id.*

Under 8 C.F.R. § 244.1 (1976), a special inquiry officer has discretionary power to authorize voluntary departure in lieu of an order of deportation. *Id.*; *see* I.N.A. § 244(e), 8 U.S.C. § 1254(e) (1970). Eligibility is established by fulfilling the requirements of I.N.A. § 242, 8 U.S.C. § 1252 (1970). The option of voluntary departure is clearly preferable to the alien since it is not strictly considered a deportation. 8 C.F.R. § 243.5 (1976). Exercising this option allows the alien to choose his destination, rather than having one imposed upon him. It also may increase the possibility of his reentry into the United States and in addition speed up the process leading to his eventual return. *See, e.g.*, I.N.A. § 212(a)(17), 8 U.S.C. § 1182(a)(17) (1970); 2 C. GORDON & H. ROSENFIELD, IM-

Failing to leave within the month, he entered into a marriage with a United States citizen which was later determined to be part of a conspiracy "to defraud the United States to obtain a permanent residence visa."[8] Following Giambanco's plea of guilty to a criminal conspiracy charge,[9] the trial judge granted his motion to recommend to the INS that the conviction not be the basis for any future deportation proceedings.[10]

Shortly thereafter, Giambanco divorced his first wife and married the citizen-daughter of one of his co-conspirators in the original fraud.[11] Based upon his second wife's American citizenship, he moved to reopen the prior deportation proceeding by filing concurrent applications:[12] one, under section 245 of the Immigration and Nationality Act (I.N.A.),[13] for "an adjustment of [his] status to that of

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MIGRATION LAW AND PROCEDURE § 7.2a (rev. ed. 1976).

[8] Giambanco v. INS, 531 F.2d 141, 142 (3d Cir. 1976). For a general discussion of the issue of fraudulent marriages, see Comment, *Defense of Sham Marriage Deportations*, 8 U.C.D.L. REV. 309 (1975).

[9] Giambanco v. INS, 531 F.2d 141, 142 (3d Cir. 1976).

[10] *Id.* at 142–43. The trial judge suspended the sentence and placed Giambanco on probation for two years. *Id.* at 142.

I.N.A. § 241(a)(4), 8 U.S.C. § 1251(a)(4) (1970), provides that an alien who has committed "a crime involving moral turpitude within five years after entry" is considered automatically deportable. Under section 241(b)(2), 8 U.S.C. § 1251(b)(2) (1970), however, automatic deportability should not apply if the trial court recommends to the Attorney General that such conviction not be the basis of a deportation order. Upon the defendant's request for such relief, notice must first be given to the INS which may then appear at the hearing in order to advise the judge of the ramifications which his order may have on the present and future status of the alien. This procedure is considered direct notice to the Attorney General. 8 C.F.R. § 241.1 (1976).

The classification of an individual act as one "involving moral turpitude is a Federal question" uncontrolled by any state determination as to the nature of the act. *See* Wyngaard v. Rogers, 187 F. Supp. 527, 528 (D.D.C. 1960), *aff'd sub nom.* Wyngaard v. Kennedy, 295 F.2d 184, 185 (D.C. Cir.), *cert. denied*, 368 U.S. 926 (1961).

In Giambanco's subsequent appeal, the Third Circuit majority largely concerned itself with the issue of the weight to be accorded by the INS to the trial judge's recommendation. *See* Giambanco v. INS, 531 F.2d 141, 145–49 (3d Cir. 1976).

[11] Giambanco v. INS, 531 F.2d 141, 143 (3d Cir. 1976).

[12] *Id.* Petitions for reopening or reconsidering deportation orders are provided for in 8 C.F.R. §§ 103.5, 242.22 (1976). These regulations allow for consideration of new matters arising after the original hearing, but they mandate that no stay of execution of the deportation order will be granted unless the Service, in its discretion, so orders. *Id.* In Giambanco's case, the officer exercised his discretion and granted a stay of deportation. *See* Giambanco v. INS, 531 F.2d 141, 143 (3d Cir. 1976).

[13] 8 U.S.C. § 1255 (1970). The I.N.A. contemplates an adjustment of the status of an alien, upon application, if he

> (1) . . . makes an application for such adjustment, (2) . . . is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

I.N.A. § 245(a)(1)–(3), 8 U.S.C. § 1255(a)(1)–(3) (1970).

a permanent resident,"[14] and another, under section 212(h),[15] for a "waiver of a ground of excludability."[16] As requested, "the hearing was reopened," but both applications were denied.[17] A subsequent "petition for review to the Board of Immigration Appeals [Board or B.I.A.] was dismissed."[18]

Another deportation case, decided at the same time, involved Julio and Doris Cisternas-Estay, Chilean citizens who entered the United States on visitor for pleasure visas in March of 1971.[19] Six months later they applied for asylum, claiming that the government of then Chilean President Salvatore Allende-Gossens "would persecute them on their return to Chile."[20] Several months after the fall of

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[14] Giambanco v. INS, 531 F.2d 141, 143 (3d Cir. 1976).

[15] I.N.A. § 212(h), 8 U.S.C. § 1182(h) (1970). Bearing upon the ultimate question of admissibility is section 217(a)(9), which provides that an alien convicted of a crime of moral turpitude is ineligible to receive an immigrant visa. *Id.* § 217(a)(9), 8 U.S.C. § 1182(a)(9) (1970); *see* note 10 *supra*. Such a person is considered excludable and foreclosed from an adjustment of status. Although Giambanco was considered to be an excludable alien, he could petition for a waiver of that status pursuant to section 212(h). That section controls section 245 on ineligibility, preventing it from becoming operative when the spouse of a United States citizen is involved. *Id.* § 212(h), 8 U.S.C. § 1182(h) (1970).

[16] Giambanco v. INS, 531 F.2d 141, 143 (3d Cir. 1976).

[17] *Id.* A hearing officer's denial of an immigrant's petition is the end result of a process based on virtually "unfettered discretion." Jay v. Boyd, 351 U.S. 345, 354 (1956). Despite the language of I.N.A. § 245(a), 8 U.S.C. § 1255(a) (1970), setting forth the various conditions for eligibility, aliens putatively eligible under the statute must, in addition to satisfying its prerequisites, also convince a special inquiry officer of their worthiness. The officer's final decision rests on his balancing of the equities in each case. *See* United States *ex rel.* Hintopoulos v. Shaughnessy, 353 U.S. 72, 77 (1957).

Unfortunately for both the alien, who is seeking to attack the use of discretion, and for the special inquiry officer, who is looking for guidelines, there is an absence of meaningful administrative standards to guide the exercise of discretion. *See* Jarecha v. INS, 417 F.2d 220, 223 (5th Cir. 1969); Goon Wing Wah v. INS, 386 F.2d 292, 294 (1st Cir. 1967); Chen v. Foley, 385 F.2d 929, 934 (6th Cir. 1967); Castillo v. INS, 350 F.2d 1, 3 (9th Cir. 1965).

[18] Giambanco v. INS, 531 F.2d 141, 143 (3d Cir. 1976).

[19] Cisternas-Estay v. INS, 531 F.2d 155, 157 (3d Cir. 1976). The government alleged that at the time of entry, the Cisternas-Estays utilized passports indicating that they were single persons rather than reflecting their true status as a married couple. *Id.* at 157 & n.1.

[20] *Id.* at 157. Although the court referred to the Cisternas-Estays' problem with the Allende government as being "unspecified," *id.*, the problem apparently originated as the result of anti-Allende statements made by Mr. Cisternas-Estay following a speech given by Allende at his school. The petitioners feared political retribution as a result of these and other antigovernment statements. *See* Certified Administrative Record at 49–50, Cisternas-Estay v. INS, 531 F.2d 155 (3d Cir. 1976) (transcript of hearing before the immigration judge) [hereinafter cited as Record].

The possibility of political asylum is provided for in I.N.A. § 243(h), 8 U.S.C. § 1253(h) (1970), which states that

> . . . [t]he Attorney General is authorized to withhold deportation of any

the Allende government, and approximately two and one-half years after the application had been filed, their request was denied by the Service.[21] Subsequently, their counsel called a press conference during which Mr. Cisternas-Estay read a prepared statement attacking the succeeding Chilean government for its abrogation of personal freedoms.[22] During the ensuing deportation hearing in which they admitted deportability, the Cisternas-Estays introduced this statement into evidence, again seeking a discretionary grant of political asylum.[23] The special inquiry officer denied this application for the withholding of deportation,[24] and their appeal to the Board was dismissed.[25]

Both Giambanco and the Cisternas-Estays filed appeals from their respective B.I.A. dismissals to the Third Circuit court of appeals[26] which set the cases for argument in tandem. Uniting these

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alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

See also 8 C.F.R. §§ 108.1–.2 (1976).

[21] *See* Cisternas-Estay v. INS, 531 F.2d 155, 157 (3d Cir. 1976). It is questionable why the application for asylum remained active with no disposition for so long a period of time.

[22] *Id.* Mr. Cisternas-Estay made the following statement:

> It is with deep regret that I must make this statement. My family fled from Communist Chile three years ago and I had hoped that a Democratic form of Government would be restored. This is not the case, as the rights to free speech, press and political activity have been destroyed by the Military government.
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> My family and I are now seeking refuge in the United States of America.

Record, *supra* note 20, at 60.

[23] Cisternas-Estay v. INS, 531 F.2d 155, 157–58 (3d Cir. 1976). For the text of I.N.A. § 243(h), 8 U.S.C. § 1253(h) (1970), pertaining to the Attorney General's authority to grant political asylum, see note 20 *supra*.

[24] Cisternas-Estay v. INS, 531 F.2d 155, 158 (3d Cir. 1976). The materials placed into evidence in support of the application for the withholding of deportation all related to Mr. Cisternas-Estay, since his wife's claim was derivative, being "entirely dependent upon that of" her husband. *Id.* at 157 n.2. The special inquiry officer determined that Mr. Cisternas-Estay had made only one statement condemning the ruling junta and that statement had never been published or circulated to others outside of those few persons in attendence at the press conference. Record, *supra* note 20, at 28–29. This showing was therefore insufficient to discharge the burden of proof as to the probabilities of potential persecution which are required under 8 C.F.R. § 242.17(c) (1976). *See, e.g.*, MacCaud v. INS, 500 F.2d 355, 359 nn.7–8 (2d Cir. 1974); Khalil v. District Director, 457 F.2d 1276, 1277 (9th Cir. 1972); Shkukani v. INS, 435 F.2d 1378, 1380 (8th Cir.), *cert. denied*, 403 U.S. 920 (1971); Cheng Kai Fu v. INS, 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968).

[25] Cisternas-Estay v. INS, 531 F.2d 155, 158 (3d Cir. 1976). The appeal was dismissed for virtually the same reasons as those expressed by the special inquiry officer sitting below. *Compare id. with* Record, *supra* note 20, at 28–29.

[26] Giambanco v. INS, 531 F.2d 141, 142 (3d Cir. 1976); Cisternas-Estay v. INS, 531 F.2d 155, 158 (3d Cir. 1976).

Giambanco's wife, subsequent to the Board's initial decision, had given birth to

factually dissimilar cases was a broad procedural issue: Do the hearing requirements of the Administrative Procedure Act of 1966 (A.P.A.)[27] apply to adjudications before the Board of Immigration Appeals?[28] More specifically, the court addressed itself to the question of whether the mandatory disqualification provisions of section 5(c) of the A.P.A.[29] apply to the individual Board members[30] who, in

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their citizen-child. In light of this fact, Giambanco filed a motion of remand asking the court of appeals to permit reconsideration of his case by the Board. *See* Giambanco v. INS, 531 F.2d at 143. The court believed that a grant of the motion was warranted, but went on to decide the case since the legal issues were of such importance as to demand a resolution "before any new proceeding went forward." *Id.* at 149.

[27] 5 U.S.C. §§ 551–576, 701, 704–706 (1970 & Supp. V 1975); 5 U.S.C.A. §§ 702–703 (West Cum. Supp. 1977).

[28] Giambanco v. INS, 531 F.2d 141, 143 (3d Cir. 1976); Cisternas-Estay v. INS, 531 F.2d 155, 156 (3d Cir. 1976).

In both *Giambanco* and *Cisternas-Estay*, the majority addressed itself to additional issues which the dissent did not choose to discuss. *Compare* Giambanco v. INS, 531 F.2d at 145–49 *and* Cisternas-Estay v. INS, 531 F.2d at 159–60 *with* Giambanco v. INS, 531 F.2d at 149–55 (dissenting opinion) *and* Cisternas-Estay v. INS, 531 F.2d at 160–66 (dissenting opinion). The majority in *Giambanco* perceived the second question of law as a more difficult problem since it was "one of first impression in [the] circuit." 531 F.2d at 149.

Examination of the primary briefs of the respective parties reveals that they each perceived the issue of the disqualification of Board members as being basically a due process question, rather than being a violation of the terms of the A.P.A. Brief for Petitioner at 7–9, Giambanco v. INS, 531 F.2d 141 (3d Cir. 1976) [hereinafter cited as Giambanco Brief for Petitioner]; Brief for Respondent at 9–10, Giambanco v. INS, 531 F.2d 141 (3d Cir. 1976) [hereinafter cited as Giambanco Brief for Respondent]; Brief for Petitioners at 7–8, Cisternas-Estay v. INS, 531 F.2d 155 (3d Cir. 1976). In the Cisternas-Estays' reply brief, however, there is a passing reference to the federal recusal statute, 28 U.S.C. § 455 (1970), and to section 5(d) of the A.P.A., 5 U.S.C. § 554(d) (1970), although no attempt was made either to distinguish between these two statutes or to articulate any further the question of their applicability. Reply Brief for Petitioners at 3, Cisternas-Estay v. INS, 531 F.2d 155 (3d Cir. 1976). For a detailed examination of the federal recusal statute and its construction by the federal courts, see Comment, *Disqualification of Federal District Judges—Problems and Proposals*, 7 SETON HALL L. REV. 612 (1976).

[29] 5 U.S.C. § 554(d)(2) (1970). This provision of the A.P.A. states that

> [t]he employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—
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> . . . .
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> (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.
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> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title . . . .

Id.

[30] Giambanco v. INS, 531 F.2d 141, 143 (3d Cir. 1976); Cisternas-Estay v. INS, 531

both cases, had decided the deportation appeals despite their previous appearances as counsel for the Service.[31]

Under section 242(b) of the I.N.A.,[32] the Attorney General is vested with ultimate responsibility for all final deportation orders.[33] In order to carry out this function, he established the B.I.A. and delegated to it the power to review decisions by the special inquiry officer.[34] In *Giambanco v. INS*,[35] the court found this review procedure to be "an integral part of [a] section 242" determination of deportation.[36] Furthermore, since the Supreme Court in *Marcello v.*

F.2d 155, 156 (3d Cir. 1976). The court, *sua sponte*, framed the issue in this manner. Giambanco v. INS, 531 F.2d at 143; Cisternas-Estay v. INS, 531 F.2d at 156.

[31] Giambanco v. INS, 531 F.2d 141, 143 (3d Cir. 1976); Cisternas-Estay v. INS, 531 F.2d 155, 158 (3d Cir. 1976).

During the period in which the Giambanco and Cisternas-Estay proceedings were before the special inquiry officer, and later at oral argument before the B.I.A., Board members Irving Appleman and David Milhollan had been of counsel to the Service. Their appointments to the Board came after the oral arguments had been heard but before any final decisions had been rendered. Giambanco v. INS, 531 F.2d at 143; *see* Cisternas-Estay v. INS, 531 F.2d at 158. Furthermore, one of these recent appointees had been the superior of the trial attorney who had argued the Giambanco appeal. Giambanco v. INS, 531 F.2d at 143.

The INS presented affidavits from the two Board members and the final attorney which affirmed that until the moment that the votes were actually cast, no discussions about the case had taken place among them. Giambanco Brief for Petitioner, *supra* note 28, exhibits A–C. The Cisternas-Estay appeal had been prosecuted by Irving Appleman, who did disqualify himself from participation in the Board's decision. In contrast, Mr. Milhollan again denied any participation in the case prior to his appointment and refused to disqualify himself. Brief for Respondent, exhibits A–B, Cisternas-Estay v. INS, 531 F.2d 155 (3d Cir. 1976).

No provisions have been made either by the Attorney General or by the Board itself as to mandatory or voluntary disqualification of Board members from decisions in which there might be a potential conflict of interest. *See* 8 C.F.R. §§ 3.1–.8 (1976).

[32] 8 U.S.C. § 1252(b) (1970). Section 242(b) provides in pertinent part that "[i]n any case in which an alien is ordered deported from the United States under the provisions of this chapter, or of any other law or treaty, the decision of the Attorney General shall be final." *Id.*

[33] *Id.*

[34] Giambanco v. INS, 531 F.2d 141, 144 (3d Cir. 1976).

[35] 531 F.2d 141 (3d Cir. 1976).

[36] *Id.* at 144. The court viewed section 242(b)–(c) of the I.N.A., 8 U.S.C. § 1252(b)–(c) (1970), as the source of the Attorney General's power to create the Board. 531 F.2d at 144. Neither of these sections, however, speaks in terms of the Attorney General's power to delegate the duties imposed on him by those sections. *See* I.N.A. § 242(b)(4), (c), 8 U.S.C. § 1252(b)(4), (c) (1970). By the terms of section 103 of the I.N.A., the Attorney General

> is authorized . . . to appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this chapter . . . .

Id. § 103(a), 8 U.S.C. § 1103(a) (1970). 8 C.F.R. § 3.1(a) (1976) acknowledges that the

Bonds[37] had exempted the *initial* deportation hearing from operation of the Administrative Procedure Act,[38] the *Giambanco* majority reasoned that to hold the *review* of such hearings subject to the A.P.A. provisions would create an "anomalous" situation.[39] The court therefore held that the procedures governing Board review of dismissals of section 212(h) and 245 claims for relief were outside the ambit of the Administrative Procedure Act.[40] On the strength of this holding, the same majority, in *Cisternas-Estay v. INS*,[41] upheld the B.I.A.'s dismissal of the Cisternas-Estays' administrative appeal.[42]

Judge Gibbons dissented in a lengthy opinion that spoke to both *Cisternas-Estay* and *Giambanco*.[43] In finding section 5(c) of the A.P.A. applicable to B.I.A. hearings, he rejected the majority's expansive reading of the holding in *Marcello*.[44] Judge Gibbons believed that the Supreme Court had severely limited that decision by restricting the I.N.A.'s exemption from the A.P.A. to one specific class of proceedings while, at the same time, developing a flexible, analytical framework within which courts could test other types of immigration hearings.[45] The dissent further found that the legislative history of the

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authority for the provision of a Board of Immigration Appeals derives from section 103(a). *See* 531 F.2d at 152 (Gibbons, J., dissenting).

[37] 349 U.S. 302 (1955), *discussed at* notes 106–123 *infra*.

[38] *Id.* at 309–10. The *Giambanco* court seemed to be relying upon the emphasis placed in *Marcello* on "the sole and exclusive procedure" language in section 242(b), 8 U.S.C. § 1252(b) (1970). *See* 531 F.2d at 144. *Marcello*, however, did not turn exclusively on this one particular phrase; rather the decision was based on a concatenation of factors. *See* 349 U.S. at 310; note 119 *infra*.

[39] 531 F.2d at 144.

[40] *Id.* at 144–45.

[41] 531 F.2d 155 (3d Cir. 1976).

[42] *Id.* at 160. The court found that the only distinction between the two cases was that Giambanco sought an adjustment of status under section 245 and a waiver of a ground of excludability under section 212(h), while Cisternas-Estay sought a section 243(h) suspension of deportation. This, however, "should not affect the application of the A.P.A." *Id.* at 158–59.

[43] Giambanco v. INS, 531 F.2d at 149; Cisternas-Estay v. INS, 531 F.2d at 160. (The identical dissent is reprinted in both cases, and future references will contain only citations to the dissent accompanying the *Giambanco* decision.)

[44] 531 F.2d at 150.

[45] *Id.* at 152. This method of analysis, whose creation Judge Gibbons imputed to the *Marcello* decision, *see id.*, consisted of comparing the provisions of I.N.A. § 242(b) with the analogous sections of the A.P.A. 349 U.S. at 307–08; *see* 531 F.2d at 152. Upon completion of the comparison, the *Marcello* Court had determined that

> [f]rom the Immigration Act's detailed coverage of the same subject matter dealt with in the hearing provisions of the Administrative Procedure Act, it is clear that Congress was setting up a specialized administrative procedure applicable to deportation hearings, drawing liberally on the analogous provi-

I.N.A. evidenced an explicit congressional intent to subject the entire range of possible Board adjudications to the A.P.A. standards.[46] Overshadowing these considerations were, in the dissent's view, "the policy and purpose" originally compelling promulgation of the A.P.A. criteria—reformation of the existing procedural inadequacies in administrative hearings.[47] Judge Gibbons concluded that the two cases should have been reversed and remanded to the Board for a determination of whether "the members . . . had participated or advised in a 'factually related case' "—the standard mandated by A.P.A. section 5(c).[48]

Viewed historically, federal legislation imposing restrictions on immigration into this country is of relatively recent origin. Prior to the passage "of the first general immigration statute in 1882,"[49] the attitude of the federal government toward the entry of aliens was one of beneficence, if not outright encouragement.[50] Individual states, however, did not share in this viewpoint and several enacted legislation seeking to curb the increasing flow of immigrants into their borders.[51]

The conflict engendered by these policy differences between the states and the federal government was finally resolved by two Supreme Court cases: *Henderson v. Mayor of New York*[52] and *Chy Lung v. Freeman*.[53] These seminal decisions established that the power to control immigration reposed in the federal government via the commerce clause of the Constitution.[54] Thus, the states were precluded from infringing upon "the domain of legislation which belongs exclu-

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sions of the Administrative Procedure Act and adapting them to the particular needs of the deportation process.

349 U.S. at 308.

[46] 531 F.2d at 153–54; *see* notes 162–65 *infra* and accompanying text.

[47] 531 F.2d at 154; *see* notes 166–72 *infra* and accompanying text.

[48] 531 F.2d at 155 (quoting from A.P.A. § 5(c), 5 U.S.C. § 554(d) (1970)).

[49] 1 C. GORDON & H. ROSENFIELD, *supra* note 7, § 1.2b. That immigration statute provided, *inter alia*, that a head tax of fifty cents be levied upon every passenger who was not a United States citizen and who came by ship to any port within the jurisdiction of the United States. Act of Aug. 3, 1882, ch. 376, § 1, 22 Stat. 214.

[50] 1 C. GORDON & H. ROSENFIELD, *supra* note 7, § 1.2a; *see* IMMIGRATION LAWS OF THE UNITED STATES § 2 (3d ed. E. Harper 1975) [hereinafter cited as Harper]. This attitude of beneficence was the dominant theme in United States immigration policy during the years 1800 through 1875, although there were occasional departures from this general trend. *See* 1 C. GORDON & H. ROSENFIELD, *supra*, § 1.2a.

[51] *See* 1 C. GORDON & H. ROSENFIELD, *supra* note 7, § 1.2a, at 1–7; Harper, *supra* note 50, § 2, at 5.

[52] 92 U.S. 259 (1875).

[53] 92 U.S. 275 (1875).

[54] Henderson v. Mayor of New York, 92 U.S. at 270, 272–74; Chy Lung v. Freeman, 92 U.S. at 280.

sively to the Congress of the United States."[55] This affirmation of the federal government's power marked a climacteric in American policies toward aliens and immigration. From that point forward, federal legislation became increasingly restrictive,[56] reflecting a growing xenophobia that permeated American attitudes in many areas.[57] An

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[55] Henderson v. Mayor of New York, 92 U.S. at 272. *Henderson* and *Chy Lung* involved, respectively, New York and California statutes which called for the posting of a bond indemnifying counties, cities and towns of the state "against any expense for the relief or support of the person named in the bond for" a specified period of time. *Id.* at 267; Chy Lung v. Freeman, 92 U.S. at 276–77. The *Henderson* Court examined two earlier authorities, The Passenger Cases, 48 U.S. 283 (1849), and New York v. Miln, 36 U.S. 71 (1837), which it felt were not dispositive of the issue of state regulation of foreign commerce. 92 U.S. at 269. In a unanimous opinion, the Supreme Court embraced the view that immigration was "a part of our commerce with foreign nations," *id.* at 270, and as such was "confided to Congress by the Constitution," *id.* at 274; *accord*, Chy Lung v. Freeman, 92 U.S. at 280; *see* Head Money Cases, 112 U.S. 580, 591–93 (1884).

Congress' plenary power over immigration has also been found to inhere in sovereignty and therefore, need not be found in any one of the enumerated powers of the Constitution. *See* Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892). *See also* Harisiades v. Shaughnessy, 342 U.S. 580, 587 & n.11 (1952); Carlson v. Landon, 342 U.S. 524, 534 & n.18 (1952); The Chinese Exclusion Case, 130 U.S. 581, 603–04 (1889).

[56] Until 1875, immigration into the United States was virtually unrestricted. *See* 1 C. GORDON & H. ROSENFIELD, *supra* note 7, § 1.2a; Harper, *supra* note 50, § 2. Only the Alien Enemy Act of 1798, ch. 58, § 1, 1 Stat. 570, sought to impose some conditions on the continued residence of aliens within this country. That Act also "was the first federal legislation dealing with the expulsion of [certain] aliens." Harper, *supra*, § 2, at 4.

From 1875 to 1921, Congress began to enact qualitative restrictions on immigration. *See generally id.* § 3. Reacting to fears expressed by individuals over immigration policy specifically and anti-alien feelings in general, it passed a series of laws excluding certain specified classes of aliens from entry into the United States. *E.g.*, Act of Feb. 5, 1917, ch. 29, 39 Stat. 874 (repealed 1952) (exclusion of illiterate aliens and creation of a barred zone whose inhabitants were presumptively declared inadmissible); Act of Feb. 20, 1907, ch. 1134, 34 Stat. 898 (repealed 1917) (exclusion of those with such defects as might effect their earning ability); Act of Mar. 3, 1903, ch. 1012, § 2, 32 Stat. 1213 (repealed 1917) (exclusion of epileptics, professional beggars and anarchists as well as those who might become public charges); Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084 (exclusion, *inter alia*, of polygamists and persons suffering from loathsome diseases); Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974) (prohibiting transportation of orientals for purpose of cooly labor).

Since 1921, quantitative restrictions have been added to the qualitative controls. *E.g.*, Immigration Act of 1924, ch. 190, 43 Stat. 153; Immigration Act of 1921, ch. 8, § 2(a) 42 Stat. 5 (first quota law). The national origins quota system was repealed by Congress in 1965. Act of Oct. 3, 1965, Pub. L. No. 89–236, § 1, 79 Stat. 911 (effective June 30, 1968) (amending 8 U.S.C. § 1151 (1964)). The I.N.A. contains more grounds for exclusion and deportation than any other previous act. *Compare* Immigration and Nationality Act, 8 U.S.C. §§ 1101–1503 (1970 & Supp. V 1975) *with* Act of Feb. 5, 1917, ch. 29, 39 Stat. 874 (repealed 1952) (compilation of prior immigration statutes).

[57] *See, e.g.*, H.R. REP. NO. 1365, 82d Cong., 2d Sess. 8–29 (1952), *reprinted in* [1952] U.S. CODE CONG. & AD. NEWS 1653, 1657–80. *See also* Higham, *American Immigration Policy in Historical Perspective*, 21 LAW & CONTEMP. PROB. 213 (1956). Higham points

initial indication of this change in attitude came when the contract labor laws were amended to provide for the exclusion or deportation of any alien who entered this country in violation of the prohibition against importing cheap foreign labor.[58] The passage of these laws represented the first time in ninety years that a statute prescribed deportation as the method for dealing with unwanted aliens.[59]

The next thirty years witnessed the passage of a sequence of confusing and often unrelated immigration laws[60] whose cumulative effect served only to impede the formulation of an effective national policy toward aliens. Finally, in response to this confusion, an omnibus deportation bill codifying the prior disparate array of laws affecting immigration was passed.[61] This bill, the Immigration Act of 1917, was the first statute to outline, even in a cursory fashion, the mechanics by which a finding of deportability was to be made.[62] Not

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to a complex of social and economic upheavals that led to "[i]mmigration restriction . . . as a simple way of using the power of the state to combat many interlocking social problems." *Id.* at 218.

[58] Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565 (repealed 1952), *amending* Act of Feb. 23, 1887, ch. 220, 24 Stat. 414 (deportation provided for aliens who were seeking to land under contract), *amending* Act of Feb. 26, 1885, ch. 164, 23 Stat. 332 ("importation . . . of . . . aliens . . . into the United States . . . under contract [for the performance of] labor or service of any kind" declared unlawful, with certain enumerated exceptions).

The Supreme Court in Lees v. United States, 150 U.S. 476 (1893), found the original contract labor law and its amendments to be constitutional on the theory that since "Congress [has] the absolute power to exclude aliens, it may exclude some and admit others, and the reasons for its discrimination are not open to challenge in the courts." *Id.* at 480. The Court went on to state that "the penalty [involved] is visited not upon the alien laborer . . . but upon the party assisting in the importation," even though the alien becomes subject to deportation. *Id.* While the action against the importer was found to be "civil in form" but "criminal in its nature," *id.*, the Court did not consider the fact that the amendment made no provision for the manner in which a determination of deportability was to be made. *See id.* The statute provided simply that when "the Secretary of the Treasury [was] *satisfied* that an immigrant ha[d] been allowed to land contrary to the prohibition of that law," the alien could be deported. Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565 (emphasis added).

[59] *See* 1 C. GORDON & H. ROSENFIELD, *supra* note 7, § 1.2b, at 1–8. Despite the absence of a procedure for deportation, much less the existence of procedural protections, this statute "was the direct ancestor of later legislative developments." *Id.*

[60] For a discussion of the proliferation of laws that had been passed between 1888 and 1917, see *id.* § 1.2b; Harper, *supra* note 50, §§ 5–8. For an in depth analysis and history of deportation as practiced in the United States prior to the I.N.A., see J. CLARK, DEPORTATION OF ALIENS FROM THE UNITED STATES TO EUROPE (1931).

[61] Act of Feb. 5, 1917, ch. 29, 39 Stat. 874 (repealed 1952).

[62] Section 17 of the act provided for three-member boards of special inquiry appointed by the Commissioner of Immigration and Naturalization with the approval of the Secretary of Labor. This section provided only the most minimal safeguards: "[t]he immigrant m[ight] have one friend or relative present under . . . regulations . . . prescribed by the Secretary of Labor"; "a complete permanent record" was required to be

until the Immigration and Nationality Act was there an exhaustive attempt to describe the grounds for and the means of accomplishing deportation.[63]

In part, the considerations of the I.N.A. were prompted by a dialectic between Congress and the courts that reflected the tension between the restrictive policies and purposes of our immigration laws and the constitutional requirements of due process.[64] By its enactments, Congress traditionally set the goals of immigration policy with little concern for the means of accomplishing these ends.[65] The courts were therefore forced to establish the perimeters of due process within which these goals were to be achieved.[66] For example, judicial

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kept of the proceedings; and appeal to the Secretary of Labor might be made "through the commissioner of immigration at the port of arrival." *Id.* Moreover, no provision was made for assistance of counsel, nor was there express provision for the cross-examination of the government's witnesses nor for presentation of an affirmative case by the alien. *See id.* Prior to passage of this act, determinations of deportability had been left to the unfettered discretion of administrative officers with only the constitutional remedy of habeas corpus available to provide judicial scrutiny.

[63] *Compare* I.N.A. §§ 241–244, 8 U.S.C. §§ 1251–1254 (1970), *with* Act of Feb. 5, 1917, ch. 29, § 17, 39 Stat. 874 (repealed 1952).

[64] *See* Comment, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L.J. 760, 782–89 (1962). The author of the comment discusses what he feels to be "the dual nature of immigration":

> The susceptibility of immigration to a classification blurred between the "legislative" and the constitutional should not be surprising in view of the anatomy of the field: it is composed of two basic issues—political control over the borders, and constitutional due process—each of which, if taken separately, would lead to opposite conclusions.

Id. at 782 (typeface changed in part).

A more accurate characterization of the problem would be to classify the struggle as a tension between two competing interests. The demands of immigration policy are not necessarily antagonistic with the requirements of due process, in the sense of compelling "opposite conclusions." *Id.* Rather, implementation of this policy without regard to questions of procedural fairness is the root of the problem.

[65] *See, e.g.*, I.N.A. §§ 201–202, 8 U.S.C. §§ 1151–1152 (1970) (numerical limitations on admission of immigrants and procedures for visa allocation); *id.* § 212, 8 U.S.C. § 1182 (1970) (excludable aliens); *id.* § 236, 8 U.S.C. § 1226 (1970) (procedures to determine excludability); *id.* § 241, 8 U.S.C. § 1251 (1970) (deportable aliens); *id.* § 242, 8 U.S.C. § 1252 (1970), (procedures for findings of deportability); Comment, *supra* note 64, at 783–84. For primary source material regarding expressions of congressional intent, see, *e.g.*, Act of Feb. 5, 1917, ch. 29, §§ 3, 11, 15–16, 39 Stat. 874 (repealed 1952); H.R. REP. NO. 1086, 87th Cong., 1st Sess. 1, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 2950; 104 CONG. REC. 17173–74 (1958); Comment, *supra* at 784 n.3.

[66] *See generally* Comment, *supra* note 64. In deciding cases in the immigration area the Supreme Court has responded to congressional actions which it deemed inappropriate by restrictively interpreting immigration legislation. Congress has likewise sought to revise judicial actions which it felt were inconsistent with its legislative intent. Giambanco v. INS, 531 F.2d at 145 n.6; *id.* at 155 (Gibbons, J., dissenting); *see* Comment, *supra* at 781–82 & nn.104–07. The extent of the dialogue may be illustrated by examin-

construction of the "finality" provisions of the Immigration Act of 1917 had forced the courts to depend solely upon habeas corpus review,[67] thereby setting out the requirements of a fair hearing on a

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ing the following examples:

(1) Brownell v. Tom We Shung, 352 U.S. 180 (1956). The Court here held that section 10 of the A.P.A., which provided for judicial review of a deportation order by means of an action in a federal district court for a declaratory judgment and injunctive relief, was available to an alien contesting an order of exclusion. 352 U.S. at 181; *accord*, Shaughnessy v. Pedreiro, 349 U.S. 48, 49–52 (1955). This was so despite the provision in section 242(b) of the I.N.A. making deportation orders of the Attorney General final. In response to these holdings, Congress passed I.N.A. section 106(a)(b) which provides that the writ of habeas corpus is to be the sole method for review of exclusion orders. Act of Sept. 26, 1961, Pub. L. No. 87–301, § 5a, 75 Stat. 651 (codified at 8 U.S.C. § 1105a(b)(1970)). Additionally, section 106(a)(b) mandated that the standards for review of immigration litigation were to be based upon the criteria expressed in the Hobbs Administrative Orders Review Act, 28 U.S.C. §§ 2341–2351 (1970) (formerly codified at 5 U.S.C. §§ 1031–1042 (1964)), rather than those in the Administrative Procedure Act. *See generally* H.R. REP. NO. 1086, 87th Cong., 1st Sess. 22, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 2950, 2960; 107 CONG. REC. 12174–81, 19650–57 (1961) (House and Senate debates).

(2) Kessler v. Strecker, 307 U.S. 22 (1939), and Bridges v. Wixon, 326 U.S. 135 (1945). *Kessler* held that the Act of June 5, 1920, ch. 251, 41 Stat. 1008 (repealed 1952) (amending Act of Oct. 16, 1918, ch. 186, § 1, 40 Stat. 1012), which provided for the deportation of individuals who were members of or affiliated with the Communist party, necessarily meant "*present membership*, or *present affiliation*." 307 U.S. at 30 (emphasis by the Court). Passage of the Alien Registration Act of 1940, ch. 439, § 23, 54 Stat. 670 (1940), by Congress reversed this construction by encompassing any association with the Communist party regardless of when it occurred. This, however, was not the end of the controversy; in *Bridges*, the Court proceeded to invalidate a deportation order by drawing narrowly the meaning of the word "affiliation" in the statute. 326 U.S. at 141–49.

(3) The Japanese Immigrant Case, 189 U.S. 86 (1903). This decision mandated that a hearing be held in accordance with the requisites of due process despite the absence of any such provision in the Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084. 189 U.S. at 99–102.

(4) Wong Wing v. United States, 163 U.S. 228 (1896). Prior to this decision, the Chinese Exclusion laws provided that any evasion of its dictates would constitute a criminal offense, and additionally, that an alien could be imprisoned pending deportation for violating section 4 of that act, without resort to a criminal trial. Act of May 5, 1892, ch. 60, § 4, 27 Stat. 25. In *Wong Wing*, the Supreme Court held that a trial by jury was required before a criminal sanction could be imposed even in those instances where the defendant was an alien. 163 U.S. at 237. This holding served to extend to aliens the protection afforded by the fifth and sixth amendments in criminal actions.

[67] *See, e.g.*, Heikkila v. Barber, 345 U.S. 229, 230 (1953); Azzollini v. Watkins, 172 F.2d 897, 898 (2d Cir. 1949); Fafalios v. Doak, 50 F.2d 640, 640 (D.C. Cir. 1931); *cf.* Fok Yung Yo v. United States, 185 U.S. 296, 305 (1902) (congressional policy to bar judicial review of exclusion determinations was manifest); Lem Moon Sing v. United States, 158 U.S. 538, 549 (1895) (Congress, by providing for administrative finality removed the court's power to review decisions of executive officers in deportation cases); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) (unless expressly authorized by law, a court could neither reexamine the evidence upon which an alien was found to be deportable nor weigh its sufficiency); Nishimura Ekiu v. United States, 142 U.S. 651, 663 (1892) (Immigration Act of 1891, ch. 551, § 8, 26 Stat. 1085, limited deportation

piecemeal basis.[68] This process was necessitated by the ill-defined

appeals to the inspector's official superiors and precluded judicial review). With the passage of the I.N.A., the Court altered its view and found that a deportation order was reviewable under the standards set forth in the A.P.A. *See* Shaughnessey v. Pedreiro, 349 U.S. 48, 52–53 (1955).

Not until 1961, however, was there an explicit statutory reference to an alien's right to judicial review of his deportation order. *See* I.N.A. § 106, 8 U.S.C. § 1105a (1970) (making 5 U.S.C. §§ 1031–1042 (1964) (currently codified at 28 U.S.C. §§ 2341–2351 (1970)) "the sole and exclusive procedure for . . . the judicial review of all final orders of deportation"). Prior to the passage of section 106 of the I.N.A., the standards for judicial review of a deportation order evolved slowly on a case-by-case basis through review of petitions for writs of habeas corpus. This type of writ was utilized since most, if not all, deportations require some form of detention. It was through testing the legality of preexpulsion detention that the courts were first able to exercise a modicum of control over the deportation process. The existence of the writ was evident as early as the case of Chew Heong v. United States, 112 U.S. 536, 538 (1884), which noted its use without comment. It was not until *Nishimura Ekiu* that use of the writ was formally endorsed by the Court. *See* 142 U.S. at 660. The relevant zone of inquiry opened by use of the writ, however, was severely limited, encompassing only an examination of the hearing's comportment with procedural due process. Courts were precluded from questioning the weight or sufficiency of the evidence upon which the finding of deportability was made. *Id.* Gradually, the scope of review available under the writ was expanded to allow inquiry into three issues: (1) were the findings supported by substantial evidence, 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23.08, at 324–25 (1958); *see* Lloyd Sabaudo Societa v. Elting, 287 U.S. 329, 335 (1932); *cf.* Bridges v. Wixon, 326 U.S. 135, 156 (1945) ("evidence . . . too flimsy to support a finding"); (2) were the acts taken by the immigration officers within the scope of the Attorney General's "statutory authority," 287 U.S. at 335; *see* Gegiow v. Uhl, 239 U.S. 3, 9 (1915); and (3) was the petitioner accorded a hearing "satisf[ying] elementary standards of fairness and reasonableness," 287 U.S. at 335–36; *see* Kwock Jan Fat v. White, 253 U.S. 454, 459 (1920); Chin Yow v. United States, 208 U.S. 8, 11 (1907); The Japanese Immigrant Case, 189 U.S. 86, 100–01 (1903). *See generally* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1388–96 (1953); *see also* Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401 (1958).

[68] *See, e.g.*, United States *ex rel.* Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 106 (1927) ("[d]eportation . . . on charges unsupported by any evidence is a denial of due process"); Kwock Jan Fat v. White, 253 U.S. 454, 464 (1920) (a decision of an immigration officer must be based upon evidence incorporated into the record of the hearing); United States *ex rel.* Weddeke v. Watkins, 166 F.2d 369, 371 (2d Cir.) ("a warrant of deportation [must not rest] upon an erroneous ruling of law"), *cert. denied*, 333 U.S. 876 (1948); Maltez v. Nagle, 27 F.2d 835, 837 (9th Cir. 1928) (no ex parte statements permitted; existence of a right to present and to cross-examine witnesses); Handlovits v. Adcock, 80 F. Supp. 425, 428 (E.D. Mich. 1948) (right to counsel); *Ex parte* Ung King Ieng, 213 F. 119, 121 (N.D. Cal. 1914) ("[t]he rights of [an alien] may not be wholly measured by the convenience or inconvenience to the immigration officers in affording . . . a fair hearing").

One case, however, did make an attempt to set forth in detail the precise requirements of a deportation hearing. In Whitfield v. Hanges, 222 F. 745 (8th Cir. 1915), the court enumerated certain "rules and principles" which it felt would obtain in immigration proceedings: the right to be heard, the right to "be notified of the nature of the charge against [the alien] in time to meet it," the right to have counsel present, the right to cross-examine adverse witnesses and to present an affirmative case, and the right to a determination based solely upon evidence adduced at the hearing and supported by "substantial evidence." *Id.* at 748–49, 751.

case law and lack of statutory guidelines by which the precise requisites of a fair deportation hearing could be ascertained.

At the same time that this ad hoc procedural evolution was occurring in the immigration area, there was also an intragovernmental concern that administrative hearings in other contexts required closer scrutiny as to their conformity with traditional concepts of due process.[69] From this anxiety arose a series of bills[70] culminating in the passage of the Administrative Procedure Act of 1946.[71] The A.P.A. articulated certain fundamental standards of fairness applicable to both the adjudicative and legislative functions of administrative bodies.[72] In order to guard against evasion of these standards, Congress granted the judiciary the power to review administrative actions.[73] No specific exemption from operation of the Act was granted to any particular agency.[74] The A.P.A., however, contained two general exclusionary provisions: first, previously existing procedures provided for by statute were left unaffected by the Act;[75] and second, judicial review would only attach where statutes empowering an agency did not preclude such review.[76]

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[69] For a detailed discussion of the depth and nature of this concern, see Wong Yang Sung v. McGrath, 339 U.S. 33, 36–41 & nn.2–21.

[70] *See id.* and sources cited therein.

[71] Ch. 324, 60 Stat. 237 (1946) (current version at 5 U.S.C. §§ 551–576, 701, 704–706 (1970 & Supp. V 1975); 5 U.S.C.A. §§ 702–703 (West Cum. Supp. 1977)).

[72] The legislative, or perhaps more accurately the rule-making, provisions of the A.P.A. are set forth at 5 U.S.C. § 553 (1970); the adjudicative provisions are at *id.* §§ 554, 556–557.

Also contained within the Act is enabling legislation creating the Administrative Conference of the United States, *id.* §§ 571–576, whose purpose is to create a mechanism by which private rights before federal agencies "may be fully protected," *id.* § 571.

[73] Administrative Procedure Act, ch. 324, § 10, 60 Stat. 237 (1946) (current version at 5 U.S.C. § 701 (1970)).

[74] *See, e.g.*, S. Rep. No. 1137, 82d Cong., 2d Sess. 7 (1952).

[75] Administrative Procedure Act § 7(a), 5 U.S.C. § 556 (1970).

[76] Administrative Procedure Act § 10, 5 U.S.C. § 701 (1970). Subsequent to promulgation of the A.P.A., three lower federal appellate courts found that the Act altered the character of review available to test findings of deportability. *See* Prince v. Commissioner of Immigration & Naturalization, 185 F.2d 578, 580–81 (6th Cir. 1950); Kristensen v. McGrath, 179 F.2d 796, 800 (D.C. Cir. 1949), *aff'd on other grounds*, 340 U.S. 162 (1950); United States *ex rel.* Trinler v. Carusi, 166 F.2d 457, 460–61, *vacated and dismissed as abated*, 168 F.2d 1014 (3d Cir. 1948).

In *Trinler*, the first of these decisions, the court held that "final" in the language of the Immigration Act of 1917 meant administrative finality and not an absolute preclusion from judicial review. 166 F.2d at 459–60. In addition, the court went on to find that the 1917 immigration act did not come within any of the exceptions set forth in the A.P.A. and was therefore subject to its standards. *Id.* at 461; *accord*, 185 F.2d at 580–81 (A.P.A. § 10(a)(2) exception for action " 'committed to agency discretion' " did not "bar

The immediate reaction of the INS was to deny the applicability of the hearing and review provisions of the A.P.A. to adjudications conducted under its aegis.[77] Officials of the Service interpreted the A.P.A. as comprehending within its requirements only those hearings expressly mandated by statute—not those created in response to judicial decisions and "administrative experience."[78] A conflict developed among the courts as to the validity of this contention,[79] and the

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judicial review"); 179 F.2d at 800 (A.P.A. "was not intended to perpetuate preexisting rigidities in the use of extraordinary legal remedies but rather to simplify and make more flexible the avenues to judicial relief").

In Heikkila v. Barber, 345 U.S. 229 (1953), however, the Supreme Court rejected the expansionist approach followed by the *Trinler*, *Kristensen* and *Prince* courts. The Supreme Court found instead that finality had a specific history in immigration legislation which indicated "that Congress had intended to make these administrative decisions nonreviewable to the fullest extent possible under the Constitution." *Id.* at 234. Additionally, the majority noted that the habeas corpus relief which was available was of a different character than full judicial review. *Id.* at 236. The opinion noted in a footnote, however, that this decision was based upon the Immigration Act of 1917 and not the newly passed 1952 immigration law. *Id.* at 232 n.4.

Shortly after a split-Court affirmance in Rubenstein v. Brownell, 346 U.S. 929 (1959), *aff'g per curiam by an equally divided court* 206 F.2d 449 (D.C. Cir. 1953), where the court of appeals had held that an order of deportation was reviewable under the A.P.A., 206 F.2d at 403, the Supreme Court decided Shaughnessy v. Pedreiro, 349 U.S. 48 (1955). The *Shaughnessy* decision reached the issue squarely, holding that the I.N.A. contained no express exemption as was required by section 12 of the A.P.A. *Id.* at 50–51. In light of the broad, remedial purposes of the A.P.A., finality was found to refer to administrative exhaustion of remedies and not to the precludability of review. *Id.* at 51–52; *see* Brownell v. Tom We Shung, 352 U.S. 180, 184–85 (1956); 345 U.S. at 238–40 (Frankfurter, J., dissenting).

[77] Carusi, *The Federal Administrative Procedure Act and the Immigration and Naturalization Service*, in THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 278 (G. Warren ed. 1947).

[78] *Id.* at 296–97.

[79] *Compare* United States *ex rel.* Lee Wo Shing v. Watkins, 175 F.2d 194, 195 (2d Cir. 1949) (A.P.A. does not apply) *and* Azzollini v. Watkins, 172 F.2d 897, 898–99 (2d Cir. 1949) (often cited as holding A.P.A. does not apply although court failed to reach issue) *and* Wolf v. Boyd, 87 F. Supp. 906, 907 (W.D. Wash. 1949) (A.P.A. inapplicable to deportation proceedings) *and* Yiakoumis v. Hall, 83 F. Supp. 469, 472 (E.D. Va. 1949) (A.P.A. does not cover deportation hearings since immigration is an exercise of sovereign power in international affairs and thus excluded by sections 4 and 5 of the A.P.A.) *and* United States *ex rel.* Lindenau v. Watkins, 73 F. Supp. 216, 219 (S.D.N.Y. 1947) (A.P.A. does not modify existing forms of procedure but changes scope of review), *rev'd on other grounds sub nom.* United States *ex rel.* Paetau v. Watkins, 164 F.2d 457 (2d Cir. 1947) *with* Kristensen v. McGrath, 179 F.2d 796, 800 (D.C. Cir. 1949) (A.P.A. expands the rights of aliens to judicial review of an order of deportation), *aff'd*, 340 U.S. 162 (1950) *and* United States *ex rel.* Trinler v. Carusi, 166 F.2d 457, 461 (same), *vacated and dismissed as abated*, 168 F.2d 1014 (3d Cir. 1948) *and* United States *ex rel.* Cammarata v. Miller, 79 F. Supp. 643 (S.D.N.Y. 1948) (A.P.A. applies to Board hearings) *and* Eisler v. Clark, 77 F. Supp. 610, 611 (D.D.C. 1948) (due process as read into the I.N.A. demands a hearing in accordance with the A.P.A.'s provisions), *cert. denied*, 338 U.S. 879 (1949).

United States Supreme Court granted certiorari[80] to resolve the issue.

Notwithstanding the language of the Act which on its face was limited to hearings required by statute, the Court, in *Wong Yang Sung v. McGrath*,[81] held that the A.P.A. did in fact apply to deportation hearings even though they were constitutionally, as opposed to statutorily, mandated.[82] The petitioner in *Wong Yang Sung*, a citizen of China serving as a seaman, was arrested when he overstayed his shore leave in the United States.[83] As a result of a hearing before an immigration inspector, he was ordered deported and his subsequent appeals to the Acting Commissioner and the B.I.A. were denied.[84] Upon being taken into custody prior to expulsion, Wong Yang Sung sought release by instituting habeas corpus proceedings in the district court for the District of Columbia.[85] The single ground supporting his petition was "that the administrative hearing was not conducted in conformity with [sections] 5 and 11 of the Administrative Procedure Act."[86]

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[80] Wong Yang Sung v. Clark, 338 U.S. 812 (1949), *granting cert. to* 174 F.2d 158 (D.C. Cir. 1949).

[81] 339 U.S. 33, *modified per curiam*, 339 U.S. 908 (1950).

[82] 339 U.S. at 50. The Court stated

> that the limitation to hearings "required by statute" in § 5 of the [A.P.A.] exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the [A.P.A.] inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity.

Id.

[83] *Id.* at 35.

[84] *Id.*

[85] *Id.*

[86] *Id.* Wong Yang Sung's specific objection was the fact that the same individuals were alternately investigators and adjudicators, with colleagues switching roles from one day to the next. *Id.* at 45. Also objectionable was the fact that a presiding inspector may in fact " 'conduct the interrogation of the alien and the witnesses in behalf of the Government and shall cross-examine the alien's witnesses and present such evidence as is necessary to support the charges in the warrant of arrest.' " *Id.* at 46 (quoting from 8 C.F.R. § 150.6(b) (1949)).

Under section 5 of the A.P.A., such commingling of functions would have been invalid. Administrative Procedure Act, ch. 324, § 5, 60 Stat. 237 (1946) (current version at 5 U.S.C. § 554 (1970)). Admitting that the commingling of functions here would be invalid under the Act, the Government argued that the A.P.A. was inapplicable. 339 U.S. at 36. Part of the Immigration Service's theory was based on the failure of the Immigration Act of 1917 to provide for a hearing, thus exempting it under section 5 of the A.P.A. which mandated compliance only " '[i]n every case of adjudication required by statute.' " 339 U.S. at 48 (quoting from Administrative Procedure Act, ch. 324, § 5, 60 Stat. 237 (1946) (current version at 5 U.S.C. § 554 (1970))). The second aspect of the Government's theory involved section 7(a) of the A.P.A. which exempted " 'the conduct of specified classes of proceedings in whole or part by or before boards or other officers

The salient issue presented to the Court was whether the "general scope" of the A.P.A. covered deportation proceedings.[87] Answering in the affirmative, the Court traced the etiology of the Act, emphasizing its nature as a piece of remedial legislation designed to correct the "evils" inherent in existing administrative procedures.[88] Since the Act's theme was manifestly one of reform, the Court found that the duty devolved upon the judiciary to effectuate "its remedial purposes where the evils it was aimed at appear[ed]."[89]

One such evil, emphasized in the *Wong Yang Sung* opinion, was the commingling in a single individual of the incompatible offices of prosecutor and judge—a practice which occurred in the instant case.[90] Quoting extensively from a series of investigative committee reports, the Court discussed the widespread criticism of this practice.[91] Justice Jackson then noted that the deportation hearing in question was "a perfect exemplification of the practices so unanimously condemned."[92] Operating from this premise, he went on to find that "[n]othing in the nature of the parties or proceedings suggest[ed] to the majority that it should absolve "deportation proceedings from reforms in administrative procedure applicable generally to federal agencies."[93]

The Court would not ascribe to Congress an intent to grant greater protections in a hearing created by statute than in one required by the Constitution.[94] Since immigration hearings were mandated by

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specially provided for by . . . statute.' " 339 U.S. at 51 (quoting from Administrative Procedure Act, ch. 324, § 7, 60 Stat. 237 (1946) (current version at 5 U.S.C. § 556(b) (1970))). The Government further argued that section 16 of the I.N.A. designated immigrant inspectors to conduct deportation hearings and thus the A.P.A. by its terms exempted the hearing. 339 U.S. at 51.

[87] 339 U.S. at 35.

[88] *Id.* at 36–41.

[89] *Id.* at 41.

[90] *Id.* at 45–46. *See generally* Davis, *Separation of Functions in Administrative Agencies*, 61 HARV. L. REV. 389 (1948).

[91] 339 U.S. at 41–45. For sources criticizing the commingling of functions specifically in the immigration context, see ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION AND REPORTS 315 (1972) [hereinafter cited as ADMINISTRATIVE CONFERENCE]; PRESIDENT'S COMM'N ON IMMIGRATION AND NATURALIZATION, WHOM SHALL WE WELCOME 158 (1953); Davis, *supra* note 90, at 389; Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 349–59 (1956).

[92] 339 U.S. at 45.

[93] *Id.* at 46. The opinion emphasized, however, that the A.P.A. did not demand a complete dichotomy between the investigatory and the prosecutorial functions as exercised by administrative officials. *Id.* What the Court did not reach was the constitutional neccesity for procedures patterned after the A.P.A. requirements.

[94] *Id.* at 50.

constitutional due process rather than by the immigration laws, the procedures contained within the A.P.A. were found applicable because "[w]hen the *Constitution* requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality."[95] As was noted in the majority's conclusion, a construction of the 1917 immigration law which would have eliminated the need for compliance with the A.P.A. would have served to place that statute in "constitutional jeopardy."[96]

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[95] *Id.* (emphasis added). For a further exposition of the Court's interpretation of "hearing required by statute," see 25 N.Y.U.L. REV. 638 (1950).

Defining the dimensions of the hearing is the next logical step in the progression from the premise that the Constitution requires an adjudication. The *Wong Yang Sung* Court appears to have developed a new test for determining the adequacy of procedural safeguards when there is a constitutional imperative to conduct a hearing. The criteria of the test demand that such hearings be held "before a tribunal which meets at least currently prevailing standards of impartiality." 339 U.S. at 50. Although not explicitly outlined in the Court's reasoning, the opinion rejects the contention that the standard should be grounded upon and limited by the scope of the more lenient due process clause, since

> [i]t might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.

Id. at 50–51. *But cf.* Withrow v. Larkin, 421 U.S. 35, 49–50 (1975) (person combining investigative and adjudicative functions presumed unbiased).

In evaluating a particular hearing procedure, the issue to be addressed is not the quantum of protection offered, but rather how that amount of protection compares to protections offered similar rights. Since Congress can delineate statutory standards and the courts can promulgate judicial rules which mandate stricter procedural safeguards than those set by the Constitution, the judiciary's role is expanded beyond interpretation of the terms of that document. The scope of the Supreme Court's review power is thus not limited to deciding what constitutes the minimum set forth in the Constitution. *Cf.* McNabb v. United States, 318 U.S. 332, 340 (1943) (the Supreme Court has "the duty of establishing and maintaining civilized standards of procedure and evidence").

In two decisions handed down shortly after *Wong Yang Sung*, the Supreme Court appeared to be exercising its expansive review powers by reversing lower court opinions which refused to extend the A.P.A. to cover hearings conducted by the Interstate Commerce Commission and postal fraud hearings respectively. *See* Riss & Co. v. United States, 341 U.S. 907 (1951), *rev'g* 96 F. Supp. 452 (W.D. Mo. 1950) and Cates v. Haderlein, 342 U.S. 804 (1951), *rev'g* 189 F.2d 369 (7th Cir. 1951). In United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952), however, the Court refused an opportunity to state explicitly that *Wong Yang Sung* was a constitutional decision as opposed to one of statutory interpretation, *see* Note, *The Requirement of Formal Adjudication Under Section 5 of the Administrative Procedure Act*, 12 HARV. J. LEGIS. 194, 210–11 (1975), thus leaving the precise rationale behind the holding of that case in some doubt. In Marcello v. Ahrens, 212 F.2d 830 (5th Cir. 1954), *aff'd sub nom.* Marcello v. Bonds, 349 U.S. 302 (1955), the court suggested a possible resolution of the issue: until Congress develops procedures specifically applicable to a particular administrative adjudication, the A.P.A. applies; once specific procedures are promulgated, they will supersede the more general A.P.A. provisions. 212 F.2d at 836.

[96] 339 U.S. at 50.

The *Wong Yang Sung* decision triggered an immediate congressional response. Within six months, the House of Representatives passed a rider to an appropriations bill which specifically exempted the Immigration Act of 1917 from the adjudicatory provisions of the A.P.A.[97] Two years later, however, upon passage of the Immigration and Nationality Act of 1952, the rider and its attendant exemption were repealed.[98] In place of this blanket exemption were substituted special statutory hearing provisions for matters of deportation and exclusion patterned upon analogous provisions of the Administrative Procedure Act.[99] As regards the commingling of functions, these new procedures did not extend to the alien the same scope of protection as that found in the similar A.P.A. provisions.[100] Protection of aliens'

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[97] Act of Sept. 27, 1950, ch. 1052, 64 Stat. 1044. This Act states that "[p]roceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the [A.P.A.]." *Id.* Despite the substantive nature of the Act, as an appropriations bill, the exemption required no approval by the Senate. As to the constitutionality of the rider, see Sigurdson v. Landon, 215 F.2d 791, 798 (9th Cir. 1954) (argument of unconstitutionality "patently frivolous").

The purpose stated for passage of the rider was to reduce the cost to the INS of compliance with the A.P.A.'s regulations. *See* Belizaro v. Zimmerman, 200 F.2d 282, 283 & n.2 (3d Cir. 1952); 96 CONG. REC. 13504–05, 13546–50 (1950). The *Wong Yang Sung* Court had decided, however, that procedural fairness was not to depend upon considerations of convenience or expense. 339 U.S. at 40–47, 50. Although this appropriation revised the result achieved in *Wong Yang Sung*, it has never been considered as having destroyed the vitality of that opinion's reasoning. *See* 2 K. DAVIS, *supra* note 67, § 13.08.

[98] Immigration and Nationality Act, ch. 477, § 403(a)(47), 66 Stat. 280 (1952).

[99] 8 U.S.C. § 1226(a) (1970) (exclusion); *id.* § 1252(b) (deportation); *see* Marcello v. Bonds, 349 U.S. 302, 307–10 (1955). The exclusion procedure under section 1226 was exempted from A.P.A. coverage not on the basis of its "mirror provisions," but because the Court has long held that in exclusion cases the procedure provided by Congress is presumed to be due process of law. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950); Nishimura Ekiu v. United States, 142 U.S. 651, 666 (1892).

[100] *Compare* 8 U.S.C. 1252(b) (1970) (special inquiry officer may still in certain circumstances assume the disparate roles of investigator, advocate and judge, although he is prevented from conducting deportation hearings in which he had participated in the investigation) *with* 5 U.S.C. § 554(d) (1970) ("[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that *or a factually related case*, participate or advise in the decision, recommended decision, or agency review" (emphasis added)) *and id.* § 554(d)(2) (the special inquiry officer should not "be responsible to or subject to the supervision or direction of" those in the agency who are also responsible for "investigative or prosecuting functions").

Although the Attorney General has moved in a limited number of cases to provide for a separation of functions, 8 C.F.R. § 242.16(c) (1976), the provision is merely a rule instituted at his discretion and not a statutory mandate. In addition, the majority of immigration cases involve some form of discretionary relief in which there is no separation requirement. A study conducted for the Administrative Conference of the United States has indicated that "[i]t seems likely, on the basis of our interviews and extensive file examination, that the multiple functions of examiners do affect the outcome of some

rights was not, however, the basis for passage of these sections; rather, they were specifically tailored to meet the particular administrative requirements of the Service.[101] In an apparent contradiction, the 1952 immigration act, although delineating this new methodology for determining deportability,[102] did not contain, as was required by section 559 of the A.P.A.,[103] a specific exemption from that act.[104] What it did provide was that "[t]he procedure [described in the I.N.A.] shall be the sole and exclusive procedure for determining the deportability of an alien under this section."[105] The question then arose as to whether these new hearing provisions, when read in light of the "sole and exclusive procedure" language, were sufficient to excuse deportation hearings from the requirements of the Administrative Procedure Act.

In *Marcello v. Bonds*, the Supreme Court directly addressed this issue and decided that mirror provisions, when coupled with language of exclusivity, were sufficient to create such an exemption.[106] The petitioner in *Marcello* was a native of Africa who had been brought to the United States as an infant and had continued to reside here.[107] In 1938, he was convicted of violating the Marihuana Tax Act[108] and "sentenced to imprisonment for one year."[109] At a hearing in

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section 245 adjudications." ADMINISTRATIVE CONFERENCE, *supra* note 91, at 316. *See also* Maslow, *supra* note 91, at 350–53.

[101] 98 CONG. REC. 5626 (1952). Senator McCarran, cosponsor of the bill, remarked that

> the Department pointed out that in the majority of deportation cases . . . the dual-examiner system would hamper effective administration without any compensating advantage.
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> . . . .
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> . . . [I]t has been demonstrated that it would be impracticable to adapt the dual-examiner system to the deportation procedures . . . .
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> . . . This bill eliminates [the] exemption [provided by the Appropriations Rider] but accomplishes such elimination with due regard for the administrative problems of the [INS] by providing at the same time the special procedures which these problems require.

Id.

[102] *See* I.N.A. § 242(b), 8 U.S.C. § 1252(b) (1970).

[103] 5 U.S.C. § 559 (1970). This section provides that a "[s]ubsequent statute may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly." *Id.*

[104] *See generally* Marcello v. Bonds, 349 U.S. 302 (1955), *discussed at* notes 37–38 *supra* & 106–23 *infra* and accompanying text.

[105] I.N.A. § 242(b), 8 U.S.C. § 1252(b) (1970).

[106] 349 U.S. at 308–10.

[107] *Id.* at 311 n.5.

[108] Act of Aug. 2, 1937, ch. 553, 50 Stat. 551 (repealed 1939).

[109] 349 U.S. at 303. Section 241(a)(11) of the I.N.A., 8 U.S.C. § 1251(a)(11) (1970),

1953 held pursuant to section 242(b) of the I.N.A., Marcello chose not to controvert the fact of his earlier conviction, but challenged the nature of the present deportation "proceedings on the ground that they violated due process and the Administrative Procedure Act . . . ."[110] He specifically objected to the Service's use of a "special inquiry officer [who] was under the supervision and control of officials in the Immigration Service [and] who performed investigative and prosecuting functions."[111] Both the hearing officer and the B.I.A. had dismissed this contention in a cursory fashion, drawing support for their actions from the legislative history of the A.P.A.[112]

On appeal, the petitioner directed the Supreme Court's attention to differences in the scope of the protections afforded by the I.N.A. and the Administrative Procedure Act.[113] He urged that wherever a "variance" between the acts exists, the more comprehensive A.P.A. standards should "govern unless those of the Immigration Act 'shall . . . expressly' negate their application."[114] In rejecting this approach,

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makes the conviction of any offense relating to the use, possession or sale of narcotics (including marihuana) a deportable offense. Section 241(d), 8 U.S.C. § 1251(d) (1970), provides further that such deportation provisions shall be applied even though the conviction occurred prior to the enactment of the 1952 Act. *See* M____, 5 I. & N. Dec. 261, 263 (B.I.A.), *aff'd sub nom.* United States *ex rel.* Marcello v. Ahrens, 113 F. Supp. 22 (E.D. La. 1953), *aff'd*, 212 F.2d 830 (5th Cir. 1954), *aff'd sub nom.* Marcello v. Bonds, 349 U.S. 302 (1955).

[110] 349 U.S. at 303 (citation omitted). Without citation to any authority, the Court dismissed the due process theory of petitioner, saying that

> [t]he contention is without substance when considered against the long-standing practice in deportation proceedings, judicially approved in numerous decisions in the federal courts, and against the special considerations applicable to deportation which the Congress may take into account in exercising its particularly broad discretion in immigration matters.

Id. at 311.

[111] *Id.* at 304.

[112] *Id.* at 303–04. The B.I.A. had cited to the joint conference report which stated that

> "the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, remain within the framework and the pattern of the Administrative Procedure Act."

M____, 5 I. & N. Dec. 261, 263 (B.I.A.) (quoting from [1952] U.S. CODE CONG. & AD. NEWS 1653, 1754), *aff'd sub nom.* United States *ex rel.* Marcello v. Ahrens, 113 F. Supp. 22 (E.D. La. 1953), *aff'd*, 212 F.2d 830 (5th Cir. 1954), *aff'd sub nom.* Marcello v. Bonds, 349 U.S. 302 (1955).

[113] 349 U.S. at 305.

[114] *Id.* (quoting from Administrative Procedure Act, ch. 324, § 12, 60 Stat. 237 (1946) (current version at 5 U.S.C. § 559 (1970))). The discrepancy emphasized by Marcello in prosecuting his appeal arose from a comparison of "the 'separation of functions' provision of § 5(c) of the [A.P.A.]" with section 242(b) of the I.N.A. 349 U.S. at 305.

the *Marcello* Court premised its holding on the cumulative effect of three findings.[115] First, a functional analysis of the respective statutory provisions revealed that a conscious attempt had been made to cover within the I.N.A. "the same subject matter dealt with in the hearing provisions of the Administrative Procedure Act . . . adapting them to the particular needs of the deportation process."[116] Second, not only did the legislative history of the I.N.A. expressly acknowledge the "adoptive technique," but it also recognized that "particular deviations" in coverage did exist.[117] Finally, the presence of deviations was coupled with the manifest directive of the statute that the I.N.A. procedure was to constitute the " 'sole and exclusive' " method of conducting deportation proceedings.[118] The Court acknowledged that while no literal exemption from the applicability of the A.P.A. existed in the language of either act, Congress did not need "to employ magical passwords in order to" exempt the I.N.A. hearing provisions from the A.P.A. standards.[119]

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[115] *See* 349 U.S. at 310.

[116] *Id.* at 307-09.

[117] *Id.* at 310. The remarks of Senator McCarran in opposition to a proposed amendment to his bill are most illuminating in this regard, for he stated that

> the committee bill goes further [than the amendment] by writing within the framework of the Administrative Procedure Act specific procedures which are *specially adopted* to the exclusion and expulsion of aliens.
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> . . . .
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> . . . Except for the failure to comply strictly with the dual-examiner provisions of the [A.P.A.], I believe that the procedures set forth are in *substantial compliance* with the procedural rationale of the [A.P.A.]. I further believe that it has been demonstrated that it would be impracticable to adapt the dual-examiner system to the deportation procedures . . . .

98 CONG. REC. 5625–26 (1952) (emphasis added). *See also, e.g.*, S. REP. NO. 1137, 82d Cong., 2d Sess. 28 (1952); H.R. REP. NO. 1365, 83d Cong., 2d Sess. 58 (1952) *reprinted in* [1952] U.S. CODE CONG. & AD. NEWS 1653, 1713; 98 CONG. REC. 4414–16, 5417–21, 5433–34, 5604, 5618–19, 5778–88 (1952).

[118] 349 U.S. at 309 (quoting from I.N.A. § 242(b), 8 U.S.C. § 1252(b) (1970)).

[119] 349 U.S. at 310. The Court did not rest its determination on any single factor; rather, the opinion reflected a concatenation of elements: the legislative history, congressional recognition of departures from the A.P.A. requirements, and "the sole and exclusive procedure" language of the statute. *Id.* While acknowledging that "[e]xemptions from the terms of the Administrative Procedure Act are not lightly to be presumed," the Court stated that one could not overlook "the background of the" immigration act and "its laborious adaption of the Administrative Procedure Act" procedures. *Id.*

The most disturbing aspect of the opinion, however, was the short shrift given to the Court's earlier holding in *Wong Yang Sung*. *See* 349 U.S. at 306–07. Immediately upon repeal of the Appropriations Rider, one of the A.P.A.'s sponsors had indicated that the decision should have been reinstated to its full force and effect. 98 CONG. REC. 4416 (1952). Yet, the majority in *Marcello* chose to ignore its constitutional, as opposed to purely statutory, imperative. *See* 349 U.S. at 306–07.

The *Marcello* Court also failed to analyze the congressionally instituted mirror pro-

Despite the expansive language in *Marcello* that the I.N.A. "expressly supersedes the hearing provisions of" the A.P.A.,[120] that holding must be viewed within the context of the question presented to the Court and the analysis upon which the opinion was predicated. At no point in its discussion of the case did the Court address itself to the existence of any possible interfaces between the A.P.A. and other immigration proceedings except for the limited question of deportation hearings conducted under section 242(b) of the I.N.A. of 1952. The issue as framed by the *Marcello* Court was limited to the failure of section 242(b) to comply with the A.P.A. standards for the conduct of administrative hearings.[121] Furthermore, in erecting the analytical framework within which it studied the relationship between the two acts, the Supreme Court focused only on the particular procedures provided for in the deportation process, and not on any other of the possible immigration proceedings.[122] Thus, the Court did not address the issue of A.P.A. applicability to hearings before the Board of Immigration Appeals.[123]

This failure to analyze the impact of the A.P.A. upon adjudications beyond deportation hearings was not evident until the problem was faced by the Third Circuit in *Giambanco* and *Cisternas-Estay*. The types of relief sought by the petitioners in those cases encompassed classes of immigration actions distinct from that exempted from the A.P.A. by the *Marcello* Court.[124] Further confounding the court's task was the fact that the adjudicatory body which Giambanco and Cisternas-Estay sought to have governed by the A.P.A. standards was not expressly provided for by the I.N.A.[125] Speaking through

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cedures in light of the analysis in *Wong Yang Sung* that

> [w]hen the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and . . . perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.

339 U.S. at 50–51; *see* 349 U.S. at 315–18 (Black, J., dissenting).

[120] 349 U.S. at 310.

[121] *Id.* at 304–09.

[122] Giambanco v. INS, 531 F.2d at 152; *see* 349 U.S. at 305–10.

[123] *See* 349 U.S. at 307–08.

[124] *See* 531 F.2d at 143, 156. Giambanco was seeking an adjustment of his status as a nonimmigrant under section 245 of the I.N.A., 8 U.S.C. § 1255 (1970), and a waiver of a ground of excludability under section 212(h), 8 U.S.C. § 1182(h) (1970). 531 F.2d at 143. Cisternas-Estay had petitioned for suspension of deportation under section 243(h), 8 U.S.C. § 1253(h) (1970).

[125] 531 F.2d at 152 (Gibbons, J., dissenting). The Senate rejected several attempts

Judge Biggs, the majority in *Giambanco* adopted a broad reading of the *Marcello* holding, finding that "it would be anomalous to [exempt] the initial immigration hearing" from the A.P.A. while concurrently mandating that Board "review of such [a] hearing was not [also] exempt."[126] To conclude otherwise, in the court's view, would serve only to "interject needless complexity into what [was] designed to be a discretionary process";[127] it would also necessitate compliance with "different standards for [the] separation of adjudicative and prosecutorial functions" at the hearing and review stages of immigration hearings.[128]

Aside from the desire to avoid the twin problems of "needless complexity" and "different standards" at the two levels "for [the] separation of . . . functions," the court found the holding to be "compelled by the language of section 242 itself."[129] Under this provision of the Immigration Act, the Attorney General has been delegated, *inter alia*, the responsibility to "assure by regulation" that all deporta-

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to provide for a statutory B.I.A., ostensibly on the ground that an independent board within a department should not be able to overturn the decisions of the department head. *See id. See also* 98 CONG. REC. 4401, 4415, 4431, 5608, 5612–13, 5618–19 (1952).

[126] 531 F.2d at 144. The quoted passage highlights an important conceptual error committed by the majority. Throughout the *Giambanco* opinion, Judge Biggs does not attempt to delineate the distinctions between section 242(b) adjudications and discretionary adjustment under other applicable I.N.A. provisions of those section 242 determinations. The court speaks in overly broad terms of "initial immigration hearing[s]" and an exemption under *Marcello* for "the hearing procedures of the immigration judge." *Id.* The majority also discusses initial immigration hearings as "be[ing] a discretionary process." *Id.* From the context of the discussion presented by the court, it is possible to define initial immigration hearings as section 242(b) deportation adjudications. *Id.* at 143–45. If so, the court is clearly in error in describing them as "discretionary." *Id.* at 144. There is no language in section 242(b) setting forth the requirements for immigration hearings which is capable of being interpreted as indicating that such adjudications are discretionary. Additionally, the Supreme Court has been consistent in mandating a trial-type adjudication for deportations. Wong Yang Sung v. McGrath, 339 U.S. at 49–50; Kwock Jan Fat v. White, 253 U.S. 454, 459, 464 (1920); The Japanese Immigrant Case, 189 U.S. 86, 100–01 (1903). Furthermore, the determination that an individual is deportable does not require the exercise of discretion; either the alien fulfills the statutory requisites for deportability or he does not.

[127] 531 F.2d at 144.

[128] *Id.*

[129] *Id.* For a comparison of the differing standards for review set by A.P.A. § 554 and I.N.A. § 242(b), see note 100 *supra*.

In a footnote in its discussion at this point, the court advanced the thesis that since the immigration hearing is exempt from compliance with the A.P.A. under the *Marcello* rationale, "it presumably would be subject to the more lenient due process standard." 531 F.2d at 144 n.3. It is unclear why the traditional due process test should be used to examine the hearing procedures under the I.N.A. when Congress has provided more stringent provisions against commingling of functions in section 242(b).

tion adjudications are held in conformity with the "mirror" hearing procedures delineated by Congress in subsections (b)(1) through (b)(4) of section 242.[130] It is further stipulated in this section that in all cases where an alien is ordered to be deported, the Attorney General's decision shall be considered "final."[131]

As a means of effectively discharging this statutory duty to oversee orders of deportation, the Attorney General has exercised his discretion by establishing the Board of Immigration Appeals.[132] Acting as his "surrogate" in immigration matters, the Board was perceived by the court to constitute a mechanism by which the rights and

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[130] 531 F.2d at 144. *See* I.N.A. § 242(b), 8 U.S.C. § 1252(b) (1970), which states the following:

> Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—
>
> (1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;
>
> (2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;
>
> (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and
>
> (4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

In Woodby v. INS, 385 U.S. 276, 281–82 (1966), the Supreme Court found that the statute did not set forth a standard for deportation orders, but rather provided a standard for judicial review. The Court held that the standard for a deportation order was "clear, unequivocal, and convincing evidence." *Id.* at 286.

[131] I.N.A. § 242(b), 8 U.S.C. § 1252(b) (1970); *see* Giambanco v. INS, 531 F.2d at 144. For a discussion of the meaning of "final" under section 242(b), see note 76 *supra*.

[132] Giambanco v. INS, 531 F.2d at 144. The majority opinion does not point to any specific section of the immigration act as directly authorizing creation of the Board. *Id.* Instead, it examines the responsibilities of the Attorney General and concludes that "[t]he Board has been established at the Attorney General's discretion to implement the statutory requirements of deportation and exclusion under the INA." *Id.*; *see* note 130 *supra*. By focusing implicitly on section 242(b) as the source of the Attorney General's power, the court was able to assert that discretionary relief from deportation is "an integral part of the exempt section 242 procedure." Giambanco v. INS, 531 F.2d at 144.

Under I.N.A. § 103(a), 8 U.S.C. § 1103(a) (1970), the Attorney General is empowered "to delegate . . . in his discretion any of the duties and powers imposed upon him in this chapter." *See* Giambanco v. INS, 531 F.2d at 152 (Gibbons, J., dissenting); Noverola-Bolaina v. INS, 395 F.2d 131, 133 (9th Cir. 1968); 8 C.F.R. pt. 3, at 7 (authority note) (1976). Sitting in review of an immigration officer's exercise of discretion, the Board acts as part of an all-inclusive appellate procedure and not merely as an extension of a section 242 proceeding. Such an expansion in the scope of the practice under section 242(b) has the effect of making its "mirror provisions" control the procedure under other sections of the I.N.A., contrary to the intent of Congress. *See* notes 175–76 *infra*.

privileges of aliens caught up in the deportation process were to be protected.[133] Judge Biggs noted that, as such a prophylactic device, "[t]he Board has been made by the Attorney General a central part of his implementation of section 242."[134] Thus, in accordance with the Supreme Court's holding in *Marcello*, appellate hearings conducted by the B.I.A. were considered to be within the ambit of section 242's "sole and exclusive procedure" language and therefore exempted from the dictates of the Administrative Procedure Act.[135] Although the court recognized that a section 242 determination of deportation was not at issue in either *Giambanco* or *Cisternas-Estay*, it still found the A.P.A. to be inapplicable to the hearings involved. It was noted that whenever the Board is petitioned to grant an adjustment of status,[136] "to waive a ground of excludability,"[137] or to suspend an order of deportation,[138] "it is acting as an integral part of the exempt 242 procedure."[139] Such a conclusion was deemed to flow from the consideration that, since these adjudications relate ultimately to the propriety of a finding of deportability, they cannot be viewed as distinct processes.[140]

Examining the legislative history of the I.N.A., the majority found additional support for its contention that the B.I.A. was not subject to the Administrative Procedure Act. Rather than focusing on some affirmative act, the court noted the absence of any indication that Congress did not intend the Board "to operate in conjunction with the exempt specialized hearing procedures of section 242."[141] In the majority's view, a finding that the Board was subject to the A.P.A. would require "hypothesiz[ing] a disjointed congressional intent that makes no appearance in the legislative history of the 1952 Act."[142] This, however, was not the only Congressional inaction which the

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[133] Giambanco v. INS, 531 F.2d at 144.

[134] *Id.*

[135] *Id.*

[136] I.N.A. § 245, 8 U.S.C. § 1255 (1970).

[137] *Id.* § 212(h), 8 U.S.C. § 1182(h) (1970).

[138] *Id.* § 243(h), 8 U.S.C. § 1253(h) (1970).

[139] Giambanco v. INS, 531 F.2d at 144; Cisternas-Estay v. INS, 531 F.2d at 159.

[140] Cisternas-Estay v. INS, 531 F.2d at 159; *see* note 157 *infra*.

[141] Giambanco v. INS, 531 F.2d at 144.

[142] *Id.* at 145. For a discussion of the "disjointed intent" of Congress, see notes 174–77, 185–89 *infra* and accompanying text. In a footnote, the court indicated that section 7 of the A.P.A. exempted proceedings before boards "specially provided for" by statute. The *Giambanco* court held "that Board review under the INA is an extension of the proceeding specially provided for under INA section 242; therefore, in [its] view, the exemption should apply." 531 F.2d at 145 n.6. For a criticism of this view, see note 126 *supra*.

court found to be significant. When the A.P.A. was amended and recodified in 1966,[143] Congress had both the opportunity and the power to restructure the Act in order to eliminate the exemption provided for the I.N.A. by the holding in *Marcello*. Noting that Congress had failed at that time to take any remedial action, the court indicated that this was an expression of implicit agreement with the *Marcello* result, since "Congress ha[d] been quick to act in the past when it disagree[d] with the Court's application of the APA in the immigration area."[144]

Speaking in dissent, Judge Gibbons assailed the majority position on three grounds. First, the court's opinion extended the scope of the holding in *Marcello* by ignoring the reasoning upon which that decision was based. Second, there was an express indication in the legislative history of the I.N.A. of congressional intent to bring the Board within the ambit of the Administrative Procedure Act. Third, and most importantly, strong policy considerations compelled a contrary result.[145]

Judge Gibbons noted that in extending the scope of A.P.A. exemptions to include appellate review by the B.I.A., the majority failed to take cognizance of the basic premise underlying *Marcello*:[146] subsequent statutes cannot supersede the provisions of the A.P.A. absent a clear intent to do so.[147] He pointed out that section 12 of the A.P.A.

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[143] Act of Sept. 6, 1966, Pub. L. No. 89–554, 80 Stat. 378 (current version at 5 U.S.C §§ 500–576, 701, 704–706 (1970 & Supp. V 1975); 28 U.S.C.A. §§ 702–703 (West Cum. Supp. 1977)).

[144] Giambanco v. INS, 531 F.2d at 145 n.6.

[145] *Id.* at 150 (Gibbons, J., dissenting).

[146] *See id.* at 150, 152.

[147] Administrative Procedure Act § 12, 5 U.S.C. 559 (1970); Giambanco v. INS, 531 F.2d at 152. In the case of Rusk v. Cort, 369 U.S. 367, 375–80 (1962), the Court addressed the question of whether the procedures mandated by I.N.A. § 360(b)–(c) superseded the provisions of the A.P.A. The appellee, Cort, was an American-born physician who had moved to Czechoslovakia ostensibly to avoid the draft. When his passport expired he applied for a new one, but it was denied pursuant to section 349(a)(10) of the I.N.A., which provided that an individual could lose his citizenship if he remained outside the United States to avoid military service. *Id.* at 368–70. Cort then instituted an action in federal court to declare this section unconstitutional. *Id.* at 369. Relying upon the amended version of the Declaratory Judgment Act, 28 U.S.C. § 2201 (1958) (current version at 28 U.S.C.A. § 2201 (West Cum. Supp. 1977)), in conjunction with the A.P.A., the three-judge court rejected the Secretary of State's contention that I.N.A. § 360(b)–(c) was the sole method of proceeding available to Cort, and additionally found section 349(a)(10) to be unconstitutional. Cort v. Herter, 187 F. Supp. 683 (D.D.C. 1960), *aff'd in part*, 369 U.S. 367 (1962).

Upon direct appeal, the Supreme Court reached only the question of jurisdiction. 369 U.S. at 370. In making its determination, the Court examined the genesis of section 349(a)(10) and found that the legislative history reflected an intent to reduce the abuse

provides that deviations from its terms must be express.[148] It was clear to the dissent that the *Marcello* Court, by its holding, had interpreted this section to include statutes whose legislative history indicates a congressional intent to carve out an exemption through creation of mirror provisions, as opposed to those containing literal statements of exemption.[149] Building upon this assumption, the dissent determined that the *Marcello* Court had proceeded to articulate a process for determining the applicability of the A.P.A. hearing in a variety of contexts.[150]

Judge Gibbons reasoned that this development of "a method of analysis to employ in discovering the interrelationship between" the A.P.A. and the I.N.A. was the most significant aspect of the holding in *Marcello*.[151] The *Marcello* Court had not, therefore, in his opinion, formulated a general rule of exemption to be mechanically applied as the *Giambanco* majority was doing.[152] According to Judge Gibbons,

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by certain classes of individuals of an earlier I.N.A. provision. *Id.* at 375–79. Since Cort was not a member of the class against whom the section was directed, the Court held that Congress did not intend to preclude him from prosecuting a suit for declaratory and injunctive relief. *Id.* at 379. Prior decisional law indicates "that the Court will not hold that the broadly remedial provisions of the Administrative Procedural Act are unavailable to review administrative decisions under the 1952 Act in the absence of clear and convincing evidence that Congress so intended." *Id.* at 379–80.

Additional cases, while not articulating the nature of the relationship between the A.P.A. and the I.N.A. have nonetheless proceeded to apply A.P.A. standards in reviewing administrative action. Giambanco v. INS, 531 F.2d at 144 n.1; *see, e.g.*, Noel v. Chapman, 508 F.2d 1023, 1029–31 (2d Cir. 1975) (INS exercise of its rulemaking authority must conform to the A.P.A.); Blackwell College of Business v. Attorney General, 454 F.2d 928, 930, 933–35 (D.C. Cir. 1971) (license revocation by the INS under I.N.A. § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1970), must conform to the A.P.A. since there is no administrative procedure set forth in the statute); Wong Wing Hang v. INS, 360 F.2d 715, 717 (2d Cir. 1966) (review procedures of A.P.A. § 10, 5 U.S.C. § 1009 (1964), apply to review of abuse of discretion under I.N.A. § 106, 8 U.S.C. § 1105(a) (1970)); Xytex Corp. v. Schliemann, 382 F. Supp. 50, 52 (D. Colo. 1974) (limited judicial review under A.P.A. § 10(e), 5 U.S.C. § 706 (1970), applicable to certification under I.N.A. § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1970)); Hou Ching Chow v. Attorney General, 362 F. Supp. 1288, 1292 (D.D.C. 1973) (revocation of rule granting exemption to I.N.A. § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1970), must proceed in conformance with A.P.A. § 4, 5 U.S.C. § 553 (1970)).

The Seventh Circuit in United States v. Martin, 467 F.2d 1366 (7th Cir. 1972), has indicated that "it is clear that administrative hearings in deportation cases must conform to due process of law and the Administrative Procedure Act." *Id.* at 1368. This decision, however, appears to be an aberration since the court fails to discuss the clear holding to the contrary in *Marcello* and cites only *Wong Yang Sung* for support. *See id.*

[148] Giambanco v. INS, 531 F.2d at 152 (relying upon 5 U.S.C. § 559 (1970)).

[149] *See* Giambanco v. INS, 531 F.2d at 152 (relying upon 349 U.S. at 310).

[150] Giambanco v. INS, 531 F.2d at 152.

[151] *Id.*

[152] *Id.* at 152, 154.

"[a] court must compare" the provisions of both acts to discover whether "Congress meant to adopt the procedural safeguards of the A.P.A. to the particular needs of the I.N.S."[153] He concluded that if the reviewing court finds that Congress has provided for either a specific exemption of an act from the A.P.A. or has adopted "mirror provisions," it should not then subject that act to the A.P.A.'s hearing requirements.[154]

Applying this analytical framework to the facts in the instant case, the dissent first looked to the I.N.A. to discover whether the Board had been mentioned within the language of the Act. Since Congress had expressly refrained from a legislative adoption of the B.I.A., Judge Gibbons hypothesized that it could not have intended the hearing provisions it did enact—the I.N.A. section 242(b) mirror provisions—to apply to the Board.[155] Furthermore, in examining the

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[153] *Id.* It is problematical whether Judge Gibbons' view that the *Marcello* Court was consciously developing a mandatory procedure by which to test the A.P.A.'s applicability to the I.N.A. was correct. Justice Clark in *Marcello* had viewed a comparative analysis of the two acts as but one method of determining whether Congress, with its passage of the immigration act, intended to restore the doctrine expressed in *Wong Yang Sung*. 349 U.S. 306–07.

In Wong Wing Hang v. INS, 360 F.2d 715 (2d Cir. 1966), the court attempted to review the denial of an application for a suspension of deportation under I.N.A. § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1964). 360 F.2d at 716. Finding that section 106 of that act did not provide a suitable standard to be applied in such a case, the court

> turn[ed] for illumination to § 10 of the Administrative Procedure Act, a course particularly appropriate in light of the expressed congressional purpose to fashion in § 106 a statutory procedure of review that "implements and applies" § 10 of the APA.

Id. at 717 (quoting from H.R. REP. NO. 1086, 87th Cong., 1st Sess. 22, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 2950, 2966).

The significance of this reasoning is twofold. First, the court appeared implicitly to adopt the methodology of the *Marcello* Court by examining the statutory scheme of section 106 to determine if mirror provisions had been developed. Second, the decision referred to the legislative history of the Act in order to determine the congressional intent. 360 F.2d at 717. The House Report indicates a

> purpose . . . to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States, by adding a new section 106 to the Immigration and Nationality Act. In so doing, the bill implements and applies section 10 of the Administrative Procedure Act (5 U.S.C. § 1009).

H.R. REP. NO. 1086, 87th Cong., 1st Sess. 22, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 2950, 2966. Prior to passage of section 106, the Supreme Court had determined that the A.P.A. provided the means for reviewing I.N.A. adjudications. *See* Shaughnessy v. Pedreiro, 349 U.S. 48, 50–51 (1955); note 76 *supra*. Thus, what the *Wong Wing Hang* court, in interpreting section 106, and the House, in passing it, were implementing was the statutory dictate of the A.P.A. that deviations from its terms must be express. *See* Giambanco v. INS, 531 F.2d at 152 (Gibbons, J., dissenting).

[154] Giambanco v. INS, 531 F.2d at 152.

[155] *See id.* at 153–54. There are clear indications of a contrary intent in the House

scope of the Board's appellate jurisdiction, Judge Gibbons concluded that its hearings are not mere extensions of adjudications under section 242;[156] rather, they are "distinct proceeding[s] in need of some procedural safeguards."[157] It was noted that the administrative regulations creating and guiding the B.I.A.'s procedure, however, do not even contain an equivalent to the abbreviated protections regarding disqualification of inquiry officers afforded aliens in their initial hearings under section 242(b) of the I.N.A.[158] Hence, in the dissent's

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Report accompanying the I.N.A.'s passage. In the course of an analysis of the bill's provisions, the report states that

> [i]t is believed that the Board has well served its purpose and has greatly contributed to a fair and equitable administration of justice in immigration, nationality, and naturalization cases. *Refraining at this time from proposing to change the status of the Board into a statutory body, the committee is of the opinion that the Attorney General should not alter in any way the structure and functions of the Board.*

H.R. REP. NO. 1365, 82d Cong., 2d Sess. 35–36 (emphasis added), *reprinted in* [1952] U.S. CODE CONG. & AD. NEWS 1653, 1687–88. During debate over passage of the immigration act, at least two proposals were made for creation of a statutory Board. 98 CONG. REC. 4401, 5603–04, 5608, 5611–13, 5618–19, 5778 (1952). Arguments advanced for its passage included the considerations that the Board's existence was "tenuous" and contingent, and that it was dependent, not upon "authorization of law," but rather upon "administrative regulation." *Id.* at 4401. Additional arguments raised in the Senate centered around the propriety of reposing in the Attorney General "dictatorial power, without appeal, over the lives of others." *Id.* at 5778. The argument most often advanced in opposition to the creation of a statutory Board was that it would establish an independent body within the Department of Justice capable of reversing decisions made by the Attorney General. Giambanco v. INS, 531 F.2d at 153 (Gibbons, J., dissenting); 98 CONG. REC. 5780 (1952). Yet another argument against such a Board was raised by Senator McCarran who felt that his proposed administrative court would obviate the need for establishment of a Board by statute. *Id.* at 5778. In any event, no such proposal for a statutory Board was passed by the conference committee. *See* Giambanco v. INS, 531 F.2d at 153 (Gibbons, J., dissenting); S. REP. NO. 1137, 82d Cong., 2d Sess. 8 (minority report on S. 2550); H.R. REP. NO. 1365, 82d Cong., 2d Sess. 36, *reprinted in* [1952] U.S. CODE CONG. & AD. NEWS 1653, 1687–88.

[156] *See* Giambanco v. INS, 531 F.2d at 152–53.

[157] *Id.* at 153. Under 8 C.F.R. § 3.1(d)(1) (1976), the B.I.A. has been vested with the "discretion and authority conferred upon the Attorney General by law" in matters of deportation and exclusion. Courts have interpreted this discretion as not limiting the B.I.A. to reviewing findings of fact made by the hearing examiner. Instead it may review the record de novo and may make factual determinations inconsistent with those of the special inquiry officer. Giambanco v. INS, 531 F.2d at 153 (Gibbons, J., dissenting); *see* United States *ex rel.* Barbour v. District Director, 491 F.2d 573, 578 (5th Cir. 1974); Carrasco-Favela v. INS, 445 F.2d 865, 866 (9th Cir. 1971); Noverola-Bolaina v. INS, 395 F.2d 131, 135–36 (9th Cir. 1968); Goon Wing Wah v. INS, 386 F.2d 292, 293–94 (1st Cir. 1967); De Lucia v. INS, 370 F.2d 305, 308 (7th Cir. 1966), *cert. denied*, 386 U.S. 912 (1967).

[158] *See* Giambanco v. INS, 531 F.2d at 153; 8 C.F.R. §§ 3.1–.8 (1976). This part of the regulation fails to delineate any standards for voluntary or mandatory disqualification of Board members. In contrast, section 242(b) of the I.N.A. provides that "[n]o

view, if the *Giambanco* holding is generally accepted, the alien at his Board hearing will be afforded only the minimal safeguards provided by due process, while at the initial hearing the stricter statutory protections will be available.[159] Judge Gibbons believed that denial of A.P.A. applicability to Board hearings thus results in a different "anomalous" situation: placing a litigant before an appellate body clothed with fewer procedural protections than were afforded him at his initial adjudication.[160] He noted that this anomaly is surely much greater than that inherent in a finding that Congress did have a disjointed intent in exempting the initial hearing from A.P.A. proce-

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special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated . . . in prosecuting functions." 8 U.S.C. § 1252(b) (1970). A.P.A. sections 5(c) and 7(a) also provide similar, although stricter, disqualification provisions. 5 U.S.C. §§ 554(d), 556(b) (1970). The *Giambanco* majority failed to address the question of standards for disqualification, preferring instead to rest its decision upon representations of the Board members, made in the affidavits, as to their impartiality. *See* Giambanco v. INS, 531 F.2d at 143. Judge Gibbons, however, would have reversed and remanded the causes to the Board for a further determination under the A.P.A. section 5(c) standard. *Id.* at 155 (dissenting opinion); *see* text accompanying note 48 *supra*.

[159] Giambanco v. INS, 531 F.2d at 153. The majority is mistaken at footnote 3 of its opinion where it finds that the immigration hearing is merely subject to the due process standard for separation of functions. Under section 242(b) stricter statutory protections for disqualification of hearing officers have been mandated. *Compare id.* at 144 n.3 (majority opinion) *with* I.N.A. § 242(b), 8 U.S.C. § 1252(b) (1970). Flowing implictly from the court's error is the conclusion that Board hearings are also subject to the more lenient due process standard. The due process standard for separation of functions which the majority would apply is that recently adopted by the Supreme Court in Withrow v. Larkin, 421 U.S. 35 (1975). In *Withrow*, the Court held that the mere combination of adjudicative and investigative functions in one individual was not, without more, violative of due process of the law. *Id.* at 58. The facts of this case revealed that an examining board of physicians had investigated charges against Dr. Larkin, had conducted hearings, and had also made the determination that probable cause existed to revoke Dr. Larkin's license. *Id.* at 38–42. A three-judge district court found this commingling of funtions to be unconstitutional as a violation of due process. Larkin v. Withrow, 368 F. Supp. 796, 797–98 (E.D. Wis. 1973), *rev'd*, 421 U.S. 35 (1975). Upon direct appeal, the Supreme Court reversed in a unanimous opinion, finding that a "combination of . . . functions" in one individual carries with it "a presumption of honesty and integrity in those serving as adjudicators." 421 U.S. at 47. In order to rebut this presumption, a plaintiff must present "*a realistic appraisal of psychological tendencies and human weakness*," showing that there is "a risk of actual bias or prejudgment" such that failure to forbid the practice would place due process in jeopardy. *Id.* at 47 (emphasis added). The Court went on to note that there is "no support for the bald proposition . . . that agency members who participate in an investigation are disqualified from adjudicating." *Id.* at 52; *see* 2 K. DAVIS, *supra* note 67, § 1302, at 175. *See generally* Davis, Withrow v. Larkin *and the "Separation of Functions" Concept in State Administrative Proceedings*, 27 AD. L. REV. 407 (1975); Comment, *Prejudice and the Administrative Process*, 59 NW. U.L. REV. 216 (1964); 35 MD. L. REV. 704 (1976).

[160] Giambanco v. INS, 531 F.2d at 153.

dures while allowing Board hearings to be within its ambit.[161]

Judge Gibbons further indicated that the legislative history suggests that Congress did not contemplate diminished protections upon Board review.[162] Although there was extensive debate as to the applicability of the A.P.A. to the immigration act itself, little consideration was paid to the effect of the A.P.A. on the Board.[163] The senatorial sponsor of both the A.P.A. and the I.N.A. did emphasize, however, that "the provisions of the Administrative Procedure Act [were] made applicable to all proceedings before the Board of Immigration Appeals."[164] The dissent indicated that this pronouncement directly contradicted the majority's "assumption that greater procedural protections are afforded at hearings conducted by immigration judges only because Congress expressly granted them in § 242(b)."[165]

Not content to rest his opinion on statutory interpretation alone, Judge Gibbons believed that the most trenchant reasons compelling A.P.A. governance of Board hearings were the "policy and purpose of the APA" as first articulated "in the context of immigration proceedings in *Wong Yang Sung*."[166] Although the "impact" of that holding has been eroded by passage of the 1952 immigration act and subsequent decisional law, there was no doubt in Judge Gibbons' mind, as to the continuing vitality of its public policy analysis.[167]

The dissent first noted that one of the fundamental remedial purposes compelling promulgation of the A.P.A. was the abolition of

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[161] *Compare id.* at 144–45 (majority opinion) *with id.* at 153 (Gibbons, J., dissenting).

[162] *Id.* at 153 (dissenting opinion).

[163] *See* 98 CONG. REC. 4302, 4414–16, 5329, 5417–21, 5604, 5618–19, 5625–26, 5778–88 (1952). Most of the discussion of the B.I.A. took place in the context of recommendations that it be replaced with a statutory entity. *See id.* at 4401, 5608, 5612–13, 5618–19.

[164] *Id.* at 5778 (remarks of Sen. McCarran). *See also id.* at 4302, 4414, 4416, 5329, 5778–79.

[165] Giambanco v. INS, 531 F.2d at 153.

[166] *Id.* at 154. The *Wong Yang Sung* Court had found that "[o]ne purpose was to introduce greater uniformity of procedure and standarization of administrative practice among the diverse agencies whose customs had departed widely from each other." 339 U.S. at 41. Justice Jackson indicated that the Court "pursue[d] this no further than to note that any exception [it might] find to its applicability would tend to defeat this purpose." *Id.* Another consideration given by the Court for the passage of the A.P.A. was the need "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge." *Id.*

[167] Giambanco v. INS, 531 F.2d at 154. The impact of which Judge Gibbons speaks is *Wong Yang Sung*'s holding that the A.P.A. applies to immigration hearings. *Id.* Under the *Marcello v. Bonds* interpretation of the I.N.A., such a result no longer obtains. 349 U.S. at 310.

the then existing practice of commingling in one individual the incompatible responsibilities "of advocacy and adjudication."[168] The history of the A.P.A.'s enactment was found to be replete with references to the effects that such a dual role has had on substantive judicial fairness and on the societal perception of, and confidence in, agency process.[169] Thus, as the dissent opined, once provided with statutory reforms to insure procedural fairness, the courts must " 'construe this remedial legislation to eliminate . . . the practices it condemns.' "[170] Judge Gibbons found the *Wong Yang Sung* Court's objection to the commingling of functions no less compelling when the level of adjudication has changed. Since the litigants involved in immigration proceedings are noncitizens and may well be " 'strangers to the laws and customs in which they find themselves involved,' " as well as to the language of their triers, Judge Gibbons advocated their protection equally at the hearing and review levels.[171] Agreeing with Justice Jackson's opinion in *Wong Yang Sung*, the dissenter in *Giambanco* concluded that because there is nothing inherent " 'in the nature of the parties or proceedings' " that would lead to exemption, the court "should not hesitate to extend the procedural safeguards of the APA to cases before the Board of Immigration Appeals."[172]

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[168] Giambanco v. INS, 531 F.2d at 154; *see* Wong Yang Sung v. McGrath, 339 U.S. at 41. In *Wong Yang Sung*, the Court quoted at length from a study undertaken "by a . . . committee named by the Secretary of Labor, whose jurisdiction at the time included the Immigration and Naturalization Service." *Id.* at 42–44. It was observed in that study that

> "[m]erely to provide that in particular cases different inspectors shall investigate and hear is an insufficient guarantee of insulation and independence of the presiding official. The present organization of the field staff not only gives work of both kinds commonly to the same inspector *but tends toward an identity of viewpoint as between inspectors who are chiefly doing only one or the other kind of work . . . .*"

Id. at 43 (emphasis added) (quoting from THE SECRETARY OF LABOR'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, THE IMMIGRATION AND NATURALIZATION SERVICE 81 (Mimeo. 1940)).

[169] Giambanco v. INS, 531 F.2d at 151; *see* Wong Yang Sung v. McGrath, 339 U.S. at 36–39 & nn. 2–13 (extensive citation of sources criticizing this practice).

[170] Giambanco v. INS, 531 F.2d at 154 (Gibbons, J., dissenting) (quoting from Wong Yang Sung v. McGrath, 339 U.S. at 45).

[171] Giambanco v. INS, 531 F.2d at 154–55 (quoting from Wong Yang Sung v. McGrath, 339 U.S. at 46).

The *Wong Yang Sung* Court had recognized that arguments advanced against application of the A.P.A. to immigration proceedings could equally be applied to all other agencies. The Court stated, however, that "[t]he agencies, unlike the aliens, have ready and persuasive access to the legislative ear and if error is made by including them, relief from Congress is a simple matter." 339 U.S. at 46–47; *see* Giambanco v. INS, 531 F.2d at 155 (Gibbons, J., dissenting).

[172] Giambanco v. INS, 531 F.2d at 154 (quoting from Wong Yang Sung v. McGrath, 339 U.S. at 46).

To resolve whether the majority correctly extended the *Marcello* holding to Board review, or whether the dissent was correct in viewing that holding as limited to initial hearings, it is necessary to examine the congressional intent behind the I.N.A. Only by conducting such an examination can it be understood what limitations are inherent in *Marcello*'s alteration of the A.P.A. language that deviations from its terms must be express.[173]

What emerges from an analysis of the legislative history of the I.N.A. is an indication that, contrary to the *Giambanco* majority's conclusion, Congress did have a "disjointed . . . intent"[174] in mind when it enacted that act into law. Both the House and Senate sponsors of the bill made clear in debate the fact that the A.P.A. was meant to govern the administration of the immigration laws.[175] They further indicated that the holding of *Wong Yang Sung*—that the A.P.A. applies to I.N.A. hearings—would be restored following its implicit overruling by the Supplemental Appropriations Act of 1951.[176] Contrary statements found in debate and in the House Report accompanying the passage of the I.N.A., which acknowledged that some specialized immigration procedures had been developed,[177] are not irreconcilable with a concurrent intention of making the A.P.A. applicable to Board hearings.

Further evidence of Congressional intent to submit Board review to A.P.A. requirements may be seen in an examination of immigration problems leading to passage of the I.N.A. Prior to this time, the ability of an immigration officer to provide some form of discretionary relief to an alien was severely circumscribed by the addition in 1940 of section 19(c) to the Immigration Act of 1917.[178] According to the terms of that section, one of the forms of relief available was a six-month suspension of deportation by the Attorney General.[179] Because of the overwhelming problems involved in obtaining such relief,[180] the number of aliens who received such discretion was ex-

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[173] 5 U.S.C. § 559 (1970).

[174] Giambanco v. INS, 531 F.2d at 145.

[175] 98 CONG. REC. 4302, 4414–16, 5329, 5778–88 (1952).

[176] *Id.* at 4302, 4414, 4416, 5625–26.

[177] *See, e.g.*, H.R. REP. NO. 1365, 82d Cong., 2d Sess. 55–58, *reprinted in* [1952] U.S. CODE CONG. & AD. NEWS 1653, 1710–13, 1754; 98 CONG. REC. 5417–21, 5625 (1952).

[178] Act of June 28, 1940, ch. 439, § 20(c), 54 Stat. 670, *amending* Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 874.

[179] Act of June 28, 1940, ch. 439, § 20(c)(2), 54 Stat. 670. The only other relief available was the option of voluntary departure. *See id.* § 20(c)(1).

[180] In order to be eligible for relief under section 19(c), an alien needed to demonstrate "good moral character for the preceding five years." *Id.* § 20(c). In addition he

tremely limited.[181] In 1952, when Congress drafted the omnibus immigration act, it was cognizant of criticism voiced over the inequities involved in such a procedure.[182] It therefore provided for several additional mechanisms by which aliens could seek relief from orders of deportation.[183] In light of the concern Congress had expressed over the deliberate evasion of immigration laws by aliens, however, the standards for relief were quite stringent.[184]

Responding to concern by INS officials over the increased burdens which would be occasioned by application of the A.P.A. to deportation hearings,[185] the sponsors of the I.N.A. incorporated a modified version of the A.P.A. hearing provisions to avoid the feared difficulties.[186] What they did not do was to fashion a wholesale ex-

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must be found not to be ineligible for naturalization. *Id.* § 20(c)(2). Deportation could be suspended if these conditions were satisfied *and* it was found "that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien." *Id.*

In order for deportation to be suspended for more than six months, Congress had to approve affirmatively the suspension. *Id.* Until 1940, the Attorney General, acting alone, had no discretion whatsoever to provide for permanent relief from expulsion. Deportation "was mandatory" and the "only avenue of relief in a hardship case was by a private bill in Congress." Foti v. INS, 375 U.S. 217, 222–23 (1963).

[181] *See* Gordon, *Ameliorating Hardships under the Immigration Laws*, 367 ANNALS 85, 86–87 (1966).

[182] *Id.*; *see* C. GORDON & H. ROSENFIELD, *supra* note 7, § 7.1a, at 7-4 to -5. Congressional reaction was not limited to the year 1952; at subsequent intervals when the Act was amended, other avenues of relief were provided. *See id.*, at 7-5 to -6.

[183] Today there are a myriad of possible alternatives to deportation including, *inter alia*, adjustment of status under I.N.A. § 245, 8 U.S.C. § 1255 (1970), suspension of deportation under I.N.A. § 244, 8 U.S.C. § 1254 (1970), and waiver of grounds of excludability under I.N.A. § 212(c), 8 U.S.C. § 1182(c) (1970). For an analysis of these and other avenues of relief, see J. WASSERMAN, *supra* note 5, at 193–222. There are so many remedies available to aliens "that, in most deportation proceedings today, the principal issue is not whether the alien is deportable, which often is conceded, but rather whether he is entitled to various discretionary dispensations." Gordon, *supra* note 181, at 86–87.

[184] *See, e.g.*, I.N.A. § 244(a), 8 U.S.C. § 1254(a) (1970). In speaking specifically of this section, a House Report recognized the increase in illegal entry by aliens who later attempted to have their status adjusted "to that of permanent resident." This report further noted that

> [t]his practice [was] threatening our entire immigration system and the incentive for the practice must be removed. Accordingly, under the bill, to justify the suspension of deportation *the hardship must not only be unusual but must also be exceptionally and extremely unusual.*

H.R. REP. NO. 1365, 82d Cong., 2d Sess. 62–63 (emphasis added), *reprinted in* [1952] U.S. CODE CONG. & AD. NEWS 1653, 1718.

[185] 96 CONG. REC. 13504–05, 13546–50 (1950). *See also* 98 CONG. REC. 5626 (1952).

[186] 98 CONG. REC. 5626 (1952). Senator McCarran, who sponsored both the A.P.A. and the I.N.A., stated that the I.N.A. eliminated exemptions from the A.P.A. "in the case

emption or modification of the A.P.A. as to other types of adjudications or hearings before the Board.[187] The sponsors were explicit in contending that the A.P.A. was meant to apply to "the administration of the bill."[188] As a result, when courts in the past have discussed the relationship of the A.P.A. to the I.N.A. in factual contexts outside that of deportation adjudications, they have consistently applied A.P.A. standards.[189]

In limiting the mirror provisions to deportation adjudications, Congress apparently did not anticipate the burgeoning number of individuals seeking both discretionary relief and appeal to the Board. Had such an increase been foreseen, perhaps the sponsors would have undertaken a more general modification of the A.P.A., extending it to Board proceedings as well. This is mere speculation, however, since there is no indication in the legislative history that such would have been the case.

The result in the *Giambanco* and *Cisternas-Estay* cases is clearly questionable, since it effectively accomplishes a transformation of Congress' inaction with regard to the Board into an affirmative intention to extend the I.N.A.'s exemption from the A.P.A.[190] In addition, the court drew this conclusion based on its erroneous perception of the B.I.A. as a mere extension of the 242(b) deportation hearing.[191]

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of deportation proceedings, but accomplishe[d] such elimination with due regard for the administrative problems of the Immigration and Naturalization Service by providing at the same time the special procedures which these problems require." *Id.*

[187] *See id.* at 4302, 5329. Senator McCarran, in attacking a substitute amendment for his I.N.A. proposal, indicated that he was opposed to "*any and all blanket exemptions* from the Administrative Procedure Act." *Id.* at 5626 (emphasis added). The Senator felt that there was no absolute exemption here, but that his mirror provisions were "in substantial compliance with the" A.P.A., "[e]xcept for the failure to comply strictly with [its] dual-examiner provisions." *Id.* If there were "a blanket exemption, the agency would prescribe its own procedures"—a result which did not obtain in the case of the I.N.A. *Id.*

[188] *Id.* at 5779.

[189] *See* 531 F.2d at 144.

[190] This rationale was rejected by the Supreme Court in *Wong Yang Sung*. 339 U.S. at 47. Earlier, the INS had "asked Congress for exempting legislation . . . which appropriate committees of both Houses reported favorably"; however, Congress took no "further action." *Id.* (footnote omitted). In *Wong Yang Sung*, the Government contended that since Congress was aware of the construction of the Act by the INS and " 'ha[d] taken no action indicating disagreement with that interpretation' . . . it 'is at least arguable that Congress was prepared to specifically confirm the administrative construction by clarifying legislation.' " *Id.* (quoting from an unidentified source). The court responded by indicating that it "d[id] not think [it could] draw that inference from incompleted steps in the legislative process." 339 U.S. at 47.

[191] *See* note 137 *supra*.

In view of the fact that the apparent holding of *Giambanco* leaves aliens with even fewer safeguards than those provided for section 242(b) hearings, the court should have moved more circumspectly. This is particularly so since procedural fairness is an indispensable element of the concept of liberty, and furthermore, since the severe substantive nature of the immigration laws demands that they be fairly and impartially applied. The agency involved in the instant cases is more than an impartial adjudicator; it is a vitally interested litigant. In such circumstances, the need for a more stringent separation of functions is self-evident.

Due process is a fluid concept that varies with the particular facts and circumstances of each case. In any particular factual situation the risk of unfairness in applying a lower standard of protection may be too high to allow the procedure to stand. In cases concerning deportation or exclusionary relief surely a high degree of protection is required for conformity with due process, since the possible consequences, although denominated civil, are more akin to those resulting from a criminal prosecution.[192] A litigant who stands before the B.I.A. finds himself in a precarious situation where Board members can even go so far as to make new findings of fact and institute additional charges. As Judge Gibbons points out, however, the courts have been apprised by the A.P.A. of the mood of Congress toward procedural fairness.[193] It is this mood which should have been executed in the absence of express indications to the contrary.

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[192] *See* Ng Fung Ho v. White, 259 U.S. 276 (1922). In *Ng Fung Ho*, Justice Brandeis formulated the now classic description of the consquences of deportation: it "obviously deprives [the individual] of liberty . . . . It may result also in loss of both property and life; or all that makes life worth living." *Id.* at 284.

[193] *See* Giambanco v. INS, 531 F.2d at 155 (dissenting opinion). In Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), the Supreme Court indicated that Congress, by passage of the A.P.A., had expressed "its mood" of concern over procedural fairness and regularity in administrative adjudication. *See id.* at 477–87. Thus, "[t]he APA . . . provides courts with a broad congressional judgment regarding administrative policy to which they should refer in establishing rules of decision in this area, especially in cases of first impression." Giambanco v. INS, 531 F.2d at 155 (dissenting opinion).