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Immigration cases have provided some of the most controversial circumstances under which the doctrine of equitable estoppel[1] has been asserted against the federal government. Unfortunately, the federal courts have failed to establish a clear test for deciding the applicability of estoppel against the government in these cases. As a result, there have been inconsistent holdings in factually similar situations.

This note examines the case law[2] dealing with immigration estoppel. Part I reviews the recent development of this case law; Part II analyzes why the present standards for applying estoppel may be misapplying prior decisions; and Part III proposes a test for determining when to allow estoppel in immigration cases and analyzes the proposed test by applying it to two immigration cases.

I. Estoppel Doctrine in Immigration Cases

Traditionally, estoppel could not be asserted against the government.[3] This rule was grounded in notions of sovereign immunity[4] and separation of powers.[5] Several commentators have criticized the traditional rule because of its potential for inequity when strictly applied.[6] Some lower courts have attempted to allevi-

1 "Equitable estoppel is a rule of fairness by which courts protect the reliances and expectations of innocent persons from defeat by those who have induced those reliances and expectations." Santiago v. INS, 526 F.2d 488, 494 (9th Cir. 1975) (Choy, J., dissenting), *cert. denied*, 425 U.S. 971 (1976). *See generally* M. BIGELOW, A TREATISE ON THE LAW OF ESTOPPEL 602-716 (6th ed. 1913); 3 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 801-812 (5th ed. 1941). As used in this note, the term "estoppel" means "equitable estoppel against the government" unless otherwise indicated.

2 The Immigration and Nationality Act, 8 U.S.C. §§ 1101-1503 (1976) is the pertinent statutory authority regarding immigration. In Gordon, *Finality of Immigration and Nationality Determinations—Can the Government Be Estopped?*, 31 U. CHI. L. REV. 433, 436-53 (1964), Professor Gordon examined this statute and its legislative history and concluded that no statutory authority existed for allowing estoppel in immigration cases. But in Corniel-Rodriguez v. INS, 532 F.2d 301 (2d Cir. 1976), the court noted that "the Government's improper actions may preclude it from deporting an alien, even if the language of the Immigration & Nationality Act, read *in vacuo*, might suggest a difference [sic] result." *Id.* at 306 (citations omitted). Given the absence of statutory support, this note will focus on judicial support for immigration estoppel.

3 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 17.01 (1958). *See, e.g.*, Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917); Lee v. Munroe, 11 U.S. (7 Cranch) 366, 369-70 (1813).

4 *See* 2 K. DAVIS, *supra* note 3, at § 17.01.

5 *See* Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680, 686 (1954).

6 *See, e.g.*, 2 K. DAVIS, *supra* note 3, at § 17.09; Asimow, *Estoppel Against the Government: The Immigration and Naturalization Service*, 1 IMIG. & NATUR. L. REV. 161 (1976-77); Berger, *supra* note 5; Article, *Estoppel and Immigration*, 22 CATH. LAW. 287 (1976); Comment, *Never Trust a Bureaucrat: Estoppel Against the Government*, 42 S. CAL. L. REV. 391 (1969); Comment, *Emergence of an Equitable Doctrine of Estoppel Against the Government—The Oil Shale Cases*, 46 U. COLO. L. REV. 433 (1975); Comment, Santiago v. Immigration and Naturalization Service—*The Ninth Circuit Retreats from its Modern Approach to Estoppel Against the Government*, 1976 UTAH L. REV. 371; 41 FORDHAM L. REV. 140 (1972). Because deportation often results when estoppel is disallowed in immigration cases, courts have been especially concerned with the equitable ramifications of disallowance. *See, e.g.*, Sun Il Yoo v. INS, 534 F.2d 1325, 1329 (9th Cir. 1976) ("deportation is a drastic measure that may inflict 'the equivalent of banishment, or exile,' and 'result in the loss of all that makes life worth living' ") (citations omitted).

ate this unfairness in certain governmental action by allowing the use of estoppel against the government. However, the case these courts most frequently cite as supporting estoppel, *Moser v. United States*,[7] was actually decided on a waiver theory.[8]

While *Moser* has been used to "open the door," the key estoppel case in the immigration area has been *INS v. Hibi*.[9] In *Hibi*, a Filipino who had served in the United States Army during World War II filed a petition for naturalization as an American citizen in 1967. Under the Nationality Act of 1940,[10] a noncitizen who served honorably in the United States Armed Forces during World War II was exempted from certain literacy and residency requirements of naturalization.[11] The Act established a December 31, 1946 deadline for filing naturalization petitions[12] and provided that officers be appointed to handle the naturalization procedures for noncitizens still serving in the armed forces and thus outside the jurisdiction of a naturalization court.[13] Hibi argued that the government was estopped from claiming he was too late to receive the Act's benefits on the grounds that the Immigration and Naturalization Service (INS) had failed to advise him of his naturalization rights and to provide a naturalization representative in the Philippines at any time when he was eligible for the Act's benefits. On appeal, the Supreme Court of the United States rejected Hibi's estoppel argument. The Court concluded:

> While the issue of whether "affirmative misconduct" on the part of the Government might estop it from denying citizenship was left open in *Montana v. Kennedy*, no conduct of the sort there adverted to was involved here. We do not think that the failure to fully publicize the rights which Congress accorded under the Act of 1940, or the failure to have stationed in the Philippine Islands during all of the time those rights were available an authorized naturalization representative, can give rise to an estoppel against the Government.[14]

Despite summarily deciding that the *Hibi* facts did not warrant invoking estoppel, the Court did leave open the possibility of estoppel against the government. Its opinion prompted lower courts to adopt an "affirmative misconduct"

7 341 U.S. 41 (1951). *See, e.g.*, Santiago v. INS, 526 F.2d 488, 492 (9th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); United States v. Lazy FC Ranch, 481 F.2d 985, 988 (9th Cir. 1973); 2 K. DAVIS, *supra* note 3, § 17.02, at 501-04.

8 In *Moser*, a Swiss citizen's application for United States citizenship had been denied on the basis of his prior exemption from military service as a neutral alien. Moser claimed reliance on a letter from the Swiss legation which had indicated that no waiver of citizenship would result from claiming the exemption. The Supreme Court concluded that "[t]here is no need to evaluate these circumstances on the basis of any estoppel of the Government . . . . Petitioner did not knowingly and intentionally waive his rights to citizenship." 341 U.S. at 47.

9 414 U.S. 5 (1973) (per curiam).

10 Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137 (current version at 8 U.S.C. §§ 1101-1503 (1976)).

11 Second War Powers Act, Pub. L. No. 77-507, tit. X, § 1001, 56 Stat. 176 (1942), *as amended by* Act of December 22, 1944, Pub. L. No. 78-531, 58 Stat. 886 (amending Nationality Act of 1940, Pub. L. No. 76-853, tit. III, §§ 701-705, 54 Stat. 1137) (repealed 1952). Subsequent legislation did not renew the literacy exemptions. *See* 8 U.S.C. § 1140(b) (1976).

12 Act of December 28, 1945, Pub. L. No. 79-270, 59 Stat. 658 (amending Nationality Act of 1940, Pub. L. No. 76-853, tit. III, § 701, 54 Stat. 1137) (repealed 1952).

13 Second War Powers Act, Pub. L. No. 77-507, tit. X, § 1001, 56 Stat. 176 (1942), *as amended by* Act of December 22, 1944, Pub. L. No. 78-531, 58 Stat. 886 (amending Nationality Act of 1940, Pub. L. No. 76-853, tit. III, §§ 701-705, 54 Stat. 1137) (repealed 1952).

14 414 U.S. at 8-9 (citation omitted).

standard to determine when to allow estoppel.[15] Unfortunately, courts of appeals have inconsistently defined and applied this standard.

A. *The Second Circuit*

In the Second Circuit[16] case of *Corniel-Rodriguez v. INS*,[17] the petitioner had an exemption from certain visa requirements provided she was unmarried both at the time of application and at the time of admission to the United States.[18] A State Department regulation[19] required that the government warn minor aliens of marriageable age about this restriction and provide a special warning form to be signed by the minor alien. The petitioner received neither the oral nor the written warning, and shortly before coming to the United States she was married. Five years after the petitioner's arrival in the United States, the INS initiated proceedings to deport her. Petitioner argued that the government's failure to warn her of the special marriage requirements for minor aliens estopped it from claiming that she had entered the United States in violation of her visa.[20] The Second Circuit agreed. Noting that the Supreme Court had "taken pains not to disturb lower court holdings"[21] receptive to the estoppel defense in citizenship cases,[22] the court found that the government's conduct in failing to provide the mandated warning was "fully as misleading"[23] and "at least as severe an act of affirmative misconduct"[24] as was found in the estoppel cases left "undisturbed" by the Supreme Court. The court concluded that "[t]o permit [petitioner] to be deported, under these circumstances, would be to sanction a manifest injustice occasioned by the Government's own failures."[25]

15 *See, e.g.*, Simon v. Califano, 593 F.2d 121, 123 (9th Cir. 1979); United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979); Yang v. INS, 574 F.2d 171, 175 (3d Cir. 1978) (dictum); Corniel-Rodriguez v. INS, 532 F.2d 301, 306-07 (2d Cir. 1976); Santiago v. INS, 526 F.2d 488, 492-93 (9th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).

16 Although this note concentrates on Second and Ninth Circuit decisions, other federal appellate courts have also addressed the immigration estoppel issue. *See, e.g.*, Jung Been Suh v. INS, 592 F.2d 230 (5th Cir. 1979); Navarro v. INS, 574 F.2d 379 (7th Cir.), *cert. denied*, 439 U.S. 861 (1978); Yang v. INS, 574 F.2d 171 (3d Cir. 1978); Peignand v. INS, 440 F.2d 757 (1st Cir. 1971). These courts, however, have either left the issue undecided or relied on precedent found in the Ninth Circuit.

17 532 F.2d 301 (2nd Cir. 1976).

18 Act of October 3, 1965, Pub. L. No. 89-236, § 10(a), 79 Stat. 911 (amending Immigration and Nationality Act, Pub. L. No. 82-414, tit. II, ch. 2, § 212(a)(14), 66 Stat. 163 (1952)) (current version at 8 U.S.C. § 1182(a)(14) (1976)). Petitioner's exemption was based on her status as a "child" of a United States resident alien. Under the immigration law, a definitional "child" must be unmarried. 8 U.S.C. § 1101(b)(1) (1976).

19 22 C.F.R. § 42.122(d) (1980).

20 The petitioner might also have sought relief based on the argument that "[c]ourts have looked with disfavor upon actions taken by federal agencies which have violated their own regulations." Mendez v. INS, 563 F.2d 956 (9th Cir. 1977) (deportation overturned based on INS's failure to comply with published regulations). *See also* Yellin v. United States, 374 U.S. 109 (1963); Accardi v. Shaughnessy, 347 U.S. 260 (1954); Jung Been Suh v. INS, 592 F.2d 230 (5th Cir. 1979).

21 532 F.2d at 306.

22 The Second Circuit in *Corniel-Rodriguez* cited Lee You Fee v. Dulles, 236 F.2d 885 (7th Cir. 1956), *rev'd on other grounds*, 355 U.S. 61 (1957) and Podea v. Acheson, 179 F.2d 306 (2d Cir. 1950) as being among the estoppel cases left "undisturbed" by the Supreme Court in INS v. Hibi, 414 U.S. 5 (1973) (per curiam) and Montana v. Kennedy, 366 U.S. 308 (1961). 532 F.2d at 306.

23 532 F.2d at 306.

24 *Id.* at 307.

25 *Id.*

B. *The Ninth Circuit*

The Ninth Circuit has had a major role in developing the use of estoppel against the government in both immigration[26] and nonimmigration[27] cases. *Hibi*, however, has caused the Ninth Circuit to reassess its progressive position.[28]

Santiago v. INS[29] presented the Ninth Circuit with its first opportunity to address fully the immigration estoppel issue in light of *Hibi*.[30] *Santiago* involved four separate cases combined for purposes of review. Each of the four petitioners—Santiago, Paglinawan, Catam, and Khan—had been granted an immigrant visa with a preference derived from a spouse or parent entitled to a preference under the Immigration and Nationality Act.[31] For varying reasons, each failed to comply with a visa requirement that he be "accompanying, or following to join, [a] spouse or a parent."[32] Upon entering the United States, three of the petitioners were admitted without question by immigration officers. In each case, it was evident on the face of the visa that the petitioner was entering based on a derived visa preference. An immigration officer questioned the fourth petitioner, Khan, and discovered that he was not in compliance with the "accompanying, or following to join" language of the Act. The immigration officer nevertheless admitted Khan without pointing out to him the requirement breach. At subsequent hearings, the INS found that the four petitioners had been excludable at entry and ordered them to leave the country or face deportation.

On appeal, the petitioners sought to estop the government from finding them excludable at entry on the grounds that the immigration officers had failed both to inform them of the "accompanying, or following to join" requirement and to inquire as to the whereabouts of the spouse or parent from whom they derived their visa preferences.[33] Khan also sought estoppel on the grounds that the immigration officer had admitted him with full knowledge of his noncompliance with the Act.[34]

The Ninth Circuit focused on the concept of "affirmative misconduct," which it considered a prerequisite to permitting the use of estoppel. The court reasoned that the immigration officers' failure to inform or to inquire constituted "affirmative misconduct" only if it were more blameworthy than the conduct at

26 *See, e.g.*, Sun Il Yoo v. INS, 534 F.2d 1325 (9th Cir. 1976); INS v. Hibi, 475 F.2d 7 (9th Cir.), *rev'd per curiam*, 414 U.S. 5 (1973); Hetzer v. INS, 420 F.2d 357 (9th Cir. 1970); Tejeda v. INS, 346 F.2d 389 (9th Cir. 1965).

27 *See, e.g.*, United States v. Wharton, 514 F.2d 406 (9th Cir. 1975); United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973); United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970); Schuster v. Commissioner, 312 F.2d 311 (9th Cir. 1962).

28 *See generally* Asimow, *supra* note 6; Article, *Estoppel and Immigration*, 22 CATH. LAW. 287 (1976); Comment, Santiago v. Immigration and Naturalization Service—*The Ninth Circuit Retreats from its Modern Approach to Estoppel Against the Government*, 1976 UTAH L. REV. 371.

29 526 F.2d 488 (9th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).

30 In de Hernandez v. INS, 498 F.2d 919 (9th Cir. 1974) (per curiam), the Ninth Circuit rejected an alien's estoppel argument on the ground that "nothing in the facts . . . could distinguish *Hibi*," *Id.* at 921. *De Hernandez* was decided before *Santiago*; however, because *Hibi* was decided after the alien's briefs were filed in *de Hernandez*, neither the parties nor the Ninth Circuit had the opportunity to fully address the *Hibi* issues. *Id.*

31 8 U.S.C. § 1153(a)(9) (1976).

32 *Id.*

33 526 F.2d at 491.

34 *Id.*

issue in *Hibi*.[35] After weighing the facts in *Santiago* against those in *Hibi*, the Ninth Circuit concluded that estoppel was unavailable.[36]

Ninth Circuit decisions dealing with immigration estoppel after *Santiago* have also applied the "affirmative misconduct" standard. In *Sun Il Yoo v. INS*,[37] the court allowed an estoppel defense. Yoo entered the United States as a nonimmigrant student in June, 1968 and sought a permanent visa in October, 1969. While investigating Yoo's visa application, the INS found discrepancies in the prior employment information which Yoo had provided. In March, 1970, Yoo sent the INS a letter written by his former employer which clarified the discrepancies. The INS nevertheless delayed acting on Yoo's visa application for ten months, then denied it on the grounds that Yoo had given false information concerning his prior employment. In March, 1971, the INS agreed to reconsider the application only to deny it again on the ground that due to the processing delay Yoo no longer qualified for the visa for which he had applied originally. The Board of Immigration Appeals ordered Yoo deported and he appealed.

The Ninth Circuit declared that "estoppel is available where the particular facts warrant it"[38] and found that the INS's unexplained one year delay[39] in determining Yoo's preference visa eligibility constituted "affirmative misconduct."[40] The court noted that "once an alien has gathered and supplied all relevant information and has fulfilled all requirements, INS officials are under a duty to accord to him within a reasonable time the status to which he is entitled by law."[41] The injury sustained by Yoo in reliance on the government's conduct was such that "justice and fair play" could only be achieved by estopping the government from denying him the benefit of labor certification.[42] The court distinguished *Santiago* on the ground that the petitioners there had no right to enter the United States when they did, while Yoo had an absolute right to the labor certification he lost through the INS's "affirmative inaction."[43]

Oki v. INS[44] involved a third Ninth Circuit application of the "affirmative misconduct" standard. Oki had entered the United States as an exchange student in 1974. Oki obtained permanent employment in October, 1976, but did not submit his application for employment certification until four months later. The INS initiated deportation proceedings against Oki in March, 1977 for failure to secure INS approval before starting work. Oki sought to estop the government on the ground that the INS failed to warn him of the approval requirement when

35 The court sidestepped Khan's additional argument for estoppel based on the officer's act of admitting him with knowledge of the noncompliance, stating: "[I]t is obvious to us that the central complaint of each petitioner is not the act of admission but the failure to inform or inquire." 526 F.2d at 493.

36 *Id.*

37 534 F.2d 1325 (9th Cir. 1976).

38 534 F.2d at 1328.

39 The majority opinion found a delay of one year measured from March, 1970, when Yoo sent the INS the letter clarifying the discrepancies in his prior employment information, to March, 1971, when the INS agreed to reconsider Yoo's application. *Id.* The dissent more accurately describes the delay as lasting ten months—from March, 1970 to January, 1971, when the INS first denied Yoo's application. *Id.* at 1329 (Wright, J., dissenting).

40 *Cf.* Villena v. INS, 622 F.2d 1352, 1361 (9th Cir. 1980) (dictum) (four year delay in responding to petition for preference classification; INS estopped); Shon Ning Lee v. INS, 576 F.2d 1380, 1382 (9th Cir. 1978) (nine month delay in deciding case; Board of Immigration Appeals not estopped).

41 534 F.2d at 1328-29.

42 *Id.* at 1329.

43 *Id.*

44 598 F.2d 1160 (9th Cir. 1979).

it gave him the application form.[45] The Ninth Circuit rejected the estoppel argument, declaring: "[I]t is not the failure to do something which may lead to estoppel against a Government agency; the conduct complained about must be an affirmative act."[46] The court dichotomized "affirmative misconduct" and concluded that the question of *misconduct* did not have to be reached because the failure to advise Oki did not constitute *affirmative* conduct.[47]

The test applied by the Ninth Circuit in *Santiago*, *Sun Il Yoo*, and *Oki* appears to involve four separate inquiries:

(1) Did the government's conduct constitute either (a) an affirmative act,[48] or (b) an inaction after the alien had fulfilled all requirements for which he was responsible?[49]
(2) Did the government's conduct, whether affirmative act or inaction, constitute misconduct?[50]
(3) If the government's conduct constituted "affirmative misconduct," was it more blameworthy than that found in *Hibi*?[51]
(4) Did the alien sustain an injury in reliance on the government's "affirmative misconduct" such that justice demands that estoppel be allowed?[52]

II. The Misapplication of *Hibi*

The Second and Ninth Circuits consider governmental "affirmative misconduct" a prerequisite to applying estoppel in immigration cases.[53] This requirement, although assertedly derived from the Supreme Court's decision in *Hibi*, is not in fact required by *Hibi*.[54] *Hibi*'s discussion of estoppel and "affirmative misconduct"[55] should have had limited precedential value for several reasons.

First, *Hibi* was a summary reversal without benefit of oral arguments or briefs.[56] The Court made no finding expressly approving or disapproving estoppel against the government. The Court's consideration of the issue does imply that estoppel is allowable in a proper case; however, *Hibi* gives little indication of what might constitute such a case. Lower courts have nevertheless placed great emphasis on the language of *Hibi* in making "affirmative misconduct" a prerequisite to estoppel.[57]

The highly unusual facts of *Hibi* provide a second reason for limiting its precedential value. Hibi based his estoppel argument on a policy decision of the United States Attorney General;[58] the "normal" case of immigration estoppel is

45 *Id.* at 1161-62.
46 *Id.* at 1162.
47 *Id.*
48 *Id.*
49 Sun Il Yoo v. INS, 534 F.2d at 1328-29.
50 Santiago v. INS, 526 F.2d at 492-93.
51 *Id.* at 493.
52 Sun Il Yoo v. INS, 534 F.2d at 1329.
53 *See, e.g.*, Corniel-Rodriguez v. INS, 532 F.2d at 306-07; Santiago v. INS, 526 F.2d at 492-93.
54 *See* Comment, *supra* note 28, at 380-83.
55 *See* text accompanying note 14 *supra*.
56 414 U.S. at 9. *See also* Asimow, *supra* note 6, at 188.
57 "Lower courts seem to be developing the idea that the government cannot be estopped except for 'affirmative misconduct.' They rely on [*Hibi*] . . . . Neither the holding nor the language seems significant." K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES §§ 17.03 & 17.04 (Supp. 1980).
58 414 U.S. at 10-11 (Douglas, J., dissenting).

based on the actions of minor officials.[59] As the dissent in *Santiago* observed:

> The conduct at issue in *Hibi* was not the negligence or malfeasance of minor officials, but a deliberate decision of policy by the Attorney General. Although acting in the face of a contrary congressional purpose, the executive branch was attempting to advance diplomatic relations between the United States and the government of the Philippines. Regardless of whether the Government's conduct constituted an abuse of discretion, its decisions were so patently of the type committed to the executive branch that the Court was extremely reluctant to nullify them over 20 years later in order to relieve one individual instance of hardship.[60]

Third, *Hibi* is also one of the unusual immigration cases in which balancing the equities would dictate a decision for the government.[61] An alien who did not pursue his claim of citizenship for twenty-two years[62] could not claim serious injustice. On the other hand, a decision for Hibi could have resulted in successful claims by thousands of other Filipinos who were similarly situated,[63] which could have negatively affected diplomatic relations with the Philippines.[64] A decision for Hibi could also have unduly harmed the public interest by allowing a major influx of immigrants who would not have been subject to the normal naturalization requirements of the Immigration and Nationality Act.[65]

Finally and most importantly, the Court in *Hibi* did not define "affirmative misconduct"; it simply stated that this term did not describe the conduct in *Hibi*.[66] The Court found that *Hibi* did not involve the sort of conduct adverted to in *Montana v. Kennedy*,[67] specifically the conduct in *Podea v. Acheson*[68] and *Lee You Fee v. Dulles*,[69] two estoppel cases cited in *Montana*.[70]

Podea and *Lee You Fee* applied different standards for determining the degree

59 *See, e.g.*, Corniel-Rodriguez v. INS, 532 F.2d at 301 (consular officers); Santiago v. INS, 526 F.2d at 488 (immigration officers).

60 526 F.2d at 496 (Choy, J., dissenting).

61 Most immigration cases involve one petitioner seeking a right solely for his own benefit; the public interest is not jeopardized by such an individual's legitimate assertion of estoppel. *In re* LaVoie, 349 F. Supp. 68, 74 (D.V.I. 1972).

62 INS v. Hibi, 414 U.S. 5, 5-6 (1973) (Hibi petitioned for citizenship in 1967 after having been discharged from the United States Army in 1945).

63 The government estimated that as many as 80,000 Filipinos could take advantage of a holding in favor of Hibi, including unmarried children of naturalized persons who would qualify for "first preference" visas under 8 U.S.C. § 1153(a)(1) (1976). Asimow, *supra* note 6, at 191 n.123. Hibi conceded only that a few hundred would take advantage of a decision in his favor. *Id.* Although any estimate is purely speculative, it is noteworthy that 4,000 of the Filipinos still serving in the United States Army in late 1946 were naturalized when a naturalization agent was finally stationed in the Philippines. *In re* Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931, 936 (N.D. Cal. 1975).

64 The Philippine government's manpower concerns in *1973* would have been the major factor determining the effect of a decision for Hibi on United States relations with the Philippines. Those manpower concerns were clearly expressed in 1945. *See* Olegario v. United States, 629 F.2d 204 (2d Cir. 1980), *cert. denied*, 101 S.Ct. 1513 (1981).

65 This detrimental impact on the public interest could have resulted from the naturalization of a potentially large number of immigrants unable "to speak the English language, sign [their] petition[s] in [their] own handwriting, or meet any educational test." Second War Powers Act, Pub. L. No. 77-507, tit. X, § 1001, 56 Stat. 176 (1942) (amending Nationality Act of 1940, Pub. L. No. 76-853, tit. III, § 701, 54 Stat. 1137) (repealed 1952). The protections provided by 8 U.S.C. § 1423(1) (1976) (literacy in English language), 8 U.S.C. § 1423(2) (1976) (passing test on United States history and government), and 8 U.S.C. § 1445(a) (1976) (signing petition in own handwriting) would have been inapplicable to these immigrants had estoppel been allowed in *Hibi*.

66 *See* text accompanying note 14 *supra*.

67 366 U.S. 308 (1960).

68 179 F.2d 306 (2d Cir. 1949).

69 236 F.2d 885 (7th Cir. 1956), *rev'd on other grounds*, 355 U.S. 61 (1957).

70 414 U.S. at 8.

of government culpability necessary for estoppel. In *Podea*, the Second Circuit granted citizenship to the petitioner despite his apparent ineligibility because he acted in reliance on erroneous advice negligently given by the State Department.[71] In *Lee You Fee*, the Seventh Circuit denied citizenship to a person whose own failure to act left him ineligible for citizenship. The court distinguished *Lee You Fee* from cases in which ineligibility resulted from a person's failure to "do something which the officials of the Government had carelessly or willfully prevented his doing."[72] Since *Hibi*, the Supreme Court has not clarified "affirmative misconduct," leaving further definition and application of "affirmative misconduct" to the lower courts.

The Second Circuit in *Corniel-Rodriguez* applied the "affirmative misconduct" standard by comparing the government conduct in that case with the government's conduct in *Podea* and *Lee You Fee*.[73] The Ninth Circuit in *Santiago* and *Sun Il Yoo* ignored those cases and compared any questioned government conduct to the conduct in *Hibi*.[74] Since the Supreme Court specifically found estoppel unavailable in *Hibi*, the Ninth Circuit has reasoned that estoppel requires misconduct at least more blameworthy than that found in *Hibi*.[75] Based on the language of *Hibi*, the "affirmative misconduct" standards of both the Second and Ninth Circuits are defensible. The key issue, however, is whether a standard of "affirmative misconduct" is necessary. The summary nature of the Supreme Court's disposition in *Hibi*, the unusual facts and equitable considerations involved, and the Supreme Court's failure to define "affirmative misconduct" indicate that the term has been given undue importance and should not be raised to the level of a test for the allowability of estoppel.

The existing case law does not set forth a clear test for allowing estoppel in immigration cases. By comparing questioned government conduct to the government's conduct in *Podea* and *Lee You Fee*, the Second Circuit's test[76] leaves unclear the degree of fault necessary for "affirmative misconduct."[77] Perhaps recognizing this problem, the Second Circuit's holding in *Corniel-Rodriguez* was very narrowly drawn: "We do not, of course, suggest that noncompliance with any regulation, no matter how minor its impact or importance, will automatically prevent the Government from deporting an alien. Our holding is limited to the extraordinary circumstances before us."[78] *Corniel-Rodriguez* thus applies only when government agents fail to comply with a formalized procedure requiring affirmative oral or written warnings.[79] Rather than protecting aliens, *Corniel-Rod-*

71 179 F.2d at 309.

72 236 F.2d at 887. In W. PROSSER, LAW OF TORTS § 34 at 184-86 (4th ed. 1971), Professor Prosser distinguishes the negligence and willfulness standards of culpability applied in *Podea* and *Lee You Fee* respectively. *See also* Article, *supra* note 28, at 292 n.30.

73 532 F.2d at 306-07.

74 Santiago v. INS, 526 F.2d at 493; Sun Il Yoo v. INS, 534 F.2d at 1330.

75 Santiago v. INS, 526 F.2d at 493.

76 In a nonimmigration context, the Second Circuit has offered a different view of the "affirmative misconduct" necessary to estop the government. *See* Hansen v. Harris, 619 F.2d 942, 948 (2d Cir. 1980) (distinguishing cases of substantive ineligibility from cases of ineligibility caused by failure to fulfill a procedural requirement).

77 *See* notes 71-72 *supra* and accompanying text.

78 532 F.2d at 307 n.18. A subsequent Second Circuit decision appeared to render *Corniel-Rodriguez* a mere aberration of the traditional viewpoint espoused in that court of appeals. *See* Goldberg v. Weinberger, 546 F.2d 477, 481 n.5 (2d Cir. 1976). *But see* Hansen v. Harris, 619 F.2d 942, 948 (2d Cir. 1980).

79 The argument for this narrow view of *Corniel-Rodriguez* is presented in the dissenting opinion to

riguez actually discourages the INS from establishing affirmative warning procedures.

The Ninth Circuit's apparent four-part test similarly suffers from its dependence on the problematic concept of "affirmative misconduct." The Ninth Circuit in *Oki* denied estoppel on the ground that a failure to act is not "affirmative" conduct.[80] This emphasis on the misfeasance/nonfeasance distinction seems inconsistent with the court's warning in *Santiago*: "[I]t would [not] be productive to dwell overlong on the possible reasons for the inclusion of the modifier 'affirmative.' That term . . . suggests a distinction might be drawn between nonfeasance and misfeasance, but these are slippery terms."[81] Despite its own admonition, the *Santiago* majority proceeded to label the government's conduct "a failure to act"[82]—that is, nonfeasance—because the officers failed to inquire as to the alien's status. The dissent, on the other hand, found misfeasance in improperly admitting aliens into the country.[83] This disagreement illustrates the difficulties involved in attempting to label a particular action "affirmative."

The *Sun Il Yoo* decision also illustrates the problems inherent in *Oki*'s dichotomy of "affirmative" and "misconduct." The court in *Sun Il Yoo* allowed estoppel against the government based on the INS's "affirmative inaction" in failing to process an alien's visa application within a reasonable time.[84] As in *Santiago*, the conduct at issue could have been described in either affirmative or negative terms depending on the result desired. The court was favorably disposed toward Yoo, however, and therefore labeled the government's failure to process the application "affirmative inaction."[85] The court in *Oki*, by contrast, had used negative terms and found no "affirmative" conduct in the government's failure to warn.[86]

The Second and Ninth Circuits, unlike the other federal courts, have attempted to derive "affirmative misconduct" tests for immigration estoppel from *Hibi*. Unfortunately, these attempts have created more rather than less uncertainty. A new test for determining when to allow estoppel in immigration cases is needed.

III. Proposed Test

The federal courts should adopt a two-step test for allowing estoppel in immigration cases. This test would require (1) that the elements of equitable estoppel be strictly met, and (2) that the particular equities involved in estopping the government weigh in favor of allowing estoppel.[87] The first step of the proposed

Hansen. Hansen v. Harris, 619 F.2d at 951-52 (Friendly, J., dissenting). *See also* Martinez v. Bell, 468 F. Supp. 719, 729 (S.D.N.Y. 1979).

80 598 F.2d at 1162.

81 526 F.2d at 493.

82 *Id.*

83 *Id.* at 494-95 (Choy, J., dissenting). Addressing the misfeasance/nonfeasance problem, Judge Choy noted: "Each one of the claims paraphrased negatively can readily be restated affirmatively . . . . But it is not *how* we cast the facts, but the facts themselves that should dictate the nature of relief warranted." *Id.* at 495.

84 534 F.2d at 1329.

85 *Id.* The inherent contradiction in the terms "affirmative" and "inaction" underlines the inadequacy of an analysis which would cause one to describe the other.

86 598 F.2d at 1162.

87 The proposed test generally follows the approach taken in United States v. Ruby Co., 588 F.2d 697,

test would require that all five elements of equitable estoppel[88] be established:

(1) The government must engage in conduct—acts, language, or silence—amounting to a representation or concealment of a material fact.
(2) The government must know the true facts at the time of its questioned conduct, or at least the circumstances must be such that the government may reasonably be expected to possess such knowledge.
(3) The government must intend that its conduct shall be acted on or must so act that the alien has a right to believe it is so intended.
(4) The alien must be ignorant of the true facts at the time of the questioned conduct and at the time he acted upon such conduct.
(5) The alien must rely to his detriment on the questioned conduct of the government.[89]

The party asserting the estoppel should be required to prove each of these five elements of equitable estoppel.[90] If he does so, a rebuttable presumption should arise that the estoppel is allowable. The government would then be required to rebut this presumption in the second step of the proposed test.[91]

The test's second step would require a balancing of the particular equities and policy considerations involved in estopping the government. The competing considerations here would be the tendency of the government's misconduct to work a serious injustice and the tendency of the estoppel to cause undue damage to the public interest.[92] In weighing the seriousness of the injustice caused by the government's misconduct, the courts should consider the seriousness of that misconduct, its remoteness in time,[93] the duration of the alien's United States residency, the likelihood of family separation,[94] the alien's lost eligibility to a prior right,[95] and the type of right affected.[96] In measuring the damage to the public

703-05 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979) and suggested in Comment, *supra* note 28, at 383-84. *Ruby* was not an immigration case, and the application of nonimmigration estoppel precedent to immigration cases has been questioned. Santiago v. INS, 526 F.2d at 491. However, there seems to be no persuasive reason for distinguishing estoppel in immigration and nonimmigration cases. Precedent for "cross-fertilization" is, in fact, available. *See, e.g.*, de Gallardo v. INS, 624 F.2d 85, 88 (9th Cir. 1980) (immigration case cites land title case); Oki v. INS, 598 F.2d at 1162 (immigration case cites land title case); United States v. Ruby Co., 588 F.2d at 704 (land title case cites immigration case); Yoo v. INS, 534 F.2d at 1329 (immigration case cites tax case).

88 *See* J. POMEROY, *supra* note 1, § 805 at 191-92.

89 *Id. Cf.* United States v. Ruby Co., 588 F.2d at 703-04 (applying four elements of estoppel "modified in light of the affirmative misconduct limitation"). *See generally* M. BIGELOW, *supra* note 1, at 631-709; J. POMEROY, *supra* note 1, §§ 805-812.

90 Addressing an estoppel argument grounded in "broad principles of equity," the *Ruby* Court "found no case which would allow the application of estoppel when there has been a failure of proof as to the required elements." 588 F.2d at 704.

91 *But see id.* at 705 (petitioner has burden of proving both the elements of estoppel and that the "equities" weigh in his favor).

92 United States v. Wharton, 514 F.2d 406, 411 (9th Cir. 1975); United States v. Lazy FC Ranch, 481 F.2d 985, 989 (9th Cir. 1973).

93 *Compare* INS v. Hibi, 414 U.S. at 5 (alien claimed estoppel 22 years after the questioned conduct) *with* Sun Il Yoo v. INS, 534 F.2d at 1325 (alien claimed estoppel immediately following the questioned conduct).

94 *Compare* Corniel-Rodriguez v. INS, 532 F.2d at 301 (alien sought to stay with father in the United States) *with* Santiago v. INS, 526 F.2d at 488 (Khan, an alien, sought to stay in the United States while his family remained in Pakistan). *See also* 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW & PROCEDURE § 4.1c(1) (rev. ed. 1980).

95 *See, e.g.*, notes 115-16 *infra* and accompanying text; Sun Il Yoo v. INS, 534 F.2d at 1329.

96 Sun Il Yoo v. INS, 534 F.2d at 1329.

interest, the courts should consider the loss of legal protections,[97] monetary cost,[98] effect on the separation of powers,[99] and the "sovereign" nature of the immigration function.[100]

The effect of the proposed test on immigration estoppel cases can be demonstrated by applying that test to *Hibi* and *Santiago*. Although *Hibi*'s result would be unaltered by the proposed test, the reasoning supporting the decision would be very different. First, four of the five elements of estoppel are adequately shown in the facts. The government's failure to publicize Hibi's rights and to send an authorized naturalization representative to the Philippines concealed the material fact of Hibi's right to be naturalized while he was in the U.S. Army; the government knew or should have known Hibi's rights under the 1940 Act;[101] the government intended that its conduct cause aliens in Hibi's position not to pursue their naturalization rights;[102] and Hibi was ignorant of the true facts concerning his naturalization rights.[103] However, the fifth element of estoppel was absent. Hibi did not rely to his detriment on the government's failure to publicize his rights or to provide an authorized naturalization officer.[104]

Hibi's estoppel argument would also have failed the second step of the proposed test. Hibi could not effectively claim that the government's conduct resulted in a serious injustice when he had not pursued his claim of citizenship for twenty-two years.[105] On the other hand, a decision for Hibi would have been potentially damaging to the public interest. The cost of publicizing the rights of persons qualifying under the 1940 Act would have been sizeable.[106] A potentially large number of similarly situated Filipinos might have asserted successful claims for citizenship[107] without meeting the normal naturalization requirements of the Immigration and Nationality Act.[108] *Hibi* also contained a special separation of powers problem; the Supreme Court was reluctant to overturn a foreign policy decision of the executive branch.[109] Thus, application of the proposed test to the facts in *Hibi* would have resulted in the disallowance of the estoppel.[110]

97 *See, e.g.*, note 65 *supra* and accompanying text.

98 *See, e.g.*, Corniel-Rodriguez v. INS, 532 F.2d at 307 n.17 (distinguishing *Hibi* based on differences in the monetary cost of allowing estoppel); Union Oil Co. v. Morton, 512 F.2d 743, 748-49 n.2 (9th Cir. 1975) (enormous monetary cost to the public outweighed injustice to the party seeking to estop the government).

99 *See* Asimow, *supra* note 6, at 195.

100 *See* United States v. Lazy FC Ranch, 481 F.2d 985, 989 & n.5 (9th Cir. 1973); American Training Serv., Inc. v. Veterans Administration, 434 F. Supp. 988, 1001-02 & n.35 (D.N.J. 1977).

101 *In re* Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931, 935 n.3 (N.D. Cal. 1975).

102 *Id.* at 936 n.6.

103 414 U.S. at 11 (Douglas, J., dissenting).

104 *See* Asimow, *supra* note 6, at 189; Comment, *supra* note 28, at 381.

105 *See* note 62 *supra*.

106 Corniel-Rodriguez v. INS, 532 F.2d at 307 n.17.

107 *See* note 63 *supra*.

108 *See* note 65 *supra*.

109 Santiago v. INS, 526 F.2d at 496 (Choy, J., dissenting).

110 *In re* Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931 (N.D. Cal. 1975) involved facts similar to those in *Hibi* with two notable exceptions: (1) seven of the petitioners had attempted to apply for naturalization prior to the deadline under the 1940 Act, *id.* at 938; and (2) the government was not aware of any similarly situated Filipino veterans, *Oversight of INS Policies and Legal Issues: Hearing before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 5 (August 3, 1978) (statement of David Crosland). Given these additional facts, application of the proposed test would result in allowing the seven petitioners to assert estoppel against the government. Detrimental reliance would be established and the equitable considerations would weigh in favor of allowing estoppel. The court in *68 Filipinos* did, in fact, allow these seven petitioners to assert estoppel against the government, and the INS acquiesed in the result of that holding. On the recommendation of

An analysis of the *Santiago* facts under the proposed test indicates that *Santiago* may have been improperly decided; the four cases were not so similar as to require the same result in each. The Ninth Circuit should have remanded the four cases for the factual determinations necessary to apply both steps of the proposed test.

Of the four petitioners, only Khan and Paglinawan could show the five elements of estoppel based on the facts given in the *Santiago* opinion. First, the government's admitting the four petitioners into the United States constituted a representation that they were in fact admissible. Second, the immigration officer in Khan's case knew the true facts since he had questioned Khan concerning the whereabouts of the spouse or parent who had preceded him.[111] In the other three cases, the immigration officer observed the visa number indicating the petitioner's status.[112] Under these circumstances, knowledge of the true facts is necessarily imputed to the immigration officer and the government. Third, in each case the immigration officers intended that their conduct be acted on by the petitioners—that the petitioners enter the United States. Fourth, no evidence existed suggesting that Khan and Paglinawan had any knowledge of the true facts concerning the visa requirements prior to the deportation proceedings.[113] The record is unclear as to Santiago and Catam's knowledge;[114] this element of the test could have been addressed on remand. Fifth, the four petitioners relied to their detriment on the government's conduct. Santiago, Catam, and Paglinawan could have returned to their homelands, picked up their spouses, and returned legally to the United States.[115] In reliance on the government's conduct, they did not take that action and their wives' visas expired,[116] eliminating the availability of derivative visas. Further evidence of detrimental reliance included the eight months[117] and two years[118] respectively, during which Khan and Santiago labored to establish new lives for themselves and their families.

Only Khan and Paglinawan would not have required a remand to determine if the five requirements of step one had been met. However, in order to apply step two of the proposed test, it will be assumed that all of the petitioners were able to prove the five elements of estoppel.

The balancing test of step two reveals a serious injustice resulting from the government's misconduct.[119] Catam, Paglinawan, and Santiago lost the oppor-

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the INS, the Solicitor General withdrew the appeal of *68 Filipinos* on November 30, 1977. *Id.* The INS's recommendation was based on "the distinctions between *68 Filipinos* and *Hibi*, and the equitable factors involved." *Id.* While the INS has not conceded the allowability of estoppel, its actions regarding *68 Filipinos* indicate that the INS will choose carefully the cases with which to test the estoppel concept in the appellate courts.

111 Santiago v. INS, 526 F.2d at 490.

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.* at 493.

116 *Id.* at 490.

117 *See In re* Khan, 14 Imig. & Natur. Dec. 122, 122-23 (1972) *aff'd sub nom.* Santiago v. INS, 526 F.2d 488 (9th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).

118 526 F.2d at 490.

119 Of the four petitioners, Khan had the weakest case for the allowability of estoppel under the second step of the proposed test. The parent from whom he derived his preference visa had died prior to Khan's admission into the United States. *Id.* Khan had resided in the United States only eight months when his deportability was detected. He was unmarried and his immediate family lived in Pakistan, not the United States. *Id.*

tunity to correct their entry and establish permanent legal residence in the United States. Santiago was further victimized by having unnecessarily endured separation from his wife and children for two years while he worked to save the money necessary to bring them to the United States. At the same time, the public interest would have suffered little damage. No significant monetary cost to the public was involved, and few other immigrants were likely to have been similarly situated. The separation of powers doctrine had only its usual significance; no major policy typically committed to one branch of government was involved. Assuming they were able to prove all the estoppel elements under step one, the defense of estoppel would have been allowed to the four *Santiago* petitioners under the proposed test, with the possible exception of Khan.

IV. Conclusion

An unnecessary emphasis on *Hibi*'s elusive concept of "affirmative misconduct" has created inconsistency in the federal courts' handling of immigration estoppel cases. This note has proposed a two-step test which would alleviate the uncertainty surrounding estoppel in immigration cases by abandoning the "affirmative misconduct" standard.[120] The proposed test would require aliens asserting an estoppel to (1) prove that the five elements of estoppel exist, and (2) demonstrate that the policy considerations peculiar to immigration cases favor estoppel. The proposed test would bring order as well as flexibility to immigration estoppel decisions.[121] *Hibi* and its progeny have had their day; it is time to bring consistency and certainty to this area of law.

Tom F. Veldman

120 As Judge Choy suggested in his *Santiago* dissent: "Rather than juggle the terminology [of "affirmative misconduct"] found in the *Hibi* opinion, I would inquire into the interests which the *Hibi* Court sought to protect." *Id.* at 496 (Choy, J., dissenting).

121 *See* United States v. Ruby Co., 588 F.2d at 704.