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ARE THE BORDERS CLOSING? Errico to Reid: A New Court and an Aging Frontier

VICKI JOINER MUSTO* AND JUDITH RUFFO**

The number of illegal aliens in the United States with the consequent economic and social problems continues to increase. One response from the United States Supreme Court is a limitation of the waiver of deportation provision for illegal aliens who gained entry through a misrepresentation, but have families partially composed of United States citizens. The author suggests that this change in emphasis goes too far in restricting congressional intent to preserve family unity.

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I. INTRODUCTION

The United States, the land built by immigrants, continues to hold an attraction for people seeking to begin anew, be it legally or otherwise. According to statistics provided by the United States Department of Justice, during the fiscal year 1974, the total annual limit on legal immigration of aliens was 290,000;¹ however, even

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¹ IMMIGRATION AND NATURALIZATION SERVICE, ANNUAL REPORT 3 (1974).
The conservative government estimates place illegal entrance of aliens at over 1 million. The problems created by this large illegal alien population include: 1) the elimination of jobs which would otherwise be held by United States citizens; 2) a drain on social services of all types with minimal or no payment of taxes by the illegal alien; 3) depression of the wages paid American workers; and 4) aggravation of the balance of payments deficits by the sending of American currency out of the United States.

The social problems, real or imagined, are stirring proposals for counter-measures. The Immigration and Naturalization Service (INS), along with Congressman Peter Rodino, are proposing that legislation be passed which will penalize an employer who knowingly hires illegal aliens; that is, requiring that employers hire only persons with proof of United States citizenship.

The problem, when considered in the aggregate, becomes abstract. The problem must be considered in human terms: What is to be done about a native of another country, i.e., an “alien,” who has lived in this country and who has become part of family composed partially of United States citizens or permanent resident aliens when it is later discovered that the person originally gained entry into this country through some form of misrepresentation?

Congress’ solution to this problem is contained in the Immigration and Nationality Act section 241(f):


The Rodino Bill would amend the Immigration and Nationality Act § 274, 8 U.S.C. § 1324 (1970) to impose a system of civil-criminal penalties upon those who knowingly employ illegal aliens. The bill would allow a procedural change having a significant effect: an illegal alien from the Western Hemisphere would adjust his status to that of permanent resident alien without having to return to his home country. Pertinent to the purposes of this article is the provision in section 2 that an illegal alien related to a United States citizen and physically present in the United States since June 30, 1965, would be eligible for adjustment of status.

The Kennedy Bill differs from the Rodino Bill in that there is no scienter provision, and there is liability only for civil penalties. The Kennedy Bill also makes changes in the adjustment of status provisions, requiring physical presence for 3 years as of January 1, 1975, or illegal presence and entry before October 3, 1965.
The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.4

The United States Supreme Court has made it clear that this legislative treatment is no solution. This section has been construed twice by the Supreme Court, once by the Warren Court, and recently by the Burger Court, with seemingly contradictory results. The Warren Court expressed its construction of section 241(f) in the consolidated Errico and Scott cases of 1966.5 The decision established that section 241(f) applied to any deportation order resulting directly from the misrepresentation made by the alien at time of entry, regardless of the section of the statute under which the order was brought.6 Thus, under the Warren Court, section 241(f) afforded an encompassing protection from deportation to the alien, related to a United States citizen or a lawful resident alien, who gained entry through misrepresentation.

The Burger Court has withdrawn much of this protection from the alien and his family. On March 18, 1975, the Court, in Reid v. Immigration and Naturalization Service,7 announced that the waiver of the deportation provision of section 241(f) is applicable exclusively to deportation charges which are based on section 212(a)(19),8 pertaining to aliens excludable because of entry by fraud or misrepresentation, and which are brought under section 241(a)(1), which enumerates quota requirements for entry.9 The effect of this

6. 385 U.S. at 217.
   (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States.
   (19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact.
9. 420 U.S. at 630, referring to section 212(a)(19). See note 8 supra for the text of section 212(a)(19), and note 26 infra for the text of section 241(a)(1).
decision is simple, clear, and pervasive: unless the INS chooses to base its deportation charges on these specific provisions, as obviously it would not, section 241(f) offers no more than an illusion of relief from deportation to the illegal alien.

In formulating its decision, the Court relied on its own narrow interpretation of the holding in *Errico* and looked to the literal language of the law, while only obliquely considering the policy behind it. It is this narrow reading to which the Court pledged its adherence.10 Thus, although *Errico* has not been expressly overruled, it has been supplanted by a decision which will result in personal tragedies for many aliens who are most deserving of a deportation waiver under the provisions of an extremely harsh act11 and who are among those aliens Congress sought to protect.12

II. HISTORICAL BACKGROUND AND THE LATE GREAT CASE OF *Errico*

The need for a waiver of deportation provision became apparent shortly after World War II, when those who had become homeless

10. 420 U.S. at 629.
11. The Act now has 31 provisions containing grounds for exclusion. Immigration and Nationality Act §§ 212(a)(1)-(31), 8 U.S.C. §§ 1182(a)(1)-(31) (1970). These overlapping provisions often have multiple terms, which greatly increase the number of grounds on which an alien can be excluded. Similarly, although the Act enumerates 18 basic grounds for deportation, §§ 241(a)(1)-(18), 8 U.S.C. §§ 1251(a)(1)-(18), it is estimated that among the multiple and overlapping terms, there may be hundreds of separate grounds for deportation.

Furthermore, grounds for deportation are retroactive, covering actions which were not illegal at the time they were committed. Immigration and Nationality Act § 241(d), 8 U.S.C. § 1251(d) (1970). Nor is there any statute of limitations during which the INS must either bring charges or waive the grounds. *Id.*

The retroactive effect of the deportation provisions has been held not to violate the constitutional prohibition against *ex post facto* laws, Lehman v. United States ex rel. Carson, 353 U.S. 685 (1957), nor does deportation constitute cruel and unusual punishment. Cortez v. Immigration and Naturalization Serv., 395 F.2d 965 (5th Cir. 1968). In addition, the Act places the burden of proof on the *alien* to prove the alien's admissibility. Immigration and Nationality Act § 291, 8 U.S.C. § 1361 (1970).

In regard to procedural due process, only the bare minimum is provided to an alien: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950). The alien apparently has no right to substantive due process. *See generally* 2 C. Gordon and H. Rosenfield, *Immigration Law and Procedure* § 7.2 (rev. ed. 1976).


and stateless during the war sought admission to the United States. The Displaced Persons Act of 1948 provided for the admission of war refugees to the United States and represented one of several legislative efforts to partially humanize an increasingly harsh Act. Many of the refugees misrepresented their nationality or other information in order to avoid being repatriated to a Communist country and thereby violated section 10 of that Act, which provided that persons making willful misrepresentations for the purpose of gaining admission “shall thereafter not be admissible into the United States.” This situation was thought to be so harsh as to merit reform. In 1952 when the Act was revised, the House Committee attached a provision which would have saved such refugees from deportation when they misrepresented information in order to avoid repatriation and persecution. This provision was removed by the Conference Committee which instead substituted an Opinion by the Committee on how the section should be applied. The INS and the Attorney General did not apply the statute as the Conference Committee recommended, believing that the bald statutory language did not allow for a congressional exception in the form of a mere written Committee Opinion; thus, the immigrants in question were deported.

In 1957 a reform act was passed to grant relief from the application of such provisions. The purpose was plainly to grant exceptions to the Act in order to keep family units together. In many instances, preserving the family was seen as more important than enforc-

15. This reads in part as follows:
   It is also the opinion of the conferees that the sections of the bill which provide for the exclusion of aliens who obtained travel documents by fraud or by willfully misrepresenting a material fact, should not serve to exclude or to deport certain bona fide refugees who in fear of being forcibly repatriated to their former homelands misrepresented their place of birth when applying for a visa and such misrepresentation did not have as its basis the desire to evade the quota provisions of the law or an investigation in the place of their former residence.
   For expressions of congressional concern which preceded its passage, see H.R. REP. No. 1365, 82d Cong., 2d Sess. 29 (1962); H.R. REP. No. 2096, supra note 15. For congressional intent see H.R. REP. No. 1199, 8th Cong., 1st Sess. 11 (1957) and S. REP. No. 1057, 86th Cong., 1st Sess. (1957).
ing strict quota limitations or keeping undesirable aliens out of the country, such as aliens afflicted with tuberculosis or those who had been convicted of a crime involving moral turpitude.\textsuperscript{17}

Section 7 of this Act\textsuperscript{18} granted relief from deportation for aliens who had originally gained entry or documentation through fraud or misrepresentation, but who were the spouse, parent, or child of a United States citizen and were otherwise admissible. The current section 241(f) is essentially a re-enactment of section 7 of the 1957 Act,\textsuperscript{19} omitting the latter portion which had dealt with war refugees who made misrepresentations out of fear of persecution. This latter part covered those refugees who did not possess a special familial relationship to a United States citizen or permanent resident only during the years of the war’s aftermath, 1945 through 1954. It was subsequently eliminated in whole because it had served its purpose. The first part of section 7 was left intact to become the current section 241(f).

As the Warren Court pointed out in \textit{Errico},\textsuperscript{21} section 7 of the 1957 amendments waived deportation for two different groups of aliens who committed a fraud or misrepresentation at the time of

\begin{itemize}
\item \textbf{Aliens who sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentations, or (2) aliens who were not of the nationality specified in their visas, shall not apply to an alien otherwise admissible at the time of entry who (A) is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence; or (B) was admitted to the United States between December 22, 1945, and November 1, 1954, both dates inclusive, and misrepresented his nationality, place of birth, identity, or residence in applying for a visa: Provided, That such alien described in clause (B) shall establish to the satisfaction of the Attorney General that the misrepresentation was predicated upon the alien’s fear of persecution because of race, religion, or political opinion if repatriated to his former home or residence, and was not committed for the purpose of evading the quota restrictions of the immigration laws or an investigation of the alien at the place of his former home, or residence, or elsewhere.}
\end{itemize}

\textsuperscript{17} Immigration & Naturalization Serv. v. Errico, 385 U.S. 214, 220 (1966); see War Brides Act of 1945, ch. 591, § 1, 59 Stat. 659 (1945); Gordon & Rosenfield, supra note 11, at § 7.11(d).

\textsuperscript{18} Section 7 of the Act of Sept. 11, 1957, Pub. L. No. 85-316, 71 Stat. 639, 640-41 reads as follows:

\begin{verbatim}

The provisions of section 241 of the Immigration and Nationality Act relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as (1) aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentations, or (2) aliens who were not of the nationality specified in their visas, shall not apply to an alien otherwise admissible at the time of entry who (A) is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence; or (B) was admitted to the United States between December 22, 1945, and November 1, 1954, both dates inclusive, and misrepresented his nationality, place of birth, identity, or residence in applying for a visa: Provided, That such alien described in clause (B) shall establish to the satisfaction of the Attorney General that the misrepresentation was predicated upon the alien’s fear of persecution because of race, religion, or political opinion if repatriated to his former home or residence, and was not committed for the purpose of evading the quota restrictions of the immigration laws or an investigation of the alien at the place of his former home, or residence, or elsewhere.

\end{verbatim}

(emphasis added).


\textsuperscript{20} Id.

\textsuperscript{21} 385 U.S. at 222.
entry. The first group were entitled to the waiver of deportation if they established that they were the spouse, parent, or child of a United States citizen, and that they were otherwise admissible. The second group (who did not have the family relationship noted above) were entitled to a waiver of deportation if they established that they were otherwise admissible, that the misrepresentation was due to fear of persecution upon possible repatriation, and that the misrepresentation had not been committed for the purpose of evading the quota restrictions or an investigation of their backgrounds.

The Court reasoned that aliens comprising the first group were admissible even if their fraud did have the purpose of evading quota restrictions or an investigation, by reason of their special and close family relationship to a United States citizen or permanent United States resident. This conclusion was substantiated by the fact that the second group of aliens, who might be refugees from Communist countries, yet who did not have such a family relationship with a United States citizen, were required to prove that their fraud had not been for the purpose of avoiding quota restrictions or to impede an investigation. Thus, the Court found that aliens who did possess the special family relationships designated in the first part of section 7 of the 1957 Act did not have to comply with quota restrictions in order to be “otherwise admissible” and to have deportation waived.22 Such an interpretation is consistent with the legislative intent that where the unity of a family partially composed of United States citizens is at stake, Congress opted for forgiveness rather than retribution.23

22. Id. at 223. In support of the Errico analysis of section 241(f)'s development and that any alien covered by it does not have to additionally satisfy quota requirements in order to be otherwise admissible, see Wendell & Kolodny, Waiver of Deportation: An Analysis of Section 241(f) of the Immigration & Nationality Act, 4 Calif. Int'l L.J. 271, 306 & n. 183:

The court might have further buttressed its argument by noting that the term "otherwise admissible" was used in both the 1907 and 1917 Acts which antedated the quota restrictions which first appeared in 1921.

23. Immigration & Naturalization Serv. v. Errico, 385 U.S. 214, 224-25 (1965); Barber v. Gonzales, 347 U.S. 637, 642-43 (1954). In Lee Fook Chuey v. Immigration & Naturalization Serv., 439 F.2d 244, 250-51 (9th Cir. 1971), the court expressed the legislative intent as follows:

When Congress enacted this provision, it was reconciling strong and conflicting policies. . . . Section 241(f) as we have interpreted it, is the result of the ineffective enforcement of the immigration laws, not the cause of it. . . . Congress made the wholly reasonable choice that the interest in family unity outweighs the deterrent effects of a more draconian policy.
A. Errico

The Errico and Scott cases presented the following facts. Mr. Errico, a native of Italy, gained first preference quota status under the statutory preference scheme in effect at the time by falsely representing to the immigration authorities that he was a skilled mechanic in repairing foreign automobiles. He and his wife thus entered the United States in 1959. A child was born to them in 1960 and became an American citizen at birth.\(^\text{24}\) In 1963 deportation proceedings were commenced against the Erricos on the ground that Mr. Errico was excludable at the time of entry in that he was not of the quota status specified in the immigrant visa.\(^\text{25}\) In Scott, Miss Scott, a native of Jamaica, contracted a proxy marriage with a United States citizen solely for the purpose of obtaining non-quota status for entry under the Act. She entered the United States in 1958 and gave birth to an illegitimate child who became an American citizen at birth. Deportation proceedings were begun when the fraud was discovered, on the ground that she was not of the non-quota status specified in her visa. Charges were brought under section 241(a)(1) for deportation based on excludability under section 211 dealing with quota limits.\(^\text{26}\)


\(^{25}\) The status of an immediate relative such as Mrs. Errico stems from the status of the applicant. If the applicant qualifies for preferred treatment, then immediate relatives are admitted without regard to the numerical limitations (quotas). Immigration and Nationality Act § 201(b), 8 U.S.C. § 115(b) (1970).

\(^{26}\) In both Scott and Errico deportation was based on section 241(a)(1) of the Act, 8 U.S.C. § 1251(a)(1) (1970), which provides:

(a) Any alien in the United States (including an alien crewman) shall upon the order of the Attorney General, be deported who —

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry . . . .

Since the aliens in the two cases were not of the quota status listed on their visas, they were excludable at entry under section 211 of the Act, 8 U.S.C. § 1181 (1970), and therefore, deportable under section 241(a)(1). Section 211 reads in pertinent part:

With respect to immigrants to be admitted under quotas of quota area prior to June 30, 1968, no immigrant visa shall be deemed valid unless the immigrant is properly chargeable to the quota area under the quota of which the visa is issued.
Each alien argued that he was saved from deportation by section 241(f) of the Act. In *Errico*, the special inquiry officer of INS ruled that the alien was not entitled to relief under section 241(f) because, without compliance with quota requirements, the alien was not "otherwise admissible at the time of entry." The Board of Immigration Appeals affirmed the deportation order, but the United States Court of Appeals for the Ninth Circuit reversed the Board, holding that such a construction of section 241(f) would strip it of practically all meaning. In *Scott*, the deportation order of the INS was affirmed by the Board of Immigration Appeals, and by the United States Court of Appeals for the Second Circuit which held that since the alien was not of the non-quota status claimed in her visa, she was not entitled to relief under section 241(f) because she was not "otherwise admissible at the time of entry." Upon consolidation, the Supreme Court affirmed the decision in *Errico* and reversed the decision in *Scott* and held, with Chief Justice Warren writing for six members of the Court, that an alien who evaded quota restrictions by fraud or misrepresentation was not denied relief under section 241(f) as an alien not "otherwise admissible at the time of entry." In broader terms, the Court indicated that: (1) section 241(f) cannot be limited to a deportation charge brought under section 212(a)(19) of the Act, which would be the literal application of section 241(f); (2) such literal application would contravene the legislative purpose of the 1957 amendments to the harsh deportation provisions of the original Act of 1952; (3) since misrepresentations are made about factors which will affect admissibility, a construction of the section which forgives the misrepresentation but not the factor misrepresented, would strip the section of practical effect; and (4) where there is doubt as to the proper construction of the Act, the doubt should be resolved in favor of the alien. Justices Stewart, Harlan, and White dissented.

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27. 349 F.2d 541 (9th Cir. 1965) (order of deportation vacated). The concurring opinion states that the statutory language "otherwise admissible refers to matters other than matters of quota status." *Id.* at 547 (Duniway, J.)
28. 350 F.2d 279 (2d Cir. 1965).
31. 385 U.S. at 225. The dissent based its opinion on two grounds: (1) that section 241
B. Reid: The New Lead Case

In Reid the aliens, a husband and wife, citizens of British Honduras, entered the United States without a thorough inspection by the immigration authorities by falsely stating that they were United States citizens. Subsequently they had two children born in the United States. An order of deportation against the Reids was affirmed by the United States Court of Appeals for the Second Circuit, and certiorari to the Supreme Court was granted to resolve a conflict between this holding and a contrary conclusion in the Ninth Circuit in Lee Fook Chuey v. Immigration and Naturalization Service, which followed Errico.

In Reid, the Burger Court held that the INS could have brought charges against the Reids under section 212(a)(19), dealing with general classes of excludable aliens, or under section 241(a)(1), pro-

- applies only where a deportation is sought because of fraudulent entry; and (2) even were section 241 applicable, these two applicants were not otherwise admissible because they evaded the quota requirements. Typifying the phrase "otherwise admissible" as a term of art," id. at 229, the dissenters defined it as including quota restrictions. The dissent subsequently interpreted legislative history as having shown no intention of Congress to alter or modify the quota system. Id. at 228 n.4. To allow a waiver for evasion of quota would be contradictory to this intent. The meaning of section 241(f) is maintained, according to the dissent, by applying it to the many countries not restricted by quotas whose emigrants would benefit therefrom.

32. When an alien, as in Reid, comes into customs or INS inspection facilities and in reply to a question concerning his nationality, that alien falsely claims to be a United States citizen, a question arises as to how such an obvious misrepresentation at the time of entry gets converted into an entry "without inspection." Clearly the alien went through customs facilities, was physically observed, and was questioned.

The Court and INS consider the above facts to constitute an entry without inspection because immigration officials do not question as closely persons who claim to be United States citizens as they do others in order to determine their admissibility. Note, however, that in truth, this is not a failure of the alien to be inspected, but a failure by immigration officials to inspect. These aliens do not have United States passports, documents, or identification. They simply assert that they are United States citizens. There is no logical reason why the immigration officials should cease to question them when they have no United States identification. In fact, immigration officers have both the power and the duty to question thoroughly anyone who cannot document his citizenship to the satisfaction of the officer. Federal regulations stipulate: "[I]f such an applicant for admission fails to satisfy the examining immigration officer that he is a U.S. citizen, he shall thereafter be inspected as an alien." 8 C.F.R. § 235.1(b) (1976) (emphasis added). See also Immigration and Nationality Act § 235, 8 U.S.C. § 1225 (a) (1970).


34. 439 F.2d 244 (9th Cir. 1970).
viding deportation if excludable at time of entry, and thus the aliens would have been saved from deportation by section 241(f). But since the INS brought charges under section 241(a)(2) instead, the Court held that the waiver provision of section 241(f) would not apply. The Court viewed section 241(a)(2) as a separate and independent ground for deportation, independent of all section 212 grounds for initial excludability, which are also grounds for deportation under section 241(a)(1).

The Court found section 241(f) inapplicable because "by its terms [it] grants relief against deportation of aliens 'on the ground that they were excludable at the time of entry . . . ." Furthermore, "[t]he language of § 241(f) tracks with the provisions of § 212(a)(19) . . . dealing with aliens who are excludable." Later, the Court indicated that "the 'explicit language' of § 241(f) . . . waives deportation for aliens who are 'excludable at the time of entry' by reason of the fraud specified in § 212(a)(19), and for that reason deportable under the provisions of § 241(a)(1)." In addition to having held earlier that section 241(f) did not apply to section 241(a)(2), the Court later limited the waiver to charges brought

   (a) Any alien in the United States (including an alien crewman) shall upon the
   order of the Attorney General, be deported who . . .
   (2) entered the United States without inspection or at any time or place other
   than as designated by the Attorney General or is in the United States in violation
   of this chapter or in violation of any other law of the United States.

36. 420 U.S. at 622 n.2, 623. Although the Reid Court quotes and subsequently misquotes
the recognized immigration law authority of Gordon and Rosenfield, Immigration Law and
Procedure, in support of the proposition that a deportation charge brought under section
241(a)(2) (entry without inspection) is "independent" and, therefore, somehow exclusive of
all others (namely the waiver of deportation provision of section 241(f)), section 241(a)(2) is
an alternative and not exclusive provision upon which a deportation charge can be based. A
single set of facts can give rise to a deportation charge under any of many separate provisions.
The facts covered by section 241(c), 8 U.S.C. § 1251(c) (1970) are facts which result in
excludability under section 212(a)(19) and from which one would naturally think a deporta-
tion charge under section 241(a)(1) would shortly follow, but the deportation charge can be
based on section 241(a)(2) (entry without inspection) just as well. (See note 67 infra for text
of section 241(c)). See also Gordon & Rosenfield, supra note 11, §§ 4.1(b), 4.7(c) concerning
section 212(i) of the Act, 8 U.S.C. § 1182(i) (1970), which is a waiver of grounds for exclusion
based on family relationship, as section 241(f) is a waiver of grounds for deportation based
on family relationship. The waiver of section 212(i) of the Act has been applied to waive
exclusion where based on entry without inspection, Matter of Y, 8 I. & N. Dec. 143 (1959)
(alien falsely represented that he was a United States citizen).

37. 420 U.S. at 623.
38. Id. at 622.
39. Id. at 623 (emphasis added).
Reference was made to lower court decisions which have allowed the waiver of deportation of section 241(f) to be applied to acts subsequent to entry on a theory that there was an undisclosed fraudulent intent, rather than an overt action, at the time of entry. The Court indicated that this was an irrational result because aliens with United States citizens in their families are saved from deportation if they can prove their dishonesty, while aliens with United States citizens in their families but who cannot prove their undisclosed fraudulent intent, are deported. The Court also referred to one other lower court decision, which held that section 241(f) waived deportation under section 241(a)(1) even if there was no fraud involved.

Section 241(f) waives deportation for charges involving fraud, which is committed at the time of entry. If there are lower court decisions which have extended section 241(f) further than it can go by its own terms, then the Court could and should overrule those decisions; but there is nothing in a few liberal decisions which justifies a restrictive literal interpretation of the waiver which, in violation of congressional purpose, functionally eliminates section 241(f) from the Act.

Furthermore, when section 241(f) is correctly applied to the events surrounding the time of entry, there is nothing legislatively irrational about it. It makes sense to have such a provision which, in consideration of the policy of preserving the family units of United States citizens and permanent residents, forgives fraud committed at the time of entry for certain aliens. It would make little sense to have a provision waiving deportation for aliens who at the time of entry did not make any misrepresentations because (1) if they did not make any misrepresentations but were ineligible for

40. Id. at 630. Errico seems to hold to the contrary, however, for the Court stated:

At the outset it should be noted that even the Government agrees that § 241(f) cannot be applied with strict literalness. Literally, § 241(f) applies only when the alien is charged with entering in violation of § 212(a)(19) of the statute . . . . The Government concedes that such an interpretation would be inconsistent with the manifest purpose of the section, and the administrative authorities have consistently held that § 241(f) waives any deportation charge that results directly from the misrepresentation regardless of the section of the statute under which the charge was brought . . . .

385 U.S. at 217.
41. 420 U.S. at 629.
admission, they remain outside the country, and (2) if they did not make any misrepresentations and were eligible for admission anyway, they are not going to be facing a deportation charge—unless it is for something that they have done since entry. In either instance the section 241(f) exception does not apply. Thus, despite the smoke screen thrown up by the Court, section 241(f), waiving fraud or misrepresentation at the time of entry for aliens who now have families composed partially of United States citizens, cannot be said to be irrational because there is not a corollary provision for people who do not need one.

Section 241(f) is highly dependent upon its legislative history since its language standing alone has proven difficult to apply. It is, therefore, disheartening that Reid dealt very little with legislative history. It did acknowledge that the congressional intent of section 241(f) was to “[grant] relief to limited classes of aliens whose fraud was of such a nature that it was more than counterbalanced by after-acquired family ties.” Unfortunately, there was no discussion of the type of fraud which can be off-set by familial ties.

In the footnote to this acknowledgement of congressional intent the Court indicated:

> The legislative history of this provision, designed primarily to prevent the deportation of refugees from totalitarian nations for harmless misrepresentations made solely to escape persecution, is fully consistent with our interpretation of the provision.4

> It is submitted that this is an incorrect interpretation of legislative history since it was not the (B) part of section 7 of the 1957 Act (dealing with the entrance of war refugees between the years of 1945 and 1954) which was the forerunner of section 241(f), but the first part of section 7 which remains intact today. The significance of this fact cannot be overlooked since the first part of section 7 emphasized the family relationships of the alien and did not require quota compliance, whereas the latter part of section 7, now repealed, did not emphasize the family and did require quota compliance! Furthermore, examination of section 7(B) shows that it waived misrepresentations concerning “nationality, place of birth, identity, or residence.” Nationality and place of birth are factors which would

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43. Id. at 630.
44. Id. n.8.
45. See notes 18 and 19 supra and accompanying text.
be crucial to determining an alien's quota status, and identity is a factor which would be crucial in conducting an investigation into an alien's background. Therefore, the Act did not waive only "harmless" misrepresentations, but *material* misrepresentations which were intended by Congress to be waived. These are certainly two important points in the legislative history of section 241(f), and it is not encouraging that the Court did not appear to consider such clear language. As the dissenting Justices in *Reid* lamented: "Today the Court strains to construe statutory language against the alien."47

III. LIMITATION OF THE SECTION 241(f) WAIVER

A. A False Schism is Created: Excludable/Deportable

There are several devices that the United States Supreme Court uses in order to drastically reduce the viability of section 241(f). The first device is embodied in an effort to create a false schism between the words "excludable" and "deportable." The Court attempted to establish the idea that there is a great difference in significance between these two words: "Because of the complexity of Congressional enactments relating to immigration, some understanding of the structure of these laws is required before evaluating the legal contentions of petitioners."48 In introducing the Act, the Court emphasized that "[s]ection 212 of the Act . . . specifies various grounds for exclusion of aliens seeking admission to this country, [whereas] [s]ection 241 . . . specifies grounds for deportation of aliens already in this country."49

The Court discussed the factual situation of the deportation under section 241(a)(2) refering to the well-known treatise, Gordon and Rosenfield, *Immigration Law and Procedure*, for support of the Court's proposition that: "Entry without inspection is grounds for deportation under § 241(a)(2) even though the alien was not excludable at the time of entry under § 241(a)(1) . . . . It is a basis for deportation wholly independent of any basis for deportation which may exist under § 241(a)(1)."50

From this point on the Court seemed to misquote its own proposition. For example: "Section 241(a)(2) establishes as a separate

47. 420 U.S. at 634 (Brennan & Marshall, JJ., dissenting).
48. *Id.* at 621.
49. *Id.* (emphasis added by the Court).
50. *Id.* at 622 n.2.
ground for deportation, quite independently of whether the alien was excludable at the time of his arrival, the failure of an alien to present himself for inspection at the time he made his entry." This differs from the statement quoted above that section 241(a)(2) is a ground for deportation "even though the alien was not excludable at the time of entry under § 241(a)(1)." (emphasis added). Merely because an alien does not have to be excludable at the time of entry under section 241(a)(1) in order to be deportable under section 241(a)(2), does not mean that an alien was not excludable at the time of entry.

It is important to ascertain why the Court tried to create a dichotomy between the grounds for excludability and deportability. The reason is apparent in its statement that "nothing in the waiver provision of § 241(f), which by its terms grants relief against deportation of aliens 'on the ground that they were excludable at the time of entry,' has any bearing on the case," (the Reid case is based on section 241(a)(2)). This appears to be the Court's motive in trying to create a schism between grounds for excludability and grounds for deportability; it is done in order to claim that section 241(f) cannot apply to a section 241(a)(2) deportation for failure to be inspected.

Note, however, that in order to get to this claim, it seems that the Court must misconstrue its own authority and also section 241(f) as it relates to its ground for waiver. The Court's construction of section 241(f) simply eliminates the wording "sought to procure . . . entry into the United States by fraud or misrepresentation" from section 241(f) since in the future, the very same conduct will be termed "entering without inspection," and will be routed through section 241(a)(2), where the Court said the section 241(f) forgiveness clause cannot touch it.

Furthermore, there does not seem to be any such schism in the Act between the grounds for excludability and grounds for deportability for several reasons: (1) the Act does not differentiate exclusion from deportation by the inclusion of separate definitions; (2) many of the provisions of the Act overlap immensely with each other and

51. Id. at 623.
52. See notes 55-58 infra and accompanying text.
53. 420 U.S. at 623.
apparently without any rigid demarcation between exclusion grounds and deportation grounds other than the title captions for section 212 and section 241; and (3) a provision such as section 241(a)(2) makes every conceivable ground under the Act and every violation of any law of the United States a ground for deportation, thus rendering the whole question meaningless. The last clause of section 241(a)(2) stipulates deportation for any alien "who is in the United States in violation of this chapter or in violation of any other law of the United States." (emphasis added). In other words, any provision of the Act, as well as any violation of any provision of any law relating to presence within the United States is a ground for deportation.

Thus it is clear that the invention by the Court which prevented section 241(f) from applying to section 241(a)(2), has the effect of reading section 241(f) entirely—and not just the language concerning "entry"—out of the Act, because any deportation charge can be routed through section 241(a)(2) and now be completely untouched by section 241(f) where, by the facts of the case, it should apply. The question remains whether the will and purpose of Congress to waive deportation for a certain class of aliens (those who have been in the United States for some time, are part of families at least partially composed of United States citizens, and who are facing deportation not for anything that they have done since being in the United States but solely for a past misrepresentation at the time of entry) should be completely frustrated on the basis of a fictitious schism. It is submitted that this simply could not be the congressional intention.

B. Statutory Language is Made Rigidly Technical

The scope of the section 241(f) waiver is complicated by its awkward phraseology.\textsuperscript{55} For example, what is the meaning of the words "excludable at the time of entry?" If there is a provision of the deportation section which would cover an alien who obtained entry by making a fraudulent statement at the time of entry, is it covered by section 241(f) even though the provision does not explicitly mention that such persons would also have been excludable at the time of entry? The Reid Court used this interpretation as a

\textsuperscript{55} See note 4 supra and accompanying text.
Perhaps avoiding the immigration authorities by falsely claiming to be United States citizens can constitute entering without inspection, but it is also apparent that aliens making such a statement gained entry into the United States by making a fraudulent representation at the time of entry. It would seem apparent, therefore, that section 241(f) would apply (where its internal terms are met) to deportation proceedings under section 241(a)(2) for entering without inspection. But how technical is the language in section 241(f) about aliens “excludable at the time of entry” for obtaining false documentation or entry by fraud? If the deportation charge to be waived by section 241(f) must explicitly use the words “excludable at the time of entry,” then section 241(f) does not waive deportation under section 241(a)(2) for entering without inspection. On the other hand, if an alien went to immigration inspection facilities and then refused, for example, to answer any questions put by the officials, who can doubt that the alien would be excludable? Clearly someone who refused to answer inspection questions would be excludable at the time of entry.

The real difference between being excludable and being deportable is the time at which one is apprehended. If one is apprehended at the time of entry, one is said to be excludable, for it is conceptually difficult to “deport” someone who has not yet entered the country. However, if one is apprehended after entering, then one is said to be deportable. It is important to note that the Immigration Act section on definitions does not define or differentiate the words “excludable” or “deportable.” Therefore, it is unlikely that the language in section 241(f) was intended to have a rigid technical application.

The Reids came to the attention of the immigration authorities after entry, and, therefore, were “deportable.” This, however, does not mean that they were not excludable at the time of entry. The simple fact is that if they had been caught in the falsehood at the time of entering the country, they clearly would have been excludable under section (a)(19), as aliens who sought to obtain entry by

willfully misrepresenting a material fact. The relevant question is whether they would have been excludable for the attempted fraud if they had been detected at the time. If so, and the answer is clearly yes, then the aliens are deportable when the immigration process catches up with them under section 241(a)(1) or (2), and just as clearly, section 241(f) should apply to their cases where its terms are met.

If the Court is saying, however, that had the Reids been requested to submit to inspection questions at the time they entered the United States, and they had refused to do so or been caught in a falsehood at the time, they would not have been excludable, then it is engaging in semantic games. Call it “exclusion” or call it “preemptive deportation,” the fact is that whether excludable or deportable, the Reids would not have gotten into the United States. Indeed, the Act apparently does not make any significant distinction between grounds for exclusion and grounds for deportation. The difference between whether an alien is excludable or deportable seems to be the time the alien is detected.\(^{57}\)

Section 241(a)(2) (which the INS relied upon in Reid to effect deportation) is in itself an excellent example of the non-technical shotgun manner in which the Act operates.\(^{58}\) The provision covers just about all possible circumstances: (1) aliens who managed to get into the country by circumventing immigration inspection authorities entirely; (2) aliens who might be in violation of any provision of the Act, regardless of whether it is individually specified in section 241(a)(2); and (3) aliens who might be in violation of any law of the United States. If this provision applied to United States citizens, the country would be depopulated. It cannot be said that the Act sets up highly specific, technical grounds for exclusion as opposed to deportation, or that the grounds are exclusive of one another. The Act just does not work that way; it is much more of a shotgun action.

\(^{57}\) There is a situation in which a distinction between an alien's being excludable or being deportable is of significance, that is, in determining what procedural rights an alien has at his hearing. Although the due process rights of an alien are extremely limited (see note 11 supra) an alien who has been actually living within the United States for some time (deportable) is felt to have a right to more procedural safeguards in a hearing than is an alien who has not yet made an entry into the country. Leng May Ma v. Barber, 357 U.S. 185 (1958). Note, however, that the distinction is made concerning procedural rights and not concerning the grounds for removing the alien from our shores. Kordic v. Esperdy, 386 F.2d 232 (2d Cir. 1967), cert. denied, 392 U.S. 935 (1968).

\(^{58}\) “Entry,” however, is something of a technical word. See id.
Nor can a rationale be found for drastically limiting the application of the section 241(f) waiver by saying that it is as broad in its forgiveness as section 241(a)(2) is in its thrust to deport. Section 241(f) can only apply to a deportation charge brought under section 241(a)(2) when the alien gained the entry without inspection through use of a fraudulent device at the time of entry, was "otherwise admissible" at the time of entry, is the spouse, parent, or child of a United States citizen or permanent resident, and when the alien has committed no action subsequent to entry which would render him independently deportable. This is precisely why the Act is known as a harsh act: almost any alien can be excluded or deported under it and separated forcibly from both chosen country and from dearest relatives. This was the impetus for the reform movement and the amendments of 1957. Yet, it appears that the United States Supreme Court is dismantling these humanitarian amendments, for certainly there is nothing in its treatment of section 241(f) which indicates that any other humanitarian provision is going to fare any better.

C. The Final Undoing: Waiving the Immaterial

The Court employed one more device to render section 241(f) useless. This final undoing concerns the meaning of the phrase in section 241(f) which says that certain deportation provisions "shall not apply to an alien otherwise admissible at the time of entry." (emphasis added). This phrase was not at issue in the Reid case, and therefore, the discussion relating to it is dictum, but the Court has signaled the INS that they can, through the device to be explained, again use section 211(a) and any other deportation section, without section 241(f) waiving any deportation order issued.

The question concerning the phrase "otherwise admissible" relates to whether section 241(f), when applied to an appropriate case, forgives the whole transaction comprising the deportation charge or whether it merely forgives the misrepresentation (but not the fact misrepresented). Under the former interpretation, the alien is "otherwise admissible" if the alien is in conformity with all the remaining provisions of the Act. Under the latter interpretation, the alien

59. Section 211(a) is the section of the Act upon which deportation charges were brought in Errico and Scott and relates to satisfaction of numerical requirements (quotes). See note 26 supra, for text of section.
is not "otherwise admissible" unless he is in conformity with all the remaining provisions of the Act, and also with the very provision he is charged with misrepresenting.

The *Errico* case dealt with precisely this question in the context of section 211(a), the provision relating to requirements of the quota system. After a lengthy examination of legislative history, the *Errico* opinion held that Congress intended section 241(f) to be effective in preserving intact families partially composed of United States citizens, and that section 241(f) was meant to forgive the whole transaction—the lie and the factor lied about—as long as the alien was otherwise admissible under the remaining provisions of the Act.60 Then in *Reid* the Court asserted:

> We adhere to the holding of that case [*Errico*], which we take to be that where the INS chooses not to seek deportation under the obviously available provisions of § 212(a)(19) relating to the fraudulent procurement of visas, documentation, or entry, but instead asserts a failure to comply with those separate requirements of § 211(a), dealing with compliance with quota requirements, as a ground for deportation under § 241(a)(1), § 241(f) waives the fraud on the part of the alien in showing compliance with the provisions of § 211(a).61

At this point it can be realized that a waiver of fraud on the part of the alien "in showing compliance" with the provisions of section 211(a) does not include waiver of the non-compliance itself, but only the attempt of the alien not to reveal the lack of conformity. This is phrased in terms of the alien not being otherwise admissible due to failure to conform with the provision which concerned the misrepresentation. This interpretation of the above statement by the *Reid* Court is entirely consistent with the almost violent dissent filed in the *Errico* case by Justices White and Stewart, who today are among the majority in the *Reid* case, and who obviously have not changed their view.62

Therefore, even in the small number of situations where section 241(f) might still be applicable, it is rendered useless. The people who need such a waiver are those who made a material misrepresentation, but they will now be deported nonetheless because the pres-

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60. 385 U.S. at 217-19.
61. 420 U.S. at 630 (emphasis added).
62. See note 31 supra.
ent interpretation of section 241(f) forgives only the act of making a misrepresentation and not the factor which the alien found necessary to conceal in order to obtain entry. Now that the alien must be in conformity with the provision under which the deportation charge is brought, it is clear that section 241(f) will relate only to totally immaterial misrepresentations of people who were always eligible for entry, and who probably made accidental misrepresentations. As such, the section hardly merits the term of "waiver."

Ironically, the Reid opinion said that the waiver did not apply "to any of the grounds of excludability specified in § 212(a) other than subsection 19" of that provision. Yet that section refers to "willfully misrepresenting a material fact"! Thus, it is submitted, by sheer force of statutory language within the only provision to which the Reid Court allowed section 241(f) to apply, the waiver provisions should apply to material misrepresentations. The scope imposed upon section 241(f) by the Court is greatly at odds with the acts it should forgive under section 212(a)(19), that is, willful misrepresentations of material facts. This is indicative that the Court was not interested in making sense out of section 241(f), but simply in severely limiting its application.

IV. Light From Other Provisions of the Act

The proposition that the section 241(f) waiver of deportation provision was intended to apply to other subsections of the section 241 deportation provision, including a section 241(a)(2) entry without inspection, finds strong apparent support in section 241(d), "[a]pplicability to all aliens," which provides: "Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) of this section." Thus section 241(f) was intended to apply to section 241(a)(2), as well as to any other subsection of section 241(a) to which it can by its own terms apply. The only exception is something which is "otherwise specifically provided in this section." Nowhere in section 241 is there anything which specifically provides that the waiver of section 241(f) shall not apply to section 241(a)(2)—in fact, it takes

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63. 420 U.S. at 630.
a great deal of intellectualizing to even make the argument that it does not. The Court's argument to that effect in *Reid*, 65 is in fact a significant, albeit silent, admission that there is nothing in section 241 which specifically limits the scope of section 241(f) to certain provision(s) and not to others. Yet there is a provision which says that all of the provisions of the section apply to all the subsections of section 241(a).

In order to illustrate what kind of specific provision is required by section 241(d) in order to limit the scope of any of the provisions of the section, the language of section 241(b) is notable:

> The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) . . . . The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection(a)(11) of this section. 66

Note that all provisions of section 241 apply by virtue of section 241(d) to all subsections of section 241(a) "except as otherwise specifically provided in this section," and section 241(b) illustrates how this is done. The provision is referred to by its individual number and letter and then is specifically limited. Nothing so limits the scope of section 241(f).

Furthermore, note the language of section 241(f): "The provisions of this section relating to the deportation of aliens . . . . shall not apply . . . ." For what purpose did Congress refer to "provisions" in the plural if it only intended section 241(f) to apply to one subsection, section 241(a)(1), per the *Reid* court?

In addition section 241(c), 67 indicates that when drafting this legislation, Congress anticipated certain abuses of familial relationships and took affirmative steps to prevent those relationships which it did not deem meritorious from impeding the deportation

65. 420 U.S. at 623.
67. Id. § 241(c), 8 U.S.C. § 1251(c) (1970):
An alien shall be deported as having procured a visa or other documentation by fraud within the meaning of paragraph (19) of section 1182(a) of this title . . . . unless such alien shall establish to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws; or (2) it appears to the satisfaction of the Attorney General that he or she has failed or refused to fulfill his or her marital agreement which in the opinion of the Attorney General was hereafter made for the purpose of procuring his or her entry as an immigrant.
process. Although section 241(f) may have some awkward phraseology, it was not enacted thoughtlessly or as a carte blanche. It was enacted, as its terms indicate, to protect certain aliens with certain family relationships from deportation, just as section 241(c) was enacted to avoid protecting other aliens with family relationships whom Congress did not deem meritorious enough to warrant a waiver of deportation.

Consideration must also be given to section 212(i) which is a waiver of excludability for certain aliens seeking entrance to the United States who have the same family relationships for which deportation is waived by section 241(f). This section again indicates Congress' serious intention to protect these family relationships. Unlike section 241(f), however, the section 212(i) waiver of excludability is discretionary with the Attorney General. Although the rights of aliens are quite limited, those who have been in the United States and have, therefore, put down some roots here, are given more consideration than aliens who are merely seeking entry. Thus, while section 212(i) is discretionary, the waiver of deportation under section 241(f) is mandatory: "The provisions of this section . . . shall not apply to . . . the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence." Congress felt so strongly about protecting these family relationships, that it even extended a discretionary waiver of section 212(i) to aliens with these relationships who had not yet even entered the United States!

V. The Reid Decision Renders the Act Irrational

The Reid decision limiting the scope of section 241(f) would seem to render the Act irrational. As long as the waiver of deportation provisions of section 241(f) is applicable whenever the internal terms are satisfied, the Act has a high degree of rationality because the ultimate result of deportation cases with identical facts will be

68. Id. § 212(i), 8 U.S.C. § 1182(i) (1970) (formerly § 212(h));
   Any alien who is the spouse, parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence and who is excludable because (1) . . . may be granted a visa and admitted to the United States for permanent residence . . .
69. See notes 11 and 57 supra regarding procedural due process.
70. See also note 25 supra.
the same, regardless of which deportation provisions are used to charge the aliens. The alien will either be deported or not deported, depending solely on whether the waiver terms of section 241(f) meet the facts of the case.\textsuperscript{71}

Where, however, limits are set on the scope of section 241(f) which relate to artificial technicalities, rather than to its terms, the Act becomes irrational in purpose and effect. This is so because the facts of one social transaction by one alien can often be the basis for deportation under more than one provision.\textsuperscript{72} The INS can simply then bring the charge under a section from which the Court has blocked off section 241(f). This is a shopping license for the INS, which becomes the sole determiner of the ultimate outcome of the case. By simply basing the charge on one deportation provision rather than another the INS decides how aliens in the same situation will be treated—deported or saved.

An excellent example of this provision-shopping is found in the Errico and Scott cases which the Court in Reid outlines rather explicitly:

INS could clearly have proceeded against either Scott or Errico under § 212(a)(19), on the basis of their procuring a visa or other documentation by fraud or misrepresentation. Just as clearly Scott and Errico could have then asserted their claim to the benefit of § 241(f) . . . . Instead the INS relied on the provisions of § 211(a) . . . .\textsuperscript{73}

In the Reid case itself, the INS passed over not merely one other provision as in Errico, but two other provisions until they found one which they believed would result in deportation. They passed over both section 212(a)(19) and section 211(a) because Errico held that section 241(f) would apply where its terms were met under each of

\textsuperscript{71} Section 241(f) does not waive deportation for anything an alien does after entry into the United States. Khadjenouri v. Immigration & Naturalization Serv., 460 F.2d 461 (9th Cir. 1972). It waives only fraud at entry which the immigration process failed to detect but which INS attempts to assert after the alien has become part of a family containing United States citizens or permanent residents.

\textsuperscript{72} The Court in Reid itself is quite aware of this. See the portion of Reid opinion, 420 U.S. at 630, quoted in the text of this article at p. 20.

Note also that significant civil rights issues, such as the first amendment right of the American public to hear foreign speakers, have been litigated in the context of whether the speaker has a right to be in the United States, \textit{i.e.}, in the context of the immigration laws. See Kleindienst v. Mandel, 408 U.S. 753 (1972).

\textsuperscript{73} 420 U.S. at 627.
these provisions. Thus, the Reids and their two children were deported.

The Reid Court approved of and aided this provision-shopping; in fact, it is the Reid decision which makes this approach possible in the future. The Errico Court applied section 241(f) whenever its internal terms were met, regardless of the provision under which the charge was brought, and the Act functioned rationally. The very real effect under the current approach, however, is that section 241(f) is eliminated from the Act altogether. Under Reid, the INS can always bring any deportation charge under the catchall provision of section 241(a)(2) which, in addition to entering without inspection, covers any violation of the Act and any violation of any law relating to presence within the United States. It is submitted that surely this was not the intent of Congress.

VI. CONCLUSION

The legislative history of section 241(f) indicates that Congress intended the waiver to have an ameliorative effect upon orders of deportation made to aliens who entered the country through some form of misrepresentation, and who have families composed partially of United States citizens or lawful permanent resident aliens. The Warren Court in Errico followed this intent based upon the policy of preserving the family unit. It is submitted that the Burger Court's holding in Reid that section 241(f) applies exclusively to deportation charges based on section 212(a)(19) and brought under section 241(a)(1), disregarded the legislative purpose of the Act, and so constricted legal precedent, as to render section 241(f) a nullity.

In a land of immigrants, the sign now reads: "No immigrants need apply." There should be no illusions about this; the Supreme Court has enunciated a new policy in favor of deportation and now "strains to construe statutory language against the alien." The presumption of Errico has been reversed; the alien no longer receives the benefit of the doubt. It is a new Court, and an aging Frontier.

74. Id. at 623, and dissenting opinion at 630.
75. Id. at 634 (Brennan, J., dissenting).