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NOTE

UNITED STATES v. LOPEZ-VELASQUEZ: WHAT IS A "REASONABLE POSSIBILITY" OF APPARENT ELIGIBILITY FOR RELIEF FROM DEPORTATION?

KRISTINA M. SEIL[*]

INTRODUCTION

Merriam-Webster defines deportation as "the removal from a country of an alien whose presence is unlawful or prejudicial" and provides "the deportation of Jews from Spain in 1492" as an example.[1] Historically, deportations have been isolated mass expulsions of people deemed "undesirable" (usually on the basis of religion or ethnicity) in their countries of residence.[2] Due process—the concept of notice and a fair chance to be heard[3]—was alien to these historical deportations.[4]

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[*] J.D. Candidate, May 2012, Golden Gate University School of Law, San Francisco, California; M.A., University of San Francisco; B.A., University of California at Santa Cruz. My thanks go out to all who have patiently helped me write and edit this article, and to friends and family for their constant support—especially my Granny, who is always "perfect," and my Grandma, who taught me that "smak og behag, kan du ikke diskutere."

[1] *Deportation*, MERRIAM-WEBSTER.COM , www.merriam-webster.com/dictionary/deportation (last visited Sept. 20, 2011).

[2] *See, e.g.*, Benjamin Gray, *From Exile of Citizens to Deportation of Non-Citizens: Ancient Greece as a Mirror to Illuminate a Modern Transition*, 15 OXFORD J. CITIZENSHIP STUD. 565, 565-67 (2011) (describing the practices of expulsion of noncitizens as well as exile and outlawing of citizens in Ancient Greece, and comparing the latter practices to modern deportation).

[3] *See, e.g.*, Kwong Hai Chew v. Colding, 344 U.S. 590, 597-98 (1953).

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The rise of the nation-state coupled with the greater mobility of people led to an increase in deportation-like phenomena, such as the deportation of criminals from England to its colonies,[5] or the expulsion of ethnic Poles from Prussia.[6] Deportation[7] today is an industry in its own right—in 2010, the United States deported nearly 400,000 noncitizens, up from fewer than 300,000 in 2007.[8] Despite the significant interests at stake—family unity, [9] property rights,[10] and community interests[11]—noncitizen respondents[12] in immigration proceedings are not entitled to government-appointed counsel.[13]

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[4] Unlike in the case of exile of citizens, little protection was afforded noncitizens against the "deportations" of history. *See, e.g.*, Gray, *From Exile of Citizens to Deportation of Non-Citizens: Ancient Greece as a Mirror to Illuminate a Modern Transition*, 15 OXFORD J. CITIZENSHIP STUD. at 565.

[5] *See, e.g.*, Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1308-09 (2011) (pointing to the punitive nature of the historical deportation-like practice of banishment in England); Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 116-17 (1999) (arguing that the British practice of "banishment" is an antecedent to modern deportation and establishes that deportation is a form of punishment).

[6] *See, e.g.*, *Expulsion of Poles by Germany*, SOURCES.COM, www.sources.com/SSR/Docs/SSRW-Expulsion_of_Poles_by_Germany.htm (last visited Sept. 20, 2011).

[7] Although the word "removal" is used in lieu of "deportation" to describe the procedure, the term "deportation" continues to be useful and descriptive. Indeed, this is the term used by the Ninth Circuit in the decision discussed. *See* United States v. Lopez-Velasquez, 629 F.3d 894 (9th Cir. 2010) (en banc).

[8] *See* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE TOTAL REMOVALS THROUGH JULY 31ST, 2011, *available at* www.ice.gov/doclib/about/offices/ero/pdf/ero-removals.pdf; *see also* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, TRAC REPORTS, INC., SYRACUSE UNIVERSITY, CURRENT ICE REMOVALS OF NONCITIZENS EXCEED NUMBERS UNDER BUSH ADMINISTRATION (Aug. 2, 2010), *available at* http://trac.syr.edu/immigration/reports/234/; Shankar Vedantam, *United States Deportations Reach Record High*, WASH. POST, Oct. 7, 2010, *available at* www.washingtonpost.com/wpdyn/content/article/2010/10/06/AR2010100607232.html.

[9] *See, e.g.*, Ana Tintocalis, *Students Suffer When Deportation Tears Families Apart*, KPBS.ORG (May 17, 2010), www.kpbs.org/news/2010/may/17/the-impact-of-deportation-on-students/.

[10] As an example of property lost through deportation, the Tulsa County Sheriff's Office reported $6 million in seized property last year from deported immigrants. *See* Ginnie Graham , *Legislative Panel Seeks Immigration Reform*, TULSA WORLD, Mar. 7, 2011, *available at* www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20110307_11_A1_Ihlryo165451.

[11] Raul Hinojosa-Ojeda & Marshall Fitz, *A Rising Tide or a Shrinking Pie: The Economic Impact of Legalization Versus Deportation in Arizona*, CTR. FOR AM. PROGRESS (Mar. 2011), *available at* www.americanprogress.org/issues/2011/03/pdf/rising_tide.pdf (analyzing the economic impact of immigration and deportation).

[12] Individuals in immigration proceedings are called "respondents" because they "respond" to a summoning document called the "Notice to Appear." Outside of immigration proceedings, the term "alien" appears in immigration statutes and regulations. Immigration caselaw variously uses the terms "alien," "noncitizen," "petitioner" (before the Circuit Courts of Appeals) and "respondent." This Note will use the term "noncitizen" instead of "alien."

[13] Although noncitizens have a right to counsel if they are in criminal proceedings, there is

Unlike its historical counterparts, however, modern deportation procedure is circumscribed by regulations intended to guarantee fairness and uniformity.[14] Federal regulations thus mandate that immigration judges inform noncitizens of their eligibility for relief from deportation in an effort to ensure that unrepresented respondents in immigration proceedings make informed decisions.[15]

Unhappily, the U.S. Court of Appeals for the Ninth Circuit has recently limited this regulation-mandated duty to inform. In *United States v. Lopez-Velasquez*, the Ninth Circuit held that the duty to inform is not triggered when sources outside the Ninth Circuit indicate that relief may be possible because the relevant Ninth Circuit precedent is no longer correct.[16] In *United States v. Lopez-Velasquez*, a noncitizen defendant named Edmundo Lopez-Velasquez argued that he had been deported from the United States without due process because an immigration judge did not inform him that he may have been eligible for relief from deportation under former section 212(c)[17] of the Immigration and Nationality Act (INA). In 1995, the year after he was deported, a Ninth Circuit decision found that noncitizens in Lopez-Velasquez's position could be eligible for relief under section 212(c).[18] On appeal before the Ninth Circuit, Lopez-Velasquez argued that the immigration judge's failure to inform him of this potential relief rendered Lopez-Velasquez's decision to waive appeal uninformed and unintelligent.[19]

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no Sixth Amendment right to counsel in immigration proceedings. Due process under the Fifth Amendment provides that noncitizens may retain an attorney in immigration proceedings, but not at the government's expense. *See, e.g.*, Matt Adams, *Advancing the "Right" to Counsel in Removal Proceedings*, 9 SEATTLE J. FOR SOC. JUST. 169 (2010).

[14] *See, e.g.*, Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1655 (1992).

[15] Relief from deportation refers generally to any legal argument that can prevent a noncitizen from being deported. This includes such forms of relief as asylum and cancellation of removal; historically it also included suspension of deportation and relief under section 212(c). *See* United States v. Lopez-Velasquez, 629 F.3d 894 (9th Cir. 2010) (en banc).

[16] *See generally* United States v. Lopez-Velasquez, 629 F.3d 894 (9th Cir. 2010).

[17] At the time of Lopez-Velasquez's original deportation, INA section 212(c) provided for relief from deportation for an "aggravated felony" for a legal permanent resident with seven years of "lawful unrelinquished domicile" whose criminal sentence did not exceed five years. Immigration and Nationality Act (McCarran-Walter Act) of 1952, Pub. L. No. 82-414, § 212(c), 66 Stat. 163, 187 (1952), codified at 8 U.S.C. § 1182(c) (repealed 1996); *see also* Lok v. I.N.S. (*Lok II*), 681 F.2d 107, 108 n.2 (2d Cir. 1982); Brent S. Wible, *The Strange Afterlife of Section 212(c) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry After* St. Cyr, 19 GEO. IMMIGR. L.J. 455, 463-64 (2005).

[18] Ortega de Robles v. I.N.S., 58 F.3d 1355, 1359 (9th Cir. 1995).

[19] *Lopez-Velasquez*, 629 F.3d at 895-96; *see also* United States v. Mendoza-Lopez, 481 U.S. 828 (1987).

Therefore, Lopez-Velasquez contended, the deportation proceeding lacked due process.[20]

Relying on a 1979 decision to find that relief was not possible, the Ninth Circuit rejected Lopez-Velasquez's argument, holding that the duty to inform "is limited to informing an alien of a reasonable possibility that the alien *is* eligible for relief at the time of the hearing."[21] Prior to its holding in *Lopez-Velasquez,* the Ninth Circuit maintained that the duty to inform is triggered where "there is a reasonable possibility that the petitioner *may be* eligible for relief."[22] Under this standard, it was not necessary for a respondent to ultimately prevail on a claim for relief, and the reasonable possibility that a respondent may have been eligible was sufficient to trigger the judge's duty to inform.[23] In *Lopez-Velasquez*, the Ninth Circuit limited this standard by finding that, if Ninth Circuit precedent appears to preclude relief, there is no duty to inform even when legal sources outside the Ninth Circuit suggest that this precedent has been invalidated.[24]

This Note evaluates whether the Ninth Circuit's holding in *United States v. Lopez-Velasquez* comports with established immigration due process standards, focusing on the immigration judge's duty to inform noncitizen respondents of relief from deportation. Part I outlines the facts and procedural history of *United States v. Lopez-Velasquez*. Part II explains due process standards in immigration proceedings and the standard that triggers an immigration judge's duty to inform respondents of relief. Part III analyzes the Ninth Circuit's decision in *Lopez-Velasquez* and argues that the facts were sufficient to require the immigration judge to inform Lopez-Velasquez of his potential argument for relief from deportation. The Note concludes that the Ninth Circuit's holding in *United States v. Lopez-Velasquez* departs from established due process requirements.

I. FACTS AND PROCEDURAL HISTORY OF *UNITED STATES V. LOPEZ-VELASQUEZ*

Edmundo Lopez-Velasquez entered the United States illegally in the early 1980s as a seasonal agricultural laborer, but soon legalized his

[20] *Lopez-Velasquez*, 629 F.3d at 895-96.
[21] *Id.* at 901 (emphasis added).
[22] Moran-Enriquez v. I.N.S., 884 F.2d 420, 423 (9th Cir. 1989) (emphasis added).
[23] *Id.* at 423.
[24] *Lopez-Velasquez*, 629 F.3d at 895.

status.[25] In 1986, as part of the Immigration Reform and Control Act (IRCA), Congress established the Special Agricultural Workers (SAW) Program to provide a pathway to legal permanent residence for certain agricultural laborers.[26] Lopez-Velasquez took the opportunity presented by the SAW Program to legitimize his status in the United States.[27] He acquired legal permanent resident status in October 1987, married a U.S. citizen, and became the father of two children who were also U.S. citizens.[28] Unfortunately, in 1993 Lopez-Velasquez was arrested and convicted for delivery of a controlled substance.[29] He was sentenced to eight months in prison.[30] After serving his time, he was then automatically placed in deportation proceedings.[31]

Lopez-Velasquez was not represented in his group deportation proceeding, and the immigration judge did not inform him that he had an argument for relief from deportation.[32] In this group deportation, an immigration judge "heard" Lopez-Velasquez's case as part of a group proceeding that included the cases of several other noncitizens.[33] The immigration judge asked counsel for the Immigration and Naturalization Service (INS)[34] whether any of the respondents qualified for relief from deportation.[35] When counsel for the INS responded that he did not believe so, the immigration judge ordered all the respondents deported.[36] Since the immigration judge's actions made it seem as though no relief

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[25] *Id.* at 895-96.

[26] *Id.* The SAW program was temporary and is no longer in effect, but it was passed to allow noncitizens working in agriculture in the United States without documentation the opportunity to legalize their status, with the potential to become legal permanent residents. *See also* 8 U.S.C.A. § 1160 (Westlaw 2011).

[27] *Lopez-Velasquez*, 629 F.3d at 895-96.

[28] United States v. Lopez-Velasquez, 568 F.3d 1139, 1141 (9th Cir. 2009), *reh'g en banc granted*, 599 F.3d 925 (9th Cir. 2010), *and on reh'g en banc*, 629 F.3d 894 (9th Cir. 2010).

[29] *Id.*

[30] *Id.*

[31] *Lopez-Velasquez*, 629 F.3d at 895-96.

[32] *Id.*; *see also* United States v. Lopez-Vasquez, 1 F.3d 751, 754 (9th Cir. 1993) (per curiam) (noting that group deportations are permissible if conducted with due process).

[33] *Lopez-Velasquez*, 629 F.3d at 895-96.

[34] The INS has since been incorporated into the Department of Homeland Security (DHS). *See* The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

[35] *Lopez-Velasquez*, 629 F.3d at 895-96.

[36] *Id.* It is improper for the immigration judge to rely solely on the representations and findings of the government. *See* United States v. Ramos, 623 F.3d 672, 683 (9th Cir. 2010) ("Without any independent inquiry of the petitioner, and depending solely on information provided by DHS, the IJ concluded that Ramos had 'voluntarily, knowingly, and intelligently' waived his due process rights. As we have noted, 'shortcuts frequently turn out to be mistakes.'") (citations omitted).

was available to him, Lopez-Velasquez waived his right to appeal and was deported.[37]

In order to rejoin his family, Lopez-Velasquez reentered the United States twice following his initial deportation.[38] He was deported in 2003 and was placed in deportation proceedings again in 2006.[39] Lopez-Velasquez argued in both proceedings that his original deportation violated due process.[40] During the 2006 proceedings, the U.S. District Court for the District of Oregon ruled in favor of Lopez-Velasquez, stating that he had a colorable claim for relief under former INA section 212(c), of which the immigration judge failed to inform him.[41] Thus, the district court found that Lopez-Velasquez was denied due process.[42] The government appealed.[43]

A Ninth Circuit panel issued a unanimous opinion affirming the district court's decision in favor of Lopez-Velasquez, reasoning that the immigration judge's failure to inform Lopez-Velasquez of his potential for relief constituted a violation of due process.[44] In a rehearing en banc,[45] however, the Ninth Circuit reversed both the panel decision and district court's judgment, holding that the immigration judge was not required to inform Lopez-Velasquez of relief at the time of his original deportation, in part because then-current Ninth Circuit jurisprudence seemed to indicate that relief was not possible.[46]

II. RELEVANT LAW: DUE PROCESS, THE DUTY TO INFORM, AND ELIGIBILITY FOR RELIEF

The central issue in *Lopez-Velasquez* was whether, at the time of his original deportation, Lopez-Velasquez had a colorable legal argument for

[37] *Lopez-Velasquez*, 629 F.3d at 895-96.

[38] *Id.* at 895.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* at 897.

[45] Law French for "on the bench," en banc means "with all the judges present and participating; in full court." BLACK'S LAW DICTIONARY 606 (9th ed. 2009). Because of its size, the Ninth Circuit ordinarily uses a limited en banc court, consisting of the Chief Judge of the circuit plus ten additional judges drawn by lot from the pool of active judges. Rarely, a case heard by a limited en banc court may be reheard by the full court. *See* 9th Cir. R. 35-3; *see also* 28 U.S.C.A. § 46(c) (Westlaw 2011); Pub. L. No. 95-486, § 6, 92 Stat. 1629 (1978) (authorizing limited en banc courts for courts of appeals having more than fifteen active judges). *Lopez-Velasquez* was decided by a limited en banc court. *See* 629 F.3d at 895.

[46] *Lopez-Velasquez*, 629 F.3d at 897.

relief sufficient to trigger the duty to inform required for due process.[47] Because Lopez-Velasquez was not only ordered deported but also charged with illegal reentry (a criminal offense punishable by up to twenty years in prison), his prosecutors were required to show that his original deportation was valid,[48] that is, conducted with due process.[49] This section will describe the level of due process required in immigration proceedings, as well as the role of an immigration judge's duty to inform.

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[47] *Id.* at 896.

[48] Both illegal entry and illegal reentry carry criminal charges separate from their immigration consequences. *See* 8 U.S.C.A. § 1326 (Westlaw 2011); *see also* United States v. Gonzalez-Ruiz, 369 F. Supp. 2d 1151, 1155-56 (N.D. Cal. 2005). Criminal prosecution for illegal reentry requires that the underlying deportation not be fundamentally unfair or deprive the alien of the opportunity for judicial review. 8 U.S.C.A. § 1326(d) (Westlaw 2011). Underlying deportation procedures can be collaterally attacked in defense against a charge of criminal reentry. *Id.*; s*ee generally* United States v. Mendoza-Lopez, 481 U.S. 828 (1987) (finding no due process in a group deportation where none of the respondents had been informed of potential relief); Brent S. Wible, *The Strange Afterlife of Section 212(c) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry After* St. Cyr, 19 GEO. IMMIGR. L.J. 455, 462 (2005); *see also* United States v. Nicholas-Armenta, 763 F.2d 1089, 1090 (9th Cir. 1985) ("Criminal convictions are the result of a proceeding with all the constitutional safeguards. Respondents in a civil deportation hearing, however, are not entitled to the same constitutional rights afforded a criminal defendant. . . . Therefore, before imposing a § 1326 felony conviction which carries a prison sentence, the district court should be able to review the legality of an underlying deportation order obtained without the benefit of the same constitutional protection that is extended to criminal defendants. *See, e.g.*, I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984) (exclusionary rule does not apply to a deportation proceeding); Ramirez v. I.N.S., 550 F.2d 560, 563 (9th Cir. 1977) (no Sixth Amendment right to appointed counsel in deportation proceedings); Trias-Hernandez v. I.N.S., 528 F.2d 366, 368-69 (9th Cir. 1975) (failure to give *Miranda* warnings does not preclude use of alien's statements in a deportation hearing); United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 154 (1923) (Fifth Amendment refusal to testify may form the basis of inferences against alien in the deportation hearing).").

[49] 8 U.S.C.A. § 1326(d) (Westlaw 2011); *see also Mendoza-Lopez,* 481 U.S. at 840. The Supreme Court in *Mendoza-Lopez* affirmed that a failure to inform could compromise due process such that a deportation order suffering from this flaw could not be used as an element of criminal reentry. *Id.* In *Mendoza-Lopez*, an immigration judge failed to inform noncitizens of their eligibility for relief from deportation. *Id.* The Court explained that, since the respondents in this group deportation had not been informed of relief, their waivers of appeal were therefore not "considered and intelligent" and thus these noncitizens had been "deprived of judicial review of their deportation proceeding." *Id.* Because the underlying deportations lacked due process, the Court stated that the government could not rely on these invalid deportation orders as "reliable proof" of an element in a criminal offense. *Id.* After the Supreme Court's holding in *Mendoza-Lopez*, Congress clarified that a collateral attack on a deportation proceeding could be made on due process grounds because, if a deportation is carried out without due process, it cannot be the basis of subsequent charges. *See* 8 U.S.C.A. § 1326(d) (Westlaw 2011); *see also* Wible, *The Strange Afterlife of Section 212(c) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry After* St. Cyr, 19 GEO. IMMIGR. L.J. at 462.

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A. DUE PROCESS IN IMMIGRATION PROCEEDINGS

Although noncitizens have no substantive due process right to receive benefits in immigration proceedings, procedural due process rights have long been recognized, particularly in the context of deportation.[50] The procedural protections available in deportation proceedings do not rise to the level of those available in criminal law because deportation is not considered punishment.[51] For example, in immigration proceedings, there is no right to government-appointed counsel, no right to exclude hearsay evidence, and the Double Jeopardy Clause has no application.[52] In addition, Congress's power to regulate immigration is plenary, effectively limiting the courts' ability to delineate constitutional protections in this field.[53]

As early as 1903, the United States Supreme Court affirmed the right to procedural due process for noncitizens in deportation proceedings, writing:

> [A]n alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, [cannot] be taken into custody and deported without [an] opportunity to be heard upon the questions involving his right to be and remain in the United States.[54]

Although the extent of procedural due process in immigration proceedings has been contested,[55] due process requirements, in general, are stronger in deportation than exclusion proceedings.[56] Noncitizens

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[50] *See* Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 307-13 (2000); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Capric v. Ashcroft, 355 F.3d 1075 (7th Cir. 2004); Ramirez-Alejandre v. Ashcroft, 319 F.3d 365 (9th Cir. 2003) (en banc); United States v. Jauregui, 314 F.3d 961 (8th Cir. 2003); American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045 (9th Cir. 1995); Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983); Walter S. Gindin, *(Potentially) Resolving the Ever-Present Debate over Whether Noncitizens in Removal Proceedings Have a Due-Process Right to Effective Assistance of Counsel*, 96 IOWA L. REV. 669 (2011).

[51] *See* Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. at 307-13.

[52] *Id.*; *see also* United States v. Nicholas-Armenta, 763 F.2d 1089, 1090 (9th Cir. 1985).

[53] *See* Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. at 307-13.

[54] Yamataya v. Fisher, 189 U.S. 86, 101 (1903); *see also* Tang Tun v. Edsell, 223 U.S. 673, 681-82 (1912) (agency decisions should still comply with "the fundamental principles of justice embraced within the conception of due process of law").

[55] *See generally* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

[56] Exclusion proceedings are meant to "exclude" arriving noncitizens who are inadmissible

who have been living in the United States are entitled to a higher level of due process than noncitizens recently arriving in the United States, because their interest in remaining is deemed stronger due to their more extensive ties to the community.[57]

Procedural regulations promulgated by the Attorney General determine due process in deportation proceedings.[58] The immigration judge and the Board of Immigration Appeals (BIA) have a special duty to adhere to these regulations.[59] Indeed, the Attorney General has argued that the procedural due process constraints set forth in regulations apply with especial force to actions "as they pertain[] to 'proceedings before the immigration judge or the [BIA]' itself."[60] For example, in *Orantes-Hernandez v. Thornburgh*, the Ninth Circuit found that the right to obtain counsel—at the noncitizens' own expense—was set out in regulations promulgated by the Attorney General.[61] The court held that the INS violated due process when it prevented a group of Salvadoran refugees from obtaining counsel.[62] Failure to follow the procedures outlined in the federal regulations can thus constitute a violation of due process.[63]

B. THE DUTY TO INFORM

One essential procedural safeguard required by the regulations promulgated by the Attorney General is the immigration judge's duty to inform.[64] The Attorney General derives authority in immigration law

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to the United States, while deportation proceedings are meant to deport removable noncitizens. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly. Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation, and, although we have only rarely held that the procedures provided by the executive were inadequate, we developed the rule that a continuously present permanent resident alien has a right to due process in such a situation.") (citing United States *ex rel.* Tisi v. Tod, 264 U.S. 131, 133-34 (1924); Low Wah Suey v. Backus, 225 U.S. 460, 468 (1912) (hearing may be conclusive "when fairly conducted"); United States *ex rel.* Vajtauer v. Comm'r of Immigration, 273 U.S. 103, 106 (1927); The Japanese Immigrant Case, 189 U.S. 86, 100-01 (1903); Wong Yang Sung v. McGrath, 339 U.S. 33, 49-50 (1950); Bridges v. Wixon, 326 U.S. 135, 153-54 (1945)).

[57] *Landon*, 459 U.S. at 32.

[58] Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. at 1641.

[59] Brief for the Respondent at 6, Afanwi v. Holder, 130 S. Ct. 350 (2009) (No. 08-906), 2009 WL 2625869 (analysis of the Attorney General).

[60] *Id.*

[61] Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 554 (9th Cir. 1990).

[62] *Id.*

[63] *Id.*

[64] 8 C.F.R. § 242.17 (recodified as 8 C.F.R. § 1240.49 (Westlaw 2011)).

from the Immigration and Nationality Act.[65] Specifically, section 103(a)(3) of the INA authorizes the Attorney General to "establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this Act."[66] Pursuant to INA section 103(a)(3), the Attorney General promulgated 8 C.F.R. § 242.17(a) to address due process issues for unrepresented and often uninformed respondents in immigration proceedings.[67] Section 242.17(a), which was renumbered in 2006 as § 1240.49,[68] states that "[t]he immigration judge shall inform the respondent of his or her apparent eligibility to apply for any of the benefits enumerated in this paragraph and shall afford the respondent an opportunity to make application therefore during the hearing."[69]

The regulation makes no mention of the probability of the noncitizen's success in such an application, but only requires that the opportunity be given to noncitizens who are "apparently" eligible.[70] One leading commentator at the time of the initial passage of the INA remarked that access to information was notably lacking in immigration procedures and that, at that time, immigration officers were not required to be legally trained.[71] Another commentator who argued that 8 C.F.R. § 1240.49 should be construed broadly to protect the few constitutional rights noncitizens possess stated:

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[65] *See* INA § 103(a)(3), 8 U.S.C. § 1103(a)(3). The 1952 Immigration and Naturalization Act still comprises the bulk of immigration law in the United States; *see also* IMMIGRATION AND NATIONALITY ACT, DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERVS., www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextchannel=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD (last visited Aug. 31, 2011).

[66] *Id.*

[67] Michael D. Anderson, Case Comment, *Aliens Must Be Informed by Immigration Judges of the Availability of Relief from Deportation When Record Raises Inference That a Reasonable Possibility for Relief Exists,* Moran-Enriquez v. Immigration and Naturalization Service*, 884 F.2d 420 (9th Cir.1989)*, 14 SUFFOLK TRANSNAT'L L.J. 645, 656 (1991) (internal citations omitted) [hereinafter Anderson, *Aliens Must Be Informed of Relief*].

[68] 8 C.F.R. § 242.17 is currently reserved, but the text was recodified without alteration as 8 C.F.R. § 1240.49 (Westlaw 2011).

[69] 8 C.F.R. § 1240.49 (Westlaw 2011).

[70] *Id.*; *see also* Moran-Enriquez v. I.N.S., 884 F.2d 420, 422 (9th Cir. 1989); Anderson, Case Comment, *Aliens Must Be Informed of Relief*, 14 SUFFOLK TRANSNAT'L L.J. at 652.

[71] Franz M. Oppenheimer, Book Review, 65 YALE L.J. 115, 115-16 (1955) (reviewing FRANK L. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES (1955)) (noting also that "[t]he Act and the Regulations constitute . . . an unspeakable quagmire, treacherous even for the expert. . . . And the incidence of misinformation emanating from other presumably authoritative sources in this field is, in the experience of this reviewer, great enough to jeopardize the decent application of the law.").

> Aliens . . . have traditionally been afforded few constitutional protections in deportation proceedings. It is in light of the historic treatment of aliens that 8 C.F.R. § [1240.49] must be analyzed. Because the constitutional rights that aliens have are not as broad as those afforded United States citizens, the rights they do have under statutes and regulations should not be narrowly construed, but rather read to give the alien the fullest protection permissible.[72]

The immigration judge's disclosure to noncitizens of their "apparent eligibility to apply for" relief is therefore required by 8 C.F.R. § 1240.49.[73] This does not mean that the noncitizen will actually be eligible for relief.[74] The regulation simply requires the immigration judge to inform a respondent when eligibility for relief is "apparent."[75] Furthermore, the Courts of Appeals for the Second, Seventh, and Ninth Circuits have explicitly held that an immigration judge's failure to inform noncitizens of their eligibility for relief from deportation violates due process.[76]

The Ninth Circuit outlined the scope of an immigration judge's duty to inform in *Moran-Enriquez v. I.N.S.*[77] Respondent Moran-Enriquez was a legal permanent resident married to a U.S. citizen; his children were also U.S. citizens.[78] He was convicted of a "crime involving moral turpitude," an offense that made him deportable.[79] The Ninth Circuit considered his permanent resident status and the hardship his family

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[72] Anderson, Case Comment, *Aliens Must Be Informed of Relief*, 14 SUFFOLK TRANSNAT'L L.J. at 656 (footnotes omitted).

[73] 8 C.F.R. § 1240.49 (Westlaw 2011); *Moran-Enriquez*, 884 F.2d at 422; Anderson, Case Comment, *Aliens Must Be Informed of Relief*, 14 SUFFOLK TRANSNAT'L L.J. at 656.

[74] 8 C.F.R. § 1240.49 (Westlaw 2011); *Moran-Enriquez*, 884 F.2d at 422; Anderson, Case Comment, *Aliens Must Be Informed of Relief*, 14 SUFFOLK TRANSNAT'L L.J. at 656.

[75] 8 C.F.R. § 1240.49 (Westlaw 2011); *Moran-Enriquez*, 884 F.2d at 422; Anderson, Case Comment, *Aliens Must Be Informed of Relief*, 14 SUFFOLK TRANSNAT'L L.J. at 656.

[76] *See* United States v. Muro-Inclan, 249 F.3d 1180, 1184 (9th Cir. 2001) ("[W]hen the record before the [IJ] raises a reasonable possibility of relief from deportation under this provision, it is a denial of due process to fail to inform an alien of that possibility at the deportation hearing." (internal quotation marks omitted) (citing United States v. Arrieta, 224 F.3d 1076, 1079 (9th Cir. 2000))); *see also* United States v. Roque-Espinoza, 338 F.3d 724, 730 (7th Cir. 2003) (addressing a distinction "between an alien's claim that she has a right to seek discretionary relief, and the very different claim that she has a right to have that discretion exercised in a particular way"); United States v. Perez, 330 F.3d 97, 104 (2d Cir. 2003) (finding deportation proceeding fundamentally unfair when ineffective assistance of counsel resulted in an alien who was "eligible for § 212(c) relief and could have made a strong showing in support of such relief" failing to apply for waiver).

[77] *Moran-Enriquez*, 884 F.2d at 422; *see also* Anderson, Case Comment, *Aliens Must Be Informed of Relief*, 14 SUFFOLK TRANSNAT'L L.J. at 656.

[78] *Moran-Enriquez*, 884 F.2d at 422.

[79] *Id.* at 421; *see also* Anderson, Case Comment, *Aliens Must Be Informed of Relief*, 14 SUFFOLK TRANSNAT'L L.J. at 657.

would face upon his deportation and found he was "apparently eligible" for relief from deportation under INA section 212(h).[80] The standard announced in *Moran-Enriquez* is that, under 8 C.F.R. § 1240.49, an immigration judge "must" inform respondents in deportation hearings of "*apparent eligibility*" for relief.[81] The Ninth Circuit in *Moran-Enriquez* explained the "apparent eligibility" standard as follows:

> We read the "apparent eligibility" standard of 8 C.F.R. section [1240.49] to mean that where the record, fairly reviewed by an individual who is intimately familiar with the immigration laws—as [immigration judges] no doubt are—raises a reasonable possibility that the petitioner may be eligible for relief, the [immigration judge] must advise the alien of this possibility and give him the opportunity to develop the issue.[82]

Thus, even though a noncitizen may not have a complete showing of eligibility, if there is a "reasonable possibility" of relief, then the immigration judge must inform the noncitizen of that relief and give him or her the opportunity to obtain evidence and argue for potential relief.[83] Thus, an immigration judge has a mandatory duty to inform if the record "raises a reasonable *possibility* that the petitioner *may* be eligible for relief."[84]

In *United States v. Bui,* the Ninth Circuit affirmed that failure to inform of the potential for relief results in an invalid deportation order.[85] Bui had entered the United States from Vietnam when he was sixteen years old.[86] During Bui's deportation proceedings, the immigration judge failed to consider that Bui might have United States citizen or legal permanent resident relatives whose existence could provide Bui relief from deportation.[87] Even though the record before the immigration judge did not reveal any relatives, the Ninth Circuit determined that, because of Bui's young age, the possibility that such relatives existed

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[80] *Moran-Enriquez*, 884 F.2d at 422; *see also* Anderson, Case Comment, *Aliens Must Be Informed of Relief*, 14 SUFFOLK TRANSNAT'L L.J. at 655.

[81] *Moran-Enriquez*, 884 F.2d at 422; *see also* Anderson, Case Comment, *Aliens Must Be Informed of Relief*, 14 SUFFOLK TRANSNAT'L L.J. at 652.

[82] *Moran-Enriquez*, 884 F.2d at 423.

[83] *Id.*

[84] *Id.* (emphasis added).

[85] Bui v. I.N.S., 76 F.3d 268 (9th Cir. 1996); *see also* Thomas G. LaRussa, *Ninth Circuit Finds Reversible Error in Failure of IJ to Grant Deported Alien Right to Choose Country Of Deportation: Failure Excludability is Error*, 10 GEO. IMMIGR. L.J. 564 (1996).

[86] *Bui*, 76 F.3d at 269.

[87] *Id.*

was strong enough to trigger the duty to inform.[88] The Ninth Circuit scrutinized the duty established under § 1240.49 and, citing *Moran-Enriquez*, summarized: "'Apparent eligibility' is a reasonable possibility that the alien may be eligible for relief."[89] The Ninth Circuit held that even though the record did not directly report the existence of qualifying relatives, failure to consider the fact that Bui might have such relatives and therefore inform him of his potential relief was reversible error.[90]

The decisions of the Ninth Circuit establish that an immigration judge's duty to inform is triggered when there is a "reasonable possibility" that the noncitizen is eligible for relief from deportation.[91] In *Moran-Enriquez*, the Ninth Circuit held that the duty to inform is triggered when there is a reasonable *possibility* that the petitioner *may* be eligible for relief.[92] In *Bui*, the court held that the duty applied even when the record only suggested facts demonstrating relief.[93] The deportation of a noncitizen who has not been informed of potential relief and subsequently waives the right to appeal lacks due process because waiver of appeal must be intelligent and informed.[94] If an immigration judge fails to inform a noncitizen in deportation procedures of potential relief, the deportation is most likely invalid for lack of due process.[95]

C. Eligibility for Relief from Deportation

Since an immigration judge's duty to inform arises when there is a reasonable possibility that a noncitizen is eligible for relief from deportation, it is critical to know what relief from deportation entails.[96] As the court in *Moran-Enriquez* noted, there is "no doubt" that an immigration judge is an expert in immigration law and is well qualified

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[88] *Id.*

[89] *Id.* at 270.

[90] *Id.* at 271 ("Here, the record disclosed that Bui entered the United States at sixteen years of age under lawful permanent resident status; this also should have raised an inference of the existence of relatives and the possibility of relief.").

[91] *See, e.g.*, Moran-Enriquez v. I.N.S., 884 F.2d 420, 423 (9th Cir. 1989); *Bui*, 76 F.3d at 270.

[92] *Moran-Enriquez*, 884 F.2d at 423.

[93] *Bui*, 76 F.3d at 271.

[94] 8 U.S.C.A. § 1326(d) (Westlaw 2011); United States v. Mendoza-Lopez, 481 U.S. 828, 840 (1987).

[95] *See, e.g.*, 8 U.S.C. § 1326(d) (1996); *see also Mendoza-Lopez*, 481 U.S. at 840; *Bui*, 76 F.3d 268; Thomas G. LaRussa, *Ninth Circuit Finds Reversible Error in Failure of IJ to Grant Deported Alien Right to Choose Country Of Deportation: Failure Excludability is Error*, 10 Geo. Immigr. L.J. 564 (1996).

[96] *Moran-Enriquez*, 884 F.2d at 423; *see also* Michael D. Anderson, Case Comment, *Aliens Must Be Informed of Relief*, 14 Suffolk Transnat'l L.J. 645, 646 (1991).

to recognize when a noncitizen is eligible for an immigration benefit, including relief from deportation.[97] The following section outlines 212(c), a relevant form of relief that would have been known to an immigration judge during the period of inquiry.

1. *Immigration and Nationality Act Section 212(c) and the Question of Domicile*

The type of relief that might have been available to Lopez-Velasquez was known as relief under INA section 212(c).[98] Relief from deportation has taken various forms over the years; however, before passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, relief under INA section 212(c) was one of the most important forms of relief from deportation.[99] Section 212(c) replaced the "seventh proviso" of the Immigration Act of 1917, which provided that any noncitizen returning from a temporary absence abroad could not be excluded as inadmissible if he or she had acquired seven years of unrelinquished domicile in the United States.[100] Since this "seventh proviso" had not even required that noncitizens domiciled in the United States be in legal status, section 212(c) made these requirements more rigorous in that domicile must have been "lawful" and noncitizens seeking relief under section 212(c) must be legal permanent residents at the time of relief.[101]

A further modification to section 212(c) extended relief to legal permanent residents who had not left the United States but who had become deportable through the commission of an "aggravated felony" (including the crime of trafficking in a controlled substance).[102] However, relief was available only to a noncitizen who had not served a criminal sentence of more than five years. Thus, in 1994,[103] section 212(c) relief was available to a legal permanent resident with seven years

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[97] *Moran-Enriquez*, 884 F.2d at 423; *see also* Anderson, Case Comment, *Aliens Must Be Informed of Relief*, 14 SUFFOLK TRANSNAT'L L.J. at 646.

[98] United States v. Lopez-Velasquez, 629 F.3d 894, 895 (9th Cir. 2010) (en banc).

[99] *See* I.N.S. v. St. Cyr, 533 U.S. 289, 289 (2001).

[100] Mark Figueiredo, Butros v. INS*: The Folly of Finality as an Absolute Bar to Seeking §212(c) Relief from Deportation*, 24 GOLDEN GATE U. L. REV. 607, 615-617 (1994).

[101] *Id.* at 615-618.

[102] *See* I.N.S. v. St. Cyr, 533 U.S. 289 (2001). After IIRIRA, an "aggravated felony" refers broadly to a number of crimes, including gambling and fraud. 8 U.S.C. § 1101(a)(43). Before IIRIRA, it referred more narrowly to possession of firearms, drug trafficking and murder. *See* Pub. L. No. 100-690, § 7342, 102 Stat. 4181 (1988).

[103] This date is important because it was the year in which Lopez-Velasquez was deported.

of lawful unrelinquished domicile who had not served a term of imprisonment for five years or more for an aggravated felony.[104]

Determining whether a noncitizen has acquired seven years of "lawful unrelinquished domicile" for the purposes of section 212(c) hinges on whether the noncitizen could acquire domicile while residing in the United States in a legal status other than that of a legal permanent resident.[105] Between 1979 and 1995, the Ninth Circuit and other courts of appeals issued mixed rulings regarding whether non-permanent residents could acquire domicile, but the trend favored allowing noncitizens to acquire domicile outside of legal permanent residency.[106] In *Castillo-Felix v. I.N.S.*, the Ninth Circuit held that noncitizens who were not legal permanent residents could not acquire domicile.[107] In 1995, the Ninth Circuit overturned *Castillo-Felix* and held that noncitizens who were not permanent residents could acquire domicile.[108] However, even before the Ninth Circuit overturned *Castillo-Felix*, Congress passed the Immigration Reform and Control Act (IRCA). When read in light of decisions of the United States Supreme Court and of other circuits' decisions, IRCA's passage indicated that noncitizens who were not legal permanent residents could acquire domicile—the biggest question involved in determining Lopez-Velasquez's eligibility for relief.[109]

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[104] *St. Cyr*, 533 U.S. at 296-97.

[105] Figueiredo, Butros v. INS*: The Folly of Finality as an Absolute Bar to Seeking §212(c) Relief from Deportation*, 24 GOLDEN GATE U. L. REV. at 615–17.

[106] Ortega de Robles v. I.N.S., 58 F.3d 1355, 1361 (9th Cir. 1995); Castellon-Contreras v. I.N.S., 45 F.3d 149, 154 (7th Cir. 1995) (alien gained lawful domicile for purposes of § 212(c) on date that he applied for amnesty under IRCA); *compare* Lok v. I.N.S. (*Lok I*), 548 F.2d 37 (2d Cir. 1977), *with* Castillo-Felix v. I.N.S., 601 F.2d 459 (9th Cir. 1979).

[107] *Castillo-Felix*, 601 F.2d at 467.

[108] *Ortega de Robles*, 58 F.3d at 1361.

[109] *See* United States v. Lopez-Velasquez, 568 F.3d 1139, 1144 (9th Cir. 2009) ("Although in *Castillo-Felix v. INS*, we determined that an alien must have permanent residency to establish such 'lawful unrelinquished domicile,' the intervening enactment of IRCA's amnesty programs raised the reasonable possibility that *Castillo-Felix* no longer remained controlling law. Indeed, a year after Lopez-Velasquez's removal proceeding, we held that IRCA superseded *Castillo-Felix*. We concluded that 'lawful unrelinquished domicile' includes the period of temporary residency granted by the § 245A general amnesty provision of the IRCA, because during that time an alien is lawfully and physically present and intends to remain in the United States.") (citing *Ortega de Robles*, 58 F.3d at 1360-61), *overruled on other grounds by* United States v. Lopez-Velasquez, 629 F.3d 894 (9th Cir. 2010) (en banc).

2. Requirements for Domicile: The Lawful Intent to Remain

The Board of Immigration Appeals (BIA) has held that a noncitizen could acquire domicile if he or she was physically present and intended to remain in the United States, and both the physical presence and intent to remain were "lawful" under the terms of the noncitizen's visa.[110] Most groups of noncitizens are by law foreclosed from forming an intent to remain. For instance, if a noncitizen, such as a student from abroad, forms an intent to remain in the United States while holding a nonimmigrant visa, his or her presence automatically becomes "unlawful."[111] However, the passage of IRCA altered the landscape of the law, allowing non-permanent residents to form the intent to remain.

Before the passage of IRCA, the U.S. Supreme Court in *Elkins v. Moreno* examined congressional intent regarding whether "nonimmigrant" noncitizens (i.e., lawfully present noncitizens who were not legal permanent residents) could acquire domicile if they lawfully intend to remain in the United States.[112] The Court explained that while Congress had restricted certain noncitizens from immigrating by requiring that they not abandon their residences abroad, it did not require certain other classes of nonimmigrants to maintain their foreign residences.[113] Thus, reasoned the Court, these nonimmigrants were "nonrestricted."[114] The Supreme Court stated that "Congress, while anticipating that permanent immigration would normally occur through immigrant channels, was willing to allow nonrestricted nonimmigrant

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[110] *In re* Lok, 18 I. & N. Dec. 101, 109-10 (BIA 1981); *see also In re* Carrasco, 16 I. & N. Dec. 195, 197 (BIA 1977). Outside of the Second Circuit, the BIA also held that section 212(c) relief required seven years of lawful permanent residence, but after the Ninth Circuit's holding in *Ortega de Robles*, the BIA agreed that IRCA had changed the statutory scheme such that congressional intent supported an argument that domicile could be acquired outside of legal permanent residence. *See In re* Cazares-Alvarez, 21 I. & N. Dec. 188, 197 (BIA 1996) (stating that "[i]f Congress has not addressed the precise issue the question for the court is whether the agency's answer is based upon a permissible construction of the statute" and that the Ninth Circuit found that "the statutory scheme no longer supports" the interpretation that domicile could only be acquired by legal permanent residents) (internal quotations omitted).

[111] *In re* Lok, 18 I. & N. Dec. at 108 ("In order for an alien to establish a domicile in the United States, he must be physically present in this country and have the intention of residing here permanently or indefinitely. For that domicile to be considered 'lawful,' however, the alien's presence here must be lawful within the meaning of this country's immigration laws. The Immigration and Nationality Act sanctions the continuing presence in this country of but one class of aliens other than those lawfully admitted for permanent residence, namely, nonimmigrants in compliance with the terms and conditions of their admission.") (internal citations omitted).

[112] Elkins v. Moreno, 435 U.S. 647, 666 (1978).

[113] *Id.*

[114] *Id.*

aliens to adopt the United States as their domicile."[115] Congress's flexibility in defining "domicile" raised a fair possibility that noncitizen, nonimmigrants who were not required to maintain a residence abroad (and were thus "nonrestricted") could adopt the United States as their domicile.[116]

A growing trend among the circuits also indicated that nonimmigrant, noncitizens could establish lawful domicile.[117] In two decisions regarding the same noncitizen, the Court of Appeals for the Second Circuit interpreted "lawful domicile" to encompass domicile for noncitizens with legal nonimmigrant status—not just permanent resident status.[118] In *Lok I* and *Lok II*, the Second Circuit explained that legal permanent residence has a specific definition under immigration law that is distinct from the concept of domicile.[119] The court reasoned in *Lok I* that "it is possible for aliens to possess a lawful domicile in this country without being admitted for permanent residence."[120] It further noted in *Lok II* that the Ninth Circuit's contrary holding in *Castillo-Felix* was "open to question."[121] Thus, the Second Circuit recognized certain lawfully present noncitizens could acquire domicile, even if they were not permanent residents.[122]

Following the Second Circuit's decision in *Lok I*, the Court of Appeals for the District of Columbia Circuit clarified that the distinguishing element in establishing domicile is the intent to remain,[123] and further stated that an individual might establish domicile if he or she

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[115] *Id.*

[116] *Id.*

[117] Melian v. I.N.S., 987 F.2d 1521, 1525 (11th Cir. 1993); Prichard-Ciriza v. I.N.S., 978 F.2d 219, 224 n.7 (5th Cir. 1992); Lok v. I.N.S. (*Lok II*), 681 F.2d 107, 108 n.2 (2d Cir. 1982); Anwo v. I.N.S., 607 F.2d 435 (D.C. Cir. 1979) (per curiam); Francis v. I.N.S., 532 F.2d 268 (2d Cir. 1976).

[118] *See* Lok v. I.N.S. (*Lok I*), 548 F.2d 37, 40 (2d Cir. 1977); *Lok II*, 681 F.2d at 109 ("Thousands of aliens could become lawful domiciliaries without becoming permanent residents under Elkins and Tim Lok I.").

[119] *Lok I*, 548 F.2d at 40 ("The phrase 'lawfully admitted for permanent residence' is a carefully defined term, 8 U.S.C. s 1101(a)(20), and does not bear the same meaning as the words 'lawful unrelinquished domicile.'").

[120] *Id.*

[121] *Lok II*, 681 F.2d at 110 n.4.

[122] *Lok I*, 548 F.2d at 40.

[123] Anwo v. I.N.S., 607 F.2d 435, 438 (D.C. Cir. 1979) (per curiam); *see* Gilbert v. David, 235 U.S. 561, 569 (1915); Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954) ("Residence in fact, and the intention of making the place of residence one's home, are essential elements of domicile."). Intent to remain distinguishes "domicile" from "residence," which is defined in the Act as the "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C.A. § 1101(a)(33) (Westlaw 2011); *see also* Bache Halsey Stuart Inc. v. Namm, 446 F. Supp. 692, 694 (S.D.N.Y. 1978) ("It is well established that domicile entails not only residence in fact, but also intent to make that place of residence one's home.").

"intends to reside permanently or indefinitely in the new location."[124] The court held that a noncitizen on a student visa, who was not lawfully able to intend to remain in the United States, could not establish domicile because the terms of the visa prevented it.[125] However, this holding left open the possibility that a noncitizen whose visa allowed for an intent to reside permanently in the United States could lawfully establish domicile.[126]

In *Prichard-Ciriza v. I.N.S.*, the Fifth Circuit addressed a hypothetical situation in which a noncitizen had maintained lawful status before becoming a legal permanent resident, and theorized that domicile could accrue in lawful nonimmigrant status.[127] The Fifth Circuit reasoned that a noncitizen who had legal status under a visa that had not expired might acquire time toward establishing domicile even before adjusting status to that of a permanent resident.[128]

In *Melian v. I.N.S.*, the Court of Appeals for the Eleventh Circuit recognized that the Supreme Court's holding in *Elkins* meant that non-permanent residents could acquire domicile.[129] Moreover, it reasoned that this interpretation was the most consistent with the requirements of section 212(c), since the statute required legal permanent residence as well as seven years of domicile, rather than simply requiring seven years of legal permanent residence (which would have also captured the physical presence and intent of domicile).[130] The Eleventh Circuit held that while a noncitizen who did not have legal status could not acquire domicile, one whose legal status was other than that of a permanent resident, but who could still hold the intent to remain, could indeed be domiciled in the United States for the purposes of section 212(c) relief.[131] Thus, the precedent of the Supreme Court as well as many of the circuits had acknowledged the possibility of noncitizens who were not legal permanent residents acquiring domicile.[132]

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[124] *Anwo*, 607 F.2d at 438.

[125] *Id.*

[126] *Id.*

[127] Prichard-Ciriza v. I.N.S., 978 F.2d 219, 224 n.7 (5th Cir. 1992) ("[I]f [noncitizen respondent] had been in the United States on a valid temporary work visa and had achieved permanent resident status *prior to* the expiration of that visa, then the time he was domiciled in the United States under the auspices of the visa might well count toward his seven-year minimum.") (emphasis in original).

[128] *Id.*

[129] Melian v. I.N.S., 987 F.2d 1521, 1525 (11th Cir. 1993).

[130] *Id.*

[131] *Id.*

[132] Elkins v. Moreno, 435 U.S. 647, 666 (1978); *Melian*, 987 F.2d at 1525; Anwo v. I.N.S., 607 F.2d 435 (D.C. Cir. 1979) (per curiam); *Prichard-Ciriza*, 978 F.2d at 224 n.7; Lok v. I.N.S. (*Lok*

3. *Congressional Intent and the Immigration Reform and Control Act*

In 1986, Congress created a program granting amnesty to certain undocumented noncitizens, and passed it as part of the Immigration Reform and Control Act (IRCA).[133] The amnesty program enacted through IRCA was meant to ameliorate the circumstances of those noncitizens who had made the United States their home.[134] The program provided a means for certain noncitizens living in the United States to legalize their status in the country.[135] In addition, in a conference report, members of Congress expressed their intent that noncitizens be given information about IRCA, including information not only about adjusting to permanent resident status, but also "the facilities available to provide education and employment training and opportunities in order to meet such requirements."[136]

This generous allowance evidences congressional intent to reach out to undocumented noncitizens and provide them with all the information they would need to remain legally in the country.[137] Moreover, Congressman Theodore Weiss of New York stated that IRCA was "a major improvement over earlier efforts" at immigration reform and "maintained a relatively generous program of legalization for illegal immigrants, and its provisions relating to agricultural workers were

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II), 681 F.2d 107, 108 n.2 (2d Cir. 1982); Francis v. I.N.S., 532 F.2d 268 (2d Cir. 1976).

[133] *See* IMMIGRATION REFORM & CONTROL ACT OF 1986, H.R. REP. NO. 99-1000 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 5840.

[134] Ortega de Robles v. I.N.S., 58 F.3d 1355, 1359 (9th Cir. 1995) ("Congress reasoned as follows: 'The United States has a large undocumented alien population living and working within its borders. Many of these people have been here for a number of years and have become a part of their communities. Many have strong family ties here which include United States citizens and lawful residents. They have built social networks in this country. They have contributed to the United States in myriad ways, including providing their talents, labor and tax dollars. However, because of their undocumented status, these people live in fear, afraid to seek help when their rights are violated, when they are victimized by criminals, employers or landlords or when they become ill. Continuing to ignore this situation is harmful to both the United States and the aliens themselves. However, the alternative of intensifying interior enforcement or attempting mass deportations would be both costly, ineffective, and inconsistent with our immigrant heritage. The Committee believes that the solution lies in legalizing the [status] of aliens who have been present in the United States for several years, recognizing that past failures to [enforce] the immigration laws have allowed them to enter and to settle here.'") (citation omitted) (brackets in original).

[135] *See* H.R. REP. NO. 99-1000, *reprinted in* 1986 U.S.C.C.A.N. 5840.

[136] *Id.*, at 8, *reprinted in* 1986 U.S.C.C.A.N. at 5848 (stating that noncitizens should be provided with "information respecting the requirements that aliens with lawful temporary residence status would have to meet to have their status adjusted to permanent resident status and the facilities available to provide education and employment training and opportunities in order to meet such requirements").

[137] *Id.*

designed to prevent widespread exploitation."[138] Congressman Weiss's comment reinforces the fact that Congress designed IRCA to protect and provide for noncitizens living and laboring in the United States.[139] Senator Paul Simon of Illinois added, "We are offering legal assistance and we provide a legal status for people."[140] Thus, the intent of Congress in passing IRCA was to allow certain noncitizens to immigrate, that is, to lawfully intend to remain in the United States.[141]

III. ANALYSIS

Lopez-Velasquez presented the issue of whether Lopez-Velasquez's underlying deportation lacked due process because the immigration judge failed to execute his duty to inform Lopez-Velasquez of his potential relief under INA section 212(c).[142] The duty to inform applies when there is a "reasonable possibility" that the noncitizen qualifies for relief from deportation.[143] Hence, if at the time of his original deportation there was a "reasonable possibility" that Lopez-Velasquez was eligible for relief, the immigration judge's failure to inform him of this possibility would have rendered the proceeding invalid for lack of due process.

There was a reasonable possibility that Lopez-Velasquez might have been eligible for relief under INA section 212(c) at the time of his original deportation.[144] This section provided relief from deportation for a noncitizen who was a legal permanent resident, had seven years of "lawful unrelinquished domicile," and had not served more than five years imprisonment for an aggravated felony.[145] Lopez-Velasquez's

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[138] 132 CONG. REC. E3826-01 (1986).

[139] *Id.*

[140] 132 CONG. REC. S16879-01 (1986).

[141] *See* H.R. REP. NO. 99-1000, *reprinted in* 1986 U.S.C.C.A.N. 5840.

[142] United States v. Lopez-Velasquez, 629 F.3d 894, 895 (9th Cir. 2010) (en banc).

[143] Moran-Enriquez v. I.N.S., 884 F.2d 420, 423 (9th Cir. 1989).

[144] Elkins v. Moreno, 435 U.S. 647, 666 (1978); Prichard-Ciriza v. I.N.S., 978 F.2d 219, 224 n.7 (5th Cir. 1992); Lok v. I.N.S. (*Lok II*), 681 F.2d 107, 108 n.2 (2d Cir. 1982); Francis v. I.N.S., 532 F.2d 268 (2d Cir. 1976); Melian v. I.N.S., 987 F.2d 1521, 1525 (11th Cir. 1993); Anwo v. I.N.S., 607 F.2d 435 (D.C. Cir. 1979) (per curiam).

[145] 8 U.S.C. § 1182(c) (repealed 1996); *Lok II*, 681 F.2d at 108 n.2 ("On its face, [§] 212(c) grants discretionary relief only to aliens outside the United States who seek to return. We struck this limitation down as without rational basis and therefore violative of the fifth amendment to the Constitution. The INS has since applied [§] 212(c) to both resident aliens and aliens seeking to return to their residence in the United States. Therefore Lok is not barred from [§] 212(c) relief by virtue of his presence in the United States.") (citations omitted); *see also* Brent S. Wible, *The Strange Afterlife of Section 212(c) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry After* St. Cyr, 19 GEO. IMMIGR. L.J. 455, 463-64 (2005).

status as a legal permanent resident, and the fact that his criminal sentence did not exceed the statutory limit, were never disputed.[146] The only disputed issue in determining Lopez-Velasquez's eligibility for relief under section 212(c) was whether he had acquired the requisite seven years of domicile.[147]

A. THE NINTH CIRCUIT'S PANEL DECISION

In its initial panel decision, the Ninth Circuit correctly applied the test laid out in *Moran-Enriquez* and found that, due to the changes in the law brought about by IRCA, there was a "reasonable possibility" that Lopez-Velasquez could have been eligible for relief under section 212(c).[148] The panel pointed out that, approximately one year after Lopez-Velasquez was deported, the Ninth Circuit recognized that in 1986 IRCA had superseded its 1979 decision that noncitizens who were not legal permanent residents could not acquire domicile.[149] The Ninth Circuit also found that if Lopez-Velasquez began to acquire domicile with IRCA's enactment, he would have already met the seven-year requirement under section 212(c).[150] The court reasoned in the alternative that if, as IRCA implied, Lopez-Velasquez began to acquire domicile after applying for amnesty, he would still have had a reasonable possibility for relief, since he could have acquired the remaining months of domicile while in immigration proceedings.[151] The court further noted that the proper inquiry under the standard it had developed in *Moran-Enriquez* was not whether a noncitizen would be unequivocally eligible for relief, but rather whether there was a "reasonable possibility" for such eligibility.[152] Consequently, the panel found that the immigration judge should have informed Lopez-Velasquez of the possibility for relief under section 212(c).[153]

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[146] *See Lopez-Velasquez*, 629 F.3d at 895.

[147] *Id.*

[148] United States v. Lopez-Velasquez, 568 F.3d 1139, 1143-44 (9th Cir. 2009), *overruled by* United States v. Lopez-Velasquez, 629 F.3d 894 (9th Cir. 2010) (en banc).

[149] *Id.* at 1144.

[150] *Id.* at 1143-44.

[151] *Id.* 1144.

[152] *Id.* at 1143.

[153] *Id.*

B. THE NINTH CIRCUIT'S EN BANC DECISION

In analyzing whether the immigration judge in Lopez-Velasquez's original group deportation had fulfilled his duty to inform, the Ninth Circuit's en banc decision focused on the issue of domicile.[154] The court rejected Lopez-Velasquez's argument that he had a "reasonable possibility" of relief under section 212(c), relying on the 1979 Ninth Circuit decision in *Castillo-Felix*, which held that noncitizens who were not legal permanent residents could not acquire domicile for the purposes of section 212(c) relief.[155] The Ninth Circuit found that Lopez-Velasquez could not meet the requirements of section 212(c) because he had only been a legal permanent resident for four years.[156] It reasoned that even if Lopez-Velasquez could have acquired domicile in legal, non-permanent resident status, he would still have been eight months short of the required time.[157] The court acknowledged that, in certain circumstances, such a time difference would not bar relief since a noncitizen at that time could acquire time towards domicile while in proceedings or awaiting an appeal, but held that this was not such a situation.[158] Finally, the court dismissed Lopez-Velasquez's argument that he began to acquire domicile when Congress passed IRCA.[159]

C. THE "REASONABLE POSSIBILITY" THAT LOPEZ-VELASQUEZ WAS ELIGIBLE FOR RELIEF UNDER SECTION 212(C)

The duty to inform does not require that the noncitizen actually be eligible for relief, but only that a reasonable possibility for relief be apparent.[160] Under the definition of domicile established by the Board of Immigration Appeals (BIA)—read in light of the precedent of the United States Supreme Court and other circuits, as well as the intent of Congress in passing IRCA—there was a reasonable possibility that Lopez-Velasquez may have been eligible for relief.[161] These sources indicated that noncitizens who were not permanent residents could lawfully intend

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[154] United States v. Lopez-Velasquez, 629 F.3d 894 (9th Cir. 2010) (en banc).

[155] *Id.* at 897-900.

[156] *Id.* 895-96.

[157] *Id.*

[158] *Id.* at 898.

[159] *Id.* at 900-01.

[160] Moran-Enriquez v. I.N.S., 884 F.2d 420, 423 (9th Cir. 1989).

[161] Elkins v. Moreno, 435 U.S. 647, 666 (1978); Prichard-Ciriza v. I.N.S., 978 F.2d 219, 224 n.7 (5th Cir. 1992); Lok v. I.N.S. (*Lok II*), 681 F.2d 107, 108 n.2 (2d Cir. 1982); Melian v. I.N.S., 987 F.2d 1521, 1525 (11th Cir. 1993); Anwo v. I.N.S., 607 F.2d 435 (D.C. Cir. 1979) (per curiam).

to remain in the United States, and thus establish domicile.[162] Whether Lopez-Velasquez had indeed acquired the requisite seven years of domicile would have been a close question; however, whether he would have ultimately prevailed in his claim is not the proper inquiry.[163] Rather, the question should be whether there was a "reasonable possibility" that Lopez-Velasquez might be eligible for relief.[164]

Although an immigration judge in the Ninth Circuit is required to follow Ninth Circuit precedent,[165] this is not the only controlling law—for example, Congress's power over immigration is plenary, and thus congressional intent should be afforded special weight in immigration issues.[166] Furthermore, where Ninth Circuit law is out of date or appears not to account for a new legal development, the law of other circuits may be persuasive or instructive.[167] The time of Lopez-Velasquez's original deportation was just such a point.[168] As such, there was reason for the immigration judge presiding over Lopez-Velasquez's deportation to consider the possibility, suggested by the jurisprudence of the Supreme Court and other circuits,[169] that he could be eligible for relief.[170]

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[162] Elkins v. Moreno, 435 U.S. at 666; *Prichard-Ciriza*, 978 F.2d at 224 n.7; *Lok II*, 681 F.2d at 108 n.2; *Melian*, 987 F.2d at 1525; *Anwo*, 607 F.2d 435.

[163] *Moran-Enriquez*, 884 F.2d at 423.

[164] *Id.*

[165] Singh v. Ilchert, 63 F.3d 1501, 1508 (9th Cir. 1995) ("A federal agency is obligated to follow circuit precedent in cases originating within that circuit.").

[166] Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("This Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.") (internal quotations omitted); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

[167] *See, e.g.*, Sorrels v. McKee, 290 F.3d 965, 970 (9th Cir. 2002) ("However, neither the district court, nor the parties, nor our own research has unearthed Ninth Circuit or Supreme Court caselaw on point . . . . We next look to the decisions of our sister Circuits . . . .").

[168] Ortega de Robles v. I.N.S., 58 F.3d 1355, 1359 (9th Cir. 1995) ("No decision of this circuit has squarely examined the holding and reasoning of *Castillo-Felix* in light of IRCA.").

[169] Elkins v. Moreno, 435 U.S. 647, 666 (1978); Prichard-Ciriza v. I.N.S., 978 F.2d 219, 224 n.7 (5th Cir. 1992); Lok v. I.N.S. (*Lok II*), 681 F.2d 107, 108 n.2 (2d Cir. 1982); Melian v. I.N.S., 987 F.2d 1521, 1525 (11th Cir. 1993); Anwo v. I.N.S., 607 F.2d 435 (D.C. Cir. 1979) (per curiam).

[170] In addition, it may be error for the BIA to assume that old precedent controls a matter governed by a new statute that has been passed for a new purpose. *See* Negusie v. Holder, 555 U.S. 511, 523 (2009).

1. *IRCA Beneficiaries Like Lopez-Velasquez Could Lawfully Intend to Remain*

Congress's intent in passing the IRCA amnesty legislation under which Lopez-Velasquez became a legal immigrant was to provide relief and legal status to millions of noncitizens, allowing them to form the intent to remain.[171] Committee statements from congressional sessions stressed the need to acknowledge the presence of many noncitizens living and laboring within the borders of the United States.[172] Thus, in passing IRCA, Congress intended to aid noncitizens in their attempt to gain legal status in the United States. Congress meant for qualifying undocumented noncitizens to immigrate through the legal recognition of the fact that they were already domiciled in the United States since they had made it their home, and intended to remain.[173] It would be illogical to read a statute allowing noncitizens to apply for immigrant status as simultaneously forbidding an intent to immigrate.

Lopez-Velasquez was one of the noncitizens for whom IRCA was written because he was an agricultural worker who had completed the labor required by IRCA's Seasonal Agricultural Workers Program ("SAW").[174] Because IRCA allowed noncitizens laboring as seasonal agricultural workers to form the intent to remain—that is, to immigrate—Lopez-Velasquez, as a seasonal agricultural worker who intended to legalize his status and immigrate, lawfully formed the intent to remain.[175] If Lopez Velasquez could lawfully intend to remain in the United States, then, by the long-standing definition of domicile—presence and intent to remain—he could acquire domicile while he was living in the United States in lawful status.[176] Thus, for such time as Lopez-Velasquez was lawfully present and intended to remain, there was a reasonable possibility that he had "lawful unrelinquished domicile" as required by section 212(c).[177]

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[171] *See* IMMIGRATION REFORM & CONTROL ACT OF 1986, H.R. REP. NO. 99-1000 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 5840.

[172] *Id.*

[173] *See* 8 U.S.C.A. § 1160(a)(1)(B) (Westlaw 2011).

[174] *Id.*; United States v. Lopez-Velasquez, 568 F.3d 1139, 1143-44 (9th Cir. 2009), *overruled by* United States v. Lopez-Velasquez, 629 F.3d 894 (9th Cir. 2010) (en banc).

[175] *Id.*

[176] Elkins v. Moreno, 435 U.S. 647, 666 (1978); *Lopez-Velasquez*, 568 F.3d at 1143-44.

[177] *See* Elkins v. Moreno, 435 U.S. at 666; 8 U.S.C. § 1182(c) (repealed 1996).

2. *The Decisions of the United States Supreme Court and Other Circuits Indicated a "Reasonable Possibility of Relief"*

Although at the time of Lopez-Velasquez's deportation the Ninth Circuit had not yet squarely held that beneficiaries of IRCA could acquire domicile before becoming permanent residents, the Supreme Court, BIA, and other circuits had laid the foundation for this conclusion.[178] The Supreme Court outlined this principle in its 1978 decision in *Elkins v. Moreno* when it reasoned that noncitizens who were not required to maintain a foreign residence could intend to remain.[179] Rather than being required to maintain a foreign residence, nonimmigrant noncitizens in the SAW Program were in fact required to show residence in the United States before they could be eligible for the program.[180] Thus, nonimmigrants in the SAW Program were "nonrestricted" as contemplated by the Supreme Court in *Elkins*.[181] Since *Elkins* stated that these "nonrestricted" noncitizens could acquire domicile, this inference was fairly before the immigration judge in Lopez-Velasquez's original proceedings.

Prior to Lopez-Velasquez's original deportation, other circuits had acknowledged the possibility that noncitizens who were not legal permanent residents could acquire domicile.[182] In particular, the Fifth Circuit's hypothetical in *Prichard-Ciriza* closely traces the facts of Lopez-Velasquez's original deportation proceedings: Lopez-Velasquez, present in the United States (after the SAW Program) on a "valid, temporary work visa," had indeed "achieved permanent resident status prior to the expiration of that visa."[183] The Fifth Circuit concluded that "the time [the noncitizen] was domiciled under the auspices of the [legal nonimmigrant] visa might well count toward his seven year minimum," therefore indicating that such an argument for relief in Lopez-Velasquez's case was "reasonably possible."[184] Lopez-Velasquez's

[178] Elkins v. Moreno, 435 U.S. at 666; *In re* Carrasco, 16 I. & N. Dec. 195, 197 (BIA 1977); Francis v. I.N.S., 532 F.2d 268 (2d Cir. 1976); Anwo v. I.N.S., 607 F.2d 435 (D.C. Cir. 1979) (per curiam); Lok v. I.N.S. (*Lok II*), 681 F.2d 107, 108 n.2 (2d Cir. 1982); Prichard-Ciriza v. I.N.S., 978 F.2d 219, 224 n.7 (5th Cir. 1992); Melian v. I.N.S., 987 F.2d 1521, 1525 (11th Cir. 1993).

[179] Elkins v. Moreno, 435 U.S. at 666.

[180] *See* 8 U.S.C.A. § 1160(a)(1)(B)(i) (Westlaw 2011).

[181] Elkins v. Moreno, 435 U.S. at 666.

[182] *Id.*; *Prichard-Ciriza*, 978 F.2d at 224 n.7; *Lok II*, 681 F.2d at 108 n.2; *Francis*, 532 F.2d 268; *Melian*, 987 F.2d at 1525; *Anwo* v. I.N.S., 607 F.2d 435.

[183] *Prichard-Ciriza*, 978 F.2d at 224 n.7; United States v. Lopez-Velasquez, 629 F.3d 894, 895-96 (9th Cir. 2010) (en banc).

[184] *Prichard-Ciriza*, 978 F.2d at 224 n.7.

"reasonably possible" claim should have alerted the immigration judge of his duty to inform.

The precedents set by the United States Supreme Court, BIA, and the Courts of Appeals for the Second, Fifth, Eleventh, and D.C. Circuits all suggest that "lawful domicile" is not restricted to those with legal permanent resident status, but can be accrued by lawful non-residents as well.[185] These holdings support a "reasonable possibility" that Lopez-Velasquez was "apparently eligible" for relief from deportation, such that the immigration judge had a duty to inform him of his potential relief instead of summarily deporting him.[186]

3. *The Ninth Circuit Has Acknowledged That IRCA Made It Possible for Non-Permanent Residents to Acquire Domicile*

In 1995, the Ninth Circuit held in *Ortega de Robles v. I.N.S.* that beneficiaries of IRCA could lawfully acquire domicile in the United States.[187] The Ninth Circuit pointed out that its contrary holding in *Castillo-Felix* had been made seven years before the passage of IRCA, and that therefore this holding could not be considered conclusive on this issue in light of IRCA's passage.[188] It further noted that, even according to the reasoning of *Castillo-Felix*, beneficiaries of IRCA were not precluded from acquiring domicile.[189] The Ninth Circuit also cited the precedent of the Second Circuit in *Lok I*, which had held that noncitizens who could lawfully form the intent to remain could acquire domicile outside of permanent resident status.[190] The Ninth Circuit concluded that domicile for the purposes of relief under section 212(c) could be acquired by noncitizens who were not yet legal permanent residents but who had applied for the benefits of the amnesty program under IRCA.[191]

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[185] Elkins v. Moreno, 435 U.S. at 666; *Prichard-Ciriza*, 978 F.2d at 224 n.7; *Lok II*, 681 F.2d at 108 n.2; *Francis*, 532 F.2d 268; *Melian*, 987 F.2d at 1525; *Anwo*, 607 F.2d 435.

[186] Moran-Enriquez v. I.N.S., 884 F.2d 420, 423 (9th Cir. 1989); *see also* Elkins v. Moreno, 435 U.S. at 666; *Prichard-Ciriza*, 978 F.2d at 224 n.7.

[187] Ortega de Robles v. I.N.S., 58 F.3d 1355, 1359 (9th Cir. 1995).

[188] *Id.* at 1358-59 ("No decision of this circuit has squarely examined the holding and reasoning of *Castillo-Felix* in light of IRCA. Notably, IRCA was enacted over seven years after this circuit decided *Castillo-Felix*. Therefore, the holding of *Castillo-Felix* does not necessarily apply to aliens obtaining legal status under IRCA.") (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 386 n.5 (1992) ("It is of course contrary to all traditions of our jurisprudence to consider the law on [a] point conclusively resolved by broad language in cases where the issue was not presented or even envisioned.")).

[189] *Ortega de Robles*, 58 F.3d at 1360-61.

[190] *Ortega de Robles*, 58 F.3d at 1360; Lok v. I.N.S. (*Lok I*), 548 F.2d 37 (2d Cir. 1977).

[191] United States v. Lopez-Velasquez, 568 F.3d 1139, 1141 (9th Cir. 2009), *overruled by* United States v. Lopez-Velasquez, 629 F.3d 894 (9th Cir. 2010) (en banc); *Ortega de Robles*, 58

Lopez-Velasquez was deported in 1994; however, the holding in *Ortega de Robles* described the change in the law effected by IRCA in 1986.[192] The caselaw and statutes the Ninth Circuit cited in *Ortega de Robles* were in full effect at the time of Lopez-Velasquez's proceedings.[193] This legal precedent—including the intent of Congress in passing IRCA—was not outside the knowledge of an immigration judge; all that needed to be done was to apply the courts' reasoning to the law.[194] Such a process does not require the immigration judge to be "clairvoyant" as the Ninth Circuit suggested en banc in *Lopez-Velasquez*.[195] Indeed, as the Ninth Circuit pointed out in *Ortega de Robles*, a finding that non-permanent residents could acquire domicile actually comported with the reasoning (if not the conclusion) of *Castillo-Felix*.[196]

The Ninth Circuit's reasoning in *Ortega de Robles* encompasses Lopez-Velasquez because he had also adjusted his status under IRCA.[197] Although it was not clear at the time of his deportation whether Lopez-Velasquez's time as a lawfully present noncitizen without permanent resident status could be considered "lawful unrelinquished domicile," it was without doubt a "reasonable possibility."[198] The immigration judge was not required to ultimately find for Lopez-Velasquez, but only to inform him of the possibility that he "may" have been eligible for relief.[199] The Ninth Circuit's en banc holding in *Lopez-Velasquez*,

F.3d at 1360-61.

[192] *Ortega de Robles*, 58 F.3d at 1360-61.

[193] *Id.* 1359.

[194] *Id.* 1360-61.

[195] United States v. Lopez-Velasquez, 629 F.3d 894, 900 (9th Cir. 2010) (en banc) (quoting Moran-Enriquez v. I.N.S., 884 F.2d 420, 422 (9th Cir. 1989)).

[196] *Ortega de Robles*, 58 F.3d at 1360-61 ("We are convinced that the language cited by the INS from *Castillo-Felix* is inapplicable to the situation now before us. We conclude that a lawful permanent resident who gained such status under IRCA § 245A by first becoming a 'temporary' resident established 'lawful domicile' for purposes of § 212(c) as of the date of his or her application for amnesty (if a prima facie application was presented at that time). Indeed, much of the reasoning in *Castillo-Felix* supports such a conclusion.").

[197] *Compare* United States v. Lopez-Velasquez, 568 F.3d 1139, 1143-44 (9th Cir. 2009), *overruled by* United States v. Lopez-Velasquez, 629 F.3d 894 (9th Cir. 2010) (en banc), *with Ortega de Robles*, 58 F.3d at 1361.

[198] Lopez-Velasquez had a strong argument available that he had accrued at least six years and four months of domicile—if he had not waived his right to appeal, he could have easily accrued the required domicile while his appeal was pending. Noncitizens can no longer accrue residence while waiting for an appeal; any accrual of residence or domicile now ends at the issuance of the charging document. *See* I.N.S. v. St. Cyr, 533 U.S. 289, 296-97 (2001) (describing the changes made by IIRIRA).

[199] *Moran-Enriquez*, 884 F.2d at 423; *see also* Michael D. Anderson, Case Comment, *Aliens Must Be Informed of Relief*, 14 SUFFOLK TRANSNAT'L L.J. 645, 646 (1991).

therefore, implies that an immigration judge's duty to inform does not extend to cases where the laws developed outside the Ninth Circuit suggest a reasonable possibility of relief.[200] This holding runs contrary to the purpose of the duty to inform.[201]

CONCLUSION

In *United States v. Lopez-Velasquez*, the Ninth Circuit assessed the reasonable possibility standard without considering whether the external legal climate signaled imminent changes in the Ninth Circuit itself. This holding opposes the purpose of the immigration judge's duty as explained in *Moran-Enriquez*, and whittles away at the already slim due process requirements in immigration proceedings. As a result, immigration judges now have less incentive to carefully examine the record and the law for potential relief. This will have an adverse impact on the lives of hundreds of thousands of noncitizens seeking to navigate the labyrinthine corridors of immigration law. It will stifle not only access to information, but also the ability of noncitizens to make informed decisions in the immigration courts and to explore new theories in immigration law. The Ninth Circuit's limitation on the duty to inform will prevent many noncitizens from ever hearing that they might be eligible for relief from deportation. The holding in *Lopez-Velasquez* therefore represents a dangerous change in immigration law that will impede noncitizens from making informed decisions about issues that profoundly impact their lives.

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[200] *Lopez-Velasquez*, 629 F.3d at 895.

[201] *Moran-Enriquez*, 884 F.2d at 423; *see also* Anderson, Case Comment, *Aliens Must Be Informed of Relief*, 14 SUFFOLK TRANSNAT'L L.J. at 646.