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EQUITABLE ESTOPPEL: DOES GOVERNMENTAL IMMUNITY MEAN NEVER HAVING TO SAY YOU'RE SORRY?

INTRODUCTION

The doctrine of equitable estoppel precludes a litigant who has induced another to change his position from gaining an unfair advantage by a subsequent inconsistent assertion at trial.¹ Traditionally, in order to invoke estoppel, it has been required that four elements be established.² It must be shown that (1) the estopped

¹ *Lebold v. Inland Steel Co.*, 125 F.2d 369, 375 (7th Cir. 1941); *Horn v. Cole*, 51 N.H. 287, 289 (1868); 2 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 804, at 1642 (4th ed. 1918); 3 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 1989, at 569 (14th ed. 1918).

Equitable estoppel has long been recognized as a potent remedy, *Irwin v. West End Dev. Co.*, 342 F. Supp. 687, 697 (D. Colo. 1972); *Twin Lakes Reservoir & Canal Co. v. Bond*, 157 Colo. 10, 401 P.2d 586, 591 (1965) (en banc); 2 J. POMEROY, *supra*, § 801, at 1633-34; *cf.* *Brown v. United States*, 102 F. Supp. 132, 133 (S.D. Mo. 1952) ("estoppels are odious"), and therefore is used with caution, *see United States v. Fox Lake State Bank*, 366 F.2d 962, 965 (7th Cir. 1966); *Russell v. Texas Co.*, 238 F.2d 636, 640 (9th Cir. 1956), *cert. denied*, 354 U.S. 938 (1957). Estoppel is invoked primarily when it is the sole remedy available to prevent the working of a manifest injustice, *see Dickerson v. Colgrove*, 100 U.S. 578, 580-81 (1879); *Russell v. Texas Co.*, 238 F.2d 636, 640 (9th Cir. 1956), *cert. denied*, 354 U.S. 938 (1957); *cf.* *United States v. Lucienne D'Hotelle de Benitez Rexach*, 558 F.2d 37, 43 (1st Cir. 1977) (unconscionable result would obtain absent estoppel).

As an equitable remedy founded upon the dictates of "justice and good conscience," 2 J. POMEROY, *supra*, § 802, at 1635-36; *see Emeco Indus., Inc. v. United States*, 485 F.2d 652, 657 (Ct. Cl. 1973) (per curiam) (quoting *Stevens Mfg. Co. v. United States*, 8 F. Supp. 720, 724 (1934)), equitable estoppel is subject to the various limitations applicable to any equitable remedy, *e.g.*, *Kaczanowski v. Home State Bank*, 77 F. Supp. 602, 604 (E.D. Wis. 1948); *see* 2 J. POMEROY, *supra*, § 802, at 1636-38. Consequently, a litigant seeking to invoke equitable estoppel is subject to the doctrine of unclean hands, *see, e.g.*, *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945); *United States v. Feinberg*, 372 F.2d 352, 356 (3d Cir. 1965); *Lebowitz v. Forbes Leasing & Fin. Corp.*, 326 F. Supp. 1335, 1355 (E.D. Pa. 1971), *aff'd*, 456 F.2d 979 (3d Cir.), *cert. denied*, 409 U.S. 843 (1972), as well as the doctrine of laches, *e.g.*, *Goff v. George*, 31 App. Div. 2d 579, 579, 295 N.Y.S.2d 211, 212 (3d Dep't 1968); *Walsh v. Keogh*, 282 App. Div. 378, 381, 123 N.Y.S.2d 311, 314 (4th Dep't 1953), *aff'd*, 306 N.Y. 933, 119 N.E.2d 607 (1954).

² *United States v. Ruby Co.*, 588 F.2d 697, 703 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979); *American Security & Trust Co. v. Fletcher*, 490 F.2d 481, 485 (4th Cir.), *cert. denied*, 419 U.S. 900 (1974); *Brown v. Richardson*, 395 F. Supp. 185, 191 (W.D. Pa. 1975); *see Sly v. United States*, 220 F.2d 212, 214-15 (7th Cir. 1955); *United States ex rel. Fogle v. Hal B. Hayes & Assocs.*, 221 F. Supp. 260, 264 (N.D. Cal. 1963); 2 J. POMEROY, *supra* note 1,

party made false representations,³ (2) such representations were made with the intention of inducing reliance,⁴ (3) the party asserting the estoppel was unaware of the true facts,⁵ and (4) such party reasonably relied to his detriment on the false representations.⁶ Although the estoppel device is highly flexible and has been asserted in a wide variety of circumstances,⁷ courts generally have been reluctant to apply traditional rules of estoppel to a governmental entity. Indeed, at one time the judiciary deemed the remedy categorically unavailable when the party sought to be estopped was the government.⁸ More recently, however, some federal courts have

§ 805, at 1643-52; Comment, *Never Trust a Bureaucrat: Estoppel Against the Government*, 42 S. CAL. L. REV. 391 (1969).

³ The act or representation upon which the estoppel is based need not be an affirmative act or representation. A failure to act, or silence when there is a duty to speak, will suffice. 2 J. POMEROY, *supra* note 1, § 805, at 1641, § 806, at 1652-53; see *Hillyer v. Pan Am. Petroleum Corp.*, 348 F.2d 613, 622-23 (10th Cir. 1965). Moreover, in some instances a course of conduct upon which another party relied will supplant the need for a representation. *Emeco Indus., Inc. v. United States*, 485 F.2d 652, 657 (Ct. Cl. 1973) (per curiam).

⁴ The intent necessary to satisfy the second requirement need not rise to the level of actual intent to mislead the injured party. *Columbia Broadcasting Sys., Inc. v. Stokely-Van Camp, Inc.*, 522 F.2d 369, 378 (2d Cir. 1975). Rather, it is sufficient that the estopped party acted in a manner which would lead a reasonable man to rely to his detriment on such acts. *Advanced Hydraulics, Inc. v. Otis Elevator Co.*, 525 F.2d 477, 479 (7th Cir.), *cert. denied*, 423 U.S. 869 (1975). Therefore, estoppel may be invoked against a party whose conduct is unintentionally deceiving. *Shinabarger v. United Aircraft Corp.*, 262 F. Supp. 52, 63 & n.24 (D. Conn. 1966), *aff'd in part and rev'd in part*, 381 F.2d 808 (2d Cir. 1967).

⁵ In part because of the requirement that the misrepresentation must have induced reasonable reliance, estoppel cannot be invoked by a party who knew or should have known the actual facts. *Carter v. Aetna Cas. & Sur. Co.*, 473 F.2d 1071, 1078 (8th Cir. 1973); *Minerals & Chems. Philipp Corp. v. Milwhite Co.*, 414 F.2d 428, 430 (5th Cir. 1969); *Kenneally v. First Nat'l Bank*, 400 F.2d 838, 843 (8th Cir. 1968), *cert. denied*, 393 U.S. 1063 (1969).

⁶ Since the purpose of equitable estoppel is to prevent fraud and injustice, see *Russell v. Texas Co.*, 238 F.2d 636, 640 (1956), *cert. denied*, 354 U.S. 938 (1957), estoppel may not be invoked unless there has been both reasonable and detrimental reliance, *Brown v. Richardson*, 395 F. Supp. 185, 191 (W.D. Pa. 1975).

⁷ See, e.g., *Ewald v. Great Atl. & Pac. Tea Co.*, 620 F.2d 1183, 1188 (6th Cir. 1980) (age discrimination suit); *Precious Metals Assocs. v. Commodity Futures Trading Comm'n*, 620 F.2d 900, 908-09 (1st Cir. 1980) (order to cease and desist option trading); *Gullett v. Best Shell Homes, Inc.*, 312 F.2d 58, 61 (5th Cir. 1963) (negligence); *James Talcott, Inc. v. Associates Discount Corp.*, 302 F.2d 443, 446-47 (8th Cir. 1962) (replevin); *Fort Smith Tobacco & Candy Co. v. American Guar. & Liab. Ins. Co.*, 208 F. Supp. 244, 262-63 (W.D. Ark. 1962) (action to recover on insurance policy); *Horn v. Cole*, 51 N.H. 287, 288-300 (1868) (conversion).

⁸ See *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-85 (1947); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *Lee v. Munroe*, 11 U.S. (7 Cranch) 366, 369 (1813). The view that the government may not be estopped by the unauthorized acts of its agents apparently is still adhered to by a number of courts. *Cahen Trust v. United States*, 292 F.2d 33, 39 (7th Cir. 1961), *cert. denied*, 369 U.S. 802 (1962); *Air-Sea Brokers, Inc. v. United States*, 596 F.2d 1008, 1011 (C.C.P.A. 1979).

recognized instances in which the government may be estopped from denying a previous representation.⁹ Nonetheless, due in large measure to the public policy considerations militating against governmental estoppel,¹⁰ these courts generally require a more persua-

⁹ See, e.g., *United States v. Ruby Co.*, 588 F.2d 697, 701-02 (9th Cir. 1978); *Jung-Nam Yang v. Immigration & Naturalization Serv.*, 574 F.2d 171, 174-75 (3d Cir. 1978); *L'Enfant Plaza Prop., Inc. v. District of Columbia Redev. Land Agency*, 564 F.2d 515, 524 (D.C. Cir. 1977); *Santiago v. Immigration & Naturalization Serv.*, 526 F.2d 488, 491-92 (9th Cir. 1975) (en banc) (dictum), *cert. denied*, 425 U.S. 971 (1976); *United States v. Wharton*, 514 F.2d 406, 412-13 (9th Cir. 1975); *United States v. Lazy FC Ranch*, 481 F.2d 985, 988 (9th Cir. 1973). Others courts, although still recognizing a rule against estoppel, have sought to limit its harsh effects through promulgation of exceptions to the general rule. See *United States v. Florida*, 482 F.2d 205, 209 (5th Cir. 1973); *United States v. County of Lawrence*, 173 F. Supp. 307, 314-15 (W.D. Pa. 1959), *rev'd on other grounds*, 280 F.2d 462 (3d Cir.), *aff'd*, 364 U.S. 628 (1960) (per curiam).

¹⁰ Several policy considerations have been asserted as militating against application of equitable estoppel to a governmental entity. Foremost among them is the need to preserve the separation of powers among the three branches of the federal government. It is argued, in this context, that if estoppel were to be permitted, the judiciary could override legislative restrictions on a case-by-case basis. Indeed, the issue most frequently arises in cases wherein a plaintiff has failed to comply with the conditions mandated by Congress for eligibility under the applicable statute, but nonetheless seeks to invoke estoppel to obtain statutorily conferred benefits. See *Goldberg v. Weinberger*, 546 F.2d 477, 480-81 (2d Cir. 1976), *cert. denied*, 431 U.S. 937 (1977); *Guinto v. Rosenberg*, 446 F.2d 11, 12 (9th Cir. 1971); *Cole v. Railroad Retirement Bd.*, 289 F.2d 65, 68-69 (8th Cir. 1961). The drain of federal monies, resulting from payment of judgments in addition to the cost to investigate and defend against claims, is a further policy consideration. See *Hansen v. Harris*, 619 F.2d 942, 949 (2d Cir. 1980) (Friendly, J., dissenting), *rev'd sub nom.*, *Schweiker v. Hansen*, 101 S. Ct. 1468 (1981). Indeed, the Supreme Court has stated it is "the duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947); *accord*, *Cole v. Railroad Retirement Bd.*, 289 F.2d 65, 68-69 (8th Cir. 1961). See generally *Whelan & Dunigan, Government Contracts: Apparent Authority and Estoppel*, 55 GEO. L.J. 830, 833-34 (1967). Therefore, since the monetary cost of abolishing the no-estoppel rule ultimately will be borne by the entire public, see *Costello v. United States*, 365 U.S. 265, 281 (1961); *Air-Sea Brokers, Inc. v. United States*, 596 F.2d 1008, 1011 (C.C.P.A. 1979), policy considerations support the protection of public revenues and property from injury by inadvertent acts of government officials, who are holding those revenues and property in trust for the public, see *Costello v. United States*, 365 U.S. 265, 281 (1961).

Other considerations militating against an abrogation of the no-estoppel rule include the danger of collusive suits, see *Lee v. Munroe*, 11 U.S. (7 Cranch) 366, 369 (1813); *Cheers v. Secretary of HEW*, 610 F.2d 463, 466 (7th Cir. 1979), and the logistical impossibility of preventing the dissemination of erroneous or misleading advice by government officials. Indeed, the government, as an employer, must place greater reliance on its employees, and yet exerts less control over their actions, than private employers. *California Pac. Bank v. Small Business Admin.*, 557 F.2d 218, 224 (9th Cir. 1977); see *United States v. Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735 (1824). Moreover, the increase in government programs and the concomitant increase in the size of the government itself has resulted in a decrease in supervision over governmental employees. As the government can act only through its agents, even "the utmost vigilance" over those agents could not prevent losses simply because of the sheer number of agents employed by the federal government. 22 U.S. (9

sive demonstration of culpability before such estoppel will obtain. Relying on recurrent dicta in a series of Supreme Court cases,¹¹ courts have required that the activity of the government rise to the level of affirmative misconduct as a prerequisite to invoking estoppel.¹²

Among courts which have acknowledged that the government may be subject to the estoppel doctrine, however, there exists substantial disagreement regarding when equitable estoppel against the government is apposite¹³ and, once the circumstances are ripe for such application, what degree of culpable conduct constitutes affirmative misconduct.¹⁴ This Note will examine these issues and their impact on the current status of the equitable estoppel doctrine as applied to the federal government.¹⁵ First, the Note briefly will discuss the development of the estoppel doctrine and the Supreme Court's refusal to apply the doctrine to the government in *Federal Crop Insurance Corp. v. Merrill*.¹⁶ Next, it will be demonstrated how this position gradually has been eroded by subsequent

Wheat.) at 735.

In addition to these general policy considerations, specific concerns peculiar to an individual agency of the government may militate against estopping the government. For example, one commentator has noted that the use of estoppel against the government in Selective Service cases could hamper the government in its defense of the country. M. ASIMOW, ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES § 3.11, at 58 (1973). A well-counseled draftee, he suggests, could entrap a government agent into acting incorrectly, thereby allowing the draftee to delay or entirely evade induction. *Id.*

¹¹ *Schweiker v. Hansen*, 101 S. Ct. 1468, 1470-71 (1981) (per curiam); *United States Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8-9 (1973) (per curiam); *Montana v. Kennedy*, 366 U.S. 308, 314-15 (1961); *Moser v. United States*, 341 U.S. 41, 46 (1951).

¹² See *Leimbach v. Califano*, 596 F.2d 300, 305 (8th Cir. 1979); *Shon Ning Lee v. Immigration & Naturalization Serv.*, 576 F.2d 1380, 1382 (9th Cir. 1978) (per curiam); *California Pac. Bank v. Small Business Admin.*, 557 F.2d 218, 224 (9th Cir. 1977); *Corniel-Rodriguez v. Immigration & Naturalization Serv.*, 532 F.2d 301, 307 (2d Cir. 1976); *Santiago v. Immigration & Naturalization Serv.*, 526 F.2d 488, 491-92 (9th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).

¹³ See notes 68-84 and accompanying text *infra*.

¹⁴ See notes 85-101 and accompanying text *infra*. The paucity of judicial gloss on the affirmative misconduct standard was noted by one federal district court which stated, "[w]hile frequently voicing the need for affirmative misconduct, the Ninth Circuit has avoided formulating a standard with which to determine its existence." *Beacom v. EEOC*, 500 F. Supp. 428, 436 (D. Ariz. 1980).

¹⁵ Although this Note is concerned only with estoppel of the federal government, it should be noted that many of the considerations relevant to estopping the federal government also are applicable to cases involving state and local governments. See generally Comment, *Estoppel and Government*, 14 GONZ. L. REV. 597, 609-21 (1979); Comment, *Estoppel Against State, County and City*, 23 WASH. L. REV. 51 (1948).

¹⁶ See notes 27-34 and accompanying text *infra*.

decisions wherein the Court has suggested that estoppel of the government might obtain upon a showing of affirmative misconduct.¹⁷ The Note then will proceed to a discussion of the sundry requirements formulated by the lower courts regarding when equitable estoppel of the government is justified¹⁸ and what constitutes affirmative misconduct.¹⁹ Finally, the Note will suggest that the dominant policy interest of governmental fair dealing dictates that the traditional rules for application of equitable estoppel should apply with equal force to governmental entities.²⁰

DEVELOPMENT OF GOVERNMENTAL IMMUNITY FROM EQUITABLE ESTOPPEL

The insulation of the government from the operation of normal estoppel principles had its origins in the doctrine of sovereign immunity.²¹ This doctrine, derived from the English common law²² and based upon the premise that "the King can do no wrong," foreclosed the government from liability for both breach of contract and torts committed by its employees.²³ It followed logically, that if the government could not be held liable for the torts of its employees, it also should be free from liability based upon their misrepresentations.²⁴

¹⁷ See notes 37-64 and accompanying text *infra*.

¹⁸ See notes 68-84 and accompanying text *infra*.

¹⁹ See notes 85-101 and accompanying text *infra*.

²⁰ See notes 102-140 and accompanying text *infra*.

²¹ *California Pac. Bank v. Small Business Admin.*, 557 F.2d 218, 224 (9th Cir. 1977); *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 99 (9th Cir. 1970); see *United States v. City & County of San Francisco*, 112 F. Supp. 451, 454 (N.D. Cal. 1953), *aff'd*, 223 F.2d 737 (9th Cir. 1955); Saltman, *Estoppel Against the Government: Have Recent Decisions Rounded the Corners of the Agent's Authority Problem in Federal Procurements?*, 45 *FORDHAM L. REV.* 497, 500 (1976); Comment, *Santiago v. Immigration and Naturalization Service—The Ninth Circuit Retreats From its Modern Approach to Estoppel Against the Government*, 1976 *UTAH L. REV.* 371, 371-72.

²² See Olson, *Governmental Immunity from Tort Liability—Two Decades of Decline: 1959-1979*, 31 *BAYLOR L. REV.* 485, 485 (1979); Pillsbury, *Estoppel Against the Government*, 13 *BUS. LAW.* 508, 510 (1958); Note, *Balancing the Vindication of Constitutional Guarantees Against the Effective Functioning of Government: the Official Immunity Scale Does Not Work—Butz v. Economou*, 28 *DE PAUL L. REV.* 143, 145 (1978); see, e.g., *Russell v. The Men Dwelling in the County of Devon*, 100 *Eng. Rep.* 359, 362 (1788); 2 *J. POMEROY, supra* note 1, § 802, at 1365.

²³ See Floyd and Barker, 77 *Eng. Rep.* 1305, 1306-07 (1608); 1 *F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 182-83 (2d ed. 1899); Pillsbury, *supra* note 22, at 510.

²⁴ See 1 *F. POLLOCK & F. MAITLAND, supra* note 23, at 516. Under the English common law, public policy mandated that the King not be estopped from asserting his rights. It was

Early in the history of the United States, the English principles of sovereign immunity were embraced and integrated into our legal system.²⁵ As a corollary to the adoption of the immunity doctrine, the Supreme Court announced the general American rule that "the United States is neither bound nor estopped by the acts of its officers or agents."²⁶

The initial rigid application of the "no-estoppel rule," however, frequently yielded harsh results. Often cited as the modern restatement of the general American rule, the Supreme Court decision in *Federal Crop Insurance Corp. v. Merrill*²⁷ is illustrative. In *Merrill*, the plaintiffs purchased an insurance policy from the defendant, a government-owned entity, to protect their crop of spring wheat against loss resulting from unavoidable causes.²⁸ Although the defendant's agent had advised the plaintiffs that the entire crop was insurable,²⁹ in reality most of the wheat planted was ineligible for coverage under the applicable regulations.³⁰ When the crop failed, the plaintiffs attempted to recover on the policy, claiming that because they had relied on the misstatements of the defendant's agents, the defendant should be estopped from asserting the uninsurability of their crop.³¹

Although the *Merrill* Court recognized the hardship that would result from its holding, a majority of the Supreme Court rejected the plaintiffs' contention and refused to estop the government from disclaiming liability.³² The Court conceded that under

thought his government of the country should not be made to suffer from his agents' negligence. *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1872).

²⁵ 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.01, at 436 (1958); Olson, *supra* note 22, at 485; see *United States v. Shaw*, 309 U.S. 495, 500-01 (1940); *Belknap v. Schild*, 161 U.S. 10, 16 (1896); *North Dakota-Montana Wheat Growers Ass'n v. United States*, 66 F.2d 573, 577 (8th Cir. 1933), *cert. denied*, 291 U.S. 672 (1934).

²⁶ *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *accord*, *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-84 (1947); *Pine River Logging & Improvement Co. v. United States*, 186 U.S. 279, 291 (1902); *Lee v. Munroe*, 11 U.S. (7 Cranch) 366, 369 (1813); *Ritter v. United States*, 28 F.2d 265, 267 (3d Cir. 1928).

²⁷ 332 U.S. 380 (1947).

²⁸ *Id.* at 381-82.

²⁹ *Id.* A local agricultural conservation committee, in its capacity as the Corporation's agent, assured the plaintiffs that all the wheat planted was insurable, and recommended that the plaintiffs' application be approved. *Id.*

³⁰ *Id.*

³¹ *Id.* at 382-83. The Supreme Court of Idaho had held in favor of the plaintiffs, reasoning that under the circumstances the defendant should be bound by the misrepresentations of its agent. *Id.*

³² *Id.* at 386.

similar facts a private insurance company may have been estopped to deny the insurability of the plaintiffs' crop.³³ Nevertheless, it proclaimed: "[i]t is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures."³⁴

JUDICIAL EROSION OF GOVERNMENTAL IMMUNITY FROM EQUITABLE ESTOPPEL

The admittedly harsh rule enunciated in *Merrill* did not escape criticism. Indeed, one commentator noted that "[i]t is difficult to imagine a more effective way to arrest the evolution of 'social and legal principles' leading to a discriminating use of government immunities than by way of the majority position in the *Merrill* Case."³⁵ Despite this bleak prediction, the sporadic legislative and judicial erosion of the sovereign immunity doctrine

³³ *Id.* at 383.

³⁴ *Id.* The *Merrill* Court cautioned that whenever an individual deals with a government agent, he assumes the risk that the agent is acting within the scope of his authority. *Id.* at 384 (citing *United States v. Stewart*, 311 U.S. 60, 70 (1940); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *The Floyd Acceptances (Pierce v. United States)*, 74 U.S. (7 Wall.) 666, 679-82 (1869)). Moreover, the Court found that in assessing the authority of a government agent, a party is charged with knowledge of all relevant federal statutes and regulations. 332 U.S. at 384-85. Justice Jackson, in a vigorous dissent, attacked the imputation of knowledge of federal rules and regulations to parties dealing with the government, stating:

[I]t is an absurdity to hold that every farmer who insures his crops knows what the Federal Register contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops. Nor am I convinced that a reading of technically-worded regulations would enlighten him much in any event.

Id. at 387 (Jackson, J., dissenting). See generally Saltman, *supra* note 21, at 499.

³⁵ Note, *Governmental Immunities—A Study in Misplaced Solicitude*, 16 U. CHI. L. REV. 128, 133 (1948). Another commentator, in reference to the expansion of federal tort liability, has noted that:

In days gone by, society often allowed the burden of misfortune to remain solely on the shoulders where the burden chanced to fall. The welfare state, however, reflects a different conception, namely, that when a burden is shared by everybody, it does not become disastrously heavy for anybody. Limited recognition of public liability for personal loss caused by governmental activity runs counter to that modern social notion.

W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW* 1110 (7th ed. 1979).

continued.³⁶ Notably, this evisceration of the conceptual underpinnings of the no-estoppel against the government rule did not go unreflected in subsequent Supreme Court pronouncements. Although to date the Court has not retreated significantly from the position espoused in *Merrill*, more recent cases evince an ever-increasing willingness to invoke equitable estoppel, on appropriate facts, against the federal government.

Only 4 years after its decision in *Merrill*, the Supreme Court, in *Moser v. United States*,³⁷ indicated that in some cases the federal government cannot deny with impunity the binding effect of its agents' representations. In *Moser*, a Swiss citizen residing in the United States registered under the Selective Service Act, but applied for exemption from military service.³⁸ Under applicable federal law, an alien's application for an exemption barred him from becoming a United States citizen.³⁹ The Swiss Legation, however, acting on assurances from the United States Department of State,

³⁶ The federal government has ceded much of its traditional immunity by legislative action, *see, e.g.*, Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976); Tucker Act, 28 U.S.C. § 1346 (1976 & Supp. III 1979); Federal Tort Claims Act of 1946, 28 U.S.C. §§ 2671-2680 (1976); Portal-to-Portal Act of 1947, 29 U.S.C. § 259 (1976 & Supp. III 1979), and by judicial decision, *see, e.g.*, *Honda v. Clark*, 386 U.S. 484, 501 (1967); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703-04 (1949) (dictum); *Hill v. United States*, 571 F.2d 1098, 1102 (9th Cir. 1978); *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 99-100 & n.13 (9th Cir. 1970); *Santos v. Franklin*, 493 F. Supp. 847, 852 (E.D. Pa. 1980); K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES §§ 17.01-17.04 (1976). *See generally* Peignand v. Immigration & Naturalization Serv., 440 F.2d 757, 761 (1st Cir. 1971); Olson, *supra* note 22, at 486-90; Pillsbury, *supra* note 22, at 510-11 (1958); Note, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551, 554 (1979) [hereinafter cited as *Estoppel*]. In the most notable surrender of sovereign immunity, the Federal Tort Claims Act of 1946 (FTCA), the government waived immunity for damages

for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (1976). The FTCA, however, retains federal sovereign immunity for numerous specified activities. 28 U.S.C. §§ 1580(a), 2680(h) (1976). The result of the enumerated exceptions to the federal government's waiver of immunity under the FTCA, in effect, is that the waiver of immunity is limited to negligence arising from nondiscretionary decisions. *Dalehite v. United States*, 346 U.S. 15, 26-30 (1953); *Redmond v. United States*, 518 F.2d 811, 816 (7th Cir. 1975); RESTATEMENT (SECOND) TORTS § 895A, Comment b, at 397-98 (1979). *But see* note 110 and accompanying text *infra* (bill pending in House of Representatives would expose the government to liability for the discretionary acts or omissions of its agents).

³⁷ 341 U.S. 41 (1951).

³⁸ *Id.* at 42-45.

³⁹ *Id.* at 43-44.

led Moser to believe that application for an exemption would not preclude him from becoming a naturalized citizen.⁴⁰ When Moser later sought United States citizenship, the Government opposed his application, asserting that he had lost his right to citizenship when he obtained his military service exemption.⁴¹ The Supreme Court, in reversing the Second Circuit and granting Moser citizenship, reasoned that the Government's misrepresentations deprived Moser of "an opportunity to make an intelligent election between the diametrically opposed courses required as a matter of strict law."⁴² While the *Moser* Court expressly declined to predicate its decision on an estoppel of the Government,⁴³ the opinion, nevertheless, is a significant indication of the modern judicial attitude that, under appropriate circumstances, relief may be granted to an individual notwithstanding the uncontroverted assertion by a governmental entity of his noncompliance with specific statutory requirements.⁴⁴

The issue of governmental estoppel was next before the Court in *Montana v. Kennedy*.⁴⁵ The plaintiff in *Kennedy*, an Italian-

⁴⁰ *Id.*; see Selective Training and Service Act of 1940, ch. 720, § 3(a), 54 Stat. 885 as amended by 50 U.S.C. app. § 303(a) (repealed 1947).

⁴¹ *Moser v. United States*, 341 U.S. 41, 45 (1951). After being informed that he was classified by the Selective Service as "available for service," Moser sought the aid of the Swiss Legation. *Id.* at 42. The Legation, aware of the law governing alien exemption applications, nevertheless sought an "unconditional release" for Moser, contending that the governing treaty between the United States and Switzerland granted such a right. *Id.* at 42-43; accord, Treaty of 1850, Convention with the Swiss Confederation, Article II, 11 Stat. 587, 589, T.S. No. 353. Moser, assured by the Swiss Legation that he would not lose his right to apply for United States citizenship, subsequently filed an exemption application which was amended by the State Department after negotiations with the Swiss to omit the previously contained express waiver of citizenship rights. 341 U.S. at 43-44. The application was accepted, and Moser received the exemption. *Id.* at 45.

⁴² *Moser v. United States*, 341 U.S. 41, 47 (1951).

⁴³ *Id.*

⁴⁴ *Id.* at 46-47. The *Moser* Court, deciding the case on the basis of "waiver," held that Moser had not "knowingly and intentionally" waived his right to citizenship. Commentators, however, have viewed *Moser* as an estoppel case despite protests of the Court to the contrary. See 2 K. DAVIS, *supra* note 25, § 17.02, at 501-03 (1958).

Two additional aspects of the *Moser* decision deserve mention. First, Moser was not presumed to know the law in this case even though the exemption application signed by him referred to the governing statute. See 341 U.S. at 44, 46. This represents a marked departure from the position assumed by the majority in the *Merrill* case. See note 34 and accompanying text *supra*. Second, the misrepresentations upon which Moser sought to establish estoppel, and which formed the basis for the Court's refusal to find knowing and intentional waiver, were made, not by any agent of the United States, but rather, by officials of the Swiss government. 341 U.S. at 44.

⁴⁵ 366 U.S. 308 (1961).

born son of an American mother and Italian father, brought an action seeking a declaration that he was a United States citizen.⁴⁶ He contended that even if the Court determined that he was an alien under the relevant statutes, the government should be estopped to assert his foreign birth because of certain misconduct by its officials.⁴⁷ Although the *Kennedy* Court concluded that the conduct of the government official in the instant case "[fell] far short of misconduct such as might" give rise to an estoppel of the government, the Court stated that there might be instances in which estoppel could be asserted against the United States.⁴⁸

Evidently, one such instance involves a criminal proceeding against a defendant that relied to its detriment on agency regulations. In *United States v. Pennsylvania Industrial Chemical Corp.*,⁴⁹ the defendant corporation was convicted of violating section 13 of the Rivers and Harbors Act by discharging pollutants into a navigable waterway.⁵⁰ On appeal, the defendant contended that prior agency conduct had affirmatively created the impression that its discharges into the Monongahela River would not give rise to criminal penalties.⁵¹ In accepting this argument, the Supreme Court noted that since the defendant had been misled as to whether its conduct was criminal, "traditional notions of fairness" dictated against its conviction.⁵²

⁴⁶ *Id.* at 309.

⁴⁷ *Id.* at 314. Montana asserted that his foreign birth was the result of the misconduct of an American consular officer, namely, a passport for return to the United States had been denied Montana's mother because she was pregnant. *Id.*

⁴⁸ *Id.* at 314-15. Although the Court indicated that a refusal to allow Montana's mother entry to the United States would have been improper, it found insufficient evidence to support Montana's contention that such a refusal had occurred. Rather, the Court viewed the statements made by the American consular officer merely as "well-meant" advice and not the type of conduct that might give rise to equitable estoppel. *Id.* In so ruling, the *Kennedy* Court declined to pass on the correctness of certain lower court cases that permitted application of estoppel to the federal government. *Id.* at 315 & n.11 (citing *Lee You Fee v. Dulles*, 236 F.2d 885, 887 (7th Cir. 1956); *Podea v. Acheson*, 179 F.2d 306, 308-09 (2d Cir. 1950)).

⁴⁹ 411 U.S. 655 (1973).

⁵⁰ 329 F. Supp. 1118, 1119-20 (W.D. Pa. 1971), *rev'd*, 461 F.2d 468 (3d Cir. 1972), *modified*, 411 U.S. 655 (1973).

⁵¹ *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 659-60 (1973). Although section 13 of the Rivers and Harbors Act of 1899 prohibits, absent a permit, the discharge of nonliquid refuse into navigable waters, 33 U.S.C. § 407 (1976), Pennsylvania Industrial Chemical Corporation (PICCO) argued that the Army Corp. of Engineers had limited its interpretation of section 13 to discharges which would result in obstruction of navigation, "thereby affirmatively misleading PICCO into believing that a [section] 13 permit was not required." 411 U.S. at 659 (emphasis added).

⁵² 411 U.S. at 674. Notably, PICCO did not contend that it was unaware of the statute.

Apparently, *Pennsylvania Industrial Chemical* was not intended by the Court to signal its acceptance of equitable estoppel in all contexts. Indeed, in *United States Immigration & Naturalization Service v. Hibi*,⁵³ the Court again refrained from invoking estoppel principles against the federal government.⁵⁴ In *Hibi*, a native of the Philippines had petitioned a federal court for naturalization under the Nationality Act of 1940, which exempted persons who had served honorably in the United States Armed Forces during World War II from the usual citizenship requirements.⁵⁵ Although the deadline for filing such applications had expired more than 20 years earlier,⁵⁶ the petitioner contended that the government should be estopped to deny this fact because of its failure to inform him of his rights before the expiration of the filing deadline.⁵⁷ The Supreme Court, however, held that the application of the doctrine of equitable estoppel would not be justified on these facts because the conduct of the government in failing to inform the petitioner of his rights did not reach the level of "affirmative misconduct" which the *Kennedy* Court had earlier indicated might give rise to estoppel of the government.⁵⁸

Id. at 673-74. Rather, it argued that it was entitled to rely on consistent interpretations by the responsible agency that the statute was inapplicable. *Id.* at 674. The Court, noting that the "designed purpose [of the regulations] was to guide persons as to the meaning and requirements of the statute," remanded the case to the district court for a factual determination of the reliance issue. *Id.* at 674-75.

⁵³ 414 U.S. 5 (1973) (per curiam).

⁵⁴ *Id.* at 8-9.

⁵⁵ *Id.* at 5-7. Hibi had served with the Philippine Scouts, a unit of the United States Army, during World War II, and was eligible for the exemptions provided by the Act. *Id.*

⁵⁶ The Nationality Act of 1940 provided that all petitions for citizenship made under its special provisions must be filed by December 31, 1946. *Id.* at 7; see generally 8 U.S.C. § 1446 (1976).

⁵⁷ 414 U.S. at 7-8. As an additional ground for estoppel, Hibi asserted the Government's failure to provide a naturalization representative in the Philippines throughout the relevant time period. *Id.* Apparently, the United States Attorney General had removed the naturalization representative from the Philippines in response to the Philippine Government's concern that Filipino men would leave the island after becoming American citizens. *Id.* at 10-11. Thus, Hibi argued that the Government's actions had not only left him uninformed of his rights, but had also left him with no available means of applying for citizenship. *Id.* at 7-8.

⁵⁸ *Id.* at 8-9 (citing *Montana v. Kennedy*, 366 U.S. 308, 314, 315 (1961)). Justice Douglas, in a vigorous dissent joined by Justices Brennan and Marshall, argued that the Court ignored "the deliberate—and successful—effort on the part of agents of the Executive Branch to frustrate the congressional purpose and to deny substantive rights to Filipinos such as [Hibi] by administrative fiat." 414 U.S. at 11 (Douglas, J., dissenting). Contrasting the absence of a naturalization representative in the Philippines to the presence of naturalization officers in England, Iceland, North Africa, and the Pacific Islands, pursuant to which

Most recently, in *Schweiker v. Hansen*,⁵⁹ the Supreme Court reiterated that activities short of affirmative misconduct cannot justify the application of equitable estoppel against the government.⁶⁰ In *Hansen*, the plaintiff had gone to her local Social Security office to inquire about divorced mothers' benefits.⁶¹ The field representative incorrectly told her that she was not eligible for benefits and, in addition, acting contrary to procedures outlined in the Social Security Claims Manual, he failed to instruct her to file a written application.⁶² Upon discovering 1 year later that she had been eligible for benefits when she first visited the Social Security office, Mrs. Hansen sought to obtain payments retroactive to the time of her initial inquiry.⁶³ Notwithstanding the plaintiff's assertions, the Supreme Court, echoing its decision in *Hibi*, held that the application of equitable estoppel against the government was unwarranted in the instant case due to the absence of "affirmative misconduct."⁶⁴

THE LOWER FEDERAL COURTS RESPOND (PART I): WHEN IS EQUITABLE ESTOPPEL APPPOSITE?

Examination of the post-*Merrill* Supreme Court decisions reveals a significant change in the Court's posture regarding the use of equitable estoppel against the federal government. Although the Court's current position could hardly be termed an abdication of the *Merrill* holding, it is clear that the more recent pronouncements of the Court have opened the door widely enough to allow certain resourceful plaintiffs to successfully urge the estoppel of the government. Indeed, relying on the Court's movement away from the attitude that "[m]en must turn square corners when they

thousands of foreign nationals were naturalized, *id.* at 9-11 (Douglas, J., dissenting), the dissent concluded that there had been affirmative misconduct on the part of the government. *Id.* at 11 (Douglas, J., dissenting).

⁵⁹ 101 S. Ct. 1468 (1981), *rev'g per curiam*, *Hansen v. Harris*, 619 F.2d 942 (2d Cir. 1980).

⁶⁰ 101 S. Ct. at 1471.

⁶¹ *Id.* at 1469.

⁶² *Id.* at 1469-70.

⁶³ *Id.* at 1470.

⁶⁴ *Id.* at 1471. The Court stated that it had yet to decide the level of misconduct sufficient to estop the government. *Id.* at 1470. Significantly, the *Hansen* Court's refusal to estop the government did not bar Mrs. Hansen from receiving future Social Security benefits; only 11 months of retroactive benefits were forfeited. *Id.* While this fact was not dispositive of the issue, it is submitted that the small amount of money was a factor in the Court's ruling.

deal with the Government"⁶⁵ to an acknowledgment that certain conduct by government agents may give rise to estoppel,⁶⁶ many lower courts in recent years have allowed estoppel to be more freely invoked against the federal government.⁶⁷ Nonetheless, largely due to the Supreme Court's failure to enunciate a clear standard for the use of estoppel against governmental entities, the judiciary has differed as to the circumstances under which the imposition of equitable estoppel would be proper.

Analysis of case law reveals three rather inventive standards employed by the courts to test governmental immunity from estoppel. The first of these is the Fifth Circuit's sovereign-proprietary test.⁶⁸ Simply stated, the test subjects the government to estoppel

⁶⁵ *Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920). The phrase "[m]en must turn square corners" has been interpreted to mean that injustice will not cause a court to waive compliance with a statutory pronouncement. See *Ritter v. United States*, 28 F.2d 265, 267 (3d Cir. 1928); *Terrell v. Finch*, 302 F. Supp. 1063, 1064 (S.D. Tex. 1969); accord, *United States v. Chickasha Cotton Oil Co.*, 115 F.2d 135, 137 (10th Cir. 1940).

⁶⁶ See *United States Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8-9 (1973) (per curiam); cf. *Montana v. Kennedy*, 366 U.S. 308, 313-15 (1961) ("well-meant advice" insufficient for estoppel); *Moser v. United States*, 341 U.S. 41, 46 (1951) (petitioner "lulled . . . into misconception of the legal consequences" of his act).

⁶⁷ At least eight circuits have allowed some form of equitable estoppel to be applied to the federal government. See, e.g., *Yang v. Immigration & Naturalization Serv.*, 574 F.2d 171, 174-75 (3d Cir. 1978); *L'Enfant Plaza Prop., Inc. v. District of Columbia Redev. Land Agency*, 564 F.2d 515, 524 (D.C. Cir. 1977); *United States v. Lucienne D'Hotelle de Benitez Rexach*, 558 F.2d 37, 43 (1st Cir. 1977); *Corniel-Rodriguez v. Immigration & Naturalization Serv.*, 532 F.2d 301, 306-07 (2d Cir. 1976); *United States v. Wharton*, 514 F.2d 406, 409-12 (9th Cir. 1975); *C.F. Lytle Co. v. Clark*, 491 F.2d 834, 838 (10th Cir. 1974); *United States v. Florida*, 482 F.2d 205, 209 (5th Cir. 1973) (dictum); *United States v. Fox Lake State Bank*, 366 F.2d 962, 965-66 (7th Cir. 1966). But see *United States v. One 1973 Buick Riviera Auto.*, 560 F.2d 897, 899 (8th Cir. 1977) (per curiam); *United States v. Ulvedal*, 372 F.2d 31, 35 (8th Cir. 1967).

⁶⁸ E.g., *United States v. Florida*, 482 F.2d 205, 209-10 (5th Cir. 1973); *Organized Fisherman v. Andrus*, 488 F. Supp. 1351, 1356 (S.D. Fla. 1980); *Hicks v. Califano*, 450 F. Supp. 278, 282-84 (N.D. Ga. 1977), *aff'd sub nom. Hicks v. Harris*, 606 F.2d 65 (5th Cir. 1979). The Fifth Circuit Court of Appeals adopted the sovereign-proprietary approach for estoppel of the federal government in *United States v. Florida*, 482 F.2d 205, 209-10 (5th Cir. 1973). In *Florida*, the Federal Government brought an action to quiet title and obtain a decree that it was owner of a tract of land. *Id.* at 206. In 1947, the United States had conveyed the land to the State of Florida, subject to the condition that if the property was put to any use other than as a public park, title would revert to the United States. *Id.* at 207. After it received the land, the State of Florida brought an action to quiet title against the successors-in-interest of individuals who previously had purchased the land pursuant to tax foreclosure. *Id.* at 206-07. In that action, it was determined that these successors-in-interest owned the land, subject to the 1947 conveyance to Florida. *Id.* at 207. In 1971, the United States instituted an action for declaratory relief, alleging the land was not used exclusively as a public park. The court found that the conveyance for public park purposes was "a governmental function, the action itself being for the benefit of the public." *Id.* at 209. Since the govern-

when it acts as a private person, namely, in a proprietary capacity.⁶⁹ When carrying out uniquely governmental functions, however, the sovereign is accorded immunity from estoppel.⁷⁰ The sovereign-proprietary test arguably is imbued with several advantages. For instance, since the rule subjects the government to estoppel only when it acts in the private sphere, the proper exercise of sovereign power cannot be jeopardized.⁷¹ In addition, the sovereign-proprietary rule purports to bring certainty to the question of whether a governmental entity may be estopped. Theoretically, this distinction enables courts summarily to dispose of many causes of action against the government. The possibility of such

ment had been acting as sovereign, it therefore could not be estopped from raising noncompliance with the restrictive covenant. Additionally, the court noted that even if the United States had been acting in a proprietary capacity, estoppel was not applicable on the present facts. *Id.* at 210.

Use of the sovereign-proprietary distinction has not been limited to the Fifth Circuit courts. *E.g.*, *United States v. County of Lawrence*, 173 F. Supp. 307, 314-15 (W.D. Pa. 1959), *rev'd on other grounds*, 280 F.2d 462 (3d Cir. 1960), *aff'd*, 364 U.S. 628 (1961); *Air-Sea Brokers, Inc. v. United States*, 596 F.2d 1008, 1011 (C.C.P.A. 1979); *Kappadahl v. Alcan Pac. Co.*, 222 Cal. App. 2d 626, 35 Cal. Rptr. 354, 359 (Dist. Ct. App. 1963). Originally, the Ninth Circuit employed the sovereign-proprietary distinction in governmental estoppel cases. *See United States v. City & County of San Francisco*, 112 F. Supp. 451, 454 (N.D. Cal. 1953), *aff'd*, 223 F.2d 737 (9th Cir. 1955). *But see United States v. Lazy FC Ranch*, 481 F.2d 985, 989-90 (9th Cir. 1973).

⁶⁹ The government has been held to have acted in a proprietary manner when it contracted for the construction of a public road, *Roberts v. United States*, 357 F.2d 938, 946-47 (Ct. Cl. 1966), for the construction of military housing pursuant to the Critical Defense Housing Act of 1951, *Woodbury v. United States*, 232 F. Supp. 49, 58-59 (D. Or. 1964), and for the construction of Camp Davis, *Branch Banking & Trust Co. v. United States*, 98 F. Supp. 757, 766-67 (Ct. Cl.), *cert. denied*, 342 U.S. 893 (1951). It has been stated that the government is acting in the proprietary sphere whenever it contracts with a citizen. *United States v. Brady*, 385 F. Supp. 1347, 1351 (S.D. Fla. 1974) (dictum).

⁷⁰ Governmental actions characterized as sovereign include the collection or refund of duties on imports, *Air-Sea Brokers, Inc. v. United States*, 596 F.2d 1008, 1011 (C.C.P.A. 1979), the grant of land for use as a public park, *United States v. Florida*, 482 F.2d 205, 209 (5th Cir. 1973), the Administration of the National Service Life Insurance Program, *McDaniel v. United States*, 196 F.2d 291, 294-95 (5th Cir. 1952); *Maxwell v. United States*, 313 F. Supp. 245, 249 n.2 (N.D. Cal. 1970), the administration of the Higher Education loan program, *Hicks v. Califano*, 450 F. Supp. 278, 283 (N.D. Ga. 1977), *aff'd sub nom. Hicks v. Harris*, 606 F.2d 65 (5th Cir. 1979), and the initiation of litigation to recover funds spent to acquire a nursing home under the Hill-Burton Act, *United States v. Brady*, 385 F. Supp. 1347, 1351 (S.D. Fla. 1974).

⁷¹ *United States v. Beebe*, 127 U.S. 338, 344 (1888); *United States v. Florida*, 482 F.2d 205, 209 (5th Cir. 1973). Generally, estoppel will not be permitted if it would inhibit future governmental action. *See Estoppel*, *supra* note 36, at 555. It is argued, however, that estopping the government, even when it has acted in its sovereign capacity, will not hinder the future exercise of such power. *See Smale & Robinson, Inc. v. United States*, 123 F. Supp. 457, 467 (S.D. Cal. 1954).

judicial dispatch renders the sovereign-proprietary distinction an attractive vehicle for accomodating some of the policy considerations necessarily called into play when estoppel of the government is asserted.⁷²

Notwithstanding the advantages of the sovereign-proprietary rule, several factors strongly militate against its adoption. To wit, the judiciary has experienced much difficulty in attempting to determine whether particular governmental conduct is sovereign or proprietary. Indeed, although the rule professes to bring certainty and simplicity to the question of governmental estoppel, in practice this result rarely is attained.⁷³ More important than the definitional problem, however, is the difficulty encountered in justifying the artificial distinction embodied in the sovereign-proprietary rule. Although the sovereign-proprietary distinction allows liberal application of estoppel rules to proprietary governmental conduct, it totally proscribes equitable estoppel of the government when it acts as sovereign. It is submitted that the intrinsic harshness that would obtain by judicial adoption of such a hard and fast rule is unwarranted.

A second paradigm employed in assessing when estoppel properly may be asserted against the government is the Ninth Circuit's balancing test.⁷⁴ Pursuant to this test, the court must conduct a two-fold inquiry: (1) it must assess whether the traditional equitable estoppel elements have been satisfied, and (2) it must balance the seriousness of the injury suffered by an individual against the public policy interests that would be affected by invoking estoppel.⁷⁵

⁷² See note 10 *supra*.

⁷³ The sovereign-proprietary distinction has been criticized as vague. *United States v. City & County of San Francisco*, 112 F. Supp. 451, 454 (N.D. Cal. 1953). Indeed, a problem develops in depicting a governmental action as solely sovereign or proprietary because the two are frequently intertwined. See *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 101 (9th Cir. 1970). For instance, a land transaction, such as that in *United States v. Florida*, 482 F.2d 205, 209 (5th Cir. 1973); see note 68 *supra*, would seem to involve the government as proprietor, yet the court declared it to be a sovereign action because the land was deeded for use as a public park, an admittedly sovereign function.

⁷⁴ See *United States v. Lazy FC Ranch*, 481 F.2d 985, 988-90 (9th Cir. 1973).

⁷⁵ The balancing approach to estoppel of the federal government was first enunciated in *United States v. Lazy FC Ranch*, 481 F.2d 985, 989 (9th Cir. 1973); accord, *Simon v. Califano*, 593 F.2d 121, 123 (9th Cir. 1979) (per curiam); *California Pac. Bank v. Small Business Admin.*, 557 F.2d 218, 224 (9th Cir. 1977); *Union Oil Co. v. Morton*, 512 F.2d 743, 748 n.2 (9th Cir. 1975). See generally *Estoppel*, *supra* note 36, at 557-58; Comment, *Santiago v. Immigration and Naturalization Service—The Ninth Circuit Retreats from its Modern Approach to Estoppel Against the Government*, 1976 UTAH L. REV. 371, 374-75. In *Lazy FC*

Perhaps the most obvious advantage of the Ninth Circuit's test is that, unlike the sovereign-proprietary rule, the balancing approach does not arbitrarily permit equitable estoppel. Rather, it encourages the judiciary, on a case-by-case basis, to balance the equities against the public interest in retaining governmental immunity.⁷⁶ Notwithstanding that the flexibility of the balancing test is meritorious, the inquiry does suffer several drawbacks. First, the test is somewhat cumbersome in application. Indeed, concentration on the second-tier balancing inquiry has caused some courts to fail to first assess whether the traditional equitable estoppel elements had been satisfied.⁷⁷ Second, and perhaps of greater consequence,

Ranch, the ranch partnership, together with an agent of the Agricultural Stabilization and Conservation Service of the Department of Agriculture, set up leases wherein the partnership land was divided into five parcels. This arrangement allowed the partnership to circumvent the maximum payment limitation applicable to a sole producer under the soil bank program. Without the leases, participation of the ranch in the program would have been unprofitable. 481 F.2d at 986. Although regulations in effect at the time of the lease agreement did not prohibit the lease arrangement, a regulation incorporating the prohibition was later promulgated. The Government sought to recover from the partnership money erroneously paid under the soil bank program. *Id.* at 987. The court ruled that the doctrine of equitable estoppel could be asserted successfully against the government "where justice and fair play require it," *id.* at 988, and proposed the use of a balancing test to determine when the federal government could be estopped. *Id.* at 989. If the traditional elements of equitable estoppel were satisfied, the court would then balance the equities. If, by not allowing the estoppel, the party would suffer "a serious injustice" the court should look to the possible harm to the public interest if the government was estopped. If no substantial injury to the public interest would result, the government should be estopped. *Id.*

The Ninth Circuit balancing test has been used by other courts. *E.g.*, *Jung-Nam Yang v. Immigration & Naturalization Serv.*, 574 F.2d 171, 174-75 (3d Cir. 1978); *Texas Oil & Gas Corp. v. Andrus*, 498 F. Supp. 668, 676-77 (D.D.C. 1980); *Santos v. Franklin*, 493 F. Supp. 847, 852-53 (E.D. Pa. 1980); *Hoeber v. District of Columbia Redev. Land Agency*, 483 F. Supp. 1356, 1366 (D.D.C. 1980).

⁷⁶ See, *e.g.*, *Villena v. Immigration & Naturalization Serv.*, 622 F.2d 1352, 1360-61 (9th Cir. 1980) (government estopped from asserting failure to pursue visa preference classification); *Sun Il Yoo v. Immigration & Naturalization Serv.*, 534 F.2d 1325, 1328-29 (9th Cir. 1976) (government estopped from requiring labor certification); *United States v. Wharton*, 514 F.2d 406, 413 (9th Cir. 1975) (government estopped from asserting title to land); *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931, 938-40 (N.D. Cal. 1975) (government estopped from asserting failure to timely apply for citizenship).

⁷⁷ *Smale & Robinson, Inc. v. United States*, 123 F. Supp. 457, 464 (S.D. Cal. 1954). In cases where estoppel of the government is in issue, a court will often restate the no-estoppel rule without first considering whether the elements of an estoppel are present. See *United States v. Stewart*, 311 U.S. 60, 70 (1940); *United States v. County of Lawrence*, 173 F. Supp. 307, 314-15 (W.D. Pa. 1959), *rev'd on other grounds*, 280 F.2d 462 (3d Cir. 1960), *aff'd*, 364 U.S. 628 (1961). But see *Talanoa v. Immigration & Naturalization Serv.*, 397 F.2d 196, 201-02 (9th Cir. 1968). In many cases, estoppel could be denied for failure to prove such traditional elements of equitable estoppel as detrimental reliance, *Spencer v. Railroad Retirement Bd.*, 166 F.2d 342, 343 (3d Cir. 1948), and misleading conduct, *Wilber Nat'l Bank v.*

inherent in the balancing test is a willingness to sacrifice equitable results in favor of such policy considerations as preservation of the public fisc.⁷⁸ As will be demonstrated, however, Congress appears to be interested primarily in ensuring that the government deals fairly and equitably with its citizens.⁷⁹ Therefore, it would seem that the Ninth Circuit's supplemental "balancing" inquiry, which can only detract from that objective, is unnecessary.

A third test recently developed to ascertain when equitable estoppel of the government is apposite is the substantive-procedural rule employed by the Second Circuit in *Hansen v. Harris*.⁸⁰ Under this test, estoppel may be applicable when a government agent misrepresents the content of procedural rules and regulations, but not of substantive provisions.⁸¹ The several problems associated with the Second Circuit's attempt to classify all cases as involving either substantive or procedural rules and statutes are notable. For example, the substantive-procedural rule creates an artificial distinction, not easily applied, which stops unnecessarily short of providing a fair measure of protection for those who deal with the government.⁸² The difficulty inherent in determining whether a

United States, 294 U.S. 120, 124 (1935); *United States v. 31.43 Acres of Land*, 547 F.2d 479, 482 (9th Cir. 1976).

⁷⁸ See note 10 *supra*.

⁷⁹ See notes 109-116 and accompanying text *infra*.

⁸⁰ 619 F.2d 942, 948-49 (2d Cir. 1980), *rev'd sub nom.* *Schweiker v. Hansen*, 101 S. Ct. 1468 (1981) (*per curiam*).

⁸¹ 619 F.2d at 948-49; see, e.g., *McCracken v. United States*, 502 F. Supp. 561, 571 (D. Conn. 1980) (dictum); *Liguori v. Alexander*, 495 F. Supp. 641, 647 (S.D.N.Y. 1980). The *Hansen* court postulated that when a person was substantively eligible for benefits, yet was barred from obtaining them due to a procedural defect resulting from reliance on governmental misrepresentations, "[i]t would fulfill the fundamental legislative goal to grant [the] appellee the benefits she seeks." 619 F.2d at 948. Thus, when a person was substantively within the class for whom benefits were intended, misinformation combined with misconduct would be sufficient to estop the government. *Id.*

The District Court for the District of Columbia, applying the *Hansen* standard to similar facts, estopped the Social Security Administration in *Braunstein v. Harris*, 498 F. Supp. 1301, 1302-04 (D.D.C. 1980), as did the District Court for the Western District of Virginia in *Coty v. Harris*, 495 F. Supp. 452, 453-55 (W.D. Va. 1980).

⁸² See generally *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 100-01 (9th Cir. 1970); Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 772-74 (1974).

The arbitrariness and impracticability of the sovereign-proprietary and substantive-procedural tests, in part, is responsible for "an uninspiring picture of injustice, anachronism, and rampant confusion." See M. ASIMOW, *supra* note 10, § 3.16, at 68. Indeed, the failure of the Supreme Court to formulate guidelines concerning when the government may be equitably estopped has resulted in inconsistent and disparate treatment of estoppel claims in the

particular statutory requirement is substantive or procedural in nature, of itself, should be sufficient to counsel against making the availability of estoppel depend upon the outcome of such an inquiry.⁸³ Indeed, the regulation at issue in *Hansen* is one such provision over which courts have divided concerning whether it is substantive or procedural.⁸⁴

THE LOWER COURTS RESPOND (PART II): WHAT IS AFFIRMATIVE MISCONDUCT?

Taking their cue from the dicta in *Hansen* and its predecessors, courts which have held the government subject to estoppel generally have predicated their decisions upon a finding of affirmative misconduct. The failure of the Supreme Court to define affirmative misconduct, however, predictably has resulted in differing interpretations of the nature of the conduct which would satisfy the requirement.

While most courts agree that mere inaction in the absence of a duty to act will not suffice,⁸⁵ beyond this point there is sharp disa-

Circuit Courts of Appeals. See *Schweiker v. Hansen*, 101 S. Ct. 1468, 1472-73 (1981) (Marshall, J., dissenting). Clearly, this situation is in derogation of the Supreme Court's stated goal to achieve "sound and practical judicial administration." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963); cf. *Schweiker v. Hansen*, 101 S. Ct. 1468, 1472-73 (1981) (Marshall, J., dissenting) (per curiam) (disparaging substantive-procedural tests); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383 (1947) (disparaging sovereign-proprietary test).

⁸³ The substantive-procedural distinction advocated by the Second Circuit in *Hansen* appears analogous to the substantive-procedural distinction enunciated for use in determining applicable law in federal diversity cases. See generally *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1933). The *Hansen* court apparently overlooked the difficulty encountered by federal courts in diversity actions in determining whether a particular statute or regulation defines substantive or procedural rights. *Hansen v. Harris*, 619 F.2d 942, 957 (2d Cir. 1980) (Friendly, J., dissenting), *rev'd sub nom.* *Schweiker v. Hansen*, 101 S. Ct. 1468 (1981) (per curiam); see *Hanna v. Plumer*, 380 U.S. 460, 465 (1965); *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 535-36 (1958); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting); *Ettelson v. Metropolitan Life Ins. Co.*, 137 F.2d 62, 64 (3d Cir.), *cert. denied*, 320 U.S. 777 (1943); 1A J. MOORE, *FEDERAL PRACTICE* ¶ 0.304, at 3039-40 n.11 (2d ed. 1981); C. WRIGHT, *LAW OF THE FEDERAL COURTS* § 59, at 272 (3d ed. 1976). Additionally, some confusion is likely to be engendered because a statute deemed substantive for purposes of one rule may be considered procedural under another rule. Cf. *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-09 (1945) (state statute of limitation deemed procedural by state law is substantive for choice of law purposes in diversity cases).

⁸⁴ Compare *Hansen v. Harris*, 619 F.2d 942, 948-49 (2d Cir. 1980), *rev'd sub nom.* *Schweiker v. Hansen*, 101 S. Ct. 1468 (1981) (per curiam) with *Leimbach v. Califano*, 596 F.2d 300, 303-05 (8th Cir. 1979).

⁸⁵ See *Simon v. Califano*, 593 F.2d 121, 123 (9th Cir. 1979) (per curiam); *Lake Berryessa Tenants' Council v. United States*, 588 F.2d 267, 271 (9th Cir. 1978); *Rucker v. Saxbe*,

greement particularly concerning whether misinformation alone equals affirmative misconduct.⁸⁶ At opposite ends of the spectrum are the Eighth and Ninth Circuits. While the Eighth Circuit categorically has denied governmental estoppel based upon misinformation,⁸⁷ the Ninth Circuit has defined affirmative misconduct in one case as "an affirmative misrepresentation or affirmative concealment of a material fact by the government."⁸⁸ Additionally, the Second Circuit has stated consistently that mere misinformation is an insufficient predicate for invoking estoppel against the government.⁸⁹ Nonetheless, the same court has held that affirmative misconduct was established by the failure to warn an immigrant of the conditional nature of her visa.⁹⁰ In so holding, however, the Second Circuit indicated that to constitute affirmative misconduct the fail-

552 F.2d 998, 1004 (3d Cir.), *cert. denied*, 434 U.S. 919 (1977); *Sun Il Yoo v. Immigration & Naturalization Serv.*, 534 F.2d 1325, 1328 (9th Cir. 1976); *Corniel-Rodriguez v. Immigration & Naturalization Serv.*, 532 F.2d 301, 306-07 (2d Cir. 1976); *Santiago v. Immigration & Naturalization Serv.*, 526 F.2d 488, 492-93 (9th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 971 (1976); *Santos v. Franklin*, 493 F. Supp. 847, 853 (E.D. Pa. 1980); *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931, 937-38 (N.D. Cal. 1975).

⁸⁶ Compare *Leimbach v. Califano*, 596 F.2d 300, 304-05 (8th Cir. 1979) and *American Training Servs., Inc. v. Veterans Admin.*, 434 F. Supp. 988, 1002-03 (D.N.J. 1977) with *United States v. Ruby Co.*, 588 F.2d 697, 703 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979).

⁸⁷ *Leimbach v. Califano*, 596 F.2d 300, 304 (8th Cir. 1979); *accord*, *Goldberg v. Weinberger*, 546 F.2d 477, 481 (2d Cir. 1976), *cert. denied*, 431 U.S. 937 (1977). In *Leimbach*, the plaintiff was incorrectly informed by his Social Security office, on four separate occasions spanning 4 years, that his children were ineligible for benefits. 596 F.2d at 302. In 1975, however, he learned that his children had become eligible for benefits in February 1968. *Id.* at 301-02. He then brought an action seeking benefits retroactive to his first inquiry, alleging that the government's misconduct should estop Social Security from asserting his failure to file a written application. *Id.* at 302. The court refused to invoke estoppel, stating "that estoppel will not lie against the government for the misrepresentations of its agents." *Id.* at 305.

⁸⁸ *United States v. Ruby Co.*, 588 F.2d 697, 703-04 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979); see *United States v. Wharton*, 514 F.2d 406, 410 (9th Cir. 1975). In *Ruby*, the United States brought an action to quiet title to land which had been conveyed to the defendant's predecessor-in-interest in 1891. 588 F.2d at 699-700. One boundary of the land in dispute was the meander line of the Snake River, which had been determined by a government survey in 1876. *Id.* In 1922, the government determined that the original survey was erroneous, yet a new survey was not ordered until 1957. *Id.* at 700. The defendant wished to estop the government from asserting title to the land based on the governmental inaction of 46 years. *Id.* at 701. The court refused to invoke estoppel, finding no showing of affirmative misconduct. *Id.* at 704. Indeed, the court stated that although a failure to act "may be affirmative conduct, it is . . . not misconduct." *Id.*

⁸⁹ See *Goldberg v. Weinberger*, 546 F.2d 477, 481 (2d Cir. 1976), *cert. denied*, 431 U.S. 937 (1977).

⁹⁰ *Corniel-Rodriguez v. Immigration & Naturalization Serv.*, 532 F.2d 301, 306-07 (2d Cir. 1976).

ure to warn must be a violation of an affirmative procedure "mandated by federal regulations."⁹¹

Two decisions of the Ninth Circuit, a court which "has been especially active" in the development of governmental equitable estoppel,⁹² best illustrate the difficulty courts have experienced in defining affirmative misconduct. In *Santiago v. Immigration & Naturalization Service*,⁹³ the petitioners, seeking review of deportation orders, wished to estop the Government from asserting the invalidity of their entrance visas.⁹⁴ In rejecting the petitioners' assertion of estoppel, the Ninth Circuit held that the failure of immigration officials to *inform* the petitioners of the conditional nature of their visas did not constitute affirmative misconduct.⁹⁵ In *Sun Il Yoo v. Immigration & Naturalization Service*,⁹⁶ the petitioner also sought to estop the Government from asserting the invalidity of his entrance visa.⁹⁷ On this occasion, however, the Ninth Circuit granted the petitioner's request for estoppel.⁹⁸ The court declared that the failure of immigration officials to *act* timely in processing the petitioner's application for a visa preference classification constituted affirmative misconduct.⁹⁹

Of course, *Santiago* and *Sun Il Yoo* are distinguishable. In *Santiago*, the contested conduct was a failure to give information.¹⁰⁰ In *Sun Il Yoo*, the conduct was a delay in processing an

⁹¹ *Goldberg v. Weinberger*, 546 F.2d 477, 481 n.5 (2d Cir. 1976), *cert. denied*, 431 U.S. 937 (1977).

⁹² See W. GELLHORN, C. BYSE & P. STRAUSS, *supra* note 35, at 414.

⁹³ 526 F.2d 488 (9th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 971 (1976).

⁹⁴ *Id.* at 493. The plaintiffs in *Santiago* had been granted preference status under 8 U.S.C. § 1153(a)(9) (1976), and their entry visas were valid only if used to accompany or follow a spouse or parent who was entering or already a resident of the United States. 526 F.2d at 489. Despite the conditional nature of their visas, the plaintiffs had been admitted into the United States while in violation of the condition. *Id.* at 490.

⁹⁵ 526 F.2d at 492 & n.8. It is significant that both the majority and dissent in *Santiago* overlooked the *actual conduct* of the immigration officials in allowing the plaintiffs to enter the United States. Indeed, the record showed that one of the petitioners had alleged that the conduct of the immigration officer, in admitting the petitioners, constituted affirmative misconduct. *Id.* at 492.

⁹⁶ 534 F.2d 1325 (9th Cir. 1976).

⁹⁷ *Id.* at 1328.

⁹⁸ *Id.*

⁹⁹ *Id.* The *Sun Il Yoo* court stated that a 10-month delay in processing a change in status application constituted affirmative misconduct. *Id.* Characterizing the Government's conduct as "oppressive," the court estopped the Government in the interests of "[j]ustice and fair play." *Id.* at 1328-29.

¹⁰⁰ See note 95 and accompanying text *supra*.

application, a failure to act rather than a failure to speak.¹⁰¹ It is submitted, however, that such factual distinctions represent too tenuous a basis upon which to hinge approval or disapproval of a deportation order. More significantly, it is urged that the *Santiago* and *Sun Il Yoo* decisions evince the fact that the meaning of affirmative misconduct remains an enigma.

PROPOSAL: A BETTER APPROACH FOR DETERMINING WHEN
ESTOPPEL OF THE GOVERNMENT IS WARRANTED

The developments of the past decade largely have eradicated the notion that the government is absolutely immune from equitable estoppel.¹⁰² Although a few courts continue to refuse to estop the government, finding that to do so would violate the constitutionally mandated separation of powers doctrine,¹⁰³ it is generally recognized that such rationale neither compels nor supports allowing the government to disavow with impunity the egregious misconduct of its agents.¹⁰⁴ Surely, as the advocates of the minority position indicate, the recognition of governmental estoppel contemplates that the judiciary will override express legislative dictates and grant relief despite noncompliance with statutory

¹⁰¹ See note 99 and accompanying text *supra*.

¹⁰² See notes 49-84 and accompanying text *supra*.

¹⁰³ See *Abbott v. Harris*, 610 F.2d 563, 564 (8th Cir. 1979) (per curiam); *Gressley v. Califano*, 609 F.2d 1265, 1268 (7th Cir. 1979); *Cole v. Railroad Retirement Bd.*, 289 F.2d 65, 68-69 (8th Cir. 1961); *Brown v. Richardson*, 395 F. Supp. 185, 190 (W.D. Pa. 1975); *Terrell v. Finch*, 302 F. Supp. 1063, 1064 (S.D. Tex. 1969); *Taylor v. Flemming*, 186 F. Supp. 280, 284 (W.D. Ark. 1960).

¹⁰⁴ See *Sun Il Yoo v. Immigration & Naturalization Serv.*, 534 F.2d 1325, 1328 (9th Cir. 1976). It appears clear that the *Hibi* opinion, *United States Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5 (1973) (per curiam), requires the existence of a duty in order for governmental action to be considered misconduct. See *Santiago v. Immigration & Naturalization Serv.*, 526 F.2d 488, 493 (9th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976). Beyond this point, courts have varied regarding their interpretation of *Hibi*, yet generally agree that the government is liable for the actions of its agents which rise to the level of egregious misconduct. Indeed, a common standard applied by the courts is whether the governmental action violated standards of justice and fair play. See *Villena v. Immigration & Naturalization Serv.*, 622 F.2d 1352, 1360 (9th Cir. 1980) (estoppel appropriate when government action is "oppressive"); *Sun Il Yoo v. Immigration & Naturalization Serv.*, 534 F.2d 1325, 1329 (9th Cir. 1976) (estoppel permitted to achieve "justice and fair play"); *Corniel-Rodriguez v. Immigration & Naturalization Serv.*, 532 F.2d 301, 302 (2d Cir. 1976) ("basic notions of fairness must preclude the Government from taking advantage of the [employee's] dereliction and [prohibition of estoppel] would work a serious and manifest injustice"); *United States v. Wharton*, 514 F.2d 406, 411 (9th Cir. 1975) (governmental estoppel permitted "where basic notions of fairness requir[e]").

requirements.¹⁰⁵ When, however, in the face of culpable governmental misconduct, such waiver of strict statutory compliance best effectuates the underlying legislative intent, the separation of powers doctrine would not appear to present a barrier to estopping the government. As one commentator has noted, "[i]n many cases it may be necessary and appropriate to permit a lesser breach of congressional will in order to give effect to a larger congressional purpose."¹⁰⁶ It is submitted, moreover, that other policy interests cited by the courts, such as preservation of the public fisc,¹⁰⁷ are outweighed by the more pressing interest the public has "in seeing its government deal carefully, honestly and fairly with its citizens."¹⁰⁸ That fair dealing by the government is a principle policy consideration is evinced by the plethora of bills pending in the House of Representatives and Senate, bills intended to place private individuals on a more even footing with governmental entities. One

¹⁰⁵ See *United States Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam); *Hansen v. Harris*, 619 F.2d 942, 947 (2d Cir. 1980), *rev'd sub nom. Schweiker v. Hansen*, 101 S. Ct. 1468 (1981) (per curiam); *Sun Il Yoo v. Immigration & Naturalization Serv.*, 534 F.2d 1325, 1329 (9th Cir. 1976); *United States v. Wharton*, 514 F.2d 406, 412-13 (9th Cir. 1975); *United States v. Lazy FC Ranch*, 481 F.2d 985, 987-88 (9th Cir. 1973). Although separation of powers considerations most frequently arise in cases where the plaintiff has failed to comply with the necessary conditions to receive a pecuniary benefit, such as social security, see *Goldberg v. Weinberger*, 546 F.2d 477, 480-81 (2d Cir. 1976), *cert. denied*, 431 U.S. 937 (1977), or an annuity, *Cole v. Railroad Retirement Bd.*, 289 F.2d 65, 68-69 (8th Cir. 1961), they are also present when compliance with statutory requirements is a condition to receiving nonpecuniary benefits. See *Guinto v. Rosenberg*, 446 F.2d 11, 12 (9th Cir. 1971) (immigration).

¹⁰⁶ *Estoppel*, *supra* note 36, at 556; see note 58 *supra*. Of course, discerning the congressional purpose itself may prove troublesome. Compare *Hansen v. Harris*, 619 F.2d 942, 948 (2d Cir. 1980), *rev'd sub nom. Schweiker v. Hansen*, 101 S. Ct. 1468 (1981) (per curiam) and *Santiago v. Immigration & Naturalization Serv.*, 526 F.2d 488, 490-91 (9th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 971 (1976) with *Hansen v. Harris*, 619 F.2d at 957 (Friendly, J., dissenting) and *Santiago v. Immigration & Naturalization Serv.*, 526 F.2d at 494 (Choy, J., dissenting).

¹⁰⁷ See note 10 *supra*. It is submitted that mere recitation of the need to protect the public fisc ignores the reality of the funding system. As pointed out by Judge Newman, for example, the funding needs of the Social Security program are determined by demographic facts which do not take into account the number of people who might lose benefits due to reliance on misinformation disseminated by Social Security employees. *Hansen v. Harris*, 619 F.2d 942, 962 (2d Cir. 1980) (Newman, J., concurring), *rev'd sub nom. Schweiker v. Hansen*, 101 S. Ct. 1468 (1981) (per curiam). Additionally, an enormous amount of money is expended to inform people of their rights. M. Asimow, *supra* note 10, § 1.02, at 2. Therefore, it would appear that the dominant concern is not preservation of the public fisc, but access to that fisc. Notably, the fear of draining the public treasury has proven groundless in those states which have accepted liability for "substantially all state torts." See W. GELLHORN, C. BYSE & P. STRAUSS, *supra* note 35, at 1103.

¹⁰⁸ *United States v. Wharton*, 514 F.2d 406, 413 (9th Cir. 1975).

bill, for example, would widen the ambit of the Federal Tort Claims Act—itself designed to provide relief by private entities against the government¹⁰⁹—by permitting claims “based upon an act or omission” of a governmental agent, notwithstanding that that agent had exercised due care or that his responsibilities were discretionary in nature.¹¹⁰ Already codified, of course, is the Intentional Tort Amendment Act,¹¹¹ which “exposes the government to tort liability for assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution attributable to federal investigative or law enforcement officers.”¹¹² Fair dealing by governmental entities also would be fostered by a bill, pending in the House, which would *require* agencies to respond to good-faith requests for interpretations of agency rules.¹¹³ Such a bill would strengthen a similar provision already codified in the Administrative Procedure Act, which provides that agencies may, in their discretion, “issue a declaratory order to terminate a controversy or remove uncertainty.”¹¹⁴ The same bill pending in the House would check agency abuse of process by requiring “‘trial-type’ procedures for proceedings concerning specific factual questions, including proceedings to assess a civil penalty or fine or to determine a claim

¹⁰⁹ See note 36 *supra*.

¹¹⁰ H.R. 24 in DIGEST OF PUBLIC GENERAL BILLS AND RESOLUTIONS E-9 (No. 1 1981). Another proposed bill which would foster governmental fair dealing is the Government Contractors Product Liability Act. Pursuant to this Act, government contractor indemnification could be obtained for losses incurred due to design defects when the design itself was supplied and required by the government. *Congressional Record*, Government Contractors Product Liability Act of 1981, 97th Cong., 1st Sess., 127 CONG. REC. H258-59 (Jan. 29, 1981) (remarks of Rep. McClory). The bill is intended to eliminate “the unfair, counterproductive, and inequitable situation faced by Government contractors.” 127 CONG. REC. H258 (remarks of Rep. McClory). Similarly, the proposed Civil Rights Improvement Act of 1981 “[d]eclares that it is not a defense for a government entity that the officer or employee clothed with the authority of such entity is personally immune from liability under common law or any statute” when suit is brought against the entity under 42 U.S.C. § 1983. S. 990 in DIGEST OF PUBLIC GENERAL BILLS AND RESOLUTIONS A-118 (No. 1 1981). The concept of governmental fair dealing also has been advanced by the proposed Limitation on Government Record-keeping Requirements and Actions Act of 1981, which prohibits federal agencies from “requiring any person to maintain, prepare, or produce records of an event more than five years after the event has occurred.” S. 961 in DIGEST OF PUBLIC GENERAL BILLS AND RESOLUTIONS A-110 (No. 1 1981).

¹¹¹ Pub. L. No. 93-253, 88 Stat. 50 (codified at 28 U.S.C. § 2680(h) (1976)).

¹¹² W. GELLHORN, C. BYSE & P. STRAUSS, *supra* note 35, at 1105; see 28 U.S.C. 2680(h) (1976).

¹¹³ H.R. 746 in DIGEST OF PUBLIC GENERAL BILLS AND RESOLUTIONS E-79 (No. 1 1981); H.R. 1 in DIGEST OF PUBLIC GENERAL BILLS AND RESOLUTIONS E-1 (No. 1 1981).

¹¹⁴ 5 U.S.C. § 554(e) (1976).

for certain individual benefits.”¹¹⁵ Another proposed bill actually would rectify the inequitable consequences of the *Hibi* decision, previously discussed, by providing for “the issuance of immigrant visas to aliens who are natives of the Phillipines . . . [and] who served with and were honorably discharged from the United States Armed Forces in World War II.”¹¹⁶

Clearly, in light of enacted statutes and proposed bills, a singular congressional intent to promote fairness in dealings with the government is discernible.¹¹⁷ It follows, therefore, that the judiciary should act to promote this intent by fashioning viable guidelines for determining when estoppel of the government is warranted. Of course, if a new test is to be promulgated, it should be functional, with well-defined standards designed to forestall fraudulent claims and claims with meager evidentiary support. It is submitted that the preferable alternative is the obvious one: application of conventional equitable estoppel principles to governmental entities. It is urged that such a test would promote governmental fair dealing, for by definition, traditional equitable estoppel is invoked only when the equities so dictate.¹¹⁸ In addition, it is suggested that the standard of proof associated with the test, establishment of all elements of estoppel by a preponderance of the evidence, would forestall fraudulent and petty claims.¹¹⁹ It there-

¹¹⁵ H.R. 746 in DIGEST OF PUBLIC GENERAL BILLS AND RESOLUTIONS E-79 (No. 1 1981); H.R. 1 in DIGEST OF PUBLIC GENERAL BILLS AND RESOLUTIONS E-1 (No. 1 1981).

¹¹⁶ H.R. 895 in DIGEST OF PUBLIC GENERAL BILLS AND RESOLUTIONS E-94 (No. 1 1981). As the sponsor of this bill noted, “[i]t is only fair that we offer an opportunity of American citizenship to those citizens of the Philippines who served us honorably and faithfully at great personal risk during World War II.” 127 CONG. REC. E180 (Jan. 27, 1981) (remarks of Rep. Akaka) (emphasis added).

¹¹⁷ Notably, the trend toward compensation of individuals injured because of governmental activity is not limited to the United States. W. GELLHORN, C. BYSE & P. STRAUSS, *supra* note 35, at 1114. In France, for example, there is no requirement that the injury be caused by culpable conduct as long as the risk of injury was created by governmental action. *Id.* Indeed,

the situation in France is in many ways like that which would exist if the State were operating a system of mutual insurance for those subject to administrative accidents. A citizen injured by State action is, in effect, compensated out of a mutual insurance fund supported by premiums paid in the form of taxes.

Id. (quoting FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD 295 (1954)).

¹¹⁸ See note 1 *supra*.

¹¹⁹ The party wishing to assert an equitable estoppel has the burden of going forward with the evidence and the burden of persuasion. *Tom W. Carpenter Equip. Co. v. General Elec. Credit Corp.*, 417 F.2d 988, 990 (10th Cir. 1969); *James Talcott, Inc. v. Associates Discount Corp.*, 302 F.2d 443, 446 (8th Cir. 1962); *Alba v. Pelican Marine Divers, Inc.*, 391 F. Supp. 954, 961 (E.D. La. 1975). To succeed, such party also must establish the elements of

fore is appropriate to review the four elements of traditional equitable estoppel as they would be applied to governmental entities:

(1) *Misrepresentation of a regulation by a government employee.* This element of traditional equitable estoppel, which tests for the presence or absence of culpable conduct, is conceptually identical to the affirmative misconduct requirement espoused by the Supreme Court. Of course, such misrepresentation or affirmative misconduct need not be intentional. Indeed, there is nothing in the language of the Supreme Court's *Hansen* decision that would support the proposition that affirmative misconduct connotes no less than an intentional misrepresentation of a rule or regulation.¹²⁰ While such egregious conduct might furnish a particularly appealing basis for asserting estoppel, it appears clear that the Court has not imposed such a demanding standard of culpability.¹²¹ Notwithstanding the unstated definition of "affirmative misconduct,"¹²² it is urged that a governmental misrepresentation, like any other misrepresentation, may be by act or omission, and may be intentional or negligent. Notably, such a standard would be in accord with the proposed amendment to the Federal Tort Claims Act which exposes the government to tort liability for the discretionary acts or omissions of its agents.¹²³

(2) *The governmental misrepresentation must be made with the intention of inducing reliance.* It is submitted that this element of traditional equitable estoppel serves a useful purpose heretofore overlooked by the Supreme Court. Thus, if a government agent is unsure of the rules to be interpreted, or wishes not to be held accountable for such interpretation, a simple solution is available: the person with whom the agent is dealing should be informed that the agent's opinions are merely advisory and are not binding upon the government. Notably, the Internal Revenue Service (IRS) already follows such a procedure respecting oral advice

the estoppel by a preponderance of the evidence. *Busby v. Daws*, 592 F.2d 1241, 1245 (5th Cir. 1979).

¹²⁰ See note 64 and accompanying text *supra*.

¹²¹ See *United States Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8-9 (1973) (per curiam); *Montana v. Kennedy*, 366 U.S. 308, 314-15 (1961); *Moser v. United States*, 341 U.S. 41, 47 (1951).

¹²² The complete failure of the Supreme Court to define affirmative misconduct has been noted frequently. See *Leimbach v. Califano*, 596 F.2d 300, 305 (8th Cir. 1979); *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931, 937-38 (N.D. Cal. 1975).

¹²³ See note 110 and accompanying text *supra*.

given to taxpayers,¹²⁴ since such advice is not deemed to be binding upon the agency.¹²⁵ Among other things, the Internal Revenue Manual (the Manual) stresses that IRS officials who deal with the taxpaying public must be aware of their own "limits."¹²⁶ Indeed, IRS officials are instructed that "[a]dmitting that you do not know an answer is far better than knowingly giving a wrong or incomplete answer."¹²⁷ Additionally, the Manual requires that all tax returns prepared with the assistance of IRS employees must be stamped with a disclaimer statement,¹²⁸ and as a further precaution, IRS employees are directed to inform taxpayers that their returns are "subject to examination and mathematical verification."¹²⁹

It seems apparent that the objective of the aforementioned IRS directives is to prevent taxpayers from relying on the advisory and nonbinding opinions of IRS employees.¹³⁰ Surely, other agencies could adopt similar measures sufficient to forestall reliance upon advisory opinions, or upon the decisions of low echelon employees. Indeed, it is urged that the absence of such measures in any instance wherein the government intends not to be bound by its representations is unwarranted, though perhaps constitutional.¹³¹ Clearly, government employees are in the best position to

¹²⁴ See notes 126-130 and accompanying text *infra*.

¹²⁵ 26 C.F.R. § 601.201(k)(2) (1981).

¹²⁶ 3 INTERNAL REVENUE MANUAL (CCH) ch. 422(3), at 14,534 (Oct. 14, 1977).

¹²⁷ *Id.* The Manual also instructs IRS employees to acknowledge when the IRS has made an error and to apologize for any inconvenience resulting therefrom. *Id.* ch. 410(8), at 14,533 (Apr. 30, 1981).

¹²⁸ *Id.* ch. 540(1), at 14,546 (Oct. 21, 1981). The disclaimer stamp specifies that the return has been reviewed or prepared but has not been audited. See *id.* Exhibit 500-1, at 14,551.

¹²⁹ *Id.* ch. 540(3), at 14,546 (Oct. 21, 1981).

¹³⁰ Taxpayers can obtain binding written opinions, of course, by following the procedures set forth in section 601.201(e) of the Code of Federal Regulations. See C.F.R. § 601.201(e) (1981).

¹³¹ The fifth amendment, designed to protect individuals from arbitrary governmental action, see Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 340 (1957), prohibits the deprivation of life, liberty or property without due process of law. U.S. CONST. amend V. This has been interpreted to require certain procedural protection, such as the opportunity to be heard, in order to achieve justice. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 503 (1978). Although case law does not explicitly state that an absolute prohibition of estoppel would violate due process of law, the notions of fair play and justice are implicit in *Moser v. United States*, 341 U.S. 41 (1951), and explicit in some cases estopping the government. *E.g.*, *Sun Il Yoo v. Immigration & Naturalization Serv.*, 534 F.2d 1325, 1329 (9th Cir. 1976); *United States v. Lazy FC Ranch*, 481 F.2d 985, 988 (9th Cir. 1973).

interpret government regulations. Nonetheless, when it is feared that these employees may not accurately interpret such regulations, the public should be informed of the possibility of detrimental error and of the government's policy not to be held accountable for the consequences of such error. Certainly, the failure to so inform the public is in derogation of any notion of governmental fair dealing. Consequently, it is submitted that when reliance reasonably is induced the government should be charged with having intended such reliance.

(3) *The party asserting the estoppel against the government must have been unaware of the true facts* and (4) *the party asserting the estoppel must have relied to his detriment on governmental misrepresentations*. Given that individuals are charged with constructive knowledge of the law,¹³² these traditional estoppel elements assume special significance when the federal government is the party to be estopped. Indeed, several courts have determined that as a result of the presumption that one knows the law, a governmental agent can have no apparent authority, and thus cannot bind the government by his unauthorized acts.¹³³ Other courts, however, have estopped the federal government notwithstanding that the agent upon whose representations the estoppel is based acted without actual authority.¹³⁴ These courts have recognized, at least implicitly, that attributing knowledge serves no significant purpose, but may cause serious individual injuries to be unrecompensed.¹³⁵ It is urged, therefore, that persons not be

¹³² *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947); *Brown v. Richardson*, 395 F. Supp. 185, 190 (W.D. Pa. 1975); *Flamm v. Ribicoff*, 203 F. Supp. 507, 510 (S.D.N.Y. 1961).

¹³³ *E.g.*, *Goldberg v. Weinberger*, 546 F.2d 477, 480-81 (2d Cir. 1976), *cert. denied*, 431 U.S. 937 (1977); *United States v. Florida*, 482 F.2d 205, 209-10 (5th Cir. 1973); *Atlantic Richfield Co. v. Hickel*, 432 F.2d 587, 591-92 (10th Cir. 1970); *Smale & Robinson, Inc. v. United States*, 123 F. Supp. 457, 465 (S.D. Cal. 1954); *Emeco Indus., Inc. v. United States*, 485 F.2d 652, 657 (Ct. Cl. 1973) (*per curiam*). Indeed, the Supreme Court has declared that a person dealing with the government has an affirmative duty to determine the limitations placed on the agent's authority by the government. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947). Notably, however, it has been argued that "the maxim that every man is presumed to know the law [should have] less force when one is dependent upon a governmental agency to interpret its own complex body of rules and regulations." *California Pac. Bank v. Small Business Admin.*, 557 F.2d 218, 224 (9th Cir. 1977).

¹³⁴ *E.g.*, *Santos v. Franklin*, 493 F. Supp. 847, 855 (E.D. Pa. 1980); *Tonkonogy v. United States*, 417 F. Supp. 78, 80 (S.D.N.Y. 1976).

¹³⁵ *E.g.*, *United States v. Wharton*, 514 F.2d 406, 411 (9th Cir. 1975); *Santos v. Franklin*, 493 F. Supp. 847, 854 (E.D. Pa. 1980); *Tonkonogy v. United States*, 417 F. Supp. 78, 80 (S.D.N.Y. 1976).

charged automatically with knowledge of the law, but that such knowledge should be imputed only when reasonable under the circumstances.¹³⁶

CONCLUSION

The clear trend in the lower courts to hold the government accountable for the misconduct of its officials casts serious doubt on the continued viability of the government's traditional immunity from estoppel. Indeed, it appears to be only a matter of time before the Supreme Court or Congress expressly sanctions estoppel of the government.

Of course, the impact of judicially applied governmental equitable estoppel would not be entirely unknown, since traditional estoppel principles have already been applied to several governmental entities through statutory and regulatory means. An oft-cited example is the Portal-to-Portal Act of 1947,¹³⁷ which shields from liability employers who chose not to pay wages in good-faith reliance on the representations of Labor Department employees.¹³⁸ According to one commentator, this statute "seems to have worked out quite well."¹³⁹ Of similar consequence is a regulation promulgated by the Railroad Retirement Board, which provides that a person "deterred to his detriment" by Board action may nonetheless obtain annuity benefits.¹⁴⁰ Surely, the fact that these extrajudicial instances of governmental equitable estoppel have proved workable evinces their merit, as well as the merit of a judicial initiative in this area.

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¹³⁶ See note 34 *supra*.

¹³⁷ Ch. 52, § 10, 61 Stat. 89 (1947) (codified at 29 U.S.C. § 259 (1976)).

¹³⁸ *Id.*

¹³⁹ Newman, *Should Official Advice be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 COLUM. L. REV. 374, 375 (1953).

¹⁴⁰ 20 C.F.R. § 210.2(b) (1981).