Alien Cloak of Confidentiality: Look Who's Wearing It Now

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Introduction

Protecting the privacy of citizens is a function typically performed by government in western-style democracies, at the national or local level. Safeguards for the privacy of noncitizens, especially undocumented aliens, however, is a rare phenomenon. Unlike most other countries, the United States exercises few internal controls over noncitizens. Accord-


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ing to well-known immigration commentators, this practice has evolved over time and is due in part to the American "tradition of hospitality and fair play." There is a high regard for personal liberty and privacy, whether at home, the workplace, or, to a certain extent, in dealings with government agencies.

Under the "amnesty" law which became the centerpiece of immigration reform in the last decade, Congress gave undocumented immigrants the opportunity to legalize their status.


8. The term "immigrant" is not used here as a term of art, i.e. a person who intends to immigrate to another country or adjust her status to that of a permanent resident. See, 8 U.S.C. § 1101(a)(15), (20). Rather, it is used in lieu of "alien," defined under the Immigration and Nationality Act as "any person not a citizen or national of the United States." Id., § 1101(a)(3). Many foreign-born and others find the term offensive. See, e.g., alien, "belonging or relating to another person, place or thing: STRANGE...differing in nature or character typically to the point of incompatibility...", Webster's Ninth New Collegiate Dictionary (1986); and "...repugnant in nature: HOSTILE, OPPOSED...," Webster's Third New International Dictionary (1986). But see, Nuñez, Note, Violence at Our Border: Rights and Status of Immigrant Victims of Hate Crimes and
The procedure allowed those who had continuously resided in the United States since 1982 to file an application for temporary residency. They needed to document their illegal residency and show that they were otherwise "admissible" to the country. Their applications were to be kept confidential by the Immigration and Naturalization Service (INS).

The far-reaching confidentiality section of the amnesty statute states that no employee of the Justice Department—INS's umbrella agency—may "use the information furnished pursuant to an application" for any purpose other than making a determination on an application, enforcing the section pertaining to penalties for making false statements in the application process or preparing congressional reports on the legalization program. The section also prohibits employees from "mak[ing] any publication" with individually identifiable application information or from permitting anyone—outside of the Department's sworn employees or designated non-profit agency contractors—to "examine individual applications." Violators are to be fined or imprisoned or both.

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*Violence Along the Border Between the United States and Mexico,* 43 Hastings L.J. 1573, note 9 (1992), where the author employs "illegal alien" because it is "commonly used" and "reflects the prejudice with which the immigrant must contend..."

9. There are also parallel provisions in the Act for granting temporary residency to certain "special agricultural workers" (SAWs) who had been employed in perishable commodities a requisite number of days. 8 U.S.C. § 1160 et seq.

10. To be "admissible" means that one is not "excludable" from the country. See also note 71, infra.

11. See text acc. nn. 56 and 61-67, infra and 8 C.F.R. § 245a.3(n)(1), note 13, infra, defining individual contractors as employees for purposes of this section.

12. The only exception is that the Attorney General may, in her discretion, furnish information "in the same manner and circumstances as census information may be disclosed" under a provision of the Census Act. See italicized portions of full section, note 13, infra.

13. The full text of INA § 245A(c)(5) (8 U.S.C. § 1255a(c)(5)) reads:

Neither the Attorney General, nor any other official or employee of the Department of Justice, or bureau or agency thereof, may—

(A) use the information furnished pursuant to an application filed under this section for any purpose other than to make a
Ironically, the agency which is charged with the deportation and exclusion of noncitizens — INS — and which, historically, has the most adversarial relationship with "illegal aliens," has been the most steadfast in asserting the confidentiality protection on behalf of legalization applicants. Yet, it is an assertion that is perhaps more cynical than genuine.

In almost every lawsuit challenging implementation of the determination on the application or for enforcement of paragraph (6) [applicants who falsify, misrepresent or conceal material facts or use false, fictitious or fraudulent statements shall be fined and/or imprisoned] or for the preparation of reports to Congress [on the geographic, demographic and other characteristics of the newly legalized and their impact on state and local government, employment patterns and social services] under section 404 of the Immigration Reform and Control Act of 1986,

(B) make any publication whereby the information furnished by any particular individual can be identified, or

(C) permit anyone other than the sworn officers and employees of the Department or bureau or agency or, with respect to applications filed with a designated entity, that designated entity, to examine individual applications; except that the Attorney General may provide, in the Attorney General's discretion, for the furnishing of information furnished under this section in the same manner and circumstances as census information may be disclosed by the Secretary of Commerce under section 8 of Title 13.

Anyone who uses, publishes or permits information to be examined in violation of this paragraph shall be fined in accordance with Title 18, or imprisoned not more than five years, or both.

The italicized language was adopted by Congress in 1988, Pub.L. 100-525, § 2(h)(i), 102 Stat. 2611. See also, INS' implementing regulations at 8 C.F.R. § 245a.3(n). Subparagraph (n)(1) defines "employee" to include "any individual employed under contract with the Service to work in connection with the Legalization Program. . . ."


reform act, the immigration service has refused to let plaintiffs’ counsel see the files of applicants on the theory that it would violate the IRCA confidentiality provisions. Although that response may run counter to common sense, the agency has been successful in raising this question in a number of judicial forums and putting forth an argument of strict statutory interpretation.\(^\text{16}\)

The first part of this article explores the rationale of the United States legalization program, the experience of other countries in encouraging application for their respective amnesty programs and the components of the American amnesty approach designed to maximize participation through massive outreach and broad confidentiality. The second part examines, in the context of a recent lawsuit, the immigration service’s strict construction of the IRCA confidentiality proviso, based largely on the Supreme Court’s interpretation of an analogous provision of the Census Act.\(^\text{17}\) Also considered are the positions taken by advocates for the legalizing immigrants and the views adopted by the courts. Finally, part three looks at other arguments for and against the disclosure of information to applicants’ attorneys.

The outcome of the disclosure battles has an immediate impact on continuing litigation, as attorneys for the immigrants continue to seek documents from the Service through discovery or attempt to monitor INS implementation of court orders and consent decrees.\(^\text{18}\) Beyond this, the debate forces the judiciary to come to terms with three competing concerns: the congressional mandate to encourage participation in the legalization process by mitigating the immigrants’ fears of approaching the INS, a strong American policy and legal precedent against governmental intrusion, and a practical need for lawyers to communicate with their clients. In this balancing act, the stakes are particularly high for the nation’s most vulnerable subclass. However, as this article attempts to show, the United States’ social and juridical traditions allow for a resolution that fairly weighs these distinct concerns. In the end,

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common sense must prevail over a literal reading of the law.

I.

After more than a decade of debate, Congress enacted the omnibus Immigration Reform & Control Act of 1986 (IRCA). The statute at once imposed sanctions for the employment of unauthorized immigrants and created "amnesty" or legalization programs "to allow existing undocumented aliens to emerge from the shadows." In the words of the Supreme Court, the legalization policy emerged from a "recognition that a large segment of the shadow population played a useful role in the American economy, but continued to reside in perpetual fear..."

IRCA created a one-time opportunity for undocumented persons who lived "in a twilight, sub rosa society ... vulnerable to exploitation" to legalize their status. Congress intended the amnesty application period to run for a full twelve months and to be "implemented in a liberal and generous fashion ... to ensure true resolution of the problem and to ensure that the program will be a one-time only program."

Experience With Amnesty Applications in Other Countries

The House Judiciary Committee reviewed amnesty programs in other countries and found that where participation


20. Rosenbaum, Safeguarding Employment, supra, note 4 at 1, 3.


rates were low, part of the reason was due to a distrust of authority and lack of understanding by the undocumented population or involvement by their representatives.\textsuperscript{25}

For example, Australia offered amnesty twice in the early 1970s, mainly to nonimmigrants and visa overstayers. But, the effort was hampered in part by little advertising and lack of cooperation from ethnic community groups who distrusted the nation's Department of Immigrant & Ethnic Affairs (DIEA).\textsuperscript{26} The result was applicant fear and suspicion.\textsuperscript{27}

Later, in 1980, a “Regularization of Status Programme” was announced just weeks before the application period and was operated exclusively by DIEA. This time, voluntary agencies assisted in advertising through state broadcasting, ethnic media and posters.\textsuperscript{28} In the end, the Australian program enjoyed broad public support and was perceived mainly as a success. Still, the government was criticized for not involving ethnic communities more and for devoting too few resources to outreach.\textsuperscript{29}

Outreach to immigrant and minority communities was more central to the strategy in Canada. In 1973, that country announced a general amnesty for undocumented immigrants and nonimmigrants\textsuperscript{30} who had been in Canada for less than a year and wished to change their status to “landed immi-
grant." The federal government sought help from ethnic and voluntary agencies to advertise the program and encourage applications. The Ministry of Manpower and Immigration produced extensive publicity, with special attention given to the ethnic media. Mobile teams of immigration officers were sent to remote rural areas to assure a high degree of outreach and regular offices were open beyond the usual business hours. The Canadian ministry did not, however, seek the volunteer organizations' direct assistance in implementation and some argued that these groups should have been more involved in the process. On the other hand, to accommodate foreigners unsure of their status and afraid to come forward, the government did allow persons to appoint a third party to


31. This term, since changed to "permanent resident," is the equivalent of "permanent resident alien" status under United States law. See (Canada) 1976 Immigration Act, §2(1)(defining who is "granted landing") and D. North, Amnesty: Conferring Legal Status on Illegal Aliens A-13 (1982).

32. CRS, supra, note 26 at 149. In addition, Canadian immigration authorities knew that getting agents to commit to the program was essential to encouraging immigrants to trust them and come forward. Immigration officers were therefore trained to view the amnesty as an attempt to "wipe the slate clean," rather than a "reward" for violators of the law. D. Meissner, D.G. Papademetriou and D. North, Legalization of Undocumented Aliens: Lessons from Other Countries, 13 (Carnegie Endowment for International Peace, 1986), proceedings of a conference of U.S. and foreign high-level immigration officials and leaders of voluntary agencies and ethnic communities, convened after passage of IRCA. Co-author Doris Meissner has since been named INS Commissioner. 70 Interp Rel. 1367 (Oct. 10, 1993).

33. General Acct'g Office, Information On the Enforcement of Laws Regarding Employment of Aliens in Selected Countries, (GGD-82-86), Aug. 31, 1982, App. I at 7-8 and CRS, supra, note 26, "Illegal Immigration" at 150. A major poll conducted after the amnesty program went into effect indicated that a large number of people were aware of the amnesty and knew where to get information. Hawkins, Canada: The Unintended Amnesty, 5 Migration Rev. 15 (1977).

34. CRS, supra, note 26 at 149.

initiate an application in order to protect their identities.\textsuperscript{36} Although the number of those applying was below expectations,\textsuperscript{37} the legalization campaign was considered "a relative success."\textsuperscript{38}

In France, the immigration authorities reached out to immigrant and ethnic groups, with a focus on illegally employed foreigners and their employers, but made no special concessions to insure confidentiality. The government initiated an exceptional \textit{régularisation} in 1981 to restrict new legal admissions, curb illegal employment practices and eliminate "insecurity and marginal situations ..."\textsuperscript{39} Unlike the previous French regularizations of the 1970s, the initiative was placed this time on the foreign national, not the employer.

The regularization was operated by the Office National de l'Immigration through its capital headquarters and local bureaus.\textsuperscript{40} Like the Australians and unlike the Canadians, the French did not allow third party applications; claims had to be made in person.\textsuperscript{41} In the end, approximately half of those targeted actually applied,\textsuperscript{42} due in part to a massive information campaign aimed at immigrants and ethnic groups, a large mobilization of government personnel and employer incen-

\textsuperscript{36} \textit{Id.}, at A-22. The immigrants themselves were to come forward only after a positive prospective decision was made.

\textsuperscript{37} General Acct'g Office, \textit{supra}, note 33, App. 1 at 8. Despite calls from opposition leaders and immigrant assistance agencies to extend the 60 day application period, in part to allow the legalization beneficiaries more time to gain trust, the Minister of Manpower and Immigration refused to do so. D. North, \textit{The Canadian Experience}, \textit{supra}, note 35, at A-23 and A-44 and Robinson, \textit{Illegal Immigrants in Canada: Recent Development}, 18 Migration Rev. 477 (1985).

\textsuperscript{38} CRS, \textit{supra}, note 26 at 152.


\textsuperscript{40} CRS, \textit{supra}, note 26 at 160.

\textsuperscript{41} \textit{Id.}, at 160-61.

tives and sanctions.\textsuperscript{43}

In Argentina, religious and volunteer groups played a large part in a mid-1970s amnesty. A desire to control migration from neighboring countries and fill a future labor shortage prompted the 1974 \textit{amnistía}. This complemented the goal of social integration which had been the impetus for earlier post-war amnesties.\textsuperscript{44} The heavy reliance on church and numerous voluntary organizations to implement the amnesty may be explained in part by a serious staff shortage at the centralized Departamento Nacional de Migración (DNM).\textsuperscript{45}

These organizations helped promote the benefits of the Argentine program, aided in the distribution of the necessary documents and helped registrants complete the forms. They also brought the immigrants to the DNM to register.\textsuperscript{46} But, despite heavy advertising in the capital area, rural advertising and promotion was minimal and the resulting registration was only partly successful.\textsuperscript{47}


\textsuperscript{45} Argentine officials, aware of the DNM's "repressive institutional image" among immigrant communities, attempted to counteract this image with extensive meetings with department officers. D. Meissner \textit{et al.}, \textit{supra}, note 32 at 10.

\textsuperscript{46} See Marmora, \textit{supra}, note 44 at 30-31 and XXXIV-A \textit{Anales de Legislación Argentina} 278-79 (1974).

\textsuperscript{47} Marmora, \textit{supra}, note 44 at 32 and CRS, \textit{supra}, note 26 at 166-67. Another Latin American nation, Venezuela, also offered a legalization program, the only one which was conducted pursuant to an international agreement, the Andean Pact. A low turnout, however, was blamed in part on distrust of immigration authorities, uncertainty among the undocumented whether they met the requirements and reluctance of those with legal problems to come forward. D. Meissner \textit{et al.}, \textit{supra}, note 32 at 12.
History Of INS Cooperation with Voluntary Agencies in United States

For many years now, there has been cooperation between the U.S. immigration service and voluntary or private organizations, particularly since World War II and the onset of special immigration programs. In the view of noted commentators, these voluntary agencies (VOLAGs) "cannot take the place of government, but may only supplement or complement the government's role." VOLAGs have performed services at all stages of immigration, including document preparation, matching up immigrants and sponsors, disseminating information, aiding in eligibility processing and assisting in procurement of shelter, employment, medical care and ongoing aid. In this latter category, the voluntary agencies have provided such services as legal advice to immigrants and sponsors, advocacy before federal and international policy-making bodies and representation before administrative branches of the INS and Board of Immigration Appeals.

Almost forty years before IRCA was enacted, the INS Commissioner actually appointed an assistant commissioner to serve as a consultant to the Service and as liaison officer with the VOLAGs in order to "mak[e] the law enforcement job of the


49. C. Gordon & S. Mailman, supra, note 6, § 5.01[3] at 5-5.


51. C. Gordon & S. Mailman, supra, note 6, § 5.03[4][d]. But see, note 62, infra, on the adaptation of the VOLAGs to the demands of the legalization program.
Immigration and Naturalization Service easier and more efficient."  

Responding to reports by the Select Commission on Immigration and Refugee Policy and congressional committees concerning other countries' experience and the U.S. success with VOLAGs, Congress included provisions in the amnesty act to work through organizations with ties to the ethnic and immigrant communities. Under IRCA, the Attorney General was obliged to "broadly disseminate information" about the benefits of legalization and details of the application process and to designate voluntary organizations ("qualified designated entities" or "QDEs") to assist in the legalization process. This was consistent with the approach adopted in Canada and Argentina.

Congress recognized that the legalization program could

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52. Shoemaker, supra, note 48 at 274. There is no longer an assistant commissioner who has this role, but the government-volunteer sector cooperation has continued. Frequently, INS officers refer immigrants and others to VOLAGs for assistance with immigration procedures. C. Gordon & S. Mailman, supra, note 6, § 5.03[5][b][ii]. See also, Oct. 8, 1992 Deposition of Emily Goldfarb, at 13, Catholic Social Services v. Barr, Civ. No. 86-1343 (E.D. Cal.) regarding the experience of local immigrants' rights coalition in staffing an on-site information and advocacy table at the San Francisco legalization office and Hing, The Immigration and Naturalization Service, Community Based Organizations and the Legalization Experience: Lessons for the Self Help Immigration Phenomenon, 6 Geo. Immigr. L.J. 413, 444 (1992).

53. After conducting a 19-month study, the Commission recommended extensive outreach efforts and the use of voluntary agencies to process applications. Select Comm'n Final Report, supra, note 19 at 81.

54. The House Judiciary Committee concluded that the use of voluntary agencies might be able to encourage immigrants who were fearful and distrustful of authority to come forward. H.R. Rep. No. 99-682(I), supra, note 22 at 73, reprinted in 1986 U.S. Cong. Code & Admin. News at 5677.

55. 8 U.S.C. §§ 1255a(c) & (i). See also, H.R. Conf. Rep. No. 99-1000, 99th Cong., 2d Sess. 5 (1986) 92-93, reprinted in 1986 U.S. Cong. Code & Admin. News 5840, 5848, on the responsibility of the Attorney General to disseminate information on eligibility for and the benefits of legalization. Interestingly, the conference committee deleted from the final bill the instruction that dissemination be "in English and other languages ..." Id.
succeed only if "the fear of prosecution or deportation [that] would cause many undocumented aliens to be reluctant to come forward and disclose their illegal status..."56 could be overcome.

Confidential Application Process and Outreach

During the congressional debate, the senior California senator noted that the whole purpose of legalization "is undercut if overly stringent procedures prevent vast numbers of aliens from qualifying and intimidate many others from even applying."57 The restrictive aspects of IRCA were also seen as impediments to successful implementation, to be countered by "aggressive outreach and administrative credibility."58 Congress opted for a shielded claims filing procedure, but not the third party applications permitted by the Canadians.

The publicity campaign conducted by the Service itself and its outreach to the various immigrant communities, however, met with mixed reviews. For example, a public interest advertising firm called the campaign "unresponsive, dull and uninformative" and charged the INS with failing "to create awareness and a climate of information about the amnesty program" or to address the "powerful mistrust and skepticism" of applicants.59 A prominent labor union criticized the

56. McNary v. Haitian Refugee Center, 498 U.S. 479, 484. For a discussion of fear of the INS, see Hing, supra, note 52 at 432-36.

57. 199 Cong. Rec. 12,814 (1983) (remarks of Sen. Alan Cranston), cited in Perales v. Thornburgh, 967 F.2d 798, 813 (2d Cir. 1992), judgment vacated on other grounds sub nom. Reno v. Perales, 509 U.S.__, 113 S.Ct. 3027 (1993). Having six months lead time to implement the program — as opposed to the four months more typical of the other countries — the United States was considered to have a better chance of success. D. Meissner et al., supra, note 32 at 2. One federal judge, however, referred to INS' implementation of the Act as a "moving target," with developments in the statute and regulations being "rapid and somewhat helter-skelter. In retrospect, it seem [sic] clear that Congress did not allow itself, the INS or applicants sufficient time to prepare for the legalization program." United Farm Workers v. INS, Civ. No. S-87-1064 (E.D. Cal., Order of Sept 20, 1988) at note 1. See also, Barr v. Catholic Social Services, U.S. Supreme Court, No. 91-1826, Respondents' Opp. Brf. at 9 (on file with Clearinghouse Rev., No. 42,712) (plaintiffs allege that INS' tardy compliance with IRCA resulted in non-issuance of work permits and illegal expulsions).

58. D. Meissner et al., supra, note 32 at 3.
Service for not distributing regulations and not having multilingual brochures and application forms available. An independent researcher, however, took the long view, concluding that, "[d]espite considerable shortcomings in its outreach and coordination with QDEs, the INS emerges from legalization with greater capacity to communicate and stronger roots in local communities."61

In the end, about 2,000 charitable, religious and social groups signed up with INS to receive applications and, for a small fee, to assist applicants in their preparation.62 Even this number of organizations, however, was not always able to

59. See, comments of Public Media in California Legislative Joint Comm’ee on Refugee Resettlement, International Migration and Cooperative Development, Hearings on Immigration Reform and Control Act: Implementation and Impact in California, (hereafter, California Legislative Joint Comm. Hearings) 132-33. (Statement of Stephen Rosenbaum, California Rural Legal Assistance, July 23, 1987). One RAND Corporation - Urban Institute researcher noted that the IRCA publicity budget was small and not always channeled to the appropriate media and that INS’ campaign was often at odds with the efforts of QDEs and community advocates. S. Gonzalez Baker, The Cautious Welcome: The Legalization Programs of the Immigration Reform and Control Act 121-31 (1990). See also, D. Meissner and D.G. Papademetriou, supra, note 48 at 13-15, 18-20 on the media effort and Hing, supra, note 52 at 438-43.

60. Id., at 48-49 (Testimony of Jeff Stansbury, International Ladies Garment Workers Union, May 15, 1987).

61. J. Juffras, Impact of the Immigration Reform and Control Act on the Immigration and Naturalization Service 63 (1991). In this RAND Corporation - Urban Institute report, Juffras also comments on INS’ difficulties in getting outreach funds at the district level, recruiting and training case-handling staff and working with local advocates. Id., at 61-69. See also, Hing, supra, note 52, at 424-32, for a description of outreach conducted by INS. Professor Hing puts greater emphasis on the role of the “community based organization,” a term which embraces more than the INS-designated agency. Id., at 444-53.

62. J. Joannes, D. Warner and J. Biddle, The Immigration Reform and Control Act Handbook 75 (2d ed. 1990). Almost half of these groups were qualified designated entities. See 52 Fed. Reg. 44,812 (1987). QDEs received about $15 per applicant from the Service and charged up to $75 in fees. Id. For an analysis of the positive role played by these organizations, see, Hing, supra, note 52 at 444-53. One evaluation, however, compared the success of the newer QDEs with the limitations of the “traditional immigration-assistance community” in reaching isolated communities and distinguishing between advocacy and assistance. D.
meet the high applicant demand.\textsuperscript{63}

The QDEs’ “very function was to provide a buffer — a confidential intermediary — between the INS\textsuperscript{64} and the alien....”\textsuperscript{65} Congress also intended that the files and records kept by the designated organizations not be accessible to the

\textsuperscript{63} One organization active in the application process asserted that QDEs had waiting lists of 10,000. California Legislative Joint Comm’ee Hearings, \textit{supra}, note 59, (Statement of Legal Aid Society of Orange County, May, 15, 1987) at 37. A RAND Corporation - Urban Institute study, on the other hand, noted that about 70\% of the applicants filed directly with the immigration service, bypassing the QDEs. The study’s authors attributed this to a lack of fear of the INS. F. D. Bean, G. Vernez and C. B. Keeley, \textit{Opening and Closing the Doors: Evaluating Immigration Reform and Control} 70 (1989). But see, S. González Baker, \textit{supra}, note 59 at 126, explaining that applicants often went first to trusted QDEs and then filed their applications with the INS. See also, D. North, \textit{Immigration Reform in Its First Year}, 25 (Center for Immigration Studies Paper No. 4, 1987) (estimating that midway into the application period, less than 20\% of the legalization candidates had applied through the designated entities.) North also observed that QDEs were not paid much per application, were not often mentioned in INS’ national publicity materials and were perceived by applicants as having long waiting lines. \textit{Id.}, at 25, 27. For more on the financing of publicity efforts and perceived problems see, D. Meissner and D. G. Papademetriou, \textit{supra}, note 48 at 64-67.

\textsuperscript{64} See, \textit{Perales v. Thornburgh}, 967 F.2d, \textit{supra}, where the Court of Appeals recognized that Congress provided for confidentiality; for QDEs “to mediate” between the applicants and INS; and for the broad dissemination of information, funded outreach services and a lengthy application period. \textit{Id.} at 813. Upon enactment of IRCA, immigration officials admitted publicly to their change of roles. “It’s like a 180-degree turn [for me] because now I’m working to keep people in as opposed to locking them up or sending them away,” commented a deputy regional commissioner in charge of legalization. \textit{Awaiting A Deluge At the INS; Agency Prepares for Law’s Advent}, Wash. Post, Mar. 10, 1987 at A13. See also, D. Meissner and D. G. Papademetriou, \textit{supra}, note 48 at 20, on the INS’ “image transformation” and break down of the “circle of fear” surrounding the agency. A similar role change had been reported by Argentine and Canadian immigration officers. See, \textit{supra}, nn. 32 and 45.

\textsuperscript{65} \textit{Ayuda, Inc. v. Thornburgh}, 880 F.2d 1325, 1339 (D.C. Cir. 1989). One of the questions presented by plaintiffs in this protracted lawsuit is whether QDEs have standing — independent from an individual aggrieved applicant’s — to sue INS because of the injury they may suffer, as the result of the Government’s uncertain or incorrect implementation of
Attorney General or any other government agency and that the applicants consent to the forwarding of their applications for INS processing. The cloak of confidentiality was to cover even those applications which in the view of the QDE did not warrant consideration for legalization. The confidentiality was "meant to assure applicants that the legalization process is serious, and not a ruse to invite undocumented aliens to come forward only to be snared by the INS."  

II. 

Zambrano v. Immigration & Naturalization Service

In April 1988, Mexican national Marta Zambrano and 

IRCA, from their impaired ability to advise immigrant applicants. The Circuit Court thrice held that they do not. *Id.* at 1339-40; *Ayuda, Inc. v. Thornburgh* ("Ayuda II"), 948 F. 2d 742, 748 (D.C. Cir. 1991)(concluding that McNary v. Haitian Refugee Ctr. did not decide the organizational standing question), judgment vacated sub nom. *Ayuda, Inc. v. Reno*, 509 U.S. __, 113 S.Ct. 3026; and "Ayuda III," 7 F. 3d 246, 250 (1993) (on remand, court again held QDEs lack standing). See also, *INS v. Legalization Assistance Proj.*, ___ U.S. __, 114 S. Ct. 422, 424 (1993) (O'Connor, J., Cir. Justice, stayed district court order on ground that plaintiff, a non-member organization, lacked standing because its injuries were outside "zone of interests" to be protected under IRCA).

66. 8 U.S.C. § 1255a(c)(3). Files and records which remain in QDE custody are confidential and are available to the Attorney General and INS only with the applicant's consent. *Id.*, § 1255a(c)(4). See, *Reno v. Catholic Social Services*, 509 U.S. __, 113 S.Ct. 2485 (1993) on the very practical implications for the applicant whose claim for amnesty has been rejected. Because of the confidentiality provisions, the Court noted, the immigrant may continue "residing in the United States in an unlawful status" as if "the government has not found out about him yet." *Id.*, at 2494.

others — mainly women\textsuperscript{68} with dependent children\textsuperscript{69} — filed suit in the District Court for the Eastern District of California\textsuperscript{70} on behalf of all undocumented persons presumptively eligible for legalization who had received some kind of public assistance or other benefits that could conceivably qualify them as a “public charge.”\textsuperscript{71} All of the plaintiffs were initially discouraged from applying for amnesty because of information they

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\item \textsuperscript{69} For a discussion of how United States immigration policy has historically focused on single men to the exclusion of dependent spouses and children, see Sanger, \textit{Immigration Reform and Control of the Undocumented Family}, 2 Geo. Immigr. L.J. 295 (1987).


\item \textsuperscript{71} One of the grounds of inadmissibility is that the applicant is “likely at any time to become a public charge . . .” 8 U.S.C. § 1182(a)(4). Under the precursor to this statute, the first general immigration law, Congress barred admission to “idiots, lunatics, convicts and persons likely to become public charges.” Act of May 6, 1882, 22 Stat. 58. To effectuate IRCA’s goals as stated above, Congress liberalized the standards for those who could not meet the traditional “public charge” test. 8 U.S.C. § 1255a(d)(2)(B)(iii). That is, an otherwise eligible applicant could who can show an employment history and other forms of self-support must be granted legalization. See also, Zacovic, \textit{How the Receipt of Public Benefits Can Endanger An Alien’s Immigration Status}, 21 \textit{Clearinghouse Rev.} 126 (1987) and Wheeler & Zacovic, \textit{The Public Charge Ground of Exclusion for Legalization Applicants}, 64 \textit{Interp. Rel.} 1046, 1047 (Sept. 14, 1987).
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received from INS officials, QDEs, attorneys, the media or other sources of information. They alleged that the dissuasion resulted from INS’ improper or inadequate implementation of IRCA.\textsuperscript{72}

Plaintiffs brought an action challenging these regulations before the legalization filing deadline and moved for a preliminary injunction. They sought an order requiring INS to (1) disseminate the correct public charge standard while the application period was still open and class members could still file for legalization; and (2) reconsider those applications which were erroneously denied. The district court granted plaintiffs’ motion.\textsuperscript{73}

Almost one year later, the court also granted plaintiffs’ motion for partial summary judgment, modified the class definition and entered a permanent injunction.\textsuperscript{74} The district judge reaffirmed his rulings that jurisdiction was proper and that he had the authority to order INS to begin accepting applications from individuals who had earlier been discouraged from applying because of the agency’s illegal regulations and failure to disseminate proper information as to the public charge standard.\textsuperscript{75}

Also, using his broad discretionary powers to fashion an order for relief and maintain the status quo pending appeal, the judge ordered that the names of legalization applicants who were part of the certified class be given to class counsel and to

\textsuperscript{72} Second Amended Complaint, ¶¶ 50-53, 58-59. See also, \textit{Perales v. Thornburgh}, 762 F.Supp. 1036 (S.D.N.Y.), \textit{rev’d}, 967 F.2d, on an almost identical problem facing legalization applicants in New York State. In addition, the \textit{Zambrano} plaintiffs alleged that the regulations discriminated against women and therefore violated the Equal Protection Clause of the Constitution. Second Amended Complaint, ¶¶ 62-64. To date, the courts have not reached this claim.

\textsuperscript{73} The court held — and INS did not appeal — that the “proof of financial responsibility” and “public cash assistance” regulations violated the IRCA public charge provisions. Memorandum Order of Aug. 9, 1988.

\textsuperscript{74} The district court affirmed its earlier ruling that the regulations in question violated IRCA. Memorandum Order of July 31, 1989. Again, INS did not appeal this portion of the order.

\textsuperscript{75} Memorandum Order of July 31, 1989.
the court. The government moved to stay this order, citing section 1255a(c)(5), but the court refused to do so. In support of its ruling, the district court explained:

Plaintiffs are the aliens whose interests are protected by the statute. Providing the names of class members to class counsel facilitates, rather than frustrates, the legislative intent of the statute...

However, when INS appealed the other orders of the district court to the Ninth Circuit Court of Appeals, the parties agreed to stay certain provisions, including the requirement that INS provide plaintiffs’ lawyers with the names and addresses of certain applicants. Three years later, the Court of Appeals affirmed the district court’s ruling in favor of the applicants.


77. Memorandum Order of March 14, 1989 (hereafter “Slip Op.”), aff’d, Zambrano v INS, supra, at 1125-26. Initially, the Court orally granted the stay. Only after it took the matter under submission did it deny the motion, adopting the arguments plaintiffs put forward in their briefs. See Order After Hearing (January 17, 1989) and Slip Op.

78. Slip Op. at 6 [emphasis added].


80. 972 F.2d 1122. See text acc. nn. 169-71, infra. Although defendants’ appeal of the preliminary injunction, including the order to release names, had been argued and submitted on May 8, 1989, the Ninth Circuit sua sponte requested new briefing and argument after the summary judgment orders were also appealed. See, Order of June 14, 1991. The appeals were rebriefed, reargued and resubmitted to a new appellate panel on February 14, 1992. To date, the names and addresses have still not been furnished to counsel, notwithstanding the issuance of mandate from the Ninth Circuit and INS’ decision not to petition for review of this portion of the decision. See note 172, infra. In addition to the confidentiality question, INS also appealed the district court’s holdings that it had subject matter jurisdiction and the authority to remedy the government’s misinformation and dissuasion of prospective applicants. On federal court jurisdiction of IRCA cases generally, see Kanstroom, Judicial Review of Amnesty Denials: Must Aliens Bet Their Lives to Get Into Court?, 25 Harv. C.R.-C.L.L. Rev. 53 (1990) and Reno v.
Exceptions to Statutory Privileges

The government's argument against the release of names was based almost exclusively on *Baldridge v. Shapiro*, a case interpreting nondisclosure sections of the Census Act. Section 9(a) of the Census Act and the INA's §245A are identical insofar as they both preclude the respective departments from publication of reported individual data, examination of the information by employees outside the department, or use of the information, except for statistical purposes. And, at least


83. 13 U.S.C. § 9(a) provides as follows:

Neither the Secretary [of Commerce], nor any other official or employee of the Department of Commerce, or bureau or agency thereof, may, except as provided in section 8 of this title —

(A) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

(B) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(C) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

84. But see, discussion accompanying note 104, *infra*. 
one district court found Baldridge "very instructive" precisely because of the identical statutory language.85

In examining statutorily created privileges protecting confidential information, courts have divided the laws into three categories.86 The first type of statute expressly immunizes documents from disclosure in judicial proceedings and may result in a complete bar to discovery.87 The second type provides that confidential reports must be furnished to a requesting court.88 The third category is composed of legislation, such as the IRCA confidentiality proviso, which bars disclosure without specifying from whom the information is to be withheld.

Where there is no express language prohibiting disclosure in judicial proceedings, it is well established that laws precluding general publications do not also bar judicial discovery. In Freeman v. Seligson,89 the Court of Appeals reviewed a section of the Commodity Exchange Act under which the Commodity Futures Trading Commission may not publicly disclose or "publish" business transactions or market positions of any person, trade secrets or names of customers.90 The court held


88. See e.g., 8 U.S.C. § 1202(f) (State Department visa records); 38 U.S.C. § 5701 (Department of Veterans Affairs records). See also, Policy Statement — Confidentiality, note 134, infra.

89. 405 F.2d 1326, 1348 (D.C. Cir. 1968).

90. 7 U.S.C. § 12(a) reads, in relevant part:

For the efficient execution of...this chapter, and in order to provide information for the use of Congress, the Commission may make such investigations as it deems necessary...and
that "limited disclosure in judicial proceedings, carefully curtailed by judicious use of protective orders ... is not a publishing barred by that section." 91 The same circuit has "refused to infer" any privilege against court-ordered disclosure from "congressional silence." 92

The one critical distinction between the IRCA and Census Act nondisclosure sections is that the latter specifically states:

Copies of census reports ... shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit or other judicial or administrative proceeding. 93

This proviso was added by Congress following St. Regis Paper Co. v. United States, 94 where the Supreme Court held that a respondent's copies of census reports were not privileged from court-ordered production, noting that a statute granting a privilege is to be strictly construed so as "to avoid a construction that would suppress otherwise competent evidence ..." 95

The high court also observed that "when Congress has

may publish ... the results of any such investigation and such general statistical information gathered therefrom as it deems of interest to the public.... except the Commission may not publish data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers....

See supra, note 83 for text of the Census Act subsection restricting publications.

91. Freeman, 405 F. 2d at 1348. [emphasis added].

92. Laxalt v. McClatchy, 809 F.2d 885, 889 (D.C. Cir. 1987), (in suit by plaintiff against newspaper under the Privacy Act, court was guided by Commodity Exchange Act's publication ban under which Congress did not explicitly create qualified privilege from discovery), cited with approval in Zambrano v. INS (E.D. Cal., Slip Op. at 5). See also, Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1344 (D.C. Cir. 1984) (notwithstanding statutory ban on publication of agency investigative files, Commodity Futures Trading Commission is not completely exempt from subpoena served in context of court-supervised discovery).


95. Id., at 218.
intended like reports not to be subject to compulsory process it has said so," as when it legislated that accident reports prepared by regulated common carriers not be admitted as evidence or used for any other purpose in suits or actions arising out of the accidents. 96

Section 245A(c)(5) of the Immigration & Nationality Act 97 does not contain language explicitly prohibiting court-ordered disclosure by INS nor did Congress supply the requisite legislative intent. This is a strong indication that the legislators did not intend to preclude court-ordered production of information from legalization applications, since a post-St. Regis Congress knew the words to use to proscribe review of applicant information in the course of litigation.

In a very brief opinion, the Eleventh Circuit concluded just that. In re Nelson 98 holds that there is no immunity from discovery by counsel for the legalization applicants. 99 The court denied INS' writ of mandamus reviewing discovery orders in a lawsuit which challenged the procedures for adjudicating temporary residency claims filed by special agricultural workers. 100 INS, however, has dismissed Nelson as erroneous for its failure to consider Baldridge and for its lack of independent statutory analysis. 101

96. Id., citing 45 U.S.C. § 41, supra, note 87 (railroad accident reports to Secretary of Transportation not to be admitted as evidence or used in any action for damages) and 49 U.S.C. § 320(f) (similar statute regarding reports by motor carriers to Interstate Commerce Commission)(since revised and recodified at 49 U.S.C. § 504(f)).

97. 8 U.S.C. § 1255a(c)(5).

98. Supra, note 14.

99. Id., at 1397 (quoting St. Regis Paper Co., 368 U.S. at 218 and Freeman, 405 F.2d at 1351).


The *Baldridge* analogy played a much greater role in another challenge to the IRCA eligibility requirements. In *Hernandez v. Thornburgh* ("*Hernandez I*")\(^{102}\), the court was not convinced by the argument that Congress' omission of language in IRCA which expressly immunized information from legal process — as it did in the Census Act — meant the legalization documents could be turned over to plaintiffs.\(^{103}\) Instead, it saw the immunization in the Census Act as an attempt to restrict access to copies of reports held by *third-party*, *non-government* entities.\(^{104}\) Plaintiffs' lawyers in *Hernandez* had requested documents in discovery for those applicants whose claims, they argued, were improperly denied.\(^{105}\) They wanted to see the legalization applications, the adjudicators' worksheets

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102. Order of March 20, 1989, *supra*, note 14. Scholars and litigators alike are hampered in their review of cases addressing the confidentiality issue. The peculiarities of judicial publication have it that a very short analysis by one court may be published, *viz.*, *In re Nelson* and *Zambrano v. INS* (9th Cir.), while more lengthy memorandum opinions by another court, *viz. Hernandez I, Hernandez II* and *Zambrano* (E.D. Cal.), are not.

103. *Hernandez I* at 5.

104. The immunization provisions were adopted after the Supreme Court's ruling in *St. Regis Paper Co. v. United States*, 368 U.S. (See also, *supra*, text acc. nn. 94-95). The *Hernandez I* opinion states, however, that this conclusion is based on "one reading of dicta" in *St. Regis* and that immunization of the government's reports was not "squarely addressed" in that case. *Hernandez I* at 6. In *Baldridge*, the parties seeking the allegedly confidential raw census data were neither the surveyed respondents nor federal investigatory agencies. Rather, they were local government officials who wanted the information to substantiate a census undercount that was detrimental to their ability to receive public funds. *Id.* at note 12. See also, *Hernandez II* at note 3.

105. This suit challenged the INS' implementation of 8 U.S.C. §§ 1255a(g)(2)(A) and (C), which required the Attorney General to specify periods of absence from the United States that would disrupt the continuous residency needed to qualify for legalization. Plaintiffs alleged that the INS rule, 8 C.F.R. §§ 245a.1(c)(1)(i) and (h), did not allow for a waiver for those whose absences exceeded a fixed number of days and that the "emergent reasons" exception was ill defined. Complaint, ¶¶ 4, 5.
and recommendations to the higher INS administrative units,\textsuperscript{106} the denial notices, notices of appeal and other documents relied on in denying the applications. The government objected to production of these documents, in part because it would violate the confidentiality provisions.\textsuperscript{107}

The chief magistrate\textsuperscript{108} agreed and denied plaintiffs’ motion to compel.\textsuperscript{109} The Court noted that the statute and legislative history\textsuperscript{110} were silent about use of information in a judicial proceeding, but was heavily persuaded by the reasoning in Baldridge,\textsuperscript{111} given the similarity of the Census Act language and its purpose “to encourage public participation and maintain public confidence...”\textsuperscript{112}

The only solace the magistrate’s order gave to plaintiffs was its suggestion that the privilege from discovery could be waived by the applicants. Plaintiffs had not, however, made this argument and were probably barred from doing so, the

\textsuperscript{106}This includes the Regional “Processing Facility,” since renamed “Service Center,” of which there are four throughout the country, and the Legalization Appeals Unit (LAU), the only level of administrative review permitted under IRCA. See, 8 C.F.R. §§ 103.1(s), 103.3(a)(2) and 8 U.S.C. § 1255a(f)(3).

\textsuperscript{107}The government also argued that the discovery was an improper attempt to monitor the activity of a government agency. Hernandez I at 2.


\textsuperscript{109}Hernandez I.

\textsuperscript{110}See supra, text acc. nn. 54-58.

\textsuperscript{111}Supra, note 17. The Court did recognize that while the census information sought in Baldridge, i.e. vacant addresses, was seemingly inconsequential, it was nonetheless protected from disclosure. Hernandez I at note 3.

\textsuperscript{112}Hernandez I at 5, citing Baldridge, 455 U.S. at 354. The public participation and confidence which Congress sought to foster in the recording and release of census data is in fact very different from that involved in the legalization process. INS similarly quotes out of context from the legislative history when it asserts that the need for “open communication” bars disclosure of applicant information. See text acc. nn. 146-51, infra.
Court reasoned, absent certification of a class.\textsuperscript{113}

On reconsideration of the discovery ruling, "\textit{Hernandez II}," the district judge upheld the order in only a very limited way. First, the court held that the pre-1988 language of the confidentiality statute did not yield a plain meaning on this question insofar as it did not address whether redacted application information could be furnished by INS.\textsuperscript{114} Second, while it did find the amendment made \textit{Baldridge} controlling on INS disclosure,\textsuperscript{115} the court held that material which is not "raw data," such as "bureaucrats' evaluations" of the applications—contained in the worksheets, notices and other INS-generated documents—could be released to plaintiffs without violating any privilege.\textsuperscript{116} Having affirmed in part and denied in part, the court remanded the matter to the magistrate.\textsuperscript{117}

\textit{Hernandez II} also subscribes to the view that \textit{Baldridge} relies on the peculiar legislative history of the Census Act and implies that its holding should not be grafted whole onto other statutes.\textsuperscript{118} Dictum in \textit{Baldridge} suggests the Supreme Court was unwilling to second-guess Congress' long experience with the census process by interpreting the confidentiality provisions more liberally. There have been many amendments to the Act on this subject for well over a century.\textsuperscript{119}

\begin{itemize}
\item \textsuperscript{113} \textit{Hernandez I} at note 3. A motion for class certification had been denied previously. \textit{Id}.
\item \textsuperscript{114} Order of August 23, 1989, \textit{Hernandez II}, at 7. See supra, note 85 for the court's view of the importance of an independent statutory analysis.
\item \textsuperscript{115} \textit{Id.}, at 8. See text acc. note 127, infra. In applying \textit{Baldridge}, the district judge took explicit exception to the earlier conclusion reached by his colleague on the same court, the author of the unpublished \textit{Zambrano} order. \textit{Hernandez II} at 6.
\item \textsuperscript{116} \textit{Id.}, at 9.
\item \textsuperscript{117} \textit{Id.}, at 9-10.
\item \textsuperscript{118} \textit{Id.}, at 8.
\item \textsuperscript{119} As early as 1840, confidentiality in the census taking was a concern of Congress. \textit{Baldridge}, 455 U.S. at note 11. Moreover, since 1879, Congress has sought on several occasions to expressly protect the actual census data collected as well as the names of the individual respondents. The language of the Act has been amended repeatedly to safeguard privacy. In 1976, the prohibition on disclosing information "reported by, or on behalf of, any particular respondent" was added to § 8(b). At the same time, state and municipal officials— who, like the \textit{Baldridge} plaintiffs,
Effect of Technical Amendments On
Baldridge Interpretation

The INS has also argued that the amendments to IRCA were proof that Congress intended the disclosure of information to be guided by Baldridge, because they provide that the Attorney General may furnish information "in the same manner and circumstances as census information may be disclosed" under section 8 of the Census Act. There is no legislative history to reveal the congressional thinking in the adoption of the added language, part of a large number of so-called technical amendments, but it is nonetheless an obstacle in efforts to distinguish the two laws.

The Zambrano plaintiffs had two rebuttals on this point: First, the section of the Census Act referred to is section 8 —

have complained of census undercounts — have also seen their already limited access to data restricted further. Id., at 356-58. See note 123, infra, for full text of § 8(b).

120. See subsection C, the italicized language in supra, note 13.

121. Def.Open.Brf., Ninth Cir. at 35. See note 123, infra for text of § 8.

122. Pub. L. 100-525, § 2(h)(i), 102 Stat. 2611. See text acc. note 127, infra, regarding congressional intent. The regulations were accordingly amended in 1989 with language adopted verbatim from the statute. 8 C.F.R. § 245a.3(t)(4)(iv).

123. 13 U.S.C. § 8 states, in relevant part:

(a) The Secretary [of Commerce] may, upon written request, furnish to any respondent, or to the heir, successor, or authorized agent of such respondent, authenticated transcripts or copies of reports (or portions thereof) containing information furnished by, or on behalf of, such respondent in connection with the surveys and census provided for in this title, upon payment of cost.

(b) Subject to the limitations contained in sections 6(c) [where possible, Secretary shall acquire and use information already available from private persons or agencies or other government agencies] and 9 [see supra, note 83], the Secretary may furnish tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent, and may make special statistical compilations and surveys, for departments, agencies, and establishments of the Federal Government [and other levels of government], or other public and private persons and agencies, upon payment of the actual or estimated cost of such
not section 9(a), the latter being the analogue to the confidentiality section of the Immigration and Nationality Act. Section 8 contains provisions for furnishing information to surveyed respondents and their heirs and agents, and also allows the Commerce Secretary to make statistical compilations and surveys for public and non-profit agencies without reference to any particular respondent. A common sense reading of the 1988 IRCA amendments, therefore, is that Congress intended to facilitate mere statistical and aggregate reporting, as in the required legalization reports, or the kinds of data spelled out in minute detail in section 8 of the Census Act.

Second, the amendment’s authority to furnish information begins with the words “except that the Attorney General may provide ...” which must be read in contrast to the very restrictive language on use of legalization applicant information that immediately precedes this clause.

The Zambrano courts never reached the meaning of the amendment, but it was addressed in Hernandez II, with an interpretation unfavorable to the immigrants and their lawyers. The latter court reasoned that Congress, which must be presumed to be familiar with statutory construction, had incorporated by reference the standards of the Census Act in the 1988 amendment. By doing so, Congress made “specific reference” to the “gloss” given the census statute in Baldridge. Therefore, the reasoning in Baldridge, according to Hernandez II,
should control the interpretation of IRCA.\textsuperscript{127}

III.

Beyond \textit{Baldridge}, the opposing parties have debated the public policy behind the disclosure proviso, whether strict liability in fact operates against INS in its implementation, whether certain edited information can be released by the agency and what duties the immigrants' lawyers owe to their clients in litigation.

\textbf{Disclosure to Whom}

Immigrants' advocates have argued that the congressional intent was not grounded in concern for disclosure \textit{per se}, but disclosure to the "wrong" parties.\textsuperscript{128} The objective was to protect legalization applicants from abuses by overzealous INS officials, not to insulate the agency from court-ordered disclosure in an action brought by applicants alleging a policy which denied them an opportunity to have their claims adjudicated in accordance with IRCA. This "is not so much a confidentiality provision as it is a prohibition of \textit{government use} of the information to prosecute, deport or otherwise penalize aliens who come forward seeking legalization ..."\textsuperscript{129}

Relying on the statute's fines and/or prison terms meted out to violators, INS has argued that Justice Department employees are "strictly liable" for any disclosure of names or identifying information.\textsuperscript{130} But, the statute \textit{does} permit the disclosure of application information where needed to insti-

\textsuperscript{127}\textit{Hernandez II} at 9. The court, nevertheless, found a way to distinguish \textit{Baldridge} for much of the applicant information sought by plaintiffs. See \textit{supra}, text acc. nn. 115-17.


\textsuperscript{129}Slip Op. at 6 [emphasis in original].

\textsuperscript{130}\textit{Zambrano}, \textit{supra}, Def.Open.Brf., Ninth Cir. at note 13. The government asserts that Congress has included no language in the statute "to reflect that 'intention' plays any role in the imposition of sanctions." \textit{Id.} See also \textit{United States v. Hernandez}, 913 F. 2d 1506, 1513 (10th Cir. 1990), \textit{cert. denied}, 498 U.S. \_\_\_ 111 S. Ct. 1111 (1991) (reversing district court ruling that \textit{fact} of filing application may be disclosed, but not its \textit{contents}).
tute deportation or criminal prosecution of applicants who submit fraudulent applications. The INS General Counsel has also decided that the fraud exception applies to third parties who aid and abet the commission of fraud.

The alleged strict liability is also tempered by a more flexible departmental interpretation. INS’ own internal policy statement, for example, anticipates some releases of information from the legalization application files to third parties outside the Department of Justice, pursuant to Freedom of


132. In its own interpretation of the fraud exception, the Service explains that those who attempted to commit fraud while applying for legalization (e.g., by submitting false documents or making false statements) would lose the confidentiality protection, whereas those who admitted to past false statements or use of false names and Social Security numbers would be protected by § 1255a(c)(5). See, Letter of May 11, 1987 from INS Associate Comm’r Richard Norton to American Ass’n of Immigration Lawyers (AILA) Executive Director Warren Leiden, reprinted in 64 Interp. Rel. 711, 733-34 (June 8, 1987). See also, § 544 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 8 U.S.C. §§ 1324c(a) and (d)(3), setting out civil monetary penalties of up to $500 for, inter alia, each creation, use, possession, acceptance or receipt of fraudulent or false documents.

Information and Privacy Act requests.\textsuperscript{134} The agency has also issued instructions on how to process "[r]equests from courts for information regarding the status of a legalization/SAW application" as well as reports from state agencies seeking to verify individuals' eligibility for federal entitlement programs.\textsuperscript{135}

In fact, one top-level INS official belatedly confirmed that all information in legalization files\textsuperscript{136} would be available to agency employees\textsuperscript{137} for uses consistent with the statute. This would include comparing one-time statements made by an amnesty applicant against answers given to subsequent questions in connection with a non-legalization adjustment of status.\textsuperscript{138} If this exception were actually reflected in agency practice, however, it could swallow the entire rule.

\textsuperscript{134}These parties include the applicant and her authorized representative. \textit{Policy Statement — Confidentiality of Legalization and Special Agricultural Worker Records Under [IRCA]} (hereafter, \textit{Policy Statement — Confidentiality}) at V-2 (Oct. 1987) (on file with the author). Also, according to the \textit{INS Legalization Manual}, the Service routinely requests that the CIA and FBI do security checks on applicants. Applications on which "derogatory information" has been received remain in a "wait stage" for 90 days. INS, \textit{Procedures Manual for the Legalization and Special Agricultural Worker Program of the Immigration Reform and Control Act of 1986} VI-28 to VI-30 (n.d., reprinted by AILA).

\textsuperscript{135}\textit{Policy Statement — Confidentiality}, supra, note 134 at VI-2 through VI-4.

\textsuperscript{136}The one court which has examined \textit{intra}-agency use of legalization information did not read the statute so narrowly as to prohibit the release of information — even to other INS agents — "not obtained directly from the \textit{application} itself." Lopez \textit{v. Ezell}, 716 F.Supp. at 446, supra, note 16 [emphasis added]. But see, note 138, \textit{infra}.

\textsuperscript{137}See dicta in Lopez \textit{v. Ezell}, 716 F.Supp at 446, supra, note 16, that the application information \textit{not} be disclosed to "other departments within INS."

\textsuperscript{138}See Letter of Apr. 18, 1991 from INS Acting Ass't Comm'r Janet Charney to Attorney Paul Parsons, \textit{reprinted in 68 Interp. Rel.} 1573-74, 1597-98 (Nov. 4, 1991). See also, 8 CFR § 245a.3(t)(4)(i)-(ii)(information contained in \textit{granted} legalization files may be used by INS at later date to make decision regarding visa petition and naturalization application) and INS General Counsel, "Legal Opinion," \textit{supra}, note 131 (allowing rescission of permanent residence based on legalization application information). The General Counsel concludes, \textit{id.}, at 4, that rescission of LPR status is "a determination on an application..." within the meaning of § 1255a(c)(5)(A) and the application information is therefore not
Permitting Release of "Redacted" Information

INS has asserted that it could not make available even those applications where the applicant-identifying information has been deleted.\textsuperscript{139} Release of "redacted" information was the central subject of Freedom of Information Act litigation brought against the Internal Revenue Service (IRS) by a religious organization which sought a wide variety of tax documents relating to or containing the name of the church, its leaders or its philosophy. In Church of Scientology of California v. IRS,\textsuperscript{140} the Supreme Court gave the Internal Revenue Code the same strict reading it had earlier bestowed on the Census Act.

The Court held that both the wording of the statutory exception for taxpayer information release and the legislative history worked against an interpretation that allowed for mere redaction. Why else, the Court reasoned, would Congress use a linguistic construction that permits disclosure of data "in a form" not associated or identified with the taxpayer to describe information subject to disclosure? A "much more natural phrasing" would omit these words and leave open the possibility of supplying requesters with redacted returns or return information.\textsuperscript{141} In fact, the Court said, the real intent of the exception — contained in a floor amendment which passed without debate

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\textsuperscript{139} Zambrano, supra, Def.Open.Brf., Ninth Cir. at 31-32, citing Church of Scientology of California v. IRS, 484 U.S. 9 (1987) as disfavoring judicial disclosure.

\textsuperscript{140} Supra, note 139.

\textsuperscript{141} Id., at 15. 26 U.S.C. § 6103(b)(2) reads, in relevant part:

"[R]eturn information' . . . does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer."

Section 6103(a), in turn, provides that:

"Returns and return information shall be confidential and [not] disclose[d] ... in any manner."
or roll call vote — was to allow the IRS to release statistical studies and other compilations of data prepared by the agency or data “not in a form” linked with a particular taxpayer.\textsuperscript{142}

INS’ reliance on \textit{Church of Scientology} is simply misplaced in the legalization context. Unlike section 6103(b)(2) of the Internal Revenue Code, the IRCA confidentiality sections do not contain language which would prohibit the release of \textit{redacted} information from an application, i.e., data which could not “be associated with or otherwise identify directly or indirectly, a particular [applicant].”\textsuperscript{143} The amnesty statute lacks the very precise construction of the Internal Revenue Code proviso and, as noted, has a different legislative history.

While the question of redaction was never taken up by the courts in \textit{Zambrano}, one district court has found that non-identifying information and material other than “raw data” could be produced by the INS.\textsuperscript{144} And, in another instance, the Service stipulated to the release of redacted applications to plaintiffs’ counsel.\textsuperscript{145}

\textbf{Whether “Open Communication” is Inhibited}

Finally, the immigration service argues that the reform act’s confidentiality provisions were intended to “encourage open communication on the part of aliens” who might fear that filing a legalization application could facilitate their eventual deportation, and compares this to government agencies’ need for open communication to freely deliberate about policies or other action.\textsuperscript{146} But, this “open communication” is more accurately characterized as Congress’ attempt to mitigate “distrust

\textsuperscript{142}\textit{Church of Scientology}, 484 U.S. at 16-17. According to the Court, Congress contemplated that the Internal Revenue Service could release a “reformulation” of the information in a statistical study or “some other composite product…” \textit{Id.}, at 13, \textit{citing} appellate decision, 792 F.2d 153, 160 (D.C. Cir. 1986).

\textsuperscript{143}Internal Revenue Code § 6103(b)(2); 26 U.S.C. § 6103(b)(2).

\textsuperscript{144}\textit{Hernandez II} at 9, where the court cautioned against too expansive a reading of the “gloss” which another agency privilege may be given under that particular agency’s statutory scheme. See also, \textit{supra}, text acc. nn. 115-19.

\textsuperscript{145}\textit{United Farm Workers v. INS}, Civ. No. S-87-1064 (E.D. Cal.). See text acc. note 165, \textit{infra}.

\textsuperscript{146}\textit{Zambrano}, \textit{supra}, Def.Open.Brf., Ninth Cir. at 32-33.
of authority and lack of understanding among the undocumented population."\textsuperscript{147} INS has misapplied the government privilege favoring frank and complete pre-decisional communication\textsuperscript{148} to the monitoring of a court order or the conduct of discovery, where neither the information to be released nor the underlying policy disfavoring its release bears any semblance to the issues in \textit{United States v. Weber Aircraft}.\textsuperscript{149}

The possible harm to the party who seeks to avoid disclosure is not to be given "talismanic effect."\textsuperscript{150} Indeed, the burden is on the agency to show that confidentiality is needed to protect creative debate and discussion or the integrity of the decision-making process.\textsuperscript{151}

\textbf{Duty of Plaintiffs' Counsel To Safeguard Interests Of Absent Class Members}

In arguing that IRCA bars \textit{any} disclosure, the government has failed to examine the rationale for an order requiring the release of the list of \textit{Zambrano} class member names and ad-

\begin{footnotesize}

\textsuperscript{148}This is the exemption included in the Freedom of Information Act, 5 U.S.C. § 552(b)(5), for internal agency memoranda. See e.g., \textit{EPA v. Mink}, 410 U.S. 73, 87 (1973), for a discussion of the exemption rationale, based on a recognition that disclosure of advice and comments made by particular individuals may have a "chilling effect" on the future openness of these individuals. \textit{Tax Reform Research Group v. IRS}, 419 F.Supp. 415, 423 (D.D.C. 1976).

\textsuperscript{149}465 U.S. 792 (1984), \textit{cited in Zambrano, supra}, Def.Open.Brf., Ninth Cir. at 32. In \textit{Weber}, an aircraft manufacturer sued for personal injury sought from the United States Air Force, under the Freedom of Information Act, confidential statements made during an air crash safety investigation. The Court held that these statements were exempted from disclosure under 5 U.S.C. § 552 (b)(5) as "intra-agency memorandums or letters" intended to encourage witnesses to speak frankly for an investigation designed to prevent future accidents.


\textsuperscript{151}See, e.g., \textit{Vaughn v. Rosen}, 383 F.Supp. 1049, 1053 (D.D.C.), aff'd, 523 F.2d 1136 (D.C. Cir. 1975) ("uninhibited discussion") and \textit{Sterling Drug, Inc. v. FTC}, 450 F.2d 698, 708 (D.C. Cir. 1971) (protection needed where disclosure would "infringe upon...essential communications...").
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dresses. The most obvious is that both the court and opposing counsel need some mechanism for monitoring compliance with the injunctive orders, particularly where there is a history of agency contempt or sanctionable noncompliance.\footnote{152}{INS was ordered to pay monetary sanctions under a local rule of the district court for failure to completely implement the court's preliminary injunction. \textit{Zambrano, supra}, Order of Jan. 17, 1989. The agency was later held in contempt for failure to adhere to certain provisions of the stipulated stay order. Order of Dec. 11, 1989. See also note 172, \textit{infra}, and briefs in support of Plaintiffs' Motion to Enforce Stay Order, August 11, 1992 and November 20, 1992, in the related case of \textit{Catholic Social Services v. Barr}, Civ. No. S-86-1343, (E.D. Cal.) (most court documents on file with \textit{Clearinghouse Rev.}, No. 42,712; this case, sometimes referred to simply as "CSS," has been variously styled as the Attorneys General have changed from Edwin Meese to Richard Thornburgh to William Barr to Acting Attorney General Stuart Gerson to Janet Reno; see, Fed. R. Civ. P., Rule 25 (d)(1) and Fed. R. App. P. Rule 43 (c)(1)). In the latter motion to enforce, lawyers for the class of amnesty seekers documented a host of implementation problems, including INS failure to advise apprehended class members of their eligibility for legalization, refusal to approve \textit{prima facie} applications and the Service's summary revocation of class membership. Similar problems occurred in monitoring the \textit{Lopez v. Ezell} Consent Order of May 1, 1989, Civ. No. S-88-1825 (S.D. Cal.) (on file with Clearinghouse Rev., No. 44,067) on behalf of the class member applicants for agricultural worker legalization. See e.g., Letters of July 28, 1989, August 16, 1989 and April 30, 1990 to Parker Carlos Singh (complaining of INS failure to return confiscated documents to class members and to identify class members)(on file with author).}

Equally important, providing the list facilitates representation of those class members who are not named plaintiffs in the lawsuit. By withholding its release, the immigration service is in effect asking that the applications be kept from the applicants themselves. It is a cornerstone of class action rules and case law that the parties before the court, and their attorneys, must adequately represent the interests of the absent class members i.e., the unnamed immigrant parents and other would-be legalization applicants.\footnote{153}{See, e.g., \textit{Hansberry v. Lee}, 311 U.S. 32, 41-43 (1940); Fed. R. Civ.P., Rule 23(a)(4); and discussion in H. Newberg, \textit{Newberg on Class Actions} §§ 15.03, 15.16 (2d ed. 1985).}
In Greenfield v. Villager Industries, Inc., the Court of Appeals described the serious obligations which counsel and the district court owe the absent class members:

Responsibility for compliance [with procedural rules] is placed primarily upon the active participants in the lawsuit, especially upon counsel for the class, for... as counsel to parties to the litigation, class action counsel possess, in a very real sense, fiduciary obligations to those not before the court. The ultimate responsibility of course is committed to the district court in whom, as the guardian of the rights of the absentees, is vested broad administrative, as well as adjudicative, power.

In addition to “fiduciary,” the class counsel’s relationship to individual class members has been described as “constructive attorney-client” or even akin to that of a “private attorney general.” While the precise obligations of lawyers for the class to absentee class members has not been expressly defined by the courts, it is clear that “the imperative of protecting absent class members’ interests subjects the relationship of representative counsel with class members to substantial scrutiny by the court...”

In the IRCA litigation, the attorney-class member relationship is both enhanced and monitored by the court through an order to release names of class members to plaintiffs’ counsel. Any fear by INS that the release of names of legalization

154. 483 F.2d 824 (3d Cir. 1973).
155. Id., at 832.
156. See, H. Newberg, supra, note 153, § 15.03.
157. Id., at § 15.03.
applicants would facilitate the immigrants' deportation is completely unfounded. There is no reason to suspect the class counsel or the court of any motive to independently or jointly sabotage the applicants' claims for residency. Plaintiffs' attorneys represent the immigrants' interests; it is defendants' attorneys who are the adverse party.

Lastly, the role of counsel must be viewed against the backdrop of IRCA's qualified designated entity scheme in particular and the history of VOLAGS in general. The safe meeting ground offered by the community-based organizations, for both the dissemination of information about amnesty and receipt of materials from would-be beneficiaries, is surely an indication that Congress would want to foster communication between bona fide immigration specialists and their potential immigrant clients.

Limiting Access to Disclosed Information
By Protective Order

Finally, if the INS were truly concerned about disclosure of applicants' names to a third party who might subsequently facilitate deportation, it could seek a protective order to limit the use of the names by opposing counsel, to insure that the names are placed under seal or to otherwise limit access. The mechanisms, described above, for mitigating applicants' fear

159. Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1204-05 (9th Cir. 1975). In Nguyen, the court of appeals reversed a district court order restricting access by the counsel for a class of airlifted Vietnamese orphans to an ex parte in camera inspection of random INS files on the children. The appellate court reasoned that the attorneys represented the children's interest and needed individual files to determine class eligibility. "While the [orphans'] claims of illegal detention are presented as a class, it is individuals among the group who are illegally detained." Id., at 1205 [emphasis added].

160. See, Freeman v. Seligson, 405 F.2d at 1350-51 and text supra, acc. nn. 89-91; Friedman v. Bache Halsey Stuart Shields, 738 F.2d at 1344; Rosée v. Chicago Board of Trade, 35 F.R.D. 512, 515-16 (N.D. Ill. 1964) (under Commodity Exchange Act prohibition on publication, court can limit public access to information obtained in discovery by protective order); and Nguyen Da Yen v. Kissinger, 528 F.2d at 1205 (court may issue protective order to screen out information not necessary to plaintiffs' lawyers' purposes and otherwise "surround" access to files to guard against disclosure or abuse of information).
and suspicion in the United States and other countries which have conducted legalization programs demonstrate that government agencies are capable of devising ways to protect sensitive information about immigration status.

In at least two IRCA cases — in which INS' counsel of record were the same as those who represented the agency and Attorney General in Zambrano — the confidentiality issue was resolved by way of unchallenged orders limiting the use of application documentation. In Catholic Social Services v. Meese, the court ordered that documents and evidence, submitted by legalization applicant class members filing pursuant to a remedial order like the one issued in Zambrano, "not be made public or used for any purpose unrelated to this litigation by plaintiffs' counsel." In United Farm Workers v. INS, counsel for the


162. Under the stay order of June 10, 1988, ¶ 6, plaintiffs' counsel could conceivably handle documents submitted by prospective applicants who had been apprehended or who had attempted unsuccessfully to file. But see, Order Implementing Stay Pending Appeal in Proyecto San Pablo v. INS (No. 89-456, D. Ariz., Jan. 29, 1992). After granting summary judgment for plaintiffs representing a class of applicants whose continuous residency was contested by INS (by virtue of an absence allegedly resulting from a deportation order), 784 F. Supp. 738 (D. Ariz. 1991), the district court ordered interim relief pending appeal to the Ninth Circuit, including notice to all putative class members of their right to work authorization. The court did not, however, permit release of class members' names to plaintiffs. Instead, it adopted the government's proposed order which admonished INS not to use information furnished as to the identity of any applicant for purposes other than determination of class eligibility and granting relief, Order at ¶ 4, and contained procedures for safeguarding against fraud by applicants. Id., at ¶ 3(a) and (d). In a similar case, the court ordered INS to provide late-filing legalization applicants with the names and addresses of plaintiffs' counsel as a means of facilitating contact. Immigration Assistance Project v. INS, (C 88-379), Memorandum Decision and Order Granting Interim Protective Relief at 11 (W.D. Wash., June 1, 1993), stayed on other grounds sub nom. INS v. Legalization Assistance Proj. See, supra note 65. This order, however, was issued after the Ninth Circuit decision in Zambrano. See also nn. 166-68, infra.

163. Supra, note 145.
immigration service\textsuperscript{164} stipulated to a protective order to avoid any possible violation of §1160(b)(6) — the parallel confidentiality section for agricultural worker legalization applicants. Redacted notices of denial issued by INS administrative units were provided to plaintiffs’ counsel and, perhaps more surprising, INS attorneys were given access to the application files of plaintiffs.\textsuperscript{165}

Similarly, the government acquiesced to a provision in the \textit{Hernandez v. Thornburgh} consent decree that it turn over redacted denial letters and other notices issued to applicants\textsuperscript{166} and to a stipulated stay order in the Second Circuit analogue to \textit{Zambrano}\textsuperscript{167} to disclose the names of legalization applicants to opposing counsel. These orders were intended to assist plaintiffs’ counsel in monitoring INS review of claims from applicants initially prevented from filing applications because the agency said they did not meet eligibility requirements.

Rather than stay its order that the names be released to counsel as INS had requested, the \textit{Zambrano} district court issued a protective order \textit{sua sponte}, requiring the filing of names under seal and admonishing plaintiffs’ attorneys regarding any use of the names inconsistent with their role as class counsel.\textsuperscript{168}

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\item \textsuperscript{164}Two of the INS attorneys were also counsel of record in \textit{Zambrano v. INS}. See, generally, \textit{United Farm Workers, supra}, note 145, and \textit{Zambrano} pleadings (on file with \textit{Clearinghouse Rev.}, Nos. 42,723 and 43,351, respectively).
\item \textsuperscript{165}The exchange followed contested discovery requests by both parties. \textit{United Farm Workers v. INS, supra}, note 145, Reporter’s Transcript of Nov. 23, 1988 at 1-2 (on file with the author). See also, text \textit{supra}, acc. nn. 139-45.
\item \textsuperscript{166}\textit{Hernandez v. Thornburgh, supra}, note 14, Stipulation of Settlement and Order at 3-4 (Feb. 22, 1991) (INS to provide plaintiffs’ counsel with the status of applicants where continuous residence was contested as well as copies of redacted decision letters and denial notices). No class was certified in this case. See, \textit{supra}, note 113.
\item \textsuperscript{167}\textit{Perales v. Thornburgh, supra}, note 57, Stipulation and Order of Nov. 13, 1992 (2d Cir. Nos. 91-6133, -6135, -6167), ¶¶ 2(b),(e) (government stipulated to giving names and addresses of legalization applicants to class counsel on condition that they be kept confidential). This occurred after the Ninth Circuit affirmed the district court in \textit{Zambrano}.
\item \textsuperscript{168}Slip Op. at 7-8. Even the protective order was not enough to deter INS from appealing to the Ninth Circuit; plaintiffs’ lawyers were obliged for
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Conclusion

The Ninth Circuit did uphold the district court order in an opinion which adopts much of plaintiffs' analysis, but in abbreviated form. The Court of Appeals had little problem distinguishing Baldridge, relying on the Nelson precedent and its own articulation that the Census Act's express prohibition against production in judicial proceedings was simply not adopted in IRCA.\textsuperscript{169}

Ultimately, the appellate court followed the Eleventh Circuit\textsuperscript{170} holding and examined precisely whose interests were to be protected by the statute — the immigrant applicants — and whether those interests would be served by disclosure. The panel decided they would be. In other words, the release of names "facilitates, rather than frustrates" the intent of the immigration reform act,\textsuperscript{171} according to the court. The government did not appeal the confidentiality issue to the Supreme Court.\textsuperscript{172}

Meanwhile, the parties, in at least two other cases challenging implementation of the IRCA eligibility requirements, had earlier reached settlements where they devised compli-
 ance monitoring procedures explicitly tied to the fate of Zambrano in the Court of Appeals. That is, plaintiffs’ lawyers intended to examine copies of denial notices issued to applicants for temporary residency under the special agricultural worker program, but were constrained from negotiating for release of the names until the matter was resolved in the related Zambrano appeal.

The victory in Zambrano may be too little, too late at this juncture to aid in monitoring agency compliance in the other IRCA settlements. Nonetheless, the appellate court’s affirmance is a signal to the immigration service that its absolutist construction of a statute does more to resist than assist the will of Congress. If the INS really cares about promoting public participation in immigration benefits and open communication in the application process, it will match its words about protecting immigrants’ interests with its deeds.

173. See, United Farm Workers v. INS, supra, note 145, Stipulation of Settlement and Order Pursuant Thereto, April 21, 1989, ¶ V(j) (INS to furnish class counsel with statistics on readjudicated applications for SAW status with the option to renegotiate the release of actual denial notices pending the Zambrano appeal), reprinted in 66 Interp. Rel. 470 (April 24, 1989). See also, Lopez v. Ezell, Consent Order of May 1, 1989, ¶ 9, supra, note 152. (same provision with regard to SAW applicants whose interim work authorization and stays of deportation had been confiscated and legalization claims denied).

174. The parties surely did not contemplate the hiatus between the district court and appellate rulings. See supra, note 80.

175. But see, Stipulation and Order Thereon of Mar. 4, 1993, Catholic Social Services v. Gerson, supra, note 152, Exhibit A, at 7-8 reprinted in 70 Interp. Rel. 297, 300 (Mar. 8, 1993). (INS agreed to give class counsel the names of applicants denied class status and those whose status it revoked).