Ensuring Due Process in Alien Exclusion Proceedings after Landon v. Plasencia

Alaine R. Parry

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Recommended Citation
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After Landon v. Plasencia

Congress has exclusive authority to establish immigration laws and procedures.1 This authority is limited, however, by the constitutional rights of resident aliens.2 An alien attempting to enter the United States for the first time has no constitutional rights and thus may be excluded3 on any ground and by any procedure the legislature deems appropriate.4 Once an alien has been admitted into the United States,5 however, his or her status under the Constitution changes significantly.6 When expelling a permanent resident alien,7 the govern-

1. Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895) ("The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."). See also Kleindienst v. Mandel, 408 U.S. 753, 766 (1972); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 216 (1953); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542-44 (1950) (although only Congress has the power to pass laws regarding immigration, the executive branch shares the power of exclusion under its foreign affairs powers).


3. As used in this Comment, the term "exclusion" means preventing someone from entering the United States who is physically outside the United States or is treated as being so. "Expulsion" means forcing someone out of the United States who is physically within the United States or is treated as being so. "Deportation" means the moving of someone away from the United States after his or her exclusion or expulsion. Kwong Hai Chew v. Colding, 344 U.S. 590, 596 & n.4 (1953).


5. This Comment does not address the constitutional rights of aliens who illegally enter the United States.

ment must afford the alien many constitutional protections, including procedural due process. Deportation proceedings for resident aliens have been developed by Congress in conformance with these constitutional protections. In contrast, exclusion procedures for aliens attempting initial entry into the United States have had no such constitutional restraints.

A unique situation arises when a permanent resident alien travels...
abroad and then attempts to return to the United States. The United States Supreme Court, in *Landon v. Plasencia*, grappled with this situation and decided that the returning resident alien retains the constitutional right to due process, but not the right to a deportation hearing. Thus, under *Plasencia* the determination of a resident alien's right to return to the United States must be made in an exclusion hearing that affords due process. Because exclusion hearings, as outlined in the Immigration and Nationality Act, do not provide the necessary due process protections, the *Plasencia* decision in effect created an undefined category of immigration procedure. Without either further decisions by the Supreme Court or legislation by Congress setting forth specific due process guidelines, immigration judges will have complete discretion in determining what process is "due" in an exclusion hearing for a returning resident alien.

This Comment examines the reasoning and effect of the Supreme Court's decision in *Plasencia*. The Comment first discusses the constitutional status of resident aliens, nonresident aliens, and returning resident aliens and the applicable procedures developed by Congress to proceed against such aliens. It next examines the evolution of the "re-entry doctrine" and its effect on the substantive rights of aliens. The Comment then discusses the *Plasencia* opinion, which authorizes the Immigration and Naturalization Service (INS) to proceed against returning resident aliens in exclusion hearings in which due process is afforded the alien. The Comment suggests guidelines that immigration judges should consider in determining what procedure to afford returning resident aliens, but concludes that congressional action is necessary to specify the procedural rights of returning resident aliens in exclusion proceedings.

**The Constitutional Status of Aliens**

A resident alien is a "person" under the Constitution and is therefore afforded certain rights not granted nonresident aliens, in-

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13. The Immigration and Naturalization Service (INS), under the supervision and control of the Attorney General, was established by Congress to control and guard the boundaries and borders of the United States against the illegal entry of aliens. 8 U.S.C. § 1103 (1976).
14. See supra note 2.
15. The resident alien does not enjoy the security of citizenship, but instead remains subject to Congress' power to deport. Fong Yue Ting v. United States, 149 U.S. 698, 711-14
cluding the right to due process. A resident alien threatened with expulsion must be afforded sufficient notice and the opportunity to present his or her case effectively. In addition, the Government must bear the burden of proving that a resident alien should be expelled.

To ensure a fair hearing for resident aliens facing expulsion, the Immigration and Nationality Act incorporates these due process rights into its deportation procedures.

Under the Act, a deportation action must provide the alien with fair notice of the time and place of the hearing, and of the nature of the charges filed against him or her. The alien has the right to be represented by counsel, to present evidence, and to examine and cross-examine witnesses. The immigration judge must determine whether the alien should be expelled for a reason delineated in the Act, and

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16. United States ex rel. Tisi v. Tod, 264 U.S. 131, 133-34 (1924) (right to a fair hearing); Low Wah Suey v. Backus, 225 U.S. 460, 468 (1912) (hearing may be conclusive when fairly conducted). See also supra note 8.

17. United States v. Gasca-Kraft, 522 F.2d 149, 152 (9th Cir. 1975); Hirsch v. INS, 308 F.2d 562, 566-67 (9th Cir. 1962).


21. See infra notes 22-26 & accompanying text. Since the requirement of a fair hearing is based on the Constitution, the concept of due process of law is always expanding to satisfy currently prevailing norms of fairness. Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950). Therefore, the statutory guidelines provided in the Immigration and Nationality Act present only the minimum requirements. But see supra note 9.

22. 8 U.S.C. § 1252(b)(1) (1976 & Supp. V 1981). The hearing is generally held near the resident alien's home, though it may also be brought in the locality in which the act giving rise to grounds for deportation took place. La Franca v. INS, 413 F.2d 686, 689 n.9 (2d Cir. 1969). See generally Chlomos v. INS, 516 F.2d 310, 312-14 (3d Cir. 1975).


24. Immigration judges were originally designated "special inquiry officers" under the Act. However, "immigration judge" is now considered the appropriate title for these administrative officials (though the statutory designation of "special inquiry officer" is unchanged). 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 5.7b (1982).

25. The grounds for deportation can be divided into four broad categories: (1) those aliens who have entered the United States illegally or violated the conditions of their stay, 8 U.S.C. § 1251(a)(2), (9), (10) (1976); (2) those aliens excludable at entry but nevertheless permitted to enter the country, 8 U.S.C. § 1251(a)(1); (3) those aliens who, within five years of entry committed an act or assumed a condition that rendered them deportable, id. § 1251(a)(3)-(4), (8), (13); and (4) those aliens who at any time after entry committed certain crimes or other immoral acts that rendered them deportable, id § 1251(a)(4)-(6), (11), (12), (17). See Maslow, Recasting Our Deportation Law: Proposals for Reform, 56 COLUM. L. REV. 309, 315 (1956). Examples of the third category include: conviction of a crime involving moral turpitude with a prison sentence for a term of one year or more, 8 U.S.C.
must base the decision on "clear, unequivocal, and convincing evidence" presented at the hearing.\textsuperscript{26}

In contrast to a resident alien, a nonresident alien has virtually no rights under the Constitution.\textsuperscript{27} Congress has the exclusive power to establish procedures for admitting and rejecting aliens at the border,\textsuperscript{28} a power acknowledged by the Supreme Court in \textit{United States ex rel. Knauff v. Shaughnessy.}\textsuperscript{29} The \textit{Knauff} Court held that "\textit{w}hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."\textsuperscript{30} Thus, an alien attempting initial entry is subject to the statutory guidelines established by Congress and administered by the Immigration and Naturalization Service.\textsuperscript{31}

Because there are no constitutional constraints on Congress in establishing admissibility procedures, any procedural protections provided by the Immigration and Nationality Act are privileges granted to the aliens, not rights of the aliens seeking admission.\textsuperscript{32} An immigration judge conducting an exclusion hearing has broad discretionary power


\textsuperscript{27} See \textit{supra} notes 4–5.

\textsuperscript{28} See \textit{supra} note 1. During the first 100 years of United States history there were no restrictions on immigration. Since the late 1800's, however, there have been increasing limitations placed on aliens seeking admission. Some of these statutes concerned prostitutes and convicts, Act of March 3, 1875, ch. 141, § 5, 18 Stat. 477; race, Act of May 6, 1882, ch. 126, 22 Stat. 58–59; lunatics, idiots and those likely to become public charges, Act of August 3, 1882, ch. 376, § 2, 22 Stat. 214; and political ideology, Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1213–14. In 1952, Congress codified various immigration restrictions which had developed since the late 1800's. These immigration restrictions are set forth in the Immigration and Nationality Act of 1952. 8 U.S.C. § 1182(a) (1976 & Supp. V 1981).

\textsuperscript{29} United States \textit{ex rel. Knauff v. Shaughnessy}, 338 U.S. at 542. The Immigration and Nationality Act provides the basic procedure to be followed by Immigration and Naturalization Service officials in conducting exclusion proceedings. 8 U.S.C. §§ 1225-1226 (1976).
in directing that proceeding. The judge is not restricted to the exclusion grounds suggested by the government and may explore any other possible ground for exclusion. The alien bears the burden of proving that he or she does not fall within any of the categories of excludable aliens outlined in the Act. The alien may appeal the hearing decision to the Board of Immigration Appeals, but once this Board has acted on the appeal the only recourse available is through a writ of habeas corpus. An alien who is determined to be inadmissible is sent back to his or her country of origin.

Although a resident alien enjoys many constitutional protections not afforded nonresident aliens, he or she may lose this protected status by traveling abroad. Should the alien’s return to the United States be deemed an “entry” under the Act, he or she may be treated as an

33. The judge may administer oaths, present and receive evidence, interrogate, examine and cross-examine the alien and witnesses, issue subpoenas and order the taking of depositions in cases pending before him or her. 8 U.S.C. § 1226 (1976 & Supp. V 1981). The immigration judge weighs all the evidence and determines the credibility of the witnesses in rendering a decision. See Woon Sun Seung v. Proctor, 99 F.2d 285, 286 (9th Cir. 1938); In re Becerra-Miranda, 12 I. & N. Dec. 358, 367-68 (B.I.A. 1967). The judicial rules of evidence are inapplicable in administrative hearings to determine admissibility of aliens. Jung Yen Loy v. Cahil, 81 F.2d 809, 812 (9th Cir. 1936); United States ex rel. Smith v. Curran, 12 F.2d 636, 637-38 (2d Cir. 1926).


35. 8 U.S.C. §§ 1182, 1361 (1976 & Supp. V 1981). The categories of excludable aliens under § 1182 may be divided into three types: exclusions relating to formalities in the application for entry process, exclusions relating to personal qualifications, and exclusions relating to misconduct. The first category includes aliens previously excluded, deported or removed, id. § 1182(a)(16)-(17); aliens without documents or with improper documents, id. § 1182(20)-(21) (1976); see United States ex rel. Santarelli v. Hughes, 116 F.2d 613, 615 (3d Cir. 1940); and aliens who have made willful misrepresentations in seeking entry, 8 U.S.C. § 1182(a)(19) (1976 & Supp. V 1981). The second category includes those aliens with physical and mental defects, id. § 1182(a)(1)-7; illiterates and aliens likely to become public charges, id. § 1182(a)(15), (25); aliens who accompany excluded aliens into the country, id. § 1182(a)(30); and aliens coming to perform labor where there is no need for additional, non-citizen laborers, id. § 1182(a)(14) (Supp. V 1981). The third category includes criminals, id. § 1182(a)(9) (1976); immoral aliens, id. § 1182(a)(11)-(12); narcotics violators, id. § 1182(a)(23); smugglers of aliens, id. § 1182(a)(31); subversives, id. § 1182(a)(27) - (29); and draft evaders, id. § 1182(a)(22). In Lennon v. INS, 527 F.2d 187 (2d Cir. 1975), the court observed that “[t]his portion of the Act is like a magic mirror, reflecting the fears and concerns of past Congresses.” Id. at 189.

36. 8 U.S.C. § 1226(b) (1976); 8 C.F.R. § 236.5(a)-(b) (1982).


38. Menon v. Esperdy, 413 F.2d 644, 651 (2d Cir. 1969). The country of last domicile is the country from which an alien came. United States ex rel. Milanovic v. Murff, 253 F.2d 941, 943 (2d Cir. 1958); United States ex rel. Boraca v. Schlotfeldt, 109 F.2d 106, 109 (7th Cir. 1940).

39. “The term ‘entry’ means any coming of an alien into the United States, from a
alien attempting to enter for the first time and may be excluded on one of many grounds in an exclusion hearing. If, however, a resident alien's return is not an "entry," then the alien is treated as though he or she had never left the country, and is entitled to all of the procedural protections afforded resident aliens physically present in the United States.

The concept of "entry" is a legal fiction which has developed through statutory and case law. It is possible under this concept for an alien to leave the country and return without making an "entry." Whether an "entry" has been made is a critical question in determining the constitutional rights of a returning resident alien. Therefore, it is important to understand the history and application of "entry" and the "re-entry doctrine."

Entry, the Re-Entry Doctrine, and the Resident Alien

Historically, all aliens, including resident aliens, were considered to have made an "entry" upon coming into the United States from abroad. "Entry" is a legal term of art defined as "any coming of an alien into the United States from a foreign port or place." In 1933, the Supreme Court in *United States ex rel. Volpe v. Smith* held that even the return of an alien from a foreign country is an entry. The foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: Provided, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception." 8 U.S.C. § 1101(a)(13) (1976) (emphasis in original).


42. *See infra* notes 43-65 & accompanying text.


45. 289 U.S. 422 (1933).

46. *Id.* at 425. The court upheld the deportation of an alien who, after 24 years of residence in the United States, was found to be excludable on his return from "a brief visit to Cuba." The court stated that the word "entry" includes "any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one." *Id.*
strict construction of this "re-entry doctrine," however, was softened in the late 1940's. In *Di Pasquale v. Karnuth*, the Second Circuit held that an alien does not make an entry upon returning to the United States from a foreign country if he or she had no intent to leave the United States in the first place. The court admitted that Di Pasquale, a convicted robber, was a "most undesirable member" of the community, but refused to allow deportation based on the alien's "entry" after having taken an overnight sleeper from Buffalo to Detroit on a route passing through Canada. In *Delgadillo v. Carmichael*, an alien, whose ship was torpedoed and sunk, was rescued and taken to Cuba for a week. The Supreme Court refused to deem his return to the United States an "entry." The Court distinguished *Volpe*, stating that that case involved an alien who "plainly expected or planned to enter a foreign port or place," whereas this alien "had no part in selecting the foreign port as his destination."

The holdings in both *Di Pasquale* and *Delgadillo* were incorporated into the 1952 Immigration and Nationality Act. Two exceptions were added to the general definition of "entry" which reflect the situations found in those cases. Thus, under section 101(a)(13) of the Act, a resident alien does not "enter" the country if his or her departure from the United States "was not intended or reasonably to be expected by him [or her]," or if it "was not voluntary."

In 1963, the Supreme Court greatly liberalized its approach to the entry question. Interpreting section 101 of the Act, the Court in *Rosenberg v. Fleuti* decided that it would be inconsistent with the general ameliorative purpose of Congress to hold that an "innocent, casual and brief" excursion by a resident alien outside this country's borders was "intended" as a departure disruptive of his or her resident status. Thus, a brief excursion abroad should not subject a resident to the consequences of an "entry" into the country upon his or her return.

The *Fleuti* case involved a Swiss national who was admitted to the United States as a permanent resident in 1952. He lived in the United States continuously except for a "couple of hours" in 1956 when he

47. The Supreme Court in Rosenberg v. Fleuti, 374 U.S. 449 (1963), used "re-entry doctrine" to refer to the definition of "entry" as used in *Volpe*. *Id.* at 453-54.
48. 158 F.2d 878 (2d Cir. 1947).
49. *Id.* at 879.
50. *Id.*
51. *Id.*
52. 332 U.S. 388 (1947).
53. *Id.* at 389.
54. *Id.* at 390.
56. *Id.*
58. *Id.* at 461-62.
made a brief visit to Mexico. Fleuti was subsequently ordered de-
ported because he was determined to be excludable at the time of his
re-entry.\textsuperscript{59}

In addressing the issue of whether Fleuti's return to the United
States from an afternoon trip to Mexico constituted an "entry" within
the meaning of section 101(a)(13), the court examined the history of the
re-entry doctrine. It concluded that Congress, in approving the judicial
undermining of \textit{Volpe} and the relief brought about by the \textit{Di Pasquale}
and \textit{Delgadillo} decisions, "could not have meant to limit the meaning
of the exception it created in 101(a)(13) to the facts of those cases."\textsuperscript{60}
The Court went on to state that Congress did not intend to exclude a
resident alien who "merely stepped across an international border and
returned in 'about a couple of hours.'"\textsuperscript{61}

The \textit{Fleuti} Court held that an "entry" under section 101(a)(13)
must entail an intent to depart "in a manner which can be regarded as
meaningfully interruptive of the alien's permanent residence."\textsuperscript{62}
The Court listed several factors which would indicate an intent to mean-
ingfully interrupt a resident alien's status: the length of the absence,
whether travel documents were necessary for the departure, the pur-
pose of the trip, and "other possible relevant factors to be developed by
the gradual process of judicial inclusion and exclusion."\textsuperscript{63} Thus, in
contrast to the summary approach of the 1950's, immigration judges

\textsuperscript{59.} Deportation was ordered on the ground that he had been excludable at the time of
his return as an alien "afflicted with psychopathic personality," \textit{8 U.S.C. § 1182(a)(4) (1976)},
by reason of the fact that he was a homosexual. \textit{Rosenberg v. Fleuti}, 374 U.S. at 450-51.

\textsuperscript{60.} \textit{Rosenberg v. Fleuti}, 374 U.S. at 458. The Court's "brief consideration" of the poli-
cies underlying \textit{§ 101(a)(13)} noted that both \textit{Di Pasquale} and \textit{Delgadillo} recognized the "mo-
mentous" interests at stake for the resident alien, noting that "[d]eportation can be the
equivalent of banishment or exile." \textit{Id.} at 459.

\textsuperscript{61.} \textit{Id.} at 461. The Court analogized Congress' treatment of "continuous residence"
for purposes of naturalization. Under \textit{§ 101(a)(13)} an alien seeking naturalization does not
begin to endanger the five years of "continuous residence" in the United States that must
precede his application for citizenship until he remains outside the country for six months.
The Court stated that this "enlightened concept" reflects a "congressional judgment . . .
that the exceptions to Section 101(a)(13) should be read to protect resident aliens who are
only briefly absent from the country." \textit{Id.} at 459-60.

\textsuperscript{62.} \textit{Id.} at 462.

\textsuperscript{63.} Since the \textit{Fleuti} decision, the courts have attempted to apply the factors
presented there. The courts have followed \textit{Fleuti}'s liberalizing trend but have stepped far
away from the factors listed by the \textit{Fleuti} Court. The new factors developed by this "process
of judicial inclusion and exclusion" include the uprooting of family ties, \textit{Lozano-Giron v. \textit{INS}},
\textit{506 F.2d 1073, 1079 (7th Cir. 1974)}; property or employment interests, \textit{id.} at 1077-79;
the fact that the alien has minor children who are legal residents or citizens of the United
States, \textit{Zimmerman v. Lehmann}, \textit{339 F.2d 943, 948-49 (7th Cir.), cert. denied, 381 U.S. 925
(1965)}; whether the alien is legally present in the United States and whether he relied upon
deceptive methods to secure re-entry, \textit{Heitland v. \textit{INS}}, \textit{551 F.2d 495, 502-03 (2d Cir.), cert.
denied, 434 U.S. 819 (1977)}; if the alien's purpose in leaving the country was to accomplish
today must determine resident status by weighing several subjective factors. While the *Fleuti* case greatly liberalized the substantive law concerning returning resident aliens, it did not address the questions of whether resident status may be determined by an immigration judge in an exclusion hearing and whether due process must be afforded the returning resident alien. Since the action against Fleuti was brought in a deportation hearing where due process was afforded the resident alien, the question of the proper forum in which to determine the entry question was not at issue. Nor did the cases following *Fleuti* address this procedural issue. Until recently, the authority of immigration judges to decide the entry question in both exclusion and deportation hearings was not questioned.

**Landon v. Plasencia**

In 1982, the issue of whether the entry question may be decided in an exclusion hearing was finally raised. In *Landon v. Plasencia*, the Supreme Court held that a permanent resident alien was entitled to due process, but not a deportation hearing, after returning from a trip abroad. Maria Antonieta Plasencia was arrested on June 29, 1975, while attempting to smuggle six nonresident aliens into the United States. The issue of whether the entry question may be decided in an exclusion hearing was finally raised. In *Landon v. Plasencia*, the Supreme Court held that a permanent resident alien was entitled to due process, but not a deportation hearing, after returning from a trip abroad. Maria Antonieta Plasencia was arrested on June 29, 1975, while attempting to smuggle six nonresident aliens into the United States. The courts have continued to apply the *Fleuti* factors, including purpose, **some objective** which is itself contrary to immigration policy, Longoria-Castenada v. INS, 548 F.2d 233 (8th Cir.), cert. denied, 434 U.S. 853 (1977).

The courts have continued to apply the *Fleuti* factors, including purpose, Martin-Mendoza v. INS, 499 F.2d 918 (9th Cir. 1974), cert. denied, 419 U.S. 1113 (1975) (intent to smuggle aliens illegally across the border was a meaningful interruption of residence); Palatian v. INS, 502 F.2d 1091, 1093 (9th Cir. 1974) (drug smuggling was a “purpose contrary to immigration laws” and therefore meaningful interruption even though illegal intent was formed after departure from the United States); Vargas-Banuelos v. INS, 466 F.2d 1371, 1374 (5th Cir. 1972) (no entry when illegal purpose was formed after leaving the United States); and length of absence, Munoz-Casarez v. INS, 511 F.2d 947, 948 (9th Cir. 1975) (one month abroad was a meaningful interruption when combined with the fact that the trip was 1000 miles in distance and that the alien had planned it for five years); Kamheangpatiyooth v. INS, 597 F.2d 1253, 1256 (9th Cir. 1979) (one-month trip abroad was not meaningfully interruptive of an alien’s residency for the purpose of determining continuing presence for suspension of deportation); *In re Salazar*, 17 I. & N. Dec. 167, 168 (B.I.A. 1979) (five months abroad was a meaningful interruption). The courts have differed in their application of these factors, however.

64. *See supra* notes 57-59 & accompanying text.
65. In Palatian v. INS, 502 F.2d 1091 (9th Cir. 1974), and Maldonado-Sandoval v. INS, 518 F.2d 278 (9th Cir. 1975), the Ninth Circuit acquiesced to the power of a judge in an exclusion hearing to apply the *Fleuti* factors. In *In re Rico*, 16 I. & N. Dec. 181, 186 (B.I.A. 1977), and *In re Salazar*, 17 I. & N. Dec. 167, 168 (B.I.A. 1979), the immigration judge assumed the jurisdiction to decide the re-entry question.
67. *Id.* at 328-30.
68. Plasencia, a citizen of El Salvador, was admitted as a permanent resident alien in 1970. *Id.* at 324.
States. An exclusion hearing conducted the following day resulted in Plasencia's exclusion and deportation from the United States. The immigration judge determined that her two-day trip to Mexico was a "meaningful departure" from the United States and that her return was an entry. This determination led to Plasencia's exclusion under section 212(a)(31) of the Immigration and Nationality Act, 69 and was supported by the finding of "clear and convincing" evidence that she knowingly aided nonresidents in their attempt to enter the United States illegally. 70

In a habeas corpus action, the United States District Court vacated the decision of the immigration judge and held that the Immigration and Naturalization Service could proceed against a returning resident alien only in a deportation proceeding. 71 The Ninth Circuit agreed with the district court, 72 citing Kwong Hai Chew v. Colding 73 and Maldonado-Sandoval v. INS 74 as authority. In Chew, the Supreme Court held that an alien "could not be excluded without the procedural due process to which he would have been entitled had he never left the country." 75 In Maldonado-Sandoval, the Ninth Circuit had stated that a "permanent resident alien does not lose the procedural protection to which he is otherwise entitled simply by making a brief journey abroad." 76 Based on these two cases the Ninth Circuit concluded that a

69. Section 212(a)(31) states: "[T]he following classes of aliens . . . shall be excluded from admission into the United States: . . . Any alien who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law." 8 U.S.C. § 1182(a)(31) (1976).

70. Plasencia v. Sureck, 637 F.2d 1286, 1287 (9th Cir. 1980). The immigration judge found that she had "meaningfully interrupted" her residency, assuming that this decision was appropriate in an exclusion hearing. Id.

71. Id. The report and recommendation of the magistrate as adopted by the district court are not reported.

72. Id. at 1288-89.

73. 344 U.S. 590 (1953).

74. 518 F.2d 278 (9th Cir. 1975).

75. Kwong Hai Chew v. Colding, 344 U.S. at 596. Chew, a resident alien, was temporarily detained without notice of any charges against him when he returned from a voyage abroad as a seaman on an American vessel. He was then permanently excluded without the opportunity to be heard in opposition to the charges against him. Id. at 595.

The Court held that the detention and denial of hearing violated Chew's due process rights under the Constitution. The opinion stated that Chew's constitutional status prior to the voyage as a resident alien was not terminated by the voyage. Therefore, the Supreme Court held that Chew was entitled to a fair hearing upon his return. Id. at 600. But see infra notes 90-93 & accompanying text.

76. Maldonado-Sandoval v. INS, 518 F.2d at 281. On returning from a two or three day trip to Mexico, petitioner, a resident alien, was refused admission. In the exclusion hearing, it was determined that he was excludable under 8 U.S.C. 1182(a)(20) as an immigrant who was not in possession of a valid immigrant visa or other re-entry document. On appeal, the Ninth Circuit noted that the differences between exclusion and deportation proceedings are significant and that the alien's cause might have been successful had he been
permanent resident alien is entitled to a deportation proceeding to determine if a meaningful interruption in his or her resident status has occurred.  

The Supreme Court reversed the Ninth Circuit's decision and held that the Immigration and Nationality Act permits the INS to proceed against a returning resident alien in exclusion proceedings.  

The decision was based on the Court's interpretation of section 235 of the Act and on its analyses of Rosenberg v. Fleuti and Kwong Hai Chew v. Colding.  

The Court agreed with the lower courts that Plasencia was entitled to due process as a returning resident alien, but refused to equate this right with the right to a deportation proceeding. The Court instead remanded the case for a determination of whether Plasencia had been afforded due process at the exclusion hearing.  

In its decision, the Supreme Court first addressed the distinction made in the Act between exclusion and deportation procedures. The Court noted that a deportation hearing is the usual means of proceeding against an alien who is already physically present in the United States, while an exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission. While recognizing that deportation proceedings afford the resident alien more procedural protections than do exclusion proceedings, the Court nevertheless concluded that the history and the language of the Act reflect a congressional intent to determine an alien's right to entry in an exclusion hearing.  

In its determination of congressional intent, the Court focused on section 235 of the Act, which permits the INS to examine all aliens

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77. Judge Wallace dissented, stating that "[t]he law simply does not provide for the full panoply of procedural rights which the majority concludes are required." Plasencia v. Sureck, 637 F.2d at 1289 (Wallace, J., dissenting.)

78. Landon v. Plasencia, 103 S. Ct. at 328.


80. 344 U.S. 590 (1953).

81. Landon v. Plasencia, 103 S. Ct. at 328.

82. Id. at 332.

83. Id. at 329.

84. Section 235 provides in part: "The inspection . . . of aliens (including alien crewmen) seeking admission or readmission to . . . the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. . . . The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, re-enter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service. . . . Every alien . . . who may not appear to the examining immigration officer at the
seeking to enter, re-enter, pass through, or reside in the United States. In addition to the language of section 235, the Court quoted the reports of the House of Representatives and Senate Committees working on the establishment of the 1952 Immigration and Nationality Act. These reports state that the exclusion procedure is the "sole and exclusive procedure for determining the admissibility of a person to the United States." Based on that language, the Court concluded that the legislative intent of the Act was to provide an exclusion hearing to all aliens attempting to enter or return to the United States, including resident aliens.

The Plasencia Court noted that it would not violate the scope or spirit of Rosenberg v. Fleuti to permit the INS to litigate questions of entry in exclusion proceedings. Though Fleuti greatly liberalized the substantive law of entry, the Plasencia Court did not find that this expansion mandated a deportation hearing.

The Supreme Court rejected the Ninth Circuit's interpretation of Kwong Hai Chew v. Colding upon which the Fleuti decision was partially based. The Ninth Circuit had cited Chew to support its holding that a resident alien returning from a trip abroad was entitled to a deportation hearing. The Supreme Court, in contrast, interpreted Chew as requiring only that a returning resident alien be afforded due process.

The Court stated that the reasoning in Chew "does not create a right to identical treatment" for returning resident aliens and resident aliens physically present within the United States. Thus, the Supreme Court concluded that its decision was in conformity with both Chew and Fleuti and held, based on its interpretation of these cases.

85. The Court placed special emphasis on the words "all," "readmission," and "re-enter." Landon v. Plasencia, 103 S. Ct. at 326.
86. Id.
87. Id. The Court concluded that "[n]othing in the statutory language or legislative history suggests that the respondent's status as a permanent resident entitles her to a suspension of the exclusion hearing or requires the INS to proceed only through a deportation hearing." Id. at 326-27.
88. Id. at 328.
89. Id. at 328-29.
90. Id. at 328.
91. The Court noted that the question of whether Chew was making an entry was expressly reserved in Kwong Hai Chew v. Colding, which stated: "We do not regard the constitutional status which petitioner [Chew] indisputably enjoyed prior to his voyage as terminated by that voyage. From a constitutional point of view, he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien, and we do not now reach the question of whether he is to be so treated." 344 U.S. 590, 600 (1953). See Landon v. Plasencia, 103 S. Ct. at 328 n.7.
92. Landon v. Plasencia, 103 S. Ct. at 328.
93. Id. at 328-29. The Supreme Court rejected the application of Shaughnessy v.
and its determination of congressional intent, that the “entry” issue may be decided in an exclusion hearing where due process is afforded the resident alien.94

Exclusion With Due Process

By authorizing the INS to proceed against returning resident aliens in exclusion hearings, while at the same time requiring that these exclusion proceedings afford returning aliens due process, the Supreme Court authorized an immigration procedure that is not defined in the Immigration and Nationality Act. When the Act was adopted in 1952, all aliens who left the country (with two minor exceptions) lost their resident status.95 Thus, when attempting to re-enter the United States, they had the same status as those attempting to enter for the first time. The Immigration and Nationality Act was therefore designed to handle only two classes of aliens: those outside the United States and those inside the United States. The Act accomplished this through a two-

United States ex rel. Mezei, 345 U.S. 206 (1953), to the Plasencia situation. The Mezei Court held that a resident alien returning from a nineteen-month trip abroad was lawfully excluded without a hearing where the exclusion order was based on “information of a confidential nature, the disclosure of which would be prejudicial to the public interest.” Id. at 208. Mezei, who had resided in the United States for 25 years, was deemed to be an entering alien upon his return from a visit with his dying mother in Romania. The Court held that “[f]or purpose of the immigration laws . . . the legal incidents of an alien’s entry remain unaltered whether he has been here once before or not.” Id. at 213.

The Mezei Court, in distinguishing Chew stated that “[u]nlike Chew who with full security clearance and documentation pursued his vocation for four months aboard an American ship,” Id. at 214, Mezei “simply left the United States and remained behind the Iron Curtain for 19 months.” Id. The court pointed out that naturalization laws consider maritime service such as Chew’s to be continuous residence. However, a protracted absence such as Mezei’s is a clear break in an alien’s continuous residence in the United States. Thus, the Mezei Court recognized a clear difference between the Chew case and the facts of its own case. This distinction was noted by the Plasencia court, which stated: “We need not now decide the scope of Mezei; it does not govern this case, for Plasencia was absent from the country only a few days, and the United States has conceded that she has a right to due process . . . .” Landon v. Plasencia, 103 S. Ct. at 330 (citation omitted).

94. Justice Marshall concurred with the majority decision that the Immigration and Nationality Act permits the INS to proceed against a returning resident alien in an exclusion proceeding. Landon v. Plasencia, 103 S. Ct. at 332. He dissented, however, from the decision to remand. He argued that Plasencia was denied due process because she was not given adequate and timely notice of the charges against her and of her right to retain counsel and to present a defense. Justice Marshall noted that Plasencia was given less than 24 hours notice which, he stated, “was not sufficient to afford her a reasonable opportunity to demonstrate that she was not excludable.” Id. at 333. The charges against Plasencia were inadequately explained at the hearing itself, in Justice Marshall’s opinion. This resulted in the “virtual assure[ance] that the Government attorney would present his case without factual and or legal opposition.” Id. Justice Marshall therefore stated that Plasencia was denied due process. Id. at 334.

95. See supra notes 43-54 & accompanying text.
part structure. Exclusion was established to keep persons deemed undesirable out of the country and deportation was developed to deal with aliens who had already been granted resident status.

With the 1963 Fleuti decision, however, a liberalizing trend in the re-entry doctrine began. Immigration judges were required to determine whether a resident alien's return to the United States constituted an entry. During the past two decades this liberalization has continued, culminating in the Plasencia decision, which requires that due process be afforded the returning resident alien.

Congress could not have anticipated in 1952 that the substantive law regarding returning resident aliens would so dramatically change. In 1952, there was no reason to include in the Act procedures to afford returning resident aliens the constitutional protections now required. Therefore, to incorporate due process into exclusion proceedings in conformance with the Plasencia decision additional procedures are necessary.

The Supreme Court in Plasencia had the opportunity to specify the requirements for exclusion proceedings. In other cases where it decided that procedural due process should be afforded in an administrative hearing, the Court did outline the minimum procedures required by the Constitution. In the area of immigration law, however, the Court has been hesitant to overstep its authority. Immigration law and

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96. Leng May Ma v. Barber, 357 U.S. 185, 187 (1958). These procedures were separated in the Act by developing exclusion procedure requirements in part IV of Subchapter II, 8 U.S.C. § 1226(a) (1976), and limiting the standards for deportation to part V, id. § 1251 (1976 & Supp. V 1981). The Act also provides for situations where the two procedures might conflict. For example, any alien may be deported if at the time of entry he or she fell within one or more of the classes of aliens excludable by the law existing at the time of such entry. Id. § 1251(a)(1) (1976).


99. See supra notes 57-63 & accompanying text.


102. In Morrissey v. Brewer, 408 U.S. 471 (1971), the Court listed the following minimum due process requirements in a parole revocation hearing: "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second state of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." Id. at 489. In In re Gault, 387 U.S. 1 (1966), the Court discussed the minimum process requirements of notice of charges, right to counsel, confrontation, self-incrimination, and cross-examination, appel-
procedure has historically been an area of exclusive congressional jurisdiction. Therefore, the Plasencia Court did not list the minimum due process requirements. Instead, the Court noted that "the role of the judiciary [in the immigration field] . . . does not extend to imposing procedures that merely displace congressional choices of policy." Though the Plasencia Court did not specify the minimum constitutional requirements for a returning resident alien's exclusion hearing, it did provide some guidelines. The Court noted that in evaluating the procedures provided in exclusion hearings, 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 rather than additional or different procedures." Thus, the Plasencia decision requires lower courts and, by implication, immigration judges to apply a balancing test to determine whether specific due process requirements are adequate.

The Supreme Court recognized that a returning resident alien's interest is a "weighty one," with the alien "stand[ing] to lose the right 'to stay and live and work in this land of freedom.'" The alien may

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103. The right to restrict immigration is based on a "fundamental sovereign attribute." Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953). This power, though not explicitly granted by the Constitution, has been consistently upheld by the Supreme Court. Congress has unqualified, plenary power to determine which classes of aliens may be permitted to enter the United States. See supra note 1. In the Chinese Exclusion Case, 130 U.S. 581 (1889), Justice Field stated that the sovereign authority to exclude was restricted "only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations." Id. at 604. In Galvan v. Press, 347 U.S. 522 (1954), Justice Frankfurter wrote that "[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. [citation]. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." Id. at 531.

104. Landon v. Plasencia, 103 S. Ct. at 330.

105. The Court held that Plasencia could "invoke the Due Process Clause on returning to this country," but refused to "decide the contours of the process that is due." Id. at 329.

106. Id. at 320 (quoting Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976)). See also Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) ("[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.").


108. Id. (quoting Bridges v. Wixon, 326 U.S. 135, 154 (1945)).
lose the right to rejoin his or her immediate family, "a right that ranks high among the interests of the individual." The Court also acknowledged that the government's interest in the efficient administration of the immigration laws at the border is "weighty." The Plasencia Court, however, did not balance these competing interests. Instead, it left this task to the lower courts to "evaluate the particular circumstances and determine what procedures . . . satisfy the minimum requirements of due process on the re-entry of a permanent resident alien." While new procedures are best instituted through legislative or judicial action, such actions take time. During the interim, immigration judges must use their own judgment in determining what procedures are necessary to afford due process. To aid in the formulation of these procedures, this Comment suggests possible approaches to providing due process in an exclusion hearing based on due process decisions in other areas.

Notice

Returning resident aliens should be afforded timely and adequate notice of the charges against them. Though due process depends on the particular circumstances, "there can be no doubt that at a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or

109. Id.
110. Id.
111. Id. at 330-32. The Supreme Court did balance similar competing interests in Goldberg v. Kelly, 397 U.S. 254, 260-66 (1969). In Goldberg, the Court acknowledged the governmental interest in conserving fiscal and administrative resources, but held that these interests were not overriding in the welfare context. Though the requirement of a prior hearing involves greater expense, the Court stated that "the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities." Id. at 266.

In contrast, the welfare recipients' interest was great. The Court noted that "to cut off a welfare recipient in the face of . . . "brutal need" without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it." Id. at 261 (quoting Kelly v. Wyman, 294 F. Supp. 893, 899-900 (1968)). "Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongly deprived of assistance." Id.

After balancing the competing interests the Court concluded that "[t]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal." Id. at 266 (quoting Kelly v. Wyman, 294 F. Supp. 893, 904-05 (1968)).

property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”

Under the Immigration and Nationality Act there is no requirement of notice in an exclusion hearing. Therefore, to provide this important constitutional protection, immigration judges must look elsewhere to determine what procedure is “due”.

Time of Notice

The Supreme Court’s decisions in In re Gault and Goldberg v. Kelly and Justice Marshall’s dissent in Landon v. Plasencia may aid in determining how much notice to provide returning resident aliens. In In re Gault, the Court held that notice of the hearing should be given at the earliest practicable time in advance of the hearing. The Court rejected notice given on the day of the hearing as a violation of due process. Justice Marshall also rejected same-day notice in his dissent in Plasencia, stating that it was insufficient “to afford [Plasencia] a reasonable opportunity to demonstrate that she was not excludable.” In Goldberg v. Kelly, the Court evaluated the seven-

115. 8 U.S.C. § 1226 (1976). Some exclusion hearings give less than 24 hours notice. In In re Loulos, 16 I. & N. Dec. 34 (B.I.A. 1976), notice of the exclusion hearing was delivered to the alien on August 24, 1976, for a hearing scheduled that day. In Plasencia, the returning resident alien was arrested at 9:27 on the evening of June 29, 1975. In a notice dated June 30, 1975 her hearing was set for 11:00 a.m. on June 30, 1975. Landon v. Plasencia, 103 S. Ct. at 324.
118. 103 S. Ct. at 332 (Marshall, J., dissenting).
119. In re Gault, 387 U.S. at 33. Gerald Gault, a 15-year old boy, was taken into custody as a result of a complaint that he had made lewd telephone calls. At the time Gerald was picked up, his mother and father were both at work. No notice was left at the Gault home that Gerald was being taken into custody; his parents learned from a neighbor that he had been taken to the Detention Home. Id. at 4-5. A petition was filed with the court the following day, the day of the hearing. It made no reference to any factual basis for the action which it initiated. It recited only that “said minor is under the age of eighteen years, and is in need of the protection of this Honorable Court; [and that] said minor is a delinquent minor.” It prayed for a hearing and an order regarding “the care and custody of said minor.” Id. at 5. No notice was served on the Gaults, and no complainant appeared at the hearing. No one was sworn in and no transcript or recording was taken. Several days after the first hearing, a second hearing was held. Again, the complainant was not present, nor did the judge speak to the complainant or communicate with her at any time. In fact, the probation officer had only spoken to her once over the telephone. Id. at 7-8. At the end of the hearing, Gerald was committed, as a juvenile delinquent, to the State Industrial School “for the period of his minority [that is, until 21], unless sooner discharged by due process of law.” Because no appeal is permitted under Arizona law in juvenile cases, the Gaults petitioned the Supreme Court in habeus corpus. Id.
120. Id. at 33.
121. Landon v. Plasencia, 103 S. Ct. at 332-33.
122. Id. at 333.
day notice given to welfare recipients of a hearing for revocation of their welfare benefits.123 The Court did not deem the seven-day notice constitutionally insufficient per se, but did note that there could be cases where "fairness would require that a longer time be given."124

These opinions are not controlling in exclusion hearings, yet they do provide some helpful guidelines. They emphasize the importance the Supreme Court has placed on timely notice in an administrative setting. Because adequate notice is such a crucial element of due process in these other areas, it is likely to be held essential in a returning resident alien's exclusion hearing. Therefore, it is suggested that notice to the resident alien be provided far enough in advance of the hearing to allow the alien to effectively prepare a defense. This certainly requires more than twenty-four hours notice and may require as much as one week or more.

Notice of Charges

Notice given to returning resident aliens should not only inform the alien of the time of the hearing, but should also state all of the charges which the government will bring.125 In In re Gault, the Supreme Court stated that notice, to comply with due process requirements, must set forth the alleged misconduct with particularity.126 In Morrissey v. Brewer,127 the Court stated that notice should include a statement as to the purpose of the hearing and concluded that, at a minimum, due process requires written notice of the claimed violation.128 Though these cases involved different factual situations, they did discuss minimum notice requirements in situations where important private interests were at stake.129 A returning resident alien in an exclusion hearing stands to lose the ability to return to his or her home

126. In re Gault, 387 U.S. at 33.
127. 408 U.S. 471 (1971). In Morrissey, the Supreme Court held that in order to revoke parole, a reasonably prompt informal inquiry must be conducted by an impartial hearing officer, with due process afforded the parolee. The Court noted that "the liberty of the parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee . . . ." Id. at 482.
128. In the context of a parole revocation hearing, the court held that due process requires at least: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him or her; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses; (e) an impartial hearing board; and (f) a written statement by the fact finders of the evidence relied on and the reasons for the conclusions reached. Id. at 487-89.
129. In both In re Gault and Morrissey, the private interest involved was the interest in avoiding confinement. Similarly, an alien who is deprived of his or her right to live in the United States, often suffers great personal hardship and/or imprisonment or other punish-
and family. With such an important interest at stake, a returning resident alien should be given notice of all the charges raised in order to allow him or her to prepare an effective defense.

The Immigration and Nationality Act, however, does not require the immigration judge to inform the alien of the charges being raised.\textsuperscript{130} In fact, the immigration judge is not limited to consideration of the charges raised by the government and may exclude the alien on any ground listed in the Act.\textsuperscript{131} Thus, the Act does not require notice to the returning resident alien of what he or she can expect to encounter at the hearing. Without notice of all the charges, the alien cannot prepare an effective defense. Therefore, to be consistent with the requirements of due process, an immigration judge in an exclusion hearing for a returning resident alien should be limited to the charges raised by the government as grounds for exclusion.

**Burden of Proof**

Section 291 of the Immigration and Nationality Act states that the alien has the burden of proof in an exclusion hearing.\textsuperscript{132} This provision, however, has been judicially modified as applied to returning resident aliens. In *Kwong Hai Chew v. Rogers*,\textsuperscript{133} the Court held that if a returning resident alien is to be deprived of his or her resident status, the Immigration and Naturalization Service must be the moving party and bear the burden of proof.\textsuperscript{134} The INS, as a matter of practice, has observed this requirement.\textsuperscript{135} Therefore, no change in this procedure is mandated by *Landon v. Plasencia*.

Section 291 also states that the degree of proof that must be shown is proof that "establishes to the satisfaction of the Attorney General

\textsuperscript{130} 8 U.S.C. § 1226 (1976).
\textsuperscript{133} 257 F.2d 606 (D.C. Cir. 1958).
\textsuperscript{134} Id. In *Beard v. Stahr*, 370 U.S. 41 (1962), Justice Douglas cited *Kwong Hai Chew v. Rogers* as an example of requiring the government to carry the burden of proof. The case dealt with the general discharge of a military officer. Justice Douglas noted that "[i]n comparable situations the government has been required to carry the burden of proof." *Id.* at 43 (Douglas, J., dissenting).
\textsuperscript{135} In re Bercerra-Miranda 12 L. & N. Dec. 358 (B.I.A. 1979). However, there is no mention of a shift in the burden of proof in the regulations. Cf. *Hoonsilapa v. INS*, 575 F.2d 735, 737 (9th Cir. 1978) ("In a deportation proceeding the initial burden of showing lawful entry into the United States is on the subject of deportation proceedings. 8 U.S.C. § 1361. Once that burden has been satisfied, the INS must establish a prima facie case of alienage and deportability. *Trias-Hernandez v. INS*, 528 F.2d 366 (9th Cir. 1975); *Berahmand v. INS*, 549 F.2d 1343 (9th Cir. 1977). When the INS sustains this burden, a presumption of deportability exists that the subject must rebut.").
that [the alien] is not subject to exclusion under any provision of [the Act].”\textsuperscript{136} However, since section 291 has been held not to apply to returning resident aliens as to the burden of proof,\textsuperscript{137} its provision regarding degree of proof probably does not apply.

Instead, it is suggested that the degree of proof required in a returning resident alien’s hearing be the same as that required in a deportation hearing. In \textit{Woodby v. INS},\textsuperscript{138} the Supreme Court held that the degree of proof required to deport a resident alien was “clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true.”\textsuperscript{139} The Court reasoned that a higher standard of proof should apply because of the drastic deprivation that may follow when a resident alien is forced to leave the country.\textsuperscript{140} Because a returning resident alien faces the same possibility of drastic consequences, a higher standard of proof should also apply in addressing the “entry” question in an exclusion hearing. The government, which bears the burden, should be required to prove that the alien has interrupted his or her resident status and is excludable by “clear, unequivocal and convincing” evidence.\textsuperscript{141}

\textbf{Confrontation and Cross-Examination}

The opportunity to confront the evidence produced by the government and to cross-examine adverse witnesses is a due process protection that should be afforded a returning resident alien in an exclusion

\begin{itemize}
\item \textsuperscript{136} 8 U.S.C. § 1361 (1976).
\item \textsuperscript{137} Kwong Hai Chew v. Rogers, 257 F.2d 606 (D.C. Cir. 1958). \textit{See supra} notes 133-34 & accompanying text.
\item \textsuperscript{138} 385 U.S. 276 (1966).
\item \textsuperscript{139} \textit{Id.} at 286.
\item \textsuperscript{140} The petitioners in \textit{Woodby} urged that the appropriate burden of proof in deportation proceedings should be that which the law imposes in criminal cases: the duty of proving the essential facts beyond a reasonable doubt. The Government, on the other hand, pointed out that a deportation proceeding is not a criminal case, and that the appropriate burden of proof should consequently be the one generally imposed in civil cases and administrative proceedings: the duty of prevailing by a mere preponderance of the evidence. The Court stated: “To be sure, a deportation proceeding is not a criminal prosecution. But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case. The Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification.” \textit{Id.} at 285.
\item \textsuperscript{141} “The Government, admittedly, bears a heavy burden of proof in a deportation case: its case must be established by ‘clear, unequivocal and convincing evidence,’ a test approaching that in a criminal case of proof ‘beyond a reasonable doubt.’” Mason v. INS, 394 F.2d 223, 226 (2d Cir. 1968). \textit{See also} United States \textit{ex rel.} Leong v. O’Rourke, 125 F. Supp. 769, 770 (W.D. Mo. 1954). \textit{See generally} United States \textit{ex rel.} Rongetta v. Neely, 207 F.2d 281, 284 (7th Cir. 1953); United States \textit{ex rel.} Barilla v. Uhl, 27 F. Supp. 746, 747 (S.D.N.Y. 1939), \textit{aff’d}, 108 F.2d 1021 (2d Cir. 1940).
\end{itemize}
proceeding. In *Goldberg v. Kelly*, the Supreme Court stated that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." The right to cross-examination is a due process requirement in administrative hearings involving denial of welfare benefits, revocation of parole, and juvenile detention. The Supreme Court has held that the right to confrontation and cross-examination is almost "immutable in our jurisprudence." The Court has been zealous in protecting these rights from erosion not only in criminal cases, but also in all types of cases where administrative actions are under scrutiny.

No provision in the Immigration and Nationality Act provides an alien the opportunity to confront evidence or confront and cross-examine witnesses in an exclusion proceeding. However, this right is afforded the resident alien in a deportation proceeding. Under section 242(b)(3), an alien in a deportation proceeding "shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf and to cross-examine witnesses presented by

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145. *Morrissey v. Brewer*, 408 U.S. 471, 487 (1971) ("On request of the parolee, a person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence.") The right to cross-examination may be overcome by the interest of the informant in avoiding adverse consequences stemming from providing information. *Id.* at 491 (Brennan, J., concurring).
146. *In re Gault*, 387 U.S. 1, 56-57 (1966) ("[A]bsent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements.").
147. *Green v. McElroy*, 360 U.S. 474, 496-97 (1959) ("Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative . . . actions were under scrutiny.").
148. *Id.*
150. *Id.* § 1252(b)(3).
the Government." Because the right to confrontation and cross-examination have been held to be due process requirements in most administrative settings, it is likely that these protections are also procedural rights of returning resident aliens in exclusion hearings. Immigration judges in exclusion hearings should afford the returning resident alien the opportunity to show that the charges brought against him or her are untrue. The requirements of section 242(b)(3) should be applied to the returning resident alien's exclusion hearing.

Self-Incrimination

The privilege against self-incrimination should be granted the returning resident alien in an exclusion hearing. In In re Gault, the Supreme Court stated that "[t]he privilege against self-incrimination can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicative. It protects any disclosures which the person may reasonably believe could be used in a criminal prosecution or which "could lead to other evidence that might be so used." This privilege has been specifically applied to resident aliens in deportation hearings. However, no case or statute expressly protects returning resident aliens in exclusion proceedings. Because an exclusion hearing is a civil administrative proceeding, it seems likely that the privilege against self-incrimination applies. Therefore, it is suggested that this privilege be afforded returning resident aliens in exclusion hearings.

151. Id.
152. But see United States ex rel. Lee Kum Hoy v. Shaughnessy, 115 F. Supp. 302 (S.D.N.Y. 1953) (where blood grouping tests were relied upon to exclude an alien, there was no denial of due process in allowing the introduction of the tables relating to such tests without producing authors or tables for cross-examination).
153. 387 U.S. 1, 47-48 (1966) (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 94 (1964) (White, J., concurring)).
154. Valeros v. INS, 387 F.2d 921, 922 (7th Cir. 1967). However, in a deportation hearing, an alien may, unlike the criminal defendant, be required to answer nonincriminatory questions about his or her alien status. Laqui v. INS, 422 F.2d 807, 809-10 (7th Cir. 1967). If the matter is not incriminatory, the alien's silence may be used as the basis for drawing adverse inferences. As Justice Brandeis stated in United States ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923): "Silence is often evidence of the most persuasive character . . . . [T]here is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak. . . . A person arrested on the preliminary warrant is not protected by a presumption of citizenship comparable to the presumption of innocence in a criminal case. There is no provision which forbids drawing an adverse inference from the fact of standing mute." Id. at 153-54. See also Chavez-Raya v. INS, 519 F.2d 397, 401 (7th Cir. 1975).
Impartial Presiding Official

An immigration judge in an exclusion hearing has a powerful role. He or she is authorized to conduct proceedings, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. While the immigration judge must rest his or her decision on the evidence produced at trial, he or she has the exclusive power to determine the credibility of witnesses. An immigration judge may not preside if he or she has participated in prosecuting functions or in investigative work prior to the hearing.

The dual role of an immigration judge as both interrogator and decision-maker has been held to be fair and proper. However, it may be criticized as a role too active to allow the judge to be an impartial decision-maker. In *Morrissey v. Brewer*, the Supreme Court held that though a presiding official need not be a judicial officer, he or she must be an independent decision-maker. Under current immigration laws, it can be argued that the immigration judge is allowed to become too involved in the examination process to make an impartial decision. Thus, though the *Plasencia* decision does not require a change in the role of the presiding official, its liberalizing effect should spur a re-evaluation of the role of the presiding official.

Right to Counsel

The assistance of counsel in an exclusion hearing may have a profound effect on the outcome of the hearing. In view of the complexity of current immigration laws and procedures, an alien's ability to present an effective defense may be thwarted in the absence of effective representation. Thus, it is crucial that an alien be represented if he or she desires.

There is no constitutional right to representation in an immigration hearing. However, Congress has legislated such a right into the

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156. *Id.* § 1226(a).
157. *Id.* ("The determination of such special inquiry officer shall be based only on the evidence produced at the inquiry."). A record must be made of the decision and the entire hearing. *Id.*
158. Woon Sun Seung v. Proctor, 99 F.2d 285, 286 (9th Cir. 1938).
159. 8 U.S.C. § 1226(a) (1976) ("No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions.").
160. Le Tourneur v. INS, 538 F.2d 1368, 1370 (9th Cir. 1976). *See also* Hosseinmardi v. INS, 405 F.2d 25, 27-29 (9th Cir. 1968).
163. Martin-Mendoza v. INS, 499 F.2d 918 (9th Cir. 1974); Murgia-Melendrez v. INS, 407 F.2d 207 (9th Cir. 1969). *But see* Wong Wing v. United States, 163 U.S. 228, 238 (1895) ("[I]t must be concluded that all persons within the territory of the United States are entitled
Immigration and Nationality Act. Section 292 provides that an alien may be represented by counsel in an exclusion or a deportation hearing. The denial of this right, absent a valid waiver, is reversible error which cannot be cured by the application of any “harmless error” test. Thus, an immigration judge should make sure that the alien knows of the right to counsel and, if the alien decides to be represented by counsel, that the hearing does not proceed without counsel.

An alien may, however, waive the right to counsel. In Ramirez v. INS, the court noted that “[i]t is well established that an alien can knowingly, intelligently, and voluntarily waive his right to counsel.” Where the immigration judge informs the alien of the right to counsel and of the nature of the proceedings and the alien decides to proceed without counsel, a hearing without counsel is fair. However, if the alien is not provided with an understanding of the complexity of his or her dilemma and is not made aware of the cogent legal arguments which can be raised, the waiver of counsel is not “competently and understandingly made.” Therefore, an immigration judge should fully advise the alien of the right to counsel, making certain that the alien comprehends the seriousness of the hearing.

to the protection guaranteed by [the fifth and sixth] amendments, and that even aliens shall not be held to answer for a capital or other infamous crime . . . nor be deprived of life, liberty or property without due process of law.”)

165. Castaneda-Delgado v. INS, 525 F.2d 1295, 1302 (7th Cir. 1975).
166. An alien may, however, waive the right to counsel. In Ramirez v. INS, the court noted that “[i]t is well established that an alien can knowingly, intelligently, and voluntarily waive his right to counsel.” Where the immigration judge informs the alien of the right to counsel and of the nature of the proceedings and the alien decides to proceed without counsel, a hearing without counsel is fair. However, if the alien is not provided with an understanding of the complexity of his or her dilemma and is not made aware of the cogent legal arguments which can be raised, the waiver of counsel is not “competently and understandingly made.” Therefore, an immigration judge should fully advise the alien of the right to counsel, making certain that the alien comprehends the seriousness of the hearing.

167. Barthold v. INS, 517 F.2d 689, 691 (5th Cir. 1975).
168. Partible v. INS, 600 F.2d 1094, 1096 (5th Cir. 1979).
169. Id. at 565.
170. Id.
171. Partible v. INS, 600 F.2d 1094, 1096 (5th Cir. 1979).
172. In Barthold v. INS, 517 F.2d 689 (5th Cir. 1975), the court held that the following colloquy constituted a valid waiver:

Q. You have the right to be represented by an attorney at this hearing, if you want, or you can go ahead if you do not choose to be represented. Do you want to be represented by a lawyer?
A. Can the Government give me an attorney?
Q. No, the Government cannot provide an attorney for you in these cases because we are prohibited by law from doing so. It must be an attorney at your own expense. However, if you do not have the money to afford an attorney, I can adjourn the case and give you the opportunity to contact Legal Services to see whether or not they will provide an attorney for you. Do you have—you say you do not have sufficient money to pay for an attorney?
A. No, Sir.
Though a resident alien has the right to counsel, he or she is not entitled to appointed counsel under current immigration law. The Immigration and Nationality Act provides that the alien’s right to counsel is “at no expense to the government.” Thus, though the returning resident alien faces severe consequences in an exclusion hearing, including the possibility of deprivation of liberty, he or she may be unrepresented. If an alien is unable to afford a lawyer and has difficulty getting free legal service, his or her right to counsel may be meaningless. Unfortunately, because of the almost exclusive congressional control of immigration law, courts will be hesitant to rule in direct contradiction to the counsel provision in the Act. Therefore, it is suggested that Congress reassess the necessity of appointed counsel to a returning resident alien in an exclusion hearing.

Appellate Review

There is no right to an appeal under the Constitution, but the American legal system has traditionally provided some method of review. Under the Immigration and Nationality Act an alien may appeal an exclusion decision to the Board of Immigration Appeals (BIA). If the BIA upholds the immigration judge’s decision, there is no further judicial review. Thus, a returning resident alien has no direct access to the American courts for a determination of his or her right to return. Yet, because there is no constitutional right to appeal, and because there is already a statutory right to an administrative review provided in the Act, it is unlikely that courts will rule against the

Q. Well, do you want the opportunity to call Legal Services to see if they will provide you with an attorney?
A. I will continue without an attorney.
Q. Very well. If at any time during the course of the proceedings you feel that you are unable to represent any more or that you think an attorney’s answer will be necessary, just let me know and I will adjourn the case to still give you a chance to get one. You understand that you will have this continuing right until the case is complete?
A. Yes.

Id. at 691.

175. See Hastings Comment, supra note 9, at 415-16; see also Note, Due Process and Deportation—Is There a Right to Assigned Counsel?, 8 U.C.D. L. REV. 289 (1975).
177. 8 U.S.C. § 1226(b) (1976) (“From a decision of a special inquiry officer excluding an alien, such alien may take a timely appeal to the Attorney General, and any such alien shall be advised of his right to take such appeal.”).
procedure outlined in the Act. In this area also, the only possible solution is a re-evaluation by Congress of the need for recourse through the judicial system.

Extent of Due Process Protection

The *Plasencia* decision leaves unanswered the practical question of what procedure is due after the entry question is decided in an exclusion hearing. The Court did not address whether an immigration judge must continue a returning resident alien’s exclusion hearing as a deportation procedure once it is determined that there has been no entry, or whether the exclusion hearing must end and a deportation hearing begin. It is also uncertain whether the returning resident alien’s right to due process continues in an exclusion hearing once the judge determines that an entry has been made. These practical questions will face all immigration judges in exclusion proceedings for returning resident aliens. Because there are no similar situations in other administrative areas, the judges will have complete discretion. It is suggested, however, that judges should err on the side of providing more protection for returning resident aliens. Thus, if an entry has not been made, the exclusion hearing should end and a deportation proceeding should be initiated. If an entry has been made, the exclusion hearing should continue to afford due process protection to the returning resident alien.

**Recommendation**

To provide due process in exclusion hearings, it will be necessary to modify the exclusion procedures outlined in the Immigration and Nationality Act. At present, the procedural rights of a returning resident alien are undefined. The alien has no way of determining what protections he or she can expect, or when there has been a violation of due process.

Because the *Plasencia* Court did not list the due process protections necessary in an exclusion hearing, there is a great need for Congress to specify the required procedures. The legislative process is a slow one, however, and a revision of the Immigration and Nationality Act may take years. Thus, immigration judges and the lower courts will be forced to grapple with the many procedural issues raised by the *Plasencia* decision without specific legislative guidelines. With such important interests at stake for the returning alien, it is critical that the proper procedural safeguards be provided. Therefore, it is strongly suggested that the guidelines detailed in this Comment be considered.

Notice of all the charges should be given to a returning resident far enough in advance of the hearing to allow the alien to prepare an effec-
tive defense. The hearing, the rights to confrontation and cross-examination and the privilege against self-incrimination should be observed. The burden of proof should rest on the government to show that the alien is excludable by “clear, unequivocal, and convincing” evidence. In addition, the immigration judge should refrain from participating as an interrogator, in order to preserve his or her role as an impartial decision-maker. Finally, where any question exists as to the procedures due in a returning resident alien’s exclusion hearing, greater, rather than lesser, protection should be provided. Because the alien’s interests involved are so important, every effort should be made to provide a fair and adequate hearing.

Immigration judges and the lower courts should consider, in determining exclusion procedures, that the Act already provides a hearing for aliens at the border. Thus, enhancing the procedures detailed in the Act to incorporate due process will not be overly burdensome on the government. In contrast, the potential loss to the returning resident alien is great. He or she stands to lose the same privilege as a resident alien in a deportation hearing, the privilege of living in the United States. With such an important interest involved, the procedure afforded the returning resident alien in an exclusion hearing should parallel that afforded a resident alien in a deportation hearing. At a minimum, however, the exclusion hearing should provide the alien the opportunity to effectively defend his or her right to return to the United States.

Conclusion

The decision in *Landon v. Plasencia* in effect created an undefined area of immigration procedure: exclusion with due process. Because exclusion procedures in the Immigration and Nationality Act do not incorporate due process and because the *Plasencia* Court did not address the issue, the standards of due process in exclusion hearings will necessarily develop in a case-by-case manner. Immigration judges in exclusion proceedings will be required to provide due process to returning resident aliens without clear guidelines as to what specific procedures are “due.” Returning resident aliens will be unable to know their constitutional rights or to determine when due process has been violated. They will remain subject to the discretion of immigration judges in providing procedural protections unless and until Congress

179. *See supra* notes 113-31 & accompanying text.
180. *See supra* notes 142-55 & accompanying text.
181. *See supra* notes 132-41 & accompanying text.
182. *See supra* notes 156-62 & accompanying text.
specifies what procedures are to be required in a returning resident alien's exclusion hearing.

*Alaine R. Parry*

* Member, Third Year Class.