Right to Counsel in Deportation Proceedings

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Does an indigent alien have a right to assigned counsel in deportation proceedings?[1] The likelihood seems remote because the statute states that "the alien shall have the privilege of being represented (*at no expense to the Government*) by such counsel, authorized to practice in such proceedings, as he shall choose."[2] Nevertheless, recent decisions have emphasized a persistent judicial concern in this area. This article's purpose is to present an overview of the repre-

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1. This article concerns the *expulsion* of aliens, as distinguished from *exclusion*. The views expressed are solely those of the author. For an excellent comprehensive review of the role of attorneys in immigration proceedings, including exclusion proceedings, see Gordon, *Right to Counsel in Immigration Proceedings*, 45 MINN. L. REV. 875 (1961), and Wasserman, *Practical Aspects of Representing an Alien of a Deportation Hearing*, 14 SAN DIEGO L. REV. 111 (1976).

2. Sections 242(b) and 292, Immigration and Nationality Act, 8 U.S.C. §§ 1252(b)(2) & 1362 (1970) (emphasis added) [The Immigration and Nationality Act is hereinafter cited as I. & N. Act.]. The same privilege is accorded by statute and regulation in exclusion proceedings (*id.* § 236 (a), 8 U.S.C. §§ 1226 & 1362; 8 C.F.R. § 236.2(a) (1976)), as in fact it is in every proceeding in which "examination" is required. 8 C.F.R. § 292.5(b) (1976).

sentation of aliens in deportation cases and specifically to inquire whether there is either an irrefutable legal basis for a requirement of assigned counsel or a felt need. Preliminarily, understanding the nature of the deportation process is necessary.

DEPORTATION IS NOT A CRIMINAL PROCEEDING

The power to forbid the entrance of aliens, to admit aliens only under prescribed conditions, and to expel those who have not been naturalized is inherent in national sovereignty. This power is vested in the legislative department of the Government, not in the judicial, and is executed by the executive authority. The judiciary may intervene only as required by the Constitution. A deportation proceeding is not a trial which could result in a sentence for a crime or offense.

> It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien . . . may remain within the country. The order of deportation is not a punishment for crime.[3]

"The determination . . . is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want."[4]

In the words of Justice Brandeis, "alienage is a condition, not a cause of deportation."[5] Although an alien is not deportable merely because he is an alien, his privilege of remaining in the United States may be revoked, under appropriate procedures, for violating terms of admission or prescribed conditions of residence.[6]

Pursuant to the well-established principle that deportation is an administrative civil proceeding, not a criminal action, courts have

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3. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893). The concept that deportation is not punishment has been criticized by several commentators. *See* LeTourner v. INS, 538 F.2d 1368 (9th Cir.) (1976); Recent Development, *Deportation of an Alien for a Marijuana Conviction Can Constitute Cruel and Unusual Punishment:* Lieggi v. United States Immigration and Naturalization Service, 13 SAN DIEGO L. REV. 454, 456-58 (1976).

4. Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (Holmes, J.).

5. United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 157 (1923).

6. *See* Abel v. United States, 362 U.S. 217 (1960); Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

held that the constitutional prohibition against ex post facto laws,[7] the reasonable-doubt burden of proof in criminal proceedings,[8] the presence of the alien or his counsel at the hearing,[9] and the requirement of a *Miranda*[10]—type warning in connection with preliminary statements to an Immigration and Naturalization Service (INS) officer[11] are not constitutionally mandated in deportation proceedings. Moreover, broadly based assertions of a right to counsel under the sixth amendment have been consistently rejected under the same principle.[12]

The Deportation Hearing

The Immigration and Nationality Act of 1952,[13] (Act) states in section 242[14] the requirements for a valid deportation hearing. Among these, apart from the alien's right to counsel at his own expense, are the following: He must receive timely notice of the charges against him; he must have an opportunity to be heard before an immigration judge who performs no prosecutorial functions in the case, to cross-examine witnesses, and to present evidence; the decision may be based only on the evidence produced at the hearing; and the decision must be based on evidence which is "reasonable, substantial, and probative" in character.[15]

The INS has long had independent quasi-judicial hearings. The immigration judge is a statutory officer[16] with well-defined du-

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7. Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Bugajewitz v. Adams, 228 U.S. 585 (1913).

8. Woodby v. INS, 385 U.S. 276, 286 (1966) (held standard of proof in deportation hearings is "clear, unequivocal, and convincing").

9. Weinbrand v. Prentis, 4 F.2d 778 (6th Cir. 1925). *See also* I. & N. Act § 242(b), 8 U.S.C. § 1252(b) (1970), authorizing the hearing to proceed without the presence of the alien after he has been given a "reasonable opportunity to be present."

10. Miranda v. Arizona, 384 U.S. 326 (1966).

11. Bilokumsky v. Tod, 263 U.S. 149 (1923); Jolley v. INS, 441 F.2d 1245 (5th Cir.), *cert. denied*, 404 U.S. 946 (1971). *See also* Lavoie v. INS, 418 F.2d 732 (9th Cir.), *cert. denied*, 400 U.S. 854 (1969); Diric v. INS, 400 F.2d 658 (9th Cir. 1968), *cert. denied*, 394 U.S. 1015 (1969); Nason v. INS, 370 F.2d 865 (2d Cir. 1967); Pang v. INS, 368 F.2d 637 (3d Cir. 1966), *cert. denied*, 386 U.S. 1037 (1967); Ben Huie v. INS, 349 F.2d 1014 (9th Cir. 1965).

12. Burquez v. INS, 513 F.2d 751 (10th Cir. 1975); Tupacyupanqui-Marin v. INS, 447 F.2d 603 (7th Cir. 1971); Murgia-Melendrez v. INS, 407 F.2d 207 (9th Cir. 1969); Lavoie v. INS, 418 F.2d 732 (9th Cir.), *cert. denied*, 400 U.S. 854 (1969).

13. 66 Stat. 163 (1952).

14. I. & N. Act § 242, 8 U.S.C. § 1252 (1970).

15. *But cf.* Woodby v. INS, 385 U.S. 276 (1966).

16. He is also titled "Special Inquiry Officer." I. & N. Act § 242, 8 U.S.C. § 1252 (1970); 8 C.F.R. § 1.1(1) (1976).

ties and responsibilities. Because of the "sole and exclusive" hearing procedures dictated by section 242(b) of the Act, he is not appointed pursuant to the Administrative Procedure Act.[17] Nevertheless, he has the complete independence of an Administrative Law Judge, presides over a hearing which may be fully adversary at any time the alien chooses, and, unlike many proceedings under the Administrative Procedure Act, results in determinations of fact, law, and discretion which are final, absent an appeal to the Board of Immigration Appeals (BIA) or to the courts. He thus has power which exceeds that of many Administrative Law Judges. This power carries commensurate responsibilities of knowledge and judgment. Should an appeal be made, a full-scale review is available by the BIA, which is not connected with the INS, and which has the power to make independent findings of fact and conclusions of law.[18] The BIA is in turn accountable to a United States Circuit Court,[19] if its decision is adverse to the alien. Some court decisions mention the possibility that the alien may have difficulty understanding deportation proceedings conducted in English. However, in the experience of the writer, this possibility is vastly overrated. Although most aliens do not demonstrate a precocious ability to communicate in English, there is a long-established tradition of using competent interpreters. Thus the earliest order of business in any deportation hearing is to ascertain the need for an interpreter. The hearing begins only after the immigration judge decides that a satisfactory ability to communicate has been shown. The immigration judge then advises the alien of the nature of the proceeding and of his rights, including the right to counsel at his own expense. At this stage of the proceeding, the immigration judge knows nothing about the case. He may have before him a simple case of a Mexican entrant without inspection, only too anxious to be transported back to his family in Mexico, preferably at United States Government expense, or the judge may be presented with something far more complicated.

If after notice, the alien expresses a desire for counsel, he must be given ample opportunity to have counsel of his choice present.[20] If

17. *See* Marcello v. Bonds, 349 U.S. 303 (1955).
18. *See* C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE 1-49 (rev. ed. 1975).
19. I. & N. Act § 106, 8 U.S.C. § 1105 (1970).
20. Chlomos v. United States Dep't of Justice, 516 F.2d 310 (3d Cir. 1975).

given reasonable opportunity, counsel fails to appear, the hearing may proceed.[21] The issue here, of course, is the reasonableness of the request either for additional continuances[22] or for the hearing's change of situs for the convenience of the alien or counsel.[23]

In practice, if the alien is indigent, the immigration judge usually makes an effort to put the alien in touch with a voluntary agency or legal aid group, if one is available, or with the Association of Immigration and Nationality Lawyers, whose members occasionally perform pro bono services.

A word must be said about the role the voluntary agencies play in deportation proceedings. Because of the excessive demand for their services, some legal aid groups must rely, at least partially, on law students. With safeguards spelled out by regulation,[24] the INS permits this procedure. In addition, well-established and highly reputable agencies are concerned with the welfare of aliens and have regularly undertaken the representation of indigent aliens in immigration proceedings. The representatives of some of these agencies are not members of the bar. However, here too INS regulations permit the appearance of a qualified and recognized advocate. The quality of such representation varies, but as a general rule the service is useful, particularly in advising aliens about the need for representation, in pleading to the allegations, and in assisting pursuit of the various avenues of relief. Unfortunately, these agencies' services are usually available only in large cities, and even there, because of demands on their limited personnel, their representatives cannot always appear, even though a need might exist.

Waiver of Right to Counsel

It has been stated that the same factors should be considered in determining whether an alien is competent to waive counsel as are

21. Bisaillon v. Hogan, 257 F.2d 435 (9th Cir), *cert. denied*, 358 U.S. 872 (1958) (not indigent and represented on appeal); United States v. Heikkinen, 240 F.2d 94 (7th Cir.), *rev'd on other grounds*, 355 U.S. 223 (1957) (not indigent; counsel in New York and hearing conducted in Minnecota, where alien resided); Denegeleski v. Tillinghast, 65 F.2d 440 (1st Cir. 1933) (alien confined; counsel failed to appear after a three-month continuance and no prejudice shown); Alves v. Shaughnessy, 107 F. Supp. 443 (S.D.N.Y. 1952) (given one adjournment to obtain counsel, no prejudice shown).

22. Castenada-Delgado v. INS, 525 F.2d 1295 (7th Cir. 1975); United States *ex rel.* Wiczynski v. Shaughnessy, 185 F.2d 347 (2d Cir. 1950).

23. United States v. Heikkinen, 240 F.2d 94 (7th Cir. 1957).

24. 8 C.F.R. § 291 (1976); *see* [Roberts], *Recognition of Organizations and Accreditation of Representatives Before the Immigration Service and Board of Immigration Appeals*, 53 Interpreter Releases 103 (1976).

used in determining whether a confession or admission is competent —namely, age, intelligence, education, information, understanding, and ability to comprehend.[25] If the alien declares that he wishes to waive counsel, the immigration judge has the initial responsibility of assuring that the waiver is conscious and intelligent within the above criteria.[26] Nevertheless, the immigration judge's responsibility does not end there. He usually advises the alien that if he changes his mind about having counsel during the hearing, he should inform the judge. Furthermore, if during the hearing the judge perceives the likelihood that the presence of counsel might affect the outcome, he can and frequently does reexamine the alien about the waiver of counsel. Failure to take these precautions clearly invites a reversal.[27]

An intelligent, knowing, and completely voluntary waiver of counsel has invariably been held to satisfy the requirement of a fair hearing, particularly when it has not been demonstrated that the presence of counsel would have affected the outcome of the proceedings. In *De Souza v. Barber*,[28] the alien was a nineteen-year-old whose waiver was held "competent and intelligent." Minority per se was also rejected in *Murgia-Melendez v. INS*,[29] as a ground for finding waiver of counsel involuntary. Similarly, the mere fact that the alien was confined at the time of the hearing does not invalidate his waiver.[30]

However, in *United States ex rel. Castro-Louzan v. Zimmerman* and in *Kovac v. INS*,[31] neither of the aliens spoke English, and the respective courts were not convinced the aliens understood the na-

25. Murgia-Melendrez v. INS, 407 F.2d 207, 209-10 (9th Cir. 1969); De Souza v. Barber, 263 F.2d 470, 476-77 (9th Cir.), *cert. denied*, 359 U.S. 989 (1959).

26. Kovac v. INS, 407 F.2d 102 (9th Cir. 1969); United States *ex rel.* Castro-Louzan v. Zimmerman, 94 F. Supp. 22 (E.D. Pa. 1950).

27. *See* Barthold v. INS, 517 F.2d 689 (5th Cir. 1975) (an example of the immigration judge taking careful pains to inform the alien of his rights).

28. 263 F.2d 470, 476-77 (9th Cir.), *cert. denied*, 359 U.S. 989 (1959).

29. 407 F.2d 207, 209-10 (9th Cir. 1969).

30. Giaimo v. Pederson, 289 F.2d 483 (6th Cir. 1961) (represented during appeal); Madokoro v. Del Guercio, 160 F.2d 164 (9th Cir. 1947) (indigent; facts admitted and no showing of prejudice); United States *ex rel.* Wiodinger v. Reimet, 103 F.2d 435 (2d Cir. 1939); United States *ex rel.* Cicerelli v. Curran, 12 F.2d 394 (2d Cir. 1926).

31. *See* note 26 *supra*.

ture of the proceedings. A similar unfamiliarity with the language and lack of "intelligent, reasonable opportunity to explain" his case was persuasive in *Van Den Berg v. Lehmann.*[32] However, in *Millan-Garcia v. INS,*[33] the court noted there was nothing to show the alien was unable to afford a lawyer, that he made no request for a continuance to employ counsel of his own choosing, and that he "voluntarily and understandingly" waived counsel.

Also waiver has been held effective when intelligently made at the first hearing; the alien need not again be advised of his right to counsel after a two-month continuance.[34] Absent a showing of prejudice, the fact that an indigent alien elected to proceed without counsel during a part of the proceedings did not warrant reversal when he was represented at the hearing upon remand and during two appeals to the BIA.[35] In general it seems that even a belated appearance of counsel can cure an earlier absence.[36]

Procedural Due Process Required

What then of those cases in which an alien does not waive counsel but is indigent and cannot secure legal assistance on a voluntary basis? Clearly in some cases the deprivation of counsel, regardless of how solicitous the immigration judge is to keep the alien informed, may work to his disadvantage. Knowledgeable counsel often protects his client with a tenacity impossible for even the most high-minded and objective public servant, and this protection is certainly beyond the capacity of the alien himself.

While the Congress has plenary power to delineate, without judicial review, the classes of aliens who may enter and the conditions under which they may remain, the courts nevertheless retain the power to scrutinize the *procedures* by which aliens are found to be within a statute's proscriptions. Even aliens who have allegedly entered the United States illegally are entitled to the full protection of the constitutional requirements of procedural due process in deportation proceedings.[37]

32. 261 F.2d 828, 829 (6th Cir. 1958).
33. 343 F.2d 825 (9th Cir. 1965).
34. Diric v. INS, 400 F.2d 658 (9th Cir. 1968), *cert. denied,* 394 U.S. 1015 (1969).
35. Martin-Mendoza v. INS, 499 F.2d 918 (9th Cir. 1974).
36. Beck v. Neely, 202 F.2d 221 (7th Cir. 1953); Schenck v. Ward, 80 F.2d 422 (1st Cir. 1935).
37. Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); The Japanese Immigrant Case, 189 U.S. 86 (1903); Millan-Garcia v. INS, 343 F.2d 825, 830 (9th Cir. 1965).

It is around this fifth amendment procedural due process requirement that the most serious argument for the right of appointed counsel in deportation proceedings has been mounted. In essence, the rationale is as follows: To an alien, deportation can be a matter of grave consequence, sometimes amounting to loss of liberty, property, or even life itself; included in his right to procedural due process is the right to a fair hearing at which he shall be heard and have a full opportunity to present his case; and because of the nature of the hearing and the gravity of its consequences, the absence of counsel necessarily impairs "fundamental fairness . . . the touchstone of due process."[38]

To date no court has reversed a lower court solely because of an indigent alien's lack of appointed counsel. At the same time the courts have not hesitated to judge the "fairness" of the hearing under a test of possible prejudicial error occasioned by lack of counsel.

In the following analysis of the prejudicial-error test, the distinction is important between failure to allow the statutorily mandated opportunity to secure counsel given a person who can afford to pay for representation (or who might be able to secure free representation if offered the chance) and the absolute right to counsel guaranteed by the fifth amendment. Unfortunately, it is not always possible to tell from the decisions whether the court was concerned with the statutory right or with the constitutional right. In many instances the courts have applied the prejudicial-error test without any particular concern, or at least without any expressed finding of the indigent alien's inability to secure counsel. Nevertheless, while it would be easy to rationalize the decisions as mostly dealing with the statutory right, dismissing the frequent references to procedural due process is not easy, for these references would be surplusage if the only concern were the breach of a statutory right to secure counsel, and not a violation of the fifth amendment.

APPLICATION OF THE PREJUDICE TEST

The prejudice test has been variously described.

38. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973). In at least one case, an unsuccessful argument has been made that because the statute *permits* counsel at no expense to the Government, but does not require counsel for indigent aliens, the statute denies indigent aliens who want counsel due process and equal protection of the laws. Henriques v. INS, 465 F.2d 119 (2d Cir. 1972), *cert. denied*, 410 U.S. 968 (1973).

> To render a hearing unfair, the defect, or the practice complained of, must have been such as might have led to a denial of justice, or there must have been absent one of the elements deemed essential to due process.[39]

In the context of this discussion, the test resolves itself into two questions: (1) Was counsel necessary for the alien to present his position adequately to the immigration judge? (2) Might the presence of counsel have made a difference in the outcome of the proceedings?[40]

Thus courts have held that a hearing was unfair when an indigent alien's waiver of counsel at the hearing was not knowing and intelligent, when he was not informed of his right to appear in person or by counsel before the BIA, and when if all the facts had been laid before the hearing officer or the BIA, the outcome of the case would have been different.[41] In *Barrese v. Ryan*,[42] the alien, a long-time resident (not an indigent) was held to have been deprived of counsel in violation of his statutory privilege when he effectively waived counsel during the hearing before the hearing officer, but asserted his desire for counsel before the BIA and because of circumstances beyond his control, was unable to secure representation in time.

Similarly, a hearing has been held lacking in essential fairness when an attorney entered his appearance in New Jersey, the alien was subsequently apprehended in Miami, and a hearing was scheduled and conducted in Miami without notice to counsel and without counsel's presence, despite the alien's request for his lawyer. The circuit court held that the immigration judge's statement that he would deny any motion to remove the case to New Jersey amounted to a prejudgment preventing the development of possibly significant circumstances.[43]

In an interesting recent decision, the Seventh Circuit, while pretermitting the constitutional issue of an absolute right to counsel, held that the right to counsel guaranteed by the statute was breached by the immigration judge's refusal to grant a second continuance to allow the aliens, people of limited means, additional op-

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39. United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 157 (1923) (Brandeis, J.).

40. *See* Aguilera-Enriquez v. INS, 516 F.2d 656 (6th Cir. 1975).

41. United States *ex rel.* Castro-Louzan v. Zimmerman, 94 F. Supp. 22 (E.D. Pa. 1950). *See also* Van Den Berg v. Lehmann, 261 F.2d 828 (6th Cir. 1958).

42. 189 F. Supp. 449 (D. Conn. 1960).

43. Chlomos v. United States Dep't of Justice, 516 F.2d 310 (3d Cir. 1975). *See also* Kovac v. INS, 407 F.2d 102 (9th Cir. 1969).

portunity to secure counsel. Because of the violation of the statutory right, the court refused to apply a harmless-error test.[44]

However, in *Henriques v. INS*,[45] the court found no prejudice, for the sole issue was whether the alien was a nonimmigrant visitor for pleasure who overstayed his four-day visa; it was undisputed that he had done so, and no justification or excuse had been offered, even during judicial review. Significantly, the court left open the "grave" question of

> whether, in a deportation hearing where the furnishing of counsel might have an effect upon the outcome of the *deportation hearing itself*, indigent aliens are entitled to have counsel furnished at government expense.[46]

Similarly, in *Aguilera-Enriquez v. INS*,[47] the alien, an indigent denied appointed counsel, had been found within the purview of section 241(a)(11) of the Act[48] because of a narcotics conviction. After the deportation hearing he moved to withdraw his guilty plea to the narcotics violation and, through Legal Assistance counsel, argued before the BIA and the court the nonfinality of the conviction underlying the deportation proceedings. The court noted that the lack of counsel before the immigration judge did not prevent full administrative consideration of his argument and that counsel could not have obtained different results. Consequently "fundamental fairness" was not abridged during the administrative proceedings and no constitutional infirmity existed for lack of "due process."

Again, however, in a footnote dictum, the court rejected the cases setting forth a per se rule against appointed counsel in deportation proceedings, as based on an "outmoded" distinction between criminal and civil proceedings. Furthermore, the court stated flatly:

> [W]here an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense. Otherwise, "fundamental fairness" would be violated.[49]

Like the Second and Sixth Circuits, the Fifth Circuit appears to

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44. Castenada-Delgado v. INS, 525 F.2d 1295 (7th Cir. 1975).
45. 465 F.2d 119 (2d Cir. 1972).
46. *Id.* at 121; *cf.* Carbonell v. INS, 460 F.2d 240 (2d Cir. 1972).
47. 516 F.2d 565 (6th Cir. 1975).
48. 8 U.S.C. § 1251(a)(1) (1970).
49. 516 F.2d at 568-69 n.3.

have "reserved" the question of the right of appointed counsel for an indigent alien.

> Whether the indigent alien has a right to appointed counsel has been much discussed in the federal courts, but never considered by the Supreme Court. The existence, let alone the nature and scope, of such a right has not been established. The parties would have us address this problem here but we find that "the posture of the case is such that we do not reach the issue petitioner seeks to raise."[50]

Noting that the proceedings could be analyzed "in terms of their fundamental fairness on a case-by-case basis," the court found that the alien, an indigent who had conceded his illegal entry, was advised that he could seek free counsel but instead elected to proceed without an attorney. "Had he sought such aid and been unsuccessful, we would have to decide the question urged upon us." The appeal was then dismissed.[51]

Earlier, in *Rosales-Caballero v. INS*,[52] the same court termed the issue a "momentous" one and remanded for testimony of the alien's indigency, pointedly suggesting that the issue would be mooted by a de novo hearing on the merits, at which the alien could be represented without fee by an attorney from the same Legal Service group which represented him before the court.

In *De Bernardo v. Rogers*,[53] the Court of Appeals for the District of Columbia also indicated its unwillingness to reject the argument outright, stating:

> It is unnecessary to decide whether due process requires that counsel be appointed to represent an indigent defendant in a deportation proceeding because the facts on which deportation was ordered in this case were not in issue.[54]

In summary, at least four circuits, the Second, Fifth, Sixth, and the District of Columbia, have recognized in varying degrees the viability of the constitutional issue of the indigent alien's absolute right to counsel under the fifth amendment. Two circuits, the Ninth and Tenth, appear to believe that under outstanding case law no such right exists.

Need for Appointed Counsel

The recently arrived Mexican or Canadian who crossed the bor-

50. Barthold v. INS, 517 F.2d 689, 690 (5th Cir. 1975).
51. *Id.* at 691.
52. 472 F.2d 1158 (5th Cir. 1973).
53. 254 F.2d 81 (D.C. Cir. 1958).
54. *Id.* at 82.

der illegally has little need for appointed counsel if given the option of voluntary departure without the stigma of a deportation order, the only relief available in this situation under the law. In the great majority of deportation cases, the experience of the writer suggests that the presence or absence of appointed counsel cannot make the slightest difference in the outcome. In the usual case, the alien either is a nonimmigrant who entered illegally, is in clear violation of status, or has remained longer than authorized.[55] His stay has been brief, and he has no family ties here. Deportability is clear, and, more often than not, freely conceded. Voluntary departure is liberally granted, often with generous time periods within which to leave. The significance of voluntary departure is that it facilitates the alien's ability to subsequently immigrate.[56] The only thing that could be achieved by the presence of counsel in such a case would be delaying the inevitable, and in many cases the result would be even greater anguish to the alien because of the destruction of unwarranted hope and the eventual severance of increasing ties with this country. The author hopes that statements about the unnecessary presence of counsel in the preceding discussion will not be taken out of context.

What then of the remaining cases in which counsel could make a difference? Thousands of deportation hearings are held each year, and[57] well over half of the appeals to the BIA are deportation cases. To say that counsel would make no difference in most cases is not to say that the remaining cases are either insubstantial in number or inconsequential in import. How does one draw the line between saying due process requires the presence of appointed counsel in every deportation hearing and ensuring counsel whenever necessary or desirable to a fair hearing?

An undetermined, but large number of deportation cases involve indigents. Some commentators have concluded that because of the possible severity of the "penalty," a due process right to assigned counsel exists for the indigent alien and that the right should be

55. *See* 1975 INS, ANNUAL REPORT 96.

56. 8 U.S.C. § 1182(a)(16) (1970). For discussion of voluntary departure, see Wasserman, *Practical Aspects of Representing an Alien at a Deportation Hearings*, 14 SAN DIEGO L. REV. 111 (1976); Comment, *Suspension of Deportation: Illusory Relief*, *id.* at 229, 252-55.

57. According to INS records, 40,697 deportation hearings were completed in fiscal 1975.

recognized in at least selected categories of cases.[58] The thesis, however, runs into a fundamental difficulty. If the alien has a right to assigned counsel in one kind of deportation case, surely he has it in all deportation cases, for every deportation case carries the same ultimate possibility of forcible ejection from the United States. Any general basis of selectivity which would reject that right in some deportation cases must, almost by definition, be improper. As a practical matter one is led to the conclusion that, absent a waiver, counsel would have to be present in every deportation case. In the opinion of the writer, a sounder and more realistic approach, and one which, as we have seen, the courts have widely recognized and applied, is the prejudicial-error test on a case-by-case basis. Deprivation of counsel should be grounds for reversal only if such deprivation was prejudicial.

Of course the *case-by-case, prejudice,* or *special-circumstances* test has been called into question in criminal proceedings by the Supreme Court's rulings in *Gideon v. Wainright*[59] and *Argersinger v. Hamlin.*[60] Similarly the Court's holdings in *Morrissey v. Brewer,*[61] and *In re Gault*[62] have undermined the position that counsel need be provided to indigents only in criminal proceedings.[63] Nevertheless, it is a long step, as indicated in *Henriques v. INS,*[64] from these cases to "a blanket rule that the Fifth Amendment requires, as a matter of due process, counsel for indigent aliens in all deportation cases, regardless of their nature."[65]

In this connection, it should be noted that in *Murgia-Melendez v. INS,*[66] the petitioner did contend that because of the potential consequences, deportation proceedings were of a criminal nature as were those faced by the juvenile in *In re Gault,* and that, because a stringent standard of due process must be observed, effective representation could be obtained only through counsel. Petitioner relied upon *Escobedo v. Illinois*[67] and *Massiah v. United States*[68] for

58. Comment, *Deportation and the Right to Counsel,* 11 HARV. INT'L L.J. 177 (1970); Comment, *Due Process and Deportation—Is There a Right to Assigned Counsel,* 8 U.C. DAVIS L. REV. 289 (1975).
59. 372 U.S. 335 (1963).
60. 407 U.S. 25 (1972).
61. 408 U.S. 471 (1972).
62. 387 U.S. 527 (1969).
63. *See also* Miranda v. Arizona, 384 U.S. 436 (1966), and Escobedo v. Illinois, 378 U.S. 478 (1964); Comment, *Deportation and the Right to Counsel, supra* note 58.
64. 465 F.2d 119 (2d Cir. 1972).
65. *Id.* at 121, n.4.
66. 407 F.2d 207 (9th Cir. 1969).
67. 378 U.S. 478 (1964); note 4 *supra.*
68. 377 U.S. 201 (1964).

support of this position. The argument was rejected because of "compelling case law . . . that a deportation proceeding is not a criminal prosecution."[69] The contention that the majority view in *Argersinger* negated a case-by-case approach to deportation cases was also rejected by the Second Circuit in *Henriques v. INS.*[70]

In rejecting the *case-by-case* or *special-circumstances* rule in *Argersinger v. Hamlin*, the Court appears to have been convinced that the possibility of imprisonment, even for a petty offense, brings into play the due process protection of right to counsel. As Justice Powell pointed out in his concurring opinion (in a different context), a "mechanistic application" of this "prophylactic rule" clearly and easily resolves any due process issue.[71]

By definition, of course, any deprivation of liberty is within the fifth amendment. But not every possibility of deportation amounts to a deprivation of liberty without due process. The result in only the occasional deportation case approximates the consequences of criminal sanction contemplated by the fifth amendment. The "mechanistic application," which the Court believed was required in *Argersinger*, is not needed to assure a due process "fair hearing" in all deportation cases. As to those occasional cases in which it is needed, the *case-by-case, special-circumstances,* or *prejudice* rule provides a more than adequate procedural due process safeguard for the indigent alien, particularly since we are not without some guidelines in identifying potential danger spots.

Concern over the fairness of the hearing reasonably should be in direct proportion to what is at stake. Certain types of deportation cases indicate by their very nature an inherent possibility of prejudice to substantial rights which may demonstrate a particular need for counsel. These categories are readily recognizable.[72] They con-

69. Murgia-Melendrez v. INS, 407 F.2d 207, 209 (9th Cir. 1969), *citing* Nason v. INS, 370 F.2d 865, 868 (2d Cir. 1967); Ah Chiu Pang v. INS, 368 F.2d 637, 639 (3d Cir.), *cert. denied*, 386 U.S. 1037 (1966). *See also* United States v. Gasca-Kraft, 522 F.2d 149 (9th Cir. 1975); Martin-Mendoza v. INS, 499 F.2d 918 (9th Cir. 1974); Dunn-Marin v. District Director, 426 F.2d 894 (9th Cir. 1970). (These later decisions of the Ninth Circuit appear to have resolved the earlier hesitation expressed in *In re* Raimondi, 126 F. Supp. 390 (N.D. Cal. 1954)).

70. 465 F.2d 119 (2d Cir. 1972).

71. 407 U.S. 25, 49, 50 (1972) (concurring opinion).

72. With some variations, they have been noted by other writers in this

cern basically: (1) the claimant to United States citizenship; (2) the claimant to lawful permanent residence; and (3) the claimant to adjustment to permanent residence.

Claim to United States Citizenship

In the first place, alienage is jurisdictional to a deportation hearing.[73] United States citizenship is treasured. The absence of counsel in a deportation hearing where a substantial claim to United States citizenship is advanced (assuming the alien was knowledgeable enough to advance this claim) could easily invite a successful challenge on prejudicial grounds.[74]

By way of example, representation could be particularly significant in any case in which a claim to derivative citizenship is made through a citizen parent or in which alienage is predicated on loss of citizenship through expatriation.

Claim to Lawful Permanent Residence

Again, lawful permanent residence as an immigrant is a valuable privilege. Scholars in the field have argued the irrationality of legislation which makes the lawful immigrant deportable for reasons not directly connected with his fitness as an immigrant at the time he entered.[75] Nevertheless, the statute makes the immigrant alien deportable for some grounds which can arise years after he has severed the ties with his homeland and has established his life in the United States. The courts have uniformly sustained the constitutionality of such provisions.[76]

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field. *See* Comment, *Due Process and Deportation—Is There a Right to Assigned Counsel, supra* note 58.

73. United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923).

74. An alleviating factor here is the possibility of de novo trial of a citizenship issue under section 360 of the I. & N. Act, 8 U.S.C. § 1503 (1970). Derivative citizenship is discussed in Comment, *How to Immigrate to the United States: A Practical Guide for the Attorney*, 14 SAN DIEGO L. REV. 193, 195-96 (1976).

75. *See, e.g.*, Wasserman, *Grounds and Procedures Relating to Deportation*, 13 SAN DIEGO L. REV. 125, 127-28 (1975).

76. *E.g.*, section 241(a)(4) of the I. & N. Act, 8 U.S.C. § 1251 (1970) (convicted of two or more crimes involving moral turpitude at any time after entry); *id.* § 241(a)(5) (failure to register as an alien); *id.* § 241(a)(6) (joining a subversive group at any time after entry); *id.* § 241(a)(11) (convicted of a narcotic offense, including possession of marijuana); *id.* § 241(a)(14) (carrying a sawed-off shotgun); *id.* § 241(a)(17) (convicted of a violation of any of several enumerated statutes). "The validity of distinctions drawn by Congress with respect to deportability is not a proper subject for judicial concern." Oliver v. United States Dep't

Despite reservations about the sometimes loose application of the oft-quoted language that deportation may "result also in loss of both property and life; or of all that makes life worth living,"[77] in the case of a recently arrived "jumped-ship" crewman, "remained-longer" visitor for pleasure, or an alien without ties here who entered surreptitiously or in transit to another country, little question can exist of the language's applicability to the lawfully admitted permanent resident who may become deportable after living practically his entire life in the United States.

The Supreme Court has recognized the special status of the lawful permanent resident vis-à-vis other aliens.

> [T]he Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all "persons" and guard against any encroachment on those rights by federal or state authority.[78] To be sure, a lawful resident alien may not captiously be deprived of his constitutional rights to procedural due process.[79]

The permanent resident alien probably has satisfied the statute's quantitative and qualitative requirements. He has successfully undergone the scrutiny of a United States consul or (in the case of adjustment of status[80] in the United States) of an immigration officer, or of both. His status may even have been specially conferred by Congress.[81] He has a prima facie right to lifelong presence here. He may work, and he may proceed toward citizenship. These are valuable privileges, and their deprivation without the most careful

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of Justice, 517 F.2d 426 (2d Cir. 1975); *see* Galvan v. Press, 347 U.S. 522, 530-32 (1954).

77. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

78. Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Bridges v. Wixon, 326 U.S. 135, 161 (concurring opinion) (1945).

79. Shaughnessy v. United States *ex rel.* Mezel, 345 U.S. 206, 213 (1953).

80. 8 U.S.C. § 1255 (1970), *as amended* Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, § 6 (Oct. 20, 1976). For a discussion of the 1976 Amendment, see *Afterword: The Immigration and Nationality Act Amendments of 1976*, 14 SAN DIEGO L. REV. 326 (1976). *See* Wasserman, *supra* note 75, at 136-37.

81. *See* Chew v. Colding, 344 U.S. 590 (1952).

regard for constitutional safeguards, including counsel, should reasonably lead to a possible application of the test of prejudice for lack of counsel.

Claim to Adjustment to Permanent Resident

The final category is stated with reservations, for, without some restrictive definition of its application to bona fide and substantial claimants, it could be subject to abuse. Some aliens have entered surreptitiously or as nonimmigrants and originally had no claim to permanent residence, but through either the passage of time or the accrual of family ties and other equities are in a position to legitimately seek permanent residence under the statutes' various relief provisions. Thus, for example, an alien who has resided here either seven or ten years after committing a deportable act (depending on the ground for deportation) may seek suspension of deportation.[82] Also many aliens, regardless of length of residence, may qualify for adjustment of status to permanent resident if eligible for an immigrant visa and if a visa is immediately available.[83] Other long-term residents who entered before June 30, 1948, may seek creation of a record of lawful admission.[84]

These aliens might conceivably be denied an adjustment of status, either as a matter of eligibility or in the exercise of discretion, even though vigorous representation might have tipped the scales the other way. Even more importantly, an unwitting failure may occur (1) to press for some lesser relief that may be available, (2) to oppose one ground of deportability because of admitted deportability on another, or (3) to challenge one of several bases on which relief is denied because of the clear applicability of the other grounds. An adverse ruling in any of these circumstances might easily bar the alien from ever obtaining lawful permanent residence, or, at the least, make clearing substantial hurdles necessary by way of waiv-

82. Not available to a crewman who entered after June 30, 1964, or "exchange" student (section 101(a)(15)(j) of the I. & N. Act, 8 U.S.C. § 1101 (1970)), or with certain exceptions to a native of a contiguous country (*id.* § 101(b)(15), 8 U.S.C. § 1101(b)(5)). For a thorough discussion of suspension of deportation, see Comment, *Suspension of Deportation: Illusory Relief*, 14 SAN DIEGO L. REV. 229 (1976).

83. *See* Wasserman, *Representing an Alien at a Deportation Hearing*, 14 SAN DIEGO L. REV. 111 (1976); Comment, *How to Immigrate to the United States: A Practical Guide for the Attorney*, *id.* at 193, 220-23.

84. I. & N. Act § 249, 8 U.S.C. § 1259 (1970). *See* Wasserman, *Practical Aspects of Representing an Alien at a Deportation Hearing*, 14 SAN DIEGO L. REV. 111 (1976); Comment, *How to Immigrate to the United States: A Practical Guide for the Practicing Attorney*, *id.* at 193, 225-26.

ers, which the alien would otherwise not confront should he seek to return at a future date.

Two examples will suffice. The most obvious situation is the passive acceptance of a deportation order, should adjustment be denied, without the alien pressing for the privilege of voluntary departure to eliminate the stigma of deportation. Deportation makes necessary a subsequent grant of permission to reapply for admission, a discretionary application passed upon by the INS; voluntary departure obviates the application. The second example is emphasized by the recent *Lennon v. INS* case.[85] Although Lennon was clearly deportable as a visitor who had remained longer than authorized, he sought adjustment on the basis of his family ties here. The relief was mandatorily denied by the INS because of a narcotic conviction in Britain. Counsel attacked the conviction as one not requiring a knowing possession of the narcotic and hence not within the statute's prohibition. The court of appeals agreed with counsel and remanded the case for discretionary consideration of the application. Had sophisticated counsel not prevailed in his argument, Lennon not only would have had a denial of adjustment to permanent resident because of statutory ineligibility, but he also would have faced permanent debarment from the United States because of the conviction.[86]

Therefore, a reasonable anticipation is that the alien who is in a position to qualify for suspension of deportation or adjustment of status to permanent resident is also in a favorable position to argue that he should be entitled to counsel under the prejudice test.

A *caveat* is in order. These categories are not exclusive. It is possible to have a failure of procedural due process from lack of counsel in a deportation case outside these categories. It is equally possible that a fair hearing could be held within these three categories despite the absence of counsel and that representation could

85. Lennon v. INS, 527 F.2d 187 (2d Cir. 1975). For a full discription of the *Lennon* litigation, see Wildes, *The Non-Priority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42 n.4 (1976).

86. *Cf.* Rose v. Woolwine, 344 F.2d 993 (4th Cir. 1965). *See also*, Wildes, United States Immigration Service v. John Lennon: *Cultural Lag*, 40 BROOKLYN L. REV. 270 (1973); Wildes, *The Nonpriority Program of the Immigration and Naturalization Service—A Measure of the Attorney General's Concern for Aliens*, 53 INTERPRETER RELEASES 25 (1976).

make absolutely no difference in the outcome. A claim to citizenship, for example, can be advanced when, under the applicable law, assuming the absolute truth of all that is claimed, the claimant could not possibly be a citizen. The lawful permanent resident frequently has no alternative under the law but to concede deportability and the unavailability of any relief. Similarly, the alien seeking adjustment to permanent residence may face absolute statutory bars. And in any of the categories, the claim to the favored status may be so frivolous and unfounded as to be purely dilatory, warranting peremptory rejection.

However, the categories should be regarded as containing clear warning signals to the INS trial attorney, the immigration judge, the BIA, and the courts. A claim within one of these categories that has any substance whatsoever should be scrutinized for the slightest implication of prejudice to the unrepresented respondent caused by absence of counsel. Only if: (1) all possible rights and avenues of relief have been fully explained and explored; (2) every opportunity (and possibly even assistance) has been given in developing a proper record; and (3) the presence of counsel could not have made the slightest difference in the outcome of the case, or there has been an intelligent, knowing, and voluntary waiver of counsel, should an adverse ruling be reasonably certain of withstanding a fair-hearing, procedural-due-process challenge for lack of counsel.

As far as the administrative authorities are concerned, the language of the statute speaks the clear intent of the Congress. There is neither a license for appointed counsel at Government expense, nor, so far as known, any source from which the necessary funds could be appropriated without violation of the congressional proscription. At the same time, the very anticipation of close scrutiny, in itself, and quite apart from the burden put upon the Government in safeguarding the record, should be enough to indicate the desirability of a maximum effort in exercising a prudent administrative policy to secure representation, not compensated by the Government, for the indigent alien, in at least these three types of cases.

Conclusion

Expulsion of aliens is basically an implied political power, inherent in national sovereignty, plenary in nature, and not subject to judicial control except as to the manner in which it is exercised.[87] The

87. See C. Gordon & H. Rosenfield, Immigration Law and Procedure 1-29 (rev. ed. 1975) and cases cited for a fuller discussion of the distinction

power is exercised administratively through an executive official—the Attorney General. An administrative hearing procedure has been established by statute which carefully and fairly delineates the rights and privileges of the alien.

Like many administrative hearings, the consequences of an adverse ruling can have a grave effect on property and person. However, these are *not* criminal proceedings. Absent a clear demonstration of inadequacy in the administrative process, no reasons exists for disturbing a rule enunciated as far back as 1893 and followed since then. As the Supreme Court noted in *Galvan v. Press*,[88] in rejecting the applicability of the *ex post facto* clause to deportation, "the slate is not clean . . . . [This] is not merely 'a page of history' . . . but a whole volume."[89]

Without impairing the objective of achieving justice, the law must work within the confines of practicality and reality. Over seventy years ago, the Supreme Court noted that the alien's right to an opportunity to be heard means

> not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act.[90]

True, "inconvenience and added expense to the Immigration Service" is not a determinative factor if the price is essential fairness.[91] Nevertheless, appointed counsel in each of the many deportation cases involving indigents heard each year, would not necessarily help achieve justice. On the contrary, substantial and completely unwarranted adjournments and delays in the completion of the administrative process could easily result in the detriment to both an already overburdened Government agency and the alien.

Procedural due process and a "fair hearing" are requisites. Experience has shown that with respect to the lack of counsel, the

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between substantive and procedural due process with respect to deportation proceedings.

88. 347 U.S. 522 (1954).
89. *Id.* at 531.
90. The Japanese Immigrant Case, 189 U.S. 86, 101 (1903).
91. Wong Yang Sung v. McGrath, 339 U.S. 33, 46 (1950).

prejudice test, applied on a case-by-case basis, is a completely adequate safeguard to procedural due process and one that is liberally used. In certain types of deportation cases, the need for counsel may be more acute and the absence of counsel more likely to affect the result. In these cases the courts have been more amenable to finding that the absence of counsel prejudiced a fair hearing.

As Justice Stewart said in *Costello v. INS*, "[i]n this area of the law, involving as it may the equivalent of banishment or exile, we do well to eschew technicalities and fictions and to deal instead with realities."[92] Earlier, Judge Learned Hand expressed the same thought; "these are consequences whose warrant we may properly scrutinize with some jealousy, and insist that logic shall not take the place of understanding."[93] It is apparent that, consciously or not, this underlying approach to deportation cases has motivated judicial review of claims of prejudice arising from lack of appointed counsel and that the approach dictates an equal concern on the part of administrative authorities when the absence of counsel might impair substantial rights.

92. 376 U.S. 120, 131 (1964).
93. United States *ex rel.* Mignozzi v. Day, 51 F.2d 1019, 1021 (2d Cir. 1931).