Due Process And Deportation -- Is There A Right To Assigned Counsel?

I. INTRODUCTION — THE CONSTITUTIONAL BACKDROP

Are indigent aliens caught up in the deportation mechanism guaranteed assistance of counsel? Although this question has been put to federal courts on several occasions,[1] it has not been authoritatively decided in the circuits, nor even considered by the Supreme Court. Because deportation is a civil[2] and administrative[3] process, it has been said that criminal precedent does not apply to deportation.[4] Those protections which the alien asserts in the deportation context must be asserted under the Immigration and Nationality Act[5] or under the Fifth Amendment due process clause of the Constitution.[6] The question here considered is whether and under what circumstances the right to assigned counsel for indigents in deportation proceedings is part of the meaning of the Fifth Amendment.[7]

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[1]*See* cases cited in notes 57, 62-64, 67-70, *infra.*

[2]Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952); Bilokumsky v. Tod, 263 U.S. 149, 154 (1923); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913); Fong Yue Ting v. U.S., 149 U.S. 698, 730 (1893).

[3]*See generally* GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, §§ 1.5, 1.6, 5.1, 8.2 [hereinafter cited as GORDON & ROSENFIELD]. For decisions upholding the allocation of deportation authority to the executive branch, *see* Zakonaite v. Wolf, 226 U.S. 272 (1912); Fong Yue Ting v. U.S., 149 U.S. 698 (1893).

[4]Woodby v. INS, 385 U.S. 276 (1966); Carlson v. Landon, 342 U.S. 524 (1952); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Mahler v. Eby, 264 U.S. 32 (1924); Bilokumsky v. Tod, 263 U.S. 149 (1923); Bugajewitz v. Adams, 228 U.S. 585 (1913); Zakonaite v. Wolf, 226 U.S. 272 (1912); MacKay v. Turner, 283 F.2d 728 (9th Cir. 1960). *See* Note, *Resident Aliens and Due Process,* 8 VILLANOVA L. REV. 566 (1963) (urging that all deportation procedures be brought in line with criminal procedures and safeguards).

[5]8 U.S.C. §§ 1101 *et seq.* (1970). The procedural requirements for deportation are set forth in §§ 242(b), 291-92 of the Immigration and Nationality Act, *as amended;* 8 U.S.C. §§ 1252(b), 1361-62 (1970).

[6]The Japanese Immigrant Case, 189 U.S. 86 (1903); Sung v. McGrath, 339 U.S. 33 (1950). *Sung* indicates that the test applied to deportation is an evolving one: "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least *currently prevailing standards* of impartiality." (Emphasis added.) 339 U.S. at 50. *See also* Chew v. Coulding, 344 U.S. 590 (1953).

[7]*See* Gordon, *Right to Counsel in Immigration Proceedings,* 45 MINN. L. REV.

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While early developments in the area of guaranteed counsel took place in the criminal context,[8] the right to assigned counsel now extends beyond criminal proceedings. In 1965, the Supreme Court declared that the guarantee of counsel extended to the civil commitment of a juvenile.[9] In 1973, the Supreme Court told state probation departments and parole boards that due process requires the assignment of counsel in certain classes of revocation cases.[10] These decisions make clear that the assistance of counsel may be part of the content of the phrase "due process of law" regardless of the characterization of the proceeding in question as civil or criminal, administrative or judicial. The elements to be considered go deeper than these labels.

The threshold question in any due process inquiry is a determination of the *nature* of the individual party's interest.[11] That is, does he have "life, liberty or property" at stake. The Supreme Court long ago declared that an alien who has legally entered the country, or resided here for a significant period of time, has a sufficient interest in "liberty" to be entitled to due process in deportation proceedings.[12] The more difficult question is the *extent* of the procedural protections required. This requires reference to a weighing test: does the interest of the respondent in having a particular procedural element outweigh the government interest in not providing that element?[13] In this context the right to counsel is assessed.

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875 (1961); Haney, *Deportation and the Right to Counsel*, 11 HARV. INT'L. L.J. 177 (1970) [hereinafter cited as Haney].

[8]*See, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932); Johnson v. Zerbst, 304 U.S. 458 (1937); Betts v. Brady, 316 U.S. 455 (1942).

[9]*In re* Gault, 387 U.S. 1 (1966). For the proposition that *Gault* in itself is sufficient precedent for extending a blanket right to assigned counsel to deportation proceedings, *see* Haney, *supra* note 7.

[10]Gagnon v. Scarpelli, 411 U.S. 778 (1973). The limiting factors are described in 411 U.S. at 790.

[11]
> The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is within the contemplation of the 'liberty or property' language of the Fourteenth Amendment. Fuentes v. Shevin, 407 U.S. 67 (1972). Once it is determined that due process applies, the question remains what process is due. . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands.

Morrissey v. Brewer, 408 U.S. 471, 481 (1972); *accord*, Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972); Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961).

[12]The Japanese Immigrant Case, 189 U.S. 86 (1903).

[13]
> [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 the government action.

Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961). *See also* Wolff v. McDonnell, 418 U.S. 539 (1974); Morrissey v. Brewer, 408 U.S. 471 (1972).

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II. PRESENT STATE OF THE LAW

A. RIGHT TO ASSIGNED COUNSEL GENERALLY

The Supreme Court's extension of the guarantee of counsel follows a pattern of looking to the interests of the defendant or respondent in the context of the proceeding in question. The assistance of counsel is seen to be a concomitant of the right to a fair hearing. In other words, the individual can truly be heard in certain circumstances only with the help of a professional advocate.[14] Beginning with a capital punishment case, the Supreme Court has extended legal assistance to parties with progressively "lesser" interests at stake. In *Powell v. Alabama*[15] the Court held that the due process clause of the Fourteenth Amendment required appointment of counsel in capital cases. Relying on the Sixth Amendment,[16] *Johnson v. Zerbst*[17] extended assistance to indigents in all federal criminal cases. *Betts v. Brady*[18] established a case-by-case test to determine whether state prosecutions without counsel were in compliance with due process requirements. The test involved an assessment of whether the trial measured up to "common and fundamental ideas of fairness and right."[19]

The Court spent the next two decades attempting to clarify the circumstances requiring appointment of counsel in state criminal prosecutions.[20] Although it ultimately abandoned the case-by-case approach, the Court developed criteria considered here because they provide a general framework for determining whether proceedings without counsel meet the due process test. The factors to be considered were identified as: (1) a criminal prosecution for a "grave" crime involving (2) an indigent defendant who (3) by age, education or other factors would have difficulty defending himself in the context of (4) a complicated legal proceeding.[21] In 1963, *Gideon v. Wainwright*[22] extended counsel to indigents in all criminal proceed-

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[14] This theme runs throughout the cases holding for a right to assigned counsel, but perhaps its clearest expression is in Powell v. Alabama, 287 U.S. 45, 68-69 (1932):

> What then, does a hearing include? . . . The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . Without [counsel] . . . [even the intelligent and educated layman] faces the danger of conviction because he does not know how to establish his innocence.

[15] 287 U.S. 45 (1932).

[16] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. Amend. VI.

[17] 304 U.S. 458 (1937).

[18] 316 U.S. 455 (1942).

[19] *Id.* at 473.

[20] Cash v. Culver, 358 U.S. 633 (1959); *see* cases cited therein at 636, n.6.

[21] *Id.* at 637.

[22] 372 U.S. 335 (1963).

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ings in state courts. The Court abandoned the "fundamental fairness" test and simply incorporated the Sixth Amendment right to counsel into the meaning of the Fourteenth Amendment.

In *In re Gault*,[23] the Supreme Court for the first time extended the right to counsel to a non-criminal case. *Gault* involved the civil commitment of a juvenile to a six-year term in a state "industrial school." The Court held that although the Sixth Amendment deals specifically with criminal proceedings, one must penetrate the civil "label-of-convenience" to reach the substance of the proceedings in order to determine the extent of due process guarantees.[24] Looking to the substance of juvenile commitment, beneath the theoretical *in loco parentis* role of the state, the Court perceived an adversary proceeding in which the state brought its power to bear on an individual to deprive him of liberty. In these circumstances, " . . . it would be extraordinary if our Constitution did not provide the procedural regularity and exercise of care implied in the phrase 'due process'."[25] The Court found that part and parcel of this exercise of care is the provision of counsel.

In *Argersinger v. Hamlin*,[26] the Court extended an absolute right to counsel to all criminal cases where the liberty of the defendant is at stake, thus including within the blanket rule of *Gideon* all misdemeanor prosecutions which might lead to imprisonment. Again, the Court looked to the interest at stake in the outcome and the complexity of the proceeding in question. "We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment for a brief period are any less complex than when a person can be sent off for six months or more."[27] The Court also noted a tendency toward "assembly-line" justice, and the large number of guilty pleas entered by unrepresented defendants in misdemeanor cases.[28]

B. *MORRISSEY* AND *GAGNON* — A DEPRIVATION IS A DEPRIVATION

In 1971, *Morrissey v. Brewer*[29] extended the "minimum requirements of due process" to parole revocation proceedings.[30] These

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[23] 387 U.S. 1 (1966).
[24] *Id.* at 49-50.
[25] *Id.* at 27-28.
[26] 407 U.S. 25 (1972), *overruling in part* Duncan v. Louisiana, 391 U.S. 145 (1968) (which had limited the *Gideon* rule to cases involving "serious crimes.")
[27] Argersinger v. Hamlin, 407 U.S. 25, 33 (1972).
[28] *Id.* at 35-36.
[29] 408 U.S. 471 (1972).
[30] They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of the 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

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elements included notice and a fair hearing. The issue of appointed counsel was left open in *Morrissey.*[31] *Gagnon v. Scarpelli*[32] resolved the question by holding that part of the process that is due in parole or probation[33] revocation proceedings is the appointment of counsel on a case-by-case basis. The Court reasoned that the opportunity to be heard which *Morrissey* guaranteed would be ineffectual in some situations unless counsel were present.[34]

Gagnon is the first case requiring appointment before an administrative body.[35] Again focusing on the fundamental interest of the individual parolee or probationer, which *Morrissey* described as "conditional liberty," *Gagnon* held that the loss of either probation or parole, "*[e]ven though ... not a part of the criminal prosecution* ..., is a serious deprivation requiring that the parolee (or probationer) be accorded due process."[36] (Emphasis added.) The revocation board is required to make a preliminary determination of whether counsel should be appointed. Noting that the administration of parole or probation is theoretically to help the subject reintegrate into society, the Court recognized that once revocation is recommended the relationship becomes functionally adversary. In these circumstances:

> 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 fact-finders as to the evidence relied on and the reasons for revoking parole.

Id. at 489. *Gagnon* explicitly extends these rights to probationers. 411 U.S. 778, 786 (1973).

[31] 408 U.S. at 489. Justice Douglas dissented (in part) in favor of a blanket guarantee of counsel. *Id.* at 498.

[32] 411 U.S. 778 (1973).

[33] Although there are distinctions between parole and probation revocation, the *Gagnon* opinion did not regard them as relevant to the right to counsel issue. "... [R]evocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole." 411 U.S. at 782, n.3.

[34]
> [T]he effectiveness of the rights guaranteed by *Morrissey* may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess. Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty presenting his version of a disputed set of facts where the presentation requires the examining or the cross-examining of witnesses or the offering or dissecting of complex documentary evidence.

Id. at 786-87.

[35] Although probation revocation is often accomplished before a judge, petitioner in *Gagnon* had been assigned to the custody of the Wisconsin Department of Public Welfare. The revocation of his probation was accomplished by that agency without a hearing. The Court first extended the right to a hearing to probation and then found that counsel must be furnished for the hearing.

[36] *Id.* at 780.

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> Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself.[37]

Thus, *Gagnon* in effect revives the case-by-case approach of *Betts v. Brady*.[38] In so doing, the Court re-affirms the position taken in *Gault*, that the denomination of a proceeding as civil, rather than criminal, does not in every instance dispose of the need for assigned counsel. *Gagnon* goes still further, however, to hold that while the state may properly employ an administrative process to revoke the "conditional liberty" of parole or probation, the administrative nature of the proceeding does not obviate the need for appointed counsel. The significance of this approach for deportation may be far-reaching for, like probation or parole revocation, deportation is administrative and civil in nature. As the probationer can be incarcerated because of acts or associations for which he has not been criminally convicted, so the alien can be deported for similar acts or associations.[39] The standard of proof in both cases is lower than that required in a criminal proceeding.[40] As in parole revoca-

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[37] *Id.* at 790.

[38] 316 U.S. 455 (1942).

[39] The terms of the parolee's or probationer's liberty often include

> . . . conditions restrict[ing] their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen. These conditions include forbidding the use of alcohol, association with certain classes of individuals and engaging in various specified activities such as traveling, marrying or incurring debts without permission of the parole officer.

Morrissey v. Brewer, 408 U.S. 471, 478 (1972). *See* Arluke, *A Summary of Parole Rules — Thirteen Years Later*, 15 CRIME & DELIN. 267 (1969).

The grounds for deportation set out in the Immigration and Nationality Act, § 242(a), 8 U.S.C. § 1251(a) (1970), include such non-crimes as being an anarchist, 8 U.S.C. § 1251(a)(6)(A) (1970), or being affiliated with a totalitarian part, 8 U.S.C. § 1251(a)(6)(C) (1970), becoming a "public charge" under certain conditions, 8 U.S.C. § 1251(a)(8) (1970). Other grounds are provided, *e.g.*, being a prostitute, 8 U.S.C. § 1251(a)(12) (1970), which might constitute crimes under state or local law. To be deported on these grounds, however, the alien need not have been convicted in a criminal proceeding. Instead, the alien is tried *de novo*, with the lesser procedural protections of the deportation proceeding. *See* GORDON & ROSENFIELD, *supra* note 3, at § § 4.11, 4.17, 4.18, 4.20, 4.21, 5.7.

[40] Woodby v. INS, 385 U.S. 276 (1966) ("clear, unequivocal and convincing evidence" standard for deportation). *E.g.*, in California, probation revocation requires that ". . . the grounds for revocation be clearly and satisfactorily

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tion,[41] the agency sitting in judgment in deportation is also the agency which prosecutes.[42]

There are distinctions between probation revocation and deportation. One of these is the end result, *i.e.*, incarceration versus deportation. Whether one is harsher than the other depends on the circumstances of the individual case. As discussed in more detail below, this may require that assignment of counsel in deportation be considered on a case-by-case basis, with criteria for assessing the interest of the respondent in the individual case.

Other distinctions exist. In theory, at least, probation and parole programs are custodial. That is, the administrators of the program have a stake in not sending the probationer to prison. The program mission is rehabilitation of the subject and prevention of overcrowding in the jails. Thus, the Court in *Gagnon* noted that revocation proceedings were theoretically non-adversary.[43] Likewise, the state generally does not employ attorneys on its behalf.[44] Deportation shares none of these client-centered characteristics. Deportation is frankly adversary from the outset.[45] In disputed cases, the government uses a prosecuting attorney.[46] The proceedings are taken not before a citizen panel, but before a Special Inquiry Officer who is also an attorney.[47] While the Court in *Gagnon* expressed concern about transforming a non-adversary proceeding into an adversary one, and thus losing some of the advantages of informality,[48] this

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shown; they need not be established beyond a reasonable doubt." People v. Hayko, 7 Cal. App. 3d 604, 609, 86 Cal. Rptr. 726 (1970); People v. Hawkins, 44 Cal. App. 3d 958, 119 Cal. Rptr. 54 (1975).

[41] Morrissey v. Brewer, 408 U.S. 471, 489 (1972) requires "a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers."

[42] In deportation, the alien is prosecuted and judged by the INS, although the Special Inquiry Officers who hear the cases are part of a separate division of the Service. GORDON & ROSENFIELD, *supra* note 3, at § 5.7a(3). In probation, although the authority to revoke usually rests with the trial court, prior to *Morrissey* " . . . the decision [was] shared between the trial court and the probation staff, and there [was] no clear delineation of function between the court and staff." DAWSON, SENTENCING, 142 (1969).

[43] *See* the discussion in 411 U.S. at 783-85.

[44] "The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel. . . ." *Id.* at 787.

[45] *See* GORDON & ROSENFIELD, *supra* note 3, at § § 5.7, 5.8.

[46] *Id.* at § 5.7c.

[47] "[E]fforts to improve the qualifications of special inquiry officers have resulted in placing lawyers, exclusively, in such positions." *Id.*, at § 5.7b.

[48] 411 U.S. at 787-88. *See* Gerstein v. Pugh, ___ U.S. ___, 95 S. Ct. 854, 867 (1975), where the Court considered the constitutional requirements for determining probable cause to detain a defendant charged by information with a crime. The Court determined that while a hearing is required, "[b]ecause of its limited function and its non-adversary character, the probable cause determination is not a critical stage in the prosecution that would require appointed

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should not trouble a court in regard to deportation. Nor would requiring counsel for respondents in deportation involve the additional burden of the government's supplying its own counsel, for such counsel is already supplied. These distinctions, then, appear to be arguments a fortiori in favor of assignment of counsel to the respondent in deportation.

The cases discussed above represent a constant widening of the guarantee of representation by counsel. The rubric of due process has now been employed by the Court to extend this right to juvenile commitment and to probation and parole revocation. In thus extending due process the Supreme Court has considered a number of factors regarding the fundamental fairness of the proceedings. The importance of both the administrative-judicial and civil-criminal distinctions has been minimized. These very distinctions were once thought to bar assigned counsel to deportation respondents.[49]

C. ASSIGNED COUNSEL IN DEPORTATION

That Congress has plenary power to determine substantive grounds for deportation is settled.[50] It is equally settled that in applying these substantive criteria to individuals, the alien is entitled to procedural due process under the Fifth Amendment.[51] The respondent in deportation must have notice of the charges and the evidence against him, and an opportunity to present evidence and witnesses on his own behalf, to cross-examine prosecution witnesses, and to have a written statement of findings.[52] In fact, the rights of the respondent in deportation closely parallel those now available in parole and probation revocation[53] — except for the right to assigned counsel. The judicial reluctance to give full treatment to this issue may be partly explained by the presence of an explicit statutory prohibition against

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counsel." This emphasis on the critical nature and the adversary context of the proceeding is consistent with extending the right to appointed counsel to deportation interrogations, hearings, and appeals.

[49] *See* cases cited *infra*, note 67.

[50] Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaughnessy, 342 U.S. 580 (1952). *But see* Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Power to Expel*, 68 YALE L.J. 1578, 69 YALE L.J. 262 (1959).

[51] The Japanese Immigrant Case, 189 U.S. 86 (1903); Sung v. McGrath, 339 U.S. 33 (1950); Chew v. Coulding, 344 U.S. 590 (1953); Bridges v. Wixon, 326 U.S. 135, 162 (1945) (Justice Murphy, concurring: "[T]he Bill of Rights makes no exception in favor of deportation laws or laws enacted pursuant to a 'plenary' power of the government. Hence, the very provisions of the Constitution negative the proposition that Congress in the exercise of a 'plenary' power, may override the rights of those who are numbered among the beneficiaries of the Bill of Rights.")

[52] *See* GORDON & ROSENFIELD, *supra* note 3, at § 5.9.

[53] *Compare Id.* with the quotation from *Morrissey*, 408 U.S. 471, 489 (1972), set out *supra* note 30.

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providing counsel at government expense in deportation cases.[54] Yet it is the courts who are the final arbiters of due process;[55] "[i]t is emphatically the province and duty of the judicial department to say what the law is."[56]

Several cases have discussed whether due process requires the appointment of counsel in deportation. The picture that emerges is by no means definitive. Many of the cases mention the issue but decide the case on other grounds. One fairly common ground is the presence of an uncontroverted case for deportability.[57] An early case following this line is *Madorko v. Del Guercio*,[58] where the Court held that "[f]ailure to have counsel, if error, like other errors may not be prejudicial. If there be a presumption that denial of due process is presumed prejudicial, that presumption is overcome by appellant's admissions here."[59] A more recent case in the Second Circuit specifically held the issue open, because "... [c]ounsel, even if furnished, could not have obtained any other result in the administrative proceedings."[60] The petitioner in that case had overstayed a four-day visa, which the court said, "... may be the least favorable factual framework in which to present the very serious and important constitutional claim [to a guarantee of counsel] made here."[61]

Other appeals for assigned counsel have failed, at least in part, because of the petitioner's failure to allege indigence,[62] or because the court found a valid waiver of any claim to counsel[63] or, in one

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[54] "The alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." Immigration and Nationality Act, § 242(b)(2), 8 U.S.C. § 1252(b)(2) (1970).

[55] "Although Congress may prescribe conditions for [the alien's] expulsion and deportation, not even Congress may expel him without a fair opportunity to be heard." Chew v. Coulding, 344 U.S. 590, 597 (1953).

[56] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[57] Henriques v. INS, 465 F.2d 119 (2nd Cir. 1972), *cert. denied*, 409 U.S. 1006; DeBernardo v. Rogers, 254 F.2d 81 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 816; Madorko v. Del Guercio, 160 F.2d 164 (9th Cir. 1947), *cert. denied*, 332 U.S. 764; Hee Chan v. Pilliod, 178 F. Supp. 793 (N.D. Ill. 1959); *In re* Raimondi, 126 F. Supp. 390 (N.D. Cal. 1954); Alves v. Shaughnessy, 107 F. Supp. 443 (S.D.N.Y. 1952).

[58] 160 F.2d 164 (9th Cir. 1947), *cert. denied*, 332 U.S. 764 (1948).

[59] *Id.* at 167.

[60] Henriques v. INS, 465 F.2d 119, 120 (2nd Cir. 1972), *cert. denied*, 409 U.S. 1006 (1972).

[61] *Id.* at 120, n.3.

[62] Murgia-Melendrez v. INS, 407 F.2d 207 (9th Cir. 1969); Millan-Garcia v. INS, 343 F.2d 825, 828 (9th Cir. 1967), *vacated on other grounds*, 382 U.S. 69. *See also* Henriques v. INS, 465 F.2d 119 (2nd Cir. 1972) (expressing doubt as to petitioner's indigence).

[63] Tupacyupanqui-Marin v. INS, 447 F.2d 603 (7th Cir. 1971); Murgia-Melendrez v. INS, 407 F.2d 207 (9th Cir. 1960); Millan-Garcia v. INS, 343 F.2d 825 (9th Cir. 1965); Burr v. INS, 350 F.2d 87 (9th Cir. 1965), *cert. denied*, 383 U.S. 915; Mustafa v. Pederson, 207 F.2d 112 (7th Cir. 1953).

case,[64] because the petitioner had been represented at several stages in the administrative process and was herself an attorney. These facts would appear to raise problems of petitioner's standing to assert a right to assigned counsel claim.[65] In the case where the petitioner was an attorney, the court recognized the problem as one of standing but saw her contention as raising "grave issues in the abstract."[66] In several cases, the courts have discussed the issue in spite of the petitioner's standing problem. These discussions have relied heavily on the civil-criminal distinction to reach a negative conclusion.[67] As we have seen, this analysis can no longer be considered to be of sufficient depth in light of *Gault* and *Gagnon.*

Finally, in some cases the courts have been able to confront the issue more squarely. In *Castro-Louzan v. Zimmerman,*[68] the petitioner showed that he was alone and friendless, with $30.00 in his pocket, when he was apprehended and subjected to deportation proceedings. The district judge, while not holding that the government had a duty to provide counsel, vacated the Special Inquiry Officer's finding of deportability to allow a new hearing with volunteer counsel.

> Where . . ., as in this case, important facts having a very distinct bearing on the outcome of the case were not presented due to the absence of counsel, I have no hesitancy in finding that it did not meet the requirements of a fair hearing.[69]

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[64]Carbonell v. INS, 460 F.2d 240 (2nd Cir. 1972).

[65]The notion of standing relates to whether the individual plaintiff is a proper party to assert the issue in question. In general, the Supreme Court has required that petitioners allege some injury as part of the standing requirement. *Cf.* Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974); Sierra Club v. Morton, 405 U.S. 727 (1972). It would seem that clear deportability, failure to allege or to prove indigence, and clear capacity for self-representation would all raise questions as to whether the alien was in fact injured by the lack of counsel. The question of waiver is more problematic. The waiver of a constitutional right " . . . is ordinarily an intelligent relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1937). *See* Von Moltke v. Gillies, 332 U.S. 708 (1948) (plurality opinion) (requiring full understanding of the implications of the waiver). In raising the issue of a right to assigned counsel in deportation, there could be no valid waiver unless the respondent was informed of such a right and intelligently waived it.

[66]Carbonell v. INS, 460 F.2d 240, 242 n.5 (2nd Cir. 1972).

[67]Tupacyupanqui-Marin v. INS, 447 F.2d 603 (7th Cir. 1971); Dunn-Marin v. INS, 426 F.2d 894 (9th Cir. 1970); Murgia-Melendrez v. INS, 407 F.2d 207 (9th Cir. 1969). *Cf.* Lavoie v. INS, 418 F.2d 732 (9th Cir. 1969), *cert. denied,* 400 U.S. 854 (1970); Ah Chiu Pang v. INS, 368 F.2d 637 (3rd Cir. 1966), *cert. denied,* 386 U.S. 1037. The primary focus of these cases is on a Sixth Amendment argument for the assignment of counsel, wherein petitioners have analogized deportation to criminal punishment. It does not seem that the courts have fully considered the Fifth Amendment due process claim.

[68]94 F. Supp. 22 (E.D. Pa. 1950).

[69]*Id.* at 26. *See also* Rose v. Woolvine, 344 F.2d 993 (4th Cir. 1965) (hearing unfair; petitioner represented by a "travel agent"); Roux v. Commissioner, 203

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The Fifth Circuit took a similar approach in the most recent case to discuss the issue.[70] Finding the facts unclear as to the petitioner's indigency, the court remanded the case to the Immigration and Naturalization Service (INS) for taking evidence on that issue. As an alternative, the INS was allowed to vacate its own order of deportation and permit the alien to appear through volunteer counsel.[71]

The issue of whether due process requires appointment of counsel in deportation is clearly a live controversy at the present time. Where the issue has been presented in the context of a deportation order against an indigent respondent whose case raises serious issues as to deportability, the courts have granted relief. Thus far, they have relied on volunteer agencies to provide counsel.[72] Other, less sympathetic, cases have denied the claim, usually by reference to the statute, or by relying on the civil-criminal distinction.[73] Because they do not reach the merits of the due process claim, these grounds can no longer be said to be dispositive. Instead we must turn to the balancing tests provided in *Morrissey* and *Gagnon.*

III. CRITERIA REQUIRING ASSIGNMENT — DOES DEPORTATION FIT?

The first common characteristic of the assigned counsel cases is that the proceeding is initiated by the government or is in some way ancillary to a government-initiated proceeding. The second is that to proceed against the individual lacking counsel is considered a violation of either the specific constitutional provision of the Sixth Amendment, or contrary to "the fundamental principles of liberty and justice" which define the boundaries of due process. Since deportation is clearly a government proceeding against an individual alien, these boundaries of "fundamental right and fairness" must be explored in the deportation context. Already outlined are some of the factors involved: (a) the weight of the interests the respondent has at stake, (b) the respondent's ability to defend without counsel, taking into account (1) his age, education, experience and familiarity with the law as related to (2) the complexity of the law and proce-

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F. 413 (9th Cir. 1913) (hearing unfair; petitioner misled as to need for counsel); Bosny v. Williams, 185 F. 598 (S.D.N.Y. 1911) (hearing unfair; plaintiff "persuaded" not to retain counsel).

[70] Rosales-Caballero v. INS, 472 F.2d 1158 (5th Cir. 1973).

[71] *Id.* at 1160.

[72] *Id.*; Castro-Louzan v. Zimmerman, 94 F. Supp. 22 (E.D. Pa. 1950). It seems doubtful that volunteer counsel could consistently handle the case-load. *See* Johnson v. Avery, 393 U.S. 483, 491 (1968) (striking down a prohibition on legal services rendered by "jailhouse lawyers") (concurring opinion by Justice Douglas, *citing* several articles on the over-load of volunteer legal service agencies).

[73] *See* cases cited *supra* note 67.

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dure itself. Against these criteria must be weighed (c) the interest of the state in proceedings without counsel.[74]

A. INTEREST OF THE ALIEN

Little sociological data exist on what happens to deported aliens after they leave the United States, or on the effects of deportation on the alien's family and property interests in this country.[75] Nevertheless, one need not have an over-active imagination to conclude, as the Courts have at various times, that deportation amounts to "banishment or exile,"[76] a "penalty,"[77] or a "drastic sanction, one which can destroy lives and disrupt families."[78]

Some of the potential consequences of deportation are either explicit or implicit in the Immigration and Nationality Act itself. The deported alien, if again found within the territory of the U.S. without permission of the Attorney General, becomes subject to a felony charge carrying a two-year prison term and a $1,000.00 fine.[79] The statute recognizes that the alien may not be welcome in the country of destination and provides for discretionary relief where the alien can demonstrate a likelihood of political, racial or religious persecution in that country.[80] Deportation on most of the commonly applied grounds also carries with it a forfeiture of Social Security en-

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[74] *C.f., e.g.,* Wolff v. McDonnell, 418 U.S. 539 (1974). Discussing due process in the context of prison disciplinary hearings the Court said,

> In striking the balance that the Due Process Clause demands, however, we think the major consideration militating against adopting the full range of procedures suggested by *Morrissey* for alleged parole violators is the very different stake the State has in the structure and content of the prison disciplinary hearing.

Id. at 561.

[75] For an account of some historical interest, which includes discussion of the fate of the Palmer era deportees and the families they left behind, *see* PANUNZIO, THE DEPORTATION CASES OF 1919-1920 (1921) (reprinted by DaCapo Press, N.Y., 1970).

[76] Costello v. INS, 376 U.S. 120, 131 (1964); Delgadillo v. Carmichael, 332 U.S. 338 (1947).

[77] "That deportation is a penalty — at times a most serious one — cannot be doubted." Bridges v. Wixon, 326 U.S. 135, 154 (1944); *accord,* Tan v. Phelan, 333 U.S. 6, 10 (1948).

[78] Gastelum-Quinones v. Kennedy, 374 U.S. 469, 479 (1963).

[79] Immigration and Nationality Act, § 276; 8 U.S.C. § 1326 (1970). *Cf.* Pena-Cabanillas v. U.S., 394 F.2d 785 (9th Cir. 1968) (criminal intent not required).

[80] "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion. . . ." Immigration and Nationality Act, § 243(h); 8 U.S.C. § 1253(h) (1970). The statute also recognizes that the alien's country of choice, or his country of origin or birth, may not accept him. An elaborate hierarchy of preferred destinations are set out, ending with " . . . any country which is willing to accept such alien into its territory." Immigration and Nationality Act, § 243(a), 8 U.S.C. § 1253(a) (1970).

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titlements.[81]

The length of the alien's tenure in the U.S. prior to commencement of deportation proceedings is one indicator of the probable hardship involved. A long tenure in this country will generally have the effect of severing ties with the country of destination for the deportee and allowing him or her to put down important roots here. Extended residence is no bar to deportation.[82] The application of substantive grounds for deportation is not subject to a statute of limitations, and Congress may give ex post facto application to such laws.[83] One study,[84] covering 320 deportation cases handled by a volunteer alien-assistance organization in New York, showed that of the 320, seven percent had lived in the U.S. for longer than 30 years, fourteen percent between 21 and 30 years, and nine percent between 11 and 20 years. More than half of the 320 respondents were married to American citizens and about half had one or more children living here.[85] While these cases are of the kind most likely to result in a maximum deprivation of personal and family interests in liberty, significant ties and patterns of life could be established in even shorter periods of time and without immediate family relationships.

B. ABILITY OF THE ALIEN TO DEFEND

1. CAPACITY FOR SELF-REPRESENTATION

An important factor in assessing the need for assigned counsel in any legal proceeding is the capacity of the individual to represent himself.[86] Thus, in the earliest case mandating assignment of counsel, the Supreme Court emphasized that the defendants were youthful, uneducated, far from home, and amidst a hostile public.[87] Where an indigent alien is involved, barriers of language, unfamiliarity with our institutions, lack of education, and friendlessness may be present. While cases may arise in which an alien may effectively represent himself, they will be rare, particularly if the individual is so poor that he cannot afford representation. Thus, early studies indicate that the alien who proceeds with counsel is more likely to avoid

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[81] 42 U.S.C. § 402(n) (1970); Flemming v. Nestor, 363 U.S. 603 (1960) (constitutionality upheld); *see* Note, 45 MINN. L. REV. 1090 (1961).
[82] *See* GORDON & ROSENFIELD, *supra* note 3, at § 4.2; Galvan v. Press, 347 U.S. 522 (1954) (36-year resident).
[83] Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaughnessey, 342 U.S. 580 (1952).
[84] COMMON COUNCIL FOR AMERICAN UNITY, THE ALIEN AND THE IMMIGRATION LAW: A STUDY OF 1446 CASES ARISING UNDER THE IMMIGRATION AND NATURALIZATION LAWS OF THE UNITED STATES (1958).
[85] *Id.* at 164.
[86] *See, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932); Gagnon v. Scarpelli, 411 U.S. 778 (1973).
[87] Powell v. Alabama, 287 U.S. 45 (1932).

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deportation than one without counsel.[88]

2. *COMPLEXITY OF THE PROCESS*

The ability of an individual to represent himself must always be measured against the complexity of the legal proceeding itself. An examination of the immigration statute leaves no doubt that the immigration law and the procedures governing it are extremely complicated.[89] The Immigration and Nationality Act enumerates 17 classes of offenses which may result in deportation, many of which contain numerous sub-classes along with a variety of "terms of art."[90] The interpretation of these categories has often proved troublesome for commentators and courts;[91] for the indigent alien it will often be impossible.

The procedures that confront the prospective deportee will be no easier to navigate than the substantive provisions of the statute. The deportation proceeding is a peculiar admixture of due process formality and the more relaxed rules of administrative adjudication.[92] It is significant that the government uses a trial attorney to prosecute its side of the case and that the hearings are conducted before a Special Inquiry Officer who is also an attorney.[93] Applications for discretionary relief from deportation may be heard before the same officer who has ruled on deportability and may also be opposed by the prosecuting attorney.[94] The eligibility requirements for discre-

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[88] Gordon, *Right to Counsel in Immigration Proceedings*, 45 MINN. L. REV. 875 n.23 (1961).

[89] "The Immigration Statute sets forth some 700 grounds of deportation, if you itemize them and take them separately. . . . Our Statute is the longest, the worst, the most ambiguous, the most complicated and illogical statute in the world." Address by J. Wasserman, 3 IMMIGRATION AND NATURALIZATION LAW INSTITUTE 309 (1970).

[90] Immigration and Nationality Act, § 241(a)(1)-(17); 8 U.S.C. § 1251(a)(1)-(17) (1970). *See* GORDON & ROSENFIELD, *supra* note 3, at § 5.

[91] *See* GORDON & ROSENFIELD, *supra* note 3, at § 5.

[92] *Id.* at § § 5.8a-8d. It is not the purpose here to catalogue the vagaries of the process, the fine distinctions of the law, or the necessary references to somewhat hazy standards of fairness which characterize deportations. These are set out in detail in other works and criticisms: *see* Gordon, *Due Process of Law in Immigration Proceedings*, 50 A.B.A.J. 34 (1964); Note, *Resident Aliens and Due Process*, 8 VILLANOVA L. REV. 566 (1963); Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien*, 68 YALE L.J. 1578, 69 YALE L.J. 262 (1959); Wasserman, *The Universal Ideal of Justice and Our Immigration Laws*, 34 NOTRE DAME LAWYER 1 (1958); Rosenfield, *Necessary Administrative Reforms in the Immigration and Nationality Act of 1952*, 27 FORDHAM L. REV. 145 (1958); Maslow, *Recasting Our Deportation Law*, 56 COLUM. L. REV. 309 (1956); PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM SHALL WE WELCOME (1953).

[93] *See* GORDON & ROSENFIELD, *supra* note 3, at § 5.7c; Williams, *The Trial Attorney — His Functions and Responsibilities*, 12 I.N. REPORTER 47 (1964).

[94] GORDON & ROSENFIELD, *supra* note 3, at § 4.8e. *Cf.* MacKay v. Alexander, 268 F.2d 35 (9th Cir. 1959), *cert. denied*, 362 U.S. 961 (upholding this practice).

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tionary relief are also extremely complicated and subtle.[95]

One should note " . . . a marked trend to require increasing formality in the deportation process, particularly in dealing with citizenship claimants and long-time residents."[96] This new formalism must be seen to cut both ways. The respondent with an attorney will carefully conserve the advantages of formality. Yet, the respondent proceeding *in propria persona* may be confused by formality, intimidated by his adversaries, unable to marshall witnesses and proof, unaware of the availability of discretionary relief or the need to submit evidence pertaining thereto during the hearing. The idea of seeking judicial review before the Circuit Courts of Appeals,[97] or by habeas corpus before the district judge,[98] even if presented to the alien, will often be foreign to his experience. The probable consequence of these problems is a large number of "guilty pleas" and voluntary submission to deportation in spite of available defenses — precisely the outcome which offended the Court in *Argersinger v. Hamlin.*[99]

C. WEIGHT OF THE GOVERNMENT INTEREST

Against the substantial interest of the indigent alien, with his apparent inability to defend himself, must be measured the government interest in not providing counsel.[100] Clearly, the government has an interest in economy.[101] Yet, every extension of the right to counsel has involved government expense. This consideration may indicate a need to limit the right in some way,[102] but it should not bar the assertion of a due process claim. Another significant government interest in maintaining summary procedures is that of discouraging certain types of illegal entry.[103] Sound policy reasons exist for not extending a guarantee of counsel to every class of deportation re-

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[95] *Cf.*, GORDON & ROSENFIELD, *supra* note 3, at § 7; Comment, *Alternatives to Deportation: Relief Provisions of the Immigration and Nationality Act*, this volume.

[96] *Id.* at § 5.1.

[97] Immigration and Nationality Act, § 106(a); 8 U.S.C. § 1105(a) (1970).

[98] Habeas corpus is available only when there is some form of restraint upon the petitioner's liberty.

[99] 407 U.S. 25, 35 (1972).

[100] Wolf v. McDonnell, 418 U.S. 539 (1974); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972); Morrissey v. Brewer, 408 U.S. 471 (1972); Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961).

[101] There would be government expense involved not only in providing counsel; the presence of counsel for the alien would probably require greater preparation by the government attorney, and a larger number of cases involving full hearings and appeals.

[102] *See* the discussion, *infra*, of possible criteria for limiting the right to assigned counsel.

[103] *See* discussion, *infra;* GORDON & ROSENFIELD, *supra* note 3, at § § 6.3, 9.13.

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spondent, as will be discussed below. Again, these government interests can be protected by a limited guarantee of counsel.

It may be asserted that the government has an interest in the expeditious deportation of "undesirables."[104] The question of "undesirability" is determined at the conclusion of the deportation process, however, and such an argument presumes the outcome. In fact, the government has a strong interest not in casting its net broadly, but rather in exercising that degree of care which justice demands. Justice is a governmental interest which calls for procedural regularity and for a right to be heard. This right is made real by the assistance of counsel.[105]

In addition to the inherent interest of the government in assuring fairness, fair deportation practices would appear to serve still another interest. The United States has come to play its role in a community of nations which is increasingly critical of U.S. policy. Our immigration and deportation policies are testimony to our national character. As one group of analysts put it:

> The immigration law is a yardstick of our approval of fair play. It is a challenge to the tradition that American law and its administration must be reasonable, fair, and humane. It betokens the current status of the doctrine of equal justice for all, immigrant or native.[106]

On balance, then, deportation appears to fit within the criteria the courts set forth in discussing the right to assigned counsel. The stakes for the individual may be substantial, his ability to represent himself limited, and the interest of the government in not providing counsel seems ambiguous. The question remains: What, if any, are the limits of this right?

IV. GUIDELINES FOR THE RIGHT TO COUNSEL IN DEPORTATION

In the first case to broadly extend due process guarantees to aliens in deportation, the Supreme Court left aside

> . . . the question whether an alien can rightfully invoke the due process clause of the Constitution who has entered the country

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[104] The historical background of our immigration and deportation policies, and in particular the Cold War context of the Immigration and Nationality Act, suggest that due process was not foremost among the concerns of their framers. *See* citations *supra* note 92. Hopefully, changed circumstances may now permit a re-examination of priorities.

[105] One element of this government interest ought to be in the elimination of misleading practices by "immigration consultants." These are persons who are not lawyers, but who set themselves up as experts on immigration and deportation, rendering advice in exchange for a substantial fee. *See* Comment, *Immigration Consultants*, this volume; Miller, *Beware of Coyotes*, 47 CAL. ST. B.J. 237 (1972).

[106] PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM SHALL WE WELCOME, *xiii* (1953).

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> clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population, before his right to remain is disputed.[107]

These two elements, clandestine entry[108] and brevity of stay,[109] are perhaps the most significant grounds for distinction among deportation respondents. The rationale for making such distinctions turns upon the weighing test used to define the scope of due process rights. In this context the interest of individual deportation respondents is variable; likewise, the government interest in more summary procedures is also variable. Clandestine entry indicates a strong government interest in maintaining the integrity of our borders; brevity of stay indicates a relatively weak individual interest in remaining. The following discussion assumes that the right to assigned counsel is present in the deportation process but that this right is limited by (a) the comparatively weak interest assertable by certain classes of aliens and (b) by criteria similar to those imposed by the Court in *Gagnon*.

A. CLASSES OF RESPONDENTS[110]

Historically, certain classes of illegal entrants have been treated in a more summary way than others, the foremost examples being alien crewmen who jump ship,[111] and stowaways.[112] Workers entering illegally from Mexico and, to a lesser extent, from Canada are also a significant problem. The large numbers of such entrants and their amenability to voluntary departure would seem to weigh against providing counsel in the majority of cases.[113] Another class of aliens

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[107] The Japanese Immigrant Case, 189 U.S. 86, 100 (1903).
[108] Of 655,968 deportable aliens apprehended in fiscal 1972-73, 84% entered illegally at points other than a port of entry. *Hearings on Legislative Oversight of the Immigration and Nationality Act Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 22, at 102 (1973) [hereinafter cited as *Hearings on Legislative Oversight of the Immigration and Nationality Act*].
[109] Of 655,968 deportable aliens apprehended in fiscal 1972-73, over one-half were apprehended within 72 hours of entry. 44,130 had been in the United States for longer than one year. *Id.* at 128.
[110] This discussion is not intended to be exhaustive, but rather suggestive of appropriate standards for classifying the interests presumable from the status of the respondents. Nor would the fact of a given status operate conclusively to grant or deny a right to assigned counsel. Instead, the classification of the relative weight of the alien's interest must be read in conjunction with the standards relating to colorable defenses and claims for relief, discussed *infra*.
[111] Immigration and Nationality Act, § § 251-57; 8 U.S.C. § § 1281-87 (1970). Congress enacted these special provisions relating to alien crewmen because it concluded that shore leave privileges were too often abused. S. REP. NO. 1515, 81st Cong., 2d Sess., p. 550; GORDON & ROSENFIELD, *supra* note 3, at § 6.3. *Cf.* D'Istria v. Day, 20 F.2d 302 (2nd Cir. 1927).
[112] The Immigration and Nationality Act, § 273(d); 8 U.S.C. § 1323(d) (1970), contains special penalties for carriers of stowaways. *See* GORDON & ROSENFIELD, *supra* note 3, at § § 2.34, 3.13b(3), 9.13.
[113] In fiscal 1972-73, the number of deportable Mexican aliens apprehended by

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for whom deportation without the assistance of counsel might be presumed to comply with due process is aliens present on temporary visas who have clearly violated the conditions of their stay.[114] These criteria, like the others suggested, should not be seen as conclusive. For example, a student who has overstayed a student visa but who makes a colorable claim that he or she would be subject to persecution if deported should be provided with counsel.

Just as it appears that certain classes of aliens are presumably not entitled to counsel, other classes present interests sufficient to support a presumption of entitlement. These would include persons asserting a colorable claim to U.S. citizenship,[115] to legal admission for permanent resident status,[116] or to admission under a special refugee program. The refugee's interest would derive primarily from the possibility of persecution should he be deported back to his country of origin.[117] Because he may have substantial claims for discretionary relief, an alien who has been in the United States for a period of time sufficient to become a part of our population should also be entitled to representation, regardless of the terms of his entry.

B. FURTHER DISTINCTIONS — DEFENSES AND CLAIMS TO RELIEF

The *Gagnon* majority held that before appointment of counsel would be required in probation revocation proceedings, the probationer must make " . . . a timely and colorable claim *(i)* that he has not committed the alleged violation . . ., or *(ii)* that . . . there are substantial reasons which justify or mitigate the violation and make revocation inappropriate . . ."[118] The revocation board is required to determine whether either of these conditions exist and whether the respondent would be able to represent himself in the proceeding.[119]

U.S. authorities was 576,823. Of these, 480,588 were apprehended by the Border Patrol Sector. Mexican aliens represented 88% of the total number of deportable aliens (655,968) apprehended in 1972-73. Eighty-four percent (551,328) of the total number of aliens apprehended had entered clandestinely at other than ports of entry. 542,244 Mexicans and 4,034 Canadians entered clandestinely. *Hearings on Legislative Oversight of the Immigration and Nationality Act, supra* note 108, at 102, 124-30.

[114] *Cf.* Henriques v. INS, 465 F.2d 119 (2nd Cir. 1972) (court unsympathetic to violator of four-day visa).

[115] The Immigration and Nationality Act, by its terms, applies only to aliens. A citizen cannot legally be deported, but citizenship is not always easily proved.

[116] *Cf.* GORDON & ROSENFIELD, *supra* note 3, at § 2.17-2.27.

[117] *Id.* at § 7.8.

[118] Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

[119] *Id.* at 791. The *Gagnon* decision indicates that the respondent's ability to defend would be weighed by the parole or probation revocation board in those cases where satisfaction of the "colorable claim" criteria is doubtful. It would seem that deportation will generally involve issues of greater complexity than probation revocation because of the statutory backdrop and the precedential use

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This determination and the reasoning behind it are to be entered into the record.[120] These criteria and procedures appear to be appropriate for deportation as well. The first is relatively straightforward: the deportation respondent who presents a colorable defense to the charge of deportability would be provided with counsel to assist in the development and presentation of that defense. The reasoning behind a decision not to provide counsel should be entered on the record.

The second criterion is of great significance when applied to deportation. Under this test, regardless of the respondent's deportability, the respondent would be entitled to the assistance of counsel if he could assert a colorable claim to the various forms of discretionary relief provided.[121] These forms of relief are numerous and complex. They usually require an affirmative showing by the respondent, a timely application and a development of facts showing eligibility.[122] The development of the respondent's equities in remaining in the United States would, in many cases, greatly benefit from the assistance of counsel. This assistance should not be cut off at the stage of defense to deportability since discretionary relief is an integral part of the statutory scheme, designed primarily to alleviate the harsh effects of the deportation process.[123]

C. STAGES OF THE PROCEEDING

The foregoing discussion has focused on the right to assistance of counsel in the deportation hearing itself. Left to one side are questions about other stages, principally pre-hearing investigations, administrative appeal and judicial review. With regard to appeal and judicial review, no reasons appear why counsel should not be provided according to the same criteria applied at the hearing stage, at least to the extent that appeal and review are available as of right.

The pre-hearing interrogation is more problematic. Certainly many of the same considerations which governed the famous decisions of *Escobedo v. Illinois*[124] and *Miranda v. Arizona*[125] are at play in the

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of both judicial and administrative decisions. These greater complexities apply both to initial defenses to deportability and to claims for discretionary relief.

[120] *Id.* at 791.

[121] For a catalogue of these provisions and a description of the prerequisites of each, *see* GORDON & ROSENFIELD, *supra* note 3, at § 7.

[122] *Id.;* Comment, *Alternatives to Deportation: Relief Provisions of the Immigration and Nationality Act*, this volume.

[123] *Id. See* Gordon, *Ameliorating Hardships Under the Immigration Laws*, 367 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 85 (1966).

[124] 378 U.S. 478 (1964).

[125] 384 U.S. 436 (1966).

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deportation context.[126] The Immigration Service would appropriately be charged with a duty to provide counsel as soon as it becomes evident that the alien fits within the criteria described above: *i.e.*, that the person being interrogated is within a class which indicates a substantial interest in remaining, or that the alien has a substantial defense, or can assert eligibility for discretionary relief.

V. CONCLUSION

The potential harshness of deportation has caused comment and concern among courts, scholars, and practitioners. Nevertheless, the courts have resisted efforts to assimilate the procedural protections available in criminal proceedings into the deportation context. The prospective deportee has had to look to the Fifth Amendment due process clause for assurance of fairness. This article has accepted the thesis that deportation is non-criminal, and that the Sixth Amendment guarantee of counsel does not directly apply. Instead, it is found that the recent evolution of the due process concept has incorporated a right to assigned counsel where the individual has much at stake, and counsel is needed for the individual to be heard in a meaningful way. These basic considerations, when applied to specified types of deportation cases, indicate a due process requirement that counsel be assigned.

Robert N. Black

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[126] The relevance of *Escobedo* and *Miranda* to deportation is discussed in Haney, *supra* note 7.

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