The Immigration Reform and Control Act of 1986: Who is “Known to the Government?”

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I. Introduction

During the 1970s, the United States witnessed several alarming events which questioned the strength of U.S. immigration policies. For example, the hostage taking at the U.S. embassy in Tehran created status questions concerning the tens of thousands of Iranian students in the United States. Also, the Haitian "boat people" who arrived after escaping from the Duvalier regime and the one hundred thousand Cubans who arrived via the "Mariel Boatlift" required the Immigration and Naturalization Service (INS) to deal with masses of undocumented aliens. In 1980 it was estimated that between 3.5 and 10 million illegal aliens were present in the United States. The INS's inability to control illegal border entry and interior immigration problems has been the result of many years of inadequate funding and overwhelming demand for immigration services.

On November 6, 1986, President Reagan signed the Immigration Reform and Control Act of 1986 (IRCA) which amended the Immigration and Nationalization Act (INA). Among other things, IRCA adopted a broad legalization program which gave legal status to all aliens who were able to prove continuous illegal residence in the United States since January 1, 1982. As with any amorphous law reform, IRCA contains several areas of controversy.

One controversial issue concerns a restrictive interpretation of the legalization procedure and its effect on a particular group of aliens, namely, nonimmigrants. A nonimmigrant is generally defined as an individual who wishes to...

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2 Id.
3 Id.
5 Leiden, supra note 1, at 3.
8 8 U.S.C. § 1255a
visit the United States for a temporary stay but also has a residence in a foreign country which he or she does not plan to abandon.\textsuperscript{10} As written, IRCA requires nonimmigrants to prove that their illegal status was "known to the Government" prior to January 1, 1982.\textsuperscript{11} As interpreted in the regulations created by the INS, "known to the Government" means "known to the INS."\textsuperscript{12} This Comment analyzes the INS interpretation of "known to the Government" in light of the generous intent of Congress in creating the legalization program.\textsuperscript{13} This Comment also attempts to find a reasonable interpretation of the phrase. The Comment first gives a background and history of the law and specifically the "known to the Government" issue.\textsuperscript{14} Second, this Comment analyzes the application of the rule of deference in this situation.\textsuperscript{15} Third, this Comment looks to recent case law interpreting "known to the Government" and the INS's response to the court decisions.\textsuperscript{16} Fourth, this Comment makes an analysis of the phrase using traditional rules of statutory interpretation.\textsuperscript{17} Finally, the Comment considers the various policy considerations of a narrow and broad interpretation.\textsuperscript{18}

II. Background

A. General History

In 1978 the Select Commission on Immigration and Refugee Policy (Commission) was created for the purpose of studying U.S. immigration and refugee laws and policy.\textsuperscript{19} After two years of study, the Commission reported a need for immediate action in revamping immigration laws in order to curb illegal immigration.\textsuperscript{20} While the Commission recognized the national importance of continuing legal immigration, the Commission believed that U.S. immigration law

\textsuperscript{13} See infra notes 198–217 and accompanying text.
\textsuperscript{14} See infra notes 19–54 and accompanying text.
\textsuperscript{15} See infra notes 68–86 and accompanying text.
\textsuperscript{16} See infra notes 87–156 and accompanying text.
\textsuperscript{17} See infra notes 157–217 and accompanying text.
\textsuperscript{18} See infra notes 218–41 and accompanying text.
\textsuperscript{19} See S. REI. :-.103, 132, 99th Cong., 1st Sess. 22 (1985) (hereinafter S. REI. :-.In. 132]. Research included social science and legal research studies, twelve regional public hearings, visits around the nation, as well as consultations with government and civilian experts, scholars, representatives from state and local governments, ethnic organizations, environmental and population groups, international organizations, church organizations, civil liberties groups, organized labor, employers' associations and immigration lawyers. Id.
\textsuperscript{20} Pub. L. No. 95-412, 92 Stat. 907 (1978). The committee consisted of sixteen members whose task was to "study and evaluate existing laws, policies, and procedures governing the admission of immigrants and refugees to the United States and to make such administrative and legislative recommendations to the President and to the Congress as are appropriate." Id. at § 4(c), 92 Stat. at 908.
should impose sanctions on employers who "knowingly hire" illegal aliens.\textsuperscript{21} The Commission's study found pre-IRCA immigration laws to be contradictory because an employer's action in hiring an alien was not illegal, even though the alien's presence in the United States was illegal and punishable by deportation.\textsuperscript{22} An employer faced no sanctions for hiring aliens.\textsuperscript{23} These aliens were often willing to work for lower wages than U.S. workers\textsuperscript{24} because the job opportunities in the United States offered higher wages and better working conditions than the aliens could find in their home countries.\textsuperscript{25} Over time, illegal aliens have become an exploitable subclass in our society.\textsuperscript{26} Their eagerness to find employment, their vulnerability to deportation, and the relatively lower working conditions of their home countries have put these people at the mercy of U.S. employers.\textsuperscript{27}

The Commission's recommendations for alleviating the problems of illegal immigration centered around three primary areas: (1) employer sanctions for hiring illegal aliens,\textsuperscript{28} (2) a legalization program for those aliens who have become an integral part of U.S. society, and (3) improvement of the temporary worker program by controlling the supply of workers and thereby lessening the burden of immigration reform on American industries.\textsuperscript{29} These issues became the basis of the Immigration Reform and Control Act of 1986.\textsuperscript{30}

\textsuperscript{21} Id. at 22-23; H.R. REP. No. 682, 99th Cong., 2d Sess. at 53, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649 [hereinafter H.R. REP. No. 682]; Leiden, supra note 1, at 5. For an explanation of the "knowingly hire" requirement, see infra note 37.
\textsuperscript{23} H.R. REP. No. 682, supra note 21, at 47 (quoting Althea Simmons, Director, Washington Bureau, NAACP).
\textsuperscript{24} Id.
\textsuperscript{25} S. REP. No. 132, supra note 20, at 8; Leiden, supra note 1, at 5.
\textsuperscript{26} S. REP. No. 132, supra note 20, at 108 (minority view of Sen. Simon). As stated by a representative of the NAACP to the Immigration Subcommittee on September 9, 1985, "[t]he [illegal alien] worker is consciously aware that he/she has no protection because of illegal status and will accept 'starvation' wages to be employed in the United States." H.R. REP. No. 682, supra note 21, at 47.
\textsuperscript{27} See H.R. REP. No. 682, supra note 21, at 49; S. REP. No. 132, supra note 20, at 8, 108.
\textsuperscript{28} The schedule of penalties is as follows: First offense—civil fine of $250 to $2,000 for each alien involved; second offense—civil fine of $2,000 to $5,000 for each alien involved; third offense—civil fine of $3,000 to $10,000 for each alien involved; pattern or practice of violations—criminal penalties of up to six months imprisonment and/or $3,000 fine; recordkeeping violations—civil fines of $100 to $1,000 for each individual for which the employer has failed to keep records. 8 U.S.C. §§ 1324a(e)(3), (e)(5), (f)(1) (Supp. 1986).
\textsuperscript{29} S. REP. No. 132, supra note 20, at 22.
\textsuperscript{30} See IRCA, supra note 6.

As long as greater job opportunities are available to foreign nationals who succeed in physically entering this country, intense illegal immigration pressure on the United States will continue. This pressure will decline only if the availability of U.S. employment is eliminated, or the disparity in wages and working conditions is reduced, through improvement in the Third World or deterioration in the United States.
B. The Immigration Reform and Control Act of 1986

On March 17, 1982 Senator Simpson submitted the original IRCA bill to Congress.\(^{31}\) Although it was passed by the Senate, the House of Representatives vigorously debated the bill on the House floor on December 16, 17, and 18, 1982 but never brought the bill to a vote.\(^{32}\) In June 1984, the House approved its version of the bill and a joint conference committee met for ten days to resolve the remaining differences between the House and Senate bills.\(^{33}\) In the 98th congressional term, however, Congress reached no final resolution.\(^{34}\) In the following year, a Conference Committee debated the bill, and produced a Conference Report which was finally passed by the House on October 15, 1986 and by the Senate on October 17, 1986.\(^{35}\)

IRCA is the most comprehensive immigration reform in the United States since 1952.\(^{36}\) The basic provisions of the Act make it unlawful for an employer to hire anyone without following a screening procedure to determine the applicant's legal status.\(^{37}\) In addition, the law provides a legalization procedure for any alien who can prove illegal residence in the United States since January 1, 1982.\(^{38}\) Special provisions were created to provide more lenient standards

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\(^{31}\) S. REP. No. 132, supra note 20, at 24.
\(^{32}\) Id. at 24–25; H.R. REP. No. 682, supra note 21, at 55.
\(^{33}\) S. REP. No. 132, supra note 20, at 26; H.R. REP. No. 682, supra note 21, at 55.
\(^{34}\) S. REP. No. 132, supra note 20, at 26; see H.R. REP. No. 682, supra note 21, at 55.
\(^{35}\) Leiden, supra note 1, at 11.
\(^{36}\) S. REP. No. 132, supra note 20, at 18. The last revision of the INA occurred in 1952 with the passage of the McCarran-Walter Act. Id. The most prominent amendments to the INA subsequent to the McCarran-Walter Act occurred in 1965 and 1976, both of which dealt with reforming the system for admitting legal immigrants. Id.
\(^{37}\) 8 U.S.C. § 1324a(a), (b) (Supp. 1986) (IRCA § 101); Mailman, supra note 22, at 13. Section 1324a(b) sets forth verification procedures that provide a defense for any employer against an alleged violation of § 1324a(a)(1). See S. REP. No. 132, supra note 20, at 32–33. The verification procedures require an employer to attest, under penalty of perjury, that he or she has examined what reasonably appears on its face to be either (1) a document establishing employment authorization and identity or (2) a combination of documents which establish employment authorization and identification. 8 U.S.C. § 1324a(b)(1). In addition, the employee must attest to being a citizen of the United States or that he or she is otherwise authorized to be employed. Id. at 1324a(b)(2).
\(^{38}\) 8 U.S.C. § 1255a (Supp. 1986) (IRCA § 201). A legalization cutoff date of July 1, 1968 was initially proposed when the legalization program was considered in the mid-1970's by the House Judiciary Subcommittee on Immigration, Citizenship, and International Law, as well as the Senate Judiciary Committee and the Subcommittee on Immigration and Naturalization. S. REP. No. 132, supra note 20, at 19–20. Under the Carter administration, the "Alien Adjustment and Employment Act of 1977" changed the cutoff dates for legalization to January 1, 1970 for granting permanent resident status and January 1, 1977 for granting a five-year temporary status, Id. at 21. Subsequently, the Select Commission on Immigration and Refugee Control reported its findings and recommended a legalization cutoff date of January 1, 1980. Id. at 22. After elaborate studies and public hearings, IRCA was passed on November 6, 1986 with a January 1, 1982 cutoff date. 8 U.S.C. § 1255a(a)(2)(B) (Supp. 1986).
for legalization of aliens employed as farmworkers,\textsuperscript{39} as well as Cubans and Haitians.\textsuperscript{40}

Regarding the requirements to qualify for legalization, Title II of IRCA amends the INA by adding 8 U.S.C. § 1255a, "Temporary Resident Status."\textsuperscript{41} It states that the Attorney General has a duty to adjust the status of an alien to that of an alien lawfully admitted as a temporary resident if the alien meets four basic eligibility requirements: (1) timely application, (2) continuous unlawful residence since before January 1, 1982, (3) continuous physical presence since enactment, and (4) admissibility as an immigrant.\textsuperscript{42} Continuous residence since 1982 requires a nonimmigrant alien to prove that he or she entered the United States and resided in an unlawful status before January 1, 1982.\textsuperscript{43} The law provides two methods for an alien who entered the United States with a nonimmigrant visa to become a temporary resident. The first allows an alien to prove that he or she entered the United States with a valid visa before January 1, 1982 and that the period of lawful stay expired before such date through the passage of time. The second method provides eligibility for legalization to an alien who violated his or her visa status even though the visa had not expired, as long as the alien can prove that this unlawfulness was "known to the Government" as of January 1, 1982.\textsuperscript{44}

As a result of IRCA's legalization provisions, approximately two million aliens will become eligible for temporary resident status.\textsuperscript{45} Once an alien has received temporary resident status, the Attorney General has a duty to adjust the status to that of a permanent resident when four requirements have been met: (1)

\begin{itemize}
  \item [\textsuperscript{40}] IRCA, supra note 6, at § 202.
  \item [\textsuperscript{41}] "Temporary Resident Status" provides privileges including legal residence, employment authorization, and permission to travel abroad. See 8 U.S.C. § 1255a(a), (b)(3). Temporary resident status may be terminated if (1) it is determined that the alien was ineligible for temporary residence, (2) the alien commits an act which renders him or her inadmissible as an immigrant, (3) the alien is convicted of any felony, or three or more misdemeanors, or (4) the alien fails to file for an adjustment of status from temporary resident status to permanent resident status. Id. at 1255a(b)(2). Termination of temporary resident status returns the alien to unlawful status. 52 Fed. Reg. 16,214 (1987) (to be codified at 8 C.F.R. § 245a.2(u)(4)).
  \item [\textsuperscript{42}] 8 U.S.C. § 1255a(a) (Supp. 1986) (IRCA § 201). Timely application requires filing between May 5, 1987 and May 4, 1988. 52 Fed. Reg. 16,206 (1987). Continuous unlawful residence will be considered broken upon a single absence from the United States of forty-five days or longer, or an aggregate of absences greater than 180 days between January 1, 1982 and the date of filing for temporary residence. Id. at 16,212. Continuous physical presence will not be broken by absences that are "brief, casual and innocent." Id. at 16,206. To be admitted as an immigrant, an alien must not have been convicted of a felony or three or more misdemeanors. 8 U.S.C. § 1255a(a)(4).
  \item [\textsuperscript{44}] Id.
  \item [\textsuperscript{45}] Drake, Zacovic, Wheeler, Poplawski, Sweeping Changes in Immigration Laws Affect Alien's Rights to Work and Legalize Their Status, CLEARINGHOUSE REV. 74 (May 1987) [hereinafter Drake].
\end{itemize}
timely application after one year of temporary residence, (2) continuous residence since legal temporary residence was granted, (3) admissibility as an immigrant, and (4) possession of basic citizenship skills. Among those otherwise eligible for legalization, a number of aliens will be denied temporary residence because of a strict interpretation of the phrase “known to the Government” contained in the administrative regulations created by the Attorney General.

C. Why Is “Known to the Government” Important?

In January 1987, the Attorney General issued draft regulations for comment pursuant to 8 U.S.C. § 1255a(g)(1) and subsequently in March published proposed regulations. Section 1255a(g)(1) specifically allows the Attorney General to propose regulations (1) to define “resided continuously,” (2) to describe the evidence needed to establish that an alien has resided continuously, and (3) to create implementation guidelines for legalization. Among those provisions of the INA added by IRCA and subject to the Attorney General’s interpretation, 8 U.S.C. § 1255a(a)(2)(B) has created a great deal of controversy. This section requires a nonimmigrant who entered the United States with a valid visa and subsequently violated the visa status to prove that his or her illegal status was “known to the Government” prior to January 1, 1982 in order to be eligible for legalization. The proposed regulations define “known to the Government” as knowledge of unlawful status held by the INS. Despite the negative feedback from practitioners protesting such an extremely limited interpretation of the phrase, the Attorney General published the official regulations on May 1, 1987 without changing the original interpretation.

Initially, the INS would not consider an alien “known” unless the Service had “made an affirmative determination that the alien was subject to deportation proceedings.” In response to practitioners’ comments, the INS loosened its

46 8 U.S.C. § 1255a(b). A timely application must be filed during the one-year period beginning eighteen months after the alien has been granted temporary residence. 52 Fed. Reg. 16,214 (1987). The continuous residence requirement will be met if the alien has not had a single absence exceeding thirty days, or multiple absences totalling greater than ninety days, between the date temporary residence was granted and the date an application was filed for permanent residence. Id. An alien is not admissible as an immigrant if he or she has been convicted of any felony or three or more misdemeanors. Id. at 16215. Possession of basic citizenship skills requires an alien to have a minimal understanding of ordinary English and a knowledge of the history and government of the United States, or to be pursuing a course of study recognized by the Attorney General as achieving these requirements. Id.

52 Id. at 16,206.
interpretation of "known to the Government." The looser interpretation includes information received by the INS from another federal agency prior to 1982, indicating an alien's clear statement of unlawful status, if such information was subsequently placed in the alien's A-file. The regulations state that it is irrelevant if the INS had made a determination of status prior to this date.53

The "known to the Government" element of a legalization case is crucial to the many aliens who entered the United States legally but subsequently violated their status. A narrow interpretation of "known to the Government" could preclude legalization and cause these aliens to be deported. For example, individuals who failed to alert the INS of their illegal presence but paid taxes to the Internal Revenue Service, filed for a Social Security Card, or had contact with other federal agencies may arguably be "known to the Government." But, under the final INS regulations this information would not qualify as "known to the Government," and therefore, these individuals would be denied eligibility for the legalization procedures that will grant approximately two million other illegal aliens lawful presence.54

### III. Is the INS Interpretation of "Known to the Government" Theoretically Reasonable?

"Known to the Government" was made a requirement of legalization in order to prevent otherwise lawful nonimmigrants from fraudulently creating documentation of illegal status.55 As will be seen, interpreting this phrase as "known to the INS" has become a pivotal issue in allowing or denying legalization.56

The INS and practitioners have crafted legal arguments concerning the appropriate scope of the phrase.

Although very little information is available concerning the INS's reason for its interpretation, the regulations state that the administrative burden would be too great if information held by all federal agencies was included in the "known to the Government" standard.57 The regulations also imply that the INS and the Attorney General are the only bodies able to make a valid determination of illegal status since they have sole control over implementation and enforcement of immigration laws. Therefore, information held by any other federal agency

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53 Id. An A-file is the file kept by the INS for every known alien in the United States for whom agency action arises under the Immigration and Nationality laws. 4 C. GORDON & H. ROSENFIELD, IMMIGRATION AND PROCEDURE 23A–27 (1987).
54 Drake, supra note 45, at 74.
55 Letter from American Immigration Lawyers Assoc. to INS Assistant Commissioner for Legalization at 4 (April 20, 1986) (commenting on INS proposed regulations) [hereinafter AILA Comments].
would be irrelevant because another agency's determination of illegal status would not be valid.\(^{58}\)

It has been argued that a narrow interpretation may reduce the threat of future waves of illegal immigration which some people fear would occur if aliens believe a second amnesty bill is possible.\(^{59}\) A narrow interpretation of the legalization provisions would avoid rewarding violations of U.S. immigration law and would strengthen a central purpose of IRCA, which is to develop effective enforcement strategies for illegal immigration.\(^{60}\)

Those opposing the INS's restrictive interpretation of "known to the Government" contend that the broad language of the phrase and the congressional intent do not support such an interpretation.\(^{61}\) Some practitioners believe an interpretation more in line with the language and intent would require an alien's status to be unlawful before January 1, 1982 and to have been discovered by some federal agency or officer through the normal functioning of the federal government prior to the same date.\(^{62}\) This interpretation is more favorable to aliens than the INS interpretation. It would increase the number of aliens eligible for legalization by accepting proof of unlawfulness held by any federal agency, rather than requiring the INS to have actual documentation in its official file.\(^{63}\)

The marked difference in the opinions of practitioners and the INS concerning this phrase makes a thorough analysis of the phrase necessary. This analysis will first address the amount of deference owed to an administrative body's decisions.\(^{64}\) Next the analysis will look to recent case law on the "known to the Government" issue,\(^{65}\) followed by an analysis of the phrase according to standard rules of statutory interpretation.\(^{66}\) Finally, the analysis will explore potential policy considerations of a narrow and broad interpretation.\(^{67}\)

\section{A. Deference: A Question of Expertise or Ordinary Interpretation}

In instances where an administrative agency is given authority to administer a law, the agency's interpretation of the law is owed deference if the court finds

\(^{58}\) See id.

\(^{59}\) See S. REP. No. 132, supra note 20, at 15; N. Montweiler, supra note 4, at 56.

\(^{60}\) See S. REP. No. 132, supra note 20, at 15.


\(^{62}\) See, e.g., Lichtman, supra note 61, at 17.


\(^{64}\) See infra notes 68--86 and accompanying text.

\(^{65}\) See infra notes 87--156 and accompanying text.

\(^{66}\) See infra notes 157--217 and accompanying text.

\(^{67}\) See infra notes 218--44 and accompanying text.
that the interpretation is within the specialized expertise of the agency. Alternatively, if the interpretation is one involving pure statutory construction, the court is qualified to determine the congressional intent by employing traditional rules of statutory interpretation, and therefore no deference is due to the agency. The rule of deference is relevant only when ambiguity of meaning remains after the plain meaning rule has been applied, the legislative history has been examined, and other basic rules of statutory interpretation have been exhausted. Where Congress chooses to delegate authority to an agency for the administration of an act, it may expressly or impliedly leave a gap for the agency to fill. If Congress expressly authorizes an agency to write regulations on specific issues, these regulations must be given controlling weight unless they are arbitrary, capricious, or contrary to the statute. If Congress confers the authority more generally, the agency has an implicit right to fill the gaps, and a court may not overturn the agency unless the interpretation appears to be one that Congress would not have approved.

In general, deference to administrative interpretation applies in situations involving technical decisions based on more than ordinary knowledge and understanding of the specific statutory policies. It is assumed that the competence and experience of the agency is more specific to issues involving the statute, and therefore, a court should not be quick to substitute its judgment for that of the agency.

In Immigration and Naturalization Service v. Cardoza-Fonseca, a recent case applying IRCA, the court limited the "gap filling" authority of the INS to the application of the law on a case by case basis. While deference is appropriate in cases where the agency has used its authority to apply the law to given facts, the court felt it did not owe deference to the INS's positions on issues of law.

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70 Catholic Social Services, Inc. v. Meese, 664 F. Supp. 1278, 1383 (E.D. Cal. 1987). The rule of deference is "secondary to application of the plain meaning rule, examination of the legislative history, and other tools of critical textual examination ... . Thus, administrative interpretation, an extrinsic aid to construction, is only relevant where examination of the text and the legislative history leaves an unresolved ambiguity." Id. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." Chevron, 467 U.S. at 843 n.9.
72 Chevron, 467 U.S. at 843–44.
73 Id. at 843–45. It should be noted that these standards differ. If Congress has delegated specific powers to create administrative regulations, the court must accord great respect to these regulations. See id. at 844–45. But where Congress has granted broad power to administer the statute and has not specifically mentioned authority to create regulations, the agency's power is merely implicit and a court would owe a lesser amount of deference. See id.
74 See id. at 844.
75 See id.
76 107 S.Ct. 1221–22 (1987); id. at 1223–25 (Scalia, J. concurring).
77 Id. at 1221–22.
The *Cardoza* case involved a Nicaraguan citizen who entered the United States as a nonimmigrant and remained in the country after expiration of her visa. The INS eventually began deportation proceedings. The plaintiff asserted two defenses to deportation, withholding of deportation under INA § 243 and asylum as a refugee under INA § 208. Under § 243, an alien must prove a "clear probability of persecution" in the country of origin, while under § 208, the alien must prove a "well founded fear of persecution." The court held that deference is appropriate in a decision by the INS as to what facts meet either the § 208 "well founded fear test" or the § 243 "clear probability of persecution test," but the legal question, whether the two tests are substantially the same, is a question for the court and does not require deference to the INS.

In considering the role of deference in this situation, it is relevant to consider the scope of authority given to the Attorney General and the INS to create regulations. IRCA expressly delegates authority to the Attorney General to create regulations for the following purposes: (1) to define "resided continuously," (2) to describe the necessary evidence needed to prove "resided continuously," and (3) to implement the legalization process. The regulations defining "known to the Government" are within the authority of the Attorney General to "fill the gap" in implementing legalization; therefore, a court would be bound to give a level of deference to the Attorney General and the INS. The question remains as to the appropriate level of deference.

The rule stated in *Cardoza* provides a test to determine the level of deference a court will owe to an administrative agency's decision. This rule applied to the "known to the Government" issue shows that a question pertaining to the sufficiency of evidence needed to prove knowledge in the pertinent government body would be a question of applying the facts of a case to the rule and therefore, would require deference to an INS decision. Alternatively, the issue whether "known to the Government" was intended to mean "known to the INS" or "known to any federal agency" is a question of law and therefore within the province of the court.

More specifically, in IRCA Congress used two sections to differentiate the legalization requirements for general aliens and special circumstance aliens.

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78 Id. at 1209, 1212.
79 See id. at 1221–22. In Justice Scalia's concurring opinion, he concluded that deference was not due because the plain meaning and structure of the two sections are different and therefore Congress intended to have a different interpretation of the sections. Id. at 1224.
82 The level of deference a court owes would vary depending on whether the authority granted to the Attorney General is implicit or explicit. See *supra* note 73 and accompanying text.
84 See *id.*
(Cubans and Haitians). In § 201 which pertains to general aliens, Congress used the words "known to the Government," but in § 202 which pertains to Cuban and Haitian aliens, Congress requires a record of the alien to have been "established by the Immigration and Naturalization Service before January 1, 1982." Therefore, whether § 201 of IRCA is substantially the same as § 202 is a question of law and does not require the traditional level of deference granted to an administrative agency.

**B. Recent Cases Involving the "Known to the Government" Controversy**

Since the passage of IRCA in October 1986, three district courts have considered the "known to the Government" issue and have given contradictory holdings. The following analysis explains the facts which justify the conflict and pinpoint the differences in the courts' analyses.

The initial query starts with the jurisdiction granted by IRCA to the INS and the courts. IRCA provides for a limited administrative review of status determinations. This administrative review is done by an appellate authority established by the Attorney General. The law also grants appellate and habeas corpus jurisdiction to federal courts in limited situations involving an order of deportation. Within the appellate jurisdiction, a court may reverse an administrative finding only in the case of an abuse of discretion or if the finding is "directly contrary to clear and convincing facts contained in the [administrative] record considered as a whole." The court's scope of review over habeas corpus petitions covers all questions concerning the constitutionality and validity of a deportation order.

Section 1255a(e)(1)(A) of 8 U.S.C., as amended by IRCA, provides for an interim procedure in which any alien apprehended before the legalization process begins may be granted a stay of deportation if he or she can prove a prima facie case of eligibility for legalization. In two of the cases argued at

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81 8 U.S.C. § 1255a(a) (Supp. 1986) (IRCA § 201); IRCA, supra note 6, at § 202.
82 8 U.S.C. § 1255a(a) (Supp. 1986) (IRCA § 201); IRCA, supra note 6, at § 202.
87 Id.
88 Id. at § 1255a(f)(4)(A); see 8 U.S.C. § 1105a(a). Section 1105a(a) provides federal appellate jurisdiction to review a final denial of a stay of deportation. In addition, § 1105a(a)(9) grants the district courts authority to review a denial of a stay of deportation through habeas corpus jurisdiction.
90 C. GORDON & G. GORDON, IMMIGRATION AND NATIONALITY LAW § 8.6(a) (Student Edition 1985).
the district court level concerning the issue of "known to the Government," the
INS determined the plaintiffs to be deportable prior to the commencement of
legalization. In the INS proceedings, the plaintiffs were unable to show a
prima facie case of legalization due to the restrictive interpretation of "known
to the Government" contained in the administrative regulations; therefore, the
INS denied their applications for a stay of deportation.

The United States District Court for the Western District of New York decided
the first case, Kalaw v. Ferro, which considered the interpretation of "known
to the Government." The petitioner, Violeta Kalaw, a citizen of the Philippines,
first entered the United States in July 1973 with a nonimmigrant exchange
visitor visa. The visa was due to expire in June 1979, but was extended until
June 1980 and changed to an H-1 temporary worker visa. Subsequently, Ms.
Kalaw applied for, and the court granted, two extensions of her visa which put
her in lawful visa status through June 27, 1982. The petitioner remained in the
United States beyond this date, and, in January 1983, the Buffalo INS office
granted her a right of voluntary departure by April 1, 1983. Kalaw sought
political asylum in May 1985 which the court denied. She was thereafter found
to be deportable. Subsequent to the passage of IRCA, she applied under 8
U.S.C. § 1255a(e)(1)(A) to the INS for a stay of deportation which was denied
for failure to prove a prima facie case for legalization. The issue of whether
the petitioner had made out a prima facie case turned on whether she had
violated the requirements of her H-1 status and whether this was "known to
the Government" before January 1, 1982.

In reviewing the INS's denial of legalization, the district court held that a
petitioner would be illegal if she regularly engaged in activity not authorized
under her INS regulations. In this case, the court found that the petitioner
was in an illegal status prior to January 1, 1982. The court also considered the
"known to the Government" phrase and found petitioner's status was known to

1163, 1165 (W.D.N.Y. 1987).
97 Kalaw, 651 F. Supp. at 1163.
98 Id. at 1165. Voluntary departure is a phrase describing a procedure where deportable aliens make
a type of "guilty plea" and are permitted to leave the United States without a formal deportation
order. D. Martin, Major Issues in Immigration Law 72–73 (1987). The advantage to the INS is the
avoidance of cost, delay, and difficult deportation proceedings. Id. The advantage to the alien is the
increased flexibility and control he or she has over departure dates, the avoidance of a formal
departure order and re-entry restrictions, as well as the possible stigma associated with deportation.
Id.
99 Kalaw, 651 F. Supp. at 1165.
100 Id. at 1166.
101 Id. at 1170.
102 Id. at 1169.
the Michigan Department of Civil Service, a state government agency, before January 1, 1982, but was unknown to the INS.103

In its holding, the court accepted the INS argument for limited interpretation because it believed the inclusion of all state and federal agencies "would make the administration of the Reform Act [IRCA] difficult."104 The court acknowledged that other interpretations of the phrase were possible.105 It should be noted that the decision might have been different if the petitioner's status had been known to a federal agency. The court hinted that the free flow of information and constant interaction between agencies could warrant a more lenient interpretation.106

On September 22, 1987, the United States District Court for the Northern District of Texas decided the Farzad v. Chandler case concerning the "known to the Government" issue.107 The petitioner, Masoud Farzad, a native of Iran, entered the United States in September 1976 under a nonimmigrant student visa due to expire on June 1, 1982.108 From December 24, 1980 through April 22, 1982, Mr. Farzad violated his status by engaging in unauthorized employment. In March 1982, the INS queried Mr. Farzad's employer and learned of the petitioner's status. On October 24, 1986, the INS issued an order of deportation. On January 23, 1987, Mr. Farzad applied for a stay of deportation under 8 U.S.C. § 1255a(e)(1)(A), based on his prima facie case of eligibility for legalization.109 The INS denied his application because he could not prove that his unlawful status was known to the INS before January 1, 1982 even though he did prove that the IRS and the Social Security Administration had records of his employment before January 1, 1982.110 Upon receiving an order of deportation from the INS, Mr. Farzad petitioned the district court for a writ of habeas corpus.111

103 Id. at 1169–70. The INS argued that Congress could not have intended "Government" to mean any state or federal agency, but instead must have intended to limit the meaning to the Attorney General or INS because these are the only entities charged with the administration of IRCA. Id. The INS also argued that knowledge by other agencies, especially state agencies, would be insignificant due to the sole administrative authority of the Attorney General. Id.
104 Id. at 1170.
105 Id. at 1170 n.8.
106 Id.
108 Id. at 691; 8 C.F.R. § 241.2(f) (1987).
110 Id. at 692, 694.
111 Id. at 691. Habeas corpus is a writ of ancient origin, the purpose of which is to obtain immediate relief from illegal confinement, to liberate those held in unlawful custody, or to obtain proper custody of persons detained. See Ballentine’s Law Dictionary 543 (3d ed. 1969). The writ is used to test the constitutionality and validity of a deportation order and must be brought in the district in which the alien is imprisoned. 28 U.S.C. § 2241. See generally Immigration Law and Procedure § 63.06 (C. Gordon & G. Gordon ed. 1987).
The district court first looked to the expressed intent of Congress concerning the meaning of "known to the Government." Since the court found no specific intent, it looked to the interpretation given by the INS and held that the INS's interpretation was not supported by the words of the statute and was not permissible in light of Congress' general intent. If the court found no specific intent, it looked to the interpretation given by the INS and held that the INS's interpretation was not supported by the words of the statute and was not permissible in light of Congress' general intent. The court cited IRCA and pointed out that in every other section, Congress refers specifically to the Attorney General or the INS, but in 8 U.S.C. § 1255a Congress used the broader term "Government." The court held that since Congress was aware of the Attorney General's exclusive administrative authority when it wrote the statute, and since Congress had specified the Attorney General or the INS in other sections of IRCA but had not done so in § 1255a(a)(2)(B), the INS interpretation was "impermissibly narrow.

As further support for its broader interpretation, the Farzad court analyzed the practical effect of requiring the INS to know of an alien's illegal status before January 1, 1982. If the INS should fail to keep records of when it initially learned of or suspected a violation, it could effectively frustrate a nonimmigrant alien's ability to meet the burden of proof. The court accepted the petitioner's logic that no one could ever meet the INS requirement because they would either have been deported or not "known to the INS." The court held that the INS interpretation is not a permissible one because it effectively removes all nonimmigrant aliens from the reach of the provision.

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112 Farzad, 670 F. Supp. at 692-93. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

113 Farzad, 670 F. Supp. at 693.

114 Id.

115 Id. at 694.

116 Id. On October 13, 1987, respondent INS filed a motion to amend the findings or to alter or amend the judgment. Brief for Respondent, Farzad v. Chandler, 670 F. Supp. 690 (N.D. Tex. 1987) (No. 3-87-0256-G). The motion is based on two grounds. First, the INS proposes that the court went beyond its habeas corpus jurisdiction by granting declaratory judgments and injunctive relief. Id. at 6-13. The court stated as reasoning for its holding that the regulations defining "known to the Government" are inconsistent with IRCA and outside the scope of the INS authority. Id. at 10. Additionally, the court held that the petitioner had made a prima facie case for legalization, although the decision whether a prima facie case has been made is a decision alleged to be solely within the control of the INS. Id. at 12. Respondent (INS) argues that these declaratory judgments and the injunctive relief, forbidding the INS from using its definition of "known to the Government" against Farzad, are outside the scope of the court's habeas corpus jurisdiction, and therefore the judgment should be amended. Id. at 10, 12. Second, the respondent also argues that the court's decision is based on erroneous facts. Id. at 3-6. In an attempt to invalidate the court's reasoning that the regulatory interpretation effectively moots the application of 8 U.S.C. § 1255a(a)(2)(B), respondent submitted affidavits of several INS officers describing the procedure for dating and retaining information received from outside sources. Id. at 4-6.

Although the Farzad case illustrates the court's opinion as to the the "known to the Government" issue, its jurisdiction is limited to reviewing the alleged unlawful deportation because the court was petitioned under a writ of habeas corpus. If the deportation is found to be unlawful, relief is limited to either a stay of deportation or, if the INS is unable to correct the deficiency of the deportation order, a conditional release of custody. As described by the Supreme Court, the limited nature of judicial review of immigration decisions is apparent from the long recognized "power to expel or exclude aliens as a fundamental sovereign attribute . . . largely immune from judicial control." A district court's grant of habeas corpus is limited to those issues directly pertaining to the validity of the final order; therefore, the court's authority is limited to vacating the INS order and discharging the petitioner from custody.

On March 10, 1988, the INS filed a Notice of Appeal in Farzad v. Chandler. Prior to submitting its appellate brief, the INS began to reconsider its position.
in light of *Ayuda v. Meese*.122 The *Ayuda* decision, as described below, clearly favors the plaintiff’s position in the *Farzad* case and declares the INS “known to the Government” regulations contrary to law.123 After considering this case, the INS motioned the court under Rule 42 of the Federal Rules of Appellate Procedure to withdraw its appeal.124 The motion was granted on May 24, 1988, and the appeal was duly dismissed.125

The third case to consider the “known to the Government” issue was *Ayuda v. Meese*, decided by the United States District Court for the District of Columbia on March 30, 1988.126 The case was brought by five nonimmigrant aliens who, but for the narrow interpretation of “known to the Government,” would be eligible for legalization, and four organizations whose core function is immigration counseling. The plaintiffs sought declaratory and injunctive relief on the basis that the administrative interpretation of the “known to the Government” requirement is unreasonable and it unlawfully excludes certain nonimmigrant aliens from the legalization procedure.127

In defense of the action, the defendants challenged the justiciability of the case on the basis that the plaintiffs lacked standing and had not exhausted the administrative remedies specified in IRCA.128 The court addressed the standing issue in detail, finding the organizations to have standing to challenge the contradictory interpretations of the INS regulations and the *Farzad* holding. The court came to this conclusion because the organizations’ core function, to provide immigration counseling, requires a clear and correct interpretation of the legalization provisions.129 The organizations’ inability to express a clear interpretation of the immigration laws prevented the proper performance of their core functions and therefore created an injury in fact. The court concluded that the plaintiff-organizations’ interests are within the zone of interest of IRCA and therefore the plaintiffs have standing.130

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123 Id. at 51,805.
127 Id. at 51,792.
128 Id. at 51,795.
129 Id. at 51,796. The court was specifically concerned with two of the plaintiff-organizations who have contracts with the INS to serve as Qualified Designated Entities (QDEs). Id. at 51,797. The contracts require the organizations to comply with all INS regulations. Id. Given this contractual relation, if standing is denied, these organizations may be compelled by contractual obligations to enforce unlawful regulations without the opportunity to challenge the interpretations. Id.
130 Id. at 51,799. The court did not reach the standing issue as it pertains to the individual plaintiffs. Id. at 51,800 n.9.
Judge Sporkin rejected the defendant's second challenge to the case's justiciability because the doctrine of exhaustion of administrative remedies is irrelevant to the plaintiffs. Sporkin noted that since IRCA does not provide an administrative remedy to plaintiff-organizations harmed by conflicting interpretations of the law, these plaintiffs may find a remedy only in federal court.\footnote{Id. at 51,800.}

After rejecting the challenges to the justiciability of the case, Judge Sporkin looked to the plain meaning of the phrase "known to the Government" and described the language as "crystal clear."\footnote{Id.} The court then considered the context of the phrase within the statute and concluded that Congress exhibited its ability to distinguish between the INS and the federal government in many sections of the law.\footnote{Id. at 51,801 (citing Farzad v. Chandler, 670 F. Supp. 690, 693 (N.D. Tex. 1987)).} The court found Congress' decision to use different language in §§ 201 and 202 of IRCA\footnote{See supra notes 84–86 and accompanying text; see infra notes 183–95 and accompanying text.} to be "exceptionally telling evidence that Congress meant Government when it said Government."\footnote{Ayuda v. Meese, 46 EPD (CCH) ¶ 37,922 at 51,801.}

Next, the court looked to the legislative history to corroborate the plain meaning of the language of the statute. Although neither party was able to find specific history pertaining to the "known to the Government" phrase, the court interpreted the lack of history as evidence of the self-explanatory nature of the language.\footnote{Id. at 51,802 n.16.} The court also looked to the broader intent of Congress and found that the extensive remedial purpose of the statute would be undercut by the INS's narrow interpretation of "known to the Government."\footnote{See supra notes 198–217 and accompanying text.}

Finally, the court recognized that the INS requirement removes virtually all nonimmigrant aliens from eligibility for legalization. As noted by the Farzad court, an alien who was known by the INS to be illegally present since 1982 is very likely to have been deported before 1986, when IRCA was written.\footnote{Farzad v. Chandler, 670 F. Supp. 690, 694 (N.D. Tex. 1987).} In addition, even if such information was given to the INS and the alien had not been deported, the likelihood of the information being contained in an INS A-file is remote.\footnote{Ayuda v. Meese, 46 EPD (CCH) ¶ 37,922 at 51,805.}

The court concluded that the alien plaintiffs and their class will be irreparably harmed if the regulations are not enjoined because these individuals will be deterred from applying for amnesty before the May 4, 1988 deadline. In accord, the court also found that any minor harm that the Government may suffer from the granting of an injunction is clearly outweighed by the substantial injury which the plaintiffs will suffer if the injunction were not granted. Finally,
since the public interest is benefitted by the facilitation of IRCA's purpose, the plaintiffs were entitled to injunctive relief.\textsuperscript{140}

The court's holding declared the word "Government," as used in the phrase "known to the Government," to mean the entire United States Government, and declared the INS regulation contrary to law. The court enjoined the INS from further application of the regulations and ordered the INS to notify all persons affected by the regulation of the court's decision.\textsuperscript{141}

At the time of the \textit{Ayuda} decision, the INS had made little or no effort to change its regulations to comply with the \textit{Farzad} decision.\textsuperscript{142} While discussing the relevant provisions of law concerning the "known to the Government" requirement, Judge Sporkin clearly stated that despite the \textit{Farzad} decision which declared the INS regulations interpreting the "known to the Government" phrase to be unlawful, "the INS has continued to use these regulations, without any modification to accord with the \textit{Farzad} decision."\textsuperscript{143}

Subsequent to the \textit{Ayuda} decision, Judge Sporkin issued a series of supplemental orders which clearly reject the INS's narrow interpretation of "known to the Government" and reinforce the \textit{Farzad} and \textit{Ayuda} opinions.\textsuperscript{144} These orders require the INS to commence processing of applications filed prior to May 5, 1988 under the court's broader interpretation of the phrase. On May 17, 1988, the INS implied its willingness to acquiesce to these orders when it finalized its decision not to appeal the \textit{Ayuda} holding.\textsuperscript{145} The plaintiffs, however, did not believe the INS's actions exhibited compliance with the court's orders, and, on July 21, 1988, they filed a motion to hold the defendants in contempt of court.\textsuperscript{146} On July 22, 1988, Judge Sporkin heard the arguments and held the motion in abeyance.\textsuperscript{147}

The plaintiffs argued that the defendants are not granting legalization to those aliens who meet the court's "known to the Government" standard and are otherwise eligible for legalization.\textsuperscript{148} Although the INS has accepted "known to the Government" applications, according to the plaintiffs, the INS has not

\footnotesize{\textsuperscript{140} Id.  
\textsuperscript{141} Id.  
\textsuperscript{142} Id. at 51,794.  
\textsuperscript{143} Id.  
\textsuperscript{144} Motion to Hold the Defendants in Contempt or, in the Alternative to Compel Compliance with the Court's Orders at 2, Ayuda v. Meese, 46 EPD (CCH) ¶ 37,922 (D.D.C. Mar. 30, 1988) (No. 88-0625).  
\textsuperscript{145} Reply of Plaintiffs to Defendants Opposition to Plaintiff's Motion to Hold Defendants in Contempt or, in the Alternative to Compel Compliance with the Court's Orders at 2, Ayuda v. Meese, 46 EPD (CCH) ¶ 37,922 (D.D.C. Mar. 30, 1988) (No. 88-0625).  
\textsuperscript{146} Motion to Hold Defendants in Contempt or, in the Alternative to Compel Compliance with the Court's Orders, Ayuda v. Meese, 46 EPD (CCH) ¶ 37,922 (D.D.C. Mar. 30, 1988) (No. 88-0625).  
\textsuperscript{148} Id. at 1.}
processed these applications and the local legalization offices continue to recommend denial. The plaintiffs point to an INS Central Office Directive which instructs local offices to take no final action on "known to the Government" applicants and to recommend denial of the applicants.149

In response to plaintiff's motion to hold defendants in contempt, the INS argued that it has fully complied with the court's orders. The INS indicated that it has issued three wires to its field offices concerning the processing of "known to the Government" applications. The first wire was sent on April 1, 1988. This wire instructed legalization office managers to accept "known to the Government" applications, adjudicate them, forward them to Regional Processing Facilities (RPFs) and issue work authorization to the aliens.150 The second wire was sent on April 11, 1988 and it contained similar instructions. The second wire also instructed local offices to "check #5 in block B of the examiner's worksheet." Item #5 is labelled "verification requested" and is not a denial or a grant of legalization. Item #5 causes the document to be sent to a RPF for further processing and a final adjudication. The April 11 wire indicated that final decisions on "known to the Government" applicants should be withheld by RPFs until further guidance is given by the INS Central Office.151 The third wire was issued on April 15, 1988 and it instructed field personnel not to impose a filing fee on any "known to the Government" applicant.152

According to the INS, the procedure for processing "known to the Government" applications has not changed since the finalization of the Ayuda case. Prior to the Ayuda holding, the INS accepted "known to the Government" applications in their local legalization offices, recommended them for denial and sent them to the RPFs where they were held until instructions from the Central Office were received. These procedures have not changed in light of the Ayuda decision.153

The INS argues that recommendations for denial by the local legalization offices do not violate the court orders because the recommendations may be rejected by the RPFs who make the final determinations. The INS argues that no proof has been given that the RPFs have denied or plan to deny these applications, therefore the motion for contempt should be denied.154

It should be noted that the April 11, 1988 wire instructed RPFs to hold final decisions on "known to the Government" applicants in abeyance until further

149 Id. at 1–3.
150 Defendant's Opposition to Plaintiff's Motion to Hold Defendants in Contempt or, in the Alternative to Compel Compliance With the Court's Orders at 6–7, Ayuda v. Meese, 46 EPD (CCH) ¶ 37,922 (D.D.C. Mar. 30, 1988) (No. 88-0625).
151 Id. at 5–6, attachment D.
152 Id. at 5.
153 Id. at 8–9 n.7.
154 Id. at 10.
notice was provided by the INS Central Office. The defendants do not indicate that any further instructions have been issued by the INS Central Office, although the INS decided not to appeal the Ayuda decision on May 17, 1988.\footnote{Reply of Plaintiff’s to Defendant’s Opposition to Plaintiff’s Motion to Hold Defendants in Contempt or, in the Alternative to Compel Compliance With the Court’s Orders at 2, Ayuda v. Meese, 46 EPD (CCH) \$ 37,922 (D.D.C. Mar. 30, 1988) (No. 88-0625).}
It may be argued that the INS’s failure to update the April 11, 1988 instructions to the RPFs is an example of noncompliance with the court’s orders.\footnote{Id. at 2-3.}

C. Statutory Interpretation

In this section, this Comment will consider the conflict which currently exists between the recent court interpretations of the phrase “known to the Government” and the INS regulatory interpretation of the phrase in light of the traditional rules of statutory interpretation. The initial inquiry of statutory interpretation is to the plain meaning of the statutory words.\footnote{Consumer Product Safety Commissioner v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).} If the words of the statute are unambiguous, the usual canon of interpretation is that courts are bound by the assumption that legislative purpose is expressed by the ordinary meaning of the words used.\footnote{American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982).} Courts believe that Congress is able to express its intent at the time of the creation of a statute, and therefore subsequent interpretation by courts is limited by the expressed intent in the plain meaning of the words.\footnote{United States v. James, 106 S.Ct. 3116, 3122-23 (1986).} Although the courts are bound by this rule, it is often difficult to determine if the plain meaning of the statute is “unambiguous and apparent.” Therefore, a thorough analysis will look to legislative history to ensure that the alleged plain meaning does not contradict expressed legislative intent.\footnote{See, e.g., Immigration and Naturalization Service v. Errico, 385 U.S. 214, 218 (1966); United States v. James, 106 S.Ct. at 3122-23.}

1. Plain Meaning

The initial inquiry in interpreting the words of a statute must be to their plain meaning.\footnote{Consumer Product Safety Commissioner v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).} Aliens who entered the United States prior to January 1, 1982 and subsequently violated their visa status are challenging the validity of the INS’s narrow interpretation of “known to the Government” as contrary to the plain meaning of the words.\footnote{See Ayuda v. Meese, 46 EPD (CCH) \$ 37,922 (D.D.C. Mar. 30, 1988) (No. 88-0625); Farzad v. Chandler, 670 F. Supp. 690 (N.D. Tex. 1987); Kalaw v. Ferro, 651 F. Supp. 1163 (W.D.N.Y. 1987).} These individuals claim that the plain meaning...
of the word "Government" includes all governmental agencies, whereas the INS believes that "Government" was intended to mean the INS.  

The ordinary dictionary definition of the word "Government," especially when it is capitalized, includes all of the federal agencies of the government, not just the INS. In support of the dictionary definition, the court in *State Bank of Albany v. United States* interpreted the word "Government," in its ordinary sense, to mean the federal government. In that case, a taxpayer had followed an IRS mimeograph which allowed the taxpayer to use a given formula to exclude certain receivables from income. The formula referred to "Government insured loans," and the taxpayer argued that this phrase did not include state insured loans. The court interpreted "Government" by applying the plain meaning rule. The court cited Webster's 3rd International Dictionary and the use of the word by the *Wall Street Journal* to reach its holding that the plain meaning of the word "Government" refers only to the federal government. This case is particularly relevant to the case at hand because it involves an agency, the IRS, which had interpreted a statute it has sole authority to administer, the Internal Revenue Code.

In addition to the plain meaning, the context of the phrase within the statute is relevant in interpreting the statute. The maxim of construction *expressio unius est exclusio alterius* means that when the legislature uses particular language in one section of a statute and different language in another, similar section of the same statute, it intends something different in each case.

Although the plain meaning of the word "Government" usually includes all federal agencies and therefore cuts against the INS's regulatory interpretation,
the word cannot be considered out of context from the rest of the phrase.\textsuperscript{173} In this case the word "known" may be argued to include a more technical knowledge than simply holding evidence of unlawfulness.\textsuperscript{174} More specifically, technical knowledge would require an INS determination of unlawfulness prior to January 1, 1982.\textsuperscript{175} Since the INS is the only body competent to evaluate if an alien's activities are in violation of visa status and therefore unlawful, it is arguable that "known" must mean known to the INS.\textsuperscript{176} Following from this premise, it may be argued that another federal agency's knowledge of unlawfulness is derivative of an INS determination, and therefore INS knowledge is a prerequisite to "knowledge" of another agency.\textsuperscript{177}

Although the plain meaning of a statute is not the sole criterion of interpretation, it is not easily discounted.\textsuperscript{178} It may be argued that the plain meaning of the word "known" is not limited to knowledge of the INS. If Congress had intended such a limitation it could have specified that the knowledge requirement could only be fulfilled by a prior INS determination of the alien's unlawful status.\textsuperscript{179} The court in \textit{Kalaw v. Ferro} did not believe the requirement of knowledge was a technical one, stating that "unlawful status" refers to activity which generally is not in accord with an alien's visa requirements.\textsuperscript{180}

In addition, when used together, "known" and "Government" may create a requirement of knowledge held by the government as a whole, rather than by a single agency.\textsuperscript{181} For this interpretation of the knowledge requirement to be met, some federal agency must hold evidence which the INS could use to determine illegal status, regardless of whether the INS actually has the evidence or has made the determination.\textsuperscript{182} Therefore, if the government as an entity possesses evidence which could lead to a determination of unlawfulness, the alien's status would be "known to the Government" and "known" would not be limited to knowledge of the INS.

\textsuperscript{174} See id.
\textsuperscript{175} Id.
\textsuperscript{176} Id. The proposed regulations implementing the Tax Reform Act of 1984, which define "resident alien" and "non-resident alien" for tax purposes may weaken this argument. See 52 Fed. Reg. 34,230 (proposed Sept. 10, 1987). Specifically, in the case of an F-1 student visa, the regulations allow the IRS to determine if a student is in "substantial compliance" with the terms of his or her visa in order to decide if the student's time in the United States will count toward the "substantial presence" test of alien residency. \textit{Id.} at 34,236. This raises an issue concerning the IRS's authority to determine the immigration status of an alien, at least for its own purposes.
\textsuperscript{177} Brief for Respondent at 2, Farzad, 670 F. Supp. 690.
\textsuperscript{179} See H.R. Rep. No. 682, supra note 21, at 73.
\textsuperscript{180} Kalaw v. Ferro, 651 F. Supp. 1163, 1169 (W.D.N.Y. 1987).
\textsuperscript{182} Id.
In IRCA, Congress has differentiated the requirements for eligibility of legalization between general aliens and special circumstance aliens (Cubans and Haitians). The general requirements for legalization are in § 201 of IRCA where the phrase “known to the Government” is found. Immediately following the § 201 general requirements is § 202 pertaining to more lenient procedures which allow Cubans and Haitians to become immediately eligible for permanent residence if they meet certain requirements. The Cuban-Haitian eligibility requirements for legalization are similar to the preceding section’s general requirements, except that in § 202 Congress has clearly stated that it requires knowledge by the INS, rather than “the Government.”

This situation is similar to *ITT Arctic Services, Inc. v. United States* where the court found that two standards with similar but not identical wordings were intended to have different meanings. Furthermore, in § 201 of IRCA, which contains all of the general legalization policies, the word “Government” is used four times, including the phrase “known to the Government.” All of these occurrences, excluding the one in question, refer expressly or impliedly to the federal government. For example, within one paragraph of § 201, Congress refers to the Attorney General and “other appropriate heads of the various departments and agencies of Government,” implying that Congress did not consider the two parties one and the same. The distinction in phraseology implies that Congress intended to give a different meaning by using different language. There are thirty instances in § 201 which refer to the Attorney General or the INS by name instead of broadly as “Government.”

In accordance with the *expressio unius* principle, as illustrated in *ITT Arctic Service*, it may be assumed that when Congress includes particular language in one section of a statute but omits it in another section of the same statute, Congress acted intentionally in the disparate inclusion or exclusion.

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183 See 8 U.S.C. § 1255a(a) (Supp. 1986) (IRCA § 201); IRCA, supra note 6, at § 202.
185 See IRCA, supra note 6, at § 202.
186 See id. at § 202(b)(2).
187 524 F.2d 680, 688 (Ct. Cl. 1975). The court held that where one paragraph of a contract used the phrase “Canadian Department of Labour” and another paragraph used the phrase “Canadian Government,” the discrepancy was intentional and “Government” was used in a broader sense than “Department of Labour.” *Id.*
188 See 8 U.S.C. §§ 1255a(a)(2)(B), (f)(2), (h)(1)(A)(i) (IRCA § 201); IRCA, supra note 6, at § 201(c)(2).
189 See 8 U.S.C. §§ 1255a(a)(2)(B), (f)(2), (h)(1)(A)(i) (IRCA § 201); IRCA, supra note 6, at § 201(c)(2).
190 *Id.* at § 1255a(h)(1)(A)(i).
191 See supra note 187 and accompanying text.
192 *See* supra note 189 and accompanying text.
193 *ITT Arctic Services, Inc. v. United States*, 524 F.2d 680, 688 (Ct. Cl. 1975).
194 See United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972).
fore, it would be illogical to assume Congress, in writing IRCA, intended the same meaning in both §§ 201 and 202 even though it used different language.\footnote{See Russello v. United States, 464 U.S. 16, 23 (1983). “We would not presume to ascribe this difference [between sections of the same statute] to a simple mistake in draftingmanship.” Id.}

As is apparent after analyzing the meaning of the words “known” and “Government” within the context of the statute, there is still a question as to the intent of Congress in its use of this phrase. Although the plain meaning strongly favors an interpretation of “Government” including all federal agencies,\footnote{See supra notes 165–70 and accompanying text.} it is less clear whether the interpretation of “known” refers to knowledge of any federal agency or technical knowledge of unlawfulness which can only be ascertained by the INS.\footnote{See supra notes 173–95 and accompanying text.} Therefore, the legislative history must be examined to discern the legislative intent.

2. Legislative History

Since Congress has plenary power to make rules for the admission of aliens,\footnote{U.S. CONST. art. I, § 8; Fiallo v. Bell, 430 U.S. 787, 792 (1977).} the interpretation of immigration laws must include a consideration of Congress’ intent in writing the relevant statute. Although the legislative history of IRCA does not express a specific intent on the narrow issue of interpreting “known to the Government,” the objective of IRCA is “to establish a reasonable, fair, orderly, and secure system of immigration into this country and not to discriminate in any way against particular nations or people.”\footnote{Statement by President of the United States, 1986 U.S. CODE CONG. & ADMIN. NEWS 5856–64 (Nov. 6, 1986) (pertaining to IRCA).} The Senate’s primary goal in establishing a legalization program is to eliminate the illegal subclass in the United States while attempting not to waste money by locating individuals who are well settled in the country.\footnote{S. REP. No. 132, supra note 20, at 16. As stated in the Senate Report, the legalization procedure seeks two major goals:

The first is to avoid wasteful use of Immigration and Naturalization Service’s limited enforcement resources. The United States is unlikely to obtain as much enforcement for its dollar if the INS attempts to locate and deport those who have become well settled in this country . . . .

The second is to eliminate the illegal subclass now present in our society . . . .

Id.} The Senate desires to grant legalization to those aliens who are “well settled” in the United States.\footnote{Id.; see also H.R. REP. No. 682, supra note 21, at 49. Originally, “well settled” was intended to be measured by continuous residence since January 1, 1980, but when the final statute was enacted a January 1, 1982 cutoff was adopted. See S. REP. No. 132, supra note 20, at 15; 8 U.S.C. § 1255a(a)(2) (Supp. 1986).} No distinction is made in the Senate Report between illegal border entry and legal entry followed by a violation of visa rules in determining the treatment of illegal aliens.\footnote{See S. REP. No. 132, supra note 20, at 15–16. But see H.R. REP. No. 682, supra note 21, at 72.} Both initial illegal entrants and nonimmigrants who subsequently became illegal have
breached U.S. laws.\textsuperscript{203} No distinction is expressed by the Senate to imply that Congress intended to grant amnesty to illegal border entrants while denying amnesty to nonimmigrants,\textsuperscript{204} and yet, only nonimmigrants would be affected by a restrictive interpretation of "known to the Government."\textsuperscript{205}

The House Report considered both aliens and nonimmigrants together in recognizing that employment opportunity is the primary reason why aliens either enter the United States illegally or violate their status.\textsuperscript{206} The legalization program was established in recognition of the fact that the INS has not had control over illegal immigration in the past, and this has allowed both immigrant and nonimmigrant aliens to enter the country.\textsuperscript{207} Therefore, the solution is to legalize those who have been here for a long time.\textsuperscript{208}

The House Report states an intention to create sufficient openness and flexibility to encourage qualified aliens to step forward and to ensure that they receive a legalized status.\textsuperscript{209} The Report also states an intent to use sufficient care to avoid legalization of those with fraudulent claims while rewarding only those long-time residents Congress deemed worthy of amnesty.\textsuperscript{210} The House Report emphasizes an efficient legalization process available to all legitimate (as opposed to fraudulent) claims.\textsuperscript{211} Both the House and Senate Reports provide general statements of purpose which stress the importance of a generous program to accept those aliens who have become an integral part of American society.\textsuperscript{212}

Although the House Report states that nonimmigrant aliens will not be deemed unlawful solely because of "technical violations of their terms of entry,"\textsuperscript{213} the report goes on to state that:

\begin{quote}
[u]necessarily rigid demands for proof of eligibility for legalization could seriously impede the success of the legalization effort. Therefore, the Committee expects the INS to incorporate flexibility into
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\textsuperscript{203} See S. Rep. No. 132, supra note 20, at 20-21. The Senate Report states that aliens: "have breached our nation’s immigration laws, displaced many American citizens from jobs, and placed an increased financial burden on many States and local governments." \textit{Id.}
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\textsuperscript{206} H.R. Rep. No. 682, supra note 21, at 46. "Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status." \textit{Id.}
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\textsuperscript{207} See H.R. Rep. No. 682, supra note 21, at 49. The House Report states "that past failures to enforce [sic] the immigration laws have allowed them [immigrants and nonimmigrants] to enter and to settle here." \textit{Id.}
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\textsuperscript{208} See \textit{id.}
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\textsuperscript{209} \textit{Id.} at 73.
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\textsuperscript{210} See \textit{id.}
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\textsuperscript{211} \textit{Id.}
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\textsuperscript{212} See \textit{id.} at 71-72; S. Rep. No. 132, supra note 20, at 15.
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\textsuperscript{213} H.R. Rep. No. 682, supra note 21, at 72.
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the standards for legalization eligibility, permitting the use of affidavits of credible witnesses and taking into consideration the special circumstances relating to persons previously living clandestinely in this country.\textsuperscript{214}

These two thoughts imply that the House did not intend minor violations of visa rules to allow an alien to become eligible for legalization, while it did intend to treat aliens equitably.

In addition, the legislative history states that Congress intended that the legalization procedures should be carried out in a generous fashion.\textsuperscript{215} The class of aliens intended to benefit from legalization are those individuals who have been in the United States for a number of years, have become members of their community, and have built social networks here.\textsuperscript{216} The House "strongly believes that a one-time legalization program is a necessary part of an effective enforcement program and that a generous program is an essential part of any immigration reform legislation."\textsuperscript{217}

D. Policy Considerations of a Broad Interpretation of "Government"

The primary purpose of the "known to the Government" phrase is to prevent otherwise lawful nonimmigrants from fraudulently creating documentation of acts which make them "illegal" in order to qualify for legalization.\textsuperscript{218} Beyond protection against fraud, there is no clear purpose for the "known to the Government" requirement.\textsuperscript{219} Once a nonimmigrant’s illegal status is verified by a reliable third party, there is no more need for scrutiny of a nonimmigrant than there is for an alien who entered the United States without inspection.\textsuperscript{220}

\textsuperscript{214} Id. at 73.
\textsuperscript{215} Id. at 49, 72. The House Report states an intention to have the legalization program "implemented in a liberal and generous fashion, as has been the historical pattern with other forms of administrative relief granted by Congress." Id. at 72.
\textsuperscript{216} Id. at 49.
\textsuperscript{217} Id.
\textsuperscript{218} AILA Comments, \textit{supra} note 55, at 4. "By requiring that the evidence of unlawful status be in the hands of the Government ... the Act limits eligibility to those for whom there is objective evidence from a reliable, third-party source." Id. As to general documentary requirements for eligibility for legalization, a balanced and flexible approach should be taken in evaluating an applicant's testimony and the overall sufficiency and probative value of the evidence he or she has provided to support his or her claim to eligibility. Discretion should also be applied in the types and quantities of documents requested .... The inference drawn from the documents provided should depend not on quantity alone, but on the reliability, credibility and amenability to verification.

\textsuperscript{219} See AILA Comments, \textit{supra} note 55, at 4.
\textsuperscript{220} Id.
1. Policies Supporting a Narrow Interpretation

The INS's limited interpretation of "known to the Government" may decrease the administrative burden which will be created by a broad interpretation of "Government." The INS argues that since the Attorney General and the INS are the sole administrative authorities of IRCA, they are the only competent bodies able to decide if an alien was illegal prior to January 1, 1982. Therefore, allowing the standard to be met by knowledge of any federal agency would greatly increase the INS's burden without increasing the validity of the knowledge.

The administrative burden is apparent from the massive filing of legalization applications that has created a demand for the INS to provide aliens with documentation from their A-files. The procedure of getting information from an A-file requires filing a Freedom of Information Act (FOIA) request. Because of the large number of FOIA filings, the INS has authorized aliens to file amnesty applications without the results of their FOIA request. This authorization will help those aliens who are certain that their illegal status was "known to the INS" before January 1, 1982 because they are now permitted to file their applications without actual documentation. The authorization will not alleviate the problem of proving knowledge of illegal status for aliens who are not sure if the INS knew of their status. The backlog of FOIA requests poses a major obstacle to aliens who are unsure whether the INS had knowledge of their unlawful status. Aliens are prohibited under the INS approach from using information outside of their A-file to prove "knowledge of the Government" and yet they cannot obtain timely information concerning the contents of their A-file. This information is necessary for an accurate application by the May 4, 1988 deadline and since the application fee is not refundable, most aliens in this position were deterred from submitting an application.

Another policy consideration in favor of limiting the "known to the Government" phrase is the fear of creating new waves of illegal immigration. A generous reading of the legalization provisions may encourage future increases in illegal immigration.

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222 Id. This argument is similar to the controversy discussed earlier over the interpretation of "known." See supra notes 173-95 and accompanying text.
223 64 INTERPRETER RELEASES 1172 (1987).
224 Id. at 1173.
226 64 INTERPRETER RELEASES 1173 (1987).
227 Id.
228 See id.
230 See S. REP. NO. 132, supra note 20, at 15; N. MONTWEILER, supra note 4, at 56.
in illegal immigration due to expectations of an expanding amnesty.\textsuperscript{231} In addition, some representatives voting on the bill believed amnesty was a reward for lawbreakers.\textsuperscript{232} This implies that any legalization program should be interpreted narrowly.

2. Policies Supporting a Broad Interpretation

An interpretation of Government which includes all federal agencies who have a free flow of information and constant interaction\textsuperscript{233} would not undermine the evidentiary purpose of the provision.\textsuperscript{234} The federal agencies would provide their own authentic records containing evidence of the alien's status prior to 1982.\textsuperscript{235} In this respect, any federal agency would be considered a reliable third party for purposes of providing evidence of illegal status.\textsuperscript{236}

In addition, if the INS is the only body whose knowledge is relevant for purposes of the "known to the Government" requirement, virtually all nonimmigrants will be excluded from legalization.\textsuperscript{237} The determination of an alien's status prior to January 1, 1982 occurs when the alien applies for legalization.\textsuperscript{238} According to the INS regulations, an INS examiner may look only to information held in an alien's A-file to find evidence of illegal status prior to January 1, 1982.\textsuperscript{239} Since the examiner must make the determination based on authentic records created before January 1, 1982,\textsuperscript{240} it would be impossible for an alien to subsequently create an illegal status. Requiring the INS to have had the information in the alien's A-file prior to 1982, imposes an extra-legislative requirement on any nonimmigrant otherwise able to prove his illegal status through records held by another federal agency.\textsuperscript{241} Since a majority of nonimmigrant aliens do not have an INS A-file, or would have been subject to deportation if proof of illegal status was in their file, the effect of a narrow interpretation would be to exclude virtually all nonimmigrants from the legalization procedures.\textsuperscript{242}

The fear of creating new flows of illegal immigration is a strong concern of critics of the new law. This fear, however, applies equally to all illegal aliens,

\textsuperscript{231} See S. Rep. No. 132, supra note 20, at 15; N. Montweiler, supra note 4, at 56.
\textsuperscript{232} N. Montweiler, supra note 4, at 56–57.
\textsuperscript{233} See Kalaw v. Ferro, 651 F. Supp. 1163, 1170 n.8 (W.D.N.Y. 1987).
\textsuperscript{234} See AILA Comments, supra note 55, at 4–5.
\textsuperscript{235} Id.
\textsuperscript{236} Id.
\textsuperscript{238} AILA Comments, supra note 55, at 5.
\textsuperscript{239} Immigration and Naturalization Act, 8 C.F.R. § 245a (1987).
\textsuperscript{240} See AILA Comments, supra note 55, at 5.
\textsuperscript{241} Id.
whether nonimmigrants or illegal border entrants. The legislative history stresses the fact that this is a one-time legalization program in order to dispel expectations of future amnesty bills.\textsuperscript{243} Although several members of the Select Commission for Immigration Reform and Control believed allowing nonimmigrants to adjust their status would encourage fraudulent entry, the majority of members acknowledged the substantial benefits of admitting and adjusting the status of nonimmigrants and did not believe this would result in any abuse.\textsuperscript{244}

IV. Conclusion

The “known to the Government” phrase has become a vital aspect of proving eligibility for legalization to nonimmigrants.\textsuperscript{245} Given the INS’s narrow interpretation, many nonimmigrants will be deported if they are unable to meet the stricter requirement of “known to the INS.”\textsuperscript{246} As shown in this Comment, there is an alternate interpretation that is plausible and persuasive.

Although a reviewing court would owe deference to an INS factual finding, deference would not be due in the situation at hand.\textsuperscript{247} Since the “known to the Government” issue centers around a legal question of pure statutory interpretation which does not hinge on the expertise of the INS, a reviewing court would be in a better position to determine the legislature’s intended meaning.\textsuperscript{248} The district courts in both Farzad and Ayuda agreed with this view when they held that the “known to the Government” phrase should include all federal agencies, and that the INS interpretation was impermissibly narrow.\textsuperscript{249} Although these courts concurred in their opinions, and the INS has decided not to appeal either decision, the INS has not complied with the decisions and continues to recommend denial of “known to the Government” applicants.\textsuperscript{250}

Given the contrary interpretations of the INS and the district courts, this Comment considered the two interpretations according to traditional rules of statutory interpretation. The plain meaning of “Government” as stated in several dictionaries and case interpretations includes all federal agencies.\textsuperscript{251} This, along with the context of the phrase within IRCA, where Congress has distin-

\textsuperscript{243} See H.R. REP. No. 682, supra note 21, at 49; S. REP. No. 132, supra note 20, at 15.
\textsuperscript{244} U.S. IMMIG. POL’Y AND THE NAT’L INTEREST, The Final Report and Recommendations of the Select Commission on Immig. and Refugee Policy 206 (1981). Representative Bill McCollum of Florida, however, submitted a bill to delete the legalization program from the amendments to INA on the grounds that “amnesty reward[s] law breakers.” N. MONTWEILER, supra note 4, at 56–57. The McCollum bill was defeated by a seven vote margin. Id.
\textsuperscript{245} See supra notes 47–54 and accompanying text.
\textsuperscript{246} Id.
\textsuperscript{247} See supra notes 68–86 and accompanying text.
\textsuperscript{248} Id.
\textsuperscript{249} See supra notes 107–56 and accompanying text.
\textsuperscript{250} See supra notes 141–56.
\textsuperscript{251} See supra notes 161–70 and accompanying text.
guished its intention between the INS and the Government in numerous other sections of the law, makes a very persuasive argument that the phrase should be defined to include all federal agencies of the federal government.\textsuperscript{252}

To support its position, the INS has put emphasis on the word “known” in order to argue that it is the only competent body to “know” or determine if an alien is illegal.\textsuperscript{253} Although persuasive, this argument is not supported by the text of the statute or the legislative history, neither of which require a formal INS determination of illegality.\textsuperscript{254}

The final considerations of statutory interpretation, the legislative history and relevant policy concerns, prove that the most reasonable interpretation includes all federal agencies’ information of illegal status.\textsuperscript{255} Although the legislative history does not specifically state an intention as to “known to the Government,” Congress’ overall intent was to enact a generous legalization program with flexible standards for eligibility.\textsuperscript{256} The basic purpose of the phrase is to avoid falsification of records.\textsuperscript{257} There is no valid reason why only the INS can provide authentic verification.

In conclusion, it has been shown that the “known to the Government” phrase has the potential to affect a large number of nonimmigrant aliens who will be denied temporary residence because their status was not “known to the INS” before January 1, 1982. Interestingly, if their status had been known to the INS, there is a strong chance they would have been deported before the passage of IRCA.\textsuperscript{258} Overall, these aliens do not have a realistic chance for legalization if the INS continues to apply its own restrictive interpretation of the legalization requirement.

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\textsuperscript{252} See supra notes 171–97 and accompanying text.
\textsuperscript{253} See supra notes 173–80 and accompanying text.
\textsuperscript{254} Id.; see supra notes 198–217 and accompanying text.
\textsuperscript{255} See supra notes 198–244 and accompanying text.
\textsuperscript{256} See supra note 215 and accompanying text.
\textsuperscript{257} See supra note 218 and accompanying text.