

## Estoppel and Immigration

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# ESTOPPEL AND IMMIGRATION\*

*And if a stranger sojourn with thee in your land, ye shall not vex him.*

—Leviticus 20:33

## INTRODUCTION

Until recently, the rule was firmly established that the doctrine of equitable estoppel<sup>1</sup> could not be employed against the government.<sup>2</sup> Dissatisfied with the harsh consequences of this doctrine, courts have attempted to formulate a more equitable solution to the problem presented when a person is injured as a result of his reliance on a misrepresentation by a government official.<sup>3</sup> One area of the law in which the government's immunity from estoppel can easily lead to inequitable results is that of immigration and naturalization. Under the traditional rule, equitable estoppel would never be available as a defense in a deportation proceeding

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<sup>1</sup> The Supreme Court has declared that "[t]he vital principle [of equitable estoppel] is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he has acted." *Dickerson v. Colgrove*, 100 U.S. 578, 580 (1879). The availability of estoppel depends upon four elements: (1) there must be acts, words, or silence by the party to be estopped which amount to a representation or concealment of a material fact; (2) the truth concerning this fact must be known by the party to be estopped and unknown to the other party; (3) the probability must exist that the representation will induce action; and (4) the party asserting the estoppel actually must have relied to his detriment on the representation. Compare *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970), and *Lebold v. Inland Steel Co.*, 125 F.2d 369, 375 (7th Cir. 1941), modified on other grounds, 136 F.2d 876 (7th Cir. 1943), with *Smale & Robinson, Inc. v. United States*, 123 F. Supp. 457, 463 (S.D. Cal. 1954). See generally M. BIGELOW, TREATISE ON THE LAW OF ESTOPPEL AND ITS APPLICATION IN PRACTICE 431-93 (2d ed. 1876) [hereinafter cited as BIGELOW]; 2 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 804-12 (4th ed. 1918) [hereinafter cited as POMEROY].

<sup>2</sup> See, e.g., *United States v. California*, 332 U.S. 19, 40 (1947) (disposal of government property by government officials without authority to do so does not estop the government); *Wilber Nat'l Bank v. United States*, 294 U.S. 120, 123 (1935) (statutory regulations cannot be waived by the acts of government employees). Accord, *Hart v. United States*, 95 U.S. 316, 319 (1877); *Claremont Aircraft, Inc. v. United States*, 420 F.2d 896, 898 (9th Cir. 1970).

<sup>3</sup> One court has declared: "To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970). See also Comment, *Emergence of an Equitable Doctrine of Estoppel Against the Government—The Oil Shale Cases*, 46 U. COLO. L. REV. 433 (1975).

against an alien who entered the United States in good faith reliance upon the improper action of an immigration official. Two recent cases, *Santiago v. INS*,<sup>4</sup> decided by the Court of Appeals for the Ninth Circuit, and *Corniel-Rodriguez v. INS*,<sup>5</sup> decided by the Court of Appeals for the Second Circuit, illustrate the difficulties encountered by courts when they endeavor to develop a workable rule for the application of estoppel against the government in this situation. This Note will analyze *Santiago* and *Corniel-Rodriguez* and will attempt to discern the criteria which these cases, together with the applicable Supreme Court precedents, established for permitting estoppel against the government in the area of immigration.

#### *Historical Background: INS v. Hibi*

The bar to the imposition of estoppel against the government had its foundation in the doctrine of separation of powers. Under this principle, it has been established that the government cannot be bound by the unauthorized act of a government official.<sup>6</sup> The rationale for this prohibition has been articulated as follows:

Administrators are clothed with authority to act and make rules by the exercise of legislative power; and such legislative power is exercisable only by Congress. It cannot be exercised by an administrator; no administrator may do that which is forbidden, nor exercise a power that was withheld. The fact that a citizen was injured by his action does not clothe an administrator with legislative power, *i. e.*, with the power to assume an authority that has been withheld or prohibited.<sup>7</sup>

Since the administrator's act is unauthorized, his action is not truly action by the government, and thus does not estop the government. Implicit in this reasoning is the corollary that the authorized act of an agent could effect an estoppel against the government. The courts, however, have been reluctant to find the actual authority necessary to provide the basis for an estoppel.<sup>8</sup> This hesitancy can be attributed, in part, to the belief that the

<sup>4</sup> 526 F.2d 488 (9th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 971 (1976).

<sup>5</sup> 532 F.2d 301 (2d Cir. 1976).

<sup>6</sup> It is the lack of authority on the part of the government official that has been emphasized by the courts as the basis for the denial of an estoppel. *See, e.g.*, *United States v. California*, 332 U.S. 19, 40 (1947); *Lee v. Monroe*, 11 U.S. (7 Cranch) 366, 369 (1813). While this emphasis on authority stems from the doctrine of separation of powers, that doctrine is seldom mentioned explicitly in the cases. *See Berger, Estoppel Against the Government*, 21 U. CHI. L. REV. 680, 686 (1954) [hereinafter cited as *Berger*].

<sup>7</sup> *Berger, supra* note 6, at 686.

<sup>8</sup> *See, e.g.*, *Pine River Logging Co. v. United States*, 186 U.S. 279 (1902) (government officers had no authority to modify a contract); *Whiteside v. United States*, 93 U.S. 247 (1876) (agreement by government officer to pay commission for procurement of abandoned or captured property did not bind government absent proof of his authority); *Filor v. United States*, 76 U.S. (9 Wall.) 45 (1869) (absent a regulation or Act of Congress granting authority, action of Army officers in obtaining a lease did not bind the government); *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666 (1868) (Secretary of War without authority to accept drafts to assure

harm suffered by an individual who has relied to his detriment on the wrongful conduct of a government official is outweighed by the greater potential harm to the public if the government can be estopped from enforcing its laws.<sup>9</sup>

The Supreme Court has never expressly recognized the availability of estoppel against the government. The case most frequently interpreted as permitting estoppel, *Moser v. United States*,<sup>10</sup> was actually based on a waiver theory, and not on estoppel.<sup>11</sup> In *INS v. Hibi*,<sup>12</sup> however, the Court indicated in a much cited dictum that the government might be subject to estoppel if it were guilty of "affirmative misconduct."<sup>13</sup> Unfortunately, the Court provided little guidance as to the kind of conduct which would meet that standard.

In *Hibi*, the petitioner attempted to obtain United States citizenship in 1967 pursuant to a federal statute which provided for the naturalization of aliens who had served in the American armed forces during World War

the delivery of goods to Army prior to receipt of the goods); *Lee v. Monroe*, 11 U.S. (7 Cranch) 366 (1813) (communications by city commissioners concerning status of an account with city did not bind government).

The courts have demanded actual, express authority as a prerequisite for the application of estoppel against the government. Similarly, the doctrine of apparent authority, which is based on the theory that one should be bound by his representations, see *RESTATEMENT (SECOND) OF AGENCY* § 8, comment d (1957), prevents the mere appearance of authority from providing the basis for an estoppel. It has been suggested, however, that the refusal to recognize implied authority as the basis for estoppel ignores the operational realities of government. See *Berger*, *supra* note 6, at 693.

<sup>9</sup> In addition to harm to the public, other reasons offered by courts for their reluctance to find actual authority include the following: fear of collusion; fear that estoppel would result in costly interference with government operations; the need for administrative flexibility; and, finally, the belief that the government, acting through possibly negligent or inefficient agents, should be afforded protection against the superior business acumen and self-interest of private citizens. See *Whiteside v. United States*, 93 U.S. 247, 257 (1876); *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 681 (1868); *Whelan & Dunigan, Government Contracts: Apparent Authority and Estoppel*, 55 *Geo. L.J.* 830 (1967); Comment, *Never Trust a Bureaucrat: Estoppel Against the Government*, 42 *S. CAL. L. REV.* 391, 397-401 (1969). See also Newman, *Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 *COLUM. L. REV.* 374 (1953).

<sup>10</sup> 341 U.S. 41 (1951).

<sup>11</sup> In *Moser*, the petitioner was held not to have knowingly and voluntarily waived his right to United States citizenship by claiming exemption from military service as a neutral alien because he had been led to believe that he would not forfeit any rights by taking such action. *Id.* at 47. Although this case has been widely read as allowing an estoppel against the government, see, e.g., *Santiago v. INS*, 526 F.2d 488, 492 (9th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 971 (1976); 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 17.02, at 501 (1958), the decision clearly rests on the ground of waiver. The Court was not concerned with whether the circumstances provided the basis for an estoppel, but rather with whether the petitioner made an intelligent, voluntary choice. 341 U.S. at 47. See Gordon, *Finality of Immigration and Nationality Determinations—Can the Government Be Estopped?*, 31 *U. CHI. L. REV.* 433, 455 (1964).

<sup>12</sup> 414 U.S. 5 (1973) (per curiam).

<sup>13</sup> *Id.* at 8.

II.<sup>14</sup> By its terms, however, the statute had expired in 1946. It was the petitioner's contention that the government should be estopped from asserting the passage of the statutory filing deadline because it had not adequately publicized that provision. Furthermore, the petitioner argued, the government's removal of all naturalization officers from his locale had precluded him from securing timely application for citizenship. Nevertheless, the Supreme Court refused to estop the government, holding that the challenged actions did not amount to "affirmative misconduct."<sup>15</sup>

#### THE AFFIRMATIVE MISCONDUCT REQUIREMENT: SANTIAGO V. INS

*Santiago* involved separate actions by four aliens, each of whom held an immigrant visa as the husband or child of a person entitled to enter the United States. The visas were valid only if the holder was either "accompanying, or following to join his spouse or parent."<sup>16</sup> In each case, the petitioner, in contravention of the immigration law, attempted to gain admission to the United States prior to the entrance of his spouse or parent. Three of the aliens were admitted by immigration officers without inquiry. In the fourth case,<sup>17</sup> the government official summarily allowed the petitioner to enter the United States although the officer had knowledge that the petitioner was preceding his father into the country. Subsequently, in all four cases, the petitioner's relative was unable to enter this country either because of death or visa expiration. In the interim, however, each immigrant, relying in good faith upon an apparently lawful entry into the United States,<sup>18</sup> proceeded to establish a new life for himself in his adopted land.

<sup>14</sup> See Second War Powers Act, ch. 199, tit. X, § 701, 56 Stat. 182 (1942), as amended by Act of Dec. 28, 1945, ch. 590, 59 Stat. 658 (current version at 8 U.S.C. § 1440 (1970)).

<sup>15</sup> In *Hibi*, the Supreme Court did not address the question whether the petitioner had been deprived of due process by the government's failure to station a naturalization officer in his locale during the time the petitioner was eligible for naturalization. That contention was subsequently raised in *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975) (mem.). In this case, which arose out of the same factual setting as *Hibi*, the court held that the removal of the naturalization officer was based on an inherently suspect classification of either alienage or ethnic origin. It was the court's opinion that the government had not met the heavy burden necessary to justify such a classification. *Id.* at 948-51.

<sup>16</sup> Immigration and Nationality Act § 203(a)(9), 8 U.S.C. § 1153(a)(9) (1970), provides:

A spouse or child . . . shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa or to conditional entry under paragraphs (1) through (8) of this subsection, be entitled to the same status, and the same order of consideration provided in subsection (b) of this section, if accompanying, or following to join, his spouse or parent.

<sup>17</sup> *Khan v. INS, consolidated with Santiago v. INS*, 526 F.2d 488 (9th Cir. 1975) (en banc), cert. denied, 425 U.S. 971 (1976).

<sup>18</sup> It appeared that two of the petitioners may have been aware of the "accompanying, or following to join" requirement. For this reason, Judge Choy would have remanded these cases for further factual determinations. 526 F.2d at 493 n.1 (Choy, J., concurring and dissenting).

Despite the considerable reliance which the government's wrongful conduct induced in each petitioner, the Ninth Circuit, in an attempt to comply with the dictates of the Supreme Court,<sup>19</sup> felt constrained to hold that the government was not estopped from asserting the petitioners' illegal entries as a basis for deportation.

### *Corniel-Rodriguez v. INS*

In *Corniel-Rodriguez v. INS*,<sup>20</sup> the petitioner had obtained a visa as the child of a resident alien. The validity of the visa was contingent on petitioner's unmarried status at the time of her entry into the United States.<sup>21</sup> A State Department regulation required that a warning of this restriction be given to the recipient of such a visa by the issuing officials.<sup>22</sup> No warning was given to the petitioner and she was married three days before her departure for the United States. The Second Circuit held that under these "extraordinary circumstances," involving the failure of an immigration official to perform a duty affirmatively required by the statute, the government was estopped from asserting the petitioner's marriage as a basis for deportation.<sup>23</sup>

### *Comparative Analysis of Santiago and Corniel-Rodriguez*

Applying the rather amorphous "affirmative misconduct" test, the Ninth Circuit, in *Santiago*, concluded that the government could be subject to estoppel only if its conduct could be considered more blameworthy than the conduct exhibited in *Hibi*.<sup>24</sup> Interpreting *Hibi*'s "affirmative misconduct" standard as requiring some form of *misfeasance* on the part of the government, the Ninth Circuit characterized the government's conduct in *Santiago* as mere *nonfeasance*—the failure to inform—rather than as *misfeasance*.<sup>25</sup>

<sup>19</sup> See notes 12-15 and accompanying text *supra*.

<sup>20</sup> 532 F.2d 301, 307 n.18 (2d Cir. 1976).

<sup>21</sup> Immigration and Nationality Act §§ 101(b)(1), 212(a)(14), 8 U.S.C. §§ 1101(b)(1), 1182(a)(14) (1970).

<sup>22</sup> 22 C.F.R. § 42.122(d) (1976) provides in part: "The consular officer shall warn an alien, when appropriate, that he will be inadmissible as such an immigrant if he is not unmarried at the time of application for admission . . . ."

<sup>23</sup> 532 F.2d at 307 n.18.

<sup>24</sup> See 526 F.2d at 493.

<sup>25</sup> *Id.* Characterization of conduct as *misfeasance* or *nonfeasance* may be unduly semantic. As Judge Choy stated in his concurring and dissenting opinion in *Santiago*:

Each one of the claims paraphrased negatively can readily be restated affirmatively; e.g., the immigration officer admitted [petitioner] Khan even after learning that Khan was not accompanying or following to join his father. But it is not *how* we cast the facts, but the facts themselves that should dictate the nature of relief warranted.

*Id.* at 495 (Choy, J., concurring and dissenting) (emphasis in original). Further support for Judge Choy's position can be garnered from the principle that a representation serving as a basis for an estoppel need not consist of an express statement; it is sufficient that a representation can be implied from silence or other conduct. See BIGELOW, *supra* note 1, at 438; POMEROY, *supra* note 1, § 818, at 1680.

The Ninth Circuit also emphasized that the petitioners had lost no rights to which they were entitled under the immigration laws. In this sense, the petitioners in *Santiago* were in a better position than the *Hibi* petitioner, who had lost entirely the opportunity to acquire United States citizenship.<sup>26</sup> Although conceding that the *Santiago* petitioners could have returned to their native countries and then have lawfully reentered this country if they had been informed of the "accompanying, or following to join" requirement, the Ninth Circuit nevertheless held that the conduct of the immigration officials did not actually deprive the petitioners of the opportunity to do so.<sup>27</sup> It is submitted, however, that the government's conduct effectively precluded any possibility that the petitioners would comply with the statutory requirements for lawful entry. It would seem, moreover, that the government is guilty of misfeasance, and not mere nonfeasance, where an immigration official knowingly admits an alien in violation of the immigration law, as in the case of the fourth *Santiago* petitioner.<sup>28</sup>

In contrast to the egregious behavior which the Ninth Circuit deemed necessary to satisfy the "affirmative misconduct" test, the Second Circuit, in *Corniel-Rodriguez*, concluded that this test required only carelessness which, in the absence of an estoppel, would lead to serious injury.<sup>29</sup> The court found support for its position in a series of cases in which the petitioners, after being prevented by the careless or willful conduct of government officials from complying with the requirements of continued United States citizenship, were held not to have forfeited their citizenship.<sup>30</sup> Char-

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<sup>26</sup> See notes 12-15 and accompanying text *supra*.

<sup>27</sup> The court's position appears irreconcilable with another case decided by the Ninth Circuit just prior to *Santiago*. In *United States v. Wharton*, 514 F.2d 406 (9th Cir. 1975), officials of the Bureau of Land Management erroneously told the petitioner that it was impossible for him to obtain a patent for the land which had been cultivated by his family for over 40 years. When the Bureau subsequently reclassified the land, it did become impossible for the petitioner to obtain a patent. *Id.* at 407-08. Under these facts, the Ninth Circuit held the government estopped. The court stated that the government was guilty of "affirmative misconduct," notwithstanding that at the time the misrepresentations were made and subsequently thereafter, the opportunity remained for the petitioner to file for a patent. *Id.* at 412.

<sup>28</sup> See note 17 and accompanying text *supra*.

<sup>29</sup> See 532 F.2d at 306-07.

<sup>30</sup> In *Podea v. Acheson*, 179 F.2d 306 (2d Cir. 1950), the petitioner joined the Roumanian army and pledged allegiance to that foreign sovereign only after he was erroneously told by United States officials that he had already lost his United States citizenship. The Second Circuit held that since the petitioner had acted in reliance on the government's misrepresentation, he had not voluntarily expatriated himself, and thus did not lose his United States citizenship. *Id.* at 309. In *Lee You Fee v. Dulles*, 236 F.2d 885 (7th Cir. 1956), *rev'd on other grounds*, 355 U.S. 61 (1957), the Seventh Circuit stated: "[T]he Government should not be heard to contend that a plaintiff had been deprived of his citizenship because of the failure of the plaintiff to do something which the officials of the Government had carelessly or willfully prevented his doing." 236 F.2d at 887. As support for this proposition, the Seventh Circuit relied upon three other cases: *Lee Wing Hong v. Dulles*, 214 F.2d 753 (7th Cir. 1954); *Lee Hong v. Acheson*, 110 F. Supp. 60 (N.D. Cal. 1953); *Lee Bang Hong v. Acheson*, 110 F. Supp.

acterizing the government conduct in *Corniel-Rodriguez* as at least as blameworthy as the "tardiness and unnecessary delay"<sup>31</sup> decried in the earlier cases, the Second Circuit held that estoppel was appropriate.

### *The Scope of the "Affirmative Misconduct" Test*

The "affirmative misconduct" test, as stated in *Hibi*, arose out of a dispute concerning citizenship. It is unclear, however, whether the Court intended to limit this dictum exclusively to citizenship cases. Subsequently, it has been held that this test is equally applicable to cases involving immigration.<sup>32</sup> Prior to the Supreme Court's enunciation of the "affirmative misconduct" test, the Ninth Circuit had evolved a liberal rule which allowed estoppel against the government "if the government's wrongful conduct [threatened] to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel."<sup>33</sup> In *Santiago*, the Ninth Circuit narrowly interpreted *Hibi* as a rejection of its liberal rule only in the areas of citizenship and immigration.<sup>34</sup> In contrast, the Second Circuit, which prior to *Corniel-Rodriguez* had not held estoppel to be available against the government, broadly construed *Hibi* as the birth of a new rule of law which opened the door to the application of estoppel. Whether the Second Circuit will apply this rule in areas other than citizenship and immigration is not clear.

### THE PROHIBITION AGAINST ESTOPPEL: A REASSESSMENT

Historically, three rationales have been asserted as justification for the rule of law which prohibits estoppel of the government—separation of powers, public interest in the enforcement of the laws, and sovereign immunity. It is submitted, however, that these rationales are insufficient to sup-

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48 (D. Hawaii 1951). In each of these cases, the petitioners were foreign born children of a United States citizen and an alien. Although each child was a United States citizen by birth, under the immigration law each would lose his citizenship if he failed to take up residence in this country by his sixteenth birthday. The children all filed the necessary applications and made diligent efforts to enter the United States within the required time, but were prevented from doing so by the wrongful conduct of United States officials. As a result, the petitioners were held not to have been divested of their citizenship by the failure to take up residence within the prescribed time.

<sup>31</sup> 532 F.2d at 307, quoting *Lee You Fee v. Dulles*, 236 F.2d 885, 887 (7th Cir. 1956), *rev'd on other grounds*, 355 U.S. 61 (1957).

<sup>32</sup> See *Hernandez v. INS*, 498 F.2d 919, 921 (9th Cir. 1974) (per curiam).

<sup>33</sup> *United States v. Lazy FC Ranch*, 481 F.2d 985, 989 (9th Cir. 1973). For discussion of the approach to estoppel developed by the Ninth Circuit, see *Gestuvo v. INS*, 337 F. Supp. 1093, 1098-1101 (C.D. Cal. 1971), *rev'd and remanded*, No. 72-1904 (9th Cir. May 15, 1974), discussed in Comment, *Emergence of an Equitable Doctrine of Estoppel Against the Government—The Oil Shale Cases*, 46 U. COLO. L. REV. 433, 446-51 (1975); 41 *FORDHAM L. REV.* 140 (1972).

<sup>34</sup> See 526 F.2d at 492. *But see Burglin v. Morton*, 527 F.2d 486, 490 n.3 (9th Cir. 1976) ("affirmative misconduct" standard for estoppel in oil and gas lease case).

port such a harsh and inequitable rule. The doctrine of separation of powers does not appear to bar the imposition of estoppel in cases such as the ones discussed.<sup>35</sup> It is difficult to see how this doctrine is violated when a government official is prohibited from denying the exercise of a right created by Congress. Rather than a strict rule of law, the separation of powers doctrine is an eighteenth century political philosophy which was intended to prevent despotism. As such, it provides little support for a rule which sanctions wrongful governmental conduct that can cause enormous injury to innocent individuals.<sup>36</sup>

Under the second rationale, it is contended that the public interest in enforcement of the law outweighs the harm suffered by an individual who has relied on the conduct of a government official. This is not invariably true, however, and it would seem appropriate to apply a balancing approach. Although the public interest must be considered before an estoppel is invoked,<sup>37</sup> in the area of immigration the harm to the public is usually negligible and the injury to the individual is often substantial. The public interest will not be harmed by estopping the government in the occasional instance where an alien, who has in good faith attempted to comply with the immigration law, relies on the appearance of propriety created by negligent immigration officials.<sup>38</sup>

The doctrine of sovereign immunity does, however, continue to present an obstacle to the application of estoppel against the government.<sup>39</sup> In

<sup>35</sup> One commentator has stated:

Modern jurisprudence exhorts the government to observe the highest precepts of rectitude in dealing with its citizens. At the same time, there is a strong feeling that the actions of a single officer should not be permitted to override legislative programs or policies that can be formulated only by Congress. As between these competing considerations, the trend of current decisions appears to reflect that the impulse for fair dealing usually will prevail in immigration and nationality matters.

Gordon, *Finality of Immigration and Nationality Determinations—Can the Government Be Estopped?*, 31 U. CHI. L. REV. 433, 454 (1964).

<sup>36</sup> For a thorough historical investigation of the separation of powers doctrine, see Sharp, *The Classical American Doctrine of "The Separation Of Powers,"* 2 U. CHI. L. REV. 385 (1935).

<sup>37</sup> Applying a balancing approach, a number of courts have held that harm to the public interest precludes the granting of an estoppel. See, e.g., *Union Oil Co. v. Morton*, 512 F.2d 743, 748 n.2 (9th Cir. 1975) (cost to public would be enormous if government were estopped from continuing to regulate company's drilling); *UAW v. NLRB*, 462 F.2d 298 (D.C. Cir. 1972) (to hold NLRB estopped by its acceptance of trial examiner's decision would undermine policy of the NLRA). Cf. *Beaver v. United States*, 350 F.2d 4 (9th Cir. 1965), cert. denied, 383 U.S. 937 (1966) (courts are reluctant to estop government in cases which involve rights to public land).

<sup>38</sup> The expressed legislative purpose behind the passage of the Immigration and Nationality Act of 1965, 8 U.S.C. §§ 1101-1503 (1970), was to prevent excessive immigration. The legislators felt that the evils associated with immigration are the result of a large and uncontrolled influx of aliens. See *Hearings on H.R. 770 Before a Subcomm. of the House Comm. on the Judiciary*, 88th Cong., 2d Sess. (1964). The effect upon immigration of allowing estoppel against the government will surely be de minimis.

<sup>39</sup> One court stated the sovereign immunity argument as follows:

[T]he principle of sovereignty by which the state cannot be sued against its consent

accordance with this doctrine, the state cannot be sued without its consent.<sup>40</sup> Similarly, the state cannot, without its consent, be subjected to estoppel.<sup>41</sup> Although the applicability of sovereign immunity has been greatly diminished,<sup>42</sup> the courts remain reluctant to impose liability upon the state when it is engaged in fundamental governmental activity.<sup>43</sup> For example, in *Hibi*, there was no allegation that a government official acted in a wrongful or negligent manner. Instead, the conduct objected to consisted of foreign policy determinations made by the executive branch of the government.<sup>44</sup> It can be inferred from *Hibi*, as the dissent in *Santiago* noted,<sup>45</sup> that it was not the characterization of the act as something less than affirmative misconduct, but rather the characterization of the conduct relied upon as the product of an executive level policy determination which was responsible for the denial of estoppel in *Hibi*. Consequently, it would appear that sovereign immunity continues to preclude the use of

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would seem to defeat a claim of estoppel presented as an affirmative defense. Not being suable in invitum, it may not be subject to an estoppel against the assertion of its rights, when it has not consented to their defeat, although facts constituting estoppel as between individuals are shown.

*Trustees of Phillips Exeter Academy v. Exeter*, 90 N.H. 472, 495, 27 A.2d 569, 586 (1940) (citation omitted).

<sup>40</sup> See B. SCHWARTZ, *ADMINISTRATIVE LAW* § 198, at 563 (1976).

<sup>41</sup> See, e.g., *Trustees of Phillips Exeter Academy v. Exeter*, 90 N.H. 472, 27 A.2d 569 (1940).

<sup>42</sup> The sovereign immunity doctrine is subject to the following criticism:

Monarchical doctrines of Kings who can do no wrong and sovereigns above the law were developed and inflated in the United States to a point never reached in England, in which they had their roots, and never even deemed worthy of serious consideration in the feudal continent so often and so erroneously deemed the source of governmental irresponsibility. It was left for the democratic United States to furnish the rationalizations and unconvincing explanations which gave a misunderstood major premise the false appearance of a reasoned and logical conclusion.

Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform*, 20 A.B.A.J. 747 (1934).

<sup>43</sup> Cf. Federal Tort Claims Act, 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-78, 2680 (1970). Pursuant to the Act, the government's liability is very broad: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ." *Id.* § 2674. By its terms the Act is subject to certain limitations. See generally 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 25.08, at 469-71 (1958). The courts have created additional exceptions, including a limitation on liability for injury resulting from governmental acts of a policy or planning nature as opposed to acts of a ministerial character. See *Dalehite v. United States*, 346 U.S. 15 (1953). Professor Davis argues that this judicial limitation of government liability is necessary, stating:

What a spectacle it would be if a court in a damage suit were to receive evidence designed to prove that congressmen were at fault in determining which way to vote on a bill! Or that the President and his assistants were negligent in the manner in which they considered an executive order!

3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 25.11, at 484 (1958). See generally Borchard, *Government Liability in Tort*, 34 *YALE L.J.* 1 (1924).

<sup>44</sup> See 414 U.S. at 6-9.

<sup>45</sup> See 526 F.2d at 496 (Choy, J., concurring and dissenting).

estoppel against the government only in cases involving high-echelon policy decisions.

#### CONCLUSION

In *Hibi*, the Supreme Court opened the door for the imposition of estoppel against the government. *Santiago* and *Corniel-Rodriguez*, viewed in conjunction with *Hibi*, would appear to yield the following rule for the imposition of estoppel in the area of immigration: Where a right created by Congress has been denied through the wrongful or negligent conduct of a government official, "affirmative misconduct" is present, and unless the governmental conduct involves an executive level policy determination, the ordinary rules of estoppel will be applicable. It is submitted that a liberal application of estoppel is especially appropriate in the immigration situation. Deportation and loss of citizenship are harsh sanctions which should not be lightly imposed. The interests sought to be protected by the invocation of estoppel are not merely those of property or contract, but of liberty, home, and family; indeed, of "all that makes life worth living."<sup>46</sup>

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<sup>46</sup> *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).