Due Process and Deportation: A Critical Examination of the Plenary Power and the Fundamental Fairness Doctrine

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Introduction

Although federal courts have consistently considered deportation proceedings as civil or administrative hearings rather than criminal prosecutions,[1] they have concurrently held that aliens subject to deportation are entitled to many of the due process protections afforded the criminal defendant.[2] Aliens presently enjoy limited rights to counsel,[3] to freedom from self incrimination,[4] and to reasonable notice of the nature of the charges against them.[5] Aliens have been completely denied the protection of the constitutional prohibitions against double jeopardy, *ex post facto* laws, and cruel and unusual punishment in accordance with the theory that such rights only attach to criminal prosecutions.[6] The question here considered is whether there is a valid distinction between criminal and deportation proceedings, and if there is, whether it justifies a judicial and congressional grant of certain limited constitutional due process rights and the denial of others.

The law governing procedural due process[7] in deportation hearings is in a state of flux. The federal circuit courts are divided

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1. *See, e.g.*, Abel v. United States, 362 U.S. 217 (1960); Nai Cheng Chen v. INS, 537 F.2d 566, 568 (1st Cir. 1976).

2. *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Japanese Immigrant Case, 189 U.S. 86 (1903).

3. Ramirez v. INS, 550 F.2d 560 (9th Cir. 1977); Chlomos v. Department of Justice, 516 F.2d 310 (3d Cir. 1975).

4. Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977); Bong Youn Choy v. Barber, 279 F.2d 642 (9th Cir. 1960).

5. United States v. Gasca-Kraft, 522 F.2d 149 (9th Cir. 1975); Immigration & Nationality Act, 8 U.S.C. § 1252b (1976).

6. *See* 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE §§ 4.3c, .3h, .3i (1980). *See* § III(F) *infra.*

7. The issues considered here are limited to the procedural rights of aliens in deportation hearings. This analysis includes the process by which aliens are deported rather than substantive issues of law.

on important issues that directly affect the constitutional rights of aliens, and the Supreme Court seems unwilling to address these issues in order to assure that aliens will be subject to a uniform system of justice throughout the United States.[8] The Court's refusal to take deportation cases contributes to the general feeling of insecurity which permeates alien communities.

Much of the confusion plaguing deportation law results directly from the interaction between the plenary power of Congress over aliens and the limits imposed on that power by procedural due process requirements.[9] Although the plenary power to expel aliens is theoretically unlimited,[10] the Supreme Court has imposed constitutional restrictions via the Fourteenth Amendment.[11] However, by relying on the nebulous doctrine of "fundamental fairness,"[12] the Court has failed to clearly define the nature and scope of these restrictions. In fact, the Court has created even greater confusion by defining alien rights with terms analogous to those used in criminal proceedings.[13] Deportation procedure remains a mutant which sprang from the marriage between civil and criminal law principles.

A good example of the confusion created by the Supreme Court's refusal to adjudicate deportation issues is found in the area of Fourth Amendment search and seizure. The Court ruled in dicta, in *United States ex rel. Bilokumsky v. Tod,*[14] that the exclusionary rule was applicable to deportation proceedings. During the initial fifty-five years following *Bilokumsky,* however, the federal courts have failed to determine the exact scope of the rule as it relates to immigration law.[15] The circuits remain in conflict as to whether the rule should apply to deportation proceedings under any circumstances.[16] The Supreme Court's failure to resolve this issue has created conflict and confusion which affects the entire immigration field. In addition, the circuit courts have promulgated

8. *But see* Woodby v. INS, 385 U.S. 277 (1966) (where the Court finally decided the burden of proof issue because the Second Circuit seemed incapable of making a coherent judgment).

9. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 902 (1978).

10. *See* Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) (reference to unfettered congressional power).

11. *See* Japanese Immigrant Case, 189 U.S. 86 (1903).

12. *See, e.g.,* Bridges v. Wixon, 326 U.S. 135, 154 (1945).

13. *See* notes 186, 187 & 203 and accompanying text *infra.*

14. 263 U.S. 149, 155 (1923)(dicta).

15. *Cf.* Matter of Sandoval, Interim Decision 2725, at 7 (BIA 1979) (the Board of Immigration Appeals claimed that the federal courts had merely avoided the issue for 55 years).

16. *See* text accompanying notes 211-19 *infra.*

elaborate search and seizure rules which govern the activity of Immigration Officers, yet they have failed to determine whether they will admit evidence seized in violation of those rules.[17] Immigration Officers will naturally tend to disregard the law as long as the courts remain unwilling to provide a method of enforcement.

The inability of the circuit courts to resolve issues concerning the Immigration and Nationality Act[18] allows the Immigration Service to follow its own rules where no court has decided the issue or has decided the issue in the Service's favor, and to follow contrary court rulings only in those parts of the country subject to that court's jurisdiction. For example, in *Lok v. Immigration & Naturalization Service*[19] the Second Circuit decided that permanent residence status was not a prerequisite for a discretionary waiver of deportation.[20] "After the *Lok* decision, the BIA[21] announced that the INS[22] would observe the *Lok* interpretation of [the Act] in the Second Circuit. . . . Believing that interpretation to be incorrect, however, the BIA added that it would adhere to its own interpretation outside the Second Circuit."[23]

The Ninth Circuit subsequently supported the BIA's construction of the statutory language and rejected the argument that the discrepancy in the Service's policy constituted a violation of the equal protection component of the Fifth Amendment due process clause.[24] According to Circuit Judge Bright, the Immigration Service tends to completely ignore the judiciary on this issue. In *Bowe v. Immigration and Naturalization Service*[25] he stated that: "[t]his court must recognize that . . . the Service in fact exercises discretionary power in some cases to waive deportability of drug offenders, under [the Act] notwithstanding this circuit's decisions denying the existence of such power."[26]

Not only has the Immigration Service refused to comply with circuit court rulings, it has also failed to comply with its own rules.[27] Despite this fact, the federal courts have not agreed on a

17. *Id.*
18. 8 U.S.C. §§ 1101-1503 (1976).
19. 548 F.2d 37 (2d Cir. 1977).
20. *Id.* at 38. 8 U.S.C. § 1182c (1976) requires a seven year period of lawful unrelinquished domicile.
21. Board of Immigration Appeals.
22. Immigration & Naturalization Service.
23. Castillo-Felix v. INS, 601 F.2d 459, 467 (9th Cir. 1979)(citation omitted).
24. *Id. See also* Bowe v. INS, 597 F.2d 1158 (9th Cir. 1979).
25. 597 F.2d 1158 (9th Cir. 1979).
26. *Id.* at 1159 (citation omitted).
27. *See, e.g.*, Nicholas v. INS, 590 F.2d 802, 805 (9th Cir. 1979).

uniform standard for determining the impact of the Service's violations of its own regulations.[28] As with the controversy over the application of the exclusionary rule, the federal court system's failure to determine whether the Immigration Service's regulations create due process rights[29] has left the alien community without any protection against administrative abuses of power. In lieu of congressional intervention, the Supreme Court should determine that the Service is not only bound by its own regulations,[30] but that its deportation efforts must fail when the broken rules directly affect procedural due process rights.

The biggest flaw in the judicial formulation of due process rights in deportation cases stems from the fact that the doctrine upon which these rights depend, fundamental fairness, has not yet been given a definition by the federal courts.[31] If the circuits are unable to agree on what kind of procedural errors constitute fundamental unfairness,[32] then they certainly cannot determine the nature and scope of due process rights in deportation actions. This problem may be aggravated by the ambivalent attitude that judges hold with respect to the deportation process. Throughout history federal judges have decried the harshness and the punitive character of deportation,[33] yet with the same stroke of the pen they have held that aliens are not protected by the same procedural safeguards afforded criminals.

I. Historical Perspective[34]

A. Exclusion of Aliens

The power of Congress to control immigration was originally based on the premise that "every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."[35] Although the Supreme Court occasionally has attempted to justify governmental control of immigration as a power

28. *See* notes 94-129 and accompanying text *infra*.
29. *Id.*
30. *See* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954).
31. *See* § III(A) *infra*.
32. *Id.*
33. *See* note 249 *infra*.
34. For a good chronological summary of restrictive immigration legislation see [1952] U.S. CODE CONG. & AD. NEWS 1653-74.
35. Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

incidental to various treaty obligations,[36] the primary justification has been the powers inherent in sovereignty theory. Neither the President, the Congress, nor the Supreme Court has ever attempted to find a constitutional basis for the many and varied laws which regulate the flow of aliens into the United States.

The first cases to adhere to the theory that power over aliens is inherent in sovereignty dealt with situations where the government sought to exclude rather than expel aliens.[37] This distinction was crucial because although aliens did not have a constitutional right to enter the United States, once legally here, they could claim most of the constitutional rights which citizens enjoy.[38] By subscribing to the sovereignty theory and attributing the exclusion power to the legislative[39] and executive[40] branches, the early cases neglected to assign the Constitution a role in exclusion proceedings. The Supreme Court did, however, conclude that the power to exclude aliens on facts determined by executive officers was not subject to judicial review.[41] Even today, the President and the Congress exercise unfettered control over the quantity and character of aliens entering the United States.

The Court's unwillingness to extend constitutional protection to persons desiring entry into the United States allowed the government to enforce an immigration policy which only responded to the needs of the marketplace.[42] Aliens were considered mere commodities, subject to the law of supply and demand. This attitude continues to influence modern immigration law and policy.[43]

B. Expulsion of Aliens

The Supreme Court in *Fong Yue Ting v. United States*[44] reaffirmed the notion that the power to exclude aliens from our shores lay with the political branches of government, and extended the rationale to encompass the power to expel aliens.[45] The Court proclaimed that "[t]he right of a nation to expel or deport foreigners,

36. *See, e.g.*, Chinese Exclusion Case, 130 U.S. 581, 597 (1889).

37. Nishimura Ekiu v. United States, 142 U.S. 651 (1892); Chinese Exclusion Case, 130 U.S. 581 (1889).

38. *See* 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE §§ 1.31, .32 (1980).

39. Chinese Exclusion Case, 130 U.S. 581, 603 (1889).

40. Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892).

41. *Id.*

42. National Lawyers Guild, IMMIGRATION LAW AND DEFENSE §§ 2.1-.9 (2d ed. 1979).

43. *Id.* at § 2.8.

44. 149 U.S. 698 (1893).

45. *Id.* at 705, 707.

who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."[46] Although the Court's language seemed to imply that the powers inherent in sovereignty justify only the expulsion of aliens who fail to take "steps towards becoming citizens," these powers have nevertheless provided the justification for all forms of deportation.[47] Those aliens who have taken "steps toward becoming citizens," such as lawful permanent residents,[48] receive essentially the same consideration as illegal aliens.[49]

Fong Yue Ting laid the foundation upon which modern deportation law was built. The Supreme Court concluded that deportation was not punishment, but rather "the removal of an alien out of the country . . . without any punishment being imposed or contemplated."[50] Deportation was considered necessary to protect the public welfare;[51] the hardship it might work on the deportee was not considered material.

The *Fong Yue Ting* Court took the position that aliens were entitled to constitutional safeguards in all matters except exclusion and expulsion.[52] Congress could expel aliens "whenever in its judgment their removal is necessary or expedient for the public interest."[53] But if aliens were subject to a completely arbitrary expulsion power, they would be incapable or unwilling to assert their constitutional rights. Under the *Fong Yue Ting* rationale, for example, an alien exercising his right to free speech in a manner critical of the government could be summarily deported as an expedient for the public interest.

In order to justify this extreme position, the Court distinguished but did not overrule *Yick Wo v. Hopkins,*[54] despite the

46. *Id.* at 707.

47. § 241(a) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1976), applies to any noncitizen of the United States.

48. *See, e.g.,* Bassett v. INS, 581 F.2d 1385 (10th Cir. 1978).

49. *See, e.g.,* Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977). As a practical matter, an alien's status may come to the Immigration Service's attention only when he or she applies for naturalization.

50. 149 U.S. at 709.

51. *Id.*

52. *Id.* at 724.

53. *Id.*

54. 118 U.S. 356 (1886)(holding invalid the discriminatory enforcement of a statute regulating Chinese laundries as contrary to the equal protection clause of the Fourteenth Amendment).

fact that *Yick Wo* found the Fourteenth Amendment applicable to aliens. Since *Yick Wo* did not specifically relate to the political expulsion power, and since deportation proceedings were not criminal trials which could result in the deprivation of life, liberty or property, the *Fong Yue Ting* Court refused to apply the Fourth, Fifth, Sixth and Eighth Amendments.[55]

Justice Brewer dissented in *Fong Yue Ting*, claiming that aliens "who have become domiciled in the [United States] are entitled to a more distinct and larger measure of protection that those who are simply passing through."[56] Because he believed the government's powers over all domiciliaries of the United States to be limited by the Constitution,[57] he argued that there was no absolute power to deport. He rejected the inherent powers theory and reasoned that if aliens were protected under the Fourteenth Amendment[58] because they were persons living within the United States, then the use of the words "people," "person" and "accused" in the Fourth, Fifth and Sixth Amendments should, by analogy, make those constitutional rights applicable to aliens as well as citizens.[59] He further maintained that deportation "imposes punishment without a trial," and, characterizing such punishment as "cruel and severe," he indicated that it ran afoul of the Eighth Amendment.[60]

Justice Field, in a separate dissenting opinion, agreed with Justice Brewer's reasoning but used much stronger language. He stated that the deportation "punishment is beyond all reason in its severity. It is cruel and unusual. . . . Every step in the procedure . . . tramples upon some constitutional right.[61]

The objections made by Justices Brewer and Field have been repeated in many strong dissents which assert that aliens are entitled to a greater degree of constitutional protection.[62] In fact, a majority of the Court later partially accepted the Brewer-Field analysis by holding that resident aliens are entitled to the protection of the Bill of Rights.[63]

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55. 149 U.S. at 725, 730.
56. *Id.* at 734 (Brewer, J., dissenting).
57. *Id.* at 738.
58. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).
59. 149 U.S. at 739 (Brewer, J., dissenting).
60. *Id.*
61. *Id.* at 760 (Field, J., dissenting).
62. *See* note 249 *infra*.
63. *See* Wong Wing v. United States, 163 U.S. 228 (1896).

C. The Japanese Immigrant Case

The Court's initial departure from the *Fong Yue Ting* standard came in the *Japanese Immigrant Case*,[64] the first decision to impose constitutional limits on deportation actions. The Immigration Service had declared that a young Japanese woman was likely to become a public charge; she was therefore deportable under the 1891 Act.[65] The alien, Ms. Yamataya, was taken into custody shortly after her arrival in Seattle. Her counsel argued that the sovereign power theory did not apply to aliens dwelling in the United States because they were "persons" within the meaning of the Constitution.[66] He also argued that Ms. Yamataya had been "deprived of her liberty in violation of the Fifth Amendment to the Constitution . . . in that she was not given any notice or opportunity to be heard."[67]

The Court accepted the latter argument and rejected the former, thereby creating tension between the plenary power and the constitutional rights of aliens.[68] Aliens were subject to expulsion by administrative officers in conformity with regulations promulgated pursuant to the plenary power, yet they were entitled also to due process of law. Despite the *ex parte* nature of Ms. Yamataya's hearing, the Court affirmed the deportation order because she had "never been naturalized, nor acquired any domicil or residence within the United States," and "[a]s to such persons, the decisions of executive or administrative officers . . . are due process of law."[69]

The Court, while reaffirming the congressional power to establish regulations for the exclusion or expulsion of aliens,[70] had nevertheless taken a giant libertarian step forward. Without expressly overruling *Fong Yue Ting*, the Court had required that administrative officers observe the fundamental principles of due process when executing the provisions of a statute involving the liberty of aliens.[71] However, the Court did not clearly define fundamental due process principles. Justice Harlan stated that:

> One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before

64. 189 U.S. 86 (1903).
65. *Id.* at 87; *see generally* 8 U.S.C. § 1552 (1976).
66. 189 U.S. at 89 (argument for appellant).
67. *Id.* at 90.
68. *See* National Lawyers Guild, IMMIGRATION LAW AND DEFENSE § 6.2 (2d ed. 1979).
69. 189 U.S. at 98.
70. *Id.* at 97.
71. *Id.* at 100.

> such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act.[72]

Unfortunately, this was of little use to aliens in Ms. Yamataya's position. Alien domiciliaries of the United States were entitled only, at some point determined by an administrative officer, to speak in their own behalf. Despite the analogies drawn by the *Fong Yue Ting* dissenters, aliens did not have the rights normally associated with criminal proceedings. There was no right to counsel, no right to remain silent, and no protection against double jeopardy.

Although the *Japanese Immigrant Case* constitutes the modern rule regarding due process in deportation proceedings,[73] the ambiguous standard set by the Court has caused a tremendous amount of confusion in deportation procedure. The Court did not define the exact parameters of alien due process rights, and the federal courts have struggled with the problems for nearly a century.

II. The Immigration and Nationality Act of 1952

Although the Supreme Court has repeatedly declared that deportation hearings must "meet the essential standards of fairness,"[74] the courts have neglected to fix those standards. In order to eliminate the uncertainty shrouding deportation procedure, Congress passed the Immigration and Nationality Act of 1952,[75] also known as the McCarran Act. The purpose of the bill was to codify and revise immigration laws in accordance with then existing law and the then most recent decisions of the Supreme Court.[76] Whether or not the Act has accomplished its objectives is a difficult question to answer. Despite the fact that it has created a greater degree of certainty in deportation law by specifying, *inter alia,* which procedures satisfy the judicial requirement of funda-

72. *Id.* at 101.

73. *See, e.g.,* Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Nicholas v. INS, 590 F.2d 802 (9th Cir. 1979).

74. Bridges v. Wixon, 326 U.S. 135, 154 (1945).

75. Pub. L. No. 414, 66 Stat. 163 (1952)(codified at 8 U.S.C. §§ 1101-1503 (1976)).

76. H.R. REP. No. 1365, 82d Cong., 2d Sess. (1952), *reprinted in* [1952] U.S. CODE CONG. & AD. NEWS 1653; 98 CONG. REC. 4301 (1952).

mental fairness,[77] it has not eliminated the inherent contradiction which arises from the premise that even though deportation puts "the liberty of an individual . . . at stake," it "is not technically a criminal proceeding."[78]

Congress quite naturally based its authority to enact the statute on the powers inherent in sovereignty theory.[79] Not a single Congressman recorded an objection to the theory because the plenary power had become firmly established in the years following *Fong Yue Ting*.[80] One Congressman, however, objected to the bill on the ground that it did not fulfill the requirements of due process. He stated that:

> Anyone who has read this bill carefully must be greatly concerned with the almost arbitrary power it bestows upon officials to seize, deport, or bar aliens from this country without the right of appeal. Deportation, for example, can be authorized by such officials for technical violations of law, and in some cases even where no violation of law is involved. . . . It would grant to immigration officials unprecedented powers for search, seizure, and deportation of aliens in this country.[81]

The Act was designed, among other things, to define alien rights in deportation proceedings. Ironically, it accomplished this objective by denying aliens most of the rights normally associated with proceedings involving deprivations of liberty.

The McCarran Act authorizes administrative hearings to determine deportability. Immigration judges[82] conduct the proceedings under the express authority of the Attorney General. They "present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and . . . make determinations, including orders of deportation."[83] In most respects they function as do other judges, but they lack some characteristics of an independent judiciary because they are creatures of the statute and employees of the Service.

Although immigration judges exercise discretion in many areas

77. *See* notes 130-48 and accompanying text *infra*.

78. Bridges v. Wixon, 326 U.S. 135, 154 (1945).

79. *See* note 76 *supra*.

80. Congress did not share the doubts of the many judges who had dissented against the theory. *See* note 249 *infra*.

81. 98 CONG. REC. 4311 (remarks of Rep. Heller). He further complained that the bill "provides for procedures which . . . run directly counter to the basic principles underlying civil liberty and the bill of rights." *Id.*

82. Formerly called Special Inquiry Officers.

83. 8 U.S.C. § 1252(b)(1976).

of deportation procedure,[84] the statute expressly extends certain due process rights to persons subject to deportation. Aliens are guaranteed notice of the nature of the charges against them, and they enjoy the right of counsel (though not at government expense), the right to assert a defense, and the right to a decision based on substantial and probative evidence.[85]

The Act was not designed to create rights, but rather to codify immigration laws in accordance with existing law,[86] and perhaps to prevent the federal courts from expanding procedural due process in deportation actions.[87] It may have been the congressional response to the Supreme Court's decision in *Wong Yang Sung v. McGrath*.[88] There, the Court concluded that the recently passed Administrative Procedure Act[89] was applicable to deportation proceedings. The Service claimed that the Administrative Act did not apply to deportation[90] and supported bills in Congress to exempt the agency from its requirement for a hearing before an impartial judge.[91]

Despite the fact that the Immigration Act[92] then in effect did not contain an express requirement for a hearing, the Court rejected the argument that Congress did not intend for there to be such a requirement. Justice Jackson stated that "[t]he constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body."[93] The Court therefore adopted the Administrative Procedure Act as a standard of fairness in deportation procedure. Congress may have passed the 1952 Act in order to reassert control over the process of excluding and expelling aliens.

The Immigration Service's regulations create almost as many due process problems as does the 1952 Act. Although the federal

84. *E.g.*, Wun Man Lau v. INS, 426 F.2d 689 (3d Cir. 1970) (upholding a discretionary denial of voluntary departure).

85. 8 U.S.C. § 1252(b)(1)-(4)(1976).

86. *See* note 76 *supra*.

87. *See generally*, Note, *Due Process and Deportation—Is There a Right to Assigned Counsel?*, 8 U. CAL. D.L. REV. 289, 296-97 (1975) (concluding that the courts may have refrained from creating a right to assigned counsel because of the specific statutory admonition of "not at government expense" in 8 U.S.C. § 1252(b)(2) (1976)).

88. 339 U.S. 33 (1950).

89. Pub. L. No. 404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 1001-1011 (1976)).

90. 339 U.S. at 48.

91. *Id.* at 41-45.

92. Pub. L. No. 64-301, 39 Stat. 874 (1917) (codified in scattered sections of 8 U.S.C.).

93. 339 U.S. at 49.

courts have generally held that the Immigration Service must comply with its own rules,[94] they have not determined whether the regulations themselves create due process rights.[95] In *Bridges v. Wixon*[96] the Supreme Court vacated a deportation order because of noncompliance with an Immigration Service regulation governing the admissability of statements taken out of court, but did not address the issue of whether the regulations actually created procedural due process rights.

In *United States ex rel. Accardi v. Shaughnessy*[97] the Court decided that once the Attorney General conferred discretionary power on the Board of Immigration Appeals, he was precluded from interfering with or avoiding the Board's exercise of that power.[98] The Court indicated that the regulations could confer rights not otherwise granted to aliens by stating that "[t]he crucial question is whether the alleged conduct of the Attorney General deprived petitioner of any of the *rights* guaranteed him by the statute or by the *regulations*. . . ."[99] However, the holding in *Accardi* did not specifically determine when or under what circumstances due process rights could be created by regulation. *Accardi* also failed to provide a rational framework upon which the Attorney General could rely when formulating regulations which create alien rights. Once again, major issues were left for the circuit courts to decide.

The First Circuit has taken the position that compliance with the regulations is necessary to insure due process in deportation proceedings.[100] According to Judge Tuttle's opinion in *Navia-Duran v. Immigration and Naturalization Service*,[101] the fact that "the Constitution does not offer the same level of protection to persons subject to civil proceedings as it does to criminal defendants, cannot excuse the failure of federal agencies to abide by their own regulations."[102] Judge Tuttle claimed that "[t]he rule

94. *See* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954); Bridges v. Wixon, 326 U.S. 135 (1945); MacLeod v. INS, 327 F.2d 453 (9th Cir. 1964)(order to show cause pursuant to 8 C.F.R. § 242.1 (1980) did not inform the defendant of the charges against him).

95. *See* Nicholas v. INS, 590 F.2d 802 (9th Cir. 1979); Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977); United States v. Floulis, 457 F. Supp. 1350 (W.D. Pa. 1978).

96. 326 U.S. 135 (1945).

97. 347 U.S. 260 (1954).

98. *Id.* at 265-67.

99. *Id.* at 265 (emphasis added).

100. Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977).

101. *Id.*

102. *Id.* at 809.

that such agency failure violated due process evolved in the context of civil not criminal proceedings."[103] Although he accepted the Service's argument that *Miranda v. Arizona*[104] does not apply to deportation actions, he held that aliens possessed a right to be informed of rights conferred upon them by the regulations.[105]

The First Circuit's position is the most liberal in the nation. Judge Tuttle in *Navia-Duran* clearly held that the regulations were capable of creating due process rights. In addition, he put the Service on notice that violations of alien rights would hinder and in some cases reverse the deportation process.[106]

In *Nicholas v. Immigration and Naturalization Service,*[107] the Ninth Circuit held that agency regulations did not create due process rights,[108] but did not go so far as to completely reject the First Circuit's position. In *Nicholas,* the suspect alien had sought reversal of a deportation order, claiming that the Service's failure to provide him with copies of exhibits, as required by the regulations,[109] was a violation of due process.[110] He also claimed the Service had violated his rights by failing to consider his request for non-priority status pursuant to the Service's Operations Instructions.[111]

The circuit court[112] held that the petitioner's first argument failed because there was no showing that he had been "denied a meaningful opportunity to litigate the issues presented on appeal."[113] Implicit in the court's analysis was the notion that a violation of the regulations would not be considered a *per se* denial of due process unless the alien could demonstrate prejudice. However, the court took a contrary approach to the immigration judge's failure to comply with the Operation Instructions. The majority

103. *Id.*

104. 384 U.S. 436 (1966).

105. 568 F.2d at 809. 8 C.F.R. § 287.3 (1980) states that the Service must inform suspects of their rights.

106. 568 F.2d at 808-09.

107. 590 F.2d 802 (9th Cir. 1979).

108. *Id.* at 807.

109. 8 C.F.R. § 292.4(b)(1980) states that the Service must supply the accused with copies of exhibits.

110. 590 F.2d at 809.

111. The immigration judge summarily denied the petitioner's request despite the fact that Operations Instruction 103.1(a)(1)(ii) required him to consider the existence of humanitarian factors, including the defendant's age, the number of years he had lived in the United States, his physical and mental condition, his family situation, and his recent moral conduct.

112. District Judge Takasugi was designated to sit on the circuit court bench.

113. 590 F.2d at 810.

found that although the rules did not create procedural rights, breaking them could constitute a denial of due process if the disregarded rule directly affected substantive rights.[114]

In *Nicholas,* the immigration judge's failure to consider the existence of certain humanitarian factors before denying the request for deferred action resulted in the immediate deportation of the petitioner. The court found the alien's substantive right "to continue residence in the United States"[115] to have been directly affected by the rules governing the immigration judge's decision. *Nicholas* significantly differed from *Navia-Duran* in that it restricted the Attorney General's power to create procedural due process rights, limiting it to situations where regulations directly affected substantive rights or violated due process standards.

The Federal District Court in Western Pennsylvania has taken the most conservative position on this issue. In *United States v. Floulis,*[116] the district court followed the portion of the *Nicholas* decision which held that a violation of a regulation must be evaluated to determine if it renders the proceeding fundamentally unfair,[117] but did not agree with the concept that a violation affecting substantive rights automatically results in a denial of due process.

Claiming that Fourteenth Amendment due process could not change each time a new regulation was passed,[118] the court found that the immigration judge's failure to advise the suspect alien of his rights[119] and to give him seventy-two hours advance notice of the time and place to surrender[120] did not constitute a denial of due process. The *Floulis* Court, by viewing the regulations as unrelated to traditional procedural due process rights, in that the Service's failure to obey them could not affect the deportation machinery, ignored the realities of modern deportation procedure.[121]

Should the federal courts ultimately find that noncompliance with the regulations constitutes a *per se* denial of due process,[122] or, alternatively, that noncompliance will result in a denial of due process only when it affects substantive rights,[123] then advocates

114. *Id.* at 807.
115. *Id.*
116. 457 F. Supp. 1350 (W.D. Pa. 1978).
117. *Id.* at 1355.
118. *Id.* at 1354.
119. 8 C.F.R. § 242.16(a) (1980).
120. *Id.* at § 243.3.
121. *See, e.g.,* notes 9-16 and accompanying text *supra.*
122. *See* Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977).
123. *See* Nicholas v. INS, 590 F.2d 802 (9th Cir. 1979).

will be able to identify those regulations which the courts will recognize as giving rise to procedural due process rights in deportation actions. Among the more significant rights which could be found in the regulations are the right to a written record,[124] the right to communicate with foreign embassies,[125] the right to appeal to an administrative officer[126] and to Board of Immigration Appeals,[127] and the right to be advised of one's rights when arrested, whether pursuant to a warrant[128] or not.[129] Unfortunately, an alien cannot be sure which of these rights he possesses unless he knows how the federal court has decided the issue of agency regulations in the district in which he had been arrested and subjected to deportation proceedings.

III. Fundamental Fairness

A. Generally

The federal judiciary has applied the fundamental fairness doctrine to criminal and immigration procedure. The disparity between the rights afforded criminals and those afforded aliens illuminates the basic flaws in the doctrine. As noted earlier, the federal courts have failed to clearly define the exact due process rights afforded aliens in deportation proceedings.[130] Nonetheless, they have adamantly proclaimed that deportation actions must comply with the rather nebulous standard of fundamental fairness.[131] In *Aguilera-Enriquez v. Immigration and Naturalization Service*,[132] the Sixth Circuit held that "if procedures mandated by Congress do not provide an alien with procedural due process, they must yield."[133] However, the Sixth Circuit's language seems to conflict with the Supreme Court's determination that deportation proceedings are civil in character and subject to the plenary power of Congress.[134]

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124. 8 C.F.R. § 242.15 (1980).
125. *Id.* at § 242.2(e).
126. *Id.* at § 242.2(b).
127. *Id.* at § 242.21.
128. *Id.* at § 242.2(a).
129. *Id.* at § 287.3.
130. *See, e.g.*, Lieggi v. INS, 389 F. Supp. 12 (N.D. Ill. 1975), *rev'd mem.*, 529 F.2d 530 (7th Cir. 1976).
131. *See* Bridges v. Wixon, 326 U.S. at 154.
132. 516 F.2d 565 (6th Cir. 1975).
133. *Id.* at 568.
134. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 586 (1952) (holding that aliens are present in the United States not as a matter of right but as a matter of tolerance and

The elasticity of the fundamental fairness doctrine becomes apparent when one attempts to determine when a deportation proceeding is so fundamentally unfair as to violate due process rights. As one commentator has stated: "In assessing the dictates of 'fundamental fairness,' courts determined the requirements of procedural due process in a one-step process without any clear attempt to distinquish the question of what specific interests are entitled to due process protection, from the inquiry into what process is due."[135]

An order of deportation is reversible if the immigration judge's decision is in any way " 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.' "[136] However, the federal courts are split as to what standard to apply when determining whether or not there has been a violation of the alien's due process rights.

In *United States v. Floulis*,[137] the district court held that an alien facing deportation must be afforded at least some Fourteenth Amendment protections. Deportation actions, the court maintained, could only be determined to be fundamentally unfair when the appellate court concluded that there had been a "gross miscarriage of justice in the former proceedings."[138] The *Floulis* decision was based upon two earlier federal court of appeals decisions, *United States ex rel. Steffner v. Carmichael*[139] in the Fifth Circuit, and *McLeod v. Peterson*[140] in the Third Circuit. While the Third and Fifth Circuits continue to apply a twenty year old standard, the Ninth and Tenth Circuits have formulated a new approach: a violation of due process may occur when the alien suffers prejudice in the lower court.[141]

In *Nicholas v. Immigration and Naturalization Service*,[142] the Ninth Circuit concluded that the suspect alien had not suffered any prejudice when his request to the Service for copies of documentary evidence was not met.[143] The court found that the Ser-

permission).

135. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 507 (1978).

136. Unification Church v. Attorney General, 581 F.2d 870, 878 (D.C. Cir. 1978)(quoting 5 U.S.C. § 706(2)(A)(1976)).

137. 457 F. Supp. 1350 (W.D. Pa. 1978).

138. *Id.* at 1354.

139. 183 F.2d 19 (5th Cir. 1950).

140. 283 F.2d 180 (3d Cir. 1960).

141. Nicholas v. INS, 590 F.2d 802 (9th Cir. 1979); Burquez v. INS, 513 F.2d 751 (10th Cir. 1975).

142. 590 F.2d 802 (9th Cir. 1979).

143. *Id.* at 810.

vice's actions had not denied the alien "a meaningful opportunity to litigate the issues presented on appeal."[144] However, one could reasonably conclude that had the court discovered even slight prejudice, the doctrine of fundamental fairness would have required a reversal of the lower court decision.

The Supreme Court's unwillingness to clarify the "fundamental fairness" doctrine in deportation actions has created a serious conflict within the federal circuits. In certain jurisdictions aliens are found to have been denied Fourteenth Amendment rights only where there has been a gross miscarriage of justice. In other jurisdictions alien due process rights are considered violated if the defendant has merely suffered some prejudice.

In applying the nebulous doctrine of fundamental fairness, federal courts have found no offense to due process where the suspect alien was mentally incompetent and therefore unaware of the proceedings against him,[145] where the immigration judge was replaced after 60% of the proceedings had already been completed,[146] or where the alien was found deportable solely on the basis of admissions made by his attorney.[147] The doctrine is much too flexible. It allows the courts to determine important constitutional rights on a case by case basis. In any given situation, immigration judges may exercise arbitrary powers which will be upheld on appeal because circuit court decisions provide conflicting standards of review.

B. Self-Incrimination

Current immigration laws do not allow aliens to assert any right to freedom from self-incrimination. In *United States ex rel. Bilokumsky v. Tod*,[148] the Supreme Court held that aliens did not have the right to remain silent. Furthermore, a refusal to testify permitted the inference that the individual was in fact an alien.[149] The alien in the *Bilokumsky* case had "admitted that he was an alien, but denied that he had done anything which rendered him liable to deportation";[150] there was nothing to suggest that he made his statement because of threats or promises of favor.[151]

144. *Id.*
145. *See* Nee Hao Wong v. INS, 550 F.2d 521 (9th Cir. 1977).
146. *See* LeTourneur v. INS, 538 F.2d 1368 (9th Cir. 1976).
147. *See* Chen v. Palmer, 589 F.2d 355 (8th Cir. 1978).
148. 263 U.S. 149 (1923).
149. *Id.* at 154.
150. *Id.* at 151.
151. *Id.*

Bilokumsky, therefore, did establish that voluntariness is an essential element in deportation hearings,[152] as it is in criminal trials.[153]

In *Bong Youn Choy v. Barber,*[154] the defendant, Choy, was threatened with deportation to Korea where he would have been subjected to political persecution. The Immigration Officers obtained Choy's confession to his affiliation with the Communist Party by repeatedly threatening to bring charges of perjury against him. They also made it clear to Choy that his wife and children would suffer if he did not comply with their demand. The court of appeals invalidated Choy's deportation order, holding that "[a] statement obtained by the government by inducing fear through official threats of prosecution is not voluntarily given. It can no more be used as a basis for deportation than for conviction of a crime."[155]

Although the *Miranda v. Arizona*[156] rule, rendering involuntary statements inadmissible as evidence, does not apply to deportation proceedings,[157] due process[158] may bar admission of statements made by aliens who have not been informed of their rights under the regulations.[159] In *Navia-Duran v. Immigration and Naturalization Service*[160] the alien suspect was approached late at night by an immigration officer who entered and searched her home, and questioned her in an intimidating manner for a period of four hours.

The First Circuit determined "from the totality of circumstances surrounding [her] apprehension and interrogation that the order of deportation was rendered in violation of due process."[161] Significantly, the court based its decision on the fact that the Service had failed to inform Ms. Navia-Duran that Immigration and Naturalization Service regulations granted her the right to remain silent.[162] Although the outcome of the case was based on the Service's failure to warn the defendant of her right against self-in-

152. Bong Youn Choy v. Barber, 279 F.2d 642, 646 (9th Cir. 1960).

153. *See* Mallory v. United States, 354 U.S. 449 (1957).

154. 279 F.2d 642 (9th Cir. 1960).

155. *Id.* at 647 (citations omitted).

156. 384 U.S. 436 (1966). For a discussion of the exclusionary rule see Weeks v. United States, 232 U.S. 383 (1914).

157. Navia-Duran v. INS, 568 F.2d at 808; Trias-Hernandez v. INS, 528 F.2d 366, 368-69 (9th Cir. 1975).

158. Navia-Duran v. INS, 568 F.2d at 809.

159. 8 C.F.R. § 242.2 (1980); 8 C.F.R. § 287.3 (1980).

160. 568 F.2d 803 (1st Cir. 1977).

161. *Id.* at 804-05.

162. *Id.* at 809 (referring to 8 C.F.R. § 287.3 (1980)).

crimination, the court nevertheless touched on the merits of the theory that the regulations may themselves create due process rights.[163]

Despite judicial attempts to limit deportations founded on coerced confessions, different standards of voluntariness in civil and criminal proceedings[164] deprive aliens of many rights enjoyed by suspects in criminal trials. In most jurisdictions an alien's silence may be used to infer alienage,[165] and contrary to the rule in criminal proceedings,[166] an alien's statement made without counsel is admissible.[167] However, there is little consistency among the federal circuits as to the scope of an alien's right against self-incrimination. For instance, the Ninth Circuit's holding in *Trias-Hernandez v. Immigration and Naturalization Service*[168] differed sharply from the First Circuit's holding in *Navia-Duran.* In *Trias-Hernandez,* Judge Wright stated that "[t]he language of the regulation[169] neither requires specifically the use of *Miranda* warnings nor does it provide for comparable admonitions."[170]

Aliens do not have the protection of the Fifth Amendment prohibition against requiring witnesses to testify against themselves. The most that they can hope for is that where the courts encounter clear cut instances of coercion, they will find that evidence so obtained is inadmissible as contrary to the due process clause of the Fourteenth Amendment. As long as deportation remains a civil action, admissions of alienage will not trigger the Fifth Amendment protections enjoyed by criminal defendants.

C. The Right to Counsel

It is undisputed that aliens have both a statutory[171] and a constitutional[172] right to counsel in deportation proceedings, but unlike criminal defendants,[173] indigent aliens do not have a right to

163. *Id.* at 808-09.

164. *See* Trias-Hernandez v. INS, 528 F.2d 366, 368-69 (9th Cir. 1975). The main distinction revolves around the civil/criminal dichotomy which permits immigration courts to admit statements taken in violation of the *Miranda* rules.

165. *See* Chevez-Raya v. INS, 519 F.2d 397, 402 (7th Cir. 1975).

166. Escobedo v. Illinois, 378 U.S. 478 (1964).

167. Lavoie v. INS, 418 F.2d 732, 734 (9th Cir. 1969).

168. 528 F.2d 366 (9th Cir. 1975).

169. 8 C.F.R. § 287.3 (1980).

170. 528 F.2d at 369.

171. 8 U.S.C. § 1252(b)(1976).

172. Ramirez v. INS, 550 F.2d 560 (9th Cir. 1977).

173. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

court appointed counsel.[174] In fact, the Immigration and Nationality Act expressly prohibits the government from providing counsel at its expense to aliens who cannot afford to pay for it themselves.[175] The courts have been reluctant to find a right to court appointed counsel for aliens in light of this manifestation of contrary congressional intent. However, the courts alone determine the limits of fundamental fairness, and if Congress trespasses within those boundries, the judicial power must control.[176]

Significantly, the Supreme Court has not limited the right to assigned counsel to criminal cases. In the case of *In re Gault*,[177] the Court found that a right to court appointed counsel existed in the civil commitment of juveniles, and in *Gagnon v. Scarpelli*[178] it found a similar right in administrative hearings on parole and probation violations.

Both situations involved a possible deprivation of liberty which was arguably no worse than the deprivation many aliens experience when they are deported.[179] However, the court extended the right to assigned counsel to these cases because the proceedings would otherwise violate the Sixth Amendment.[180] Although the courts will probably not apply the Sixth Amendment in a similar fashion to deportation hearings as long as they are considered civil proceedings, they may find the fundamental fairness doctrine sufficiently flexible to provide a procedural right to assigned counsel, particularly in light of the fact that an alien's inability to pay for an attorney will normally result in a complete lack of legal assistance.

Unlike other civil proceedings where only private parties are involved, aliens subject to deportation must face the awesome power of the state. They are often unable to speak English and are generally unfamiliar with the American legal system. Yet, despite the clear indications that it is fundamentally unfair to deport aliens who have not had legal representation, the courts have resisted efforts to provide aliens with counsel at government expense,[181] and have preferred to base the general right to counsel at

174. Chlomos v. Department of Justice, 516 F.2d 310 (3d Cir. 1975).

175. 8 U.S.C. § 1252(b)(1976).

176. *See* note 132 and accompanying text *supra*.

177. 387 U.S. 1 (1967).

178. 411 U.S. 778 (1973).

179. Many aliens face the very real possibility that they will starve to death, see Mayer, *The Dimensions of Human Hunger*, in HUMAN NUTRITION 234 (1978).

180. *See* Note, *Due Process and Deportation—Is There a Right to Assigned Counsel?*, 8 U. CAL. D.L. REV. 289, 299 (1975).

181. *See* Henriques v. INS, 465 F.2d 119 (2d Cir. 1972).

the alien's expense on statutory rather than constitutional grounds.[182]

Despite the fact that the federal courts have not based the right to counsel in deportation hearings on the Sixth Amendment,[183] they continue to define alien rights to counsel with terms analogous to those used in criminal proceedings. In *Partible v. Immigration and Naturalization Service*,[184] the alien defendant "waived her rights [to counsel] without being provided with any understanding . . . of the complexity of her dilemma and without any awareness of the cogent legal arguments which could have been made on her behalf."[185] The court, when reversing the deportation order on the basis that the defendant's "waiver of counsel was not 'competently and understandingly made,' "[186] borrowed language from *Argersinger v. Hamlin*,[187] the foremost criminal case on waiver of counsel.

Similarly, in *Castaneda-Delgado v. Immigration and Naturalization Service*,[188] the court found that the alien defendant was improperly denied a continuance he needed in order to hire an attorney. Relying on the criminal case of *United States v. Robinson*,[189] District Judge Bryan stated "the courts have repeatedly recognized that denial of the *Sixth Amendment* right to counsel is so inherently prejudicial that there is no room for the harmless error doctrine."[190] This reliance on criminal precedent illustrates the lack of a clear conceptual separation between deportation hearings, which are ostensibly civil, and criminal trials.[191]

182. *See* Castro-Nuno v. INS, 577 F.2d 577, 578 (9th Cir. 1978); Castaneda-Delgado v. INS, 525 F.2d 1295, 1296 (7th Cir. 1975).

183. *See* Ramirez v. INS, 550 F.2d 560, 563 (9th Cir. 1977), where the court found "[t]he Sixth Amendment's guarantee of the right to counsel is not applicable to deportation proceedings," presumably because they are not criminal prosecutions. Yet the majority found that the defendant alien had a right to counsel arising out of Fifth Amendment guarantees, rather than the due process clause of the Fourteenth Amendment.

184. 600 F.2d 1094 (5th Cir. 1979).

185. *Id.* at 1096.

186. *Id.* (citation omitted).

187. 407 U.S. 25 (1972).

188. 525 F.2d 1295 (7th Cir. 1975).

189. 414 U.S. 218 (1973).

190. 525 F.2d at 1300 (emphasis added).

191. One possible explanation for the judicial, congressional and executive refusal to expand the alien right to counsel is that it might prove extremely costly to provide lawyers for the many indigent aliens who cross the Mexican border daily. However, there is no real justification for attempting to alleviate the United States' problem with illegal immigrants by denying the entire alien population important constitutional rights.

D. Search and Seizure

Immigration officers can interrogate anyone they believe to be an alien,[192] and they can make a warrantless arrest of any alien suspected of being in the United States unlawfully.[193] However, federal courts have held that these powers are limited by the Fourth Amendment's prohibition against unreasonable searches and seizures.[194]

The courts seem to have expanded the Fourth Amendment rights of aliens more out of concern for the welfare of United States citizens than for the protection of aliens. In *United States v. Brignoni-Ponce,*[195] the Supreme Court stated that the congressional power to subject aliens to reasonable questioning could not "diminish the Fourth Amendment rights of citizens who may be mistaken for aliens."[196]

To the extent that the federal courts have applied the Fourth Amendment to alien rights, they have generally adopted criminal law precedent when deciding search and seizure issues. In *Brignoni-Ponce,* the Supreme Court relied on *Terry v. Ohio*[197] to limit interrogation to situations where the Service could show a "reasonable suspicion" of alienage.[198] In *Lee v. Immigration and Naturalization Service,*[199] the Third Circuit construed the statutory term "reason to believe" to be coterminous with "probable cause" as used in criminal law.[200] Similarly, the District of Columbia Circuit relied on the criminal case of *Adams v. Williams*[201] when determining whether the interrogation of an Asian immigrant constituted "mere questioning."[202]

However, the federal courts have not completely accepted criminal law precedent, and have normally set standards more favorable to the government. Contrary to the *Terry* determination that "whenever a police officer . . . restrains [an individual's] free-

192. *See* 8 U.S.C. § 1357(a)(1)(1976).
193. *See* 8 U.S.C. § 1357(a)(2)(1976).
194. *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975).
195. *Id.*
196. *Id.* at 884. Aliens were not really entitled to Fourth Amendment rights, but the only way to insure citizen rights was to protect everyone, including aliens. This rationale could be extended. For instance, if an indigent citizen should be mistakenly arrested as an illegal alien, he would not have the benefit of counsel.
197. 392 U.S. 1 (1968).
198. 422 U.S. at 884.
199. 590 F.2d 497 (3d Cir. 1979).
200. *Id.* at 500.
201. 407 U.S. 143 (1972).
202. *See* Cheung Tin Wong v. INS, 468 F.2d 1123, 1127 (D.C. Cir. 1972).

dom to walk away, he has 'seized' that person,"[203] the Seventh Circuit has held that the standard of "reasonable suspicion" is limited to situations where the officer temporarily detains the suspect with force or the threat of force on the basis that he is illegally in the United States. If the officer merely wants to question the suspect, without forcibly detaining him, he must have a reasonable belief that the suspect is an alien.[204]

The District Court in *Marquez v. Kiley*[205] found the distinction between mere questioning[206] and forcible detention unworkable. The court noted that the dichotomy "undermined the realities of the matter"[207] and stated that it was "the nature of an oxymoron to speak of 'casual' inquiry between a government official, armed with a badge and a gun and charged with enforcing the nation's immigration laws, and a person suspected of alienage."[208] It concluded that the same standard which applies to criminal cases should also apply to deportation. Accordingly, immigration officers should not be able to approach an alien for questioning unless they have a reasonable suspicion of alienage.

The Third Circuit resolved the issue by determining that where a stop and interrogation were "reasonably related in scope to the justification for their initiation," they would not violate the Fourth Amendment.[209] The court also held that an officer could base his suspicion on the suspect's mode of dress, language, demeanor and other subjective factors.[210] While the Third Circuit's interpretation of the *Terry* standard may not significantly deter official misconduct, it is certainly more protective of resident alien rights than the Seventh Circuit's diluted standard.

The primary issue remaining in the application of the Fourth Amendment to deportation proceedings is whether the federal courts will invoke the exclusionary rule[211] as a means of insuring Immigration Service compliance. So far, the courts have refused to apply the exclusionary rule where the only illegally seized evidence

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203. Terry v. Ohio, 392 U.S. at 16.

204. Illinois Migrant Council v. Pilliod, 548 F.2d 715, 715 (7th Cir. 1977), *modifying*, 540 F.2d 1062 (7th Cir. 1976).

205. 436 F. Supp. 100 (S.D.N.Y. 1977).

206. *See* Cuevas-Ortega v. INS, 588 F.2d 1274 (9th Cir. 1979), for a good example of mere questioning.

207. 436 F. Supp. at 113.

208. *Id.*

209. Lee v. INS, 590 F.2d at 502 (quoting United States v. Brignoni-Ponce, 422 U.S. at 881, and Terry v. Ohio, 392 U.S. at 29).

210. 590 F.2d at 502.

211. *See* Wong Sun v. United States, 371 U.S. 471 (1963).

was the person arrested[212] on the theory that: "[t]o grant life-long immunity from investigation and prosecution simply because a violation of the Fourth Amendment first indicated to the police that a man was not the law-abiding citizen he purported to be would stretch the exclusionary rule beyond tolerable bounds."[213]

However, the circuits have found that evidence obtained from illegal searches of premises may be inadmissible. In *Wong Chung Che v. Immigration and Naturalization Service*,[214] the First Circuit held that if the evidence offered by the Service at the deportation hearing was "obtained through an illegal search, there is no authority of which we are aware that would make it admissible."[215] The majority stated that "[w]hile wide latitude is permitted the government in introducing statements of arrested suspects, whether or not they might be suppressed in a criminal proceeding, we can think of no justification by necessity for encouraging illegal searches of premises."[216]

Although the general rule requires the application of the exclusionary rule to illegal searches of premises, the federal courts are not unanimously in favor of placing such a restriction on the Immigration Service. In *Smith v. Morris*,[217] a federal district court judge maintained in dicta that the exclusionary rule had no application to deportation procedure because it "serves no useful purpose in any deportation proceeding in which the decision does not depend upon proof of specific events, but merely on proof of status."[218] Since most deportation actions turn on the identity and status of the defendant rather than factual proof of the elements of a crime, the court concluded that the "application of an exclusionary rule could not have any significant impact on the result of the deportation proceeding."[219]

The Board of Immigration Appeals has disregarded *Wong Chung Che* and has adhered to the *Smith* theory.[220] Reasoning

212. *See, e.g.*, Huerta-Cabrera v. INS, 466 F.2d 759 (7th Cir. 1972) (the court admitted evidence obtained through the interrogation of an illegally arrested alien); *see also* Hoonsilapa v. INS, 575 F.2d 735 (9th Cir. 1978); Nai Cheng Chen v. INS, 537 F.2d 566 (1st Cir. 1976).

213. Hoonsilapa v. INS, 575 F.2d 735, 738 (9th Cir. 1978).

214. 565 F.2d 166 (1st Cir. 1977).

215. *Id.* at 169.

216. *Id.*

217. 442 F. Supp. 712 (E.D. Pa. 1977).

218. *Id.* at 714.

219. *Id.*

220. *See* Matter of Sandoval, Interim Decision 2725, at 8 (BIA 1979). The Board rejected *Wong Chung Che* because it "was based in large part on what was viewed as the long

that the Supreme Court has never upheld exclusion of evidence from purely civil proceedings, the Board has refused to apply the exclusionary rule in deportation actions.[221] The Board has come to the conclusion that the exclusionary rule should not apply to deportation because "pragmatic analysis" reveals that the societal interest in the expeditious enforcement of immigration laws outweighs the alien's interest in the enforcement of Fourth Amendment prohibitions against unreasonable searches and seizures.[222] Additionally, the Board has stated that it has "no convincing empirical evidence that the exclusionary rule has operated to deter violations of the Fourth Amendment."[223]

The BIA maintains that it is justified in disregarding the First Circuit's ruling on the application of the exclusionary rule to deportation hearings because the Supreme Court has not dealt with the issue for fifty-five years. However, when the Supreme Court has considered the issue, it has held in favor of excluding illegally obtained evidence.[224]

The extent to which alien Fourth Amendment rights will be protected by the federal courts remains an unknown factor. As long as the courts refuse to apply criminal procedural safeguards to deportation hearings, aliens will not receive constitutional protection.

E. Burden of Proof

In *Woodby v. Immigration and Naturalization Service,*[225] the United States Supreme Court held that the level of proof required to deport was "clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true."[226] *Woodby* represents one of the few instances in which the Court has responded to an obvious ambiguity in deportation law.

In *Sherman v. Immigration and Naturalization Service,*[227] the

history of 'assumed' inadmissibility rather than on a detailed analysis of the relative merits of excluding such evidence from deportation proceedings." *Id.*

221. *Id.* at 9.

222. *Id.* at 10. If the societal interest in preventing criminals from being set free is outweighed by the Fourth Amendment (see Wong Sun v. United States, 371 U.S. 471 (1963)), then alien Fourth Amendment rights certainly outweigh the societal interest in deporting illegal immigrants.

223. *See* Matter of Sandoval, Interim Decision 2725, at 12 (BIA 1979).

224. *See* United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 155 (1923) (dicta).

225. 385 U.S. 276 (1966).

226. *Id.* at 286.

227. 350 F.2d 894 (2d Cir. 1965), *rev'd en banc,* 350 F.2d at 901.

Second Circuit originally found that "beyond a reasonable doubt" was the test in deportation cases where the defendant had resided in the United States for a significant length of time.[228] However, the Second Circuit ultimately reversed its decision in *Sherman* and adopted the dissenting view that Congress had set the level of proof and that the courts lacked the authority to change it.[229]

The United States Supreme Court in *Woodby* rejected this argument on the basis that the degree of proof in deportation cases was "the kind of question which has traditionally been left to the judiciary to resolve,"[230] and because they considered the statutory standard of "reasonable, substantial, and probative evidence"[231] as merely a congressional attempt to set the scope of judicial review.[232] The Court plowed the middle ground between the appellant's contention in *Sherman,* that the degree of proof should have been "beyond reasonable doubt," and the government's contention that it should have been "by a preponderance."[233] Ultimately, the Second Circuit concluded that the *Woodby* "clear, unequivocal, and convincing" test approached the level of proof required in a criminal case.[234]

Although the degree of proof in deportation cases seems to approach the level established for criminal trials, the burden of proof is an entirely different matter. The initial burden is on the accused to show lawful entry into the United States, and once he meets that burden, the government need only make out a *prima facie* case of deportability which then creates a rebuttable presumption that the alien is deportable.[235] This standard varies substantially from the "innocent until proven guilty" credo in criminal law, and stretches the concept of fundamental fairness.[236]

F. Ex Post Facto, Double Jeopardy and the Eighth Amendment

Aliens have been denied the constitutional protection against

228. 350 F.2d at 899. The circuit court initially accepted the petitioner's argument that "the requirements of due process in deportation proceedings should be elaborated by analogy to the criminal law rather than to the law of economic regulation." *Id.* at 896.

229. *Id.* at 900-01.

230. 385 U.S. at 284.

231. 8 U.S.C. § 1252(b)(4) (1976).

232. 385 U.S. at 282.

233. *Id.* at 284-85.

234. *See* Nason v. INS, 394 F.2d 223, 226 (2d Cir. 1968).

235. Hoonsilapa v. INS, 575 F.2d 735, 737 (9th Cir. 1978).

236. *E.g.,* an alien who has lost his green card theoretically cannot meet the initial burden of proving lawful entry.

ex post facto laws because the term *ex post facto* by definition refers to criminal penalties.[237] Aliens have also been denied the protection of the constitutional prohibition against double jeopardy, the rationale being that deportation is a civil rather than criminal action.[238]

The result of the federal courts' refusal to extend the *ex post facto* prohibition to deportation law has been that Congress, under the plenary power, may decree that aliens are deportable for past activities that were completely innocent. Resident aliens have no way of knowing when or for what reason they will be deported.[239] Similarly, the denial of the double jeopardy prohibition allows the government to initiate deportation proceedings against aliens who have been convicted of crimes despite the fact that deportation may work a much greater hardship on the alien than would the criminal sanction.[240]

For example, in *LeTourneur v. Immigration and Naturalization Service,*[241] the defendant alien, who was responsible for supporting two children, had lived in the United States for all but four of his thirty-seven years. In 1973 he was convicted of armed robbery and sentenced to prison. The Immigration Service subsequently brought a deportation action against him. On appeal the circuit court found that the Fifth Amendment prohibition against double jeopardy did not apply despite the fact that the result " 'bristles with severities.' "[242]

In *Bassett v. Immigration and Naturalization Service,*[243] the Tenth Circuit upheld the deportation of an alien who had been convicted of possession of marijuana even though the Second Circuit had refused to deport John Lennon for the same offense.[244] The Tenth Circuit distinguished *Lennon v. Immigration and Naturalization Service,*[245] on the basis that Lennon was convicted in England where there is no *mens rea* requirement for possession of marijuana.[246] However, neither court considered applying the con-

237. *See* Calder v. Bull, 1 U.S. (3 Dall.) 386, 396 (1798); Note, *Resident Aliens and Due Process: Anatomy of a Deportation,* 8 VILL. L. REV. 566, 587 (1963).

238. *See* LeTourneur v. INS, 538 F.2d 1368, 1370 (9th Cir. 1976).

239. *See* 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 4.3c (1980).

240. *E.g.,* Bassett v. INS, 581 F.2d 1385 (10th Cir. 1978).

241. 538 F.2d 1368 (9th Cir. 1976).

242. *Id.* at 1370 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952)).

243. 581 F.2d 1385 (10th Cir. 1978).

244. Lennon v. INS, 527 F.2d 187 (2d Cir. 1975).

245. *Id.*

246. 581 F.2d at 1386.

stitutional prohibition against double jeopardy to deportation procedures.

Although the alien in *Bassett* argued that his "deportation is additional punishment for his crime," the court rejected his contention on the basis that the "[i]mmigration laws never have been considered penal."[247] Had the appellant enjoyed a greater degree of constitutional protection, he would have been able to combat his deportation as easily as had Lennon, who enjoyed a greater degree of notoriety and public support.[248] The federal courts should not be required to rely on legal technicalities in order to avoid inequitable results.

Theoretically, the courts should not consider the hardship which results from the denial of the double jeopardy prohibition when formulating results in deportation actions. Despite the fact that judges throughout history have characterized deportation as a severe punishment,[249] the federal courts have continued to insist that deportation is a civil rather than criminal process,[250] and therefore have refused to apply the Eighth Amendment prohibition against cruel and unusual punishment.[251]

However, the federal district court in *Lieggi v. Immigration and Naturalization Service*[252] attempted to apply the Eighth

247. *Id.* at 1387.

248. NEWSWEEK, Sept. 29, 1980, at 76.

249. *See e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 739-40 (1893) (Brewer, J., dissenting); Aguilera-Enriquez v. INS, 516 F.2d 565, 572 (6th Cir. 1975) (Demascio, J., dissenting: "No matter the classification, deportation is punishment, pure and simple"); United States *ex rel.* Klonis v. Davis, 13 F.2d 630, 630 (2d Cir. 1926) (Hand, J., dissenting: deportation is a "dreadful punishment").

250. *But cf.* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (lamenting the fact that deportation may deprive a person of "all that makes life worth living").

251. Oliver v. Department of Justice, 517 F.2d 426 (2d Cir. 1975).

252. 389 F. Supp. 12 (N.D. Ill. 1975), *rev'd mem.*, 529 F.2d 530 (7th Cir. 1976). District Judge Bauer rejected 100 years of precedent and declared that deportation is punishment and that persons facing deportation are entitled to the same constitutional safeguards that criminal defendants enjoy. 389 F. Supp. at 19. Rather than rely on some obscure technicality, Judge Bauer invoked equitable principles and stated that to have decided otherwise would have been an "acrimonious act under our contemporary standards of decency and equality." *Id.* at 21.

Judge Bauer rejected the civil/criminal distinction because he believed that the powers inherent in sovereignty theory rendered the issue of whether deportation is penal in nature moot since the political branches can do whatever they please with aliens. He claimed that the "Court's *Fong Yue Ting* premise that deportation is not punishment is fundamentally unbelievable." *Id.* at 17. And even if it were believeable, "it seems unnecessary to argue whether the penalty is civil or criminal [because] the classification becomes merely a means of holding that procedural rights do not apply to deportation, without facing the general issue of whether a government may perform such 'sovereign' acts in ways repugnant to the

Amendment to deportation hearings on the equitable ground that the defendant alien "will suffer severe punishment in relation to the offense."[253] The Seventh Circuit summarily reversed this decision,[254] and the defendant alien who had been convicted for having given a marijuana cigarette to a friend, was subsequently deported. The circuit court apparently could not accept the district judge's decision to abolish the civil/criminal distinction. Nevertheless, the distinction permits the government to exploit its civil powers[255] and thereby to exact ever greater penalties from aliens by denying them important constitutional rights.

If the circuit court had upheld the lower court in *Lieggi,* alien defendants in deportation proceedings would ultimately benefit from the procedural protections currently afforded defendants in criminal trials.[256] The civil/criminal dichotomy constitutes a nearly insurmountable barrier to alien rights, especially with respect to the judicial denial of the constitutional prohibitions against *ex post facto* laws, double jeopardy, and cruel and unusual punishment.[257]

Conclusion

Procedural due process in deportation hearings, as defined by the ambiguous doctrine of fundamental fairness, offers insufficient protection to this nation's alien population. A citizen accused of an offense has available the full protection of the Constitution while

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Constitution." *Id.* (quoting Note, *Immigrants, Aliens, and the Constitution,* 49 NOTRE DAME LAW. 1095 (1974)); *see generally* A. POST, THE DEPORTATIONS DELIRIUM OF NINETEEN-TWENTY (1923).

He based his decision on the equal protection clause of the Fourteenth Amendment. 389 F. Supp. at 19; *accord,* Note, *Aliens, Deportation and the Equal Protection Clause: A Critical Reappraisal,* 6 GOLDEN GATE U. L. REV. 23 (1975). He claimed that "since the Supreme Court has recognized that alienage is a suspect criterion, the application of the penalty of deportation, a penalty which applies only to aliens, should be upheld only upon the showing of a compelling state interest." 389 F. Supp. at 19; *contra,* Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979) where the circuit court held that discrimination against Iranian students need only have been rationally based to comply with the equal protection clause. *Id.* at 747.

253. 389 F. Supp. at 21.

254. 529 F.2d 530 (7th Cir. 1976) (no published opinion).

255. 389 F. Supp. at 17. The district court reasoned that the inherent powers theory granted the government unrestrained power which was subject to abuse. *See, e.g.,* Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979). The deportation of Iranian students illustrates the potential of unfettered executive power. The American alien community may at any time be held hostage to the whims of domestic political opinion as influenced by international events.

256. *See* note 252 *supra.*

257. The dichotomy has precluded even a limited grant of the protection afforded by these prohibitions. *Cf.* the discussion of the limited right to counsel, notes 171-91 *supra.*

an alien must resort to the scanty protection afforded by conflicting judicial doctrines.[258] Despite the fact that deportation "is a drastic measure which amounts to a grave penalty,"[259] millions of people[260] must live under the threat of deportation with no real certainty that the law will not change their status,[261] or that they will not be subject to the harassment of repetitious deportation proceedings.[262] Believing deportation to be a civil process subject only to the political authority, the federal courts have failed to clearly articulate alien rights. Given the inequitable results of this assumption, federal courts should abandon it and recognize that deportation hearings are essentially criminal in nature and effect.[263]

Even if the courts should find it impractical to extend criminal procedural safeguards to undocumented aliens who have surreptitiously crossed the American border, they should nevertheless extend a greater degree of protection to lawful permanent residents who have not circumvented the immigration laws.[264] Although it would be most equitable to extend criminal procedural safeguards to all aliens within the United States, the alternative of applying such safeguards only to lawful residents would at least be more equitable than the present system.

The federal courts should more clearly define and enforce the constitutional protections they have imposed on the deportation process. This could be accomplished by forcing the Immigration Service to adhere to the regulations,[265] and by setting forth the circumstances under which the regulations create procedural due process rights.[266] Additionally, the courts should exclude evidence obtained from illegal searches and seizures,[267] and extend the rule in *Miranda* to avoid involuntary confessions.[268] The courts also should require that counsel be provided to indigent aliens in order

258. *See* § III(A) *supra.*

259. Haller v. Esperdy, 397 F.2d 211, 214 (2d Cir. 1968).

260. Wall St. J., Nov. 13, 1979, at 16, col. 1.

261. LeTourneur v. INS, 538 F.2d 1368 (9th Cir. 1976).

262. *See* 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE §4.3i (1979).

263. *See* Lieggi v. INS, 389 F. Supp. 12 (N.D. Ill. 1975), *rev'd mem.*, 529 F.2d 530 (7th Cir. 1976).

264. *See* text accompanying notes 44-49 *supra.* The *Fong Yue Ting* Court suggested that the plenary power only applies to aliens who fail to take "steps towards becoming citizens." 149 U.S. at 724.

265. *See* text accompanying notes 28-30 *supra.*

266. *See* § I(C) *supra.*

267. *See* § III(D) *supra.*

268. *See* § III(B) *supra.*

to effectuate the right to meaningful representation.[269] Finally, and most importantly, the federal courts should define the doctrine of fundamental fairness so as to provide deportation procedure with a proper constitutional foundation rather than an amorphous and nearly unintelligible set of constantly changing rules.[270]

Deportation is a severe criminal sanction which is invoked for the crime of illegally residing in the United States. Although expressed congressional objectives may not include the concept of punishment, linguistical niceties do not eliminate the punitive effect of deportation on aliens. When people are seized from their homes, subjected to a summary hearing and transported across the border, they are deprived of rights possessed by citizens under the Fourth, Fifth, Sixth and Eighth Amendments. The fact that the Congress and the courts have chosen not to treat aliens as "persons" within the contemplation of these amendments is repugnant to the spirit and the letter of the Constitution.

269. *See* § III(C) *supra.*
270. *See* § III(A) *supra.*