UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324c Proceeding CASE NO. 93C00208
ARMANDO ALVAREZ-SUAREZ, Respondent.	)	

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT
AND
GRANTING AND DENYING IN PART COMPLAINANT'S MOTION
TO STRIKE AFFIRMATIVE DEFENSES

I. *Introduction and Procedural History*

Before this Administrative Law Judge are Complainant's Motion for Default Judgment and Motion to Strike Affirmative Defenses. These motions were filed pursuant to 28 C.F.R. §§ 68.1, 68.9(b) and 68.7 and Rule 12(f) of the Federal Rules of Civil Procedure.

On November 19, 1993 a Complaint was filed by the United States Department of Justice Immigration and Naturalization Service ("Complainant" or "INS") against Armando Alvarez-Suarez ("Respondent" or "Alvarez-Suarez") alleging that sometime after November 29, 1990, Alvarez-Suarez knowingly provided two forged, counterfeited, altered, and falsely made documents for the purpose of satisfying a requirement of the Immigration and Nationality Act in violation of 274C(a)(2) of the

Immigration and Nationality Act, 8 U.S.C. § 1324c(a)(2). The documents provided, as alleged in the Complaint, are an I-551 Resident Alien Card #A90012445 in the name of Guadalupe Figueroa-Torres and an I-551 resident Alien Card #A90014441 in the name of Enrique Vargas Garcia. The Complaint does not state to whom Respondent provided these documents.

On February 29, 1994 Respondent filed his answer to the complaint denying in its entirety the allegations in Count I and raising as affirmative defenses that the complaint: (1) is barred by the doctrine of res judicata; (2) is a violation of Respondent's civil and constitutional rights set forth in 42 U.S.C. § 1983; and (3) is a violation by Complainant of 18 U.S.C. § 1546.

On March 2, 1994, I issued my standard Pre-trial Order directing the parties to inter alia begin discovery and set the case for an evidentiary hearing on June 20, 1994 at San Francisco, California. On June 7, 1994 because of the motions now before me, I continued the hearing date until future order.

On March 30, 1994 Complainant filed a Motion to Strike Respondent's Affirmative Defenses and a Motion for Default Judgment. More specifically, Complainant moves to strike Respondent's affirmatives defenses that the complaint filed herein (1) is barred by the doctrine of res judicata; (2) is a violation of Respondent's civil and constitutional rights set forth in 42 U.S.C. § 1983; and (3) is a violation by Complainant of 18 U.S.C. § 1546.

In its motion for default, Complainant states Respondent failed to file a timely answer to the "Notice of Hearing and Complaint Regarding Civil Document Fraud" served upon him and his attorney of record by certified and regular mail on December 13, 1993 because Respondent's answer to the Complaint and his affirmative defenses was not received by OCAHO until February 28, 1994, forty-six (46) days after the date it should have been filed. Complainant further states that Respondent's failure to answer within the thirty (30) days, requires a finding that he is in default. Moreover, argues Complainant, Respondent must have requested that his default be excused and secure leave to answer before his pleading can be recognized, which he failed to do.

Complainant further argues, that in order for Respondent to avoid a default, he must demonstrate good cause for having filed a late answer, and in determining "good cause", an Administrative Law Judge ("ALJ")

may consider a number of factors, including whether Complainant would be prejudiced, whether Respondent has a meritorious defense, and whether culpable conduct on the part of Respondent led to the default.

Complainant argues that it has been prejudiced because: (1) Respondent has been rewarded by having the late filing of his answer trigger the course and timing of this prosecution and Complainant has been required to maintain the integrity of its evidence and witnesses during the delay; (2) Respondent was aware that INS's witnesses are seasonal in their living and working habits and that delays in prosecution undermines Complainant's ability to have witnesses available for trial; (3) If a late answer is allowed to be filed, the ruling will reward the behavior of Respondent's counsel that violates the regulations; (4) Respondent's affirmative defense that the allegations in Count I are subject to the doctrine of res judicata is without merit because there was no prior litigation conducted in district court on criminal charges against Respondent that resulted in a final order dismissing the criminal charges. Although what occurred was that INS referred this case for criminal prosecution to the U.S. Attorney's office, prosecution was declined; (5) Respondent filed his answer without explaining why he waited 46 days before filing an answer; and (6) the absence of cause cannot be determined to be "good cause."

On May 9, 1994, Respondent filed a "Combined Response to Complainant's Motion to Strike and Motion for Default." In its combined response Respondent covers several issues, including the motion for default and the motion to strike in some detail. Respondent refers to several cases and Rule 12(f) of the Federal Rules of Civil Procedure to support its argument that a motion to strike is inappropriate in this case because of disputed questions of law and fact. Respondent argues the following as to why Complainant's motion for default should be denied: (l) at the time of filing Respondent's answer, no motion for default had been filed; (2) I accepted the filing of the answer; (3) if I were inclined to stand on the technical grounds of 28 C.F.R. § 69.9(b), I would have refused to accept Respondent's answer without argument of counsel regarding the date in filing and would not have issued a schedule for proceeding; (4) even if I should find that a party should or must make a request that a default be excused and permit the late filing of the answer, Respondent makes that request and argues that in light of the advanced stage of this case that his request should be granted; (5) the delay has not prejudiced Complainant because, if good cause was shown, the INS would still have to maintain the integrity of its evidence and witnesses during the delay; (6) it is the INS's conduct

that lead to the delay in filing because of insincere settlement overtures, filing of frivolous and vexatious Bar Association grievance against Respondent's counsel; and (7) Respondent's affirmative defense that this proceeding should be dismissed under the doctrine of res judicata is supported by the facts and law.

On May 13, 1994 Complainant filed its response to Respondent's combined response to motion to strike and motion for default judgement.

II. *Legal Analysis and Findings*

A. Motion for Default

The undisputed facts in this case show that on November 19, 1993 the INS filed the complaint in this case with the CAHO. The complaint was served upon Respondent and his attorney of record by certified and regular mail on December 13, 1993. Respondent filed his answer to the complaint with this office on March 1, 1994.

The Respondent had thirty (30) days from December 13, 1993 to file his answer with this office. 28 C.F.R. §§ 68.6, 68.8(a) and (c)(1) and 68.9(a). The answer in this case, therefore, had to be filed with this office on or before January 12, 1994. Since the answer was not filed until March 1, 1994, the answer was 47 days late.

Although Respondent was in default by failing to file his answer on January 12, 1994, I have discretion in granting the motion for default. 28 C.F.R. § 68.9(b); See United States v. Onion River Sports, Inc., OCAHO Case No. 93A00167 (Order Denying Motion for Default Judgement and Denying Motion to Dismiss Order Granting Motion to File Late Answer and Directing Parties to Begin Discovery 11/30/93) at 2 and cases cited therein).

Our regulations provide that the Federal Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules and other specified law. 28 C.F.R. § 68.1. I interpret this regulation to permit me to use federal decisions interpreting the Federal Rules of Civil Procedure as guidelines in deciding similar procedural legal issues under our regulations.

Rule 55(b)(2) of the Federal Rules of Civil procedure provides that an application for default must be filed with the court and notice given to

defaulting party to show cause why default should not be entered and why the requested relief should not be granted. Our regulations do not provide for a notice to the defaulting party to provide he or she with an opportunity to show good cause why a default should not be entered; but the policy and practice of this agency is to require the administrative law judge to issue a show cause order before entering a default. See United States v. Shine Auto Service, 1 OCAHO 70 (Vacation by The Chief Administrative Hearing Officer of the ALJ's Order Denying Default Judgement) (7/14/79) at 3. In that Order the CAHO stated:

> Respondent must justify [in response to the show cause order] its failure to respond in a timely manner. Based on the Respondent's reply the ALJ shall determine whether Respondent has met the threshold for good cause. If the ALJ determines that the Respondent possessed requisite good cause for failing to file a timely answer, then the ALJ may allow the respondent to file a late answer."

Rule 55(c) of the Federal Rules of Civ. Procedure enables the court to set aside an entry of default for good cause.

> The distinction between an entry of default and a default judgment in the federal courts has significance in terms of the procedure (emphasis added) for setting them aside. The party against whom a default has been entered typically will attempt to have his default set aside in order to enable the action to proceed. A motion for relief under Rule 55(c) is appropriate for this purpose even though there has not been a formal entry of default. For example, when defendant fails to answer within the time specified by the rules, he is in default even if that fact is not officially noted. Therefore, he must request that the default be 'excused' and secure leave to answer before his responsive pleading will be recognized." 10 Wright and Miller at 466.

The issue before me is whether Respondent has shown good cause for allowing the filing of late answer in this case. Although I have not formally issued a show cause order, I am satisfied that the motion pleadings filed in this case have provided Respondent with an opportunity to explain why he failed to file a timely answer to the complaint in this case. See Respondent's Combined Response to Motion to Strike and Motion for Default Judgment at pages 8-11.

Federal and OCAHO decisions consistently hold that default judgements are generally not favored and any doubts are resolved in favor of a trial on the merits. See United States v. Onion River Sports, Inc., supra at 3. The federal cases hold that a number of factors may be considered, including: (l) the amount of money potentially involved; (2) whether material issues of fact or issues of substantial importance are at issue; (3) whether the default is largely technical; (4) whether plaintiff has been substantially prejudiced by the delay involved; and (5) whether the grounds are clearly established or are in doubt.

Further, federal courts consider whether the default was caused by good faith mistake or excusable neglect; how harsh an effect a default judgment might have; and whether the court thinks it later would be obliged to set aside the default on defendant's motion. Id.

After a careful consideration of the pleadings filed in this case, I find that there is good cause to grant Respondent's request for filing a late answer. This is based upon: (1) the good faith of Respondent in filing an answer prior to the filing of any motion for default; (2) the long delay in filing an answer was based in part on Respondent's good faith attempts to legitimately negotiate a settlement of this case and avoid the cost and time of filing an answer; (3) the failure of Complainant to file a motion of default until almost thirty days after the answer was filed and after numerous procedural matters had occurred, including commencement of discovery and the setting of the case for an evidentiary hearing; (4) the lack of prejudice to Complainant's case since there has been no showing by Complainant that the delay in this case has had an adverse impact on any of its witnesses or evidence; (5) Respondent's defenses to the charges of fraud in this case raises new and novel legal issues; and most importantly, (6) a default in this case would be a basis for the deportation of Respondent. For all these reasons, I am GRANTING Respondent's request to permit the late filing of his answer (as of 3/1/94) and I am DENYING Complainant's motion for default judgment.

B. Motion to Strike

1. Legal Standard for Motions to Strike Affirmative Defenses

Although the rules of practice and procedure for administrative hearings in cases involving allegations of unlawful employment of aliens provides that Complainant may file a reply responding to each affirmative defense asserted in an answer, they do not expressly provide for motions to strike. See 28 C.F.R. § 68.9(d). The Federal Rules of Civil Procedure, however, may be used as a guideline in any situation not provided for or controlled by the rules. 28 C.F.R. § 68.1.

Rule 12(f) of the Federal Rules of Civil procedure provides that "(u)pon motion . . . the court may order stricken from any pleading any insufficient defense . . . ." This rule has been utilized by the administrative law judges in this office as a guideline in considering motions to strike affirmative defenses. See, e.g., United States v. Applied Computer Technology, 2 OCAHO 306 (3/22/91).

A motion to strike is a drastic remedy and therefore is not favored. 5A C. Wright and A. Miller, Federal Practice and Procedure (hereinafter "C. Wright and A. Miller") § 1380 at 647; Stewart Investment Co. v. Bauer Dredging Const. Co., 323 F.Supp. 907, 909 (D. Md. 1971). More specifically, a motion to strike insufficient defenses, "should not be granted when the sufficiency of the defense depends upon disputed issues of fact or unclear questions of law." United States v. Marisol, Inc., 725 F. Supp. 833, 836 (M.D. Pa. 1989) (a CERCLA case). "The court must review with extreme scrutiny a motion to strike which seeks the opportunity to determine disputed and substantial questions of law, particularly when no significant discovery has occurred in the case." U.S. v. Hardage, 116 F.R.D. 460, 463 (W.D. Okl. 1987) (a CERCLA case). Such questions of law "quite properly are viewed as determinable only after discovery and a hearing on the merits." 5A C. Wright and A. Miller, § 1381 at 674-76. Thus, "even when technically appropriate and well- founded, [a motion to strike is] often not granted in the absence of a showing of prejudice to the moving party." 5A C. Wright and Miller, § 1381 at 672.

It is important to recognize that a motion to strike insufficient defenses "serve[s] a useful purpose by eliminating insufficient defenses and saving the time and expense which would otherwise be spent in litigating issues which would not affect the outcome of the case." Marisol, 725 F.Supp. at 836. "[A] defense that might confuse the issues in the case and would not, under the facts alleged, constitute a valid defense to the action can and should be deleted." 5A C. Wright and A. Miller, § 1381 at 665; see also F.D.I.C. v. Isham, 782 F.Supp. 524, 530 (D. Col. 1992) ("An affirmative defense is insufficient if, as a matter of law, the defense cannot succeed under any circumstances.").

I will strike only those defenses so legally insufficient that "it is beyond cavil that Respondent could not prevail upon them." United States v. Kramer, 757 F.Supp. 397, 410 (D. N.J. 1991). "[A] court should not grant a motion to strike a defense unless the insufficiency of the defense is 'clearly apparent.' . . . The underlining of this principle rests on a concern that a court should restrain from evaluating the merits of a defense where . . . the factual background for a case is largely undeveloped." Cipollone v. Liggett Group, Inc., 789 F.2d 181, 188 (3d Cir. 1986).

In disposing of a motion attacking affirmative defenses as insufficient on their face, the court must construe defenses in a light most favorable to defendants, but in this regard allegations of the complaint are not conclusively binding on the defendants and do not bar them from

asserting defenses based upon their version of the facts. McCormick v. Wood, 156 F.Supp. 483 (D. N.Y. 1957).

I intend to follow the guidelines of these federal decisions in determining the merits of Complainant's motion to strike. In sum, I shall strike defenses which cannot succeed under any set of circumstances; however, where there is any question of fact or any substantial question of law, I shall refrain from acting until a later time when I can more appropriately address those issues.

2. Analysis

In the case at bar, there has been little or no opportunity for discovery and therefore little or no opportunity to develop the factual background. I thus conclude that it is premature to strike defenses that have any possible merit, based upon the facts alleged in Respondent's answers.[1]

A. The Alleged Affirmative Defense That The Prosecution of This Case Should be Dismissed Because of the Doctrines of Res Judicata, Collateral Estoppel, or Double Jeopardy

The doctrine of res judicata applies to bar a second attempt to relitigate the same cause of action between the parties. Commissioner v. Sunnen, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948); U.S. v. Tatum, 943 F.2d 370, 381 (4th cir. 1991); United States v. Mumford, 630 F.2d 1023, 1027 (4th cir. 1980), cert. denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 238 (1981). Stated another way, res judicata, or claim preclusion prevents the relitigation of a claim previously tried and decided. Collateral estoppel, or issue preclusion, bars the relitigation of issues actually adjudicated in previous litigation between the same parties. Clark v. Bear Stearns and Co. Inc., 966 F.2d 1318, 1320 (9th Cir. 1992) citing 18 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure § 4402 (1981).

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[1] My approach in this case is not inconsistent with my prior pronouncements in Educated Car Wash. As the instant case involves different legal issues and is at the early pleading stage, I will not apply the legal doctrine enunciated in Educated Car Wash as it would be overly restrictive in this case. To do otherwise would invite error. This is an administrative proceeding with a relatively new statute and respondents should be allowed an opportunity to test and develop the viability of the law under a variety of legal theories. Unless it is clear that a respondent does not have any legal theory supported by some facts or evidence, I will permit a respondent to develop his or her defense.

Res judicata bars all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties on the same cause of action. Clark v. Bear Stearns and Co. Inc., supra, McClain v. Apodaca, 793 F.2d 1031, 1033 (9th Cir. 1986). Stated fully, the rule provides that:

> When a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

Sunnen, 333 U.S. at 597, 68 S.Ct. at 719 (quoting Cromwell v. County of Sac, 94 U.S. 351, 352, 24 L.Ed. 195 (1877)). The rule's purpose is to promote judicial efficiency and foster reliance on adjudications by putting an end to a cause of action once litigated. U.S. v. Tatum, supra at 381.

In determining whether successive lawsuits involve the same cause of action, the Ninth Circuit Court of Appeals considers: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transaction nucleus of facts. Clark v. Bear Stearns and Co. Inc., supra, Constantini v. Trans World Airlines, 681 F.2d 1199, 1201-02 (9th Cir.), cert. denied, 459 U.S. 1087, 74 L.Ed. 2d 932 (1982).

To foreclose relitigation of an issue under collateral estoppel the Ninth Circuit holds that: (l) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action. Clark v. Bear Stearns and Co., Inc., supra; Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1360 (11th Cir. 1985).

The party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment. United States v. Lasky, 600 F.2d, 765 (9th Cir.), cert. denied, 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed. 2d 405 (1979). Preclusion is now frequently allowed after judgments of conviction, both in civil actions between the former criminal defendant and the government and in civil actions by private parties against the former defendant. Acquittals, on

the other hand, seldom provide any basis for preclusion. 18 Federal Practice and Procedure, supra, § 4474 at 748.

Claim preclusion does not extend from criminal prosecutions to civil actions. The division between civil and criminal procedure does not contemplate any opportunity for joining any civil claim with the criminal prosecution. Id. Federal decisions hold that a different claim or cause of action is involved in a subsequent civil action between private parties, or in an action brought by the criminal defendant against the government. 8 Federal Practice and Procedures supra, § 4474 at 748-749 citing Hernandez v. City of Los Angeles, 624 F.2d 935, 937 n. 1 (9th Cir. 1980); Murphy v. Andrews, 465 F.Supp. 511, 512 (D. Pa. 1979); Neaderland v. Commissioner, 424 F.2d 639, 641 2d. Cir.) cert. denied, 400 U.S. 827 (1970); See also, Vinson v. Campbell City Fiscal Ct., 820 F.2d 194, 197 (6th Cir. 1987) ("Res Judicata or claim preclusion is not applicable in the present case because plaintiff's [42 U.S.C.A.] § 1983 action is not the same cause of action as the state's criminal case against her."); Slayton v. Willingham, 726 F.2d 631, 633-634 (10th Cir. 1984) (Claim preclusion did not bar a civil rights action against police officers after the plaintiff was convicted of state charges on a nolo contendre plea. Since a § 1983 plaintiff's civil suite is not the same 'cause of action' as the state's criminal case against the plaintiff, res judicata is inapposite.)"

"Even when the government appears as plaintiff in the civil action, the claim is different." 18 Federal Practice and Procedure, supra § 4474 at p. 749. See Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938) (civil fraud penalties permissible after acquittal in tax evasion prosecution); U.S. v. Mumford, 630 F.2d 1023, 1027 (4th Cir. 1980) (Different causes of action are involved in an SEC action to enjoin future violations of the securities laws and a criminal prosecution for past violations of the securities laws. Claim preclusion therefore does not arise from dismissal of the civil action so as to bar a criminal conviction)." Id.[2]

"Problems arise only when it is asserted that a nominally civil action brought by the government involves an element (emphasis added) of punishment that runs afoul of double jeopardy principles." 18 Fed. Practice and Procedure, supra at 749. "Prior to 1984, no clear principle had emerged for distinguishing remedial from punitive actions, most

[2] The general rule that criminal prosecution and civil action involve separate causes of action is also stated in RESTATEMENT (SECOND) OF JUDGMENTS, § 85, Comment a (1981).

decisions, however, permitted criminal prosecutions to be followed by civil actions for injunction, forfeiture, monetary penalties, or double damages. See One Lot Emerald Cut Stones and One Ring v. U.S., 93 S.Ct. 489, 409 U.S. 232, 34 L.Ed. 438 (1972) (Forfeiture of gem stones was not barred by the double jeopardy effects of acquittal in a prosecution for attempted smuggling. The forfeiture proceeding is not a criminal proceeding, and it does not result in a criminal punishment); Helvering v. Mitchell, supra Murphy v. U.S., 47 S. Ct. 218, 272 U.S. 639, 71 L.Ed. 446 (1926) (acquittal on charges of maintaining a nuisance in violation of the National Prohibition Act may be followed by an injunction against continuing the same nuisance); Berdick v. U.S., 612 F.2d 533, 537-538 (Ct. Cl. 1979) (conviction of making false statements may be followed by action for double damages and forfeitures); U.S. v. Kismetoglu, 476 F.2d 269 (9th Cir. 1973) cert. dismissed 933 S.Ct. 1454, 410 U.S. 976, 35 L.Ed.2d 709 (forfeiture after acquittal); U.S. v. Kates, 419 F. Supp. 846, 850-855 (D. Pa. 1976) (conviction followed by action for double damages and forfeitures)." Id.

In Coffey v. U.S., 116 U.S. 436 (1886), "the court ruled that after acquittal on charges of concealing apple brandy with intent to avoid and defraud the taxes, an in rem forfeiture decision could not be maintained against the brandy on a parallel theory under the same statutes. This decision has come to be distinguished on the ground that the Court believed that the particular forfeiture provision involved a punishment." 18 Federal Practice and Procedure supra, § 4474 at 749.

"The Coffey decision created confusion in trying to distinguish between criminal and civil penalties. The rationale for the Coffey decision incorporated 'notions of both collateral estoppel and double jeopardy', but the Court 'did not identify the precise legal foundation for the rule of preclusion.' '[F]or this reason later decisions of the Supreme Court reflected uncertainty as to the exact scope of the Coffey holding.' U.S. v. One Assortment of 89 Firearms, 104 S.Ct. 1099, 1103, 465 U.S. 354, 358 (1984)." Id.

"The Coffey decision was clarified by the decision in U.S. v. One Assortment of 89 Firearms, supra. The facts in the case show that Defendant Mulcahey, who asserted the defense of entrapment, was acquitted of criminal charges of knowingly engaging in the business of dealing in firearms without a license, in violation of 18 U.S.C. § 922(a)(1). Eighty-nine firearms were then declared forfeit in separate in rem proceedings. The Court of Appeals reversed the forfeiture, relying on the Coffey decisions. The Supreme Court reversed the Court of Appeals. Initially, it stated clearly that neither 'collateral estoppel

[n]or double jeopardy automatically bars a civil, remedial forfeiture proceeding following an acquittal on related criminal charges. To the extent that Coffey v United States, suggest otherwise, it is hereby disapproved.' 104 S.Ct. at 1104. The Court further stated that '[i]t is clear that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel citing to Helvering v. Mitchell, supra 303 U.S. at 397, 58 S.Ct at 632; One Lot Emerald Cut Stones v. United States, supra 409 U.S. at 235, 93 S.Ct. at 492." id.

"The Court turned to the question whether the forfeiture proceeding under section 924(d) is barred by the double Jeopardy Clause of the Fifth Amendment. In order to make this determination the Court stated:

> 'Unless the forfeiture sanction was intended as punishment so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable. (citations omitted) The question, then is whether a section 924(d) forfeiture proceeding is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial. Resolution of this question begins as a matter of statutory interpretation. (citations omitted)
>
> Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. (citation omitted) Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. (citation omitted).'

Id."

"Thus two tests were applied. The first looked to the intent of Congress. Congress was found to have intended the forfeiture provisions of the Gun Control Act to be civil. The procedures established are those of in rem civil actions; the forfeiture provision is broader than the parallel criminal prohibition the forfeiture serves broad remedial aims; and the fact that the forfeiture is styled a 'penalty' is not controlling, since penalties may be civil as well as criminal. The second test looked to the question whether the scheme is so putative in purpose or effect as to negate the intent to create a civil remedy. The only possible indication of a punitive character is the fact that the forfeiture parallels a criminal prohibition, and this aspect is undercut by the fact that the forfeiture is broader." 18 Wright and Miller, Federal Practice and Procedure (Supp. 1994) § 4474 at 565-566.

The facts in the case at bar show that on April 3, 1992, pursuant to Rule 3 of the Federal Rules of Criminal Procedure, a criminal complaint was filed by Special Agent, INS Abelardo Gonzalez against Respondent with the U.S. Magistrate, the Hon. Franklin D. Burgess, within the Western District of Washington. The complaint alleged two separate violations of the law, both occurring on March 6, 1992. Count I alleged that Respondent on or about March 6, 1992 knowingly sold for $2,000.00, a counterfeit Alien Registration Receipt Card (Form Revised I-551), to Enrique Vargas-Garcia, a person not authorized by law to receive the document, in violation of 18 U.S.C. § 1546. Count II of the complaint alleged that on March 6, 1992 Respondent knowingly sold for $2,000.00 a counterfeit Alien Registration Receipt Card (Form Revised I-551), to Guadalupe Figueroa-Torres, a person not authorized by law to receive the document in violation of Title 18 United States Code.

On June 4, 1992, pursuant to Rule 5.1 of the Fed. Rules of Crim. Procedure, a preliminary hearing was held before the U.S. Magistrate. After hearing the testimony of witnesses and examining relevant documents, the U.S. Magistrate found probable cause to believe the offenses alleged in the complaint had been committed by Respondent, and the Respondent was held to answer in district court. On June 24, 1992, pursuant to Rule 48(a) of the Fed. Rules of Crim. Procedure, the United States Attorney, obtained leave of court to dismiss the complaint.

Respondent argues that the dismissal by the U.S. Attorney's Office with leave of court of the criminal complaint filed against him bars the the civil document proceedings initiated by the INS in this case because of the doctrines of res judicata, collateral estoppel and double jeopardy. Respondent argues that the rule is well settled that a motion to strike a defense in an answer admits the factual allegations (citations omitted). Complainant is therefore barred from alleging that Respondent has not been charged, convicted or acquitted, and criminal charges have not been dismissed. Even if Complainant were not required to admit those factual allegations, the charges are either simply not true or sharply disputed issues of fact, precluding a motion to strike. Respondent cites the pleadings filed in his criminal case, United States v. Armando Jose Alvarez-Suarez, a/k/a Armando Alvarez, a/k/a/ "AJ", Magistrate Docket # 92-351M (W.D. Wa. 1992), including a complaint, appearance bond, initial hearing record, receipt for exhibits returned, preliminary hearing and order of dismissal.

Respondent further argues that Complainant is not correct when he argues that Coffey v. United States, supra was overruled by United

States v. One Assortment of 89 Firearms, 465 U.S. 345 (1984). Respondent argues that One Assortment of 89 Firearms only overrules Coffey as to in rem forfeiture actions not in personam personal actions. Respondent further states that the One Assortment decision only overruled Coffey to the extent that the double jeopardy and res judicata doctrines bar "a civil remedial forfeiture proceeding" initiated subsequent to related criminal charges. Respondent also cites to Rule 41(b) of the Federal Rules of Civil Procedure which states in part that "unless the court in its order for dismissal otherwise specifies . . . any dismissal. . . other than for lack of jurisdiction, for improper venue, or failure to join a party under Rule 19, operates as an adjudication on the merits. Respondent then argues that the Order for Dismissal of the prior criminal proceeding against Respondent on the exact same evidence [as in this case] makes no Rule 41(b) specification and therefore operates by law as an adjudication on the merits. Respondent also points out that the Supreme Court has upheld the distinction between sanctions that are remedial and those that are punitive and he concludes that there is at least a genuine issue of law in this that precludes the summary relief sought by Complainant. I do not agree.

Respondents affirmative defense, that the INS is precluded from bringing this civil administrative action, is barred because of res judicata, collateral estoppel or double jeopardy is based upon a legal theory that is simply not supported by the law. The law is clear that acquittal of a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based. Helvering v. Mitchell, supra, 303 U.S. at 397-398, 58 S.Ct. at 632. It is also clear that the difference in the relative burdens of proof in the criminal and civil action precludes the application of the doctrine of collateral estoppel or res judicata to this case. Helvering v. Mitchell, supra, 303 U.S. at 397, 58 S.Ct. at 632; One Lot Emerald Cut Stones v. United States, supra, 409 at 235, 93 S.Ct., at 492.

Respondent's next affirmative defense is that the Double Jeopardy Clause of the Fifth Amendment bars this administrative action. This argument is based upon the theory that the civil penalties that can be assessed against Respondent in this case were intended as punishment, so that the proceeding is essentially criminal in character. This would require me to determine whether these proceedings are "intended to be or by its nature necessarily is, criminal and punitive, or civil and remedial."

In its motion to strike, Complainant states that Respondent misunderstands the nature and scope of the proceedings in federal district court and confuses the dismissal of criminal charges with the dismissal of a Complaint that has been declined for prosecution by the United States Attorney's office. Complainant argues that Respondent has not been charged, convicted, or acquitted, and criminal charges have not been dismissed.

Complainant also argues that in asserting a claim of double jeopardy, Respondent must show the existence of a prior criminal adjudication by a court of competent jurisdiction resolving the factual and legal issues in the complaint. Complainant further argues that Respondent's exhibits illustrate that he has confused the district court's dismissal of a complaint with the filing of a grand jury indictment, subsequent arraignment, and a dismissal of charges for legally sufficient reasons. See Complainant's Response to Respondent's Combined Response to Motion To Strike and Motion for Default Judgment at 3-4. I agree with Complainant's argument.

The problem with Respondent's argument is that there must have been a prior adjudication on the merits of Respondent's criminal case before there is inquiry into the issue of double jeopardy. It is undisputed that the criminal complaint filed against Respondent has been voluntarily dismissed by the U.S. Attorney. A voluntary dismissal does not amount to an adjudication of the issues. See Lawlor v. National Screen Service Corp., 349 U.S. 322, 326-27, 75 S.Ct. 865, 99 L.Ed. 1122 (1955). Respondent has not been tried and acquitted of any criminal violations based upon the facts that gave rise to the complaint in this case.

In my view, the dismissal by the U.S. Attorney's office of the complaint filed in the criminal case is not a sufficient basis to raise the issue of whether that dismissal can be the basis of dismissing the case at bar because of res judicata, collateral estoppel or double jeopardy. Accordingly, Complainant's motion to strike these affirmative defenses is GRANTED.

3. The Alleged Affirmative Defense that Respondent's Civil and Constitutional Rights Were Violated Under 42 U.S.C. Section 1983

In its answer Respondent refers to what he characterizes as "egregious aspects of this case not raised for obvious reasons by Com-

plainant." Answer at 5. Respondent refers to the language in Coffey citing Gelston et al. v. Hoyt, 16 U.S. 246 (1818) stating:

> This court held that the sentence of acquittal, with a denial of a certificate of reasonable cause of seizure, was conclusive evidence that no forfeiture was incurred, and that the seizure was tortious; and that these questions could not again be litigated in any forum.

Respondent's answer states that this "language fits directly into the proscriptions for violation of people's civil and constitutional rights set forth in 42 U.S.C. § 1983. Moreover, Respondent asserts that "since the Complainant's case cannot be reasonably said to have been substantially justified, the Equal Access to Justice Act provisions come into play." id. at 5. The Complainant argues that Respondent's claim of tortious litigation in violation of 42 U.S.C. § 1983 is unfounded. Complainant's Motion to Strike at 3.

Respondent states that Complainant has not submitted any case law in support of its response to his answer that the filing of this case is tortious and a violation of 42 U.S.C. § 1983. He further argues that whether Complainant's filing of the charge in this case is tortious or a violation of his civil rights is a disputed question of law and fact and therefore should not be stricken as an affirmative defense. See Respondent's Combined Response to Motion to Strike and Motion for Default at 3. I disagree.

I interpret Respondent's answer and brief to suggest that the filing of the case at bar after the dismissal of the criminal charge violates if not the "letter, then the spirit" of 42 U.S.C. § 1983. In my view, neither the Gelston decision nor Title 42 U.S.C. § 1983 provide Respondent with a basis for asserting that Complainant's filing the complaint in this case violated either the statute or was tortious and an affirmative defense to the charges in this case.

In Gelston, et al. supra, Goold Hoyt sued David Gelston, the collector, and Peter A. Schenck, the surveyor, of the port of New York, in trespass, for taking and carrying away, on July 10, 1810, a ship called the American Eagle and its contents.[3] The defendants pleaded that they had seized the ship, by authority of president James Madison, as

[3] "Trespass is an unlawful interference with one's person, property or rights. At common law, trespass was a form of action brought to recover damages for any injury to one's person or property or relationship with another. . . It comprehends not only forcible wrongs, but also acts the consequences of which make then tortious. Black's Law Dictionary 1347 (5th ed. 1979)

forfeited for a violation of the statute against fitting out a vessel to commit hostilities against a friendly power, and that she had been so fitted out, and was forfeited.[4] At the trial, it was shown that, after seizure, the vessel was proceeded against by the United States, by libel in the United States district court, for the alleged offense, and Hoyt had claimed her, and she was acquitted, and ordered to be restored, and a certificate of reasonable cause of seizure was denied.[5] The defendants offered to prove facts showing the forfeiture. The trial court excluded the evidence. In the Supreme Court the question was presented whether the sentence of the district court was or was not conclusive on the defendants, on the question of forfeiture. The Court held that the sentence of acquittal, with a denial of a certificate of reasonable cause of seizure, was conclusive evidence that no forfeiture was incurred, and that the seizure was tortious; and that these questions could not again be litigated in any forum.

I fail to see how the Gelston case supports any theory of an affirmative defense in the case at bar. As indicated above, Gelston dealt with a prior acquittal in a libel case of forfeiture of a vessel which affected a subsequent court's decision to exclude evidence to prove the forfeiture in a trespass case. The district court excluded the evidence but did not permit the jury to consider punitive damages because the plaintiff admitted defendants did not act maliciously. The Supreme Court described the seizure as tortious. There has been no acquittal of the Respondent in this case for any prior criminal offense that is related to the charges before me and there has not been any finding by any other court that the INS conducted an unlawful search and seizure. I do not find therefore that INS decision to file a complaint in this case against Respondent is similar to the tortious action of the defendants in Gelston to seize a ship without a legal basis.

I also do not find that 42 U.S.C. § 1983 provides Respondent with any basis for asserting an affirmative defense. Section 1983 applies to "[e]very person who, under color of any statute, ordinance, regulation,

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[4] By the act of the 18th of February 1793, ch. 8. s. 27 officers of the revenue are authorized to make seizures of any ship or goods for any breach of the laws of the United States. The statute of 1794, ch. 50. s 3 prohibits fitting out any ship for the service of any foreign prince or states, to cruise against the subject of any other foreign prince or state. The statute of 1794 did not however apply to any new government, unless it had been acknowledged by the United States, or by the government of the country to which the new state belonged.

[5] Libel in pleadings was "[f]ormerly, the initiatory pleading in an admiralty action, corresponding to the declaration, bill or complaint."id. at 824.

custom, or usage, of any State" deprives anyone of a civil right.[6] Section 1983, however, does not provide for a forum to redress actions taken by the United States government or its agencies under Federal law. Scott v. U.S. Veterans Administration, 749 F.Supp. 133 (W.D. La. 1990), aff'd, 929 F.2d 146 (5th Cir. 1991). These entities are not "persons" that can be sued under the statute, and actions of the federal government are "facially exempt" from section 1983. Id., District of Columbia v. Carter, 409 U.S. 418, 425, 93 S.Ct. 602, 606, 34 L.Ed. 2d 613 (1973); Zernial v. United States, 714 F.2d 431, 435 (5th Cir. 1983); Accardi v. United States, 435 F.2d 1239, 1341 (3d Cir. 1970); Garcia v. United States, 538 F.Supp. 814, 816 (S.D. Tex. 1982); Broome v. Simon, 255 F.Supp. 434, 440 (W.D. La. 1965).

This statute is a basis for an individual to file a lawsuit to recover any damages that he or she has suffered as a result of a violation of their civil rights. It is not an affirmative defense to the charges in this case. Since section 1983 does not apply to federal agencies, I do not find that there is any factual or legal basis for Respondent to assert as an affirmative defense that the INS allegedly deprived Respondent of any rights protected under 42 U.S.C. § 1983 nor committed a tortious act by bringing this action. Accordingly, I GRANT Complainant's motion to strike these alleged affirmative defenses.

4. The Alleged Affirmative Defense that the INS violated 18 U.S.C. section 1546

Respondent also asserts as an affirmative defense that Complainant and its agents have engaged in criminal activity by providing Guadalupe Figueroa-Torres, Vargas-Garcia and four others temporary employment authorization. Respondent states that the criminal complaint that was filed against Armando Jose Alvarez-Suarez states that Guadalupe Figueroa-Torres [and the others were] not authorized by law to receive an "Alien Registration Receipt Card (Form Revised I-551) but [all were] "given temporary employment authorization by United States Immigration and Naturalization Service subsequent to [her] [their] execution of the sworn affidavits." Answer at 5. Respondent's answer further states that "if Figueroa-Torres [and the others

[6] The complete statute reads: "Every person who, under color of any statute, ordinance, regulation custom, or usage, of any State of territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

are] person[s] not authorized by law to receive said documents, and the U.S. I.N.S. directly provided [them] with them in an obvious trade arrangement, the government was the only party involved who established such a serious violation of law-against itself and its own agents." Id. Respondent concludes in its answer that the INS by providing temporary work authorizations to Torres and the five others, who were not authorized to receive these permits, violates Title 18 U.S.C. § 1546 and is an affirmative defense to the charges in this case.

Complainant argues that the INS has authority pursuant to 8 C.F.R. § 274a.12(c)(14) to grant work authorization to a foreign national who is in the United States without legal status. Complainant also argues that placing witnesses in deferred action status and granting work authorization during the period of time necessary for administrative investigation and prosecution is within the discretion of INS and is not a violation of l8 U.S.C. § 1546.

Complainant also argues that Congress by enacting 8 U.S.C. § § 1324c (b) and (c) recognized the potential defenses raised by Respondent because the statute "does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States" (thus refuting Respondent's argument that government itself is guilty of document fraud by issuing documents to unauthorized aliens) and "[n]othing in this section shall be construed to diminish or qualify any of the penalties available for activities prohibited by this section but proscribed as well in title 18, United States Code." (thus refuting Respondent's argument that civil document fraud proceedings constitute duplicitious punishments based upon the same facts). 8 U.S.C. § 1324c(c). I agree and GRANT Complainant's motion to strike this alleged affirmative defense.[7]

5. The Alleged Affirmative Defense That the INS Conduct in Selectively Prosecuting Respondent for Prosecution Violates Respondent's Constitutional Right to Due Process of Law

Respondent also argues that there is a clear question of law as to whether the primary purpose of the instant action is "remedial" action, or simply an attempt to punish Respondent by deporting him and thereby indefinitely separating him from his wife and granddaughter

[7] Although Respondent cannot use the the terms of the plea agreement as an affirmative defense, he can use the plea agreements to impeach the credibility of any of the witnesses who received deferred status and work authorization and who testify at hearing.

and taking away his longtime permanent residence status. Respondent argues that although there is a civil monetary penalty for alleged violations of 8 U.S.C. § 1374c, the INS is using the law as a widespread tactic to deport lawful residents of the United States.[8] Respondent further states that Complainant's attorney refused to accept any amount of "remedial" civil money penalty in exchange for agreeing not to deport Respondent. Respondent argues that the INS goal in this case is to punish Respondent in a way that affects his fundamental liberty and family privacy rights as a U.S. permanent resident alien.

I view this argument as an assertion that the INS has violated Respondent's constitutional right to due process of law by an impermissible selective prosecution. Although government misconduct arising to the level of a denial of due process of law is difficult to prove, if proven it is an affirmative defense to the charges in this case. See United States v. Law Offices of Manulkin, Glaser and Bennet, 1 OCAHO 100 (10/27/89) (where I detail the application of prosecutorial misconduct as an affirmative defense to administrative proceedings). The Government's motion to strike this affirmative defense and any other factual allegations in the Respondent's answer which may support a finding of governmental misconduct as an affirmative defense is DENIED.

III. *Conclusions*

Based upon the findings made above, it is hereby ORDERED that:

1. Complainant's Motion for Default is DENIED.

2. Complaint's motion top strike affirmative defenses is GRANTED IN PART AND DENIED IN PART.

3. Respondent's request for attorney fees is DENIED.

4. Both parties shall make every effort to complete all their discovery in this case on or before July 30, 1994.

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[8] Title 8 U.S.C. § 1182(a)(6)(F) is a new ground for exclusion added by the 1990 Act which renders excludable any alien subject to a final administrative order under § 1374c, for participation in immigration document fraud and under 8 U.S.C. § 1251(a)(3)(C) such an order would make Respondent deportable.

5. An evidentiary hearing in this case is set for August 15, 1994, in Seattle, Washington at a time and place to be determined by future order.

SO ORDERED on this 24th day of June, 1994.

B. SCHNEIDER
Administrative Law Judge