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The Exclusion of Homosexual Aliens Without Medical Certification:

In re Longstaff

In August 1979 the Surgeon General stated that homosexuality no longer was considered a mental defect and announced that Public Health Service (PHS) officers would no longer medically examine and certify homosexual aliens as "psychopathic personalities" or "sexual deviates" solely on the basis of their homosexuality. Prior to this announcement the Immigration and Naturalization Service (INS) had required a medical examination and certificate of homosexuality before a homosexual alien could be excluded under sec-

1 In making this determination, the Surgeon General relied upon the position of the American Psychiatric Association that homosexuality is not to be considered a psychiatric disorder but should be viewed as an alternative lifestyle. The Surgeon General was also influenced by the fact that this stance had been officially endorsed by the American Psychological Association, 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. The Public Health Service has traditionally relied on these organizations for their professional expertise, advice, and information on a wide variety of physical and mental health issues. 56 Interpreter Releases 387, 398 (1979).

2 Section 1182(a)(4) of the Immigration and Nationality Act states that aliens afflicted "with psychopathic personality, sexual deviation, or a mental defect" are to be excluded from entry into the United States. 8 U.S.C. § 1182(a)(4) (1982). Congress intended the terms "psychopathic personality" and "sexual deviation" to include homosexuality. See Boutilier v. INS, 387 U.S. 118, 120-21 (1967) (Congress intended the term "psychopathic personality" to exclude homosexuals from admission into the United States); S. REP. No. 748, 89th Cong., 1st Sess. 18-19 (1965), reprinted in 1965 U.S. CODE CONG. & ADMIN. NEWS 3328, 3337 (Congress amended § 1182(a)(4) by adding the term "sexual deviation" to resolve all doubt that homosexuals were to be excluded from entry into the United States).


4 E.g., In re Hayes, No. A-12-402-065-Boston (Mar. 13, 1968), cited in Hill v. INS, 714 F.2d 1470, 1477 n.9 (9th Cir. 1983) (medical certificate issued without strict compliance with Surgeon General's regulations held to be insufficient basis for exclusion despite alien's admission of homosexual acts and psychiatric testimony before special inquiry officer); In re Caydem, 12 I. & N. Dec. 528, 533-34 (1967) (Board of Immigration Appeals remanded deportation order for the conducting of a new and proper medical examination—medical certificate was defective and Board lacked authority and expertise to make medical determinations); In re Berger, No. A-10-379-108-New York (July 12, 1967), cited in Hill, 714 F.2d at 1477 n.9 (medical certificate, issued without examination but based on alien's admission of homosexual behavior and his two convictions for homosexual acts, held insufficient to exclude alien under § 1182(a)(4)); In re Flight, No. A-12-944-125 (Sept. 8, 1965), cited in Hill, 714 F.2d at 1477 n.9 (alien's admission and description of five homo-
tion 1182(a)(4) of the Immigration and Nationality Act (INA). Thus, the question whether a medical certificate is indispensable to exclude a homosexual alien under section 1182(a)(4) remained unresolved.

Faced with this question in In re Longstaff, the U.S. Court of Appeals for the Fifth Circuit held that the INS has the authority to exclude homosexual aliens absent a medical certificate. This conclusion was based on the history and structure of the INA and on the procedure for the admission of aliens into the United States. In so ruling, the Fifth Circuit rejected a contrary holding of the U.S. Court of Appeals for the Ninth Circuit, decided three weeks earlier.

Although no other federal courts have yet addressed the issue of excluding homosexual aliens without a medical certification, Longstaff clearly establishes a conflict between the circuits that the Supreme Court may be compelled to resolve. Meanwhile, the INS is continuing to exclude homosexual aliens under a new admission and evidentiary policy.

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6 716 F.2d 1439 (5th Cir. 1983), cert. denied, 104 S. Ct. 2668 (1984) (only Justice Brennan would have granted certiorari).
7 See Hill, 714 F.2d at 1470.
8 Under the new INS policy, if an alien, without being asked any questions regarding his sexual preference, makes an unambiguous oral or written admission of homosexuality (which does not include exhibition of buttons, literature, or other similar material), or if a third person who is also presenting himself for inspection voluntarily states, without prompting or prior questioning, that an alien who arrived in the United States at the same time is a homosexual, the alien may be examined privately by an immigration officer and asked to sign a statement that he or she is a homosexual. The INS bases its exclusion upon this statement. INS officials are not permitted to search an alien’s person or luggage for evidence of homosexuality. Guidelines and Procedures for the Inspection of Aliens Who Are Suspected of Being Homosexual, Dep’t of Justice Press Release (Sept. 9, 1980); 57 Interpreter Releases 440 (1980). See also 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 2.38b(1) (rev. ed. Supp. 1985).

This policy as stated is misleading, however, for the application form used by aliens asks whether the alien is “afflicted with psychopathic personality” or sexual deviation. See Application for Immigrant Visa and Alien Registration, cited in Longstaff, 716 F.2d at 1449-50 n.54.
In 1965 Richard John Longstaff, a native of Northern Ireland, was admitted to the United States as a permanent resident. Prior to his entry into the United States, Longstaff completed a form stating that he was not afflicted with any physical or mental afflictions including psychopathic personality. He had no knowledge that the term "psychopathic personality" was a term of art that included homosexuals, who are denied admission to the United States.

 Fifteen years later, after establishing businesses in Texas selling clothing and offering hairdressing services, Longstaff sought to become a naturalized citizen. Reputable witnesses testified to his good moral character, and a naturalization examiner recommended Longstaff for naturalization. The District Court for the Northern District of Texas, however, denied naturalization because it found that Longstaff had violated the Texas Penal Code by engaging in homosexual activity, had exhibited a lack of candor in answering questions about his sexual activities, and had failed to carry his burden of establishing good moral character as required by the INA. The Fifth Circuit Court of Appeals affirmed on the ground that Longstaff had failed to discharge his burden of proof, and remanded to afford Longstaff an opportunity to introduce additional evidence of his good moral character. Pursuant to the district court's pretrial order, an INS examiner interrogated Longstaff and concluded that Longstaff had met his burden of establishing good moral character. Nevertheless, naturalization was denied because Longstaff had engaged in homosexual activity before entering the United States in 1965. The INS examiner concluded that because Longstaff was excludable when he entered, he had not been lawfully admitted, and, therefore, he could not be naturalized. After a trial de novo, the district court again

If the alien answers "yes" to this question, the INS is on notice to request that the alien sign a statement attesting he is a homosexual. Thus, through the use of the application form, all aliens are subjected to prior questioning by the INS regarding whether they are homosexuals. The aim of this new INS policy is not to prohibit questioning about homosexuality but to prevent prior oral questioning of aliens by INS officers about homosexuality. Due to the unclear meaning of many of the questions on the application form, however, the INS officers do in fact engage in prior oral questioning of aliens about homosexuality when aliens seek explanation of and assistance with the application. While this INS policy does outline the procedures for when an alien, after making an unambiguous oral or written admission of homosexuality, does sign this statement, it does not outline the procedures for when he does not sign the statement after making such a statement. This omission in the policy will probably be the source of future litigation.

10 Application for Immigrant Visa and Alien Registration, cited in Longstaff, 716 F.2d at 1449-50 n.54.
12 In re Longstaff, 631 F.2d 731 (5th Cir. 1980).
13 In re Longstaff, 634 F.2d 629 (5th Cir. 1980).
14 See Nemetz v. INS, 647 F.2d 432 (4th Cir. 1981) (sexual preference is not a ground for denying citizenship under § 1427(a)(5)).
15 Under 8 U.S.C. § 1429 (1982), no person may be naturalized unless he has been
denied Longstaff’s petition for naturalization because of his unlawful admittance.

The Fifth Circuit affirmed, noting that Longstaff had the burden of proving lawful entry.16 Because he was granted a visa and admitted according to regular procedure, Longstaff argued that he was eligible for naturalization even if, for any reason, he should have been excluded. The court rejected his argument, stating, “It would be paradoxical if a person who was ineligible to receive a visa and should have been excluded from admission became lawfully admitted simply because, by error, he was not excluded. We decline to read a congressional enactment so absurdly.”17

The court faced the issue whether the Immigration and Nationality Act was designed to exclude only those persons declared by a PHS medical officer to be afflicted with psychopathic personality or sexual deviation. Because section 1182(a) separates medical from nonmedical reasons for exclusion and the exclusion of those afflicted with psychopathic personality and sexual deviation is contained in a clause enumerating medical bases for exclusion,18 Longstaff argued that homosexuals may be excluded only upon a medical examination lawfully admitted into the United States for permanent residence in accordance with all applicable provisions of the Immigration and Nationality Act. Id.

17 Longstaff, 716 F.2d at 1442. But see In re Labady, 326 F. Supp. 924 (S.D.N.Y. 1971). In Labady an alien who had disclosed his homosexuality to the INS upon his entry into the United States sought to be naturalized. Because Labady validly entered the country without deceit, the district court held that he had been lawfully admitted. But see also Kovacs v. United States, 476 F.2d 843 (2d Cir. 1973) (stating that had the alien testified truthfully about past sexual activity, his petition for naturalization might have been granted).
18 Of the 33 classes of persons who are ineligible to receive visas and are to be excluded from admission into the United States, the first seven are excluded for medical reasons:

(1)—Aliens who are mentally retarded;
(2)—Aliens who are insane;
(3)—Aliens who have had one or more attacks of insanity;
(4)—Aliens afflicted with psychopathic personality, sexual deviation or a mental defect;
(5)—Aliens who are narcotic drug addicts or chronic alcoholics;
(6)—Aliens who are afflicted with any dangerous contagious disease;
(7)—Aliens not comprehended within any of the foregoing classes who are certified by the examining surgeon 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 . . . .


The remaining 26 classes of excludefable aliens are based on nonmedical grounds. These classes include: aliens who are paupers, professional beggars, or vagrants; aliens convicted of a crime involving moral turpitude or who admit committing the essential elements of such a crime; aliens who have been sentenced to confinement for at least five years in the aggregate for conviction of two or more crimes; aliens who are polygamists; aliens who are involved in prostitution; aliens who seek entry into the United States to engage in prostitution, other commercialized vice, or any immoral sexual act; aliens who seek entry to perform skilled or unskilled labor and who have not been certified by the Secretary of Labor; and aliens likely to become a public charge in the United States. See 8 U.S.C. § 1182(a)(8)-(33) (1982).
and certification by a PHS officer. The court rejected this argument, stating that a medical certificate was not the exclusive evidence necessary for the exclusion of homosexual aliens. The court based its decision on the language of the INA, administrative interpretation of the Act, legislative history as indicative of congressional intent, and administrative and judicial determinations.

Under section 1226(d), a medical certificate designating an alien as afflicted with an excludable medical condition is conclusive evidence for denial of entry. Although the section manifests a congressional intent that only competent evidence of medical excludability be introduced at exclusion proceedings, the Longstaff court found that an informed applicant’s admission to being a member of an excluded class is also competent evidence on which to base exclusion. The court stated:

To remand the case for a medical determination of homosexuality would appear to be to ask for a certification of the obvious. It is patent that sexual preference cannot be determined by blood test or physical examination; even doctors must reach a decision by interrogation of the person involved or of others professing knowledge about that person. To require the INS to disregard the most reliable source of information, the statements of the person involved, would be to substitute secondary evidence for primary.

Examining the INS interpretation of the Act, the court cited an opinion by the Office of Legal Counsel issued after the Surgeon General’s announcement which stated:

Since 1952, the exclusion of homosexual aliens has been enforced both unilaterally by the INS, e.g., relying on an alien’s admission of homosexuality, and jointly, subsequent to a certification by the PHS that particular aliens are afflicted with a “ment al defect or disease,” i.e., homosexuality.

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19 Longstaff, 716 F.2d at 1443.
20 Id. at 1448.
22 Longstaff, 716 F.2d at 1448. But see Boutilier, 387 U.S. at 125 (dictum) (indicating that an actual medical examination rather than reliance on the alien’s admissions would be needed for the exclusion of a homosexual alien); In re Hollinger, 211 F. Supp. 203 (E.D. Mich. 1962) (relying on letter of alien’s physician stating that the alien was paranoid schizophrenic, the INS excluded the alien as being insane and sought no medical certificate of insanity. Court concluded that this evidence was insufficient to exclude the alien). But cf. United States ex rel. Wulf v. Esperdy, 277 F.2d 537 (2d Cir. 1960) (per curiam) (after alien stated she had tuberculosis and medical certificate was issued to that effect, court affirmed exclusion order, relying solely on the medical certificate).
23 Longstaff, 716 F.2d at 1448.

Contra Memorandum from David Crosland, General Counsel for the INS, supra note 4, which was drafted prior to the Surgeon General’s announcement. Note that David Crosland, Acting Commissioner of the INS, who received and acted upon the opinion issued by the Office of the Attorney General, was the same David Crosland who drafted a contrary opinion for the INS when he was general counsel for the INS.
The court also called for deference to the current INS interpretation of the Act, which no longer requires a medical certificate as a condition to exclude homosexual aliens.\textsuperscript{25}

Examining the congressional intent to exclude homosexuals, the court concluded that Congress' use of medical terminology to describe the excludable class was not intended to establish a clinical test for exclusion. Further, the court stated that moral as well as medical reasons dictated the congressional decision to exclude homosexuals.\textsuperscript{26} Thus, Congress intended that the exclusion of homosexuals not be based entirely on medical grounds.\textsuperscript{27}

Although the court admitted that prior decisions reveal that exclusion for homosexuality required medical certification,\textsuperscript{28} it cited several deportation cases\textsuperscript{29} supporting its holding that if an "alien admits the facts determining his excludability, the Board [of Immigration Appeals], other immigration officials, and the courts may assuredly act on the basis of that admission."\textsuperscript{30}

Therefore, based upon statutory construction, administrative interpretation, congressional intent, and administrative and judicial determinations, the court held that medical certification of homosexuality is not indispensable for exclusion. The court concluded that an alien's unambiguous admission of homosexuality or a voluntary statement of a third party, made without either prompting or questioning, is sufficient for exclusion.\textsuperscript{31}

In his dissent, Judge Tate stated that he agreed with the Ninth


\textsuperscript{26} Longstaff, 716 F.2d at 1450 n.56.


\textsuperscript{28} See In re Hayes, No. A-12-402-065-Boston, cited in Hill, 714 F.2d at 1477 n.9; In re Caydem, 12 I. & N. Dec. at 333-34; In re Berger, No. A-10-379-108-New York, cited in Hill, 714 F.2d at 1477 n.9; In re Flight, No. A-12-944-125, cited in Hill, 714 F.2d at 1477 n.9. See also In re Hernandez-Gutierrez, No. A-12-633-815, cited in Longstaff, 716 F.2d at 1446 n.43; In re Anonymous, No. A-11-065-813, cited in Longstaff, 716 F.2d at 1446 n.43; In re Roberts, No. A-12-463-838, cited in Longstaff, 716 F.2d at 1446 n.43; In re Beaton, No. A-2-486-963, cited in Longstaff, 716 F.2d at 1446 n.43. See also memorandum to INS Commissioner Le- onel Castillo, supra note 4.

\textsuperscript{29} See In re LaVoie, 12 I. & N. Dec. 821 (1968), aff'd sub nom. LaVoie v. INS, 418 F.2d 732 (9th Cir. 1969), cert. denied, 400 U.S. 854 (1970) (alien's admission of homosexuality at time of entry satisfied clear, convincing, and unequivocal evidence standard for deportation); In re Steele, 12 I. & N. Dec. 302 (1967) (Board sustained deportation order on ground that alien was excludable as homosexual at time of entry; to prove excludability, INS relied on alien's admission of homosexuality); In re LaRochelle, 11 I. & N. Dec. 436 (1965) (alien's admission of homosexuality at time of entry supported deportation order; medical certification not required in deportation proceedings).

\textit{But see Bontilier, 387 U.S. at 125 (dictum stating that, although medical certification of homosexuality is not required for deportation, it is required for exclusion).}

\textsuperscript{30} Longstaff, 716 F.2d at 1449.

\textsuperscript{31} Id. at 1451.
Circuit in *Hill v. INS* 32 "that Congress did so intend to treat medical causes for exclusion or deportation differently from nonmedical causes for denial of lawful admission to the United States," and that "the intended illogic of Congress in according such talismanic significance to the presence or absence of a conclusive medical certification as determinative of admissibility or deportability" must be respected. 35

To understand the holding in *Longstaff*, it is necessary to examine the history of homosexual alien exclusions. The Immigration and Nationality Act of 1917, 34 an act codifying all earlier immigration policies, was the first to exclude homosexual aliens from the United States. 35 This Act excluded persons who were certified by PHS officers as mentally defective or afflicted with a "constitutional psychopathic inferiority." 36

In 1952 Congress repealed this Act by passing the McCarren-Walter Act (also known as the Immigration and Nationality Act (INA)), 37 which incorporated a PHS formulated list of medically excludable classes of aliens. 38 One of these excludable classes was aliens "afflicted with psychopathic personality, epilepsy, or a mental defect." 39 Based upon the Act's legislative history, Congress clearly intended the "psychopathic personality to apply to homosexuals." 40 Thus, the PHS examined suspected homosexual aliens and issued a Class A medical certificate 41 designating the alien as homosexual; the INS then used the Class A certificates as a bar to admission. 42

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32 *Hill*, 714 F.2d at 1470.
33 *Longstaff*, 716 F.2d at 1453 (Tate, J., dissenting).
41 Of the three kinds of medical certificates issued by the PHS, a Class A certificate indicates a definite, as opposed to inconclusive, diagnosis and has been the certificate required for exclusion. 42 C.F.R. § 34.7 (1984). See IA C. Gordon & H. Rosenfield, supra note 9, at §§ 3.15b-c.
Ten years later, the Ninth Circuit in Fleuti v. Rosenberg held that the term "psychopathic personality" was void for vagueness and that the term did not provide a sufficiently definite warning that "psychopathic personality" encompassed homosexuality and sexual perversion. Congress then amended section 1182(a)(4), deleting the term "epilepsy" and replacing it with "sexual deviation." Congress stated that it had intended the term "psychopathic personality" to include homosexuals but, because of the Fleuti holding, added "sexual deviation" to resolve all doubt.

Subsequently, the Supreme Court in Boutilier v. INS overruled Fleuti by declaring that the term "psychopathic personality" was not constitutionally vague. Because Congress has plenary power over the admission of aliens, the Court held that the McCarren-Walter Act was constitutional, even if the term "psychopathic personality" did not give fair warning to the ordinary person that the phrase included homosexuals.

On August 2, 1979, the Surgeon General announced that PHS officers no longer would issue medical certificates solely because an alien is a homosexual. The rationale for this announcement was that, according to "current and generally accepted canons of medical practice," homosexuality per se is no longer considered to be a mental disorder, and "the determination of homosexuality is not made through a medical diagnostic procedure."

Consequently, the INS allowed suspected homosexual aliens to enter the country conditionally under parole status and deferred their medical examinations pending resolution of the dispute with the PHS. After receiving a Justice Department opinion that it was still obligated to exclude homosexuals, the INS instituted a policy which made an alien's unambiguous admission or a voluntary state-

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43 302 F.2d 652 (9th Cir. 1962), vacated on other grounds, 374 U.S. 449 (1963).
44 Fleuti, 302 F.2d at 658.
48 Id. at 122.
51 In 1973 the American Psychiatric Association removed homosexuality from its list of medical and mental disorders. N.Y. Times, Apr. 9, 1974, at 12, col. 4. See Diagnostic and Statistical Manual of Mental Disorders (1979).
52 Interpreter Releases 387, 398 (1979).
55 Memorandum from John Harmon, supra note 24.
ment of a third party sufficient to deny entry into this country.56

Three weeks prior to Longstaff, the Ninth Circuit in Hill v. INS 57 held that a medical certificate is indispensable to exclude homosexual aliens from the United States.58 The court based its conclusion upon the language and structure of the Act, congressional intent, the longstanding and consistent interpretation of the Act by the INS, and prior judicial decisions.

Because the Act does not state explicitly that a medical certificate is required for exclusion under section 1182(a)(4), the court looked to the language and structure of the Act as a whole. Under section 1222,59 aliens suspected of affliction with mental disability are to be detained for observation and examination before being permitted to enter the country.60 Section 122461 requires that PHS officers conduct all medical examinations and contemplates that homosexual aliens are to be given medical examinations.62 Under section 1226(d),63 an INS decision to exclude a person afflicted with psychopathic personality or sexual deviation shall be based solely on the medical certificate.64 Finally, section 1225(a)65 states that INS "officers are not to perform physical and mental examinations by obtaining admissions; doctors are to perform the mental and physical examinations."66 The court concluded that "these sections viewed

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56 See materials cited supra note 9.
57 Lesbian/Gay Freedom Day Comm., Inc. v. INS, 541 F. Supp. 569 (N.D. Cal. 1982), aff'd in part, Hill v. INS, 714 F.2d 1470 (9th Cir. 1983). Due to the interrelationship between many of the factual and legal questions presented in two separate cases—In re Hill and Lesbian/Gay Freedom Day Comm., Inc. v. INS—the two cases were consolidated.
58 In re Hill, Carl Hill, a British subject, while entering the United States, made an unsolicited statement to the immigration inspector that he was a homosexual. The INS sought to use Hill's unsolicited statement as a basis for excluding him. Hill filed a writ of habeas corpus to challenge the procedures for excluding homosexual aliens.
59 The Lesbian/Gay Freedom Day Comm., Inc. brought suit contending that the exclusion of homosexual visitors from entering the United States violated the first amendment rights of U.S. citizens to freedom of speech and association. This organization feared that the INS policy of per se exclusion of homosexual aliens would deter foreign homosexuals from attending its Lesbian/Gay Freedom Day activities.
60 The district court held the newly adopted INS policy for excluding homosexual aliens without a medical certificate invalid because it violated congressional intent that a medical certification be required for exclusion. The court also held that the first amendment rights of U.S. citizens seeking to engage in discussion and exchange with homosexual aliens outweighed any interest INS had in a per se exclusion of homosexual aliens.
61 On appeal, the Ninth Circuit Court of Appeals in Hill v. INS affirmed the decision regarding the procedural requirements for exclusion of homosexual aliens; it vacated the decision regarding the violation of the first amendment. Hill, 714 F.2d at 1481.
as a whole clearly indicate a congressional intent to set up a procedure for medical examinations and medical certificates prior to exclusion on mental or physical grounds.  

The court found support for its conclusion in the Act's legislative history. According to the House Report concerning the 1952 Act, the organization of section 1182(a) was to be divided into two categories: medically and nonmedically determined exclusions. The basis for exclusion under section 1182(a)(4) was to be medical, and the diagnosis of homosexuality was to include not only a discovery of the "affliction of homosexuality" in those aliens aware of their affliction but also in those unaware of it.

Next, the court examined the INS interpretation of the Act, noting that in "interpreting a statute, courts show great respect for the construction given by the officers or agency charged with its administration." Based upon the long history of the INS requirement of a medical examination and certificate for exclusion of homosexuals, the court concluded that the INS cannot exclude homosexual aliens without medical certification. Furthermore, the court cited several cases that required medical certification to exclude homosexual aliens.

The Hill decision creates a classic catch-22 situation: to fulfill the congressional mandate to exclude homosexual aliens, the INS must get medical certification from the PHS, which the Surgeon General has refused to issue any longer.

Longstaff creates a conflict among the circuits by validating the new INS policy for excluding homosexual aliens. Analyzing the Longstaff reasoning, a number of inconsistencies appear.

67 Id.
68 H.R. REP. No. 1365, supra note 38.
69 The court stated that Congress' reference to the exclusion for psychopathic personality as one based on medical grounds does not conflict with the Supreme Court's holding in Boutilier that Congress did not intend to use the term in its clinical sense. See Boutilier, 387 U.S. at 124. By analogy, the court concluded that the definition of "psychopathic personality" was similar to that of "insanity" in that, although both are legal definitions, both require medical examination to determine their presence in an individual. Hill, 714 F.2d at 1476 n.6. See BLACK'S LAW DICTIONARY 714 (rev. 5th ed. 1979) ("INSANITY. The term is a social and legal term rather than a medical one.")
70 Hill, 714 F.2d at 1476.
71 Id. at 1477. See Udall v. Tallman, 380 U.S. 1, 16 (1965); Adams v. Howerton, 673 F.2d 1036, 1040 (9th Cir.), cert. denied, 498 U.S. 1111 (1982).
72 See In re Hayes, No. A-12-402-065-Boston, cited in Hill, 714 F.2d at 1477 n.9; In re Berger, No. A-10-379-108-New York, cited in Hill, 714 F.2d at 1477 n.9; In re Flight, No. A-12-944-125, cited in Hill, 714 F.2d at 1477 n.9. See also In re Hernandez-Gutierrez, No. A-12-633-815, cited in Longstaff, 716 F.2d at 1446 n.43; In re Anonymous, No. A-11-065-813, cited in Longstaff, 716 F.2d at 1446 n.43; In re Roberts, No. A-12-463-838, cited in Longstaff, 716 F.2d at 1446 n.43; In re Beaton, No. A-2-486-963, cited in Longstaff, 716 F.2d at 1446 n.43. See also memorandum to INS Commissioner Leonel Castillo, supra note 4. But see memorandum to Acting INS Commissioner David Crossland, supra note 24.
73 Hill, 714 F.2d at 1478-80.
74 The INS chose not to appeal this decision.
75 See materials cited supra note 9.
When the court examined the language of the Act, it failed to find an explicit statement requiring medical certification for exclusion of homosexual aliens. It, therefore, presumed that other evidence—the admission of the homosexual alien—is sufficient for exclusion. The court neglected to consider, however, that Congress intended section 1182(a)(4) as a basis for medical exclusion, and excludable aliens included both those aware and those unaware of their affliction.

The Longstaff court examined the new INS policy for the exclusion of homosexual aliens and stated that the interpretation of the administrative agency charged with enforcement of the Act is entitled to deference. Yet the court failed to note the longstanding history of the requirement of medical certification to exclude homosexual aliens. If the Longstaff court is required to grant deference to the new INS policy, should it not be required to grant even greater deference to the prior consistent and longstanding policy of the INS?

Further, the court concluded that Congress’ decision to exclude homosexual aliens was based on moral as well as medical reasons. The only evidence of a moral reason, however, is remarks of two congressmen made on the floor of the House. Because no other statements in the legislative history support those remarks, they must be viewed as mere personal opinion and not as representative of congressional intent.

The court also reviewed INS and court determinations in deportation cases and concluded that homosexual aliens could be excluded without medical certification. Unfortunately, the court failed to observe that, unlike exclusion, deportation requires no medical certification.

Finally, the court failed to consider that aliens subject to exclusion have fewer constitutional protections than aliens subject to de-

76 See Longstaff, 716 F.2d at 1448.
78 Longstaff, 716 F.2d at 1449-50.
79 See In re Hayes, No. A-12-402-065-Boston, cited in Hill, 714 F.2d at 1477 n.9; In re Caydem, 12 I. & N. Dec. at 533-34; In re Berger, No. A-10-379-108-New York, cited in Hill, 714 F.2d at 1477 n.9; In re Flight, No. A-12-944-125, cited in Hill, 714 F.2d at 1477 n.9. See also In re Hernandez-Gutierrez, No. A-12-633-815, cited in Longstaff, 716 F.2d at 1446 n.43; In re Anonymous, No. A-11-065-813, cited in Longstaff, 716 F.2d at 1446 n.43; In re Roberts, No. A-12-463-858, cited in Longstaff, 716 F.2d at 1446 n.43; In re Beaton, No. A-2-486-963, cited in Longstaff, 716 F.2d at 1446 n.43. See also memorandum to INS Commissioner Leonel Castillo, supra note 4.
80 See Longstaff, 716 F.2d at 1450 n.56.
81 See The Propriety of Denying Entry to Homosexual Aliens, supra note 27. at 345-46 n.100.
82 Id.
83 Longstaff, 716 F.2d at 1449 n.52.
84 See Bontilier, 387 U.S. at 125 (dictum that although medical certification of homosexuality is not required for deportation, it is required for exclusion).
portation because potentially excludable aliens are deemed not to have entered the United States.\textsuperscript{85} Because the procedural protections applicable to aliens subject to exclusion are the aliens' primary protection, these safeguards must be interpreted narrowly rather than broadly. A broad interpretation is equivalent to a denial of what few rights aliens do possess.

In conclusion, the inconsistencies of the Longstaff reasoning cause the decision to lose its persuasiveness. A more logical and persuasive analysis of this issue can be found in the Hill decision, which states that a medical certificate for the exclusion of homosexual aliens is indispensable. Should Hill be adopted by other circuits, Congress will be forced to react if it intends to insure the exclusion of homosexual aliens.

However, a key issue is whether homosexual aliens should continue to be excluded. Today, one out of every ten U.S. citizens is a homosexual.\textsuperscript{86} Homosexuals are in every economic class, racial group, religious organization, and occupation,\textsuperscript{87} forming an integral part of our society. Like exclusion on the grounds of sex or race, exclusion on the grounds of sexual preference violates the democratic values that form the cornerstone of our country.

In light of the recent concern over the Acquired Immune Deficiency Syndrome (AIDS), some may argue that continued exclusion of homosexuals is necessary. This argument is flawed, however, in that homosexuals are not the only group linked to AIDS.\textsuperscript{88} Furthermore, under the new INS policy, homosexuals who do not make an unsolicited statement as to their sexual preference and do not have a third person reveal such preference are being admitted into the United States daily without being tested for AIDS. If Congress were to permit homosexuals to enter the United States provided they submit to the blood test for AIDS, the carriers of AIDS could be prevented from entering the United States.

Initially, Congress ordered the exclusion of homosexuals out of ignorance. The continued exclusion of homosexual aliens promotes this ignorance. Homosexuals are entitled to the same rights as other people. The only difference between them and others is their sexual preference, which they exercise behind closed doors. Even with the

\textsuperscript{86} Langone, AIDS, 6 DISCOVER 28, 50 (1985).
\textsuperscript{87} C. CURRY & D. CLIFFORD, A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES (3d ed. 1985).
concern over the spread of AIDS, there is no valid reason for the continued exclusion of homosexual aliens.

—RANDY GERALD VESTAL