The Propriety of Denying Entry to Homosexual Aliens: Examining the Public Health Service's Authority Over Medical Exclusions

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From the early 1950's through the late 1970's, the Immigration and Naturalization Service (INS) routinely denied homosexual aliens admission to the United States pursuant to section 212(a)(4) of the Immigration and Nationality Act (INA). This provision requires the exclusion of aliens afflicted with "psychopathic personality" or, after the 1965 Amendment, "sexual deviation." Both the INS and the Public Health Service (PHS) participate in the exclusion process. The INS administers the general inspection procedure, and the PHS performs medical examinations.

In the last decade, however, health professionals have questioned the status of homosexuality as a mental illness, and this change has affected immigration policy. In 1973, the American Psychiatric Association (APA) removed homosexuality from its list of mental diseases. In 1979, the PHS responded to the reappraisal of homosexuality by

5. "The inspection, other than physical and mental examination, of aliens ... seeking admission ... shall be conducted by immigration officers. ..." 8 U.S.C. § 1225(a) (1982).
7. See N.Y. Times, Dec. 16, 1973, at 1, col. 1. In the first six printings of the AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2d ed. 1968) [hereinafter cited as DSM-II], homosexuality, fetishism, pedophilia, transvestism, exhibitionism, voyeurism, sadism, masochism, and other sexual deviations were included under the heading "Sexual Deviations." Socarides, The Sexual Deviations and the Diagnostic Manual, 32 AM. J. PSYCHOTHERAPY 414, 418 (1978). Sexual deviations appear under the general headings of "Personality Disorders" and "Certain Other Non-Psychotic Mental Disorders." Id. The seventh printing of DSM-II (July 1974) substituted "sexual orientation disturbance (homosexuality)" for homosexuality. Id. at 421. This new classification comprises persons troubled by their sexual interests in persons of the same sex, as distinguished from homosexuality per se, a form of sexual behavior not itself a psychiatric disorder. Id. See generally Ferlemann, Homosexuality, 5 MENNINGER PERSPECTIVE, Summer 1974, at 24; Hadden, Homosexuality: Its Questioned Classification, 6 PSYCHIATRIC ANNALS 165 (1976); Should Homosexuality Be in the APA Nomenclature?, 130 AM. J. PSYCHIATRY 1207 (1973); Note, The Immigration and Nationality Act and the Exclusion of Homosexuals: Boutillier v. INS Revisited, 2 CARDOZO L. REV. 359, 366-69 (1981).
refusing to furnish the INS with the medical certification that, until that time, had provided the basis for the exclusion of homosexual aliens. In response to the PHS position, the INS, relying on its interpretation of the INA, established a procedure by which it would exclude homosexual aliens even absent medical certification.

Courts differ on the validity of the INS practice of excluding aliens without medical certification. In the context of a deportation proceeding, the Ninth Circuit held, in *Hill v. INS*,¹⁰ that medical certification by the PHS is an indispensable requirement for excluding an alien on medical grounds.¹¹ The Fifth Circuit disagreed, holding in *In re Longstaff*,¹² a naturalization case, that the INS has the authority to exclude homosexual aliens despite the absence of a medical certificate.¹³

This Note defends the position that the PHS has the authority to define homosexuality for the purpose of the section 212(a)(4) exclusion, and that the PHS definition is binding upon the INS. Therefore, the PHS's decision to refuse to examine aliens for homosexuality precludes the INS from excluding aliens on that basis. Part I of this Note traces the history of the policy of excluding homosexual aliens. Part II maintains that, regardless of the psychiatric profession's interpretation of "psychopathic personality," Congress intended the expression to encompass homosexuality. Part III contends that Congress intended to empower the PHS to change its policy concerning the exclusion of homosexual aliens. Part IV examines the effect of judicial responses to the PHS's change in policy on the exclusion, deportation, and naturalization of homosexual aliens, as well as the prospect of congressional resolution of this controversy.

I. HISTORY OF THE EXCLUSION OF HOMOSEXUAL ALIENS

Since the late nineteenth century, Congress has enacted a number of statutes containing provisions that have excluded aliens afflicted with mental disabilities from admission into the United States.¹⁴ Congress

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10. 714 F.2d 1470 (9th Cir. 1983).

11. Id. at 1480.


13. Id. at 1448.

initially sought to stem the influx of aliens likely to become dependents of the states,\(^\text{15}\) and consequently limited the purview of its first Act to "lunatics" and "idiots."\(^\text{16}\) Subsequent statutes,\(^\text{17}\) however, excluded aliens on the basis of mental disability, without relating the disability to the alien's capability of self-support.\(^\text{18}\) In order to achieve this broader objective, Congress expanded its formulation of mental disabilities by including within it "persons of constitutional psychopathic inferiority."\(^\text{19}\) Although no court ever determined that the expression "constitutional psychopathic inferiority" encompassed homosexuality,\(^\text{20}\) this expres-

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\(^{15}\) The Act of Aug. 3, 1882 specifically refers to lunatics and idiots who are "unable to take care of [themselves] without becoming . . . public charge[s]," ch. 376, § 2, 22 Stat. 214, and before Congress passed the Act of Mar. 3, 1891, "[t]he Ford committee reported that there were thousands of alien paupers, insane persons, and idiots landing in this country annually who became a burden upon the States. . . ." S. REP. No. 1515, 81st Cong., 2d Sess. 51 (1950).


\(^{18}\) The 1917 Act added "persons of constitutional psychopathic inferiority" and "persons with chronic alcoholism" to the list of mental disabilities set forth in earlier statutes. The Senate report accompanying that bill explained that the purpose of these additions and other changes was to "prevent the introduction into the country of strains of mental defect that may continue and multiply through succeeding generations, irrespective of the immediate effect thereof on earning capacity." S. REP. No. 352, 64th Cong., 2d Sess. 4-5 (1917), quoted in S. REP. No. 1515, 81st Cong., 2d Sess. 338 (1950).

\(^{19}\) Immigration Act, Pub. L. No. 64-301, § 3, 39 Stat. 874, 875 (1917).

\(^{20}\) A Board of Immigration Appeals (BIA) decision, In re La Rochelle, 11 I. & N. Dec. 436 (BIA 1965), however, held that a homosexual came within the meaning of the term "constitutional psychopathic inferiority," but, in light of the alien's good standing, the BIA held the deportation order in abeyance pending naturalization proceedings. The BIA based its inclusion of homosexual persons under the heading "constitutional psychopathic inferiority" on the PHS regulations interpreting the expression. Although these regulations were not, in and of themselves, conclusive, the BIA also maintained that replacement of the term "constitutional psychopathic inferiority" with "psychopathic personality" in the 1952 Act represented Congress's desire to continue excluding homosexual aliens. Looking to the legislative history of the 1952 Act, which explicitly expressed an intent to exclude homosexuals, see infra note 38 and accompanying text, the Board reasoned that since the later term did not to add to or modify the earlier term, the two must be coextensive. Id. at 440-41. Still, prior to the 1952 Act, the BIA only excluded aliens if they admitted to, or were convicted of, the commission of a homosexual act that constituted a crime involving moral turpitude. Immigration Act, Pub. L. No. 64-301, § 3, 39 Stat. 874, 875 (1917); see In re W—, 5 I. & N. Dec. 578 (BIA 1953) (deportation for admission to crime of gross indecency, i.e., "male practicing masturbation with another male"); cf. In re S—, 5 I. & N. Dec. 576 (BIA 1953) (insufficient information in the record to conclude that conviction of the crime of gross indecency between males under a Michigan statute constituted a conviction of a crime involving moral turpitude); In re Z—, 2 I. & N. Dec. 316 (BIA 1945) (lack of a definition for the term "gross indecency," as used in the Canadian Criminal Code, precluded the BIA from concluding that the crime of "gross indecency with another male person" constituted a crime involving moral turpitude). The BIA's use of the "crime of moral
sion acted as the precursor of the terms "psychopathic personality"21 and "sexual deviation,"22 which immigration officials and courts have employed to exclude homosexual aliens from admission.23

A. Legislative History of the Immigration and Nationality Act

In 1947, the Senate undertook a comprehensive investigation of the immigration system.24 This investigation culminated in the release of a Judiciary Committee Report,25 which recommended the addition of "homosexuals and other sex perverts" to the class of medically excludable aliens.26 A bill incorporating these recommendations accompanied the report.27

To aid its deliberation, Congress asked the Public Health Service (PHS) to comment on the medical aspects of the proposed legislation.28 The PHS responded,29 but the meaning and implications of its response remain unclear. Unlike its analyses of the other medical classifications set forth by the bill,10 the PHS's comments on "homosexuals and sex perverts" included no specific recommendation. Instead, the PHS addressed the difficulty encountered in substantiating the diagnosis of homosexuality and sexual perversion,31 and added that, in "instances
where the disturbance in sexuality [might] be difficult to uncover, a more obvious disturbance in personality [might] be encountered which would warrant a classification of psychopathic personality or mental defect." [32]

The Senate Judiciary Committee reformulated the immigration bill [33] to reflect both the PHS report and testimony presented in joint hearings. [34] This new bill [35] eliminated "homosexuals and sex perverts" as an exclusionary category. The report [36] accompanying the bill maintained that the Senate made this change in response to the PHS assertion that "the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect ... [was] sufficiently broad to provide for the exclusion of homosexuals and sex perverts." [37] The report further specified that the "change in nomenclature [was] not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates." [38] The revised bill passed Congress to become the Immigration and Nationality Act (INA). [39]

B. Judicial Interpretation of the INA

The first significant issue [40] to arise from the application of section 212(a)(4) [41] of the INA concerned whether the expression "psychopathic personality" included "homosexuality." Initially there was little doubt that it did. Following a number of administrative decisions, [42] the Sec-
ond Circuit in Quiroz v. Neely⁴³ looked to the legislative history of the Act and concluded that, regardless of the medical profession’s understanding of the term “psychopathic personality,” Congress intended it to include homosexuality.⁴⁴

In Fleuti v. Rosenberg,⁴⁵ however, the Ninth Circuit disrupted this consensus.⁴⁶ Fleuti involved the deportation⁴⁷ of an allegedly homosexual alien under section 241(a)(1) of the INA,⁴⁸ a provision requiring the deportation of any alien who, though excludable at the time of entry, had somehow gained admission. The Ninth Circuit objected to the use of postentry behavior in determining the excludability of an alien,⁴⁹ and maintained that evidence of homosexual activity subsequent to entry was irrelevant to the decision of whether immigration officials should have admitted an alien in the first place. Unfortunately, the Ninth Circuit’s determination that, in the context of postentry behavior, the expression “psychopathic personality” was void for vagueness⁵⁰ led some

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43. 291 F.2d 906 (5th Cir. 1961).
44. We find it unnecessary “to embark” . . . “on an amateur’s voyage on the fog­

—-shrouded sea of psychiatry.” . . . The legislative history is clear as to the meaning

to be given to ["psychopathic personality"] . . . Whatever the phrase . . . may mean

to the psychiatrist, to Congress it was intended to include homosexuals and sex perverts.
It is that intent which controls here.
Id. at 907.
45. 302 F.2d 652 (9th Cir. 1962), vacated and remanded on other grounds, 374 U.S.449 (1963).
46. In addition to the authorities mentioned in notes 42 and 43, supra, other courts have interpreted § 212(a)(4) without directly applying it to exclude or deport a homosexual alien. See, e.g., United States v. Flores-Rodriguez, 237 F.2d 405, 412-13 (2d Cir. 1956) (Frank, J., concur­
ring) (stating that the legislative history of the expression “psychopathic personality” plainly
indicates that homosexual persons were encompassed within that term); Ganduxe y Marino v.
male denied ever having been arrested or convicted, the court deemed the misrepresentation material
since, had this information been known earlier, “an attempt would almost certainly have been
made to exclude him” as a homosexual person under § 212(a)(4) of the INA), aff’d sub nom.
47. Although § 212(a)(4) of the INA explicitly pertains to the excludability of aliens, most
cases under that section involve deportation proceedings. The reason for this lies in the differing
due process requirements for exclusion and deportation. These requirements facilitate more readily
appeals on substantive matters for deportations. See Leng May Ma v. Barber, 357 U.S. 185,
187 (1958); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953). See generally
1286, 1311-33 (1983) [hereinafter cited as Developments]; Note, Constitutional Limits on the
Power to Exclude Aliens, 82 Colum. L. Rev. 957 (1982); Note, Limitations on Congressional
Power to Deport Resident Aliens Excludable as Psychopaths at Time of Entry, 68 Yale L.J.
931 (1959).

An excluded alien who has exhausted his administrative remedies may obtain judicial review
49. 302 F.2d at 655.
50. 302 F.2d at 654-58.
courts to misunderstand the case, and at least one court interpreted *Fleuti* to mean that homosexual aliens could not be excluded as "persons afflicted with psychopathic personality."\(^{51}\)

In *Boutilier v. INS*,\(^{52}\) the Supreme Court eliminated the confusion surrounding the validity of using the expression "psychopathic personality" to exclude homosexual aliens. The Court held that Congress intended the expression "psychopathic personality" to include homosexuality\(^{53}\) and, furthermore, that the phrase is not used as a clinical term, but as an expression designed to achieve Congress's goal of excluding homosexual aliens.\(^{54}\) The Court also rejected the void-for-vagueness argument, asserting that, with regard to preentry behavior.

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51. Lavoie v. INS, 360 F.2d 27 (9th Cir. 1966) (per curiam), vacated and remanded per curiam, 387 U.S. 572 (1967), on remand, 418 F.2d 732 (9th Cir. 1970). The Lavoie court included none of the judges who handed down the 1962 *Fleuti* decision. The court issued a per curiam decision which, without revealing any of the case's facts, maintained that *Fleuti* stood for the proposition that the term "psychopathic personality" is void for vagueness as applied to homosexuals. The actual facts of *Lavoie* reveal that, unlike in *Fleuti*, the court based its decision to deport Lavoie exclusively on evidence of preentry behavior. *In re Lavoie*, 121. & N. Dec. 821 (BIA 1968).

Congress also seems to have read *Fleuti* too broadly. Its 1965 amendment of 8 U.S.C. § 1182(a)(4) was a response to its determination that *Fleuti* had held section 212(a)(4) to be "unconstitutionally vague in that homosexuality was not sufficiently encompassed within the term 'psychopathic personality.'" S. REP. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S. CODE CONG. & AD. NEWS 3328, 3337.

52. 387 U.S. 118 (1967). Justice Brennan dissented for the same reasons Judge Moore did in the lower court opinion. Justices Douglas and Fortas dissented because they found "psychopathic personality" too vague a term to be employed as a criterion for imposition of penalties or punishment and that "affliction" conveyed the idea of an accustomed pattern of conduct, or a way of life, which had not been demonstrated in this case. *Id.* at 125-35.

53. The court relied on legislative history, especially S. REP. No. 1137, see supra text accompanying note 38, in finding that "the Act indicates beyond a shadow of a doubt that the Congress intended the phrase ‘psychopathic personality’ to include homosexuals. . . ." 387 U.S. at 120.

Justice Brennan dissented for the same reasons that Judge Moore dissented from the lower court opinion. Judge Moore's interpretation of congressional intent, which is probably closer to the sentiments expressed in the PHS comments on the proposed bill, see infra text accompanying notes 80-85, contends that Congress could not have intended to exclude all homosexual persons, but only those who have a "long-lasting and perhaps compulsive orientation towards homosexual or otherwise ‘abnormal’ behavior." 363 F.2d at 488. This distinction goes to the parameters of Congress's definition of homosexuality, rather than to the more general question of whether "psychopathic personality" represents a medical term or a term of art. Judge Moore does not deny that Congress intended to exclude certain homosexual aliens under § 212(a)(4) of the INA, but only insofar as these homosexual aliens are afflicted with psychopathic personality, *id.* at 498; he contests the validity of the PHS decision that this particular homosexual alien suffered from "psychopathic personality."

54. Because of the manner in which Congress expressed its reasons for adopting the expression "psychopathic personality," the Court concluded that the term was not used in its medical sense. 387 U.S. at 121-22. The Court based this conclusion on Congress's arguably erroneous assertion that it was adopting a PHS recommendation. See infra text accompanying notes 80-89. The lower court refers to the expression "psychopathic personality" as a term of art, 363 F.2d at 493-94, and relies on the same reasoning as *Quiroz*, see supra note 44.

behavior, Congress's plenary power to make rules for the admission of aliens was not subject to any constitutional requirement of fair warning. 56

C. 1965 Amendment

In 1965, Congress substantially revised immigration policy.57 One change made was the addition of the term "sexual deviation" to section 212(a)(4) of the INA in response to its understanding of the Ninth Circuit's decision in Fleuti.58 The report accompanying this legislation first reiterated the Judiciary Committee's 1952 position that the "change in nomenclature" resulting from the elimination of homosexuality and sexual perversions as explicit exclusionary categories was "not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates."59 The report then explained that the committee specifically had added the medical60 term "sexual deviation" as a ground of exclusion to resolve any remaining doubt.61

56. Id. at 123.

Justices Douglas and Fortas dissented on the ground that the term "psychopathic personality" was too vague to be used as a standard for the imposition of deportation. Id. at 125-35.

Judge Moore's dissent, on which Justice Brennan based his dissent, argued that had the exclusionary expression been less vague, the alien could have modified his preentry behavior. Consequently, he agreed with the decision in Lavoie, see supra note 51, 363 F.2d at 498-99.


58. See supra note 51.


60. A number of congressional representatives indicated in debate on the floor of the House that "sexual deviation" represents a medical term. Rep. Feighan, Chairman of the Subcommittee on Immigration and Nationality of the House Committee on the Judiciary, in reporting the bill stated that it "establishes a new class of aliens who are mandatorily excluded from admission. Those are persons classified under the medical term of 'sexual deviation.'" 111 CONG. REC. 21,586 (1965). Rep. Gilbert commented that "[t]he measure . . . retains the exclusionary provisions of its predecessors, designed to assure that the United States does not become burdened with persons who are physically or morally unfit. Though this objective remains unchanged, several of the old definitions of unfitness have been refined to conform with new medical or psychological knowledge." 111 CONG. REC. 21,771 (1965). Rep. Poff stated that, by using the precise term "sexual deviation," "the bill makes it plain that the Congress intends that aliens afflicted with that disgraceful disability be excluded from our shores." 111 CONG. REC. 21,782 (1965). Finally, Rep. Ryan noted that "certain mental and physical conditions warranting exclusionability under the old law have been clarified and made to conform with recent advances in medical science." 111 CONG. REC. 21,782 (1965).

II. LEGAL RELATIONSHIP BETWEEN HOMOSEXUALITY AND PSYCHOPATHIC PERSONALITY

The examination of two issues may prove helpful in analyzing the dispute that has arisen from the refusal of the PHS to certify aliens who are homosexual as medically excludable. The first issue involves whether homosexuality constitutes a form of "psychopathic personality." This was the primary concern of pre-\textit{Boutilier} decisions and is roughly equivalent to asking whether \textit{Boutilier} was correctly decided. The second issue assumes, for reasons which will be developed in this section, that \textit{Boutilier} was correctly decided, and then seeks to determine the proper meaning of homosexuality under section 212(a)(4) of the INA. This two-part analysis establishes that the \textit{Boutilier} Court's characterization of "psychopathic personality" as a term of art arises from circumstances and concerns that do not apply to "homosexuality" or "sexual deviation." Consequently, the Court's holding that "psychopathic personality" does not lend itself to medical reevaluation should not preclude the PHS from interpreting "homosexuality" and "sexual deviation" in light of congressional intent and advancing medical knowledge.

Prior to \textit{Boutilier}, two views existed with regard to the meaning of "psychopathic personality." The first, to which the \textit{Boutilier} dissenters subscribed, argued that Congress used the expression as a medical term\textsuperscript{62} and that homosexuals should be excluded only insofar as they are afflicted with the mental condition "psychopathic personality."\textsuperscript{63} The other view, which ultimately prevailed, asserted that "psychopathic personality" represents a term of art\textsuperscript{64} that Congress employed to exclude certain classes of aliens, with one such class comprising aliens who are homosexual.\textsuperscript{65} An examination of the meaning of the term "psychopathic personality" in the context of the statute as a whole provides the appropriate point of departure in determining the relative merits of each of these opposing arguments.\textsuperscript{66}

\textsuperscript{62} This is never stated explicitly, but Judge Moore urges that a physical examination is required to establish that the petitioner is a psychopathic personality, even if it has already been determined that he is homosexual. 363 F.2d at 496-99. Similarly, Justice Douglas discusses various medical definitions of "psychopathic personality" in his dissenting opinion. 387 U.S. at 125-131.

\textsuperscript{63} 363 F.2d at 497-98.

\textsuperscript{64} See Quiroz v. Neelly, 291 F.2d 906, 907 (5th Cir. 1961).

\textsuperscript{65} Boutilier v. INS, 387 U.S. 118, 120, 122 (1966).

A. Statutory Language

The position of "psychopathic personality" within the statute indicates that the term has medical significance. First, section 212(a)(4),\textsuperscript{67} which contains the term, is located among six other medically related subsections.\textsuperscript{68} Second, section 234\textsuperscript{69} requires the provision of suitable facilities for examining aliens suspected of being excludable under the first five of these subsections.\textsuperscript{70} Third, section 234\textsuperscript{71} authorizes the Surgeon General to promulgate additional regulations to govern these medical examinations. Finally, if a medical officer issues a certificate excluding an alien under one of these provisions, section 236(d)\textsuperscript{72} dictates that the INS must base its decision to exclude solely upon that certificate.

These factors do not, however, dispositively determine that "psychopathic personality" constitutes a medical term. The statute provides the same medical procedures for aliens suspected of being "insane"\textsuperscript{73} as for aliens suspected of being afflicted with "psychopathic personality," even though insanity is a legal and not a medical term.\textsuperscript{74} Because the statute fails to clarify the meaning of "psychopathic personality," it is necessary to examine the INA's history to determine the purpose Congress intended the term to serve.\textsuperscript{75}

\textsuperscript{68} § 1182. Excludable aliens
\hspace{1em} (a) General classes
\hspace{1.5em} 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:
\hspace{2em} (1) Aliens who are mentally retarded;
\hspace{2em} (2) Aliens who are insane;
\hspace{2em} (3) Aliens who have had one or more attacks of insanity;
\hspace{2em} (4) Aliens afflicted with psychopathic personality, or sexual deviation, or a mental defect;
\hspace{2em} (5) Aliens who are narcotic drug addicts or chronic alcoholics;
\hspace{2em} (6) Aliens who are afflicted with any dangerous contagious disease;
\hspace{2em} (7) Aliens not comprehended within any of the foregoing classes who are certified by the examining physician as having a physical defect, disease, or disability, when determined by the consular or immigration officer to be of such a nature that it may affect the ability of the alien to earn a living, unless the alien affirmatively establishes that he will not have to earn a living; . . .
\textsuperscript{69} 8 U.S.C. § 1182(a)(1)-(7) (1982). Section 1182(a)(8), which excludes aliens "who are paupers, professional beggars, or vagrants," however, is not a medical exclusion.
\textsuperscript{70} 8 U.S.C. § 1224 (1982).
\textsuperscript{72} 8 U.S.C. § 1226(d) (1982).
\textsuperscript{73} 8 U.S.C. § 1182(a)(2) (1982).
\textsuperscript{74} BLACK'S LAW DICTIONARY 714 (rev. 5th ed. 1979) ("INSANITY. The term is a social and legal term rather than a medical one.").
\textsuperscript{75} One may make a distinction between legislative intent and statutory meaning. The former looks at the language of the statute from the point of view of the drafter, the latter views it from the perspective of those persons whom the legislation will affect. J. SUTHERLAND, supra
B. Congressional Intent

The first version of the proposed INA, introduced in 1950, contained a provision specifically requiring the exclusion of homosexual aliens.\(^{76}\) In a subsequent draft,\(^ {77}\) the House Judiciary Committee removed this provision. Although the Committee allegedly removed the provision in response to the recommendations of a PHS report,\(^ {78}\) a close examination of the report suggests otherwise. Discrepancies exist between the PHS position and Congress's interpretation of that position, and these discrepancies laid the groundwork for the present controversy.

1. PHS report—The predominant PHS concern was diagnosability.\(^ {79}\) Its report indicated that the lack of a reliable laboratory test makes substantiating a diagnosis of homosexuality difficult.\(^ {80}\) The report noted, however, that more obvious disturbances would come under the classifications "psychopathic personality" or "mental defect" found in another provision of the proposed statute.\(^ {81}\) Nevertheless, despite these comments, it failed to make specific recommendations regarding the retention of homosexuality as an explicit exclusionary classification.\(^ {82}\)

The PHS never stated that psychopathic personality, as understood

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\(^{76}\) S. 3455, 81st Cong., 2d Sess. (1950).

\(^{77}\) S. 2055, 82d Cong., 1st Sess. (1951).

\(^{78}\) S. REP. No. 1137, 82d Cong., 1st Sess. 9 (1951); see supra notes 28-38 and accompanying text.

\(^{79}\) The diagnosability of homosexuality is a recurring issue. In 1979 the PHS said that homosexuality is not medically diagnosable. Memorandum of the Surgeon General, supra note 8, at 399. The possible meanings of this statement will be discussed later. See infra note 151. The difficulty does not seem to involve determining, after prolonged analysis, whether an individual is homosexual. Rather, the problem consists of developing an accurate, expedient, standardized test for making this determination. See, e.g., DeLuca, Performance of Overt Male Homosexuals and Controls on Blacky Test, 23 J. CLINICAL PSYCHOLOGY 497 (1967) (concluding that the Blacky Test does not differentiate overt male homosexuals from nonhomosexuals); Goldfried, On the Diagnosis of Homosexuality from the Rorschach, 30 J. CONSULTING PSYCHOLOGY 338 (1966) (concluding that the Rorschach test is of limited efficacy); Zamansky, A Technique for Assessing Homosexual Tendencies, 24 J. PERSONALITY 436 (1956) (concluding that overt homosexuals (1) will look at a picture of a man relatively longer than will a normal male; (2) will manifest, when compared to normal males, a greater attraction to men than to neutral objects; and, (3) subject to limitations, will manifest a greater avoidance of women than will normal males); see also D. West, HOMOSEXUALITY 48-53 (3d ed. 1968).

\(^{80}\) PHS REPORT, supra note 28, at 1701.

\(^{81}\) See supra note 30 and accompanying text.

\(^{82}\) PHS REPORT, supra note 28, at 1700.
by the medical profession, encompassed homosexuality. Instead, the PHS noted that persons with sociopathic reactions are afflicted with psychopathic personality, and that this group frequently includes individuals suffering from sexual deviation. The PHS noted that persons with sociopathic reactions are afflicted with psychopathic personality, and that this group frequently includes individuals suffering from sexual deviation. Elsewhere in the report the PHS stated that ordinarily persons with pathologic behavior such as "homosexuality or sexual perversion which includes sexual sadism, fetishism, tranvestism and pedophilia" are included within the classification "psychopathic personality with pathologic sexuality." The modifiers "frequently" in the first statement and "ordinarily" in the second imply that not all homosexuals would necessarily come under the term "psychopathic personality." When examined in conjunction with the difficulty involved in diagnosing homosexuality, the PHS report seems to suggest that the INA should not exclude homosexual aliens who exhibit no evidence of "psychopathic personality," "mental defect," or "pathologic sexuality."

2. Congressional interpretation—A Senate Judiciary Committee report noted that the provision excluding aliens afflicted with "psychopathic personality" did not specifically provide for the exclusion of homosexual aliens. Nevertheless, the report maintained that the change in nomenclature did not modify the intent to exclude sex-

83. Id.
84. Id. at 1701. The ambiguity of this statement casts even greater doubt on the extent to which "psychopathic personality" encompasses "homosexuality." It is unclear whether homosexuality and/or sexual perversion absent sexual sadism, fetishism, transvestism or pedophilia would constitute "pathologic sexuality" for purposes of determining "psychopathic personality."
85. See supra note 79. The mental examination of an alien consists of an interview by an aide who is alert for any unusual sign indicating mental aberration. HOUSE COMMITTEE ON THE JUDICIARY, 88TH CONG., 1ST SESS., SPECIAL SERIES No. 12, STUDY OF POPULATION AND IMMIGRATION PROBLEMS, INQUIRY INTO THE ALIEN MEDICAL EXAMINATION PROGRAM OF THE U.S. PUBLIC HEALTH SERVICE 28 (1963) [hereinafter cited as PHS STUDY].

86. S. REP. No. 1137, 82d Cong., 2d Sess. (1952). The authority of this report is discounted in Note, "Psychopathic Personality" and "Sexual Deviation": Medical Terms or Legal Catchalls—Analysis of the Status of the Homosexual Aliens, 40 TEMP. L.Q. 328, 337-39 (1967). The author argues that the official legislative history of the Act is H. REP. No. 1365, 82d Cong., 2d Sess. (1952), since it was the House bill, not the Senate bill, which became law. Id. at 338. The House Report states that the medical grounds of exclusion "have been reexamined in the light of information made available by the [PHS]." H. REP. No. 1365, 82 Cong., 2d Sess., reprinted in 1952 U.S. CODE CONG. & AD. NEWS 1653, 1693. The Note suggests that the House, therefore, intended to incorporate the PHS position that only sexually deviant persons with a more obvious mental disturbance (e.g., psychopathic personality) were to be excluded. Note, supra, at 339. It is further observed, however, that the House bill eliminated the explicit exclusion of "aliens who are homosexuals or sex perverts," although the PHS Report makes no such recommendation. Id. This inconsistency seems to indicate that views of the House were tantamount to those of the PHS. Since the inquiry seeks to determine what Congress meant, it may be preferable to examine the Senate Report.

ually deviant aliens, stating that the PHS had advised the committee that the terms "psychopathic personality" and "mental defect" were sufficiently broad to provide for the exclusion of homosexuals and "sex perverts." Actually, the PHS had asserted that in "instances where the disturbance in sexuality may be difficult to uncover, a more obvious disturbance in personality may be encountered which would warrant a classification of psychopathic personality or mental defect." This discrepancy provides the peculiar circumstances that provoked the Supreme Court to determine that, in the context of the statute, "psychopathic personality" represents a legal term.

C. Meaning of Boutilier

*Boutilier* does not controvert the general authority of the PHS to interpret medical terms to reflect advances in medical knowledge. The Supreme Court read the Senate Report as an expression of Congress's desire to exclude homosexual aliens. The Court saw no reason to question the report's assertion that the PHS had indicated that "psychopathic personality" encompassed "homosexuality," especially in light of the PHS having certified Boutilier as excludable. Its concern over the psychiatric profession's decision to classify "homosexuality" under a heading other than "psychopathic personality" prompted the Court

88. *See supra* note 87.
89. *PHS Report, supra* note 28, at 1701. The Senate may have looked at the PHS statement that "ordinarily, persons suffering from disturbances in sexuality are included within the classification of 'psychopathic personality with pathologic sexuality.'" *Id.* The word "ordinarily" fails, however, to establish whether homosexual persons will always fall within the classification. Moreover, it is not clear that the general classification "psychopathic personality" encompasses the classification "psychopathic personality with pathologic sexuality." *See supra* note 84.
90. *Boutilier* may, in fact, more strongly support the contention that the Supreme Court intended to emphasize the PHS's authority. The PHS guidelines themselves stated that "psychopathic personality" represents a legal term. *Public Health Service, Manual for Medical Examination of Aliens* § 6-1 (1963) [hereinafter cited as *PHS Manual*]. Furthermore, the Court mentions three times that Congress based its decision on PHS findings and twice that PHS doctors made the determination of Boutilier's homosexuality. 387 U.S. at 122.
91. Although the Senate Report may not be the official legislative history of the Act, it represents the most explicit, most consistent expression of congressional intent available. *See supra* note 86. As such, it is arguably the strongest foundation on which the *Boutilier* Court could have rested its decision. It is interesting to note that neither the *Boutilier* Court nor the petitioners in their brief directly question this report's authority. The citation of the Senate Report in the official legislative history of the 1965 amendment, *H. Rep. No. 745, 89th Cong., 1st Sess.* 16 (1965), further weakens the argument against reliance on the report.
92. 387 U.S. at 120-22.
93. *Id.* at 122.
94. 363 F.2d at 493 n.9, 494 n.11; *cf.* Lesbian/Gay Freedom Day Comm., Inc. v. INS, 541 F. Supp. 569, 584 (N.D. Cal. 1982), *modified sub nom.* Hill v. INS, 714 F.2d 1470 (9th Cir. 1983) ("*Boutilier* authority is not controlling where the medical profession has not changed the medical illness label applied to a homosexual ... , but rather has determined that homosexuality is no longer a medical illness, mental disorder, or a sexual deviation at all.").
to affirm both congressional intent and PHS policy by fixing the legal relationship between these two terms. As such, the decision merely represents the repair of a congressional misinterpretation of medical terminology — a misinterpretation the PHS supported out of deference to congressional intent.

III. SIGNIFICANCE OF THE PHS POLICY CHANGE

Congress and the Supreme Court have adopted the position that homosexuality is included within “psychopathic personality” and/or “sexual deviation.” In order to apply the term “homosexuality” to individual aliens, it remains necessary to determine precisely what Congress meant by this term. The statute itself provides no definition of “psychopathic personality” or “sexual deviation,” much less “homosexuality.” Because a number of definitions of homosexuality exist, one must examine the purpose of Congress’s exclusion of homosexual aliens in order to ascertain the appropriate meaning.

A. Medical Nature of the Exclusion

Although the placement of section 212(a)(4) among a group of medical exclusions may create a presumption that the provision’s purpose was the exclusion of mentally disabled aliens, Congress may have employed medical terms to achieve nonmedical objectives. It has been asserted that “homosexuality” serves as a term of convenience employed to exclude immoral aliens, subversive aliens, or aliens likely to become public charges.

Although such conjecture is plausible, little evidence suggests that

95. Homosexuality can be unconscious, pseudo, latent, compulsive or debilitive. S. Willis, UNDERSTANDING AND COUNSELING THE MALE HOMOSEXUAL 25-39 (1967). A broad definition of homosexuality could include at least 37% of the American population, A. Kinsey, W. Pomeroy & C. Martin, SEXUAL BEHAVIOR IN THE HUMAN MALE 623 (1948), while the more restrictive definition of sexual orientation disturbance, see DSM-II, supra note 7, probably would encompass a much smaller fraction of the population. See also D. West, HOMOSEXUALITY RE-EXAMINED, 1-2 (1977); D. West, supra note 79, at 10-15.

96. In 1950, the year the first version of the INA was introduced in Congress, the Senate passed a resolution authorizing a study and investigation of the federal government’s employment of persons described as “homosexuals and other moral perverts,” and of the preparedness of the government for the protection of life and property against the threat to security inherent in the employment of such perverts. S. Res. 280, 81st Cong., 2d Sess., 96 Cong. Rec. 8209 (1950). See Developments, supra note 47, at 1342-48 (implying that the legal nature of the term “psychopathic personality” created a per se bar against admitting homosexuals and relying on comments made in the 1965 floor debates as evidence that Congress did not exclude homosexual aliens solely for medical purposes); see also supra note 60.

97. PHS STUDY, supra note 85, at 16 (Rep. Poff) (asserting that the importance of excluding homosexual aliens lies not in the immorality involved, but in the susceptibility of homosexuals to subversion). The Senate undertook a study of homosexuals and sex perverts as federal employees and found them unsuitable and a security risk. See 96 Cong. Rec. 16,587 (1950) (presenting S. Doc. No. 241, 81st Cong., 2d Sess. (1950)); see also D. West, supra note 79, at 92-93.
this was Congress's purpose. Substantial evidence, however, supports the proposition that the exclusion of homosexual aliens sought to protect exclusively medical interests. Although Congress may have considered homosexuality morally reprehensible, it failed to reveal such a view when it enacted the INA. Each draft of the statute contained a group of provisions explicitly denying admission to certain classes of immoral aliens, yet in each of these bills, Congress placed the clause excluding homosexual aliens among the medical, not moral, exclusions. Moreover, the replacement of the terms "homosexuality" and "sexual perversion" with the expression "psychopathic personality" fails to evince an intent to exclude homosexual aliens for moral reasons. If Congress had truly believed that the exclusion of homosexual aliens served a moral purpose, its objective might have been furthered by retaining the term "homosexuality," with all its moral overtones, rather than by acceding to a PHS medical report and relying instead on "psychopathic personality," a less morally charged term.

Congress also failed to disclose a morally oriented objective in its 1965 amendment of the INA. The *Fleuti* decision, which had prompted Congress to reassess its use of "psychopathic personality" in section 212(a)(4), addressed a controversy ultimately based upon conflicting medical interpretations of that expression. Again, Congress could have resolved this dispute by making clear that homosexuality was a moral category of exclusion. This could have been accomplished by including homosexuality among the other moral exclusions, or at least by announcing that it used medical terms to achieve a moral end. Instead, Congress merely added "sexual deviation," a more precise medical term than "psychopathic personality," to section 212(a)(4).

98. 8 U.S.C. § 1182 (1982) provides for the exclusion of aliens involved in certain acts deemed immoral. See, e.g., § 1182(a)(9) (crimes involving moral turpitude); § 1182(a)(10) (habitual criminals); § 1182(a)(11) (polygamists); § 1182(a)(12) (prostitutes); § 1182(a)(13) (immoral sex acts).

99. Dr. Dahlgren, a PHS physician, and Dr. Harvey, who represented Fleuti, disagreed as to the propriety of classifying Fleuti as a psychopathic personality. *Fleuti v. Rosenberg*, 302 F.2d 652, 657-58 (9th Cir. 1962), remanded on other grounds, 374 U.S. 449 (1963).

100. The remarks of two congressmen on the House floor provide the strongest evidence of a nonmedical purpose behind Congress's exclusion of homosexual aliens. Rep. Gilbert stated that the 1965 Amendment would assure the exclusion of physically or *morally* unfit persons. 111 CONG. REC. 21,771 (1965). Since the only changes affecting § 212(a) were (1) the replacement of "feebleminded" with "mentally retarded," (2) the deletion of "epilepsy," (3) the addition of "sexual deviation," and (4) an alteration of the exclusion of aliens with communicable diseases and past mental illness, 79 Stat. at 919, one can infer that moral unfitness applied to sexual deviation.

Rep. Poff referred to sexual deviation as a disgraceful affliction. 111 CONG. REC. 21,772 (1965). It is interesting to note, however, that the 1917 Act excluded aliens afflicted with "loathsome" contagious diseases, and that the first version of the INA also used that term. It seems unlikely that the use of this pejorative modifier was intended to alter the medical nature of that exclusion.

The statements of these two congressmen, especially Rep. Gilbert's explicit reference to moral unfitness, must be accorded some probative weight, but they are by no means dispositive evidence of congressional purpose. Generally, statements made during floor debates are inadmissible in
When it passed the INA, Congress’s concerns included the exclusion of aliens likely to engage in subversive activities. Although some evidence suggests that Congress believed homosexual persons presented a greater security risk than heterosexual persons, there is no evidence suggesting that this concern prompted Congress to exclude homosexual aliens. In fact, Congress explicitly provided for the exclusion of potential subversives in comprehensive provisions elsewhere in the statute.

Similarly, although the entry of aliens afflicted with mental disorders that render them unable to earn a living had also been a longstanding concern of Congress, nothing indicates that the exclusion of aliens afflicted with “psychopathic personality” was designed to eliminate...
this problem. Indeed, another section of the statute explicitly addresses
this concern.\textsuperscript{105}

The purpose of the "psychopathic personality" exclusion was to
"keep out 'tainted blood,' that is, 'persons who have medical traits
that would harm the people of the United States if these traits were
introduced in this country.'"\textsuperscript{106} This statement does not clarify the ex­
act nature of the harm anticipated, but such medical harm seems to
bear little relation to the problem of aliens becoming public charges.\textsuperscript{107}
Thus, though questions of morality, subversion, or destitution may
have motivated Congress to act,\textsuperscript{108} the evidence of such intentions is
inadequate to override the manifestly medical nature of the provision.

\section*{B. PHS Role in the Exclusion of Aliens}

Another area of contention in determining the excludability of
homosexual aliens is the requirement of section 236(d) that, if a medical
officer has certified an alien excludable, then the decision to exclude
shall be based solely upon that certification.\textsuperscript{109} The Ninth Circuit main­
tains that a medical certificate constitutes an indispensable prerequisite
to exclusion,\textsuperscript{110} while the Fifth Circuit contends that an applicant's ad­
mission of homosexuality suffices to establish excludability.\textsuperscript{111} Neither
assertion entirely corresponds with Congress's statutory scheme, and
both avoid the pivotal question of the PHS authority in the exclu­
sionary process. The great weight of evidence suggests, however, that
the exclusion of aliens on medical grounds does not necessarily de­
mand a medical certificate, but that no alien can be excluded in disregard
of PHS policy.

\textsuperscript{105} "Aliens ... who are certified ... as having a physical defect, disease, or disability
... of such a nature that it may affect the ability of the alien to earn a living [shall be excluded
from admission] unless the alien affirmatively establishes that he will not have to earn a living."

\textsuperscript{106} S. REP. NO. 1515, 81st Cong., 2d Sess. 343 (1950) (emphasis added). The Immigration
Service espouses this purpose. The Committee on the Judiciary added that the classification "con­
stitutional psychopathic inferiority" (later to become "psychopathic personality") was designed
to prevent the entry of aliens with "an inherent likelihood of becoming mental cases." \textit{Id.}

\textsuperscript{107} Congress allowed an exception to the exclusion in § 1182(a)(7) for aliens who would
not have to support themselves. The absence of such an exception in § 1182(a)(4) indicates that
the purpose of excluding aliens afflicted with psychopathic personality goes beyond a concern
that the alien not become a public charge.

\textsuperscript{108} One commentator looks to a remark by one congressman in floor debates to conclude
that the implicit assumption made in \textit{Lesbian/Gay Freedom Day} (the district court decision in
\textit{Hill v. INS}) and \textit{Boutilier}, that the psychopathic personality exclusion is a medical one, is flawed.\n\textit{See Developments, supra} note 47, at 1346. The possibility that Congress had ulterior motives
for enacting a statute, however, would not seem to control that statute's construction when the
actual words, context, and legislative history of the law fail to confirm those motives.

\textsuperscript{109} 8 U.S.C. § 1226(d) (1982).

\textsuperscript{110} \textit{Hill v. INS}, 714 F.2d 1470, 1480 (9th Cir. 1983).

\textsuperscript{111} \textit{In re Longstaff}, 716 F.2d 1439, 1448 (5th Cir. 1983), \textit{cert. denied}, 52 U.S.L.W. 3861
(May 29, 1984).
1. Necessity of medical certification— The wording of section 236(d) requires the exclusion of aliens under section 212(a)(1)-(7) to rest upon medical certification when such certification is available. Because of the prior availability of medical certificates, the issue of exclusion without certification had little significance. To determine the necessity of medical certification in light of the present PHS policy, it becomes essential first to examine the relationship of certification to the overall system of proof in the exclusion process.

Any alien not clearly entitled to enter the United States may be detained for further inquiry. In a subsequent exclusionary hearing that alien assumes the burden of proving admissibility. This policy reflects the position that admission into the United States is a privilege that an alien must merit. Although this burden falls short of requiring the alien to introduce clear, unequivocal, and convincing evidence that none of the thirty-three exclusionary categories apply, an alien’s admission of facts evincing inadmissibility has been deemed a sufficient basis on which to exclude.

To argue that a medical certificate constitutes an indispensable requirement for exclusion, the Ninth Circuit relied on a series of cases.

112. These provisions contain the INA's medical exclusions. See supra note 68.

113. See United States ex rel. Johnson v. Shaughnessy, 336 U.S. 806 (1949) (holding a board of special inquiry bound to accept as final a certificate that an alien is a mental defective where a medical appeal board has issued such certificate after a fair hearing); United States ex rel. Wulf v. Esperdy, 277 F.2d 537 (2d Cir. 1960) (holding that an alien's inability to rebut findings in the certificate does not deny due process).

114. 8 U.S.C. § 1225(b) (1982). Medical certificates are issued only if immigration officials clearly establish the presence of a disease or defect. 42 C.F.R. § 34.4 (1983); S. REP. No. 1515, 81st Cong., 2d Sess. 339 (1950). If a medical decision must be made where the record is incomplete, it is the responsibility of the applicant to provide information to rule out the possibility of his excludability. PHS STUDY, supra note 85, at 29.

115. 8 U.S.C. § 1361 (1982). The government, however, assumes the burden of proof in deportation proceedings. Id.

116. The shift in the burden of proof from the alien to the government is also consistent with the greater due process safeguards afforded in deportation proceedings. See supra note 47.


118. These 33 categories are set out in 8 U.S.C. § 1182(a) (1982).


120. Hill v. INS, 714 F.2d 1470, 1479-80 (9th Cir. 1983). The Hill court relies on questionable authority for its contention that a medical certificate is indispensable. That authority, In re Hollinger, 211 F. Supp. 203 (E.D. Mich. 1962), asserted that a medical certificate provided the only evidence upon which a finding of insanity could be made for the purpose of excluding an alien. This statement, however, represented only one of two alternative bases for the case's holding. Furthermore, the Hollinger court offered no explanation or support for its comment; it merely presented the proposition in a conclusory fashion. The district court in Hill, Lesbian/Gay Freedom Day Comm., Inc. v. INS, 541 F. Supp. 569, 580 (N.D. Cal. 1982), stated that this conclusion in Hollinger was the holding of the case. The Fifth Circuit, in In re Longstaff, 716 F.2d 1439,
that interpret section 236(d) to preclude the introduction of evidence by the alien to rebut the PHS's certification.\textsuperscript{121} If Congress provided medical examinations for aliens in order to safeguard the opportunity of these aliens for admission, then the Ninth Circuit's contention would have merit. In effect, Congress would thereby gratuitously grant aliens a procedural due process right. If, however, Congress intended medical examinations to act as nothing more than an expeditious screening procedure, performed for the benefit of the United States in its effort to exclude undesirable aliens, then section 236(d) might seek only to accelerate exclusionary proceedings by denying the alien the right to contest medical evidence brought against him by the PHS.

The available evidence indicates that Congress intended the examination to serve primarily as an expeditious screening procedure. First, Congress does not seem to have been concerned with establishing procedural protections. The precise language of section 236(d) implies that medical certification proves dispositive when available, but it does not explicitly require such certification.\textsuperscript{122} Furthermore, section 236(d) denies the alien an appeal of an INS decision based on such certification.\textsuperscript{123} Second, because not all incoming aliens receive a full medical examination, it appears that the examination acts primarily as a screening device.\textsuperscript{124} Moreover, the failure of a medical examiner to find a defect during the initial examination does not prevent the PHS from later determining that the alien had been excludable; the INS does not consider the amount of time that has elapsed between the initial entry and any subsequent determination of excludability.\textsuperscript{125}

\textsuperscript{1144} n.27 (5th Cir. 1983), however, refers to it as dictum. The Ninth Circuit fails to bolster the reasoning behind \textit{Hollinger}, maintaining instead only that it finds the case "persuasive." 714 F.2d 1470, 1480 (9th Cir. 1983).

\textsuperscript{121}. 714 F.2d 1470, 1478-79 (9th Cir. 1983). The court relies on United States ex rel. Johnson v. Shaughnessy, 336 U.S. 806 (1949); United States ex rel. Saclarides v. Shaughnessy, 180 F.2d 687, 688 (2d Cir. 1950) (follows \textit{Johnson}); United States ex rel. Wulf v. Esperdy, 277 F.2d 537 (2d Cir. 1960); \textit{see supra} note 113.

\textsuperscript{122}. 8 U.S.C. § 1226(d) (1982).

\textsuperscript{123}. \textit{Id.} An appeal is permitted, however, to seek admission under bond pursuant to 8 U.S.C. § 1183 where the defect is physical. \textit{Id.; see also} H.R. Rep. No. 1365, 82d Cong., 2d Sess., \textit{reprinted in} 1952 U.S. CODE CONG. & AD. NEWS 1653, 1711. An alien also has a right to bring an appeal of any medical decision before a PHS appeals board. 8 U.S.C. § 1224 (1982).

\textsuperscript{124}. Medical inspections serve to screen the population from excludable diseases, bring significant cases to the attention of the INS, and deter medically excludable aliens from entering this country. PHS \textit{Study}, \textit{supra} note 85, at 22, 38, 48; \textit{see also} United States ex rel. Wulf v. Esperdy, 277 F.2d 537, 538 (2d Cir. 1960) (noting that the apparent purpose of section 236(d) was to provide a summary proceeding). Immigrants and five percent of nonimmigrants receive medical examinations when they apply for visas; all other aliens are subject only to less thorough medical inspections at their ports of entry. PHS \textit{Study}, \textit{supra} note 85, at 9-11, 27.

\textsuperscript{125}. \textit{See, e.g.,} Canciamilla v. Haff, 64 F.2d 875 (9th Cir. 1933); \textit{In re} Vallejos, 14 I. & N. Dec. 68 (BIA 1972); \textit{In re} LaRochelle, 11 I. & N. Dec. 436, 438 (BIA 1965); \textit{In re} A—, 8 I. & N. Dec. 12 (BIA 1958) (medical certificate not required for deportation); \textit{accord} Santiago v. INS, 526 F.2d 488 (9th Cir. 1975) (validity of visa), \textit{cert. denied}, 425 U.S. 971 (1976); Alarcon-
2. **PHS rule-making authority**—Congress divided the authority to regulate the medical examination of aliens between the PHS and INS; it charged the PHS with preparing medical regulations and the INS with prescribing administrative regulations. The PHS exercises plenary power to evaluate the medical condition of aliens. When medical certification is available, Congress has denied the INS the authority to base a medical exclusion on any other criteria. Moreover, Congress explicitly established a procedure for resolving appeals of medical decisions wholly within the PHS. The medical expertise of the PHS forms the basis for its autonomy.

The INS itself recognized this expertise, noting the authority of the PHS to issue additional instructions and guidelines for performing examinations, and limiting its own administrative role to establishing procedures for selecting non-PHS physicians to perform medical examinations in places where PHS officers are not available.

3. **Validity of the PHS rule**—The PHS policy of refusing to certify homosexual aliens as excludable constitutes an administrative rule. Having been informally promulgated, this rule does not have the

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Congress has taken note of the crucial importance of this medical determination by prescribing certain minimal procedural requirements that the [PHS] must follow. In order that further safeguards might be provided, Congress authorized the Surgeon General: to prescribe additional regulations governing the procedure to be observed in exercise of the Service’s exclusive authority over medical questions.


“Of course practical questions should be determined by the immigration officials, but questions of purely medical nature must be determined by members of the medical profession.” S. Rep. No. 352, 64th Cong., 1st Sess. (1917), cited in United States *ex rel.* Johnson v. Watkins, 170 F.2d 1009, 1012 (2d Cir. 1948).

8 C.F.R. § 234.2(a) (1983).

8 C.F.R. § 234.2(b)-(c) (1983). The Ninth Circuit implicitly found that the PHS had exclusive authority to determine which aliens to exclude for medical reasons. Hill *v.* INS, 714 F.2d 1470, 1480 (1983). This Note directly examines the authority of the PHS to formulate policy without relying solely on its role in providing the INS with medical certificates.

The term “rule” has a broad meaning. One commentator notes that “[a]ll ‘rules’ could be lined up on a scale from unthinking habits of a single employee at a low level to the most formal ‘rules’ published in the Code of Federal Regulations.” 2 K. Davis, *Administrative Law Treatise* § 7:1, at 3 (2d ed. 1979). In this instance, the PHS first issued a memorandum outlining its new policy, Memorandum of the Surgeon General, supra note 8, at 398-99, and then incorporated this policy in its *Guidelines for Diagnosis of Mental Conditions*, the successor to the PHS Manual, supra note 90.

force of statutory law. Unlike a statute, the validity of an interpretative rule is subject to the discretion of the reviewing court and “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade.” Courts ordinarily uphold an agency regulation if the rule is reasonable and not inconsistent with the statute itself.

A close examination of the foundations and operation of the PHS regulation establishes its validity. The PHS decision to discontinue its practice of issuing certificates for the purpose of excluding homosexual aliens rested on two bases. First, the policy change reflected “current and generally accepted canons of medical practice with respect to homosexuality,” and second, “the determination of homosexuality is not made through a medical diagnostic procedure.” The reasonableness of this decision depends upon the authority of the PHS to change a regulation in accordance with new medical knowledge as well as the merits of this particular change.

Although Congress never explicitly indicated whether the PHS could revise its regulations in response to medical advances, the PHS periodically updated its diagnostic guidelines to conform with current medical opinion. This ability to revise appears consistent with Congress’s implicit intent. In enacting the statutes, Congress repeatedly sought information regarding current medical knowledge to help formulate its legislation. Congress relied exclusively on the PHS to pro-

137. See Red Lion Broadcasting Co. v. Federal Communication Comm’n, 395 U.S. 367, 381 (1969) (holding that, with regard to an FCC regulation, the “venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong”); Fawcus Machine Co. v. United States, 282 U.S. 375, 378 (1931) (holding that a tax regulation made “pursuant to express authority” was “valid unless unreasonable or inconsistent with statute”).
138. Memorandum of the Surgeon General, supra note 8, at 398.
139. Id. at 399.
140. The PHS issued Guidelines for the Diagnosis of Mental Conditions in 1973 and 1981 to update its PHS Manual, supra note 90. The diagnosis of narcotic drug addiction provides an example of the revisions the PHS made. The Manual merely stated that “[a] narcotic drug addict is any person who habitually uses any habit-forming narcotic drugs so as to endanger the public morals, health, safety, or welfare, or . . . [has] lost the power of self-control with the drug.” Id. at 6-7. The 1973 revision requires “evidence of habitual use and [a] clear . . . need for the drug in order to continue the normal level of functioning” to substantiate this diagnosis and suggests the use of the Nalline test. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d ed. 1980) [hereinafter cited as DSM-III], is relied on in the 1981 guidelines. Evidence of tolerance to the drug and symptoms of withdrawal are necessary to support a diagnosis of this condition.
vide this information, which it invariably incorporated into the bill under consideration.\textsuperscript{142} Knowing that medical knowledge does not stagnate between enactments of legislation, Congress’s explicit allocation to the PHS of the authority to prepare medical regulations\textsuperscript{143} seems to provide the agency with the power to revise its policy in light of medical advances, if not to require it to do so. The alternative, to compel practicing physicians to retain obsolete medical standards, seems absurd in comparison.\textsuperscript{144}

The reasonableness of the PHS policy change should be examined in light of the medical authority supporting it. The initial removal of homosexuality from the American Psychiatric Association’s (APA) \textit{Diagnostic and Statistical Manual}\textsuperscript{145} aroused vehement debate within the psychiatric community,\textsuperscript{146} factions of which still contest the change.\textsuperscript{147} The PHS did not, however, alter its policy during this turn-

\begin{footnotesize}
\begin{enumerate}
\item a PHS physician if and how § 212(a)(4) of the INA should be amended so as to be certain of excluding homosexual aliens and “sex perverts.” PHS \textit{Study}, supra note 85, at 15.
\item 142. Although Congress may not have understood what the PHS was saying, \textit{see supra} text accompanying notes 76-89, it believed it was following PHS advice when it dropped the terms “homosexuals and sex perverts” from its immigration bill. H.R. \textit{Rep.} No. 1365, 82d Cong., 2d Sess., \textit{reprinted in} 1952 \textit{U.S. Code Cong. & Ad. News} 1653, 1699, 1702. It also adopted the suggestion of PHS physician Dr. Jacobs, PHS \textit{Study}, supra note 84, at 15, that “sexual deviation” would comprise “homosexuality” and “sexual perversion.” S. \textit{Rep.} No. 748, 89th Cong., 1st Sess., \textit{reprinted in} 1965 \textit{U.S. Code Cong. & Ad. News} 3328, 3337.
\item 143. 8 U.S.C. § 1224 (1982).
\item 144. Justice Cardozo laments that statutory construction is “often a choice between uncertainties. We must be content to choose the lesser.” Burnet \textit{v.} Guggenheim, 288 U.S. 280, 288 (1933). “To arrive at a decision, we have therefore to put to ourselves the question, which choice is it the more likely that Congress would have made?” \textit{Id.} at 285. If the PHS had told Congress that homosexuality is not a psychiatric disorder and that physicians have no expertise in diagnosing it, two outcomes seem plausible. First, Congress might have listed homosexuality as a moral exclusion, or, second, Congress might have tried to exclude on medical grounds sexually perverted or deviant persons, but not homosexual aliens. It seems unlikely that Congress would have told the PHS that, as a matter of legislative fact, homosexuality was a disease and the PHS must diagnose it as such.
\item 145. DSM-II, \textit{supra} note 7.
\item 147. A leading critic of the APA’s position cites a 1977 study in which 68% of 10,000 psychiatrists who were asked “Is homosexuality usually a pathological adaptation (as opposed to a normal variation)?” responded in the affirmative. Socarides, \textit{The Sexual Deviations and the Diagnostic Manual}, 32 \textit{Am. J. Psychotherapy} 414, 424-25 (1978); \textit{see also Gnepp, Biology, Mental Illness and Homosexuality: A Comment on Public Affairs, 12 Psychology} 60 (1975).
\end{enumerate}
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bulent period. Instead it waited until a new edition of the *Diagnostic and Statistical Manual* affirmed the revision. Furthermore, the PHS listed other health organizations that had endorsed the APA's position. Although unanimity among psychiatrists may not exist with regard to the classification of homosexuality, given the medical expertise of the PHS and the existence of significant support for the reclassification of homosexuality, the PHS rule incorporating this new policy seems reasonable.

Although the PHS policy may be reasonable, to acquire the force of law it must also comply with the congressional intent underlying the statutory exclusion of aliens afflicted with "psychopathic personality" or "sexual deviation." To understand the relationship between the PHS rule and congressional intent, it is necessary to examine the nature of the PHS policy change in light of that intent. The APA reevaluation of homosexuality has aspects of both scientific inquiry: 


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148. DSM-III, supra note 140.

149. These organizations include the American Psychological Associaton, the American Public Health Association, the American Nurses' Association, and the Council of Advanced Practitioners in Psychiatric and Mental Health Nursing of the American Nurses' Association. Memorandum of the Surgeon General, supra note 8, at 398.

150. See supra notes 130-32 and accompanying text.

151. The PHS also based its policy change on the determination that homosexuality was not a medical diagnosis. The INS relies on this to conclude that it has authority to make a determination of homosexuality. *In re Hill*, I. & N. Int. Dec. No. 2873, at 5-8 (July 9, 1981). Given the difficulty of establishing a diagnosis of homosexuality, S. Rep. No. 1515, 81st Cong., 2d Sess. 3-41, 343-44 (1950); PHS Report, supra note 28, at 1701, one could argue that after more than 20 years of excluding homosexual aliens, see supra note 42, the PHS had, independently of the APA's change in position, decided that the diagnosis of homosexuality was too difficult to make. It might even be argued that the PHS used the APA change as an excuse to justify the elimination of an exclusion it had never liked. The diagnosis of homosexuality, in the absence of reliable objective tests, see supra note 79, however, seems no more problematic than a determination of a history of insanity. 8 U.S.C. § 1182(a)(3) (1982). Both involve a subjective evaluation of an alien's response to questions. This similarity reduces the likelihood that the PHS found the diagnosis of homosexuality, but not a past history of insanity, nonmedical. The absence of any evidence that the PHS has acted in bad faith further weakens the cynic's argument. Thus, the contention that the PHS determination that homosexuality was not a medical diagnosis depended upon the APA's change in position appears more plausible than the INS view of diagnosability implicit in *In re Hill*.

152. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973) (noting that courts need not defer to an agency's rule if it is inconsistent with obvious congressional intent or there are compelling indications that the rule is wrong); cf. Maryland Casualty Co. v. United States, 251 U.S. 342, 349 (1920) (holding that an agency's administrative rule has the force of law unless it conflicts with an express statutory provision).

and moral judgment.\textsuperscript{154} The consistency of the PHS policy with congressional intent depends upon the relationship between these two aspects of that reevaluation.

The APA reclassification may be read to assert that homosexuality is not a disorder itself, but merely a condition abnormal in a statistical sense.\textsuperscript{155} This approach maintains that, because inquiry into a person's sexual orientation had almost exclusively accompanied a finding of mental disorder, the psychiatric profession erroneously assumed that homosexuality must itself be a disorder.\textsuperscript{156} Upon closer examination, however, psychiatrists discovered that not all homosexuals possessed these other disorders.\textsuperscript{157} In light of their medical expertise, they decided that homosexuality per se did not constitute a disorder.\textsuperscript{158} This conclusion may involve a moral judgment, but it is a moral judgment the medical community has always been allowed to make.\textsuperscript{159} Society delegates it the authority to determine whether a particular set of behaviors or a certain physical characteristic warrants the epithet "disease." Society assumes that the moral standards of the medical profession sufficiently resemble those of the community as a whole to permit that profession to determine, for example, that alcoholism

\textsuperscript{154} A participant in the APA classification debate published an article three years before the APA took up the issue of the psychiatric status of homosexuality. The author contends that homosexuality is a medical disorder that has reached epidemiological proportions and that remains subject to wide social condemnation. The study observes that "[p]olls have shown that the majority of the public still favors legal punishment for homosexual acts even if performed in private," and that "homosexuality is considered more harmful to society than adultery and even abortion with its actual threat to life." Socarides, Homosexuality and Medicine, 212 J. A.M.A. 1199 (1970).

\textsuperscript{155} Some support exists for the proposition that homosexuality is not even statistically abnormal. See Green, Homosexuality, supra note 146, at 85-87.

\textsuperscript{156} Homosexuality probably has a tendency to go unseen in persons without other psychiatric disorders and to appear in those manifesting these other disorders. A medical examination offers only a brief inquiry into the alien's sexual preference. In addition, privacy and fear of social censure would keep aliens from volunteering this information.

\textsuperscript{157} See supra note 153.

\textsuperscript{158} Although the PHS never states that this analysis represents its interpretation of the APA decision, this analysis is, nonetheless, most consistent with the scientific method. The alternative hypothesis is that the APA simply made the moral judgment that homosexuality is not immoral. Whether this is what the APA did may not be as important as what the PHS thought the APA did. If the PHS was knowingly adopting the moral fiat of the APA, then it arguably was operating outside the scope of its medical authority. Absent contrary evidence, however, it should be presumed, in deference to the medical expertise of the PHS, that the service was relying on the scientific, medical analysis outlined in the text.

\textsuperscript{159} Green, Homosexuality, supra note 146, at 78 (arguing that psychiatrists usually are granted the prerogative of determining what behaviors to diagnose as mental illness, and that through mere consensus, they so designated homosexuality) (quoting M. Hoffman, The Gay World: Male Homosexuality and the Social Creation of Evil (1968)). This argument allows for the possibility that homosexuality could again be deemed an illness if new scientific evidence emerged which changes its relationship with other mental disorders or the medical community changed its moral outlook.
but not cigarette smoking requires psychiatric treatment. Of course the profession’s conclusion that some forms of behavior, such as prostitution, do not constitute a disease does not preclude society from deeming them immoral, but only indicates that the characteristic or behavior stands outside the expertise of the medical profession.¹⁶⁰

This line of reasoning suggests that the PHS rule complies with congressional intent. Congress’s continuing association of homosexuality with sexual perversion and sexual deviation¹⁶¹ provides a basis for the contention that Congress was doing no more than expressing the then-current medical opinion that homosexuality always signified the presence of one of these other psychiatric disorders. Accordingly, Congress would have wanted homosexuality dropped as an exclusionary condition when the psychiatric community established that homosexuality did not necessarily constitute evidence of a medically recognized disorder.

C. Effect of the Rule on the INS

The INS disagreed with the policy the PHS adopted regarding the exclusion of homosexual aliens.¹⁶² Under the INS interpretation of the INA, the PHS possesses the power to “promulgate policies regarding the description and diagnosis of disease,”¹⁶³ except in cases in which Congress has already defined the term.¹⁶⁴ With regard to diagnosability, the INS concedes that the legislature may not alter a determination by the Surgeon General that a particular disease is not medically diagnosable. The INS asserts, however, that it cannot evaluate the diagnosability of homosexuality.¹⁶⁵ The INS concludes that, despite the

¹⁶⁰. One could argue that the determination of whether to classify a behavior as a mental disorder turns on whether the conduct injures someone other than the actor. This analysis suggests that alcoholism is psychiatrically treated because of auto accidents caused by drunk drivers. Similarly, cigarette smoking is not deemed a disease, since it generally injures only the actor. This line of reasoning, however, does not account for the treatment of a great many neuroses, despite the fact that neurotic persons can be very pleasant and may exhibit no peculiar propensity for harming others.

¹⁶¹. S. 3455, 81st Cong., 2d Sess. § 212(a)(7) (1950), the first version of the INA, included homosexuals and sex perverts in the same section. The report accompanying the bill emphasizes the connection, saying “the classes of mentally defectives should be enlarged to include homosexuals and other sex perverts.” S. Rep. No. 1515, 81st Cong., 2d Sess. 345 (1950). When Congress eliminated the explicit exclusion of homosexuals and sex perverts it noted that the change did not modify its “intent to exclude all aliens who are sexual deviates.” S. Rep. No. 1137, 82d Cong., 2d Sess. 9 (1952). This language was reiterated in the report accompanying the 1965 Amendment. S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S. CODE CONG. & AD. NEWS 3328, 3337; see also PHS STUDY, supra note 85, at 14-15.

¹⁶². See Memorandum of the Attorney General, supra note 9; Press Release, supra note 9.

¹⁶³. Memorandum of the Attorney General, supra note 9, at 574.

¹⁶⁴. Id. The INS contends that Congress’s classification of homosexuality as a disease represented a definition of that term and that the PHS lacked the authority to redefine it.

¹⁶⁵. Id. at 577 n.5.
PHS policy, homosexual aliens remain subject to exclusion, and that an admission of homosexuality\textsuperscript{166} suffices to warrant exclusion.\textsuperscript{167}

This view contains two serious flaws. First, the INS concession that Congress cannot alter medical facts, including the diagnosability of a particular disease, may conflict with the contention that a congressional definition of a disease cannot be revised. For example, Congress might charge the PHS with certifying as excludable those aliens afflicted with contagious diseases of the scalp, and the legislative history of this Act might enumerate psoriasis as one such disease. Since the PHS knows, as a matter of medical fact, that psoriasis is not contagious, this congressional definition of a disease could have no medical significance. More to the point, if Congress had relied on the erroneous advice of the PHS in formulating its exclusion of persons with contagious psoriasis, this "affliction" would not remain in any useful sense a disease after the PHS discovered its error.\textsuperscript{168} Moreover, a person who still thought his psoriasis was contagious, and disclosed this condition to the INS, would not merit exclusion.

Although the APA reevaluation of homosexuality does not rest on as clear a factual error as does the above example,\textsuperscript{169} the illustration indicates that reliance on medical experts for the determination of medical facts may have an impact on the evaluation of a congressional medical definition. The unyielding position of the INS fails to accommodate the possibility of a medical advance rendering a definition in a statute or legislative history erroneous.

Second, the INS inappropriately minimizes the role the PHS played in the initial definition of the mental disorders. Congress relied on the PHS to provide information regarding the definitions of "psychopathic personality" and "sexual deviation." Instead of stating that Congress defined these terms, it would be more accurate to assert that the

\textsuperscript{166} This policy, see supra note 9 and accompanying text, conflicts with the INS's previous administrative practice of requiring a medical examination and certificate for exclusion on medical grounds. Hill v. INS, 714 F.2d 1470, 1477 n.9 (9th Cir. 1983).

\textsuperscript{167} Press Release, supra note 9, at 441.

\textsuperscript{168} The INS recognized the changing interpretation of homosexuality, saying "[i]t may reasonably be inferred that Congress intended homosexuality to be defined in light of current knowledge and social mores." Memorandum of Attorney General, supra note 9, at 581. This assertion seems to provide support for the PHS policy change. The INS contends that PHS may alter the definitions of diseases and that Congress intended the definition of homosexuality to be revised, but that the PHS revision of homosexuality is unauthorized. The INS may be objecting to the extent of the PHS revision, a revision which resembles an abolition rather than an alteration. If, however, the factors of "current knowledge" and "social mores" warrant such a drastic redefinition it is difficult to see what, in the view of the INS, precludes it.

\textsuperscript{169} The contagious psoriasis argument does not reflect the nature of the APA reevaluation of homosexuality. Although factual evidence contesting the classification of homosexuality as a disease was involved in this reevaluation, see supra note 153, there were some moral considerations as well; see supra notes 154 & 160; text accompanying notes 159-60.

\textsuperscript{170} See supra notes 141-42.
PHS defined them and that Congress adopted those definitions, giving the PHS explicit authority to prepare subsequent regulations. It seems somewhat inconsistent that the INS infers that it is authorized to "promulgate definitions and implement policies that reflect contemporary assessments of 'immoral purpose' and 'moral turpitude'" because Congress did not define these terms, yet maintains that when Congress included homosexuality within the term "psychopathic personality" in explicit reliance on PHS medical advice, it intended to preclude the PHS from redefining that term in light of new medical knowledge.\(^{171}\)

Because of the inconsistencies of the INS position, the PHS policy represents a preferable interpretation of section 212(a)(4) of the INA. Although the INS bears the responsibility for excluding aliens under that section, the medical determination of the PHS that homosexuality is not a mental disorder renders the alien's admission of homosexuality irrelevant to the issue of exclusion.

IV. CURRENT SIGNIFICANCE OF THE CONTROVERSY

The current disagreement regarding the PHS role in the exclusion process may have no appreciable impact on this country's exclusion and deportation practices. The present INS criterion for excluding homosexual aliens requires that the alien make an unsolicited, unambiguous disclosure of his or her homosexuality.\(^{172}\) Consequently, this policy allows homosexual aliens to enter the United States at will without having to make any misrepresentations concerning their sexual orientation.\(^{173}\) Although the Fifth Circuit's interpretation of the INA

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171. Memorandum of the Attorney General, *supra* note 9, at 576 n.4. The INS contention that the PHS cannot ignore the congressional definition of a disease has merit, and the INS cites cases which stand for the proposition that agencies cannot make rules which are inharmonious with congressional intent, Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 129, 134 (1936), or congressional purpose, United States v. Larkinoff, 431 U.S. 864, 873 & n.12 (1977). Memorandum of Attorney General, *supra* note 9, at 574. Although Congress arguably gave "specific meaning," *id.*, to "psychopathic personality" by including homosexuality within it, it failed to offer a clear definition of homosexuality. Thus, the PHS has not contravened congressional purpose by redefining that term. In fact, the organization's expertise peculiarly qualifies it to make such determinations.

172. *See* Press Release, *supra* note 9, at 441. The INS guidelines also provided for the exclusion of aliens who are identified by a fellow alien as a homosexual, *id.*, but the likelihood of such an occurrence is remote, *In re Hill*, I. & N. Int. Dec. No. 2873, at 6 (July 9, 1982).

173. *Hill v. INS* did not arise from standard procedures, but was essentially a test case. Lesbian/Gay Freedom Day Comm., Inc. v. INS, 541 F. Supp. 569, 571 (1982), *modified sub nom.* Hill v. INS, 714 F.2d 1470 (9th Cir. 1983); *see* United States v. Flores-Rodriguez, 237 F.2d 405, 406 (2d Cir. 1956) (holding that defendant's failure to mention in his sworn visa application a conviction for soliciting other males was material to the issue of his admissibility since such an offense constituted a crime involving moral turpitude within the meaning of an exclusionary provision); Ganduxe y Marino v. Murff, 183 F. Supp. 565, 567 (S.D.N.Y. 1959), *aff'd per curiam*, 278 F.2d 330 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960).
would make all homosexual aliens subject to deportation, it seems unlikely that the INS would undertake such an operation.  

The conflicting circuit court views, however, are of consequence to the naturalization process. One requirement of naturalization is the alien's lawful admission to the country. Unlike deportation proceedings, which the INS initiates, the petitioner begins the naturalization process and bears the burden of proving eligibility for citizenship. The INS could not overlook the alien's homosexuality in this process, and the alien's failure to disclose or denial of his or her homosexuality would constitute misrepresentation.

Congressional action would provide the most definitive resolution of this controversy. A number of bills have been introduced which would settle this issue by eliminating section 212(a)(4) of the INA entirely. None of these bills, however, have come close to passing. Nevertheless, such legislation still has support — the Justice Department, the Carter White House, and at least one group of

174. In re Longstaff, 716 F.2d 1439 (5th Cir. 1983), cert. denied, 52 U.S.L.W. 3861 (May 29, 1984). The court seems to assume the continuing excludability of homosexuals and seeks only to determine what evidence will support such an exclusion. Consequently, the question of deportability would be a matter of introducing sufficient evidence that the alien had been a homosexual before entry. The nature of this evidence remains unclear, because medical diagnosis is disputed. If an admission of homosexuality provides a sufficient basis for exclusion, then little may be required to fulfill the government's burden of proof in deportation proceedings.

175. The guidelines established for excluding homosexual aliens do not represent a rigorous policy of denying admission to all homosexual aliens. Since the Attorney General has discretion whether to deport and cannot be compelled to deport, United States ex rel. Masucci v. Follette, 272 F. Supp. 563 (S.D.N.Y. 1967), the laxity in enforcing the exclusion provisions would probably be reflected in deportation as well.

176. See Nemetz v. INS, 647 F.2d 432 (4th Cir. 1981) (homosexuality found not to be inconsistent with naturalization requirement of good moral character); In re Brodie, 394 F. Supp. 1208 (D. Or. 1975); In re Labady, 326 F. Supp. 924 (S.D.N.Y. 1971). Contra In re Schmidt, 56 Misc. 2d 456, 289 N.Y.S.2d 89 (Sup. Ct. 1968) (alien's homosexual practices were inconsistent with good moral character).


congressional representatives\textsuperscript{184} have endorsed a policy of admitting homosexual aliens.\textsuperscript{185}

\textbf{CONCLUSION}

The fate of homosexual aliens wishing to enter, reside in, or become citizens of, the United States remains unsettled. The resolution of this conflict depends upon a determination of the PHS role in the exclusionary process. The INA's legislative history provides ample evidence of Congress's consistent reliance on PHS expertise in formulating and amending the Act's medical exclusions. This reliance suggests that Congress intended the PHS to revise the definitions of medical terms so they would conform with changing medical knowledge. Despite its moral overtones, homosexuality represents one such medical term for the purposes of the INA. Thus, the PHS reevaluation of this term, in response to a change by the psychiatric profession, conforms with congressional intent. The INS, therefore, should not continue to ignore Congress's deference to the PHS's medical expertise. Instead, it should acknowledge the authority of the PHS by complying with the decision to discontinue the practice of excluding aliens on the basis of their homosexuality.

\textit{—Robert Poznanski}

\textsuperscript{184} Memorandum of the Attorney General, \textit{supra} note 9, at 576 n.4.

\textsuperscript{185} If Congress fails to act, the Supreme Court, of course, has the authority to decide the issue pursuant to its jurisdiction over circuit court conflicts involving a federal question. 28 U.S.C. § 1254 (1976); see Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); United States v. Zucca, 351 U.S. 91 (1956); United States v. Minker, 350 U.S. 179 (1956).