Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government

The vast scope and complexity of federal regulation often force citizens to seek advice and information from government officials. In most cases, the officials' statements prove to be correct. Sometimes, however, the information proves to be inaccurate; instead of helping the citizen to comply with federal law, the statements lead the citizen into a course of noncompliance. If litigation ensues between the government and the citizen, the crucial issue becomes whether the government may assert a legal position contrary to the earlier statements made by the official. For instance, if an official instructs a person not to file a written application for federal benefits because the official mistakenly believes that the person is ineligible, may the government later assert the lack of a written application as a legal justification for denying benefits?

In analogous litigation between private parties, an individual can seek to employ the doctrine of equitable estoppel. Estoppel prevents a party in litigation from taking a legal position inconsistent with an earlier statement or action that placed his adversary at a disadvantage.¹ More formally, an estoppel will be granted if three conditions are satisfied: the party against whom the estoppel is sought must have made a definite misrepresentation of fact or law;² the party must have had reason to believe that another would

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¹ See WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 105, at 691 (4th ed. 1971).

² While statements of law commonly have been treated as assertions of opinion that cannot give rise to an estoppel, *see, e.g.*, *Sturm v. Boker*, 150 U.S. 312 (1893); *Aunt Jemima Mills Co. v. Rigney & Co.*, 247 F. 407 (2d Cir.), *cert. denied*, 245 U.S. 672 (1917), that rule has been eroded by many exceptions, *see, e.g.*, *Motherway v. Wall*, 168 Mass. 333, 47 N.E. 135 (1897) (statements as to land titles); *Pieh v. Flitton*, 170 Minn. 29, 211 N.W. 964 (1927) (representation that lands may be obtained by patent free from mineral reservations); *Miller v. Osterlund*, 154 Minn. 495, 191 N.W. 919 (1923) (representation that a company was qualified to do business in the state), and the more modern view is to eliminate the distinction between statement of law and fact, *see, e.g.*, *Fainardi v. Pausata*, 126 A. 865 (R.I. 1924). For a general treatment of this issue, *see* W. PROSSER, *supra* note 1, § 109, at 724-25. It should also be noted that silence in the presence of a duty to speak has been held sufficient to constitute a misrepresentation. *See* Note, *Equitable Estoppel: Does Governmental Immunity Mean Never Having to Say You're Sorry?*, 56 ST. JOHN'S L. REV. 114, 115 nn.3-5 (1981).

rely upon the misrepresentation; and the other must have changed his position to his prejudice in reasonable reliance upon the misrepresentation.³ In the words of Justice Cardozo, the purpose of the doctrine of equitable estoppel is to insure that no one will be permitted "to found any claim upon his own inequity or take advantage of his own wrong."⁴

The Supreme Court, however, has never applied estoppel against the government when unauthorized government conduct has caused detrimental reliance by an individual. Although the Court has not categorically stated that equitable estoppel will never be applied against the government, it has consistently and without exception reversed lower court decisions estopping the government in such circumstances.⁵ In several recent cases, however, the Court has been careful to leave open the possibility that the government may be estopped in appropriate cases of unauthorized conduct if the private litigant proves the elements of private estoppel *and* demonstrates bureaucratic activity that amounts to "affirmative misconduct."⁶ Unfortunately, the Court has failed to give content to the "affirmative misconduct" standard.

This comment examines the application of estoppel against the government and attempts to determine when such estoppel is appropriate. Part I surveys the Supreme Court's decisions on equitable estoppel against the government. Part II discusses two policies that underlie those decisions: the protection of the public fisc and the separation of powers. Part III attempts to give meaning to the affirmative misconduct standard by identifying a narrow subclass of unauthorized conduct cases in which estoppel against the government is proper—those in which intentional misconduct or conduct performed with reckless disregard by executive branch officials causes citizens to fail to qualify for government benefits.

I. SUPREME COURT CASE LAW

The Supreme Court has consistently held that the authorized acts of government agents can support an estoppel against the government,⁷ but that the unauthorized acts of those agents

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³ See W. PROSSER, *supra* note 1, § 105, at 691. For reliance to be reasonable, the party must be unaware of the true fact and must be justified in being unaware. See *Heckler v. Community Health Servs., Inc.*, 467 U.S. 51, 59 (1984).

⁴ *Stearns Co. v. United States*, 291 U.S. 54, 61-62 (1934).

⁵ See, e.g., *Heckler v. Community Health Servs., Inc.*, 467 U.S. 51 (1984); *Miranda v. INS*, 459 U.S. 14 (1982) (*per curiam*).

⁶ See, e.g., *INS v. Hibi*, 414 U.S. 5 (1973) (*per curiam*).

⁷ See, e.g., *Santobello v. New York*, 404 U.S. 257 (1971). In *Santobello*, the Supreme

cannot.⁸ While distinguished commentators have argued that the concept of "authority" should be interpreted broadly so as to widen the applicability of estoppel against the government,⁹ the "authority" line itself has appeared impregnable. More recent Supreme Court decisions, however, have suggested that unauthorized official conduct may give rise to an estoppel against the government where the litigant makes out the requisites of private estoppel and shows the existence of "affirmative misconduct." To shed more light on the "affirmative misconduct" standard, this section sets forth those decisions.

In *Federal Crop Insurance Corp. v. Merrill*,¹⁰ two farmers had relied on a government agent's promise that their entire wheat crop would be federally insured. Unbeknownst to the farmers and the agent, regulations recently promulgated by the FCIC had prohibited insurance for a portion of the crop. When a drought destroyed the wheat, the Merrills sought to recover on their policy, but the FCIC cited its regulations and refused to pay. In later litigation, the Merrills argued that the government should be estopped from asserting the concededly valid regulations as a defense. The Court assumed that the requirements for private estoppel had been satisfied, but held that estoppel was unwarranted in this case.¹¹ According to the Court, respondents are presumed to know the content of FCIC regulations regardless of the "hardship resulting from innocent ignorance."¹² In addition, estop-

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Court considered the validity of a revocation of a plea bargaining arrangement. A prosecutor had promised not to recommend a sentence in return for the defendant's plea of guilty to a lesser charge. Later, a new prosecutor recommended a sentence for the original charge. The action was inadvertent and not malicious, as the second prosecutor was unaware of the initial promises. Nevertheless, the Court relied on considerations of equitable estoppel in refusing to permit the second prosecutor to assume a legal position contrary to the plea bargain negotiated by the original prosecutor. *Id.* at 262.

Other examples of federal court estoppel of the government in authorized conduct cases include *Hollerbach v. United States*, 233 U.S. 165, 172 (1914) (government cannot assert legal position contrary to representations in lawful contract), *Dayton Airplane Co. v. United States*, 21 F.2d 673, 674 (6th Cir. 1927) (same), and *Vestal v. Commissioner*, 152 F.2d 132 (D.C. Cir. 1945) (after taxing group as a partnership, tax commissioner cannot later assert that the group should be treated as a corporation).

⁸ See, for example, the cases discussed *infra* notes 10-34 and accompanying text.

⁹ See, e.g., *Berger, Estoppel Against the Government*, 21 U. CHI. L. REV. 680 (1954).

¹⁰ 332 U.S. 380 (1947).

¹¹ *Id.* at 383-84.

¹² *Id.* at 385. In contrast, Justice Jackson noted: "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." 332 U.S. at 387 (Jackson,

pel against the government would violate "the duty of all courts to observe the conditions defined by Congress for charging the public treasury."¹³ Considered in light of the broad rationales offered by the Court, *Merrill* appeared to announce a per se rule against estoppel in cases of unauthorized conduct.

*Montana v. Kennedy*¹⁴ departed from the strict approach taken in *Merrill* and was the first case to suggest that estoppel might apply against the government.¹⁵ An alien sought to estop the government from asserting his lack of citizenship as a grounds for deportation. The alien argued that he would have been born in America had his mother, an American citizen, not been denied a passport to return to the United States by an American immigration official who mistakenly interpreted a federal statute as prohibiting her from entering the United States without a passport. The Court refused to estop the government since the official's "well-meant advice" fell "far short of misconduct such as might prevent the United States from relying on petitioner's foreign birth."¹⁶ Although the Court did not decide if the government could ever be estopped, some lower courts interpreted this permissive dicta to mean that estoppel against the government might be appropriate in other unauthorized-conduct cases.¹⁷

The Court's next major estoppel decision, *INS v. Hibi*,¹⁸ confirmed the Court's desire to maintain flexibility despite *Merrill*'s

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J., dissenting).

¹³ *Id.* at 385.

¹⁴ 366 U.S. 308 (1961).

¹⁵ Some commentators view *Moser v. United States*, 341 U.S. 41 (1951), as a radical departure from *Merrill*. See, e.g., *Recent Developments: Back to Square One: Estoppel Against the Government after Immigration and Naturalization Service v. Miranda*, 16 VAND. J. TRANSNAT'L L. 1053, 1063 (1983). In that case, appellant sought to estop enforcement of an American statutory rule that foreign citizens who chose not to serve in the military could not apply for American citizenship. Moser believed that the statute interfered with a treaty with Switzerland, his native country. He based his claim on the State Department's advice to the Swiss Legation after the latter assured him that signing a form to avoid military service, which contained the waiver of citizenship in a footnote, would not jeopardize his ability to obtain citizenship. The Court held that Moser had signed the form without intending to waive citizenship after seeking guidance from the highest authority that he could, and so properly believed he would not lose his rights to seek citizenship. 341 U.S. at 45-47.

Since the decision was expressly based on lack of intelligent waiver of rights, not on estoppel, many scholars reject the view that *Moser* represented a departure from *Merrill*. See, e.g., Gordon, *Finality of Immigration and Nationality Determinations—Can the Government Be Estopped?*, 31 U. CHI. L. REV. 433, 455 (1964).

¹⁶ 366 U.S. at 314-15.

¹⁷ See, e.g., *Tejeda v. INS*, 346 F.2d 389, 393 (9th Cir. 1965).

¹⁸ 414 U.S. 5 (1973) (per curiam).

per se approach. In *Hibi*, a foreign national sought to estop the government from asserting a statutory deadline for applying for citizenship against him, arguing that the government neither informed him of his right to apply nor stationed nationalization officials in his country during the applicable statutory period.¹⁹ In language that echoed *Montana*, the Court held that the government could not be estopped because failure to publicize rights or station officials in a foreign country did not amount to "affirmative misconduct."²⁰ The Court seemed to suggest that if the government could be estopped at all, a plaintiff would have to make at least this much of a showing in order to prevail on such a claim.

Against a backdrop of several lower court decisions over the next eight years that found "affirmative misconduct" and estopped the government,²¹ the Supreme Court addressed the issue again in *Schweiker v. Hansen*.²² In *Hansen*, the plaintiff tried to estop the government from enforcing a regulation that required potential beneficiaries under the Social Security Act to file written applications in order to qualify for certain insurance benefits. Although she would have been eligible to obtain these benefits had she filed the required application, the plaintiff failed to qualify because a government field agent, who mistakenly believed that the plaintiff was ineligible, instructed her not to apply. Despite sympathy for plaintiff's predicament, the Court declined the invitation to estop the government, holding that the plaintiff had failed to establish the requisite "affirmative misconduct."²³

In reaching this decision, the Court refused to adopt the lower court's analysis, which had suggested that it was more appropriate to estop the government when a procedural requirement had been asserted than when a substantive requirement was involved.²⁴ The Court reinforced its favorable treatment of the government in estoppel cases by resurrecting the concerns expressed in *Merrill* about congressional limitations on public expenditures.²⁵ Finally,

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¹⁹ *Id.* at 6-8.

²⁰ *Id.* at 8-9.

²¹ See *Villena v. INS*, 622 F.2d 1352, 1361 (9th Cir. 1980) (four-year delay in considering occupational preference classification is affirmative misconduct); *Sun Il Yoo v. INS*, 534 F.2d 1325 (9th Cir. 1976) (one-year delay in labor certification is affirmative misconduct); *Corniel-Rodriguez v. INS*, 532 F.2d 301 (2d Cir. 1976) (failure to warn unmarried alien that she could be deported if she married before entering the country was affirmative misconduct).

²² 450 U.S. 785 (1981) (per curiam).

²³ *Id.* at 788-90.

²⁴ *Id.* at 790.

²⁵ *Id.* at 788 n.4.

the Court provided some insight into how the elements of private estoppel might apply against the government by suggesting in dicta that reliance upon oral representations of government officials might be per se unreasonable.²⁶

The Supreme Court soon elaborated and expanded upon *Hansen* in *Miranda v. INS*.²⁷ *Miranda* presented an attempt to estop the government based on its long delay in processing a permanent residency petition. The Ninth Circuit construed *Hansen* narrowly to apply only in cases involving the expenditure of public funds, and held that estoppel was appropriate.²⁸ The Supreme Court reversed, expressly rejecting this narrow reading of *Hansen*. Instead, the Court held that mere delay was not affirmative misconduct and that public funds were not the only area "of broad public concern"²⁹ that prevented estoppel of the government.

The Court's most recent consideration of this issue came in *Heckler v. Community Health Services, Inc.*³⁰ A company called Community Health Services (CHS) participated in the Medicare and CETA programs. CHS was reimbursed for the costs of services provided to Medicare recipients, but was doubly reimbursed for some specific operating expenses because of overlap between the two programs. Government regulations prevented this double recovery unless the CETA funds were used as "seed money" for new health care agencies or for expanded services at existing agencies. CHS's fiscal intermediary, a private party acting on behalf of the government, orally informed CHS that these particular CETA funds fell within the seed money exception. CHS relied on this advice to expand its services and requested reimbursements from the government while continuing to receive CETA grants. When the Health and Human Services Department later ruled that the CETA grants were not seed money, CHS sought to block recovery of the funds by estopping the government from asserting its con-

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²⁶ *Id.* The decision in *Hansen* has been described as "quite a significant setback in the gradual development by the lower courts of law that the government may be estopped." 4 KENNETH DAVIS, *ADMINISTRATIVE LAW TREATISE* § 20:5 (2d ed. 1983). By concentrating on conduct that could justify estoppel, others argue the Court implied that the government could be estopped. *Recent Developments*, *supra* note 15, at 1072; 4 K. DAVIS, *supra*, § 20:5. The result is that no one knows for sure whether the lower court decisions estopping the government remain valid. See *New Jersey v. HHS*, 670 F.2d 1284, 1296 n.17 (3d Cir.) (where lower court decisions diverge from traditional rule against equitable estoppel of the government, many may be irreconcilable with *Hansen*), *cert. denied*, 459 U.S. 824 (1982).

²⁷ 459 U.S. 14 (1982) (per curiam).

²⁸ 673 F.2d 1105 (9th Cir.), *rev'd*, 459 U.S. 14 (1982).

²⁹ 459 U.S. at 19.

³⁰ 467 U.S. 51 (1984).

cededly correct interpretation of the regulations in an action against CHS.

Although the Third Circuit accepted this argument and estopped the government, a unanimous Supreme Court reversed.³¹ The Court rested its decision on the ground that CHS failed to establish the requisite elements of private estoppel.³² The decision also echoed *Merrill's* insistence that citizens are presumed to know the law and that they may not rely on agents' erroneous statements of it; the Court simply concluded that the government cannot be expected to guarantee that every piece of informal advice will be accurate.³³ Once again, however, the Court refused to hold that the government could never be estopped, stating that there could be some cases in which "the public interest" would require it.³⁴

Heckler's recent statement of the law still leaves this issue very confused. Although the Supreme Court has consistently reversed lower court decisions granting estoppel, it has continued to leave open the possibility that equitable estoppel might apply against the government in some cases. While the series of reversals demonstrates that the Supreme Court takes an inhospitable view of this possibility, the boundaries of its analysis are not clear. This lack of clarity shows up in the variety of positions and analyses that the lower courts have employed in such cases.³⁵ Until the Su-

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³¹ The Third Circuit acknowledged that the government could not be estopped as readily as a private party, but it still granted the estoppel. *Community Health Servs., Inc. v. Califano*, 698 F.2d 615, 620-21 (3d Cir. 1983), *rev'd*, 467 U.S. 51 (1984). It found detrimental reliance by considering the effect of withdrawing the funds on indigent county residents because of the error of the only government agent CHS could consult. *Id.* at 625-26. Affirmative misconduct was found in the intermediary's violation of an HHS regulation requiring it to confirm its advice with HHS. *Id.* at 623-24.

³² 467 U.S. at 60-61. The Court held that surrendering funds a citizen had used but was not entitled to did not constitute detriment, as the expansion occurred through the unlawful use of those funds. *Id.* at 62-63. CHS lost no legal right and was not harmed by any change of position. *Id.*

³³ *Id.* at 63 & n.17.

³⁴ *Id.* at 60.

³⁵ At least six different standards have been applied in the lower federal courts: (1) courts have relied upon general notions of fairness, *see, e.g., Community Health Servs., Inc. v. Califano*, 698 F.2d 615, 627 (3d Cir. 1983), *rev'd*, 467 U.S. 51 (1984); *United States v. Lazy FC Ranch*, 481 F.2d 985, 989 (9th Cir. 1973); (2) courts have employed an "affirmative misconduct" standard, though with varying results, *compare Leimbach v. Califano*, 596 F.2d 300, 304 (8th Cir. 1979) (misinformation does not estop), *with United States v. Ruby Co.*, 588 F.2d 697, 703-04 (9th Cir. 1978) (affirmative misconduct is "affirmative misrepresentation or affirmative concealment of a material fact by the government"), *cert. denied*, 442 U.S. 917 (1979), *and with Corniel-Rodriguez v. INS*, 532 F.2d 301, 306-07 (2d Cir. 1976) (affirmative misconduct only if government agent violates affirmative procedure required by regulations); (3) courts have adopted a balancing test that compares the interests of the

preme Court sets forth the policies that underlie its decisions in more detail, this confusion is likely to continue.

II. THE POLICIES IMPLICATED BY ESTOPPEL AGAINST THE GOVERNMENT

The doctrine of estoppel has been justified as an equitable doctrine that prevents parties from taking advantage of their own wrongs.³⁶ The Supreme Court's decisions about the application of estoppel to unauthorized official conduct raise the difficult question of why the government deserves special treatment under the doctrine. Why should the government be permitted to take advantage of the wrongs of its agents when private litigants who are similarly situated would be estopped? Although the cases fail to spell out any compelling rationale, two interests peculiar to the government may offset the benefits that normally are taken to justify the imposition of an estoppel: protection of the public fisc and preservation of the separation of powers. The following subsections examine how these policies bear on estoppel against the government.

A. Protection of the Public Fisc

The most common justification for special treatment of the government in estoppel decisions is to protect the public fisc. Indeed, the Court explicitly endorsed that rationale in *Merrill*³⁷ and *Hansen*.³⁸ Although the Court never explained how a refusal to estop the government would protect the public fisc, many explanations are apparent. First, a rule of no estoppel in cases against the

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government and the interests of the individual, *see, e.g.*, *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 100 (9th Cir. 1970); (4) still others differentiate between sovereign and proprietary functions, allowing estoppel of the government in the latter cases where the requisites of private estoppel are established, *see, e.g.*, *George v. Railroad Retirement Bd.*, 738 F.2d 1233, 1236 (11th Cir. 1984); *FDIC v. Harrison*, 735 F.2d 408, 411 (11th Cir. 1984); *Hicks v. Harris*, 606 F.2d 65, 68 (5th Cir. 1979), though the validity of that approach is doubtful in light of *Merrill*, which found no estoppel where the Court assumed that the requisites of private estoppel were established and that the government was acting in a capacity analogous to a private insurer; (5) others simply hold that the federal government is not liable for the unauthorized acts of its agents, *see, e.g.*, *Werner v. Department of Interior, Fish & Wildlife Serv.*, 581 F.2d 168, 172 (8th Cir. 1978); *United States v. Ulvedal*, 372 F.2d 31, 35 (8th Cir. 1967); and (6) some courts have held that the government may be estopped from asserting a mere procedural, as opposed to a substantive, statutory or regulatory requirement, *see Hansen v. Harris*, 619 F.2d 942, 948-49 (2d Cir. 1980), *rev'd*, 450 U.S. 785 (1981) (*per curiam*). The Supreme Court cast doubt on this approach, however, by its discussion in reversing *Hansen*.

³⁶ *See supra* note 5 and accompanying text.

³⁷ 332 U.S. at 385.

³⁸ 450 U.S. at 788 n.4.

government reduces the risk that misrepresentations and omissions by the government's agents will cause it to suffer financial losses. Second, such a rule ensures that Congress's constitutional power to spend and allocate resources is not interfered with by judicial enforcement of unauthorized expenditures. Third, the rule prevents the diversion of resources away from other government programs to pay for the damage caused by estoppel. Fourth, a no estoppel rule discourages individuals who feel aggrieved by onerous statutes and regulations from resorting to collusion with government officials, perhaps through bribery, in order to secure favorable official misrepresentations that would bind the government in future litigation.

The capacity of an estoppel rule to affect the public fisc should not be underestimated. A Seventh Circuit decision, *Portmann v. United States*,³⁹ provides an excellent illustration of the potential impact of an estoppel upon the public treasury. A citizen who wished to mail valuable photographs paid to insure them after a Postal Service employee assured her that the fee would provide insurance of up to \$50,000. After the packages were lost, the Postal Service stated that it could pay only \$500 because the applicable regulations classified the photographs as "merchandise" rather than as "negotiable documents." Distinguishing the Supreme Court's decision in *Merrill*, the Seventh Circuit estopped the Postal Service from asserting the regulation as a defense in the citizen's action. Although the court professed concern for the public fisc, arguing rather abstractly that a failure to estop the government from asserting the regulation would lower consumer confidence and hence reduce revenues,⁴⁰ the court's decision to estop the government actually cost the public treasury several thousand dollars.

Nonetheless, there are several reasons to doubt whether the public fisc rationale can explain the Court's estoppel decisions. To begin with, in many cases the plaintiff seeking estoppel would be statutorily entitled to the benefit but for the misconduct by a government official. This was the case in *Schweiker v. Hansen*, for example, where the plaintiff would have been entitled to Social Security but for the official's negligence. In these cases, because the payment to the beneficiary has been statutorily authorized, there is no danger of depleting the public fisc, upsetting the budget, or diverting funds from other sources. In fact, prohibiting estoppel in

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³⁹ 674 F.2d 1155 (7th Cir. 1982).

⁴⁰ *Id.* at 1168-69.

these cases only saves the government money that it would be expected to have spent.

The public fisc rationale is particularly weak in light of the vast resources that the government possesses today: estoppel presents little danger of bankrupting the public treasury. This rationale is further eroded by the fact that the Congress has authorized payment of large and unpredictable amounts in tort claims against the government.⁴¹ And if the primary concern is instead to protect the public fisc by deterring collusion between private parties and government agents, a rule of no estoppel is a curiously circuitous measure that hardly provides much additional deterrence beyond the vigorous enforcement of criminal sanctions against those who commit fraud.⁴²

The public fisc rationale is also far too narrow to support a universal rule against estoppel.⁴³ While it is not difficult to extend the public fisc analysis to public land cases,⁴⁴ it is difficult if not impossible to extend that analysis to cover immigration decisions like *INS v. Hibi*,⁴⁵ where the only effect of an estoppel would be to grant citizenship to the applicant.

Finally, insofar as the no estoppel rule protects the public fisc by reducing the risk that the government will suffer financial losses

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⁴¹ See The Federal Torts Claim Act, 28 U.S.C. §§ 2671-2680 (1982). This point is a limited response to the vague and general fears that are occasionally expressed about the possible effects of estoppel on the public treasury. One can strongly argue, of course, that the Act explicitly refuses to waive sovereign immunity and permit estoppel to serve as an independent cause of action against the government. Yet this does not preclude the use of estoppel as a procedural bar. For discussion of these issues, see *infra* notes 60-75 and accompanying text.

⁴² See Berger, *supra* note 9, at 684 ("To the extent that a deterrent against public fraud is required, it is supplied by the severe criminal sanctions imposed for defrauding the government.").

⁴³ In *Miranda v. INS*, 459 U.S. 14 (1982) (per curiam), the Supreme Court realized that an exclusive focus on estoppel's effect on the public fisc could result in thwarting important nonmonetary policies mandated by Congress. Consequently, the Supreme Court refused to estop the government in immigration cases. The Supreme Court also has refused to estop the government in cases involving public lands. See *Lee v. Monroe & Thornton*, 11 U.S. (7 Cranch) 366, 369 (1813).

Lower federal courts also have applied the no estoppel rule in cases where estoppel would have little or no effect upon the public fisc. *Jackson v. United States*, 573 F.2d 1189 (Ct. Cl. 1978), provides a good example. The plaintiff, a member of the army reserve, sought to estop the government based upon an army recruiter's representation that the plaintiff would not have to participate in certain combat maneuvers if he enlisted. The Court of Claims refused to grant the estoppel. *But see Johnson v. Williford*, 682 F.2d 868 (9th Cir. 1982).

⁴⁴ See, e.g., *Lee v. Monroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813).

⁴⁵ 414 U.S. 5 (1973) (per curiam), discussed *supra* at notes 18-20 and accompanying text.

from the misrepresentations of its agents, it does so at a high cost—innocent litigants are forced to bear that risk. In most areas of the law, courts strike this balance differently, binding the principal to the acts of his agent as long as the agent acts within the scope of his apparent authority.⁴⁶

B. Separation of Powers

Because the public fisc rationale has limited explanatory power, commentators have tried to develop a more powerful justification for the no estoppel rule. What has emerged is a separate but related rationale based on the doctrine of separation of powers.⁴⁷

This argument begins by noting that the federal judiciary is responsible for maintaining the separation of powers among the three branches of government.⁴⁸ Since the Constitution itself mandates the separation of powers, the Supreme Court's prohibition against a branch's extension of its authority is necessary if the Court is to fulfill its responsibility as the ultimate constitutional interpreter.⁴⁹ But the Court has not preserved the separation of powers for constitutional reasons alone. It has also stressed the doctrine's vital importance to the operation of a limited government. To the framers, "the doctrine of separation of powers was not mere theory; it was a felt necessity,"⁵⁰ designed to prevent arbitrary power⁵¹ and check tyranny.⁵² Consequently, the Court's active role in preserving the separation of powers can be justified by the framers' recognition that "a mere demarcation on parchment

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⁴⁶ Cases demonstrating this principle are numerous in the corporate law context. See, e.g., *Philip Carey Mfg. Co. v. Dean*, 58 F.2d 737 (6th Cir.) (execution of time limitations waiver is within agent's apparent authority and binds corporation), *cert. denied*, 287 U.S. 623 (1932); *In re Mulco Prods., Inc.*, 50 Del. 28, 123 A.2d 95 (Super. Ct.) (borrowing money and executing a corporate note are within agent's apparent authority and binds corporation), *aff'd sub nom. Mulco Prods., Inc. v. Black*, 50 Del. 246, 127 A.2d 851 (1956); *Fair Mercantile Co. v. Union-May-Stern Co.*, 359 Mo. 385, 221 S.W.2d 751 (1949) (compromising corporate note is within agent's apparent authority and binds corporation).

⁴⁷ For the leading discussion of estoppel in cases against the government and the separation of powers, see *Berger*, *supra* note 9; see also Note, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551 (1979).

⁴⁸ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 597 (1952) (Frankfurter, J., concurring).

⁴⁹ See, e.g., *Baker v. Carr*, 369 U.S. 186, 211 (1962); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁵⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring); see also *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (per curiam).

⁵¹ *Myers v. United States*, 272 U.S. 52, 240, 293 (1926) (Brandeis, J., dissenting); see also *INS v. Chadha*, 462 U.S. 919, 959 (1983).

⁵² THE FEDERALIST No. 47, at 301 (J. Madison) (C. Rossiter ed. 1961).

of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."⁵³

The application of the doctrine of separation of powers to estoppel against the government is straightforward. If the government is estopped as a result of unauthorized government action, congressional power to legislate under article I is undermined: in effect, courts would be refusing to apply the law as enacted by Congress because an executive branch official has misrepresented the content of the law to the citizen. Estoppel would endorse the decisions of executive agents that are contrary to congressional commands and directives. The executive branch would be refashioning the law through its errors in individual cases, thus contravening the separation of powers.

By contrast, a rule of no estoppel in unauthorized conduct cases protects legislative power from executive branch encroachment. It recognizes that executive branch officials may not exercise powers beyond those delegated by Congress.⁵⁴ Congress has not delegated the power to alter statutory requirements to such officials, and a citizen's reliance, even if sufficient to support estoppel in an action against another private party, cannot confer such power upon the executive.

Separation of powers concerns weigh just as heavily against a litigant who seeks to estop enforcement of an administrative regulation as they do against a litigant who seeks to estop enforcement of a statute. This proposition is supported by the Supreme Court's decisions in *Merrill*, *Hansen*, and *Heckler*, where the Court treated administrative action as a manifestation of congressional power rather than as executive power.⁵⁵ Thus, estoppel involving an administrative regulation adopted within the terms of a governing statute raises separation of powers concerns similar to estoppel involving the statute itself.⁵⁶

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⁵³ THE FEDERALIST No. 48, *supra* note 52, at 313 (J. Madison).

⁵⁴ See *Berger*, *supra* note 9, at 686; *Housing Auth. v. Bergland*, 749 F.2d 1184, 1190 (6th Cir. 1984); *Recent Development*, *Schweiker v. Hansen: Equitable Estoppel Against the Government*, 67 CORNELL L. REV. 609, 614-15 (1982).

⁵⁵ *Heckler*, 467 U.S. at 63; *Hansen*, 450 U.S. at 788; *Merrill*, 332 U.S. at 385.

⁵⁶ Even if the Court characterized administrative action as an exercise of executive power, as it typically does in the context of the nondelegation doctrine, *see, e.g.*, *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983), the conclusion that separation of powers concerns are absent when the courts estop the government from enforcing federal regulations does not follow. Since regulations adopted by agencies are not subject to the requirements of bicameralism and presentment to the President, they take on the force of law in a manner that is

Separation of powers analysis also makes clear that estoppel should be allowed where the official has acted in a capacity authorized by statute. An action that is properly authorized by the legislature cannot be seen as an encroachment by the executive branch upon the legislative branch. Thus, the separation of powers doctrine offers no obstacle to estopping the government in cases of authorized conduct.

The case law generally reflects this same dichotomy.⁵⁷ For example, in *Vestal v. Commissioner*,⁵⁸ the District of Columbia Circuit held that the IRS, having collected taxes from a group of people by treating them as a partnership, should be estopped from collecting taxes again by treating the same entity as a corporation.⁵⁹ A separation of powers analysis justifies this result. When the Commissioner initially treated the taxpayer as a partnership, he did so with clear congressional authorization: he acted in a manner consistent with the Internal Revenue Code. Nothing in the statute, however, authorized the Commission to tax the group again as a corporation. Because estoppel in this case would not frustrate congressional intent, it would not contravene separation of powers principles.

III. THE APPROPRIATE CASE FOR ESTOPPEL AGAINST THE GOVERNMENT

The previous section demonstrated that the Supreme Court's reluctance to apply estoppel against the government derives from two basic concerns: the weaker concern about impairing the public fisc and the stronger concern about violating the separation of powers. These same concerns underlie the doctrine of sovereign immunity, which prohibits suits against the government without its consent. In identifying the appropriate case for estoppel against

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consistent with the separation of powers only if the agency acts within the scope of its authority. Thus, in adopting regulations, agencies must adhere to the standards stated in their organic legislation and must follow the procedures set forth in the Administrative Procedure Act. *See* 5 U.S.C. §§ 551-559 (1982).

To ensure compliance with their organic statutes and the Administrative Procedure Act, agency regulations are subject to judicial review. *See id.* §§ 701-706. Were courts to estop the enforcement of regulations based on officials' unauthorized statements, they would in effect be granting the force of law to agency action that failed to comply with the APA and was not subject to judicial review, a result that is also inconsistent with the separation of powers. Consequently, similar separation of powers concerns should guide the use of estoppel in both the statutory and regulatory contexts.

⁵⁷ *See supra* notes 7-9 and accompanying text.

⁵⁸ 152 F.2d 132 (D.C. Cir. 1945).

⁵⁹ *Id.* at 136-37.

the government, two very different kinds of cases must be distinguished: those in which estoppel is sought merely as a procedural device to bar a defense and those in which estoppel is used to assert an independent cause of action for misrepresentation. This section argues that the use of estoppel to assert an independent cause of action is inappropriate because the consent of the sovereign is necessary to bring such cases. Accordingly, estoppel of the government is only appropriate in cases where it is used as a procedural device to bar a defense. But, as this section will argue, even in these cases estoppel should be allowed only when intentional or reckless government conduct has caused a plaintiff to fail to qualify for statutory benefits.

A. Estoppel Versus Misrepresentation

Because estoppel involves the forfeiture of government claims and defenses without the consent of the sovereign, it can be viewed as a violation of sovereign immunity. Oddly, this argument has rarely appeared either in judicial opinions or in scholarly work.⁶⁰ This may reflect dissatisfaction with the sovereign immunity doctrine, which has been much-criticized.⁶¹ It may also be attributable to the popular characterization of estoppel as a purely procedural device. Estoppel against the government developed as part of the administrative law powers of the federal courts, which were largely based on common law before the enactment of the Administrative Procedure Act.⁶² Thus, estoppel has usually been treated as a procedural mechanism that merely precludes a party from asserting a defense, and has not been seen as an independent cause of action that would require the blessing of Congress.

Nonetheless, several of the cases in which estoppel has been sought against the government can be viewed as attempts to assert an independent cause of action against the government based on the misrepresentations of its agents.⁶³ These cases can be con-

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⁶⁰ One of the few estoppel cases mentioning sovereign immunity is *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 98-99 (9th Cir. 1970). See also *Berger*, *supra* note 9, at 683.

⁶¹ See, e.g., *Georgia-Pacific Co.*, 421 F.2d at 99 & nn.13-14; *Note*, *supra* note 47, at 554.

⁶² See, e.g., 1 K. DAVIS, *supra* note 26, §§ 1:5-:8 (1978).

⁶³ Tort claims against the government based solely on misrepresentation are barred by the Federal Tort Claims Act. See 28 U.S.C. § 2680(h) (1982). This exception has been applied to cases in which plaintiffs have relied on statements by the government to their financial detriment. In *Neustadt v. United States*, 366 U.S. 696 (1961), for example, the Supreme Court barred the plaintiff's claim alleging that he had purchased his home for more than it was worth in reliance upon an appraisal by a Federal Housing Administration official. *Neustadt* was somewhat limited, however, by *Block v. Neal*, 460 U.S. 289 (1983), where it was

trusted with those in which statements by government agents cause an individual to fail to qualify for benefits to which he would otherwise have been entitled.

A good example of an estoppel case that resembles an action for misrepresentation is *Merrill*,⁶⁴ where two farmers relied to their detriment on a government agent's advice that their entire wheat crop would be insured. This representation did not cause the plaintiffs to fail to qualify for a statutory benefit; thus, the plaintiffs were actually asserting estoppel as an independent cause of action for misrepresentation rather than as a procedural bar. *Heckler*⁶⁵ is another such case, for CHS relied on the government's advice that government funds could be used to pay for a certain type of expenditure that was in fact barred by regulations. The group then sought to block the government from recovering the funds by estopping it from asserting the existence of the regulation.⁶⁶ Once again, estoppel in this case would have allowed the plaintiff to claim a government benefit for which it could not have qualified in the absence of any misrepresentation.

Along the same lines as *Merrill* and *Heckler* is the Seventh Circuit's decision in *Portmann*,⁶⁷ where the postal employee told a citizen that her package would be insured for \$50,000 although the applicable regulations limited insurance benefits to \$500. Under these facts, the citizen did not purchase \$50,000 of insurance from the post office and could not have done so even if the postal employee had correctly represented the law. The postal employee's misrepresentation did cause the citizen to forgo an opportunity to mail her package by private delivery service, where greater insurance benefits were available, but did not cause her to fail to take appropriate actions to qualify for government benefits.

Because the government conduct in this class of cases does not cause individuals to fail to qualify for government benefits to which they would otherwise be entitled, the application of estoppel would violate sovereign immunity. Estoppel is not being used

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held that the misrepresentation exception did not apply where a government official affirmatively undertook to supervise construction of the plaintiff's house. This undertaking was held "distinct from any duty to use care in communicating information to respondent." *Id.* at 297.

⁶⁴ 332 U.S. 380 (1947), discussed *supra* notes 10-13 and accompanying text.

⁶⁵ 467 U.S. 51 (1984), discussed *supra* notes 30-34 and accompanying text.

⁶⁶ For another estoppel case that is similar to a cause of action for misrepresentation, see *United States v. Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973), where the effect of estopping the government was to allow a partnership to receive payments it would not have been entitled to but for the misrepresentation.

⁶⁷ 674 F.2d 1155 (7th Cir. 1982), discussed *supra* notes 39-40 and accompanying text.

merely as a procedural device to bar the government from asserting a defense, but is being offered as the basis for an independent cause of action. This use of estoppel also endangers the public fisc since it compels government expenditures that were never authorized by Congress. In addition, separation of powers principles may well be violated, since estoppel in effect would allow executive usurpation of Congress's power to legislate and allocate government resources.

Moreover, cases like these—having no basis in any statutory entitlement—differ greatly from cases where the plaintiff would have qualified for a statutory benefit had the government agent acted properly. In the latter class of cases, the plaintiff asserts estoppel against the government to gain access to government benefits for which he is not statutorily entitled in fact but for which he *could* have satisfied the statutory requirements had the government official rendered the correct advice. The Supreme Court's decision in *Hansen*⁶⁸ is the paradigm for this kind of claim. Hansen failed to qualify for social security benefits after a government official instructed her not to file a written application, incorrectly believing that the citizen failed to satisfy statutory requirements. Under these circumstances, it can be said that the field agent's misrepresentation actually caused the citizen to fail to qualify for the benefits.

Similarly, in the *Hibi* case⁶⁹ the INS did not properly implement an immigration program that was intended to aid foreign nationals who had served in the United States Armed Forces during World War II. Under the program, the INS was supposed to station immigration officials in foreign countries so that qualified veterans could apply for United States citizenship. The INS failed, however, to station officials in the Philippines before the statutory period for applications expired. Disgruntled veterans brought suit seeking American citizenship, arguing that the INS should be estopped from asserting as a defense the plaintiff's failure to comply with the statutory deadline for applications. The veterans argued with considerable force that but for the government's misconduct they would have qualified for citizenship.⁷⁰

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⁶⁸ 450 U.S. 785 (1981), discussed *supra* at notes 22-26 and accompanying text.

⁶⁹ 414 U.S. 5 (1973).

⁷⁰ There is, of course, always a question whether the causal relationship between the government's misconduct and the plaintiff's harm is close enough to support an estoppel. This problem also arose in *Montana v. Kennedy*, 366 U.S. 308 (1961), where an alien sought to estop the government from asserting his lack of citizenship on the ground that he would have been born here but for an American immigration official's erroneous advice that his

This second class of cases presents a much stronger basis for estopping the government. Sovereign immunity concerns are much weaker because the plaintiffs are using estoppel not to assert an independent cause of action but rather to claim a government benefit to which they would be entitled but for the government's misconduct. The estoppel is no more than a procedural device that prevents the government from asserting a defense against a plaintiff's statutorily based claim; thus, there is no need for sovereign authorization. Moreover, the plaintiff is claiming a benefit for which Congress already has allocated resources.⁷¹ Because the plaintiff would have been entitled to those resources in the absence of any misconduct, allowing the estoppel does not threaten the public fisc.

In addition, general fairness concerns weigh in favor of estoppel when the government's misrepresentations cause an individual not to qualify for a statutory benefit. The Supreme Court has recognized that in today's welfare state, where many people rely on a large array of government benefits, statutory entitlements are tantamount to property and thus are protected by the due process clause.⁷² The government need not provide the benefits in the first place, but once it does so it must also afford procedural protections for those who are entitled to receive them.⁷³ Along the same lines, there is a strong argument that when government misconduct deprives beneficiaries of statutory entitlements, due process princi-

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mother could not return to the United States.

Other cases in which misinformation by government officials caused plaintiffs not to qualify for statutory benefits include *Cheers v. Secretary of HEW*, 610 F.2d 463 (7th Cir. 1979) (plaintiff failed to file a written application for social security benefits after being erroneously told he was ineligible); *Leimbach v. Califano*, 596 F.2d 300 (8th Cir. 1979) (social security administration erroneously told plaintiff his children were not eligible for survivors' benefits); *United States v. Wharton*, 514 F.2d 406 (9th Cir. 1975) (plaintiffs failed to perfect homesteading claims as a result of government misinformation); *Miller v. United States*, 500 F.2d 1007 (2d Cir. 1974) (taxpayer's refund suit was filed late as a result of government misinformation); *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970) (government failure to notify plaintiffs of an appeal requirement caused them to fail to qualify for an oil and gas lease); *United States v. Fox Lake State Bank*, 366 F.2d 962 (7th Cir. 1966) (government misconduct would have caused bank to forfeit insurance claims on loans).

⁷¹ See, e.g., *Hansen v. Harris*, 619 F.2d 942, 962 (2d Cir. 1980) (Newman, J., concurring) (court's decision estopping the government from asserting the plaintiff's lack of a written social security application "does not drain the public fisc of one dollar that is being spent either in excess of anticipated benefit levels or contrary to a substantive policy decision of the Congress."), *rev'd sub nom.* *Schweiker v. Hansen*, 450 U.S. 785 (1981) (per curiam).

⁷² See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970); see also Reich, *The New Property*, 73 YALE L.J. 733 (1964).

⁷³ See, e.g., *Goldberg*, 397 U.S. at 261-63.

ples of fairness are implicated.

As with the first class of estoppel cases, however, this second class of cases raises separation of powers concerns. Estopping the government leaves a litigant in possession of government benefits even though he concededly failed to satisfy statutory or regulatory requirements. Congress is normally presumed to intend compliance with all of the requirements it imposes; hence, an estoppel that circumvents such procedural requirements as deadlines and filing details, on the basis that the estoppel will further the substantive purposes of the statute, does indeed frustrate congressional intent to some extent.⁷⁴ Requirements as they were erroneously stated by an unelected official are substituted for requirements as they were actually set forth by Congress or the appropriate regulatory agency.

Nonetheless, a countervailing separation of powers concern is present in the second class of cases that is absent in the first; in order to vindicate the more fundamental purposes of a statute, it may be necessary for the judiciary to permit a lesser breach of congressional will. In cases like *Hansen* the detriment suffered by citizens is the failure to qualify for government benefits. Yet Congress intended these litigants to receive the benefits if they were willing to undertake the effort of applying for them. Only through the government's misrepresentations did the citizens not undertake that effort and receive the benefits Congress had determined they should have. In such cases, not permitting the litigants to estop the government effectively frustrates the congressional judgment to award the benefits. In effect, a no estoppel rule permits the executive branch to undermine legislative programs—and thus the separation of powers—simply by intentionally or unintentionally misinforming the public. Thus, the application of estoppel in this second class of cases can be understood as preserving the separation of powers by ensuring that executive officials cannot block benefits from going to those whom Congress intended to have them.

This same argument cannot be made in the first class of cases, where the misrepresentations do not cause citizens to fail to qualify for government benefits they would have been authorized to re-

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⁷⁴ As Judge Friendly noted in his dissent from the lower court's decision in *Hansen*: "Congress did *not* wish all those eligible for divorced mother's security benefits to receive them as from the date of their eligibility. It wished such benefits to flow only to those applying for them as prescribed by HEW." *Hansen v. Harris*, 619 F.2d 942, 957 (2d Cir. 1980) (Friendly, J., dissenting) (emphasis in original).

ceive. In these cases, Congress did not intend the litigants to receive the benefits they seek. The *Portmann* case⁷⁵ is an example. There the statute limited insurance benefits to \$500, and Congress clearly intended that no citizen would receive any larger amount. In this context, a no estoppel rule maintains the separation of powers by preventing the executive from disrupting legislative programs.

B. Affirmative Misconduct

The previous section has shown why estoppel against the government should only be allowed when an individual would have received a statutory benefit but for misrepresentations by government agents.⁷⁶ Even in those cases, however, estoppel involves a tension between two competing separation of powers concerns. A no estoppel rule would frustrate Congress's general intent to provide a class of persons with benefits; an estoppel rule would frustrate statutory or regulatory requirements enacted to govern distribution of those benefits.

The affirmative misconduct standard suggested by the Supreme Court presents one way to ease this tension. Affirmative misconduct can be viewed as an element that tips the separation of powers balance decisively in favor of estoppel against the government. Although the Supreme Court has never defined the affirmative misconduct standard,⁷⁷ it should be understood to include conduct whereby a government official intentionally or recklessly deprives a beneficiary of a statutory benefit.⁷⁸

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⁷⁵ 674 F.2d 1155 (7th Cir. 1982), discussed *supra* notes 39-40, 67, and accompanying text.

⁷⁶ This approach does not rest on the distinction between procedure and substance that was emphasized by the Second Circuit and rejected by the Supreme Court in the *Hansen* case. Instead, this approach focuses on conduct that causes a plaintiff to fail to comply with either the substantive or the procedural terms of a statute or regulation.

⁷⁷ See *supra* notes 10-35 and accompanying text.

⁷⁸ Reckless conduct may occur when a government official gives out information with reckless disregard for whether the information is true or not or when an individual fails to qualify for a government benefit as a result of an official's reckless violation of a government regulation. The Supreme Court has noted that whether an official violated a regulation is relevant to the affirmative misconduct standard. *Hansen*, 450 U.S. at 789-90. See also *Corniel-Rodriguez v. INS*, 532 F.2d 301 (2d Cir. 1976), where a woman was denied an immigrant visa because she married before entering the country, for an example of a finding of affirmative misconduct where an official violated a government regulation. The court held that the government was estopped from asserting the plaintiff's lack of a visa because immigration officials had failed to comply with a regulation requiring them to warn her that she would be ineligible for the visa if she married.

It should be stressed again that an official's failure to comply with a regulation does not

Intentional or reckless executive branch misconduct that undermines a legislative program poses greater separation of powers concerns—and consequently a stronger case for abandoning the no estoppel rule—than does negligent misconduct. Intentional or reckless subversion of the legislative branch's actions is likely to present more of an encroachment by the executive branch and to engender more friction between the branches. By contrast, when the executive branch is negligent in its efforts to comply with congressional directives, at least it has acted in good faith rather than showing blatant disregard for congressional interests. General fairness concerns under the due process clause are also implicated more strongly when the government intentionally or recklessly deprives beneficiaries of their statutory entitlements.

Moreover, only in cases of intentional or reckless misconduct is estoppel necessary to preserve public confidence in government. Negligent conduct may be more understandable, and indeed is well-nigh inevitable on occasion as a byproduct of a large government bureaucracy. In contrast, citizens are entitled to expect that their government will not engage in gross misconduct against them. As the Supreme Court stated in the *Heckler* case, there are cases "in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government."⁷⁹ In such cases, innocent victims should not be forced to suffer the consequences of government misconduct. And while individuals are harmed by negligent conduct as well as by intentional and reckless conduct, an individual who is the victim of gross misconduct rather than mere negligence typically suffers a greater psychological harm.

Pragmatic concerns also counsel in favor of limiting estoppel against the government to cases of intentional or reckless misconduct. A large array of suits for negligence would threaten a more significant interference with government operations, as well as subject the government more frequently to the burdens of defending against frivolous claims. Allowing estoppel in negligence cases may

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itself end the inquiry: the individual's legal authority to obtain the benefit must still be considered. Thus, while the Third Circuit in *Heckler* found affirmative misconduct in the agent's failure to confirm his advice with HHS, see 698 F.2d at 623-24, the Supreme Court properly disregarded this conclusion. Had the regulations been complied with, HHS still would have denied plaintiff the double recovery, for in any event the plaintiff would not have been entitled to receive it.

⁷⁹ 467 U.S. at 60-61.

also deter government officials from giving needed advice in the first place.⁸⁰ This concern is much weaker with an intentional or reckless misconduct requirement.

The Supreme Court's affirmative misconduct standard can be viewed as an attempt to limit the potentially far-reaching effects if the government could be estopped in every case where its agents have given out wrong information by mistake. Some such limit is critically necessary if estoppel is to be applied against the govern-

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⁸⁰ The impact of various alternative estoppel rules on the cost of information is unclear. Some advocates of estoppel against the government state that economic analysis favors their position. In their view, applying the estoppel rule just as it would apply to private parties would eliminate transaction costs currently borne by citizens who, to protect themselves against faulty government advice, either must investigate the reliability of the advice or must purchase insurance, where they can obtain it at all, by finding an agent, paying policy premiums, and filing a loss claim. See Comment, *Never Trust a Bureaucrat: Estoppel Against the Government*, 42 S. CAL. L. REV. 391, 405 (1969). According to this argument, the risk of loss should be placed on the party that can most easily prevent it. Since a government agent possesses greater expertise and access to information than a private citizen, the loss should fall on the government. Moreover, the government can more easily discover the error, for its agents will be exposed to information that could alert them later to their previous mistake. In contrast, a wheat farmer told that his crop will be insured is unlikely to check continually to confirm that the advice is still correct. *Id.* at 404. In addition, allowing estoppel permits the loss to be distributed through society by higher taxes, causing less dislocation than if the relying individual bears the entire cost. By contrast, some companies may choose not to contract with the government if estoppel is not allowed. To the extent that these firms tend to be the most efficient producers, society will have to pay more for the services rendered by these firms. *Id.* at 406.

Yet another scholar argues that estopping the government would be economically inefficient. See Braustein, *In Defense of Traditional Immunity—Toward an Economic Rationale for Not Estopping the Government*, 14 RUTGERS L.J. 1 (1982). The reduction in information offered by the government under a rule estopping the government would increase rather than decrease transaction costs, according to one study. This would occur because information would be withheld, leading to imperfect data, which would result in less optimal choices than if the information were provided. Simply stated, more information is better than less information as long as it is reliable, and a rule estopping the government would deter it from providing information. *Id.* at 35.

In the final analysis, this debate resolves itself into the empirical question whether so much information currently is unreliable that a no estoppel rule would lead to transaction costs exceeding the costs of the information withheld under a more lenient rule. The resolution of this question is open to debate, but it should be noted that the arguments for applying estoppel may overestimate the transaction costs of the more restrictive rule. If in fact few individuals check government advice, then the transaction costs of research are low. Also, the restrictive rule does not create insurance transaction costs. At present, insurance is rarely purchased to guard against inaccurate government advice, especially by individuals who are welfare recipients or new immigrants. On the other hand, in the absence of insurance or requests for advice, private parties have no alternative but to bear the risk themselves, which creates costs that seem hidden but are nonetheless real. One further point of interest is that the lenient alternative rule might add inefficiencies by increasing the number of requests for government advice. If one's own incorrect reading of a statute does not afford relief, while the mistaken reading of the same statute by a bureaucrat may do so, this provides an incentive not to check the rule for oneself, but to ask an official to do so.

ment at all. In addition, this particular standard achieves the proper balance between the two competing separation of powers concerns, as well as addresses the policy issues that arise with claims of estoppel against the government.

CONCLUSION

Although the Supreme Court has repeatedly reversed lower court decisions estopping the government, it has steadfastly refused to rule out the possibility that the government might be estopped in some cases. Yet the Court has refused to indicate what the appropriate case would be, noting only that estoppel may be warranted where the government has engaged in "affirmative misconduct." This comment has argued that estoppel should apply when intentional or reckless unauthorized conduct by executive branch officials causes citizens to fail to qualify for government benefits. This approach gives meaning to the Court's affirmative misconduct standard and resolves the separation of powers concerns that arise if estoppel is applied against the government.

Fred Ansell