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Access to Discretionary Relief Under the Immigration and Nationality Act: *Castillo-Felix v. Immigration and Naturalization Service*, 601 F.2d 459 (9th Cir. 1979)

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NOTE

**Access to Discretionary Relief Under the
Immigration and Nationality Act**

Castillo-Felix v. Immigration and Naturalization Service
601 F.2d 459 (9th Cir. 1979)

Bautista Castillo-Felix, petitioner, unlawfully entered the United States from Mexico in 1963,¹ but was apprehended seven years later by the Immigration and Naturalization Service (INS) as an illegal alien. After being granted a voluntary departure pursuant to 8 U.S.C. § 1252(g),² he was permitted to remain in the United States due to a series of extensions granted by the INS pending his receipt of a permanent resident visa. The visa was granted and petitioner lawfully entered the United States on April 7, 1972. Petitioner was convicted in August 1975 of knowingly inducing the entry of two illegal aliens into the United States in violation of 8 U.S.C. § 1324(a)(4),³ and was

1. *Castillo-Felix v. Immigration & Naturalization Service*, 601 F.2d 459, 461 (9th Cir. 1979). All facts of the case are taken from the Court's characterization of the facts and from the respective briefs.

2. 8 U.S.C. § 1252(g) (1976) provides:

If any alien, subject to supervision or detention under subsections (c) or (d) of this section, is able to depart from the United States under the order of deportation, except that he is financially unable to pay his passage, the Attorney General may in his discretion permit such alien to depart voluntarily, and the expense of such passage to the country to which he is destined may be paid from the appropriation for the enforcement of this chapter unless such payment is otherwise provided for under this chapter.

3. 8 U.S.C. § 1324(a)(4) (1976) provides:

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who— . . .

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding \$2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however*, That for the purpose of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

consequently incarcerated.⁴ The INS commenced deportation proceedings against him based on this conviction in which petitioner conceded deportability, but sought discretionary relief under 8 U.S.C. § 1182(c).⁵ The Immigration Judge denied such relief because petitioner had not been continuously domiciled in the United States for seven years subsequent to his admission for permanent resident status in 1972.⁶ The Board of Immigration Appeals (BIA) agreed with the Immigration Judge and affirmed on the same ground of statutory ineligibility.⁷ The petitioner next sought review of the BIA order denying him discretionary relief from deportation by way of petition to the United States Circuit Court of Appeals.⁸ The Circuit Court of Appeals for the Ninth Circuit, *held*, affirmed: (1) to be eligible for § 1182(c) discretionary relief from deportation, aliens must attain seven years of lawful unrelinquished domicile after their admission for permanent resident status; and (2) the equal protection rights of the alien were not violated when he was prosecuted in the Ninth Circuit and thereby subjected to a less favorable statutory interpretation than he would have received had he been prosecuted in the Second Circuit, since any discriminatory effect resulting from the conflicting statutory interpretations was due solely to the independence of the federal appellate courts. *Castillo-Felix v. INS*, 601 F.2d 459 (9th Cir. 1979).

Castillo-Felix entered into a common law marriage with an alien holding permanent resident status in 1963. He subsequently

(b) No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.

4. 601 F.2d at 461.

5. 8 U.S.C. § 1182(c) (1976) provides:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) to (25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title.

6. 601 F.2d at 461. In an oral opinion, the judge added that even if petitioner had met the domicile requirement, he would have exercised his discretion to deny relief.

7. *Id.*

8. Such review is proper pursuant to 8 U.S.C. § 1105(a) (1976), which makes 28 U.S.C. § 308 applicable to orders of deportation and exclusion.

legitimized the relationship in an official ceremony in 1970. During these seven years, Castillo-Felix purchased a home and supported his family, which included five children. Thus, Castillo-Felix established and extended ties to the United States over a period of twelve years. In spite of these "roots," however, both the BIA and the Circuit Court denied him access to the discretionary relief available under § 1182(c), on the grounds that he was ineligible for such relief as he had not accumulated seven years of lawful unrelinquished domicile subsequent to his admission for permanent residence in 1972.⁹

The decision in this case is significant, then, for a number of reasons. Besides being obviously unfavorable to the petitioner, as it denies him even the chance of obtaining discretionary relief from deportation,¹⁰ the decision has broad consequences as well. It denies other similarly situated aliens who face either deportation or exclusion access to the sanctuary afforded by § 1182. The decision is paradoxical in that it directly conflicts with the humanitarian policies upon which the statutory provision was formulated and enacted.¹¹ Since courts are obliged to independently construe statutory provisions,¹² it is arguable that § 1182 is not judicially manageable and ought to be revised by Congress so that it may better serve and embrace the humanitarian purposes for which it was designed. Thus, the decision's primary significance lies in its use as a guidepost for determining when and under what facts and circumstances courts may choose to decide

9. 601 F.2d at 461. *Contra*, *Lok v. INS*, 548 F.2d 37 (2d Cir. 1977). The *Lok* court, per Chief Judge Kaufman, rejected the INS interpretation of § 1182(c). The Court examined the language of § 1182(c) and noted that "admission for permanent residence" was carefully defined but that "lawful unrelinquished domicile" is not defined in the Act. It further noted that some aliens may be lawfully domiciled in the United States without having been admitted for permanent residence. From this, the Court reasoned that lawful domicile could not be equated with admission for permanent residence. The Court then studied the legislative history of § 1182(c) and concluded that Congress never intended to require that seven years of lawful domicile follow admission for permanent residence. In reaching its conclusion, the Court attached significance to the fact that Congress considered and rejected a version of § 1182(c) which would have explicitly provided for such a requirement.

10. Since petitioner was charged under federal criminal law, presumably, he could apply for a Presidential pardon pursuant to Article II, section 2 of the U.S. Constitution. One can only speculate on the probability of obtaining such a pardon. However, petitioner was obligated pursuant to 8 U.S.C. § 1105a(c) (1976) to exhaust the administrative remedies available to him as of right prior to his seeking judicial review of his deportation order.

11. See note 17 *supra*.

12. *Alexander v. Dept. of Housing and Urban Dev.*, 441 U.S. 39, 49 (1979).

cases of statutory construction involving aliens contrary to apparent congressional intent and policy.

The second primary reason for the significance of the decision is the manner in which the Circuit Court handled petitioner's equal protection claim. Of particular interest is the rule of law the Court formulated pertaining to the equal protection claim and the dissent's failure to even discuss equal protection in *Castillo-Felix*.¹³ The decision has potentially broad overtones in the handling of alien deportation and exclusion cases and, therefore, warrants careful analysis. A brief background will prove useful at the outset.

I. BACKGROUND

The life situation of aliens residing in the United States is indeed difficult. The mere label of "alien" connotes something of strange or foreign character¹⁴ and presupposes the existence of a group to which other individuals do not belong and are thus different. Such a group is presumably comprised of persons, all of whom share some normative value structure.¹⁵ It logically follows that an alien, as defined by the hypothetical group, is one whose values do not coincide with those of the group. When such a group attempts to control its existence and ensure its destiny by recognizing, embracing, and giving form to these normative values, the result is a body of laws. Presumably, then, laws dealing with aliens have at their core these notions of "groupness" and normative value structure. The statutory definition of alien reflects this philosophy.¹⁶

13. Presumably, in arguing against a particular construction of a statutory provision, one would muster all the legal ammunition one could against that construction, including any equal protection objections. The dissent's failure to address the equal protection issue suggests a firm belief that the case could have been resolved on the statutory ground, in which case it would have been unnecessary to reach the constitutional issue of equal protection. This reasoning is in line with the established judicial principle that if there exists a nonconstitutional basis on which to resolve the issues, the court will do so before reaching the constitutional issues. See, e.g., *Gladstone v. Village of Bellwood*, 441 U.S. 91 (1979).

14. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 22 (7th ed. 1972).

15. P. ZIMBARDO, E. EBBESEN, C. MASLACH, *INFLUENCING ATTITUDES AND CHANGING BEHAVIOR* 42 (2d ed. 1977).

16. 8 U.S.C. § 1101(a)(3) defines alien as any person not a citizen or national of the United States. That this definition is worded in exclusive terms means that Congress embraced these notions of groupness with respect to aliens.

The underlying policy of the original Immigration and Nationality Laws,¹⁷ and one still embodied in the more contemporary acts,¹⁸ is the travel control of citizens and aliens.¹⁹ The post-war trend in immigration law was characterized by a reformulation of many of the older provisions,²⁰ resulting in the Immigration and Nationality Act (the Act).²¹ The Act is an attempt to effectuate the policy of the protection of United States' borders from encroachment by certain classes of foreigners,²² while according such foreigners the benefits

17. See Immigration Act of 1917, ch. 29, 39 Stat. 878 (1917).

18. See 8 U.S.C. § 1101 (1976).

19. 8 U.S.C. § 1151 (1976).

20. See F. AUERBACH, *THE IMMIGRATION AND NATIONALITY ACT* (1952); COMMON COUNCIL FOR AMERICAN UNITY, *THE ALIEN AND THE IMMIGRATION LAW* (1972); W. BISON, *ALIENS AND THE LAW* (1940); S. KANSAS, *UNITED STATES IMMIGRATION* (3d ed. 1948).

21. 8 U.S.C. § 1101 (1976).

22. See 8 U.S.C. § 1151 (1976); U.S. DEP'T. OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 91-101 (94th ed. 1973). In 1972, 64,209 immigrants from Mexico entered the United States. This number represented the highest total immigration to the United States from any country in the world. Mexico has been the greatest source of immigrant influx consistently since 1960. Also, more Mexican-born persons have been admitted to this country as non-immigrants than any other country in the world since 1960.

In 1972, the number of aliens reporting addresses under the Alien Address Program was the highest for aliens of Mexican nationality. This number constituted 17.7% of the total number reporting to the government. Of the total number reporting, the highest number and highest percentage (23%) were residing in California. For 1972, Mexico ranked eighth in the total number of naturalized aliens. California ranked second in state of residence of aliens naturalized, just behind New York (18.9% versus 21.3% of total aliens naturalized in 1972).

In 1977, 44,000 Mexican-born immigrants entered the United States, ranking third behind the West Indies and Cuba. In 1977, of 8,499 aliens admitted to the United States, 897 were expelled (deported or required to depart). Of the total number of aliens admitted, 935 deportable aliens from Mexico were apprehended.

The leading cause for alien deportation since 1951 has been entry without inspection or by false statements. In comparison, the least-cited cause for alien deportation is criminal or narcotics laws violations.

In 1977, and for several years prior to that, approximately 17,000 immigration prosecutions were processed. These actions resulted in between 15,000 and 16,000 convictions. Thus, approximately ninety percent of these prosecutions resulted in convictions.

In 1977, the number of deportable Mexicans located swelled to about 800,000. This corresponded to just over that number of total deportable aliens located (812,500). In border patrol activities for 1977, 138,800 aliens were found smuggled into the United States. In 1977, more Mexicans were admitted into the United States as non-immigrants than from any other country.

Of all aliens reporting addresses to the U.S. government in 1977, 19.4% were from Mexico, a higher total than from any other country. California had the highest percentage (25.4%) of reporting aliens as far as state of residence. Cali-

of due process and equal protection of the laws of the United States.²³ In this manner, the laws of the United States espouse a more humanitarian approach to the disposition of aliens.

The humanitarian aspects of the Immigration and Nationality Act are reflected in 8 U.S.C. § 1182(c),²⁴ the statutory provision under which Castillo-Felix sought, and the Circuit Court denied him, relief from deportation. The Court noted that the thrust of § 1182(c) is to provide those aliens having established roots in the United States with a remedy against exclusion or deportation.²⁵ Common examples of established roots are a family, a permanent residence, and a job. Courts, based on their conviction that "deportation is a sanction which in severity surpasses all but the most Draconian criminal penalties,"²⁶ supposedly consider these factors in deciding exclusion and deportation cases.

Castillo-Felix had established roots in the United States, yet the BIA ordered, and the Circuit Court affirmed, the harsh penalty of deportation. The following analysis will offer some illumination on this point.

II. ANALYSIS

The analysis of the decision involves a tripartite discussion. The first part is a focus on the value structure behind the particular aspects of the decision. This will entail a scrutiny of the major premises behind the Court's reasoning. The second part of the discussion is concerned with the credibility of the decision. This demands a survey of the authorities cited for the major premises of reasoning.

fornia ranked second to New York in state of residence of aliens naturalized in 1977.

U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 83-96 (100th ed. 1979).

23. See *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971); *Calvan v. Press*, 347 U.S. 522 (1954); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976).

24. *Lok v. Immigration and Naturalization Service*, 548 F.2d 37, 39 (2d Cir. 1977); *Francis v. INS*, 532 F.2d 268, 272 (2d Cir. 1976); *Matter of Anwo*, Interim Decision #2604 (BIA 1977), *aff'd sub. nom.* *Anwo v. INS*, 607 F.2d 435 (D.C. Cir. 1979) (acknowledging that the 7th Proviso to § 3 of the Immigration Act of 1917, the predecessor to § 1182(c), is a humanitarian statute designed to mitigate the harsh effects of the immigration laws). *Contra*, Brief for Respondent at 17-18, *Castillo-Felix v. INS*, 601 F.2d 459 (9th Cir. 1979).

25. 601 F.2d at 462.

26. *Lok v. INS*, 548 F.2d 37, 39 (2d Cir. 1977).

The third portion of the analysis is a crystallization of the decision, which serves the function of stating and clarifying the rule of law derived from the case. This will also place the decision in perspective with respect to future cases. Throughout the discussion, the dissent's arguments will be introduced and analyzed as they relate to the major arguments of the decision.

A. *Statutory Interpretation*

Petitioner sought relief from deportation under 8 U.S.C. § 1182 (c),²⁷ a provision originally applicable to exclusion proceedings only.²⁸ The Court disposed of this preliminary statutory applicability problem by noting three established rationales for extending § 1182(c) to deportation proceedings where the deportees meet the statutory requirements.²⁹ The court's apparent ease in acceptance of the extension of § 1182(c) to include relief for deportable, as well as excludable, aliens is misleading. A broad interpretation of § 1182(c) is suggested by such an extension since the provision makes no reference to deportable aliens.³⁰ Upon closer analysis, however, it becomes evident that the decision of the case represents the simultaneous expansion of the provision's applicability and the tightening of its requirements. It is clear from a recognition of this apparent anomaly that the

27. See note 5 *supra*.

28. 601 F.2d at 462.

29. Three rationales have been used to extend § 1182(c) relief to deportation proceedings. Aliens who committed deportable offenses, then left the United States but were not excluded upon returning, could request § 1182(c) relief *nunc pro tunc*. The INS reasoned that the discretionary relief which would have been available to them on re-entry could be granted at the later deportation hearing. *E.g.*, Matter of Tanori, Interim Decision #2467 (BIA 1976); Matter of S, 5 I&N Dec. 392 (BIA 1954).

Alternatively, aliens eligible for voluntary departure in lieu of deportation could obtain advance determinations of their eligibility for § 1182(c) relief, to apply to their future re-entry. See Matter of Anwo, Interim Decision #2604 (BIA 1977), *aff'd sub nom.* Anwo v. INS, 607 F.2d 435 (D.C. Cir. 1979); Matter of S, 5 I&N Dec. 116 (BIA 1953).

Finally, the INS allowed deportees to apply for § 1182(c) relief in connection with an application for adjustment of status, reasoning that aliens applying for adjustment of status stand in the same position as those entering this country with a permanent resident visa. Matter of Smith, Interim Decision #1510 (BIA 1965).

601 F.2d at 462 n.5.

30. See note 5 *supra*.

Court's decision is rooted in values other than those represented by a liberal reading of § 1182(c).

The Court paved the way for its holding when it stated that "the statutory mandate in § 1182(c) is ambiguous"³¹ and the "language of the section could support either the INS interpretation or that adopted in *Lok*."³² The premise that § 1182(c) is ambiguous provided the judges with a clean slate upon which the court could draft its opinion. Based on their independent evaluation of the language of the provision, the legislative history, and the structure of the Act, the Court could have held either way. In holding against petitioner, the majority gave credence to the established principle that it is not within the province of the courts to second-guess Congress in interpretations of statutory provisions.³³ In this manner, the Court was able to downplay the dissent's argument that Congress had considered and rejected language which would have explicitly required admission for permanent residence before establishment of lawful domicile.³⁴ The majority said: "[W]e can only speculate about the Committee members' reasons for not including this language. They might have considered it superfluous, believing that the enacted version adequately conveyed their intent that admission for permanent residence precede the seven years of domicile."³⁵ This line of reasoning allowed the majority to look to authority other than that of legislative history in order to resolve the issues for the case, while still giving due respect to congressional intent.

The majority found support in the case law for the premise that the BIA was entitled to due deference regarding its decision below.³⁶

31. 601 F.2d at 464.

32. *Id.*

33. *TVA v. Hill*, 437 U.S. 153 (1978). See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 524 (1947). See generally E. Levi, AN INTRODUCTION TO LEGAL REASONING 27-57 (1949).

It is an established constitutional principle stemming from the separation of powers doctrine that courts merely sit in judgment of the laws. Thus, courts are not superlegislatures and cannot make policy decisions of the type made by legislatures. This limitation on judicial power prevents courts from substituting language in statutory interpretation cases. However, the line between interpretation and substitution of language is often a gray one.

34. In 1950, the Senate Judiciary Committee considered and rejected a suggestion to include the phrase "established after a lawful entry for permanent residence" in the Seventh Proviso to section 3 of the Immigration Act of 1917, the precursor to § 1182(c). S. Rep. No. 1515, 81st Cong., 2d Sess. 384 (1950).

35. 601 F.2d at 465.

36. *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

They stated that "only a clear showing of a contrary intent by Congress will justify overruling the agency's regulations."³⁷ The majority recognized the "reversal test" applicable to administrative cases, which was cited in the *Lok* decision,³⁸ but failed to find that the INS interpretation of § 1182(c) was inconsistent with the statutory mandate, or that it frustrated congressional policy.³⁹

The dissent countered the majority's due deference argument by citing the

established rule of law that statutes affecting deportation decisions be construed in favor of the alien, *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *Lennon v. Immigration and Naturalization Service*, 527 F.2d 187, 193 (2d Cir. 1975); *Errico v. INS*, 349 F.2d 541, 547 n.3 (9th Cir. 1965).⁴⁰

This argument stems from the view that deportation is "the forfeiture for misconduct" while residing in the United States, equivalent to such drastic measures as banishment or exile.⁴¹

While this view is somewhat accurate in cases of deportation, the dissent's premise that statutes be construed in favor of aliens is a broadly-based argument. The danger of relying on such a broad argument is generalization to the point where the argument loses its persuasive quality. The lattice of facts upon which cases such as *Castillo-Felix* rests is too complex and particular to be measured by such general rules as the dissent would employ. Thus, the dissent, though correct in what it did espouse, never directly nor adequately refuted the due deference argument of the majority, leaving the Court with the two conflicting policy rationales of the dissent and the majority.

37. 601 F.2d at 465, quoting *Baur v. Mathews*, 578 F.2d 228, 233 (9th Cir. 1978), and citing *DHL Corp. v. C.A.B.*, 584 F.2d 914, 919-20 (9th Cir. 1978); *Nazareno v. Attorney Gen. of United States*, 512 F.2d 936, 940 (D.C. Cir. 1975).

38. 601 F.2d at 464. The *Lok* court recognized that despite the fact that deference is customarily accorded the agency responsible for the administration of an act, courts have a heavy responsibility to set aside administrative decisions that are inconsistent with statutory mandates or which frustrate congressional policy behind the legislation. *Lok v. INS*, 548 F.2d 37, 40 (2d Cir. 1977).

39. 601 F.2d at 467. The majority found the legislative history inconclusive on this point and, therefore, not crucial to their reasoning. Rather, the majority compared § 1182(c) to § 1254(a) and concluded that the INS interpretation preserved the overall statutory scheme of discretionary relief in deportation.

40. 601 F.2d at 468-69.

41. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

The dissent did raise important points in countering the majority's two premises that § 1182(c) limits the class of aliens eligible for relief,⁴² and that the class of aliens to which the provision applies is distinct from, and must possess a stronger relationship with, the United States than the class of aliens eligible for suspension of deportation under § 1254(a).⁴³ The majority, relying primarily on legislative history in formulating these premises,⁴⁴ also examined section 244(a) [8 U.S.C. § 1254(a)] of the Act in an effort to avoid undermining other of its provisions.⁴⁵ The majority concluded that § 1182 (c) had lesser standards than § 1254(a) and that "the alien applying for section 212(c) [§ 1182(c)] relief has only to show that he is a lawful permanent resident and that he has maintained a lawful unrelinquished domicile in the United States for a period of seven consecutive years."⁴⁶

In response, the dissent noted that no explicit constriction of the class of aliens entitled to § 1182(c) relief was included in that provision.⁴⁷ Further, the dissent, arguing against the majority's premise that § 1182(c) had lesser standards for relief consideration than § 1254(a), posited that "such a view certainly ignores the difficult standard that must be met to even qualify for permanent resident status,"⁴⁸ and "[t]he broad discretionary powers available to the Attorney General in granting lawful permanent residence could, and presumably do, serve a function equal in stringency to the establishment of good moral character and extreme hardship under § 244(a)."⁴⁹

The dissent's reasoning on these points is sound. The hardship and good moral character requirements of § 1254(a) would not be read out of the Act by the interpretation that an alien with permanent resident status meets the minimum statutory requirements of the Act's

42. 601 F.2d at 466. The dissenting members of the Senate Judiciary Committee viewed §1182(c) as a limitation on the Attorney General's discretion to readmit aliens with an unrelinquished domicile of seven consecutive years since it would require the exclusion of aliens who had voluntarily and temporarily proceeded abroad, even though they could not have been deported had they remained in the United States. S. Rep. No. 1137, 82d Cong., 2d Sess. 10 (1952).

43. 601 F.2d at 466-67.

44. See *In the Matter of S*, 5 I&N Dec. 116, 118 (BIA 1953).

45. See *Matter of Anwo*, Interim Decision #2604 (BIA 1977), *aff'd sub nom.* *Anwo v. INS*, 607 F.2d 435 (D.C. Cir. 1979) (the majority's reasoning adopts that of the second section of the agency opinion).

46. 601 F.2d at 466.

47. *Id.* at 468. See note 5 *supra*.

48. *Id.* at 469.

49. *Id.*

provisions by accumulating at least seven years of developing ties to the United States.⁵⁰ Such an interpretation is supported by the fact that circumstances exist where aliens are immediately eligible for lawful permanent resident status (i.e., marriage to an American citizen). This interpretation is especially warranted where the equities balance in favor of the alien, as with Castillo-Felix, who began establishing roots in the United States in 1963 and satisfied U.S. government officials in 1972 of his potential as an American citizen.⁵¹ Aliens eligible for § 1254(a) relief need only live in the United States between seven and ten years. Under the INS interpretation of § 1182(c), an alien who obtained permanent resident status must add seven years to those already spent developing ties to the United States without permanent resident status. Such incongruity between interpretations of these provisions of the Act yields harsh and often unjust results. Certainly, this is one intention Congress never had in enacting these provisions.

B. *Equal Protection*

The disparate interpretation of § 1182 by the Ninth Circuit and the Second Circuit was the foundation of petitioner's equal protection claim. The majority disposed of this claim in four short paragraphs.⁵² After recognizing that the principle of equal protection is a component of the Fifth Amendment due process clause,⁵³ to which aliens are entitled,⁵⁴ the majority limited its inquiry to one of minimum scrutiny under the rational basis test.⁵⁵

The majority next stated that federal appellate courts are independent and that the decision of one court of appeals, in and of itself, cannot bind another.⁵⁶ Thus, the INS was not compelled to follow the *Lok* decision outside the Second Circuit.⁵⁷ The majority

50. The dissent would have it that the hardship and good moral character requirements of § 1254(a) be regarded as explanatory of the discretionary powers available or repetitious of a policy underlying the entire Act. *Id.*

51. *Id.* at 462.

52. *Id.* at 467.

53. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

54. *Sugarman v. Dougall*, 413 U.S. 634, 641 (1973); *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

55. 601 F.2d at 467, citing *Francis v. INS*, 532 F.2d 268, 272 (2d Cir. 1976). For a discussion of the equal protection tests applicable in alienage cases, see Note, *Erosion of the Strict Scrutiny Standard as Applied to Resident Aliens*, 10 LAW. AM. 1049 (1978).

56. 601 F.2d at 467.

57. 601 F.2d 459 (9th Cir. 1979). See *Matter of Lim*, 13 I&N Dec. 169 (BIA 1969); 1 C. GORDON AND H. ROSENFELD, IMMIGRATION LAW AND PROCE-

espoused the notion that refusal to adopt the *Lok* ruling in the Second Circuit in order to achieve consistency in application of the law would "only invite appeal and reversal."⁵⁸ The Court concluded that the agency's decision to apply the *Lok* rule only in the Second Circuit avoided "this unnecessary process of appeal,"⁵⁹ and that this was a "sound and rational basis for the agency's action."⁶⁰ In affirming the BIA decision, the majority held that "[a]dherence to the law of the circuit only within that circuit does not violate petitioner's equal protection rights."⁶¹

The equal protection portion of the opinion presents some problems. The first problem involves the majority's self-imposed limitation to the rational basis test. The court asserted, citing *Francis v. INS*,⁶² that "the right of a permanent resident alien to remain in this country has never been held to be the type of 'fundamental right' which would subject classification touching on it to strict judicial scrutiny."⁶³ This was not the real point of petitioner's claim, however.

DURE § 1.10e, at 1-77 (1979). See also *Matter of Amado and Monteiro*, 13 I&N Dec. 179 (BIA 1969).

58. 601 F.2d at 467.

59. *Id.*

60. *Id.*

61. *Id.* Respondent's Brief states:

[I]t would be patently unfair to require the [BIA and INS] to follow the ruling of a single United States Court of Appeals throughout the United States. If such were the rule, then the first Court to address an issue would have binding authority over all the other federal courts, with the only recourse being an appeal to the Supreme Court. The decisions of one federal circuit court were never intended to be binding on other federal courts and they are not binding on the [BIA] outside the jurisdiction of that Court. Consequently, the BIA's decision . . . was not a violation of petitioner's Fifth Amendment guarantees of due process and equal protection of law.

Brief for Respondent at 26-27, 601 F.2d 459 (9th Cir. 1979).

62. 532 F.2d 268 (2d Cir. 1976).

63. *Id.* at 272. The court found § 1182(c) unconstitutional as applied to that petitioner. Francis was found to be deportable by the INS by reason of a marijuana conviction. He sought discretionary relief from deportation pursuant to § 1182(c). The BIA denied him such relief because he had not fulfilled the departure requirement under § 1182(c). The Second Circuit Court of Appeals, per Judge Lumbard, stated:

Reason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time.

. . . .

Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.

Francis v. INS, 532 F.2d at 273.

Castillo-Felix never argued that he was "fundamentally" entitled to remain in this country, but rather that the disparate application of § 1182(c) offended the guarantee of equal protection of the laws by allowing aliens who happen to fall within the jurisdiction of the Second Circuit to be eligible for § 1182(c) discretionary relief, while denying that same right to aliens outside the Second Circuit (himself in particular). More simply stated, petitioner's equal protection claim is based on the fact that certain aliens facing identical sanctions under federal law are accorded more, or less, rights based solely on a geographical distinction. The majority failed to adequately come to grips with these practical consequences of ruling against petitioner's equal protection claim.⁶⁴

A second problem with the majority's handling of petitioner's equal protection claim is derived from their statement that "the discriminatory effect arising from the agency's decision results entirely from the independence of federal appellate courts."⁶⁵ In this posture, the majority failed to realize that the judiciary is vested with the duty to protect those within its jurisdiction from unfair treatment under the law no matter what the source of such treatment. This includes prevention of arbitrary discrimination. It is untenable that a judiciary, charged with ensuring equal protection of the laws, would permit invidious discrimination based solely upon geographical differences, the effects of which are felt only through judicial fiat.

A third problem with the majority's handling of the equal protection issue is their reference to the fact that "the agency's decision to apply the *Lok* interpretation in the Second Circuit [only] avoids futile appeals, costly to both the agency and to petitioners seeking relief."⁶⁶ Presumably, the petitioner who applies for § 1182(c) relief in the first place wants to remain in the United States enough to pay the

64. The adherence to the rational basis test was proper under these facts and circumstances. Strict judicial scrutiny of a statute or its application is usually triggered when the statute creates a classification based on alienage which somehow discriminates against that group being classified. It is apparent that the statutory scheme does not discriminate against aliens based on their alienage. The statute mandates deportation of all aliens who are found to have been involved in certain specified misconduct. The disparity of treatment of which petitioner in this case complained was not accomplished through any statutory classification or misapplication of law. The disparity was the result of different interpretations of the law, which was held proper in this circumstance, since federal courts are free to independently interpret statutes within their purview.

65. 601 F.2d at 467.

66. *Id.*

costs of the available appeal processes and willingly so. To presume otherwise would mean that deportable aliens would readily accept their deportation as inevitable and never apply for § 1182(c) relief at the outset. Such is not the case.

This reference to "costly appeals" is even more curious than is readily apparent. It suggests an economically-rooted decision rather than one rooted in law or social policy. The problem with economically-rooted decisions is that the courts are not always the best economists, nor do they always have reliable information on which to base economic choices.⁶⁷ Thus, the conclusion by the majority that the agency's avoidance of the costly appeal process was a sound and rational basis for its action was one reached in sacrifice of the uniformity of application of federal law and in the absence of any evidence on the costs of appeals. The Court's decision cannot be described as well-founded, then, for it failed to sufficiently manifest a rational basis for the agency's action.⁶⁸

C. *Authorities for the Court's Decision*

The credibility of the *Castillo-Felix* decision can be further analyzed by examining the authorities on which the court relied to determine whether or not they support the reasoning in the case. The *Anwo*⁶⁹ decision was most heavily relied upon by the majority throughout its opinion. It was cited in support of the INS interpretation of

67. It is not apparent from what source the majority obtained its "costly appeals" reasoning. No such argument was proffered by the U.S. government in the Brief for Respondent. If the majority took judicial notice of the costs of the appeal processes, it would have been helpful to note this in a footnote. This is especially important if the majority's treatment of appeal economics as crucial to the decision is to be taken seriously. Equally perplexing is the majority's use of "futile" to describe the Second Circuit appeals that would supposedly flow from the INS' refusal to adopt the *Lok* interpretation of § 1182(c) in that circuit, and thereby achieve consistency of application of this important federal law. It is not within the province of federal judges to decide the merits of taking appeals; this is the litigant's role. Furthermore, it is beyond a circuit court judge's role to direct another circuit court in the management of its docket. Arguably, the court in *Castillo-Felix* did this with respect to the Second Circuit.

68. One conceivable rational basis for the BIA's action is the reasoning which led them to their particular interpretation of the statute. It is this statutory interpretation which ultimately decided the case and not the Court's view of the costliness of the appellate process. Thus, the Court would have given a clearer, more understandable decision if it cited the BIA's reasoning behind its statutory interpretation as the rational basis for its action.

69. *Matter of Anwo*, Interim Decision #2604 (BIA 1977), *aff'd sub nom. Anwo v. INS*, 607 F.2d 435 (D.C. Cir. 1979).

§ 1182(c) relief eligibility where the Court stated that “[the INS] has consistently applied § 1182(c) only to aliens domiciled in this country for seven or more years after their admission for permanent residence.”⁷⁰ The majority’s reliance on *Anwo* will likely cause future confusion. The BIA decision in that case did support the interpretation of § 1182(c) adopted by the majority in *Castillo-Felix*; however, at the time of the appeal in the instant case, the appeal of the BIA decision in *Anwo* was already decided by the District of Columbia Circuit Court of Appeals. That court did not decide the case on the statutory interpretation basis put forth by the majority in *Castillo-Felix*, but rather on the legal technicality that *Anwo*, as a non-immigrant student, could not have met the domicile requirement under either interpretation of § 1182(c).⁷¹ Thus, the future use of *Anwo* and *Castillo-Felix* together as authority for the interpretation of § 1182(c) which requires that aliens must accumulate seven years of lawful unrelinquished domicile after their admission for permanent residence is suspect.

The majority also cited the BIA decision of *Matter of S*⁷² in support of the INS interpretation of § 1182(c). The Board there relied on the legislative background to § 1182(c), particularly Senate Report No. 1515⁷³ and House Report No. 1365.⁷⁴; both reports were quoted extensively in the Brief for Respondent.⁷⁵ Neither of these reports, however, is conclusive on the question of whether or not the seven years of domicile must accrue after admission for permanent residence. The Senate Report stated:

The suggestion was made that if the words “established after a lawful entry for permanent residence” were inserted in the 7th proviso to qualify the domicile of the alien it would effectively eliminate practically all of the objectionable features, and at the same time the Attorney General would be left with sufficient discretionary authority to admit any lawfully resident aliens returning from a temporary visit abroad to a lawful domicile of 7 consecutive years.

The subcommittee recommends that the proviso should be limited to aliens who have the status of lawful permanent residence

70. 601 F.2d at 463.

71. *Id.* at n.7.

72. In the *Matter of S*, 5 I&N Dec. 116 (BIA 1953).

73. S. Rep. No. 1515, 81st Cong., 2d Sess. 384 (1950).

74. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 51 (1952). This text is included verbatim in S. Rep. No. 1137, 82d Cong., 2d Sess. 11-12 (1952).

75. Brief for Respondent at 8-10, 17, 601 F.2d 459 (9th Cir. 1979).

who are returning to a lawful domicile of 7 consecutive years after a temporary absence abroad.⁷⁶

The above-quoted phrase was omitted from the final draft of § 1182 (c), however, and the subcommittee recommendation that remained is ambiguous. Aliens who have the status of lawful permanent residence may have such status for less than seven years and still return to a lawful domicile of seven consecutive years after a temporary absence abroad. The only way to avoid this possibility is to define "lawful unrelinquished domicile" with the prerequisite of "lawful permanent residence" status. This is precisely what the court did in *Castillo-Felix*, but its authority for doing so is not clearly based on the legislative history of § 1182(c). The House Report compared the then-existing law to the new provision of § 1182(c):

Under present law in the case of an alien returning after a temporary absence to an unrelinquished United States domicile of 7 consecutive years, he may be admitted in the discretion of the Attorney General under such circumstances as the Attorney General may prescribe. Under existing law the Attorney General is thus empowered to waive the grounds of exclusion in the case of an alien returning under the specified circumstances even though the alien had never been lawfully admitted to the United States. The comparable discretionary authority invested in the Attorney General in section 212(c) of the bill is limited to cases where the alien had been previously admitted for lawful permanent residence and has proceeded abroad voluntarily and not under order of deportation.⁷⁷

This paragraph is likewise ambiguous. The meaning of the term "previously admitted for lawful permanent residence" is unclear from this passage. The term is susceptible to an interpretation which requires aliens to have lawful permanent residence prior to going abroad only. This interpretation would not include the requirement that such status be acquired prior to the seven year period of unrelinquished domicile. Again, to interpret the provisions of § 1182(c) as the court did in *Castillo-Felix*, one must establish that lawful permanent resident status is a definitive prerequisite to the seven year lawful unrelinquished domicile requirement. This is a necessary link in the chain of reasoning that led to the rule of law formulated by the Court.

76. S. Rep. No. 1515, 81st Cong., 2d Sess. 384 (1950).

77. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 51 (1952).

D. *The Rule of Law*

The rule of law gleaned from the case of *Castillo-Felix v. INS*⁷⁸ may be stated in any of the following ways. Aliens seeking discretionary relief from deportation pursuant to 8 U.S.C. § 1182(c) must accumulate seven years of lawful unrelinquished domicile after their admission as permanent residents to be eligible under that provision. More broadly worded, the rule is that to be eligible for § 1182(c) relief, aliens must have seven years of lawful unrelinquished domicile subsequent to their attaining permanent resident status. A narrow form of the rule is that in the BIA case of a deportable alien who petitioned for discretionary relief from deportation pursuant to 8 U.S.C. § 1182(c), the BIA correctly denied the resident alien relief on the statutory ineligibility ground that aliens must accumulate seven years of lawful unrelinquished domicile after their admission as permanent residents.

Broadly stated, the rule of law pertaining to equal protection is that adherence to the law of the circuit only within that circuit does not violate the equal protection rights of an alien. A narrow formulation of this rule is that the BIA decision to follow the Second Circuit interpretation of 8 U.S.C. § 1182(c) only within that circuit, and to retain its own interpretation outside the Second Circuit, did not violate petitioner's equal protection rights where petitioner was denied relief by virtue of the less favorable INS interpretation because the agency had a rational basis for its actions.

III. IMPLICATIONS OF THE DECISION

The decision in *Castillo-Felix* both clarified and muddled parts of immigration law surrounding 8 U.S.C. § 1182(c). Clearly, the decision placed the Ninth Circuit in direct conflict with the Second Circuit with regard to the statutory requirements for eligibility under § 1182(c).⁷⁹ The Second Circuit after *Lok* may no longer require that the seven years of lawful unrelinquished domicile follow admission for permanent residence in order for an alien to qualify for § 1182(c) relief. The *Castillo-Felix* decision reaffirms this requirement in the Ninth Circuit.

One point of statutory eligibility not specifically addressed in this section is the departure requirement of § 1182(c).⁸⁰ Although

78. 601 F.2d 459 (9th Cir. 1979).

79. *Id.* at 467 (Takasugi, J., dissenting).

80. *Id.* at 462.

the majority dealt with this requirement in an early footnote,⁸¹ it specifically stated that "we need not resolve an apparent conflict between this circuit and the Second Circuit."⁸² The Court maintained that petitioner would fail to qualify for relief if the departure requirement was an issue in the case.⁸³ The dissent noted that the *Francis* decision made the viability of the departure requirement questionable in the Ninth Circuit and eliminated it in the Second Circuit.⁸⁴ Thus, it appears that the departure requirement still has effect in the Ninth Circuit if we trust the language found in the majority's dicta and footnotes.

IV. CONCLUSION

In summary, *Castillo-Felix* stands as a legal roadblock in the alien's path toward § 1182(c) discretionary relief. This decision applies to aliens who fail to accumulate seven years of lawful unrelinquished domicile after their admission for permanent residence, regardless of the degree to which they have established roots in the United States. The decision also fosters a disparate application of § 1182(c), creating a situation in which similarly situated deportable aliens may be accorded greater protection under law in the Second Circuit than outside that circuit. This is accomplished solely on the basis of a differing interpretation of § 1182(c). Such a situation is in disharmony with the policy favoring uniformity of federal law application. It appears, then, that unless the federal courts or the Supreme Court⁸⁵ can decipher the "true" meaning of § 1182(c) in future cases, there will evolve a dual line of cases under that provision until Congress deems it appropriate to step in via the repeal and amendment process.⁸⁶

Jeffrey Marcus*

81. *Id.* at n.6.

82. *Id.*

83. *Id.* (recognizing that the Ninth Circuit retained the departure requirements in *Arias-Urbe v. INS*, 466 F.2d 1198 (9th Cir. 1972)).

84. 601 F.2d at 470 n.4.

85. The Supreme Court may properly grant certiorari to appeals from circuit courts of appeals to resolve conflicting interpretations of federal law. See *Alexander v. HUD*, 441 U.S. 39, 49 (1979).

86. It should be noted that the BIA's decision in the *Lok* case on remand may resolve some of the differences discussed herein. That is, a BIA decision requiring attainment of the seven year lawful domicile requirement subsequent to obtaining admission for permanent residence would align the Second and Ninth Circuits and render the equal protection arguments moot.

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