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IMMIGRATION LAW—DEPORTING ALIENS IN ABSENTIA: BALANCING THE ALIEN'S RIGHT TO BE PRESENT VERSUS THE COURT'S NEED TO AVOID UNNECESSARY DELAYS

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INTRODUCTION

When will an illegal alien, out on bail pending a deportation hearing, and living in a distant city, be denied due process by a deportation hearing held in absentia? Imagine a political refugee crosses our border, is detained, and ordered to show cause why he should not be deported. Having no real defense, he admits deportability, and is released on bail pending a trial on his petition for political asylum. He then relocates. Despite the location of counsel and witnesses near his new home, and the costs of traveling back for trial, his change of venue requests are denied. When he fails to appear, he is deported, and thereby denied the opportunity to present his arguments for asylum.

This Note examines in absentia deportation hearings.[1] Section I begins with an examination of the judicial definition of a deportable alien's rights prior to 1952 and then discusses the Immigration and Nationality Act of 1952,[2] an historical statute that defined those rights. The Note focuses on section 242(b) of the Act, the alien's right to be present at the hearing and the government's authority to proceed against those who are inexcusably absent. Section 242(b) has been unchanged by subsequent legislation, and remains the basis for the law in this area. Section II examines the proper scope of section 242(b). Initially, Section II analyzes change of venue and continuance motions since the denial of these motions frequently precedes the alien's failure to appear. *Maldonado-Perez v. INS*[3] is a recent example of an alien

1. Deportation is a governmental action taken to expel someone who is illegally in this country. Deportation hearings should be distinguished from exclusion proceedings, where the government acts against those detained before they ever cross the border. Deportable aliens have a constitutional guarantee of due process under the fourteenth amendment, excludable aliens do not. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). This Note focuses exclusively on aliens' rights in the deportation process, in particular, the right to be present at the hearing.

2. Pub. L. No. 414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. and various other titles).

3. 865 F.2d 328 (D.C. Cir. 1989).

deported in absentia after a denial of his change of venue request. The court's analysis of the issues in *Maldonado-Perez* are examined in detail. Section III explores the overriding judicial "fairness" requirement for deportation proceedings, and whether that requirement is met in in absentia deportations. Finally, this Note recommends that courts consider the differing interests of political refugees from other deportable aliens. Specifically, it suggests that a series of short continuances or one change of venue should be liberally granted before the court utilizes its in absentia deportation authority.

I. HISTORICAL CONTEXT

A. *Immigration Law Prior to 1952*

The immigration policy of this country began as one of encouragement.[4] In frontier America, crops needed to be harvested, and railroads built.[5] Until 1875, there were no laws restricting immigration, with the exception of a two-year period in 1798 when an unpopular law allowed direct Presidential deportation of dangerous aliens.[6]

In 1875, Congress began defining the number and nationalities of those who would be permitted to immigrate to the United States. Professor Elizabeth Hull has chronicled these restrictions,[7] many of which were based in the "scientific racism" of the time.[8] The first restrictive law was aimed at Chinese and Japanese immigrants, large numbers of whom had come to work on the railroads for minimal wages.[9] The cultural differences and language barriers between the immigrants and American citizens led to fear and anger, and eventually to claims that as a race, Asians were prone to prostitution and crime.[10] Consequently, Congress passed a series of Chinese Exclusion Acts that suspended the immigration of Chinese laborers.[11] Not surprisingly, the

4. H.R. REP. NO. 1365, 82d Cong., 2d Sess. 57, *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1655; Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 2 (1984) (referring to this time period as the stage of liberalism).

5. E. HULL, WITHOUT JUSTICE FOR ALL 8 (1985).

6. H.R. REP. NO. 1365, *supra* note 4, at 7, *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1655-56.

7. E. HULL, *supra* note 5.

8. *Id.* at 14 ("Influenced by the theory of evolution and the social Darwinism of Herbert Spencer, [scientific racism] consisted of 'highly questionable assumptions' . . . ."); *see also* Schuck, *supra* note 4, at 3 (referring to this time period as the stage of "restrictive nationalism").

9. H.R. REP. NO. 1365, *supra* note 4, at 11, *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1660.

10. E. HULL, *supra* note 5, at 11.

11. See H.R. REP. NO. 1365, *supra* note 4, at 11-12, *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1660-61, for a more complete history. In *The Chinese Ex-*

Supreme Court's early opinions on aliens' rights involved Chinese and Japanese immigrants. The Court began by examining the aliens' claims that they were entitled to protection by the Constitution. In *Yick Wo v. Hopkins*,[12] the Court held that aliens are persons within the meaning and protection of the fourteenth amendment to the Constitution. Later, the Court expanded that decision in *The Japanese Immigrant Case*,[13] holding that it violated due process to "arbitrarily . . . cause an alien, who has entered the country [illegally] . . . to be taken into custody and deported without giving him all [sic] *opportunity to be heard* . . . ."[14] For the first time, aliens had a guarantee of some due process, although in the absence of any statutory protection, these cases were the extent of those rights. Despite these gains, in *Fong Yue Ting v. United States*,[15] the Court held that deportation proceedings are civil, not criminal in nature, and therefore the scope of procedural protections would be narrowed accordingly.[16]

Although judicial decree declares that deportation hearings are civil proceedings, the risks to an alien in a deportation hearing, such as potential loss of life, property, and separation from family, closely parallel the risks to criminal defendants.[17] Perhaps for this reason, by 1915, the courts had expanded principles of procedural fairness to deportation hearings. In *Whitfield v. Hanges*,[18] the court stated that "the accused shall be notified of the nature of the charge . . . shall have [] an opportunity to be heard . . . cross-examine the witnesses . . . produce evidence and witnesses to refute . . . [and] the decision shall not be without substantial evidence taken at the hearing to support it."[19] *Whitfield* provided a clear expression of judicial intent to require significant procedural protections before any deportation order is upheld.

Two years later, Congress passed the Immigration and Nationality Act of 1917,[20] the first legislative attempt to broadly define immi-

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clusion Case, the Supreme Court observed "[t]hat the government of the United States . . . can exclude aliens from its territory is a proposition which we do not think open to controversy." 130 U.S. 581, 603 (1889).

12. 118 U.S. 356 (1886).

13. 189 U.S. 86 (1903).

14. *Id.* at 101 (emphasis added).

15. 149 U.S. 698 (1893).

16. *Id.* at 730. For a criticism of that distinction, see Schuck, *supra* note 4, at 24-27. However, Schuck later concedes that the distinction may be necessary to avoid overloading the immigration system. *Id.* at 68.

17. Schuck, *supra* note 4, at 24-27.

18. 222 F. 745 (8th Cir. 1915).

19. *Id.* at 749.

20. ch. 29, 39 Stat. 874 (1917) (codified as amended at 8 U.S.C. § 1181 (1988)).

gration policy. Despite Congress' intent to further restrict immigration,[21] the courts did not interpret the 1917 Act as changing the basic protections afforded aliens in *Whitfield*.[22] In fact, the Supreme Court expanded on those requirements, holding in *Bridges v. Wixon*[23] that the process itself must also be fundamentally fair. Justice Douglas, speaking for the Court, stated that "[w]e are dealing here with procedural requirements prescribed for the protection of the alien. . . . Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."[24]

The 1917 Act, as amended, remained the foundation of immigration law in this country until 1952, despite a groundswell of criticism in legal periodicals and at congressional hearings.[25] These attacks were aimed at the Immigration and Naturalization Service ("INS"), but came at a time when other administrative agencies were also rebuked for similar adjudicative problems.[26] Both the courts and commentators criticized the INS for the unfairness of its deportation procedures. The Supreme Court interjected its own view, holding in *Wong Yang Sung v. McGrath*[27] that deportation hearings should be subject to the Administrative Procedure Act of 1946.[28] The Administrative Procedure Act applied to all administrative agencies, and re-

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21. H.R. REP. NO. 1365, *supra* note 4, at 15-16, *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1665 (The Act "added to the inadmissible classes aliens who are illiterate, persons of constitutional psychopathic inferiority, men, as well as women, entering for immoral purposes, chronic alcoholics, stowaways, vagrants, and persons who had a previous attack of insanity.").

22. *See* Lloyd Sabaudo Societa Anonima Per Azioni v. Elting, 287 U.S. 329, 336 (1932).

23. 326 U.S. 135 (1945).

24. *Id.* at 154; *see also* Barthold v. INS, 517 F.2d 689, 691 (5th Cir. 1975) ("[W]e analyze the proceedings in terms of their fundamental fairness on a case-by-case basis."); *cf.* Aalund v. Marshall, 461 F.2d 710, 714 (5th Cir. 1972) ("[O]ur role in this type of proceeding is not to consider the fundamental fairness of the result, but only to consider the underlying fairness of the hearing in terms of the statutory scheme and the constitution.").

The fairness of Immigration and Naturalization Service procedures used to deport aliens is to be determined by balancing the personal risks to the alien and risks of erroneous deportation against the government's interest in the current procedure and the probable value of changing procedures. *See infra* note 125 and accompanying text.

25. *See* Gordon, *Due Process of Law in Immigration Proceedings*, 50 A.B.A. J. 34 n.8 (1964) (listing six authorities criticizing the INS deportation process); *see also* Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) (outlining some of the historical criticisms and holding that INS procedures in deportation violated the alien's rights).

26. *See generally* H.R. REP. NO. 1980, 79th Cong., 2d Sess., *reprinted in* 1946 U.S. CODE CONG. & ADMIN. NEWS 1195.

27. 339 U.S. 33 (1950).

28. ch. 324, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551-706 (1988)).

sponded to due process criticisms. In *Wong Yang Sung*, the Court held that "the administrative hearing [in this case is] a perfect exemplification of the practices so unanimously condemned [in the Act]. . . . We find no basis . . . for judicially declaring an exemption in favor of deportation proceedings . . . ."[29]

By 1949, Congress had begun re-writing the immigration laws. In revising the law, one of its proclaimed objectives was to delineate the scope of procedural rights afforded to aliens.[30] First, reversing the *Wong Yang Sung* decision, Congress enacted legislation that exempted deportation proceedings from the scope of the Administrative Procedure Act.[31] Congress then passed section 242(b) of the Immigration and Nationality Act of 1952. Section B of this Note will examine the language of that section and the specific due process required before a deportation order is considered "fundamentally fair."

B. *Section 242(b) of the Immigration and Nationality Act*

The Immigration and Nationality Act of 1952,[32] known popularly as the McCarran Act, constituted a major overhaul of American immigration law.[33] It proclaimed seven basic changes to the 1917 law, including provisions "for fair administrative practice and procedure."[34] That meant, *inter alia*, that aliens must be afforded an opportunity to be present at their deportation hearings. Specifically, section 242(b) of the Act states, in part:

> Determination of deportability in any case shall be made only upon a record made in a proceeding . . . at which the alien shall have *reasonable opportunity to be present* . . . . If any alien has been given a reasonable opportunity to be present . . . *and without reasonable*

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29. *Wong Yang Sung*, 339 U.S. at 45, 52.

30. H.R. REP. NO. 1365, *supra* note 4, at 28, *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1679.

31. Supplemental Appropriation Act of 1951, Pub. L. No. 843, 64 Stat. 1044, 1048 (1950), *repealed by* Immigration and Nationality Act of 1952, Pub. L. No. 414, § 403(a)(47), 66 Stat. 163, 280.

32. Pub. L. No. 414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. and various other titles).

33. Like its predecessors, the 1952 Act empowered the Justice Department with the authority to enforce the Act. The Justice Department, in turn, established the INS as the agency responsible for delineating policy derived from the immigration laws. Many of these procedures are set out in 8 C.F.R. (1990). For a complete overview of the departments and agencies involved in immigration law, see Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1303-10 (1986).

34. H.R. REP. NO. 1365, *supra* note 4, at 28, *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1679.

> *cause fails or refuses to attend* . . . the special inquiry officer may proceed to a determination *in like manner as if the alien were present.*[35]

Congress added the in absentia provision, which allows an immigration law judge to deport an absent alien who, without reasonable cause, fails to attend the hearing. The provision was added because the deportation process had frequently been "interrupted and subjected to unnecessary delays because aliens, without legitimate cause, refused to attend scheduled hearings or insisted upon leaving at their own pleasure and without other than contumacious reasons. The Government should have authority to proceed to a final decision in the face of such obstructionist tactics."[36] Section 242(b) was designed to incorporate into one document the basic requirements of fair process dictated by *Whitfield*,[37] *Bridges*,[38] and *Wong Yang Sung*,[39] and eliminate the administrative practices criticized in *Wong Yang Sung*.[40] One court commented:

> [Section 242(b) is] the first explicit statement of the requirement of a hearing in deportation proceedings and due process requires that the respondent in a deportation hearing receive timely notice; that he have an opportunity to be heard, to cross-examine witnesses against him, and to produce evidence; that the decision be based on the evidence and only on the evidence produced at the hearing; and that the decision be supported by substantial evidence.[41]

In an early interpretation of section 242(b), the Supreme Court required that the proceeding follow not only the statute, but also all written INS procedures.[42] Otherwise, the proceeding was a per se violation of due process.[43] However, the Court later limited that requirement to procedures that protected the alien's constitutional rights.[44]

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35. Immigration and Nationality (McCarran) Act § 242(b), 8 U.S.C. § 1252(b) (1988) (emphasis added).

36. H.R. REP. NO. 1365, *supra* note 4, at 28, *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1679.

37. Whitfield v. Hanges, 222 F. 745 (8th Cir. 1915).

38. Bridges v. Wixon, 326 U.S. 135 (1945).

39. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

40. *See supra* notes 26-31 and accompanying text.

41. United States v. Gasca-Kraft, 522 F.2d 149, 152 (9th Cir. 1975).

42. United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954) (sometimes referred to as the "Accardi Doctrine"). The INS is the agency responsible for establishing the procedures which are followed when dealing with aliens. *See supra* note 33.

43. *Accardi*, 347 U.S. at 260.

44. United States v. Caceres, 440 U.S. 741, 755 (1979) (only where a parties' constitutional rights are at issue must the federal agency follow procedures established to protect those rights). In *Jarecha v. INS*, the Fifth Circuit stated:

The statute grants the responsibility for ensuring that procedures are fairly administered to a "special inquiry officer."[45] Now referred to as immigration judges, these officials are individuals who are otherwise not involved in the investigation or prosecution of the alien.[46] The immigration judge determines the alien's deportability. The alien may seek review by the Board of Immigration Appeals ("BIA"),[47] and has the right to a federal court appeal after exhausting all administrative remedies.[48] Mere error, however, is insufficient to overturn an Immigration Court decision. Rather, the alien must establish that the error caused substantial prejudice to his claim.[49] Two errors often alleged to cause such harm are a judge's denial of motions for change of

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> [W]here administrative discretion is exercised without the guidance of regulations, . . . the requirements of due process (aside from the requirements of notice, fair hearing, etc.) are met if the written decision of the administrative agency or the record of the administrative hearing set out clearly the ground which forms the basis for the denial of discretionary relief, so that the appellate bodies within the agency and the reviewing courts are able to ascertain whether [the] decision is arbitrary, capricious or not supported by the "reasonable, substantial and probative evidence on the record considered as a whole".

417 F.2d 220, 225 (5th Cir. 1969).

45. Immigration and Nationality (McCarran) Act § 242(b), 8 U.S.C. § 1252(b) (1988).

46. Prior to the enactment of section 242(b), the INS had been severely criticized by several groups for permitting those involved in compiling the evidence against the alien to also act as interpreter, court stenographer, and final adjudicator of his claim. *See supra* note 25. Yet, the Supreme Court upheld this INS practice despite the opportunity for conflicting interests. *See* Marcello v. Bonds, 349 U.S. 302, 311 (1955) (referring to this policy as an acceptable past practice to illustrate that it is not unfair to have both the immigration judge and the INS under the same administrative control).

Despite the Supreme Court approval, commentators continued to criticize a structure that allowed the INS to adjudicate a case before an immigration judge who is part of the same agency. *See* Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1 (1980) (The author, a retired chairman of the Board of Immigration Appeals, discussed the problems inherent in the system and the conflicts of the INS being both an enforcement and adjudicatory agency.).

In 1983, immigration judges were finally removed from the INS and put under the auspice of the Executive Office for Immigration Review.

47. The BIA is a five-member review panel within the Department of Justice. It is provided for in 8 C.F.R. § 3.1 (1990). The BIA reviews exclusion and deportation determinations made by immigration courts. Decisions relating to visas, extensions of stays, and other less significant matters are made by INS District Directors. For an overview of the agencies involved and their respective roles, see generally Legomsky, *supra* note 33, at 1302-12.

48. 8 U.S.C. § 1105a(a) (1988).

49. Ka Fung Chan v. INS, 634 F.2d 248, 258 (5th Cir. 1981); Antolos v. INS, 402 F.2d 463, 464 (9th Cir. 1968) ("[T]he function of this court is limited to insuring that this discretion is not abused, and that petitioner has been afforded a full and fair hearing that comports with due process.").

venue[50] and continuance.[51] In cases where the alien is eventually deported in absentia, these motions have usually been made and subsequently denied before the alien failed to appear. The next Section of this Note will examine when these motions should be granted or denied, before examining when in absentia proceedings are justified by the Act.

II. APPLICATION OF THE STATUTE

A. *Continuances and Change of Venue Requests*

"It is understandable that an alien who is clearly deportable and ineligible for any relief from deportation should want to defer his enforced departure as long as possible . . . ."[52] Congress expressed concern that aliens would use their statutory rights to cause unreasonable delay.[53] Nevertheless, the courts have been concerned about overreaction to that threat. "[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality."[54] Change of venue requests and continuance motions are two mechanisms that some aliens use to delay their deportation, although the INS does recognize the legitimacy of some requests.[55]

Venue is originally established wherever the alien resides or is arrested.[56] The immigration judge may grant reasonable change of venue motions for "good cause."[57] A change of venue motion has been considered reasonable when it ensured that an alien was afforded his right to be represented by counsel,[58] or to present witnesses to sup-

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50. 8 C.F.R. § 3.19 (1990).

51. *Id.* § 3.27.

52. Roberts, *supra* note 46, at 15 n.60; *see also* Schuck, *supra* note 4, at 76-77 (discussing how aliens attempt to "beat the system").

53. *See supra* note 36 and accompanying text.

54. Rios-Berrios v. INS, 776 F.2d 859, 862 (9th Cir. 1985) (quoting Ungar v. Sarafite, 376 U.S. 575, 589 (1964)).

55. 8 C.F.R. §§ 3.19, 3.27 (1990).

56. *Id.* § 3.19(a); *see* La Franca v. INS, 413 F.2d 686, 689 n.9 (2d Cir. 1969). Residence of the alien is the preferable alternative for establishing venue. *See* 3 C. GORDON, H. ROSENFIELD & S. MAILMAN, IMMIGRATION LAW AND PROCEDURE § 5.6(c) (1990).

57. 8 C.F.R. § 3.19(b) (1990).

58. Castro-O'Ryan v. INS, 847 F.2d 1307 (9th Cir. 1988) (alien prevented from being represented by counsel who practiced in another jurisdiction); *see also* Chlomos v. INS, 516 F.2d 310, 314 (3d Cir. 1975) ("[P]etitioner's difficulty in securing his lawyer's presence at the hearing was complicated by the fact that the government chose to have the hearing in Florida rather than in New Jersey."). In both *Castro-O'Ryan* and *Chlomos*, the alien had retained counsel in another jurisdiction, and identified and willing witnesses were not able to travel to the distant location.

port his claim.[59] The courts, faced with the burdens of an increasing caseload,[60] will not grant a change of venue without evidence of need. Yet, as one court stated, the "aliens' statutory rights in deportation proceedings must be respected and . . . the desire for expeditious handling of immigration cases cannot, in itself, justify the evisceration of those rights."[61]

Motions for continuance are also at the discretion of the immigration judge.[62] Again, it is considered to be an abuse of discretion to refuse reasonable delays that, in effect, deny the alien representation[63] or prevent him from presenting testimony.[64] While judges may grant continuances on their own motions, this seldom occurs. The burden is usually on the alien to establish that further time is necessary.[65] If either or both of these procedural motions are denied, and the alien fails to appear, the court is faced with the question of the fairness of an in absentia deportation proceeding.

B. *In Absentia Hearings*

Section 242(b) of the Immigration and Nationality Act of 1952 specifically grants the immigration court authority to proceed in absentia—"in like manner as if the alien were present."[66] "Manifestly, this is an extreme power, and its use . . . justified only in the event of aggravated defiance."[67] The constitutionality of in absentia deporta-

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59. United States *ex rel.* Vermiglio v. Butterfield, 223 F.2d 804, 808 (6th Cir. 1955) (court found no abuse because it determined the alien was not prevented from presenting witnesses).

60. *See infra* note 146 and accompanying text.

61. Baires v. INS, 856 F.2d 89, 93 (9th Cir. 1988).

62. 8 C.F.R. § 3.27 (1990) ("The Immigration Judge may grant a motion for continuance for good cause shown.").

63. Rios-Berrios v. INS, 776 F.2d 859 (9th Cir. 1985) (two continuances, each of one additional day, did not allow alien sufficient time to locate counsel and have counsel prepare for hearing); *see also* Castro-Nuno v. INS, 577 F.2d 577, 579 (9th Cir. 1978) ("[T]he immigration judge should have acted *sua sponte* to continue the hearing and give Castro-Nuno a chance to locate his counsel."); *cf.* Patel v. INS, 803 F.2d 804, 806-07 (5th Cir. 1986) (denial of continuance was not abuse where attorney had one week to prepare for uncomplicated case).

64. Matter of Namio, 14 I. & N. Dec. 412, 415-16 (1973).

65. 8 C.F.R. § 242.13 (1990) ("[T]he Immigration Judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.").

66. Immigration and Nationality (McCarran) Act § 242(b), 8 U.S.C. § 1252(b) (1988).

67. 3 C. GORDON, H. ROSENFIELD & S. MAILMAN, *supra* note 56, § 5.9(e). Despite the extremeness of the power, immigration courts have increasingly begun utilizing section 242(b). *See id.* at 5-107 (Supp. 1990).

tion hearings was upheld several years ago in *Shah v. INS*.[68] In *Shah*, the court held that these hearings are not a per se violation of due process.[69]

Section 242(b) provides three prerequisites that must occur before in absentia rulings can be made: 1) there must be a reasonable opportunity for the alien to be present; 2) there must be no reasonable cause why the alien is absent; and 3) the court must proceed *in like manner* as if the alien were present.[70] The first prerequisite, opportunity to be present, has generally been held to require proper notice of the deportation hearing to the alien.[71] Notice is proper when served personally or by mail on the alien's address,[72] or to his attorney.[73] Past INS regulations had required a seven-day notice, although shorter notice was allowed when the government could show it was in the public interest.[74] However, even when notice is insufficient and the alien is absent, the deportation order will not be overturned unless the alien can also show actual substantial prejudice caused by his absence.[75]

The second criterion, reasonable cause for being absent, is reviewed on a case-by-case basis and eludes a definitive test. However, the sufficiency of some common excuses has been determined. For example, absence when a continuance or change of venue is unexpectedly denied is not sufficient cause.[76] Reliance on counsel's advice not

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68. 788 F.2d 970 (4th Cir. 1986); *see* United States v. Dekermenjian, 508 F.2d 812 (9th Cir. 1974).

69. *Shah*, 788 F.2d at 972.

70. *See* Immigration and Nationality (McCarran) Act § 242(b), 8 U.S.C. § 1252(b) (1988) (emphasis added).

71. Patel v. INS, 803 F.2d 804, 806 (5th Cir. 1986) (alien and his attorney had notice and clear warnings of the possibility of an in absentia hearing if they failed to appear).

72. Immigration and Nationality (McCarran) Act § 242(b), 8 U.S.C. § 1252(b) (1988) ("[T]he alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held."). Since 1956, regulations have required the alien to be served with an *order to show cause*, which states the charges as well as serves notice of the hearing date. *See* 8 C.F.R. § 242.1 (1990). If the alien is served by mail and does not appear or acknowledge receipt in writing, personal service is required. 8 C.F.R. § 242.1(c) (1990).

73. 8 C.F.R. § 292.5(a) (1990).

74. A predecessor to 8 C.F.R. § 242.1 (1990) contained specific language requiring a seven-day notice and allowing the notice period to be abbreviated. Both references no longer appear, but the governmental authority to hasten the proceeding apparently continues. *See* Matter of Santos, 19 I. & N. Dec. 2969 (June 26, 1984) (deportation order upheld, despite being conducted within two days of the alien's arrest; haste was justified because immigration judge only sat in that jurisdiction quarterly).

75. Ibrahim v. INS, 821 F.2d 1547, 1550 (11th Cir. 1987) (alien apparently showed he had insufficient notice, but failed to show he was prejudiced by not being present).

76. Patel v. INS, 803 F.2d 804, 806 (5th Cir. 1986); *accord* Maldonado-Perez v. INS, 865 F.2d 328, 337 (D.C. Cir. 1989).

to attend is also insufficient.[77]

The third requirement for a deportation hearing in absentia, that of proceeding in like manner, assures that the alien's deportation is based on the merits and on substantial evidence.[78] This precludes a summary judgment, and requires the government to present evidence and prove deportability even when the alien is absent. When these three criteria have been met, the Board of Immigration Appeals has upheld the immigration court's order of deportation, despite the in absentia nature of the proceeding.[79] The decision in *Maldonado-Perez v. INS*[80] is an example of the recent trend of deporting aliens in absentia. In a narrow sense, the alien is challenging a venue ruling; more generally, he is testing the accepted meaning of "an opportunity to be present," and the fairness of in absentia deportations. The next Section will examine the facts of *Maldonado-Perez* and analyze the majority and dissenting opinions, in order to explore the rationale for justifying the use of this extreme power.

C. *Maldonado-Perez v. INS*

1. Facts and Decision of the United States District Court for the District of Columbia

Pablo Maldonado-Perez was an illegal alien from El Salvador who was apprehended by INS officials one day after entering the United States near Brownsville, Texas. He retained local Texas counsel, and at the "order to show cause" hearing the following day, he conceded deportability. He then requested a stay of that order pending his application for political asylum.[81] He was released on bond, and relocated to Washington, D.C. to be closer to family and his support network. Several months later, he and his Texas counsel were notified of a court date to determine the merits of his asylum claim. Shortly thereafter, that date was accelerated from fifteen months to two months, and the local Texas counsel attempted unsuccessfully to have venue transferred to Washington.[82] One week prior to the sched-

77. *Patel*, 803 F.2d at 806; *see also* Matter of S—, 7 I. & N. Dec. 529, 531 (1957) (aliens had no reasonable cause for absence when they failed to attend because counsel advised them that court lacked subject matter jurisdiction).

78. Immigration and Nationality (McCarran) Act § 242(b), 8 U.S.C. § 1252(b)(4) (1988) ("[N]o decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.").

79. *See* Matter of Perez, 19 I. & N. Dec. 3023 (Mar. 13, 1987); Matter of Marallag, 13 I. & N. Dec. 775 (1971).

80. 865 F.2d 328 (D.C. Cir. 1989).

81. *Id.* at 330.

82. *Id.*

uled hearing, and overburdened with cases himself, the Texas attorney finally located Washington counsel to represent Maldonado-Perez at the Texas hearing. After several discussions between the new Washington counsel and INS officials in Texas, the attorney believed a change of venue motion would be supported by the INS, and he submitted the motion by mail.[83] That motion was presented to the court twelve minutes before the hearing began.[84] The court determined that the alien had failed to appear, that Texas counsel of record was absent, and that the Washington counsel's request for change of venue was untimely and therefore denied.[85] The court stated that local rules required such motions be submitted five days in advance in order to give the INS time to respond.[86] The court recessed until its afternoon session to await appearances by anyone involved, and thereafter proceeded, in absentia, to deport the alien based on the stipulated facts conceded after his arrest.[87] Maldonado-Perez appealed to the Board of Immigration Appeals, which affirmed the deportation order.[88] He then petitioned the federal court of appeals.

2. Appeal to the United States Court of Appeals for the District of Columbia

a. Opportunity to be Present

Maldonado-Perez's first allegation was that he had been denied an opportunity to be present at the hearing by virtue of the denial of his reasonable change of venue requests. He relied on *Baires v. INS*,[89] where a federal court of appeals vacated a deportation order after the immigration judge had refused to grant a reasonable change of venue.[90] That denial deprived the alien from presenting witnesses that would substantiate his claim for asylum. Maldonado-Perez argued that he, too, had been denied a reasonable change of venue, and that his interests had been substantially prejudiced. He argued that because his counsel of choice and witnesses were located elsewhere, he had been denied the opportunity to be present to make his claim.

The majority of the justices of the court of appeals held that the

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83. *Id.* at 331.

84. *Id.* On appeal, Washington counsel contended that an appearance slip to represent Maldonado-Perez also accompanied the motion. *Id.* at 340 (Wald, J., dissenting).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. 856 F.2d 89 (9th Cir. 1988).

90. *Id.* at 93.

deportation in absentia was warranted because 1) Maldonado-Perez had an opportunity to be present; and 2) no reasonable excuse for his absence was proven. The court of appeals determined that Maldonado-Perez had a reasonable opportunity to be present due to the notice he received regarding the trial date. Both he and his Texas counsel had two months' notice, and his Washington counsel had at least one week's notice. While the court admitted that one week was less than desirable, it held that this length of time was sufficient.[91]

The majority distinguished *Baires* from the present situation. In *Baires*, the alien had three named witnesses, whereas Maldonado-Perez had no identified witnesses. In *Baires*, the request for a change of venue was timely, as compared to the request made twelve minutes before the hearing was to begin in *Maldonado-Perez*. Finally, and most importantly according to the majority, the alien in *Baires* was ultimately present at his hearing despite his indigence and the limited notice he had received.

Instead, the majority relied on *Patel v. INS*,[92] where an alien accused of overstaying his visa was deported in absentia. Just as in *Maldonado-Perez*, the alien's attorney was retained one week before the scheduled hearing. Patel had requested and was denied a continuance, but believing it would be granted, he and his attorney failed to appear. The court in *Patel*, like the majority in *Maldonado-Perez*, held that 1) the alien had been given an opportunity to be present; and 2) reliance on continuance or venue motions before they are granted does not excuse the alien or the attorney for failing to appear.[93] Since the statutory criteria of section 242(b) were met, the *Patel* court upheld the in absentia deportation.

b. Excusable Absence

Maldonado-Perez's second argument on appeal was that his absence was excusable, thus negating the court's authority to proceed in absentia. He pointed to the extreme distance from his current residence to the court, and the expense of traveling back to the forum. He claimed that the denial of his two change of venue motions constituted prejudicial error.

The court of appeals held that it was not abuse of discretion for

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91. *Maldonado-Perez*, 865 F.2d at 334 (relying on Patel v. INS, 803 F.2d 804 (5th Cir. 1986)); *see also* Olvera v. INS, 504 F.2d 1372, 1374 (5th Cir. 1974) (three days was sufficient time for substitute counsel in an uncomplicated case).

92. 803 F.2d 804 (5th Cir. 1986).

93. *Id.* at 806.

the immigration judge to deny the change of venue motions. According to the court, his inconvenient distance from the courthouse was self-induced, and if he was resourceful enough to get to Washington, he must be equally capable of traveling back. The court reviewed a list of nine circumstances the alien claimed justified the change of venue. In addition to the distance from the courthouse, the circumstances included his indigence, unfamiliarity with the law, and the unavailability of counsel of his choice in the original venue. The court discounted each claim individually. Although it noted that some of the reasons may at times constitute "good cause,"[94] the claims were insufficient to prove abuse of discretion, and the court, therefore, would not overturn the venue ruling.[95] The court concluded that Maldonado-Perez lacked a sufficient cause for his absence. Having found that he had a reasonable opportunity to be present and lacked sufficient cause for his absence, the majority upheld the deportation order.[96]

c. Dissent

Chief Judge Wald dissented for two reasons. First, she argued that section 242(b) did not justify an in absentia deportation based on the facts of this case. She disagreed that sufficient notice of the trial date fulfilled the requirement of a reasonable opportunity to be present.[97] She concluded that the legislative history of section 242(b) indicated that in absentia proceedings were inserted into the statute for extreme situations, specifically to combat obstructive tactics by aliens.[98] Unless there is evidence of obstructive motives, aliens should be provided a real opportunity to be present and to make their claim. Judge Wald reviewed the facts from Maldonado-Perez's arrest to his deportation, and determined that the requests for change of venue were proper and not made to delay the proceeding unnecessarily.[99] While a court's administrative concern may be an appropriate factor in denying such motions, she determined that here, the immigration

94. *Maldonado-Perez*, 865 F.2d at 337; *see* 8 C.F.R. § 3.19(b) (1990) ("The Immigration Judge, for *good cause*, may change venue . . . .") (emphasis added).

95. *Maldonado-Perez*, 865 F.2d at 337.

96. *Id.* The third requirement, of proceeding in like manner, was apparently not in question. The court had noted that the petitioner was deported based upon the "record as constituted." *Id.* at 331 (quoting the hearing transcript at 3).

97. *Id.* at 339 (Wald, J., dissenting) ("The legislative history clearly shows, however, that Congress intended 'opportunity' to mean more than mere 'notice.' "). Judge Wald went on to note that Congress provided for notice separately from the provisions dealing with opportunity to be present. *Id.* at 339 n.3.

98. *Id.*; *see supra* note 36 and accompanying text.

99. *Maldonado-Perez*, 865 F.2d at 338 (Wald, J., dissenting).

judge was too inflexible.[100] Without more than standard administrative concerns, and faced with the harsh result of denying this alien's request, she stated that the court abused its discretion in denying these motions.[101] Consequently, Maldonado-Perez could not be deported in absentia under the statute, because he had been denied a reasonable opportunity to be present.

Judge Wald termed the majority's reliance on *Patel*[102] "misplaced."[103] Patel was accused of twice overstaying a visa. He made no claim of political asylum. Patel had petitioned for a continuance for unsubstantiated reasons, not for a change of venue because counsel and witnesses were located elsewhere.[104] The facts in *Patel* pointed to an alien utilizing delaying tactics to once again avoid deportation. Judge Wald agreed that Congress intended that aliens like Patel should be tried in absentia, but contended that the facts of *Maldonado-Perez* were so dissimilar from those of *Patel* that *Patel* did not control *Maldonado-Perez*.[105]

Judge Wald's second reason for dissenting was that denying the venue change effectively denied Maldonado-Perez an opportunity to be represented by the counsel of his choice.[106] The majority passed over that issue, except to acknowledge that the right to counsel is provided for in the immigration statute.[107] The majority never applied that section of the statute to the facts of this case. Judge Wald, however, compared this case to *Castro-O'Ryan*,[108] where the Court of Appeals for the Ninth Circuit vacated a deportation order. The *Castro-O'Ryan* court held that a denial of a change of venue motion prevented that alien from being represented by counsel. Although Castro-O'Ryan did appear at his hearing, his attorney and witnesses were in another jurisdiction and unable to attend.[109] Similarly, Maldonado-Perez had counsel located elsewhere. He also claimed to have witnesses out of the jurisdiction, although as the majority noted, he never identified them.[110] In both cases, the immigration law judges were

100. *Id.*
101. *Id.* at 341.
102. Patel v. INS, 803 F.2d 804 (5th Cir. 1986).
103. *Maldonado-Perez*, 865 F.2d at 340 n.4 (Wald, J., dissenting).
104. *Id.*
105. *Id.*
106. *Id.* at 340 n.5 (referring to 8 U.S.C.A. § 1362). Section 1362 provides that "the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel . . . as he shall choose." 8 U.S.C. § 1362 (1988).
107. *Maldonado-Perez*, 865 F.2d at 333.
108. Castro-O'Ryan v. INS, 847 F.2d 1307 (9th Cir. 1988).
109. *Id.* at 1311.
110. *Maldonado-Perez*, 865 F.2d at 334.

unimpressed, and the location of witnesses and counsel were considered insufficient reasons to grant a change of venue. However, the court of appeals in *Castro-O'Ryan* held that denial of this motion denied the alien his statutory right to counsel.[111] Judge Wald determined that Maldonado-Perez was similarly denied the counsel of his choice.

In conclusion, Judge Wald argued that the alien's need for a change of venue outweighed the court's administrative concerns, that the denial prevented him from being represented, and that it therefore was abuse of discretion to deny these motions.[112] Since the motions were in fact reasonable, she concluded that Maldonado-Perez was not afforded a reasonable opportunity to be present, and his in absentia deportation "r[an] counter to the statutory purpose and to fundamental fairness."[113]

III. ANALYSIS

The majority opinion in *Maldonado-Perez* is characteristic of the scope of judicial protection given to most aliens in in absentia proceedings, while the dissent illustrates that at least some jurists consider those protections insufficient. Appellate courts often defer to the immigration judge's determination of fact and law, although there must be fairness in INS proceedings. If the "INS's interpretation is reasonable, in that it is consistent with the statutory language, legislative history, and purpose of the statute, [the courts] will not invalidate it."[114] Stated more cynically, "[i]n the canon of classical immigration law, judges should be seen—if absolutely necessary—but not heard."[115] This deference to Congress and the INS dates back to the early case law,[116] and was reiterated shortly after section 242(b) was enacted.[117] The Supreme Court in *Galvan v. Press*[118] held that "[t]he power of Congress over the admission of aliens and their right to remain is necessarily very broad."[119] Nevertheless, the courts have not abdicated

111. *Castro-O'Ryan*, 847 F.2d at 1313.

112. *Maldonado-Perez*, 865 F.2d at 341 (Wald, J., dissenting).

113. *Id.*

114. De Los Santos v. INS, 690 F.2d 56, 59 (2d Cir. 1982); *see* Matter of Wong, 12 I. & N. Dec. 733, 735 (1968) (BIA relies upon immigration judge's findings of fact).

115. Schuck, *supra* note 4, at 14.

116. *See, e.g.*, The Chinese Exclusion Case, 130 U.S. 581, 603 (1889) ("That the government . . . can exclude aliens . . . is a proposition which we do not think open to controversy.").

117. *See* Galvan v. Press, 347 U.S. 522 (1954).

118. *Id.*

119. *Id.* at 530.

their role in assuring that the process is fundamentally fair.

A. *Fairness: Balancing of Interests and Flexible Due Process*

While courts often defer to immigration regulations, in *Landon v. Plasencia*,[120] the Supreme Court refused to unquestioningly follow INS policy. In *Landon*, the Court outlined a balancing of interests test to determine if a procedure is fair. Mrs. Plasencia, a permanent resident alien, was detained while re-entering this country.[121] She was charged with smuggling illegal aliens across the border,[122] and eventually deported as an excludable alien.[123] She appealed, arguing that she should be treated under deportation procedures, which grant broader rights to aliens.[124] Although agreeing that the INS was technically justified in treating her as excludable, the Court held that fairness required more procedural safeguards in this case than the usual exclusionary proceeding.

> The constitutional sufficiency of [immigration] procedures . . . varies with the circumstances. [T]he courts must consider the *interest at stake* for the individual, the *risk of an erroneous deprivation* of the interest through the procedures used as well as the probable *value of additional or different procedural safeguards*, and the *interest of the government* in using the current procedures . . . .[125]

Thus, competing claims of superior interests and significant risks are critical issues in determining the fairness of an in absentia proceeding.

Dean Verkuil has ranked the interests at stake for various types of aliens.[126] From these groupings, he argues for a "flexible due process" in immigration, based upon the interests at risk.[127] Those who would be denaturalized, i.e., have their citizenship stripped, are at risk of losing liberty and property, and must be afforded the greatest judicial protection. Aliens seeking asylum are the next highest category needing special due process protection.

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120. 459 U.S. 21 (1982).

121. *Id.* at 23.

122. *Id.*

123. *Id.* at 25.

124. *Id.* at 27.

125. *Id.* at 34 (emphasis added). The concept of examining the hardship to the alien had been established prior to this case, but was expanded upon in this decision. *See generally* Bridges v. Wixon, 326 U.S. 135 (1945).

126. Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141 (1984).

127. *Id.* at 1146. The concept of flexible due process began with a series of Supreme Court decisions in the early 1970s. For an overview of the concept, see Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

> [W]hen the threat of persecution is added the . . . entrant is seeking something beyond a new opportunity: she is seeking safety from oppression. Under these circumstances it is not simply a question of returning a person to the country which she left. . . . Thus, an . . . entrant seeking asylum has higher interests than those presented by the typical applicant for admission.[128]

Under this theory, aliens seeking asylum would receive greater judicial protection, perhaps including greater latitude when their change of venue or continuance motions are reviewed.

Since *Landon*, procedural fairness has necessitated a balancing of these risks and interests.[129] However, only in the Ninth Circuit has the court routinely held that an alien's interests outweigh the government's administrative concerns.[130] In contrast, in *Maldonado-Perez*,[131] the Court of Appeals for the District of Columbia upheld the immigration judge's denial of the original change of venue motion because it "would cause undue delay since the case was scheduled to be heard on the merits; petitioner had local counsel . . .; petitioner failed to identify any witnesses in the Washington area; and petitioner moved to Washington on his own accord."[132] The immigration judge denied the second venue motion because of its late arrival and because no new arguments for a change of venue were presented. Again, the court's rationale was primarily administrative in nature. Apparently, the trial court still expected local Texas counsel to represent Maldonado-Perez, even though Washington counsel argued that a motion to appear on the alien's behalf had accompanied the second change of venue motion. The Board of Immigration Appeals found no abuse of discretion in the trial court's denial of either motion. "[O]ther than the implied inconvenience, the [petitioner] ha[d] not shown how he was harmed by the immigration judge's venue ruling. He ha[d] not named any witnesses he would have presented or any evidence he could have obtained only if the hearing had been held in Washington, D.C."[133] The Board of Immigration Appeals, like the trial court, apparently weighed the government's interest in judicial economy more heavily than the alien's unsubstantiated need to be represented by counsel closer to home, where witnesses were more available. The

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128. Verkuil, *supra* note 126, at 1151.

129. *See, e.g.*, Najaf-Ali v. Meese, 653 F. Supp. 833, 837 (N.D. Cal. 1987).

130. *See* Castro-O'Ryan v. INS, 847 F.2d 1307 (9th Cir. 1988); Rios-Berrios v. INS, 776 F.2d 859 (9th Cir. 1985); Castro-Nuno v. INS, 577 F.2d 577 (9th Cir. 1978).

131. 865 F.2d 328 (D.C. Cir. 1989).

132. *Id.* at 335.

133. *Id.* at 332 (quoting the BIA Decision at 3).

government's interest in judicial economy is significant. "The central reality of immigration administration is the overwhelming caseload on the . . . immigration judges . . . ."[134] Despite this issue, an alien's change of venue request to secure counsel has been held a reasonable request, and its denial harmful error.[135]

B. *Asylum Claims Require a Different Analysis Than Other Deportation Actions*

Section 242(b) of the Immigration and Nationality Act of 1952 provides that the alien must have a reasonable opportunity to be present, or must give a reasonable excuse for his absence.[136] This analysis requires that the alien's claim be evaluated on a case-by-case basis.[137] Yet, in *Maldonado-Perez*, the immigration judge made no allowance for the fact that counsel was acting pro bono, or that he had been retained only one week earlier. Neither the trial court nor the court of appeals took special notice that this was a claim for asylum, despite the greater personal risks to aliens fleeing repressive governments.[138] The court of appeals merely analogized to *Patel*,[139] a case that did not involve a claim for asylum. Patel was an alien accused of twice overstaying a visa, and whose citizenship was from a country friendly to the United States. In contrast, Maldonado-Perez was a political refugee from an unfriendly dictatorship. The majority passed over the substantially different facts, different interests, and different risks involved in the two cases. Congress' rationale for including the in absentia process in the statute[140] is typified by Patel's delaying tactics. In absentia proceedings are thus more justifiable in Patel's case, where the alien overstayed his visa twice, requested a continuance to further extend his stay, and then did not appear when the continuances were denied.

Despite the factual differences, and the different interests at stake, the law regarding in absentia proceedings has been applied equally to asylum claims and overstay deportations. The opportunity to be present, or excused for being absent, is considered to be the same for both alien groups. While it can be argued that Congress itself made no distinction among types of aliens, it is equally arguable that the rea-

134. Schuck, *supra* note 4, at 68.
135. *See supra* note 54 and accompanying text.
136. *See supra* note 35 and accompanying text.
137. Barthold v. INS, 517 F.2d 689, 691 (5th Cir. 1975).
138. *See* Verkuil, *supra* note 126, at 1151.
139. Patel v. INS, 803 F.2d 804 (5th Cir. 1986).
140. *See supra* note 36 and accompanying text.

sonableness standards in the statute were incorporated for these situations.[141] Furthermore, the legislative history indicates that Congress incorporated the in absentia power only to fight "obstructionist" and "contumacious" behavior by aliens.[142] Those are strong words that create images of deliberate and rebellious aliens—repeat offenders caught abusing their statutory rights. The language seems harsh and misplaced when referring to political refugees, jurisdictionally bound to a court hundreds of miles from family and counsel, absent after the denial of any change of venue request. As Judge Wald argued in her dissent, the opportunity to be present must be real, and the facts surrounding each alien's status should be considered when determining if the opportunity were available.[143]

Perhaps one reason that aliens were easily "lumped" together in the 1952 statute is that the types of aliens were not as different from each other then as they are today. "There have always been refugees . . . but the brutality of modern warfare, the ferocity of political struggle, and the disruptiveness of social and economic changes have dramatically altered the scale of displacement and devastation."[144] Prior to 1980, no federal legislation dealing specifically with aliens seeking asylum existed.[145] Yet the numbers of aliens seeking asylum grew rapidly. For example, in three short years from 1978 to 1981, the number of aliens seeking asylum rose from 3,700 to over 50,000 annually.[146] Patterns of immigration have changed, and as noted above, the differences among the types of aliens are great. Judging them under similar procedures may no longer be fundamentally fair. Therefore, deportation procedures require adaptation in order to maintain their usefulness. Without fairness in INS procedures, the alien's reasonable opportunity to be present is questionable.

In *Landon v. Plasencia*,[147] the Supreme Court promoted fairness through a balancing of risks and interests. On the one hand, courts and Congress have justifiable concerns that aliens will abuse the sys-

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141. *See supra* note 35.

142. *See supra* note 36 and accompanying text.

143. Maldonado-Perez v. INS, 865 F.2d 328, 339 (D.C. Cir. 1989) (Wald, J., dissenting).

144. Schuck, *supra* note 4, at 39.

145. *See* Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 105 (codified at 8 U.S.C. § 1158 (1988)).

146. *See Immigration Reform: Hearings Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 576 (1981) [hereinafter *Immigration Reform*] (statement of Alan C. Nelson, Deputy Commissioner, INS).

147. 459 U.S. 21 (1982).

tem and its protection. "The governmental interests in the processes surrounding immigration encompass complex concerns. In any mass justice situation there is an overriding interest in efficient and effective decisionmaking."[148] Aliens enter at many border points and may relocate miles away while awaiting their deportation hearing. Waiting for these indigent defendants to secure counsel might take years, if it occurred at all. Changing venue every time an alien relocates could postpone his deportation indefinitely. Procedural safeguards could rule the system, acting as a weapon to be used to prolong and avoid the deportation process. "[T]he incentives for aliens to claim asylum are powerful, often overwhelming. Merely by filing the claim, an alien apprehended by the INS automatically wins a delay in deportation until all avenues of . . . review have been exhausted."[149] Court dockets are clogged now, and news travels fast. Some commentators have stated that our immigration laws generally allow abuse, and the message that "we do not have an adequate policy or an enforceable policy . . . has been received by the people who want to come to the United States—and there are many."[150]

On the other hand, the interests of aliens like Maldonado-Perez, Baires, and Castro-O'Ryan must be protected. "Many of these aliens, like many of our forebears, were driven from their original homelands by bigoted authorities who denied the existence of freedom and tolerance."[151] Indigent and uneducated, they seek assistance from a system more easily accessed by the educated and affluent. In many jurisdictions, the paucity of pro bono assistance precludes many from obtaining counsel and ensures that the fortunate few receive only minimal support.[152] "It seems clear that there is an urgent need for some fundamental changes in the system. Delay is built into the existing structure."[153] For Maldonado-Perez, that meant an overburdened Texas attorney from Refugee Legal Services and a pro bono Washington counselor who should not have been expected to travel to Texas to represent him. The reasonableness of both the

148. Verkuil, *supra* note 126, at 1153.

149. Schuck, *supra* note 4, at 41.

150. *Immigration Reform*, *supra* note 146, at 757 (statement of Robert Pastor, guest scholar, Brookings Inst.).

151. Bridges v. Wixon, 326 U.S. 135, 166 (1945) (Murphy, J., concurring).

152. Note, *INS Transfer Policy: Interference with Detained Aliens' Due Process Right to Retain Counsel*, 100 HARV. L. REV. 2001, 2005-06 n.25 (1987) (examining the inadequate resources available in some areas of the country where aliens are detained); *see also* Anonymous, *Pro Bono Diary*, 6 IMMIGR. J. 11 (Jan.-Mar. 1983) (in one day, attorney represented 26 aliens in court appearances).

153. Roberts, *supra* note 46, at 15.

alien's and his attorney's actions must be examined in light of the factors endemic to the system. Court decisions like *Baires*[154] and *Castro-O'Ryan*[155] demonstrate what happens when immigration judges begin to treat these motions routinely. In both cases, the court of appeals reversed the lower court, holding that refusing a reasonable change of venue motion denied the alien due process. The location of witnesses and counsel in a different jurisdiction should have been sufficient reasons to grant the motions.

The interests of all aliens are significant, but the interests of aliens seeking asylum are greater.[156] Just as procedural motions in criminal proceedings are treated differently between felonies and misdemeanors, asylum and stayover deportations should proceed under different standards. Stayover deportation proceedings like *Patel*[157] are facially fair. The alien was here on a visa, and had already overstayed the time limit twice. His motion was for a further continuance of his deportation case. Nevertheless, determinations of asylum claims in absentia are at best on the fringes of fairness. The risks to the alien are greater, and the need to hear from the alien regarding these risks is apparent. The objective of the statute, and a legitimate judicial goal, was to prevent aliens from using procedural safeguards to obstruct justice. However, denials of all change of venue requests, while attaining that end, would be unnecessarily inflexible, and would deprive many aliens of justice.

Three recommendations follow from the above concerns. First, there must be a greater appreciation of the differences between the various types of aliens, and their different interests. Second, changes are needed in the review of venue and continuance motions, which will ensure a greater opportunity for the alien to be present. Finally, in absentia proceedings should be reserved only for extreme situations.

C. *Recommendations*

1. Immigration Courts Should Consider the Alien's Status as a Factor in Determining if Pre-trial Procedural Motions Should Be Granted

Refugees requesting asylum and stayovers who have breached their visa privileges are two distinctively different alien groups. Stayover adjudications are less factually complex, require fewer

154. Baires v. INS, 856 F.2d 89 (9th Cir. 1988).
155. Castro-O'Ryan v. INS, 847 F.2d 1307 (9th Cir. 1988).
156. *See supra* note 126 and accompanying text.
157. Patel v. INS, 803 F.2d 804 (5th Cir. 1986).

witnesses, and need less legal counseling. Stayovers who have been in this country, even for a short while, are more likely to be versed in our legal system and the resources available than are recent refugees. Whether on a traveling or working visa, stayovers are more inclined to have at least some financial resources to obtain counsel.

However, political refugees have different interests.[158] They are fleeing repressive governments and must prove that threats to their safety exist in order to be granted asylum.[159] They require witnesses and the aid of counsel. The risks involved in deportation are greater for these aliens, and in *Landon*, the Court's "fairness" demands that their interests be specifically weighed and balanced. Even the "flexible due process" approach would require a case-by-case analysis, which would consider the type of alien and degree of procedural protection warranted.

2. Change of Venue and Continuance Motions Should Be Temporarily Granted in Asylum Actions

Under either the "fairness" or "flexible due process" theories, a presumption should exist in favor of granting change of venue and continuance motions in an asylum action when they involve aliens attempting to present witnesses or secure the services of counsel. Continuances should be brief, with the alien required to return to court as often as necessary to demonstrate positive action and a need for additional time. Change of venue motions should be temporarily granted, pending evidence that the alien is moving forward in securing counsel and preparing a defense. The original court could review submitted affidavits to ensure the alien's compliance. In the interest of fairness, it is worth the original court's time to review these documents. After granting either motion, the court could quickly move to final adjudication, in absentia if necessary, where the alien fails to establish that he is making progress in his defense. This system of short or temporary extensions would flush out the aliens using the system merely as a delaying tactic.

Where there is only obstructionist behavior, one short delay or temporary venue change will not greatly burden the system. Where the alien's requests were honestly motivated, however, justice will be better served by an initial "benefit of the doubt" approach to these motions. The courts' concerns for administrative efficiency, although

158. *See supra* note 126 and accompanying text.

159. 8 C.F.R. § 208.5 (1990).

significant, should not automatically preclude an alien's attempt to prove his need for a change of venue.

3. In Absentia Proceedings Should Be Reserved for Extreme Situations, Especially in Asylum Cases

Finally, where the alien alleges he is a political refugee, the "balancing" of risks and interests indicates that in absentia proceedings should be reserved for only the most extreme situations. While all deportable aliens have an option to designate where they wish to be deported, those who have overstayed a visa probably have a safer haven at home or elsewhere than political refugees. Arguably, political refugees would be victims of persecution at home, and may be unsafe in many of the countries that would accept them. In the balancing equation, the interest at stake for the alien is conceivably life itself. Furthermore, the risk of error, in our adversarial system, is greatest when no one is present to offer an opposing view. In contrast, the government's interest in efficient utilization of court resources is only slightly impeded by the short delays outlined above, especially considering that every alien does not assert refugee status. Considering that the risks of error are greatest when an alien is deported without an opportunity to make his case, the court's in absentia power should be reserved for cases where there is evidence of obstructionist intent by the alien.

CONCLUSION

These recommendations should not be read to condemn all in absentia proceedings. Where it has been established that the system is being used simply to delay, the courts should proceed without the alien, that action being reviewable by a federal court of appeals. However, before a person's rights are stripped, the government should first demonstrate that that was the only reasonable alternative left. Although deportation is a civil action, the consequences to the alien are frequently as severe as to the criminal defendant. For that reason, the courts have established requirements of procedural fairness. Just as we rarely adjudicate against criminal defendants in absentia, so too should we sparingly use that power to deport aliens absent from their hearings.

Timothy W. Murphy