IN DEFENSE OF THE ALIEN

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Who are all these friends,
all scattered like dry leaves?
The radio says they are just deportees.
Is this the best way we can grow our big orchards?
Is this the best way we can grow our good fruit?
To fall like dry leaves to rot on my topsoil
And be called by no name except deportees?**

I. INTRODUCTION

Each year, the number of aliens entering this nation increases dramatically.[1] Many of these immigrants enter legally after undergoing the painstaking process of securing valid immigration documents from American consulate offices throughout the world. An even greater number of aliens, however, enter this country surreptitiously. The alien, whether here legally or illegally, is subject to all of the various civil and penal laws of the land; however, due to the alien's peculiar status within the United States, a criminal conviction may result in either a loss of the alien's right to be in this country, or should he have no such right, in permanent deportation.

In 1975 alone there were over 14,000 prosecutions for violations of the Immigration and Nationality Act.[2] This federal legis-

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** *Plane Wreck at Los Gatos (Deportee)*, Lyrics by Woodie Guthrie (1963).

1. According to the Immigration and Naturalization Service [hereinafter cited as INS] 667,689 aliens illegally entered the United States in fiscal 1975 while over seven million entered with valid immigration documents for temporary visits or for a permanent move to this country. Of the latter, 386,194 were admitted to establish their permanent legal residence here. Department of Justice 1975 ANNUAL REPORT, Immigration and Naturalization Service, 2-9 (1975) [hereinafter cited as [ANNUAL REPORT]].

2. *Id.* at 136. The Immigration and Nationality Act [hereinafter cited as the Act] may be found in large part in 8 U.S.C. § 1101 *et seq.* (1970). The reader will note the dual citation procedure between the Act and Title 8 of the United States Code. *See generally*, IMMIGRATION LAWS OF THE UNITED STATES (3d ed. E. Harper & R. Chase 1975).

lation was enacted in part to provide criminal penalties for those attempting to enter or to aid others in entering the United States illegally. The criminal statutes, together with the legal defenses available to those prosecuted under their provisions, are the subject of this paper. In discussing the substantive offenses as well as the criminal procedures which are unique in the defense of the alien, an underlying theme emerges: in addition to the obvious ramifications of a federal or state criminal prosecution of an alien, there will almost always be adverse administrative consequences. If the defendant is an illegal alien, in addition to any criminal punishment meted out, the administrative consequence may be deportation, exclusion, or a voluntary return to the alien's native country.[3] If the alien is lawfully in the country and criminally prosecuted, the administrative consequence of a conviction may range from no action at all to the ultimate administrative sanction, deportation and a revocation of the documents entitling the alien to lawfully reside within the United States.

The Act and its accompanying regulations[4] provide detailed requirements concerning the entry of aliens into the United States. In addition, once within this nation, the alien must abide by rules and regulations concerning continued presence within the country and, if desired, the process of naturalization. While it is not necessary for a criminal law practitioner defending an alien charged with a criminal offense to be aware of the sundry administrative rules construing the Act, a thorough knowledge of the possible administrative consequences of the prosecution is essential. Thus, the relationship between the criminal offenses and administrative procedures will be a matter of discussion throughout this paper. The paper first discusses the major crimes in the Act relevant to the alien, their essential elements, and suggestions to be considered in a defense to the charge. The second half of the paper will discuss the important procedural matters which must be considered in the defense of the alien.

II. SUBSTANTIVE OFFENSES

A. *Crimes of Entry*

In 1975 a total of 766,600 deportable aliens were apprehended.[5] The vast majority of these aliens, 87 per cent, entered illegally. Ninety-nine per cent of this latter group surreptitiously

3. In fiscal 1975, 23,438 aliens were deported from the United States. ANNUAL REPORT, *supra* note 1, at 19.

4. The regulations for lawful entry may be found at 8 C.F.R. § 211-214. *See also* § 211-224 of the Act, 8 U.S.C. § 1181-85, 1201-1204 (1970).

5. ANNUAL REPORT, *supra* note 1, at 13.

entered across the Mexican border.[6] The government has asserted that only about three per cent of the illegal aliens apprehended in this country are prosecuted.[7]

1. *Illegal Entry, 8 U.S.C. § 1325.*[8] Section 275 of the Act makes it unlawful for any alien to: enter the United States at any time or place other than as designated by immigration officers, to elude examination, or to obtain entry by a willfully false or misleading representation or by concealment of a material fact. Upon the commission of the first offense of illegal entry, punishment is fixed at not more than six months imprisonment and/or a fine of not more than $500. For a subsequent conviction for this offense, maximum punishment is set at two years and a fine of not more than $1000 or both.

By far the most important consideration in defending a charge of illegal entry is whether or not an "entry" has been made. Section 101(a)(13) of the Act defines an entry as any "coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise . . ."[9] The cases which have interpreted illegal entry statutes have stated that both physical presence within the territorial limits of the United States and "freedom from official restraint" are necessary to effect an entry into the United States.[10] Thus, in *United States v. Oscar*, 496 F.2d 492 (9th Cir. 1974), it was held that

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6. *Id.*

7. Almeida-Sanchez v. United States, 413 U.S. 266, 278 (1973). As will be discussed below, a large number of these deportable aliens are held in custody either to be material witnesses in criminal prosecutions against alien smugglers or to await processing out of the nation by way of deportation or voluntary return. Thus, in 1975, 213,026 deportable aliens were incarcerated in INS or other jail-type institutions. Mexican aliens accounted for 93.2% of this total. ANNUAL REPORT *supra* note 1, at 19.

8. § 1325. Entry of alien at improper time or place; misrepresentation and concealment of facts.

Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than $500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than $1000, or both.

9. 8 U.S.C. § 1101(a)(13) (1970).

10. United States v. Vasilatos, 209 F.2d 195, 197 (3d Cir. 1954) (Greek seaman deemed to illegally enter Philadelphia after cleared by INS agent due to false representation despite never leaving the ship: physical presence existed "when, and even before, the ship arrived in Philadelphia." *Id.*); Lazarescu v. United States, 199 F.2d 898 (4th Cir. 1952) (entry occurs when alien's ship enters port and he is cleared by INS after misrepresenting his status). The definition of entry in this area should not be confused with the definition of entry where the issue is whether a permanent resident alien has made a meaningful departure from the United States to warrant labeling the alien's return an entry. *See* Section V(c) in text.

aliens with no right to enter the United States did not effect an entry when they were driven to a border port of entry and were arrested after attempting to gain entry by declaring themselves legal residents of the United States. They were apprehended at the port of entry and thus were within the territorial limits of the United States, but not free from official restraint. Since 8 U.S.C. § 1325 has no attempt provision, the actions of the alien did not fall within the entry provision of the statute.[11]

Because of the fact that of "the approximately half million illegal aliens apprehended in fiscal 1973, virtually none were prosecuted . . ."[12] one must explore the possibilities of discriminatory prosecution under the statute. INS statistics[13] and cases discussing the illegal entrant issue[14] indicate that there is usually some aggravating factor present such as assisting other aliens illegally entering or using counterfeit crossing cards, before a prosecution for illegal entry ensues. If an alien who merely entered illegally is apprehended and prosecuted under this section, a careful examination of the basis of the prosecuction must be made to determine why this particular alien has been criminally prosecuted rather than administratively handled, as are the vast majority of other simple illegal entry cases.[15]

Proof of alienage is essential to a prosecution for illegal entry. This may be established inferentially by proof that the defendant was in possession of false border crossing documents and used

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11. The Oscar case involved a defendant charged with aiding and abetting the illegal entry of aliens under 8 U.S.C. § 1325 and 18 U.S.C. § 2 by driving the aliens to the port of entry. However, to prove the defendant an aider and abettor, the prosecution must prove actual commission of the underlying offense—here, illegal entry. Since the aliens were arrested before the official restraints were lifted, no entry took place. As such, the defendant could not be convicted under an aiding and abetting theory. A concurring opinion found that a conspiracy, 18 U.S.C. § 371 (1970), to violate § 1325 would have been an "invulnerable" theory of prosecution. 496 F.2d 494. *See also* In re Dubbiosi, 191 F. Supp. 65 (E.D. Va. 1961) (no entry of seaman where landing permit issued but ship still under guard; therefore, deportation for aiding entry of illegal aliens improper); *cf.*, United States v. Martin-Plascencia, 532 F.2d 1316 (9th Cir. 1976) (entry occurs when alien scales border fence near port of entry; "official restraint" doctrine irrelevant under these facts).

12. United States v. Baca, 368 F. Supp. 398, 408 (S.D. Cal. 1973).

13. *See* notes 5 through 7 *supra* and accompanying text.

14. In United States v. Baca, 368 F. Supp. 398 (S.D. Cal. 1973), United States Magistrate Harry McCue testified that virtually no prosecutions of illegal entrants are brought by the United States Attorney's office in the Southern District of California under 8 U.S.C. § 1325 unless there are aggravating factors such as numerous previous voluntary departures or driving a vehicle with other illegally entering aliens as passengers. (Reporter's Transcript 464-70).

15. *Cf.* United States v. Steele, 461 F.2d 1148 (9th Cir. 1972) (Defendants singled out for prosecution for census form violations because they had publicly spoken against the census; proof that others who had not spoken out but had violated the same statute were not prosecuted caused reversal of conviction for discriminatory prosecution); *see also* United States v. Oaks, 508 F.2d 1403 (9th Cir. 1974) and Murgia v. Mun. Court, 15 Cal. 3d 286 (1975).

them in gaining entry.[16] A more difficult problem arises when the alien is apprehended within the United States and possesses no documentation at all. If the alien chooses to remain silent throughout the prosecution, the burden on the government would be to prove negative facts; that the defendant was not a citizen or a possessor of valid immigration documents. In one case, a court held that alienage is established by proof of a prior conviction for unlawful entry and that the date of conviction established alienage as of the date of judgment.[17] The doctrine of *res judicata* or collateral estoppel caused the presumption of continued alienage to operate to the time of the subsequent prosecution. Under this theory, an alien may be successfully prosecuted under the felony section of the Act merely by introducing into evidence a certified copy of a prior § 1325 conviction of the defendant under the same name. The identity of names is presumptive proof that the individual convicted by the prior judgment and the defendant in the present case are one and the same.[18]

If an alien is apprehended within the borders of the United States, mere proof of alienage and lack of proper documentation will not support a conviction for entering by misrepresentation or concealment of a material fact. Since the alien could illegally enter by eluding examination or by entering at a time and place not officially designated, such an inference based upon mere presence in the country is unwarranted.[19] Also, remaining unlawfully within the United States after the expiration of immigration documents is not a crime under this section.[20]

16. If an arrest of an alien using a false border crossing card to attempt entry occurs at the port of entry, no § 1325(3) prosecution will lie since there is no completed entry and § 1325 has no attempt section. United States v. Oscar, 496 F.2d 492 (9th Cir. 1974).

17. United States v. Rangel-Perez, 179 F. Supp. 619 (S.D. Cal. 1959). Here, the alien had been convicted for illegal entry in 1943 and deported. In a subsequent prosecution in 1957 for illegal reentry (8 U.S.C. § 1326), the government's proof of alienage included the record of the 1943 conviction and the alien's baptismal record from Mexico. The doctrine of collateral estoppel was successfully asserted to establish alienage as of 1943. Thereafter "the rule of evidence as to the continuance of a condition or status, once proved to exist, may be invoked." *Id.* at 627. Thus, alienage is presumed to continue in the absence of proof to the contrary. The "burden of coming forward with evidence to the contrary is placed upon the defendant." *Id.* at 628. *See also* Pena-Cabanillas v. United States, 394 F.2d 785, 786-89 (9th Cir. 1968) (although a conviction estops the defendant from contesting alienage without new proof, a previous acquittal might not estop the government from re-litigating alienage).

18. Pasterchik v. United States, 400 F.2d 696 (9th Cir. 1968) (similarity of names between a judgment and defendant at trial is sufficient to establish the identity of the person in the absence of contradictory evidence); Chung Young Chew v. Boyd, 309 F.2d 857 (9th Cir. 1962) (proof of prior felony under alien's name is sufficient to establish identity and justify deportation); *cf.* United States v. Rebon-Delgado, 467 F.2d 11, 13 (9th Cir. 1972) (admission of INS file documents proper under identity of names theory).

19. United States v. Boyle, 181 F.2d 479 (2d Cir. 1950).

20. Alves v. Shaughnessy, 107 F. Supp. 443, 446 (S.D. N.Y. 1952) (overstay of ten-day visa held not to constitute an eluding under illegal entry statute).

It should be noted that while § 1325(1) and (2) contain no requirement of willfullness, § 1325(3) requires that the false or misleading representation or concealment of a material fact shall be willful. Although not specifically categorized, sections 1325 (1) and (2) are specific intent crimes since the terms "enters" and "eludes"[21] connote willful intent. Thus, a border resident who simply wanders a short distance across the border where there is no fence, without knowledge that he is crossing into the United States, would not be culpable under this section.[22]

The Act provides that prosecutions may be instituted for violations of 8 U.S.C. § 1325 at any place in the United States where the violation occurs or where the person charged is apprehended.[23] Illegal entry thus may be prosecuted in the federal district where the entry occurred or where the arrest is consummated.

2. *Illegal Reentry, 8 U.S.C. § 1326.*[24] Section 276 of the Act makes it illegal for any alien who has been arrested and deported to thereafter enter or attempt to enter, or be found in the United States unless the alien has obtained express consent from the Attorney General to reenter. The penalty is a sentence of two years and/or a fine of $1000. The essential elements to a prosecution under this section are: (1) a showing that the defendant is an alien, (2) proof of general intent to do the act (i.e., that the reentry was voluntary), (3) an entry, attempted entry, or being found in the United States, (4) proof of a valid arrest,

21. In United States v. Oscar, 496 F.2d 492, 494 (9th Cir. 1974) the "elude" section was defined as avoiding or escaping detection which necessarily implies specific knowledge of the law and a purposeful effort to avoid it.

22. The question of intent presents overlapping concepts of voluntariness, general intent and specific intent. Ordinarily, specific intent crimes are presumed, *but cf.* Pena-Cabanillas v. United States, 394 F.2d 785, 789 (9th Cir. 1968), holding § 1326 a general intent crime.

23. 8 U.S.C. § 1329, a venue provision, provides in part: "Notwithstanding any other law such prosecutions or suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with a violation under section 1325 or 1326 of this title may be apprehended."

Crimes of illegal entry are not continuing offenses since entry "is limited to a particular locality and hardly suggests continuity." United States v. Cores, 356 U.S. 405, 408 n.6 (1958). Thus, Congress added 8 U.S.C. § 1329 to allow prosecutions where the alien is apprehended in addition to the district of entry. For crimes of inducing illegal entry under 8 U.S.C. § 1324, prosecution is permitted in the United States even if the act of inducing takes place in a foreign country. United States v. Castillo-Felix, 539 F.2d 9 (9th Cir. 1976).

24. § 1326. Reentry of deported alien. Any alien who—(1) has been arrested and deported or excluded and deported, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States, unless (a) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (b) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both.

(5) an underlying order of deportation or exclusion, and (6) no consent of the Attorney General for the alien to return.

The requirement of proof of alienage has been discussed *supra*. This statute differs markedly from the simple illegal entry statute in that there is no requirement of willfulness or specific intent and neither need be charged in the indictment.[25]

Assuming proof of the first two elements, the major consideration for the defense to prosecutions under this statute is the underlying order of deportation.[26] Thus, one who is granted a voluntary departure in lieu of deportation or excluded from the country at a port of entry cannot be prosecuted under this statute for a subsequent entry because of the absence of an underlying order of deportation. Although the courts are not unanimous, it appears clear that a collateral attack may be made on the validity of the underlying order of deportation as a defense to prosecutions under this section.[27] A leading case supporting this proposition is *United States v. Osuna-Picos*, 443 F.2d 907 (9th Cir. 1971). At his trial for illegal reentry, Osuna-Picos challenged the validity of the warrant of deportation contending that he had a defense to

25. Pena-Cabanillas v. United States, 394 F.2d 785 (9th Cir. 1968) (allegations or proof of specific intent or willfulness unnecessary to § 1326 prosecution; only proof of general intent to perform entry required); United States v. Trott, 227 F. Supp. 448, 449 (D.C. Md. 1964) (willfulness need not be pleaded or proved in § 1326 prosecution). The statute has survived constitutional attacks asserting that it is void for vagueness. United States v. Alvarado-Soto, 120 F. Supp. 848, 849-50 (S.D. Cal. 1954) (upholding statute punishing passive conduct, such as merely being "found in" the United States after deportation).

26. Deportation is to be distinguished from exclusion. Section 212 of the Act states thirty-one acts which mandate exclusion from the United States. 8 U.S.C. § 1182 (1970). Exclusion occurs when an alien is attempting entry into the nation at a port of entry and is found to fall within one of the excludable classes. "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950). Those aliens successfully entering the United States are entitled to deportation hearings after their arrest where the burden on the government is higher than at exclusion hearings. Woody v. INS, 385 U.S. 276 (1966) (facts supporting deportation must be shown by clear, unequivocal and convincing evidence). An excellent discussion of the exclusion-deportation dichotomy may be found in Wenzell and Kolodny, *Waiver of Deportation: Analysis of Section 241(f) of the Immigration and Nationality Act*, 4 CAL. WEST. INT. L.J. 271, 290-94 (1974) [hereinafter cited as Wenzell and Kolodny].

27. Recently, the Ninth Circuit called the issue still "open", United States v. Deker-Menjian, 508 F.2d 812 (9th Cir. 1974), without citing the Osuna-Picos opinion. In United States v. Spector, 343 U.S. 169 (1952), the Supreme Court specifically left this issue open. Justices Jackson and Frankfurter argued in dissent that unless the underlying deportation were open to collateral attack at the criminal trial, the lack of vital constitutional safeguards such as trial by jury in that the proceeding opens the door to "effective subversion" of the right to trial by jury. Jackson's argument has been rejected by three of the six circuits which have considered the question. The Tenth Circuit held in Arriaga-Ramirez v. United States, 325 F.2d 857, 859 (10th Cir. 1963) that collateral attack is unavailable where it is proved that the alien's re-entry into the United States was illegal, relying on United States *ex rel.* Rubio v. Jordan, 190 F.2d 573 (7th Cir. 1951). The Fifth Circuit in United States v. Gonzales-Parra, 438 F.2d 694 (5th Cir. 1971) *cert. denied*, 402 U.S. 1010 (1972) cited the defendant's failure to

the deportation order under 8 U.S.C. § 1251(f).[28] The Ninth Circuit agreed that the deportation order was invalid and reversed the criminal conviction under this section.[29]

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seek administrative review in a § 1326 prosecution and based its denial of collateral attack on the authority of Yakus v. United States, 321 U.S. 414 (1944) (prosecution for violation of price regulations, which had held that the sixth amendment was not violated by not permitting the trial court to determine the validity of those regulations). A modified version of this restrictive doctrine was expressed by the Seventh Circuit, which said that a collateral attack could be made only if the trial court was convinced "that there was a gross miscarriage of justice in the former proceedings." United States *ex rel.* Rubio v. Jordan, *supra* at 576. This procedural analysis was expressed more positively by the same circuit after Spector; the "guiding benchmarks" for collateral attack set forth by the court were whether the deportation proceeding accorded the alien due process, and followed the INS regulations and the pertinent statutory provisions. United States v. Heikkinen, 221 F.2d 890 (7th Cir. 1955) *rev'd on other grounds*, 355 U.S. 273 (1968). In the Third Circuit collateral attack has been allowed in the criminal trial on at least two fundamental and limited grounds: no basis in fact or no warrant in law for the determination of the alien's deportability. United States v. Bowles, 331 F.2d 742 (3d Cir. 1964). *But cf.* United States v. Bruno, 328 F. Supp. 815 (W.D. Md. 1971).

28. Section 241(f) of the Act, 8 U.S.C. § 1251(f) (1970) provides: "The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence." A thorough analysis of this statutory defense may be found in Wenzell and Kolodny, *supra* note 26.

The viability of § 1251(f) as a defense to deportation suffered a blow in Reid v. INS, 420 U.S. 619, 95 S. Ct. 1164 (1975). Reid involved the appeal of an order of deportation by two British Hondurans who had entered the United States representing themselves to be American citizens. After entry, they became the parents of two children born in the United States, who therefore are citizens. The INS sought to deport the parents under § 241(a)(2) of the Act which provides for the deportation of an alien who "entered the United States without inspection or at any time or place other than as designated . . ." In an opinion by Justice Rehnquist, the Supreme Court held that § 241(f), 8 U.S.C. § 1251(f), applies only to aliens who illegally enter the country in violation of § 241(a)(1) of the Act which provides for deportation of an alien who at the time of entry is within a class of aliens excludable by the law.

In a narrow statutory interpretation, the majority held that § 241(f) of the Act tracks the language of § 212(a)(19), which deals with aliens excludable rather than deportable. In this case, the INS was not relying on the excludability of the Reids, but rather on the provision of the Act that established their deportability—their failure to present themselves for inspection at the time of their entry.

The dissent found INS v. Errico, 385 U.S. 214 (1966), indistinguishable from the facts of Reid. In Errico, aliens had entered the country under false representations and the Court held that § 241(f) was applicable as a defense to deportation. The Reid majority, however, found Errico to apply only to the deportation of aliens within the United States on the ground that they were excludable at the time of entry. In Reid, the INS sought the deportation on the different ground that they had not presented themselves for inspection at the time of their entry.

29. *Cf.* United States v. Palmer, 458 F.2d 663 (1972) (§ 241(f) defense to deportation unavailable as a means of collaterally attacking an illegal reentry prosecution under 8 U.S.C. § 1326 when the defendant's spouse and child were no longer living in the United States). After Reid, *supra* note 28, it is doubtful that a § 241(f) defense is available to attack a deportation order. The defense is so narrowly limited by the courts that a successful raising of the issue is almost impossible. *E.g.*, Mahone v. INS, 504 F.2d 414 (9th Cir. 1974) (an alien who enters the U.S. without inspection or documents and makes no representations at all to gain entry is not eligible for § 241(f) relief; rather to be eligible for

As stated above, it is not necessary that the government prove that the defendant specifically knew he could not reenter.[30] An interesting question thus arises when an alien leaves the country after deportation proceedings have been instituted but prior to service of a formal order of deportation on the alien. The Act[31] states that an alien is deemed deported pursuant to law when the alien has left the country and an order is entered. Cases interpreting the statute have held a valid deportation to occur by the departure of the alien even if the alien had no knowledge of the entry of a formal order of deportation.[32] Prosecution under § 1326 of an alien who is deported without specific knowledge of the order and thereafter reenters the country smacks of arbitrariness, yet is conceivable under many of the cases interpreting the section.[33]

Resolution of this important question may be found by defining the element of "arrest" in the statute. The leading case considering the issue is *United States v. Wong Kim Bo*, 466 F.2d 1298 (5th Cir. 1972), in which the only question was whether the defendant had been properly "arrested and deported" under the statute. The court defined the arrest as proof of the issuance and execution of the Warrant of Deportation which commands that an INS officer take the alien into custody. The policy consideration here is that the formal arrest under the warrant leaves "no doubt that the defendant had been fully informed as to the legal effect of his departure and the consequences of his reentry."[34]

The issuance of the deportation warrant, service of which constitutes an arrest, provides the notice to the alien which will trigger criminal sanctions for subsequent illegal reentry. Thus, where the alien is deported by the operation of the self-executing deportation provision of the Act,[35] no § 1326 prosecution will lie

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relief the alien must have committed fraud in obtaining entry at the Port of Entry).

30. United States v. Palmer, *supra* note 29, at 665.

31. *See* note 35 *infra.*

32. Corsetti v. McGrath, 112 F.2d 719, 720 (9th Cir. 1940) ("Knowledge of the issuance of the order of deportation at or prior to such departure is not required by the statute to constitute deportation . . .").

33. *Cf.* Arriaga-Ramirez v. United States, 325 F.2d 857 (10th Cir. 1963). However, consider the following:

> . . . Congress might understandably hesitate to impose criminal sanctions for reentry where the alien does not know or realize that he has been officially ordered deported. United States v. Wong Kim Bo, 466 F.2d 1298, 1304 (5th Cir. 1972).

34. 466 F.2d 1298, 1305; *see also* United States v. Farias-Arroyo, 528 F.2d 904 (9th Cir. 1975).

35. 8 U.S.C. § 1101(g) (1970):

> For the purposes of this Act any alien ordered deported (whether before or after the enactment of this Act) who has left the United States, shall be considered to have been deported in pursuance of law,

for a subsequent reentry because the alien "did not realize that he had previously been deported and that permission of the Attorney General was consequently required."[36]

Assuming the necessary predicates to a § 1326 prosecution of alienage, entry (or being found in the United States), general intent, arrest, and deportation, the last essential element is the showing of a lack of consent by the Attorney General to permit the alien to reenter. The typical dispute over this element is whether or not a permit granted to a previously deported alien by an immigration officer is tantamount to consent by the Attorney General. The cases interpreting the statute have ruled in the negative,[37] even where the alien made no affirmative misrepresentations to obtain the permit. That the alien conceals the fact of the prior deportation is sufficient to render the permit invalid.[38]

The defense of an illegal entry or reentry case often involves questions concerning documentary evidence, including issues of admissibiity, proper authentication and the weight to be given such evidence. A thorough knowledge of the appropriate federal statutes[39]

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irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.

36. 466 F.2d 1305.

37. United States v. Bakouros, 160 F. Supp. 173, 175 (N.D. W. Va. 1958); *see also* Lazarescu v. United States, 199 F.2d 898, 901 (4th Cir. 1952).

38. *Id.*

39. Records made in the regular course of business are admissible under 28 U.S.C. § 1732(a) (1966) and copies of such records, if made in the regular course of business, are admissible under 28 U.S.C. § 1732(b) (1966). All records of agencies of the United States are admissible to prove that which the record reflects under 28 U.S.C. § 1733(a) (1966). Copies of such agency records may be admitted if properly authenticated under § 1733(b). Judicial records or books kept in public offices of a state or a possession of the United States are admissible if the attestation requirements of 28 U.S.C. § 1739 (1966) are met. In a criminal proceeding under F.R.Cr.P. 27, these documents are properly authenticated by meeting the provisions of Rule 44 of the Federal Rules of Civil Procedure, which provide:

(a) Authentication.

(1) Domestic. An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. (2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation

is essential since foreign[40] as well as federal[41] and state[42] documents are often proffered into evidence in such cases. For example, a § 1326 prosecution requires that the prosecution enter into evidence proof of a valid deportation order which is normally admissible under 28 U.S.C. § 1733(a).[43] Authentication of copies of official documents by seal of the officer having legal custody of the document is required when proffered. A proper

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or is in a chain of certificates of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

40. Farrell v. United States, 381 F.2d 368 (9th Cir. 1967) (proof of alienage by birth certificate from Panama Canal Zone correctly introduced). Failure to comply with the letter of F.R.C.P. 44(a)(2) with respect to authenticating foreign documents may be harmless error in certain circumstances. United States v. Pacheco-Lovio, 463 F.2d 232 (9th Cir. 1972).

41. Maroon v. INS, 364 F.2d 982 (8th Cir. 1966) (proof of deportability established by introduction of a certified copy of a federal indictment for tax evasion held to comply with F.R.C.P. 44); Chung Young Chew v. Boyd, 309 F.2d 857, 867 (9th Cir. 1962) (improper authentication of conviction for lack of showing attesting officer had lawful custody of original).

42. Casares-Moreno v. United States, 226 F.2d 873 (9th Cir. 1955) (in a § 1326 prosecution, defendant introduced certified copy of a birth certificate recorded in state court showing him born in Los Angeles; the trial court instructed that the constitutional requirement of full faith and credit found in Article IV, Section 1 of the Federal Constitution made the birth certificate *prima facie* evidence of birth in the United States. This evidence was overcome by overwhelming evidence of defendant's birth in Mexico).

43. *Cf.* Maroon v. INS, 364 F.2d 982, 987 (8th Cir. 1966). Where the authenticity of copies of alien registry documents was questioned, the court found them properly authenticated:

> If we assume, as do the parties in their briefs, that the documents therein are copies, it is our view that Exhibit 10 was sufficiently authenticated to substantially meet the requirements of Rule 44. The District Director of the Immigration and Naturalization Service is the officer in charge of the district, and as such he acts as the authorized delegate to the Attorney General. 8 U.S.C. § 1103(a); 8 C.F.R. § 103.7. Legal custody of the records is in the Attorney General. However, Rule 44 specifically authorizes the attestation to be made by the deputy of the officer having the legal custody. The District Director is the deputy of the Attorney General within the meaning of the rule. United States v. Ansani, 138 F. Supp. 454, 461 (D.C. Ill., 1956).

The court held that while F.R.C.P. 44 required authentication of copies of official records, it did not require authentication of original official documents. *Id. See also* Chung Young Chew v. Boyd, 309 F.2d 857, 863 (9th Cir. 1962) (proof of warrant of deportation and service on alien essential to INS jurisdiction).

foundation to establish relevancy, such as by identity evidence connecting the defendant and the order of deportation, is also essential to admissibility.[44] Failure to object to the admission of such documents on these grounds will constitute waiver of defects in authentication, admissibility and relevance.[45] Thus, counsel would be well-advised to have command of the rules in this area to competently represent the alien defendant.

3. *Smuggling, Transporting, Harboring, Inducing Entry of Illegal Aliens, 8 U.S.C. § 1324.* Section 274(a)[46] of the Act makes it unlawful to smuggle, harbor, transport, or induce illegal aliens to enter the United States. The criminal penalty is five years imprisonment and/or a $2000 fine for each alien involved[47]

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44. *E.g.*, United States v. Mendoza-Torres, 285 F. Supp. 629 (D.C. Ariz. 1968) (fingerprints on back of deportation warrant found identical with defendant's).

45. Mills v. United States, 273 F. 625, 628 (9th Cir. 1921) (failure to object to Canadian naturalization certificate which was improperly certified waived error).

46. The Act reads:

BRINGING IN AND HARBORING CERTAIN ALIENS

Sec. 274. (a) Any person, including the owner, operator, pilot, master, commanding officer, agent or consignee of any means of transportation who—

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of the law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereof, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs; Provided, however, that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

(b) No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.

See GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, 9-51 through 9-57 (1970) for a historical treatment of this criminal statute.

47. Sepulveda v. Squier, 192 F.2d 796, 798 (9th Cir. 1951) (consecutive sentence for each alien brought into country is "of the essence of the legislative intent").

in any violation of this statute. Since the provisions of this statute apply equally to citizens as well as aliens, it will be treated only briefly here.

Under any one of the four subsections of this statute (smuggling, transporting, harboring,[48] or inducing) the first essential element is proof of the alienage of the cargo—the aliens themselves. In *United States v. Camacho-Davalos*, 468 F.2d 1382 (9th Cir. 1972), a border patrol agent testified that the individuals being transported by the defendant were Mexican in appearance and spoke only Spanish. This was held inadequate to prove the individuals being transported were aliens. Although it would appear most expedient in prosecutions under this statute that an alien testify to establish alienage, this would not be required in a conspiracy prosecution under this statute. Since the charge of conspiracy is complete upon the mere agreement to violate the act, it has been held that no evidence of alienage is essential.

Prosecutions under this statute also require proof that the defendant knew the individuals he was dealing with were indeed aliens.[49] Thus, in one case involving a charge of transportation

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48. *Dicta* in Herrera v. United States, 208 F.2d 215 (9th Cir. 1954) found the exclusion of mere employment of aliens from the harboring subsection not to establish an unconstitutional preferred class. Transporting aliens for employment who legally enter with proper documents does not violate the statute since the aliens enter legally. United States v. Quinonez-Alvarado, 317 F. Supp. 1344 (W.D. Tex. 1970); United States v. Mack, 112 F.2d 290, 291 (2d Cir. 1940); *cf.* United States v. Van Drunen, 501 F.2d 1393 (7th Cir. 1974). The United States Supreme Court recently reversed DeCanas v. Bica, 40 Cal. App. 3d 976 (1974), rev'd, 424 U.S. 351 (1976), where a lower court held CAL. LABOR CODE § 2805 unconstitutional. The statute made it illegal to knowingly hire illegal aliens under certain conditions. The appellate court found that federal legislation preempted the field of regulation of aliens. The Supreme Court held there is no preemption on the face of the statute, but remanded for a hearing to determine if the statute would interfere with federal law as applied. *See Recent Developments, Preemption in the Field of Immigration: DeCanas v. Bica*, 14 SAN DIEGO L. REV. 282 (1976).

49. In cases involving "transportation" charges, 8 U.S.C. § 1324(a)(2), an essential element is that the defendant know the aliens to have entered illegally within three years. United States v. Jacobo-Gil, 474 F.2d 1213 (9th Cir. 1973). *See also* United States v. Boerner, 508 F.2d 1064 (5th Cir. 1975) (although § 1324(a)(1) has no specific provision requiring knowledge that aliens "induced" into the United States have no right to enter, the courts have read into the statute such a requirement, *e.g.*, Bland v. United States, 299 F.2d 105, 106 (5th Cir. 1962). Here, however, the trial court so instructed the jury and evidence of the exorbitant price demanded for the aliens' passage, the surreptitious manner in which they were loaded onto a vessel and crowded into its hole, unloaded at a place remote from United States Customs Inspection, and concealed in the rear of a U-Haul truck, provided ample support for the inference of guilty knowledge on the part of the defendant). *See also* United States v. Gonzales-Hernandez, 534 F.2d 1353 (9th Cir. 1976); United States v. Bunker, 532 F.2d 1262 (9th Cir. 1976).

A real question is what type of assistance extended to an illegal alien constitutes "harboring" under 8 U.S.C. § 1324(a)(3). The issue is discussed in the few reported cases dealing with harboring. In Susnjar v. United States, 27 F.2d 223 (6th Cir. 1928), the appellants smuggled six aliens from Canada. In connection with a scheme to deliver the aliens to the homes of American relatives, the

of illegal aliens under the statute, a conviction was reversed where the aliens testified that the defendant picked them up while they were hitchhiking, had never seen them prior to that time, and no conversations ensued concerning their status in the United States. Since there was no proof in the government's case in chief as to the defendant's knowledge, a motion for judgment of acquittal should have been granted. *United States v. Robles-Perez*, 474 F.2d 1271 (9th Cir. 1973).[50]

One of the more important developments concerning the defense of prosecutions under this statute is the constitutional right of the defendant to interview all the alien witnesses. Prior to July 1, 1971 the practice of the government had been to interview the aliens (the "contraband" in prosecutions under this statute) and return those whom it did not want to their native country. The

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appellants temporarily stashed them in other houses, including Susnjar's. Convictions were affirmed.

In the United States v. Smith, 112 F.2d 83 (2d Cir. 1940), the appellant maintained a house of prostitution in Buffalo. Co-defendants provided two girls from Canada and "appellant told them to reveal to no one that they were Canadians, and she instructed the Cross girl to say she was from Brownville, New York, 'if the Law come in'." The court affirmed defining "harbor" to mean "that the girls shall be sheltered from the immigration authorities and shielded from observation to prevent their discovery as aliens." *Cf.*, United States v. Acosta de Evans, 531 F.2d 428 (9th Cir. 1976).

In United States v. Mack, 112 F.2d 290 (2d Cir. 1940), the appellant was successful in her claim that the evidence was insufficient to convict her of harboring. The appellant was a madame and the alien a prostitute. The circuit found the evidence of knowledge of that alienage insufficient and noted that "the statute is very plainly directed against those who abet evaders of the law against unlawful entry, as the collocation of 'conceal' and 'harbor' shows. [I]ndeed, the word 'harbor' alone often connotes surreptitious concealment." *See also* United States v. Lopez, 521 F.2d 437 (2d Cir. 1975).

An important issue in all prosecutions under 8 U.S.C. § 1324 concerns the pre-trial statements of the alien witnesses to the prosecutor or his investigative agents. Invariably after the arrest of the defendant and the alien witnesses, INS agents will attempt to interrogate the aliens to extract incriminating statements concerning the involvement of the defendant. *See* United States v. McSweaney, 507 F.2d 298 (9th Cir. 1974) (under the Jencks Act, 18 U.S.C. § 3500(3), the prosecution is required to produce writings signed or adopted by a material witness which are substantially verbatim recitals of the witnesses oral statements concerning alien smuggling; in this case, where the alien material witness had been interviewed by government agents who took notes, it was held that this presented a *prima facie* showing of the existence of a Jencks Act statement and it was error to deny a defendant's motion for production of such statements. In the face of the government's assertion that the notes of the interview were not available, the appellate court remanded the case for a hearing to determine whether a Jencks Act statement was in fact taken at the interview of the alien witness, and if so, what happened to it. A new trial will be required if the court concludes that such a statement was taken and that the substantial rights of the defendant were affected by the failure to make that statement available for use in the cross-examination of the alien material witness).

50. In an attempt to overcome the defendant's motion for judgment of acquittal, a government agent testifying over objection stated that the aliens told him at the time of arrest, outside the presence of the defendant, that they had seen the defendant before in Mexico. This hearsay testimony was ruled inadmissible. United States v. Robles-Perez, 474 F.2d 1271, 1272 (9th Cir. 1973); *See also* United States v. Lopez Cruz, 470 F.2d 193 (9th Cir. 1972), for a similar result.

alien witnesses were returned sometimes without even allowing the defendant or his counsel an opportunity to interview them. This pick-and-choose practice by the government was declared unconstitutional in the leading case of *United States v. Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971), where the government's placing several of the alien witnesses out of the jurisdiction denied the defendant an opportunity to present potential exculpatory evidence and constituted a denial of basic confrontation rights guaranteed under the sixth amendment. The progeny of cases deriving from *Mendez-Rodriguez* requires the defendant to make an attempt to locate and interview the missing alien witnesses,[51] to object to removing the witnesses if the opportunity arises,[52] to make an effort to maintain the alien witnesses in the United States until trial if the defendant has that opportunity,[53] and in certain circumstances hold the witnesses by way of a material witness warrant[54] or seek their depositions.[55]

4. *Representation of the Material Witness.* The impact of the *Mendez-Rodriguez* decision forced the government to detain the alien material witness for trial in § 1324 prosecutions at least until the defendant has the opportunity to interview them. While no explicit statutory authorization exists to detain a material witness, Title 18 U.S.C. § 3149[56] states that a witness who has ma-

51. United States v. Peyton, 454 F.2d 213 (9th Cir. 1971); *cf.* United States v. Lomeli-Garnica, 495 F.2d 313 (9th Cir. 1974).

52. United States v. Neustice, 425 F.2d 123 (9th Cir. 1971).

53. United States v. Moran, 456 F.2d 1066 (9th Cir. 1972); *cf.* United States v. Carrillo-Frausto, 500 F.2d 234 (9th Cir. 1974) (juvenile aliens released over objection of government without affording defendant an opportunity to interview them; held no abuse of discretion). *See also* United States v. Castellanos-Machorro, 512 F.2d 1181 (9th Cir. 1975) (release of 88 aliens believed to have left appellants' motel proper where there is no claim they had any connection to the indicted charges); United States v. McQuillan, 507 F.2d 30 (9th Cir. 1974) (release proper because aliens not witnesses to offense); United States v. Romandia, 503 F.2d 1020 (9th Cir. 1974) (release of aliens pursuant to court order while defendant was unapprehended not error since there was no assurance defendant would be arrested); United States v. Verduzco-Macias, 463 F.2d 105 (9th Cir. 1972) (alien witnesses "farmed out" while awaiting defendant's trial escaped before defense attorney could interview them; conviction affirmed because the government took no part in making witnesses unavailable).

The Mendez-Rodriguez rationale has been used by the state courts to dismiss cases where state police turn alien witnesses over to the INS resulting in their deportation prior to defense interviews. *E.g.*, People v. Mejia, 57 Cal. App. 3d 574 (1976).

54. *See* 18 U.S.C. § 3149 (1966), *infra* note 56. The government has an obligation to hold alien witnesses for a putative defendant intended for indictment. *See, e.g.*, United States v. Tsutagawa, 500 F.2d 420 (9th Cir. 1974).

55. United States v. Lewis, 460 F.2d 257 (9th Cir. 1972) (deposition procedure allowed by 18 U.S.C. § 3503(a) (1974 Supp.) was found appropriate in the context of incarcerated aliens held for testimony as witnesses in § 1324 prosecution). *See also* United States v. Garcia, 527 F.2d 473 (9th Cir. 1975) (deposition procedure must follow requirements of F.R.)

56. § 3149. Release of material witnesses.

If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become imprac-

terial testimony in any criminal proceeding and whose presence may become impracticable to secure by subpoena may be committed to custody pending final disposition of the proceeding in which the testimony is needed. The Bail Reform Act of 1966[57] provides for the imposition of similar conditions of release for witnesses and defendants pursuant to 18 U.S.C. § 3146. In an important section of the Bail Reform Act, Congress provided that no material witness shall be detained because of inability to comply with any condition of release if the testimony of the witness can be adequately secured by deposition.[58] The legislative history[59] of this statute indicates the words mean that which they state—that the witness *shall* be deposed and released in the absence of good reasons to the contrary. Thus, the duty of the representative of the material witness[60] is to attempt to secure a settlement of the case as soon as possible, or in the alternative, to press the court to order the depositions and release of the incarcerated alien witnesses.

While there is no explicit authority ruling on the constitutionality of the forced detention of material witnesses,[61] appointed

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ticable to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to section 3146. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

57. 18 U.S.C. § 3141-3152 (1969).

58. *See* note 56 *supra.*

59. 1966 U.S. CODE CONG. AND ADM. NEWS, p. 2305.

60. The Criminal Justice Act of 1964, as amended, expressly provides for the appointment of counsel for indigent material witnesses. 18 U.S.C. § 3006A (g) (1974 Supp.). Since the vast majority of alien witnesses are Mexican nationals entering the United States to seek work, it would be a rare instance where they would not qualify under this statute for appointed counsel.

61. In the leading case of Bacon v. United States, 449 F.2d 933 (9th Cir. 1971), the witness challenged her arrest and incarceration as a material witness contending that the government had no power to arrest and detain a witness prior to disobedience of a subpoena. The opinion held that "a grant of power to arrest material witnesses can be inferred from [F.R.Cr.P.] Rule 46(b) and from § 3149 as well." *Id.* at 937. Relying on language from Stein v. New York, 346 U.S. 156, 184 (1953) ("The duty to disclose knowledge of crime . . . is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness."), the court opined that the power to detain material witnesses was equally inferable under the same authority. *Id.* at 939. Although the constitutionality of these statutory powers was challenged, the court declined to reach that issue. *Id.* at 941. The Supreme Court has impliedly ruled the constitutionality of incarcerating material witnesses an open question. Hurtado v. United States, 410 U.S. 578, at 579 and 588 (1973).

To justify the arrest of a material witness, probable cause must exist to believe that the witness has testimony material to a criminal case. The *Bacon* opinion left open the question whether the arrest could take place without a warrant. 449 F.2d 943. However, before such a warrant may issue, a showing must be made that the witness has material testimony and that it may be impracticable to secure his or her presence by subpoena.

counsel may raise this constitutional claim in light of the ameliorative alternative of depositions.[62] In *United States v. Lewis*, 460 F.2d 257 (9th Cir. 1972), the release of two material witnesses by the United States Magistrate and permitting them to return to Mexico without objection by the defendant was held not to be error where the witness' testimony was preserved by way of deposition at trial. In light of the statutory authorization for this deposition procedure for incarcerated material witnesses, the result in *Lewis* is proper.[63]

The potential losses to either adversary by the introduction of a deposition of a material witness are demeanor evidence,[64] and the inquiry into areas which develop after the deposition and release of the witness.[65] The former defect can be almost entirely

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62. Rule 15 of the Federal Rules of Criminal Procedure states in part:

> If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

63. *See also* United States v. Martinez-Frausto, 463 F.2d 231 (9th Cir. 1972), where the release of the witnesses after deposition was upheld even though both the government and the defendant objected. Although the judgment in this case was vacated later by the Supreme Court [409 U.S. 815 (1972)] on recommendation of the Solicitor General, the release of material witnesses by the court is appropriate even over a party's objection since the deposition procedure, in most cases will adequately preserve material testimony.

64. Videotape depositions of the witnesses are an excellent means of preserving demeanor evidence. *See* Comment, *The Wetback as a Material Witness: Pretrial Detention or Deposition*? 7 CAL. WEST. L. REV. 175, 191-195 (1970). Although this technology has been available for years, only recently have the courts begun to utilize it in order to preserve alien witness testimony and thus permit the speedy release of the incarcerated alien. *See Federal Witnesses Testify—Via Tape*, Los Angeles Daily Journal, 7 June 1974, at 1. *See generally* Note, *Videotape Depositions: An Alternative to the Incarceration of Alien Material Witnesses*, 5 CAL. WEST. INT'L L.J. 376 (1975).

65. This problem is not so easily dispensed with where the defendant objects to the deposition and early release of the witnesses so that the latter may return to their native countries and beyond the subpoena power of the defendant. Analogous situations have been litigated and appear to uphold the procedure.

A case which closely resembles the alien witness deposition and release issue is Mancusi v. Stubbs, 408 U.S. 204 (1972) where the Court permitted the use of the former testimony of a witness who was unavailable at a subsequent trial because of residence in a foreign country.

To mitigate prejudice in this area, aliens once deposed should be given a subpoena upon their release and placed on call for trial in case they are needed to explain evidence discovered during the interval between deposition and trial. While this is not a guarantee that the witness will return if called, it does at least assure that possibility. In determining whether the deposition and release procedure is warranted, the magistrate might also consider such factors as: the complexity of the case, whether the witness has made conflicting statements to the parties and whether the witness agrees to honor the subpoena if called for trial.

Should the district court refuse to grant the release of the alien witnesses upon the above conditions, counsel should exhaust appellate remedies to secure relief. This writer has successfully moved Justice Douglas for an order granting personal recognizance release in In re Witnesses: Juan Francisco Solzano-Munoz, *et al.*, No. A-790 (17 April 1975). The order signed by Justice Douglas read as follows:

> IT IS ORDERED that the above-named applicants be, and they

eradicated through the use of videotape to record the deposition.[66] This procedure has been used in civil cases[67] and is beginning to find its way into criminal proceedings as well.[68] The law permits the federal courts to order that testimony be recorded by other than stenographic means and this has been interpreted to include videotape depositions.[69] Since appellate courts have upheld the use of videotaped confessions of defendants in criminal cases,[70] there is no valid reason to exclude the use of this technology when

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are hereby, released upon their own recognizance under the following conditions:

1. That as a pre-condition of their release the above-named witnesses be served with subpoenas ordering them to appear at the time of the trial, now set for May 6, 1975, in the case of United States v. Mariano Gonzales-Santiago, *et al.*, Criminal No. 75-0261, in the United States District Court for the Southern District of California.

2. That as a further condition of their release, depositions be taken to preserve the testimony of the witnesses for use at the time of trial should any fail to appear.

3. That as a further condition of their release, the United States District Court for the Southern District of California may impose such reasonable travel restrictions upon the witnesses until they are needed for trial and until their participation in the trial is no longer needed.

The Ninth Circuit subsequently followed this lead and ordered videotape depositions in United States v. Hendrix, In re Material Witnesses, No. 75-3307 (4 Nov. 1975), to wit:

> Upon due consideration of the emergency appeal from the order denying bail reduction and the material submitted in support and in opposition thereto, this court, on the basis of Rule 46(g), Federal Rules of Criminal Procedure and 18 U.S.C. § 3149, recognizes that some detention may be necessary to avoid a failure of justice. In view of this necessity this court directs that should the trial of the defendants in the underlying action not commence within fourteen days following the entry of this order, the appellant material witnesses shall be deposed on video tape and released from custody no later than November 20, 1975. Nothing in this Order is intended to preclude any detention that may result from a decision to prosecute these material witnesses as defendants.

66. *E.g.*, Carson v. Burlington Northern, Inc., 52 F.R.D. 492 (1971) (videotape deposition of plaintiff and accident victim permitted).

67. *See, e.g.*, United States v. King, 328 F.2d 341 (9th Cir. 1976), *aff'd mem.* (upholding use of court-ordered depositions in Japan); People v. Moran, 39 Cal. App. 3d 398 (1974) (videotape of witness testimony at preliminary hearing admitted at jury trial because witness died prior to trial).

68. Federal Rule of Civil Procedure 30(b)(4) provides:

> The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

69. *See* note 66 *supra.*

70. *E.g.*, Hendricks v. Swenson, 456 F.2d 503, 506 (8th Cir. 1972), which considered the trial use of a videotape of the defendant's confession; the opinion held the use of the video technology a giant leap forward in criminal procedure:

> If a proper foundation is laid for the admission of a video tape by showing that it truly and correctly depicted the events and persons shown, and that it accurately reproduced the defendant's confession, we feel that it is an advancement in the field of criminal procedure and a protection of defendant's rights. We suggest that to the extent possible, all statements of defendants should be so preserved.

it serves the humanitarian purpose of allowing innocent people to fulfill their obligation of giving testimony at the earliest possible opportunity and then being released from custody.

Under 28 U.S.C. § 1821, a material witness is entitled to a twenty dollar per diem compensation for every day of confinement during a trial for which the witness has been detained. In *Hurtado v. United States*, 410 U.S. 578 (1973), the Supreme Court ruled the statute constitutional as applied to alien material witnesses who are compensated only one dollar per day while in custody awaiting trial. However, the court reversed the Fifth Circuit decision which limited the twenty dollar per day compensation to the day the witness testified. The alien witness is entitled to twenty dollars per day for the duration of the trial for which he or she is in attendance. Attendance was interpreted to mean summoned and available to testify in a court in session, regardless of whether the alien witness was physically present in the courtroom. It would include each trial day for which the witness is in custody.

Although the most important consideration in the representation of a material witness is speedy pretrial release, the alien material witness has many of the procedural rights due a defendant in a criminal case. Thus, although not charged with a criminal offense, the alien has standing to contest the illegal stop and seizure of his person under the fourth amendment.[71] Since "all persons" within the territory of the United States are entitled to the protections guaranteed by the fifth and sixth amendments, the alien material witness would be able to assert at trial the privilege against self-incrimination to questions which might provide a link in a chain of evidence against the witness.[72] The alien witness' testimony during a prosecution of a defendant for a violation of 8 U.S.C. § 1324 will invariably incriminate the witness. The simple solution for the prosecutor to a possible refusal to testify is to offer the witness immunity from prosecution; in jurisdictions where these prosecutions are frequent, an informal arrangement is often made by which the prosecutor assures the witness that no prosecution will be commenced against the witness for testimony against the defendant. The representative of the witness must

71. *See* United States v. Guana-Sanchez, 484 F.2d 590, 592 (7th Cir. 1973) (Pell dissenting), *certiorari dismissed as improvidently granted*, 420 U.S. 513 (1975).

72. Each witness is prosecutable under 8 U.S.C. § 1325 (1970), (illegal entry) and perhaps for other immigration law violations which were committed in obtaining entry in the United States. However, it has been held that a material witness is not entitled to Miranda warnings prior to court testimony, United States v. Anfield, 539 F.2d 674 (9th Cir. 1976), nor prior to grand jury testimony. *See* United States v. Mandujano, 425 U.S. 564 (1976).

clarify this arrangement prior to trial to properly advise the witness.

5. *Miscellaneous Crimes of Entry and Related Offense.* Although the discussion above included the major statutes concerning the crime of illegal entry into the United States, there are a number of other statutes covering differing versions of the offense. Thus, statutes are directed at the introduction into the United States of certain classes of aliens such as crewmen,[73] aliens subject to disability or afflicted with disease,[74] subversives,[75] and the importation of aliens for immoral purposes.[76] In addition,

73. Section 252 of the Act, 8 U.S.C. § 1282(c) (1970), states:

> Any alien crewman who willfully remains in the United States in excess of the number of days allowed in any conditional permit issued under subsection (a) shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $500 or shall be imprisoned for not more than six months, or both.

An alien crewman is defined as a non-immigrant alien who is "serving in good faith as such in any capacity required for normal operation and service on board a vessel (other than a fishing vessel having its home port or an operating base in the United States) or aircraft, who intends to land temporarily and solely in pursuit of his calling . . ." 8 U.S.C. § 1101(a)(15)(D) (1970). Immigration officers finding an alien crewman non-immigrant as defined above who is otherwise admissible, have the discretion to grant conditional permits to land temporarily "pursuant to regulations prescribed by the Attorney General." 8 U.S.C. § 1282(a) (1970); 8 C.F.R. 252.1(c-e) (1972). Such permits are valid for no more than twenty-nine days. *Id. See also* 8 U.S.C. §§ 1281-1287 (1970).

74. Section 272 of the Act, 8 U.S.C. § 1322 (1970), provides in part:

> (a) Any person who shall bring to the United States an alien (other than an alien crewman) who is (1) mentally retarded, (2) insane, (3) afflicted with psychopathic personality, or with sexual deviation, (4) a chronic alcoholic, (5) afflicted with any dangerous contagious disease, or (6) a narcotic drug addict, shall pay to the collector of customs of the customs district in which the place of arrival is located for each and every alien so afflicted, the sum of $1,000 . . .

75. Section 277 of the Act, 8 U.S.C. § 1327 (1970), states:

> Any person who knowingly aids or assists any alien excludable under sections [of the Act relating to subversives] to enter the United States, or who connives or conspires with any person or persons to allow, procure, or permit any such alien to enter the United States, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine of not more than $5,000 or by imprisonment for not more than five years, or both.

76. Section 278 of the Act, 8 U.S.C. § 1328 (1970), provides:

> The importation into the United States of any alien for the purpose of prostitution, or for any other immoral purpose, is hereby forbidden. Whoever shall, directly or indirectly, import, or attempt to import into the United States any alien for the purpose of prostitution or for any other immoral purpose, or shall hold or attempt to hold any alien for any such purpose in pursuance of such illegal importation, or shall keep, maintain, control, support, employ, or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, any alien, in pursuance of such illegal importation, shall, in every such case, be guilty of a felony and upon conviction thereof shall be punished by a fine of not more than $5,000 and by imprisonment for a term of not more than ten years. The trial and punishment of offenses under this section may be in any district to or into which such alien is brought in pursuance of importation by the person or persons accused, or in any district in which a violation of any of the provisions of this section occurs. In all prosecutions under this section, the testimony of a husband or wife shall be admissible and competent evidence against each other.

aliens who lawfully enter have a duty to register[77] and to notify the Attorney General of changes of address.[78] Criminal penalties are provided for failure to carry on one's person a certificate of alien registration or an alien registration card.[79] In general, the considerations stated above with respect to the proof of elements such as alienage, knowledge, willfulness, and venue will apply to prosecutions under these sections.

B. *Crimes of Misrepresentation*

While the above section concerning crimes of entry considers prosecutions having to do with the alien's physical presence in the United States, this section discusses crimes of misrepresentation made in an effort to enter or remain within the United States. To a certain extent, the crimes in both sections dovetail and allow for prosecutions under one of several statutes. Thus, an alien once deported and who has reentered the United States with a false United States birth certificate could be prosecuted under 8 U.S.C. § 1326 (reentry of a deported alien) or under 18 U.S.C. § 911 which provides criminal penalties for falsely or willfully representing one's self to be a citizen of the United States, or 8 U.S.C § 1325(3), which deals with aliens obtaining entry by willfully false or misleading representations. In addition, almost any false material statement to a government official is prosecutable under an omnibus federal false statement statute.[80] These

77. *See* Section 262 through 266 of the Act, 8 U.S.C. §§ 1301-1306 (1970).

78. 8 U.S.C. § 1305 (1970). *E.g.*, Bufalino v. INS, 473 F.2d 728 (3d Cir. 1973).

79. 8 U.S.C. § 1304(e) (1970), states:

> Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him pursuant to subsection (d). Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor and shall upon conviction for each offense be fined not be exceed $100 or be imprisoned not more than thirty days, or both.

An attorney who knowingly and without valid purpose retained registration cards of his clients for three years was convicted of aiding the aliens to violate this section. United States v. Abrams, 427 F.2d 86 (2d Cir. 1970).

80. 18 U.S.C. § 1001 states:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Many misrepresentations, both oral or written, to the INS by an alien seeking entry are prosecutable under § 1001 in addition, or as an alternative, to prosecutions under immigration statutes. Thus, false statements to INS investigators, if material, are within the ambit of this statute. Tzantarmas v. United States, 402 F.2d 163 (9th Cir. 1968). Filing documents with the INS concealing that one's marriage was consummated solely for the purpose of gaining legal immigration status also falls within this statute. Johl v. United States, 370 F.2d 174

alternatives must be kept in mind for possible use in plea bargaining the charges discussed in this section.[81]

1. *False Representation of Citizenship 18 U.S.C. § 911.* This statute makes it a crime for anyone to "falsely and willfully represent himself to be a citizen of the United States." The essential elements of this crime are: a) a direct representation by the defendant, b) that the alien is a citizen of the United States, c) which fact is false and d) willfully done.

a) *Direst Representation.* The representation by the alien must be made to another individual or entity having some purpose to inquire or adequate reason for ascertaining a defendant's citizenship.[82] It does not require that the representation be made in reply to an inquiry by one having a legal right to ask in furtherance of an official authority.[83] Thus, convictions under this section have been sustained where the direct representation of citizenship was made to a prospective employer,[84] a registrar of voters,[85] agents of the Federal Bureau of Investigation,[86] the executive board of a union,[87] a private employer corporation,[88] a state alcoholic beverage board,[89] a selective service board,[90] and a United States Customs agent.[91]

b) *United States Citizen.* Successful prosecutions under this statute require the direct representation of the defendant alien that he is a citizen of the United States. Reversals of convictions have occurred where the alien, while being booked at a police

(9th Cir. 1966). *See also* United States v. Rinaldi, 393 F.2d 97 (2d Cir. 1968) (false statement made to obtain visa preference) and 2 GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, 9-78 through 9-80 (1974).

81. For example, 18 U.S.C. § 911 (1966), is a felony offense with a maximum penalty of up to three years incarceration. A plea to the misdemeanor under 8 U.S.C. § 1325(3) (1970), for the false representation of citizenship involves a maximum incarceration of six months.

82. Smiley v. United States, 181 F.2d 505 (9th Cir. 1950), *cert. denied*, 340 U.S. 817 (1950).

83. *Id.*

84. United States v. Franklin, 188 F.2d 182 (7th Cir. 1951).

85. Fotie v. United States, 137 F.2d 831 (8th Cir. 1943). Aliens accused of having made a knowing and false representation of United States citizenship by voting in a United States election have raised the defense that voting is not *per se* a representation of United States citizenship and in addition that the defendant did not know that citizenship was a requirement for voting. United States v. Raymond, 37 F. Supp. 957 (E.D. Wash. 1941). The first argument has been rejected where the defendant signed under oath an affidavit containing a statement that the affiant is a United States citizen. United States v. Franklin, 188 F.2d 182 (7th Cir. 1951). The circuits have split, however, on whether signing a document without an express statement of citizenship and only a statement that the voter is qualified to vote, violates § 911. *Cf.* United States v. Franklin, *supra with* United States v. Anzalone, 197 F.2d 714 (3d Cir. 1952).

86. United States v. Franklin, 188 F.2d 82 (7th Cir. 1951).

87. United States v. Romberg, 150 F.2d 116 (2d Cir. 1945).

88. United Staes v. Achtner, 144 F.2d 49 (2d Cir. 1944).

89. United States v. Chow Bing Kew, 248 F.2d 466 (9th Cir. 1957).

90. Prevost v. United States, 149 F.2d 747 (9th Cir. 1945).

91. Rodriguez v. United States, 433 F.2d 964 (9th Cir. 1970).

station, answered affirmatively the question whether or not he was a "citizen."[92] Since the defendant did not represent that he was a citizen of the United States, and despite the additional fact that he falsely represented that he was born in New York, his words did not meet the requirements of the statute.[93] Although the courts seem to require that the representation of citizenship be in the words of the statute, in reality they are merely requiring the government to meet its burden of proof to demonstrate beyond a reasonable doubt that the defendant is not a citizen by naturalization or birth, and that the representation made was knowingly false.[94] Proof that a defendant merely wrote in a voter registration form that he was born in "LA." did not satisfy the requirements of the statute[95] or the government's burden of proof since to conclude that this was a representation of United States citizenship would base "inference upon inference."[96]

c) *A False Representation.* The government has the burden to prove the defendant's representation of citzenship was false. It has been held that the defendant's confessions and admissions, whether oral or through documents in his possession, are not alone sufficient to support a conviction unless corroborated by independent evidence of the *corpus delecti*.[97] The government must prove that the defendant was not born in, and was not a citizen of the United States.[98] Proof here can be difficult since demonstrating the negative fact of non-naturalization or lack of birth in the United States is in some instances difficult if not impossible.[99] One case has held that proof of non-naturalization may be shown by the absence of any such records in the Bureau of Naturalization

92. Smiley v. United States, *supra* note 82 at 506.
93. *Id.*
94. Fotie v. United States, 137 F.2d 831 (8th Cir. 1943). *See also* DEVITT AND BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, §§ 21.01-21.10, 349-354 (1970).
95. United States v. Gulotta, 29 F. Supp. 947 (W.D. Mo. 1939) *rev'd on other grounds*, 113 F.2d 683 (8th Cir. 1940).
96. *Id.* at 29 F. Supp. 950.
97. *Id.* at 949-50; 113 F.2d 683, at 686-687. The Gulotta opinion held that the *corpus delicti* principle applied to both admissions and confessions, that is, corroboration of an admission or confession is needed to make a *prima facie* case. This holding was rejected in Warszower v. United States, 312 U.S. 342, 347 (1941). The rationale of the decision was that the rule requiring corroboration of confessions made after the offense protects against errors based solely upon untrue confessions. Where an admission is made prior to the crime, this problem does not exist. *Id.* However, if the admissions occur after the crime, they are of the same character as confessions and corroboration is required. Opper v. United States, 348 U.S. 84, 92 (1954). Corroboration consists of "substantial independent evidence which would tend to establish the trustworthiness of the statement." *Id.* at 93.
98. Duncan v. United States, 68 F.2d 136 (9th Cir. 1933).
99. *E.g.*, Colt v. United States, 158 F.2d 641 (5th Cir. 1946) (defendant's admission of birth in Romania insufficient to warrant a § 911 conviction in absence of affirmative evidence of non-naturalization).

or courts in the area where the defendant was known to have lived.[100] Further, documentary evidence such as a passport may be admitted as an admission by the defendant that he was born in a foreign country.[101] However, proof of this kind requires an adequate foundation and counsel should be alert to the technical requirements of documentary evidence regarding authentication and identification.[102]

d) *Willfulness.* In 1940, the element of fraudulent intent was deleted from the language of this statute.[103] Despite the deletion, the Second Circuit in a post-1940 decision read the element of fraudulent intent into the statute.[104] The Second Circuit stands alone in this position and it is doubtful that even that Circuit would continue to so hold in light of subsequent authority.[105] Willfulness is an element of the offense but it means only that the misrepresentation of the defendant was voluntarily and deliberately made.[106] Thus, proof that the defendant made numerous similar representations is admissible to negate his contention of lack of willfulness or that he signed a document inadvertently.[107] A closer issue as to the defendant's willfulness occurs where the representation made by the alien is induced by the prevarications of a government agent. Under these circumstances, one court, although not focusing on the failure of any particular element, held the prosecution impermissible where the false representation of the defendant was induced by a purposely false statement by a government agent.[108]

2. *Fraud and Misuse of Entry Documents, 18 U.S.C. § 1546.*[109] False statements made under oath by an alien in an ap-

100. *Id.* at 643.
101. Gulotta v. United States, 113 F.2d 683 (8th Cir. 1940).
102. *See* notes 39-45 *supra.*
103. United States v. Franklin, 188 F.2d 182, 186 (7th Cir. 1951).
104. United States v. Achtner, 144 F.2d 49 (2d Cir. 1944).
105. *Cf.* Chow Bing Kew v. United States, 248 F.2d 466, 469 (9th Cir. 1957):
> The precise meaning of the word 'willfully' depends upon the context in which it is used. In view of the amendment of the above quoted statute from which § 911 was derived, we think it clear that the government in a prosecution under § 911 need not show that the misrepresentation was made for a fraudulent purpose, and that 'willfully' as used in this section means only that it must be proved beyond a reasonable doubt that the misrepresentation was voluntarily and deliberately made.

106. *Id.*
107. *Id.* at 470.
108. United States v. Alberanga-Salazar, 360 F. Supp. 1221 (C.D. Cal. 1973).
109. § 1546. Fraud and misuse of visas, permits, and other entry documents.
Whoever, knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, or document, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statements, or to have been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commis-

plication for a document required by the immigration laws[110] or regulations[111] for entry into the United States subject the alien to criminal penalties. Section 1546 also makes it illegal to counterfeit, alter, possess, or receive such documents. The leading decision interpreting this statute is *United States v. Campos-Serrano*, 404 U.S. 293 (1971). The defendant was arrested while in possession of a counterfeit alien registration receipt card and convicted under the first paragraph of this statute for possessing and using an altered immigration document required for entry into the United States.[112] In a narrow ruling, the Supreme Court affirmed the reversal of the conviction. The Court held that an alien registration receipt card[113] has as its primary purpose alien identification while within the United States, despite the fact that it is permissibly usable by an alien for reentry from abroad. The reasoning of the decision is that since the primary purpose of registration receipt cards is for identification and not entry into the United States, a conviction under § 1546 was improper.[114] Further, the integrity of alien registration receipt cards is specifically protected under 8 U.S.C. § 1306(c) and (d) which make it unlawful to

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sioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement —Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

110. Section 211 of the Act, 8 U.S.C. § 1181 (1970), states the documentary requirements for entry into the United States. Note that the third paragraph of the statute appears to encompass crimes unrelated to documents, i.e., attempting entry under an assumed name. The case law is split as to whether § 1546 covers such illegal entry absent use of a document, visa or the like. *Cf.*, United States v. Carrillo-Colmenero, 523 F.2d 1279 (5th Cir. 1975) (holding it does); with McFarland v. United States, 19 F.2d 807 (6th Cir. 1927) (holding it does not).

111. *See* 8 C.F.R. §§ 211-212 (1972).

112. United States v. Campos-Serrano, 430 F.2d 173 (7th Cir. 1970) *aff'd* 404 U.S. 293 (1971).

113. An alien registration receipt card, Form I-151, is issued to aliens admitted for permanent residence. 8 C.F.R. § 101.3 (1972).

114. 404 U.S. 293, 299-300 (1971).

make fraudulent statements in obtaining registration cards or to counterfeit such documents.[115] This is an important ruling since alien registration receipt cards are commonly used by permanent resident aliens and the penalty provisions of these two statutes differ dramatically. § 1546 is a felony carrying the maximum of five years punishment while § 1306(c) is a misdemeanor with a maximum penalty of six months. Thus, the important initial determination under prosecutions for violation of § 1546 is whether or not the document which is the basis of the prosecution falls within the purview of the statute; that is, whether the document has as its primary purpose alien entry into the United States.

Many of the prosecutions under the fourth paragraph of this statute have involved representations by an alien that he or she is married to a United States citizen in order to gain entry into the United States. These marital arrangements often involve agreements between the putative spouses that the marriage arrangement will be for valuable consideration given to the citizen in return for marrying the alien. The object of such marriages is to secure the entry of the alien into the United States without intent of consummating the marriage. Indeed, the original agreement often contemplates a speedy divorce upon successful entry of the alien spouse into the United States. The leading case in this area is *Lutwak v. United States*, 344 U.S. 604 (1953). There a three marriage conspiracy was alleged. The Supreme Court affirmed the convictions under § 1546, and upheld the lower court findings that the purpose of the marriage was solely to come within the provisions of the immigration laws[116] permitting entry of alien spouses of United States citizens. The specific violation of this statute occurred in the *concealment* of the spouses' agreement

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115. Section 266 of the Act, 8 U.S.C. § 1306 (1970), states in part:

(c) Any alien or any parent or legal guardian of any alien, who files an application for registration containing statements known by him to be false, or who procures or attempts to procure registration of himself or another person through fraud, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000, or be imprisoned not more than six months, or both; and any alien so convicted shall, upon the warrant of the Attorney General, be taken into custody and be deported in the manner provided in part V of this subchapter.

(d) Any person who with unlawful intent photographs, prints, or in any other manner makes, or executes, any engraving, photograph, print, or impression in the likeness of any certificate of alien registration or an alien registration receipt card or any colorable imitation thereof, except when and as authorized under such rules and regulations as may be prescribed by the Attorney General, shall upon conviction be fined not to exceed $5,000 or be imprisoned not more than five years, or both.

116. The War Brides Act, formerly § 232 of Title 8, permitted the entry of alien spouses of citizen war veterans.

to separate as soon as entry was perfected.[117] The technical validity of the marriage, at least for statutory purposes, was immaterial.[118]

In subsequent cases interpreting § 1546 where sham marriages are involved, convictions have turned upon whether the government's theory is that of false representations in procuring an immigration document required for entry or concealment of a material fact in the application. The latter theory was successfully used in *Lutwak*[119] where the government proved that the parties concealed the fact that the marriages would dissolve as soon as entry into the United States was made by the alien spouse. Under this theory, the technical validity of the marriage is immaterial. If the prosecution is one of false representation, then the government must prove that the representation made by the alien spouse in the application to gain entry was indeed a false one.[120] This would require that the government prove the marriage void at the time of the representation since this is the material representation which the government alleges to be false.

An additional problem with prosecutions under § 1546 concerns the question of the jurisdiction of the courts to prosecute an alien under the statute where the false representations were made outside of the United States. This is often the case where the alien makes misrepresentations in an application for an immigration document at a consulate office. The cases which have considered the issue have found the jurisdiction of this statute to apply extraterritorily.[121]

Another important issue under this statute is the intent required to violate it. In a case involving the prosecution of an attorney for conspiring with an alien and a citizen to draft immigra-

117. Lutwak v. United States, 344 U.S. 604, 612 (1953).
118. *Id.* at 610.
119. *Cf.* Chin Bick Wah v. United States, 245 F.2d 274 (9th Cir. 1957).
120. United States v. Diogo, 320 F.2d 898 (2d Cir. 1963). Judge Clark's dissent considers the distinction between the Lutwak theory and the Diogo theory hairsplitting and specious. 320 F.2d at 910. *See also* Bark v. INS, 511 F.2d 1200 (9th Cir. 1974) (In determining whether or not a marriage is a "sham" the proper standard is to look at the intent of the parties at the time they entered into the marriage—did they have the state of mind at that time to enter into a marriage with the intent of establishing a life together?) In prosecutions under 18 U.S.C. §§ 1001, 1546, the appellate courts have held that in order for a conviction for making a false statement to the INS concerning a marriage to stand, it is the meaning intended by the declarant that is paramount and not the meaning ascribed by Congress for the purpose of immigration law. Thus, where a defendant states that she is married and intends that the statement be considered under state law where the marriage is in fact lawful, no conviction may stand simply because the marriage is not valid by a congressional definition. United States v. Lozano, 511 F.2d 1 (7th Cir. 1975).
121. United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968), *cert. denied*, 392 U.S. 936 (1968). The statute has been applied to U.S. citizens as well as aliens, United States v. Knight, 514 F.2d 1286 (5th Cir. 1975).

tion documents falsely stating that the individuals were living together as man and wife, one court has approved a jury instruction permitting a conviction under this section where the attorney acted "in reckless disregard" of the true facts concerning the marital status of the alien and citizen.[122]

3. *Misrepresentations in the Procurement of Naturalization or Citizenship Papers, 18 U.S.C. §§ 1423-1426.* These statutes make it a criminal offense to misuse a certificate of naturalization or citizenship,[123] to impersonate another in any naturalization or citizenship proceding,[124] to procure naturalization or citizenship documents when not entitled to obtain those items,[125] and to counterfeit, utter, possess, import, or otherwise use such documents or plates used in printing altered documents.[126] All four

122. United States v. Sarantos, 455 F.2d 877, 880 (2d Cir. 1972). Such an instruction undermines specific intent requirements and has been found improper in other cases. *See* United States v. Bryant, 461 F.2d 913, 921 (6th Cir. 1972).

123. 18 U.S.C. § 1423 (1970), states:

> Whoever knowingly uses for any purpose any order, certificate, certificate of naturalization, certificate of citizenship, judgment, decree, or exemplification, unlawfully issued or made, or copies or duplicates thereof, showing any person to be naturalized or admitted to be a citizen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

124. 18 U.S.C. § 1424 (1970), provides:

> Whoever, whether as applicant, declarant, petitioner, witness or otherwise, in any naturalization or citizenship proceeding, knowingly personates another or appears falsely in the name of a deceased person or in an assumed or fictitious name; or
>
> Whoever knowingly and unlawfully uses or attempts to use, as showing naturalization or citizenship of any person, any order, certificate, certificate of naturalization, certificate of citizenship, judgment, decree, or exemplification, or copies or duplicates thereof, issued to another person, or in a fictitious name or in the name of a deceased person—
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

125. 18 U.S.C. § 1425 (1970), states:

> (a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship; or
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> (b) Whoever, whether for himself or another person not entitled thereto, knowingly issues, procures or obtains or applies for or otherwise attempts to procure or obtain naturalization, or citizenship, or a declaration of intention to become a citizen, or a certificate of arrival or any certificate or evidence of naturalization or citizenship, documentary or otherwise, or duplicates or copies of any of the foregoing—
> Shall be fined not ore than $5,000 or imprisoned not more than five years, or both.

126. 18 U.S.C. § 1426 (1970), provides:

> (a) Whoever falsely makes, forges, alters or counterfeits any oath, notice, affidavit, certificate of arrival, declaration of intention, certificate or documentary evidence of naturalization or citizenship or any order, record, signature, paper or proceeding or any copy thereof, required or authorized by any law relating to naturalization or citizenship or registry of aliens; or
>
> (b) Whoever utters, sells, disposes of or uses as true or genuine, any false, forged, altered, antedated or counterfeited oath, notice, affidavit, certificate of arrival, declaration of intention to become a citizen, certificate or documentary evidence of naturalization or citizenship, or any order, record, signature or other instrument paper or proceeding required

statutes are felonies carrying maximum penalties of five years in prison and/or $5,000 in fines. Unlike the mere possession of an altered I-151 registration card, the mere possession of a forged or otherwise altered naturalization or citizenship certificate is a crime under these statutes.[127]

Common prosecutions under this statutory scheme involve false testimony by a defendant alien as to material facts in a naturalization proceeding.[128] Again, the issue of corroboration of admissions by a defendant in establishing the *corpus delicti* is involved. In one case in which an alien gave false testimony and made a false affidavit in his naturalization proceeding, a prosecution under this section failed where the only evidence offered by the government was the testimony and affidavit of the defendant before the naturalization board and subsequent admissions by the defendant that the statements were false.[129] This evidence was insufficient to establish the *corpus delicti.* Under most circum-

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or authorized by any law relating to naturalization or citizenship or registry of aliens, or any copy thereof, knowing the same to be false, forged, altered, antedated or counterfeited; or
(c) Whoever, with intent unlawfully to use the same, possesses any false, forged, altered, antedated or counterfeited certificate of arrival, declaration of intention to become a citizen, certificate or documentary evidence of naturalization or citizenship purporting to have been issued under any law of the United States, or copy thereof, knowing the same to be false, forged, altered, antedated or counterfeited; or
(d) Whoever, without lawful authority, engraves or possesses, sells, or brings into the United States any plate in the likeness or similitude of any plate designed, for the printing of a declaration of intention, or certificate or documentary evidence of naturalization or citizenship; or
(e) Whoever, without lawful authority, brings into the United States any document printed therefrom; or
(f) Whoever, without lawful authority, possesses any blank certificate of arrival, blank declaration of intention or blank certificate of naturalization or citizenship provided by the Immigration and Naturalization Service, with intent unlawfully to use the same; or
(g) Whoever, with intent unlawfully to use the same, possesses a distinctive paper adopted by the proper officer or agency of the United States for the printing or engraving of a declaration of intention to become a citizen, or certificate of naturalization or certificate of citizenship; or
(h) Whoever, without lawful authority, prints, photographs, makes or executes any print or impression in the likeness of a certificate of arrival, declaration of intention to become a citizen, or certificate of citizenship;
Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

127. *Id.* at subparagraph (c); Green v. United States, 150 F. 560 (9th Cir. 1907).

128. *E.g.*, Bridges v. United States, 199 F.2d 811 (9th Cir. 1952) *rev'd on other grounds*, 346 U.S. 209 (1952). Bridges was convicted of falsely representing under oath that he was not a member of the Communist Party at his naturalization proceeding. The conviction was ultimately reversed because the prosecution was initiated after the statute of limitations had run. *See* 18 U.S.C. § 3282 (1969).

129. United States v. Golan, 24 F. Supp. 523 (E.D. Pa. 1938) (the court found that the government's evidence, the defendant's naturalization testimony and his admissions of the falsity of such testimony insufficient as not proving a *corpus delicti* independent of the admissions of the defendant).

stances, false testimony given in a naturalization or citizenship proceeding would be prosecutable under federal perjury statutes as well as this section.[130]

C. *Alien Registration Offenses*

Every alien seeking entry into the United States must first be registered and fingerprinted in connection with the application for immigration documents.[131] No visa can be issued to any alien until these requirements have been met. All aliens over the age of 14 must personally register and be fingerprinted, while the guardians of aliens under 14 years of age in the United States are responsible for the application and registration of such aliens.[132] In addition to registration, an alien required to be registered must notify the Attorney General in writing of his current address[133] and must carry at all times his personal registration certificate or receipt card.[134] The penalty for failure to comply with the registration and fingerprinting requirements include a $1,000 fine and six months in prison, or both.[135] The penalty for failure to notify the Attorney General of address changes is thirty days and/or a $200 fine.[136] However, the latter statute also provides that irrespective of a conviction for failure to notify the Attorney General of the alien's address, an administrative determination of such failure shall require the deportation of the alien unless the alien establishes that the failure was reasonably excusable or not willful.[137]

The criminal penalties for making a false registration application or for counterfeiting alien registration receipt cards have been discussed with respect to 18 U.S.C. § 1546, *supra*. Criminal penalties are provided for the failure of an alien to carry on his person a certificate of alien registration or an alien registration receipt card.[138] The Seventh Circuit has held that the statute requiring an alien to carry at all times an alien registration receipt card is constitutional.[139] The statute has survived all constitutional attacks to date. Because the purpose of the card is noncriminal, the fifth amendment privilege does not prevent an immigration officer from requiring production in a normal immigration

130. *Cf.* 18 U.S.C. §§ 1621, 1623 (1970).
131. 8 U.S.C. § 1302 (1970).
132. *Id.*
133. 8 U.S.C. § 1305 (1970).
134. 8 U.S.C. § 1304(e) (1970).
135. 8 U.S.C. § 1306(a) (1970).
136. 8 U.S.C. § 1304(e) (1970).
137. 8 U.S.C. § 1306(b) (1970).
138. 8 U.S.C. § 1304(e) (1970).
139. United States v. Campos-Serrano, 430 F.2d 173, 176 (7th Cir. 1970), *aff'd*, 404 U.S. 293 (1971).

inquiry situation. The purpose of the card is to assure that the government is aware of the number of aliens in the country and their status.[140] However, under what circumstances the alien must produce the card for inspection by an immigration officer, which inspection may involve a criminal investigation, is discussed below in the area of criminal procedure.

Prosecutions under alien registration statutes involve at least preliminarily the issue of the status of the defendant as alien or citizen. The question may turn on whether the defendant knew at the time of the offense that he or she was an alien required to register under the Act.[141] Issues often involve defendants who claim citizenship through a U.S. citizen parent even though the defendant may have been born outside of the country.[142] Thus, even though it may eventually be demonstrated in court that the alien is not a citizen under the theory alleged, the fact that the alien defendant thought he was may eliminate the element of willfulness required by the statute to sustain a conviction.[143]

If it is established that the alien was required to register, the government further has the burden of proving non-registration during the time period alleged. If the defendant testifies that the registration forms were completed, the government will not meet its burden merely by establishing that a check of its files discloses no registration form.[144] The nature of prosecutions for failure to register often leads to lengthy time delays; however, failure to register is a continuing offense tolling the statue of limitations.[145]

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140. *Id.*

141. It has been held that intent is not an element of the notice of change of address provisions of the Act. United States v. Ginn, 124 F. Supp. 658, (E.D. Pa. 1954), *rev'd on other grounds*, 222 F.2d 289 (3d Cir. 1955). However, if an alien believes himself excluded from such requirements, such belief would excuse non-compliance and criminal liability. *See* United States v. Zeid, 281 F.2d 825, 829 (3d Cir. 1960). *See also infra* note 143.

142. United States v. Sacco, 428 F.2d 264 (9th Cir. 1970).

143. United States v. Zeid, *supra* note 141. Whether a person is an alien or citizen can sometimes be a complex issue of fact and law. Beginning at § 301 of the Act (8 U.S.C. § 1401 *et seq.* (1970)), numerous means of acquiring United States citizenship are delineated. For example, where a person is born in a foreign country to a United States citizen mother and foreign national father, he is a United States citizen if the mother was physically present in the United States for a period of ten years prior to the birth of the child, five of which were after her fourteenth birthday. 8 U.S.C. § 1401(a)(7) (1970). However, persons acquiring citizenship through this section will lose it unless between the ages of fourteen and twenty-eight the person has continuous residence in the United States for two years. *Id.* at (b). If a person claims citizenship through this section, complicated issues of proof and the burden of persuasion arise. *E.g.*, Gonzales-Gomez v. INS, 450 F.2d 103 (9th Cir. 1971) (government has burden of proving lack of entry and residence once the putative citizen claims citizenship through this section). Thus, even though a defendant may not be able to establish citizenship under § 1401 or other sections of the Act, the fact that he believed himself a citizen may defeat prosecutions under the registration requirements or other criminal statutes relating to aliens. *E.g.*, Farrell v. United States, 381 F.2d 368, 369 (9th Cir. 1967).

144. United States v. Zeid, 285 F.2d 825, 828 (3d Cir. 1960).

145. United States v. Franklin, 188 F.2d 182 (7th Cir. 1951).

III. DEPORTATION CONSIDERATIONS

Deportation[146] is not a crime but merely another name for the ancient rite of banishment.[147] Although there are certain criminal penalties[148] for failure to comply with deportation orders, the number of prosecutions under the statutes are statistically insignificant. Deportation may result with or without an antecedent criminal conviction.[149] Thus, an alien may be deported after entry if it is found that the alien fell within one or more of the 31 categories of excludable aliens.[150] Further, an alien may be deported after entry if he entered illegally or engaged in one or more of 16 types of post-entry conduct.[151]

The vast majority of deportable aliens arrested in the United

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146. Deportation is covered by section 242 of the Act, 8 U.S.C. § 1252 (1970).

147. Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947).

148. § 242(d) and (3) of the Act, 8 U.S.C. § 1252(d) and (e) (1970), provide in part:

> (d) . . . Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> (e) Any alien against whom a final order of deportation is outstanding by reason of being a member of any of the classes described in paragraphs (4) to (7), (11), (12), (14) to (17), or (18) of section 1251(a) of this title, who shall willfully fail or refuse to depart from the United States within a period of six months from the date of the final order of deportation under administrative processes, or, if judicial review is had, then from the date of the final order of the court, or from September 23, 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years: . . .

See United States v. Witkovitch, 353 U.S. 194 (1957), affirming the dismissal of an indictment for violation of § 242(d) of the Act in that the information requested did not relate to the continued availability of the alien for deportation. The penalties in a § 1252 are intended to enforce the obligations imposed on an alien after entry of an order of deportation. The alien's obligations, however, are at least partially conditioned on factors over which he has little control. The Supreme Court has reversed convictions for willful failure or refusal to make a timely application in good faith for travel or other documents necessary for departure and for willful failure or refusal to depart where no country willing to receive the alien had been identified at the time of the alleged omissions. Heikkien v. United States, 355 U.S. 273 (1958). Constitutional questions of certainty and definiteness are avoided where there is a country willing to receive the alien which is identified. United States v. Spector, 343 U.S. 169 (1952) (conviction affirmed and statute held not to violate due process once country willing to receive identified).

149. *E.g.*, Khalil v. INS, 457 F.2d 1276 (9th Cir. 1972) (overstay of visa).

150. *See* Section 212 of the Act, 8 U.S.C. § 1182 (1970).

151. *See* Section 241 of the Act, 8 U.S.C. § 1251 (1970).

States, except for those falling within certain statutory exceptions, may in the discretion of the Attorney General be offered voluntary departure from the United States at their own expense.[152] A voluntary departure may occur before any formal proceedings are commenced against the alien,[153] during the course of deportation proceedings but before a final order of expulsion,[154] or after entry of the final deportation order.[155] The alien is ineligible for voluntary departure only if he is found deportable under an enumerated disqualifying ground.[156] A voluntary departure is by far the better means of an alien's departure from the United States since it does not pose a procedural bar to the alien's later application for proper immigration documents.[157] Further, a deportation order may be the basis for a serious felony prosecution if there is a subsequent illegal entry.[158] An alien who is deported is permanently barred from the United States unless he subsequently obtains the Attorney General's permission to apply for admission into the United States.[159] The granting of an application for voluntary departure rests in the sound discretion of the Attorney General and is subject to court review only where there is a clear abuse of or failure to exercise discretion.[160]

Deportation hearings are commenced with the issuance of an order to show cause containing allegations of fact and a charge of deportability.[161] The order to show cause is the full measure of notice given to the alien and there are no provisions for prehearing discovery.[162] The burden of proving deportability is on the United States except that Congress has required by statute that the alien has the burden to show the time, place, and manner of his entry into the United States.[163] If such proof is not given, the alien is presumed to be in the United States in violation of the law and is thus deportable.[164] The quantum of proof required

152. *See* Section 244(e) of the Act, 8 U.S.C. § 1254(e) (1970); 8 C.F.R. §§ 244.1-244.2. (1972).
153. 8 C.F.R. § 242.5 (1972).
154. 8 C.F.R. § 242.17(b) (1972).
155. 8 C.F.R. §§ 243.4 and 243.5 (1972).
156. Section 242(b) of this Act, 8 U.S.C. § 1251(b) (1970), provides that the privilege of voluntary departure shall not be granted when the Attorney General has reason to believe that the alien is deportable for specified grounds relating generally to criminals, subversives, narcotic violators, aliens involved in prostitution or related activities, registration and reporting violations, and those found to be undesirable residents as a result of certain offenses concerning national security.
157. *Cf.* Section 212(a)(16) of the Act, 8 U.S.C. § 1182(a)(16) (1970).
158. *Supra* note 24.
159. Section 121(d)(3) of the Act, 8 U.S.C. § 1182(d)(3) (1970) allows for a waiver of inadmissibility by the Attorney General.
160. *E.g.*, Hamad v. INS, 420 F.2d 645, 647 (D.C. Cir. 1969).
161. 8 C.F.R. § 242.1(a) (1972).
162. MacLeod v. INS, 327 F.2d 453 (9th Cir. 1964).
163. Section 291 of the Act, 8 U.S.C. § 1361 (1970).
164. *Id.*

of the government is by a preponderance of the evidence. It must be adduced by clear, unequivocal and convincing evidence as alleged in the order to show cause.[165]

The procedural rights of an alien at a deportation hearing are not commensurate with those available in a criminal prosecution. While 8 U.S.C. § 1252(b), guarantees the alien the right to confront witnesses, it is well settled that such hearings need not abide by the strict rules of evidence.[166] Although an alien does have the right to appear with counsel at the deportation hearing,[167] the Act does not provide for appointed counsel for indigent aliens at such hearings.[168] Despite the fact that the vast majority of deportations concern relatively unsophisticated, indigent, non-English speaking people from Mexico, it is safe to assume that in many instances complete defenses to deportation are ignored and the alien expelled from the country.[169] Despite the advances with respect to the right to appointed counsel in criminal prosecutions,[170] the courts continue to deny indigents a right to appointed counsel in deportation hearings.[171] Deportation proceedings are often related to criminal prosecutions[172] and it is ironic to note that although the right to counsel exists where the maximum punishment is a few days or weeks in jail, it is unavailable where the proceeding involves the permanent banishment of the alien from the United States.[173]

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165. Woodby v. INS, 385 U.S. 276 (1966).

166. Navarrette-Navarrette v. Landon, 223 F.2d 234 (9th Cir. 1955). Due process, however, does apply to such hearings. Piccirillo v. INS, 512 F.2d 1289 (9th Cir. 1975).

167. *See* Sections 242(b)(2) and 292 of the Act, 8 U.S.C. §§ 1252(b)(2), 1362 (1970).

168. Murgia-Melendrez v. INS, 407 F.2d 207 (9th Cir. 1969); *See also* Busquez v. INS, 512 F.2d 751 (10th Cir. 1975).

169. The author of this article has represented a United States citizen who had been deported from the United States as an "excludable alien." United States v. Rigoberto Ledesma-Mazi, Criminal No. 13-596T (S.D. Cal. 1972).

170. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972).

171. *E.g.*, Dunn-Marin v. INS, 426 F.2d 894 (9th Cir. 1970); *but cf.* United States v. Zimmerman, 94 F. Supp. 22, 25 (E.D. Pa. 1950). *See generally* Appleman, *Right to Counsel in Deportation Proceedings*, 14 SAN DIEGO L. REV. 130 (1976).

172. *E.g.*, where it is the basis for a § 1326 prosecution. Under these circumstances, a subversion of the right to jury trial is permitted by allowing the prior counselless deportation to form the predicate of the § 1326 criminal prosecution. Just as a prior counselless conviction may not be used to impeach a witness credibility, Loper v. Beto, 405 U.S. 473 (1972), or enhance a sentence on a subsequent conviction United States v. Tucker, 404 U.S. 443 (1972), a prior counsellless deportation should not be permitted to form the basis of a § 1326 prosecution.

173. The more recent circuit decisions on this issue have recognized the importance of counsel at such hearings. *E.g.*, Aguilera-Enriquez v. INS, 516 F.2d 565 (6th Cir. 1975); Henriques v. INS, 465 F.2d 119 (2d Cir. 1972). In Rosales-Caballero v. INS, 472 F.2d 1158 (5th Cir. 1973), the appellate court remanded a deportation of an indigent to the INS with a suggestion that the deportation order be vacated and that legal aid counsel be allowed to represent the alien at the subsequent deportation hearing. *See generally* Comment, *Deportation and the Right to Counsel*, 11 HARV. INT'L L.J. 177 (1970).

As the Supreme Court has often emphasized, deportation is a drastic measure

The availability of the sanction of deportation must always be kept in mind in the defense of an alien to criminal charges. The criminal convictions that will result in deportation and the means to defend against such a prospect are discussed in detail below in Section V.

IV. PRE-ARREST PROCEDURAL CONSIDERATIONS

Perhaps the fastest changing area of the law concerning the defense of an alien in criminal prosecutions has been that of procedure. In enforcing the immigration laws of the United States, Congress has granted immigration officers broad powers of interrogation and search at the ports of entry leading into the United States. Thus, immigration officials may board and search any means of conveyance to look for aliens being brought into the United States.[174] They may also require any person coming into the United States to state under oath the purpose or purposes for which he comes as well as the individual's intentions once in the United States.[175] If there is a question as to the individual's right to enter, the immigration officer may detain the person at the port of entry pending further investigation.[176] If any question concerning the right of the individual to enter the United States persists, the officer may simply bar the individual's entry into the United States.[177]

While the powers of the immigration officials at the border are necessarily broad, the manner in which inland enforcement has taken place is subject to controversy. Section 287 of the Act[178] grants immigration officers the power without a warrant to:

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that may inflict the equivalent of banishment or exile, Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947), and "result in the loss 'of all that makes life worth living.' " Bridges v. Wixon, 326 U.S. 135, 147 (1945). When such serious injury may be caused by INS decisions, its officials must be held to the highest standards in the diligent performance of their duties. This goal will never be reached as long as mass deportations of unrepresented aliens take place. Nevertheless, appellate courts continue to hold no right to appointed counsel exists. *E.g.*, United States v. Gasca-Kraft, 522 F.2d 149 (9th Cir. 1975). *See* Comment, *Deportation Proceedings: There Must Be A Right to Appointed Counsel*, 3 CHICANO L. REV. 185 (1976).

174. Carroll v. United States, 267 U.S. 132, 154 (1925); 8 U.S.C. § 1357(c) (1970).

175. Section 235(a) of the Act, 8 U.S.C. § 1225 (1970).

176. Section 232 of the Act, 8 U.S.C. § 1222 (1970).

177. Section 236 of the Act, 8 U.S.C. § 1226 (1970).

178. 8 U.S.C. § 1357 (1970), provides:

> (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or ex-

interrogate any person believed to be an alien as to his right to remain in the United States; to arrest any alien within the United States in violation of the law who is likely to escape before a warrant can be obtained; to board and search for aliens vessels and vehicles within a reasonable distance[179] from the border including private lands no more than 25 miles from any external boundary; and to make arrests for felonies committed under any law of the United States regulating aliens if the official has reason to believe the alien has committed an offense contravening the laws regulating the admission, exclusion, or expulsion of aliens.

287(a)(1). This section of the Act empowers immigration officials to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States. The INS maintains that this statute empowers immigration officials to *stop* any motorist traveling on a highway entirely within the United States for an identity check at an established immigration checkpoint[180] and to stop and interrogate any pedestrian as to his right

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pulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an office of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; and

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or expulsion of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States. Any such employee shall also have the power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens.

179. The implementing regulation defines reasonable distance as 100 air miles from any border. 8 C.F.R. § 287.1(a)(2) (1972).

180. This power was upheld in United States v. Martinez-Fuerte, 428 U.S. —, 96 S. Ct. 3074, 49 L. Ed. 1116 (1976), which reversed Ninth Circuit cases *contra* such as Martinez-Fuerte, 514 F.2d 308 (9th Cir. 1975). The High Court ruled that the checkpoint stops were permitted without cause; it did not reach the area warrant issue also up for review.

The government obtained area warrants based upon the authority of Justice Powell's concurring opinion in Almeida-Sanchez v. United States, 413 U.S. 266, 275-85 (1973). The area inspection warrants, which closely resemble the general warrants issued by the British during prerevolutionary days in the American Colonies, were held unconstitutional by the Ninth Circuit. United States v. Martinez-Fuerte, 514 F.2d 308 (9th Cir. 1975). The inspection warrants allowed immigration authorities to keep checkpoints functioning under the theory that there was "probable cause" to believe that mass immigration offenses were occurring on the

to remain in the United States.[181] The statute has been used to justify the massive area control sweeps in which units of the INS Investigative Division, focusing upon particular sectors of major cities, sweep the area by interrogating all those they subjectively suspect of being in the United States illegally.[182]

The leading cases interpreting this statute have held that the statute does *not* provide the Immigration Service with the broad powers enumerated above.[183] The section has been analogized to the stop and frisk authority provided by *Terry v. Ohio.*[184] One appellate court has held that the interrogating officer may forcibly but temporarily detain a person "under circumstances creating a reasonable suspicion not arising to the level of probable cause, that the individual so detained is illegally in the country."[185]

The above doctrine of "reasonable suspicion" was adopted

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highways in the areas of the checkpoints. The warrant authorized border patrolmen to stop all northbound traffic to check the legal status of the individuals in the automobiles. This was held to be in contravention to the holding of Carroll v. United States, 267 U.S. 132, 153-154 (1925): "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. . . Those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. . . ." After the Supreme Court reversed Martinez-Fuerte to permit causeless stops, detentions and interrogations at permanent checkpoints, the need for area warrants disappeared. Probable cause, however, remains necessary for searches at checkpoints.

181. A stop of a pedestrian for such an interrogation must meet minimal constitutional standards. Au Yi Lau v. INS 445 F.2d 217, 223 (D.C. Cir. 1971) (reasonable suspicion to believe suspect an alien); *cf.* Shu Fuk Cheung v. INS, 476 F.2d 1180 (8th Cir. 1973) (no record of seizure of alien during area control check negates claims of constitutional deprivation). *See* note 185 *infra.*

182. The legality of this sweep action has been challenged. *See* T. Hayden, *"The Immigration and Naturalization Service and Civil Liberties: A Report on the Abuse of Discretion,"* ACLU REPORTS (July 1974). *See also* discussion of the sweep actions by INS officials in *Hearings Before the Subcommittee on Immigration, Citizenship, and International Law of the Committee on the Judiciary of the House of Representatives,* 93rd Cong. 1st Sess. 18-46 (1973).

183. The leading cases are found *supra* notes 180 and 181.

184. 392 U.S. 1 (1968).

185. Au Yi Lau, *supra* note 181 at 223. If there is no detention, the immigration officer has statutory authority to inquire into a person's alien status under 8 U.S.C. § 1357(a)(1) (1970). Cheung Tin Wong v. INS, 468 F.2d 1123, 1126 (D.C. Cir. 1972). Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976), affirmed a district court order, 398 F. Supp. 882 (ND Ill. ED 1975), enjoining INS agents from making investigatory stops of pedestrians unless they are possessed at least of reasonable suspicion that such persons are illegal aliens. The injunction also forbade agents from entering houses, dormitories, cottages or other dwellings unless they have an arrest or search warrant, probable cause to make a warrantless entry, or permission voluntarily given by one lawfully entitled to give permission to enter.

In concluding that the requirements for a preliminary injunction had been met, the majority agree with the district judge that the standards for roving-patrol vehicle stops formulated in United States v. Brignoni-Ponce, *infra,* apply to pedestrian stops as well. The Supreme Court's intervening decision in United States v. Martinez-Fuerte, *supra,* did not change this conclusion; that case was expressly limited to vehicle stops conducted at permanent checkpoints.

by the Supreme Court in a case interpreting § 287(a)(1) of the Act. In *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574 (1975), affirming 499 F.2d 1109 (9th Cir. *en banc* 1975), the Supreme Court unanimously held that the fourth amendment does not allow a *roving* border patrol stop of a vehicle to question the occupants about their citizenship or immigration status when the only ground justifying the stop is that the occupants appear to be of Mexican ancestry. Applying the constitutional principles set forth in *Terry v. Ohio* to the statute, 8 U.S.C. § 1357(a)(1), the Court held that roving patrol officers may stop vehicles only if they are aware of specific articulable facts, which taken together with rational inferences therefrom, warrant a reasonable suspicion that the vehicle contains aliens who may be illegally in the country.

In *Brignoni-Ponce*, border patrol officers were stationed 66 miles north of the border at the San Clemente checkpoint which was closed because of inclement weather. Officers observed a car pass on the highway and stopped it because the three occupants appeared to be of Mexican descent. After stopping the vehicle, the officers discovered that two of the occupants were illegal immigrants. The driver was charged with transporting the illegal aliens, a violation of 8 U.S.C. § 1324 (a)(2). The Court of Appeals, relying on its own precedent, unanimously held that *Almeida-Sanchez v. United States*, 413 U.S. 226 (1973), and the fourth amendment forbade stopping a vehicle even for the limited purpose of questioning its occupants unless the officers have a "founded suspicion" that the occupants are aliens illegally within the country. Mexican ancestry alone was held not to support a "founded suspicion."

In holding that there must be a reasonable or founded suspicion that a vehicle contains illegal aliens prior to a roving border patrol stop, the Supreme Court noted the numerous factors which may be taken into account in deciding whether there is a reasonable suspicion to stop a car in the border area. Such criteria would include the characteristics of the area, its proximity to the border, the usual patterns of traffic on the road, previous experience with alien traffic, the behavior of the driver (erratic or evasive), the nature of the vehicle (heavily loaded, containing an extraordinarily large number of passengers, persons trying to hide). The Court refers to the government's assertion that trained officers can recognize the "characteristic appearance of persons who live in Mexico, relying on such factors such as the mode of dress and haircut." All of these factors, states the Court, would be relevant in determining whether there was a reasonable suspicion to support a roving patrol stop of a vehicle within the

United States to question the occupants as to their citizenship.

In *Brignoni-Ponce*, however, the single factor justifying the stop was the apparent Mexican ancestry of the occupants. This alone could not constitute a reasonable ground to believe that the three occupants were illegally immigrated aliens. The officers had only a fleeting nighttime glimpse of the persons traveling on the interstate highway. The Court took note of the millions of persons of Mexican-American heritage who live lawfully in the border states and held that Mexican appearance, standing alone, could not justify a reasonable suspicion that the persons were in the United States illegally.

Courts interpreting this statute's application to roving border patrol checkpoints have similarly ruled that in order to justify a stop and interrogation, the officers must have a reasonable or "founded suspicion" that the vehicle or persons inside are involved in immigration law violations.[186] The definition of founded suspicion remains elusive, but convictions have been overturned where the driver of a car with six aliens was stopped because the individuals in the car appeared Mexican and looked straight ahead while driving down the highway.[187] While the variations in factual situations surrounding the stops of vehicles at checkpoints and on roving patrols are limitless, a number of cases have been decided to give some substance to the doctrine of founded suspicion.[188] To justify a stop of a vehicle away from the border for questioning of the occupants for immigration law violations, there must be proven some unusual activity, related to the persons stopped and interrogated, which is criminal in nature.[189]

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186. *See* discussion *supra* note 180.

187. United States v. Mallides, 473 F.2d 859 (9th Cir. 1973). This case provides an excellent discussion of the founded suspicion doctrine.

188. United States v. Ogilvie, 527 F.2d 330 (9th Cir. 1973) (driving on highway and turning around just before checkpoint held insufficient to stop car); United States v. Mora-Chavez, 496 F.2d 1181 (9th Cir. 1974) (electronic sensor activity near border sufficient basis to stop car); United States v. Jaime-Barrios, 494 F.2d 455 (9th Cir. 1974) (agent unfamiliar with vehicle going too fast in suspicious area held sufficient); United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973) (Mexican driver in typical alien smuggling vehicle which was riding low in rear held sufficient). *See generally* Weisgall, *Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion*, 9 U.S.F.L. REV. 219 (Fall 1974).

189. *E.g.*, United States v. DeVita, 526 F.2d 81 (9th Cir. 1975) (unreliable informant's tip, vagueness of information provided, surveillance of innocuous activity led to an illegal stop of car); United States v. Carrizoza-Gaxiola, 523 F.2d 239 (9th Cir. 1975) ("profile" of car thieves insufficient to permit stopping car on highway where no founded suspicion present); United States v. Torrez-Urena, 513 F.2d 540 (9th Cir. 1975) (man loading boxes into pickup and driving near border area insufficient cause to stop); United States v. Barragan-Martinez, 504 F.2d 1155 (9th Cir. 1974) (tip to stop one car did not provide cause to stop another car following lead car). *Compare* United States v. Ward, 488 F.2d 162 (9th Cir. *en banc* 1973), and Irwin v. Superior Court, 1 Cal. 3d 423 (1969), where the founded suspicion doctrine has been applied in non-immigration contexts.

During an interrogation pursuant to this statute, the issue of whether a warning complying with the requirements of *Miranda v. Arizona*[190] is presented. Since only a reasonable suspicion need precede the stop, detention, and interrogation of the individual, such questioning usually does not amount to a custodial interrogation.[191] However, where the purpose of the inquiry is clearly "directed at determining a criminal violation" it has been held that *Miranda* warnings must precede the interrogation.[192] The Seventh Circuit has held that under such circumstances the warnings must precede a request for the alien's registration receipt card since the card is testimonial evidence and thus protected by the fifth amendment.[193]

287(a)(2). This section allows the immigration officer to arrest aliens attempting to enter the United States illegally and to arrest without a warrant aliens within the United States if the officer has reason to believe that the alien is in the United States in violation of the law and likely to escape before a warrant can be obtained.[194] The necessary factual indicia to support an arrest under this section are equatable with conventional probable cause standards in an ordinary criminal prosecution. To support the arrest without a warrant, the equivalent of exigent circumstances[195] must exist to foreclose the securing by the officer of an arrest warrant. Thus, in one case the immigration officer was excused from the warrant requirement because at the time of the arrest the officer knew the individual to have previously been in the custody of the INS, extremely nervous, and looking around as if about to escape. The alien admitted to the officer that he had no right to be in the United States and the combination of these facts warranted an immediate arrest without a warrant.[196]

The second portion of this section requires that any alien ar-

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190. 384 U.S. 436 (1966).

191. *Cf.* United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969) (right to counsel attaches when questioning reaches accusatory stage), and Hon Keung Kung v. INS, 356 F. Supp. 571, 575 (E.D. Mo. 1973).

192. United States v. Campos-Serrano, 430 F.2d 173, 176 (7th Cir. 1970), *aff'd*, 404 U.S. 293 (1971); *cf.* Lowe v. United States, 407 F.2d 1391 (9th Cir. 1969) (a stop based on reasonable suspicion does not necessitate giving Miranda warnings).

193. United States v. Campos-Serrano, *supra* note 192, at 176. The location of the interrogation is also important in determining if warnings are required. United States v. Trenary, 473 F.2d 680 (9th Cir. 1973) (no Miranda rights necessary where interrogation conducted in foreign country by foreign law enforcement officers even if U.S. officers present).

194. *See, e.g.*, United States v. Alvarado, 321 F.2d 336, 338 (2d Cir. 1963). One horrible recent case found "probable cause" to believe a person an illegal alien where the border patrolman saw a Mexican-appearing man in dirty clothing crouching at 4:30 a.m. near a motel located within a mile of the international border. United States v. Casmiro-Benitez, 533 F.2d 1121 (9th Cir. 1976).

195. *E.g.*, Warden v. Hayden, 387 U.S. 294 (1967).

196. United States v. Meza-Campos, 500 F.2d 33 (9th Cir. 1974).

rested pursuant to the statute shall be taken without unnecessary delay before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States. The questioning at such an interrogation is limited to inquiry concerning the alien's right to be in the United States. The requirement of Federal Rule Criminal Procedure 5(a), which mandates that an accused be taken to a committing magistrate without delay subsequent to an arrest is applicable in this context.[197] Any statements made by the alien during a period of unreasonable delay awaiting arraignment before a magistrate would be inadmissible at trial.[198]

287(a)(3). This section permits immigration officers to search vehicles within a reasonable distance from the border for illegal aliens. A reasonable distance has been defined by Congress to mean 100 miles.[199] However, searches upon private lands—not including dwellings—are limited to 25 miles from the border. The leading case interpreting this section is *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). There, the defendant was driving his vehicle 25 miles north of the Mexican-American border when stopped by a roving Immigration and Naturalization Service border patrolman. The government attempted to justify the search by claiming that this section permits causeless stops and searches for aliens. In a 4-1-4 decision, the Supreme Court held that probable cause to believe that the particular vehicle contained illegal aliens was a necessary condition precedent to the stop and search. Subsequent circuit court cases interpreting *Almeida-Sanchez* held its constitutional mandate applicable to temporary[200] and permanent[201] Immigration and Naturalization Service checkpoint searches within the United States as well as to searches resulting from roving patrols.[202]

197. McNabb v. United States, 318 U.S. 332 (1943) and Mallory v. United States, 354 U.S. 449 (1957) require exclusion of statements produced during any unnecessary delay between the arrest and initial arraignment.

198. However, a waiver of rights under Miranda v. Arizona, 384 U.S. 436 (1966) also waives McNabb-Mallory defects. United States v. Lopez, 450 F.2d 169 (9th Cir. 1971).

199. 8 C.F.R. § 287.1(a)(2) (1972).

200. United States v. Quiroz-Reyna, 500 F.2d 1223 (9th Cir. 1974); United States v. Grijalva-Carrera, 500 F.2d 592 (9th Cir. *en banc* 1974).

201. Bowen v. United States, 422 U.S. 916, 95 S. Ct. 2569 (1975), *affirming*, 500 F.2d 960 (9th Cir. *en banc* 1974) (pre-Almeida-Sanchez checkpoint searches valid without cause). The issue of retroactive application of the Almeida-Sanchez decision is examined in United States v. Peltier, 422 U.S. —, 95 S. Ct. 2313 (1975), *reversing* 500 F.2d 985 (9th Cir. *en banc* 1974), and Bowen v. United States, *supra*.

202. United States v. Brignoni-Ponce, 422 U.S. 873, 95 S. Ct. 2574 (1975) reasonable suspicion required to stop vehicle under 8 U.S.C. § 1357(a)(1)); but *cf.*, United States v. Martinez-Fuerte, 428 U.S. 931, 96 S. Ct. 3074 (1976) (no facts needed to support checkpoint stops). The obvious contradictions in Brignoni-Ponce and Martinez-Fuerte are discussed in *Recent Developments, Alien Checkpoints and the Troublesome Tetralogy: United States v. Martinez-Fuerte*, 14 SAN DIEGO L. REV. 257 (1976).

In *United States v. Ortiz*, 422 U.S. 891, 95 S. Ct. 2585 (1975), the Supreme Court unanimously held that the fourth amendment, as interpreted in *Almeida-Sanchez*, forbade border patrol officers, in the absence of consent or probable cause, to search private vehicles at permanent traffic checkpoints removed from the border or its functional equivalent. The Court in *Ortiz* found no difference of constitutional significance between a checkpoint search and a search conducted after a roving stop.

In *Ortiz*, the Court simply held that the probable cause requirements of *Almeida-Sanchez* would apply to fixed checkpoint searches of vehicles for aliens. *Ortiz* involved a stop and search of a car at the San Clemente checkpoint located on the principle highway between San Diego and Los Angeles. Over ten million vehicles pass through the checkpoint each year. The Court held that the checkpoint search procedure under 8 U.S.C. § 1357(a), did not impose any meaningful limitation on the discretion exercised by border patrol officers in selecting those cars which would be searched. To protect the travelling public from official arbitrariness, the probable cause standard was interjected as the minimum requirement for a lawful search.

Even assuming probable cause to search a vehicle, immigration officials are limited in the scope of their search to areas where aliens could plausibly be concealed.[203] Thus, while searches of trunks and under hoods of cars are permitted, other searches, such as under the front seat[204] or in a cigarette package[205] are impermissible.

It must be kept in mind that the stopping of a vehicle by a roving INS vehicle may be done without probable cause, based upon a mere founded suspicion to believe the vehicle is involved in criminal activity. No facts are required to support a checkpoint stop. If the stop is justified based on a founded suspicion or because it occurs at a checkpoint, inquiry as to the status of the occupants may provide probable cause for a subsequent search or arrest. The recent Supreme Court decisions have not by any means resolved all of the related issues before the Supreme Court. In fact the Court specifically left open at least five issues for future litigation: 1) Whether the voluntary testimony of the alien witness at trial, as opposed to a government agent's testimony about objects seized or statements overheard, is subject to suppression as the fruit of an illegal search or seizure. *See United States v.*

203. United States v. Lugan-Romero, 469 F.2d 683 (9th Cir. 1972) (illegal search of foot lockers).
204. United States v. Winer, 294 F. Supp. 731 (W.D. Tex. 1969).
205. United States v. Hortze, 179 F. Supp. 913 (S.D. Cal. 1959).

Guana-Sanchez, 484 F.2d 590 (7th Cir. 1973), *writ dismissed as improvidently granted*, 420 U.S. 513 (1975). In the area of immigration searches, this question focuses upon whether an admittedly illegal search of a car trunk which produces illegal aliens could lead to the suppression of the subsequent trial testimony of the aliens. 2) The retroactivity question of whether searches at checkpoints after *Almeida-Sanchez* and before *Ortiz* will be subject to the requirements of reasonable suspicion and probable cause. *See United States v. Juarez-Rodriguez* 498 F.2d 7 (9th Cir. *en banc* 1975), where an evenly divided (6-6) court held that probable cause for checkpoint searches would be required only after May 9, 1974, the date of *United States v. Bowen*, 500 F.2d 960 (9th Cir. *en banc* 1974). 3) Whether an area warrant may justify roving or checkpoint searches based upon information about the area as a whole in the absence of cause to believe that a particular car is carrying concealed aliens remains an open question. *See United States v. Martinez-Fuerte*, 514 F.2d 308 (9th Cir. 1975), holding such a warrant unconstitutional on several grounds. 4) The Court reserved the question whether Border Patrol officers may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country. *See Au Yi Lau v. INS*, 445 F.2d 217, *cert. denied*, 404 U.S. 864 (1971), holding that a reasonable suspicion is required for such a stop. 5) Last, the question of the stopping of buses in border areas to question the passengers as to their immigration status remains unanswered. In *United States v. Barbera*, 514 F.2d 294 (2d Cir. 1975), the appellate court affirmed the trial court's suppression of evidence which resulted from the stopping of a bus for such an alien interrogation.

The searches permitted under § 1357(a)(3), are to be distinguished from the broader powers involved in an "extended border search." The important consideration underlying the extended border stop and search doctrine is that "the totality of the circumstances . . . are such to convince the factfinder with reasonable certainty that any contraband at the time of the search was aboard the vehicle at the time of the entry into the jurisdiction of the United States."[206] Thus, if there has been constant surveillance of the person or vehicle from the time of entry to the point of apprehension a subsequent search of the vehicle is justified under border search rationale.[207]

206. Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966).

207. Where there is a "reasonable certainty" that persons or contraband have just crossed the border illegally and entered a car, a stop and search is valid on those facts alone. United States v. Markham, 440 F.2d 1119 (9th Cir. 1971); United States v. Weil, 432 F.2d 1320 (9th Cir. 1970) (car crosses at other than lawful port of entry).

The immigration officer conducting an arrest of an alien may seize items "capable of being used to establish and maintain a false identity,"[208] items which could have been used to aid in the violation of immigration or other federal statutes, and items that the accused is deliberately trying to hide.

V. Post Arrest Procedural Considerations

A. *The Arrest*

As stated above, immigration officers have authority to make arrests without warrants if an illegal alien is attempting or has completed entry into the United States in the presence of an immigration officer.[209] Arrests in other contexts must be supported by a "reason to believe" that the alien is in the United States illegally and likely to escape before a warrant can be obtained. The phrase "reason to believe" has been read as the equivalent of probable cause.[210]

The precise timing of an arrest is important in determining the limits of an interrogation as well as searches and seizures. In a case from the District of Columbia, aliens were inside a restaurant which had its exits guarded by immigration officials whose presence was not known by the aliens inside.[211] No arrest occurred because the aliens did not realize that their freedom of movement had been restrained; thus, the aliens were held not to have been arrested until a later point when probable cause had been indisputably generated by information supplied by the aliens themselves. The court held that the interrogations which occurred prior to the evolution of probable cause were supported by a reasonable suspicion that the aliens were here.[212] If a suspected alien offers voluntary statements during a noncustodial interrogation pursuant to § 287(a)(1), there is no question as to their legality and admissibility at a later prosecution.

The Immigration and Naturalization Service cooperates extensively with other law enforcement branches.[213] When an alien is arrested by Service officials and is subsequently charged with other unrelated offenses, there may be reason to suspect that the original arrest was made with the intent of facilitating the prosecu-

208. Abel v. United States, 362 U.S. 217, 239 (1960). The extent of the search would be limited in scope by traditional notions of probable cause for searches made incident to an arrest. Chimel v. California, 395 U.S. 752 (1969).

209. Section 287(a)(2) of the Act, 8 U.S.C. § 1357(a)(2) (1970).

210. Au Yi Lau v. INS, 445 F.2d 217, 222 (D.C. Cir. 1971). This is to be distinguished from the basis required for a forcible detention and inquiry as to alienage which need only be supported by a reasonable or founded suspicion.

211. *Id.*

212. *Id.* at 223-224.

213. Annual Report, *supra* note 1 at 12.

tion in the collateral matter. The danger here is that the Service will perfect an arrest of an alien for an immigration offense and conduct a search incident to the arrest, all for the primary purpose of amassing evidence for a criminal prosecution supervised by another law enforcement branch.[214]

In *Abel v. United States*, 362 U.S. 217 (1960), the Supreme Court reviewed a case involving an initial arrest by the Immigration and Naturalization Service and a subsequent prosecution based on an FBI investigation and upon evidence amassed by the INS. In determining whether the arrest by the INS was a mere pretext arrest to facilitate the FBI's investigation, the Supreme Court employed a good faith formula:

> [T]he test is whether the decision to proceed administratively toward deportation was influenced by, and was carried out for, a purpose of amassing evidence for crimes.[215]

Thus, the test of good faith which determines the validity of arrest is examined in terms of the arresting agency's motivations. If the arresting agency made the arrest to carry out its own mandate, the arrest is valid.

B. *Bail*

The arrest of an alien for purposes of criminal prosecution is likely to involve the setting of two bail bonds. The first bond will be set by the committing magistrate to insure the presence of the defendant at the criminal proceeding. If the alien is in the United States illegally or has had his immigration documents lifted at the time of the arrest, an immigration bond of $500-$1000 usually will be set by the Immigration Service.[216] The immigration bond is set to insure the alien's presence pending a determination of deportability.

One danger in meeting the bond on the criminal case without coordinating a release on the immigration bond is that the alien will be released from custody on the criminal charges and turned over to the Immigration Service. If the alien has no right to be in the United States, he may be deported forthwith. To avoid these complications, coordination of the meeting of both bonds simultaneously is required. In the event that the bail set by the Immigration Service is inordinately high, challenge may be made by a writ of habeas corpus to the district court.[217]

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214. *E.g.*, United States v. Alvarado, 321 F.2d 336 (2d Cir. 1963) (holding arrest and prosecution by INS made in good faith).
215. Abel v. United States, 362 U.S. 217, 230 (1960).
216. Section 242 of the Act, 8 U.S.C. § 1252(a) (170).
217. United States *ex rel* Mezei v. Shaughnessy, 195 F.2d 964 (2d Cir. 1952); United States *ex rel* Pirinsky v. Shaughnessy, 177 F.2d 708 (2d Cir. 1949).

To avoid the hardship of meeting two bonds, contact should be made with the deportation officer of the district in which the defendant is incarcerated. The officer has the authority to release the defendant on conditional parole into the United States rather than on an immigration bond.[218] If the immigration officer is informed that the monetary bond for the criminal prosecution has been met, he may deem this a sufficient basis for paroling the alien into the United States pending the prosecution on the criminal charge.

C. *Entering a Plea of Guilty*

For a permanent resident alien, the harmful consequences of a criminal conviction may far exceed the penalty meted out by the sentencing judge. For violations of certain enumerated criminal charges an alien faces the ultimate sanction of deportation. Thus, the alien's exposure to deportation must always be kept in mind when considering entering a plea to any criminal charge. Section 241 of the Act lists the general classes of deportable aliens.[219] An alien is deportable if convicted of a crime involving moral turpitude committed within five years after entry if sentenced to confinement or confined in a prison for one year or more,[220] or who at any time after entry is convicted of two crimes involving moral turpitude not arising out of a single criminal transaction.[221] Any alien who after entry has become a narcotic drug addict or has been convicted for violation of any law or regulation relating to narcotic drugs or marijuana shall be deported.[222] Also, any alien within five years after any entry who has knowingly and *for gain* assisted another alien in illegally entering the United States shall be deported from the United States.[223] A conviction for posses-

218. Section 242 of the Act, 8 U.S.C. § 1252(a) (1970). Note that if the defendant posts bond on the criminal case and is deported for failure to post an immigration bond (or strike an accomodation with the deportation officer in lieu of a second bond), bail may be forfeited without possibility of exoneration later if the defendant does not appear in court. *See* People v. Solorzano, 64 Cal. App. 3d 665 (1976).

219. 8 U.S.C. § 1251 (1970). In addition to deportation, conviction of certain crimes bar admission of the alien in the future. *See* § 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9) (1970).

220. Section 241(a)(4); 8 U.S.C. § 1251 (1970). *E.g.*, Munoz-Casarez v. INS, 511 F.2d 947 (9th Cir. 1975) (voluntary manslaughter is a crime of moral turpitude).

221. *Id.*

222. *Id.* at (a)(11). *E.g.*, Buchowiecki v. INS, 455 F.2d 972 (9th Cir. (1972); *but see* Varga v. Rosenberg, 237 F. Supp. 282 (C.D. Cal. 1965), where an "under the influence" conviction was held a non-deportable offense. Also, note that foreign drug convictions may constitute deportable offenses. Brice v. Pickett, 515 F.2d 153 (9th Cir. 1975) (possession of marijuana conviction in Japan sufficient for deportation); *cf.* Lennon v. INS, 527 F.2d 187 (2d Cir. 1975) (conviction for violating English marijuana possession statute where guilty knowledge not an element of offense is not a deportable offense).

223. *Id.* at (a)(13). *E.g.*, Martin-Mendoza v. INS, 499 F.2d 918 (9th Cir. 1974).

sion of automatic weapons or a sawed-off shotgun is a deportable offense.[224]

In addition to deportation for the above offenses, deportation is mandatory upon order of the Attorney General for violating the laws relating to immigration requirements. Such violations include failing to provide a current address,[225] falsely registering,[226] illegally entering the United States,[227] or at the time of entry being within one of the classes of excludable aliens.[228]

In representing a permanent resident alien charged with criminal conduct, the essential inquiry is whether or not the crime charged is a deportable offense upon conviction. If not an act specifically designated in § 241 of the Act as a deportable crime, the next inquiry is whether or not the charge is a crime involving moral turpitude as defined by the Act. A crime involving moral turpitude is defined as an act of baseness or depravity contrary to accepted moral standards.[229] The crime charged must contain the element of moral turpitude to warrant deportation upon conviction. Thus, if the crime charged does not contain such an element yet was committed in an immoral manner by the alien, this is not a basis for deportation.[230]

Conviction for the following offenses will support a deportation order: crimes involving violence,[231] fraud,[232] or perversion.[233] On the other hand, courts which have found convictions

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224. *Id.* at (a)(14).
225. *Id.* at (a)(5).
226. *Id.*
227. *Id.* at (a)(2).
228. *Id.* at (a)(1).
229. Pino v. Nicolls, 119 F. Supp. 122, 128 (D.C. Mass. 1954); *aff'd* 215 F.2d 237 (1st Cir. 1954), *rev'd on other grounds*, 349 U.S. 901 (1955). See a comprehensive treatment of this subject in Aberson, *Deportation of Aliens for Criminal Convictions*, 2 PEPPERDINE L. REV. 52 (1974).
230. Ablett v. Brownell, 240 F.2d 625, 627 (D.C. Cir. 1957). *See* dissent in Marciano v. INS, 450 F.2d 1026 (8th Cir. 1971), for an argument that due process mandates a factual inquiry of the alien's conduct to determine if the action involved moral turpitude. A comprehensive treatment of this subject may be found in Wexler and Neet, *The Alien Criminal Defendant: An Examination of Immigration Law Principles for Criminal Law Practice*, 10 CRIM. L. BULL. 289 (May 1974).
231. *E.g.*, Puigy Garcia v. Murff, 168 F. Supp. 890 (S.D.N.Y. 1958) (assault with deadly weapon); Guerrero de Nodahl v. INS, 407 F.2d 1405 (9th Cir. 1969) (child beating); DeLucia v. Flagg, 297 F.2d 58 (7th Cir. 1962) (homicide); Marciano v. INS, 450 F.2d 1022 (8th Cir. 1971) (statutory rape).
232. *E.g.*, United States *ex rel.* Sollazzo v. Esperdy, 285 F.2d 341 (2d Cir. 1961) (bribery); United States *ex rel.* Schlimmgen v. Jordan, 164 F.2d 633 (7th Cir. 1947) (counterfeiting); Burr v. INS, 350 F.2d 87 (9th Cir. 1965) (insufficient funds on check); Brett v. INS, 386 F.2d 439 (2d Cir. 1967) (petit larceny); United States *ex rel.* Boraca v. Schlotfeldt, 109 F.2d 106 (7th Cir. 1940) (perjury); Wadman v. INS, 329 F.2d 812 (9th Cir. 1964) (receiving stolen property); Morgano v. Pilliod, 299 F.2d 217 (7th Cir. 1962) (conspiracy to defraud government of taxes on liquor).
233. *E.g.*, Velez-Lozano v. INS, 463 F.2d 1305 (D.C. Cir. 1972) (consensual

not to involve moral turpitude have simply stated that the conviction does not reach the level of debasement to fit within the statutory framework despite the fact that elements of violence,[234] fraud,[235] or sexual misconduct[236] may have been present. In these instances, it is usually the fact that the conviction was for a petty act that produced the favorable result for the alien.

Under the first clause of the statute, deportation is mandated where a crime involving moral turpitude occurs within five years after an entry. While the term entry means any coming of an alien into the United States from a foreign port or place or from an outlying possession,[237] it could be interpreted to warrant deportations of long time permanent resident aliens who have made recent trips to their home country for visits. Fortunately, the courts have construed the term in a very nonliteral sense so that brief visits abroad will not constitute an entry when the alien returns to the United States.[238] If the trip is innocent, casual, and brief then it is not a meaningful departure from the United States and the return will not constitute an entry.[239] In determining whether the resident alien's departure meaningfully interrupts the alien's permanent residence, thus causing the return to constitute an entry, the courts will look to the length of time the alien is absent, the purpose of the visit to the foreign nation, and whether or not the alien had to procure travel documents in order to make the trip.[240]

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sodomy); Marinelli v. Ryan, 285 F.2d 474 (2d Cir. 1961) (indecent assault on child).

234. *E.g.*, United States *ex rel.* Griffo v. McCandless, 28 F.2d 287 (E.D. Pa. 1928) (aggravated assault).

235. *E.g.*, United States *ex rel.* Giglio v. Neelly, 208 F.2d 337 (7th Cir. 1953) (counterfeiting pennies and nickels); Hirsch v. INS, 308 F.2d 562 (9th Cir. 1962) (conviction for false statement to federal official where record omits factual circumstances in indictment); Tutrone v. Shaughnessy, 160 F. Supp. 433 (S.D.N.Y. 1958) (a very petty larceny).

236. *E.g.*, Holzapfel v. Wyrsch, 259 F.2d 890 (3d Cir. 1958) (open lewdness).

237. *See* Section 101(a)(13) of the Act, 8 U.S.C. § 1101(a)(13) (1970).

238. Wadman v. INS, 329 F.2d 812, 816 (9th Cir. 1964).

239. In Palatian v. INS, 502 F.2d 1091 (9th Cir. 1974), the question of entry concerned a resident alien whose brief visit to Mexico was highlighted by an arrest at the border for attempting to import fifty-five pounds of marijuana. The Circuit held that the fact that when Palatian left the United States on his sojourn he had no smuggling plans was irrelevant; the operative factor is the illegal act during the entry. The Fifth Circuit has held that if an alien leaves the United States lacking intent to commit offenses and while outside the country decides to perform such acts, no meaningful interruption of residency takes place (i.e. the return is not an entry for deportation purposes). Vargas-Banuelos v. INS, 466 F.2d 1371 (5th Cir. 1972); *cf.* Lozano-Giron v. INS, 506 F.2d 1073 (7th Cir. 1974); Cuevas-Cuevas v. INS, 523 F.2d 883 (9th Cir. 1975); Maldonado-Sandoval v. INS, 518 F.2d 278 (9th Cir. 1975); Munoz-Casarez v. INS, 511 F.2d 947 (9th Cir. 1975).

240. The rule may be found in the leading case of Rosenberg v. Fleuti, 374 U.S. 449 (1963). The acts of leaving and reentry must be voluntary for the return to constitute an entry. Delgadillo v. Carmichael, 332 U.S. 388 (1947).

When the crime charged is a deportable offense for which there is no defense on the merits, an imaginative use of plea bargaining alternatives may allow entry of a plea to a lesser included offense which is not deportable.[241] Since deportation is not deemed a consequence of a plea to a deportable offense, the trial court need not advise the alien that deportation may result from the entry of the plea.[242] As a result, most courts hold that there is no right to collaterally attack the validity of the plea based upon ignorance of the consequence of deportation. Nevertheless, at least one court has held that the trial court does have the discretion to allow an alien to withdraw the plea because of his ignorance that he was pleading to a deportable offense.[243]

D. *Sentencing Alternatives*

A sentencing court may not order the deportation of the defendant alien as part of the sentence for two reasons: (a) it amounts to banishment and thus constitutes cruel and unusual punishment[244] and (b) it violates the separation of powers in that Congress has vested the process of deportation solely within the executive branch.[245] Although the sentencing court's order of deportation is ineffectual, the converse is not true since Congress has provided sentencing judges the power to recommend *against* deportation for most deportable offenses. Section 241(b) of the Act provides that a conviction for a deportable offense shall not result in deportation if the sentencing court at the time of sentence or within 30 days thereafter recommends to the Attorney General

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241. Thus, while conviction of a federal importation of narcotics offense under the Controlled Substances Act of 1971 (21 U.S.C. §§ 952 and 960), results in automatic deportation under the § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1970), a plea to smuggling merchandise, 18 U.S.C. § 545 (1966), renders the alien non-deportable if the sentence of confinement is less than one year. Although smuggling is an offense of moral turpitude, deportation will not result if the sentence is less than a year. If the plea bargain includes sentencing recommendations, it is important to note that a suspended sentence of a year or more is the same as confinement for that time for deportation purposes. *See* Wood v. Hoy, 266 F.2d 825, 827 (9th Cir. 1959). Thus, the sentence must be less than one year whether imposition is suspended or executed in order to avoid deportation under § 241(a)(4) of the Act. Convictions in other countries are considered as well. Brice v. Pickett, 515 F.2d 153 (9th Cir. 1975).

242. *See* Federal Rule of Criminal Procedure 11; Michel v. United States, 507 F.2d 461 (4th Cir. 1975); United States v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971); United States v. Parrino, 212 F.2d 919, 921-922 (2d Cir. 1954); *cf.* Vizcarra-Delgadillo v. United States, 395 F.2d 70, 72 (9th Cir. 1966).

243. People v. Sup. Ct. (Giron), 11 Cal. 3d 793 (1974).

244. Dear Wing Jung v. United States, 312 F.2d 73 (9th Cir. 1962). The deportation itself, however, is not deemed punishment and thus is not cruel or unusual. Chabolla-Delgado v. INS, 384 F.2d 360 (9th Cir. 1967). *But cf.*, Fong Haw Tan v. Phelan, 333 U.S. 6 (1948) (deportation is a penalty); Bridges v. Wixon, 326 U.S. 135 (1945) (deportation is a deprivation of liberty).

245. United States v. Castillo-Burgos, 501 F.2d 217 (9th Cir. 1974).

that the alien not be deported.[246] To have binding effect, notice has to be given to the Service, the prosecuting authorities, and the interested State who shall have the opportunity to make representations to the court.[247] Thus, if there is a conviction for a deportable offense after trial or plea, there is a viable alternative to avoid the harsh consequence of deportation.

The key to gaining relief from this important ameliorative measure rests in giving notice to the interested parties and having the recommendation made at the time of sentencing or within 30 days thereafter.[248] Failure to take advantage of the relief at the first available opportunity will constitute a waiver.[249] The appellate courts have not permitted trial courts to grant *nunc pro tunc* recommendations against deportation[250] or to permit the trial court to vacate the initial sentencing and resentence the alien with a recommendation against deportation.[251]

It should be noted, however, that the sentencing court's discretion is further limited by the fact that it may only recommend against deportation for deportable offenses which are crimes involving moral turpitude under the statute.[252] All of the other specifically enumerated deportable offenses,[253] such as smuggling aliens into the country for gain,[254] remain deportable offenses irrespective of a recommendation against such action by the trial court.

E. *Expungement of a Conviction*

If defense counsel is unable to obtain a recommendation against deportation, a possible means of avoiding the consequence

246. Section 241(b), 8 U.S.C. § 1251(b) (1970) provides in part:

> (b) The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply . . . (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section.

247. When properly effected, the sentencing court's recommendation is absolutely binding on the INS. Velez-Lozano v. INS, 463 F.2d 1305 (D.C. Cir. 1972).

248. *E.g.*, Bruno v. United States, 336 F. Supp. 204 (W.D. Mo. 1971).

249. Marin v. INS, 438 F.2d 932 (9th Cir. 1971).

250. United States *ex rel.* Klonis v. Davis, 13 F.2d 630 (2d Cir. 1926).

251. United States *ex rel.* Piperkoff v. Esperdy, 267 F.2d 72 (2d Cir. 1959).

252. *See* notes 229-239 *supra* and accompanying text.

253. *See* Section 241 of the Act, 8 U.S.C. § 1251 (1970).

254. *Id.* at (a)(13). An excellent treatment of this area may be found in Appleman, *The Recommendation Against Deportation*, 53 A.B.A.J. 1294 (Dec. 1972).

of deportation following a criminal conviction for a deportable offense is (on appeal and later) to have the conviction expunged from the alien's record pursuant to the appropriate state or federal statute.[255] The effect of an expungement order is uncertain and depends on whether the federal expungement provision or a state provision is utilized.

A conviction expunged pursuant to the Federal Youth Corrections Act[256] eliminates it as a basis for deportation under the Immigration and Nationality Act.[257] Although the courts are divided on this statement of law,[258] the Board of Immigration Appeals has adopted the position that Congress' expressed objective of rehabilitation of youthful offenders would be thwarted if deportation were to result after expungement of the offense.[259] It is important to note that expungement of a federal youth offender's conviction has broader effect than a recommendation by a sentencing court against deportation. The former will prevent deportation no matter what the original conviction while the latter provides relief only for specific enumerated offenses.[260] Thus, expungement of a narcotics or marijuana offense would prevent deportation, although a sentencing court would have no authority to recommend against deportation at the time of sentencing.

Both the Service and the courts agree for the most part that state expungement of a deportable conviction will not bar deportation.[261] This position is justified on the grounds that the law of deportation should not be subject to the vagaries and anomalies of the laws of the various states. However, the Board of Immigra-

255. While a conviction for a deportable offense is on appeal, it has been held to lack the requisite finality to justify deportation. Will v. INS, 447 F.2d 529 (7th Cir. 1971). The exhaustion of appellate remedies may allow the alien to remain inside the United States long enough to gain expungement of the conviction even if the conviction is eventually affirmed on appeal.

256. 18 U.S.C. § 5021 (1969) provides for an unconditional discharge by the sentencing court and a certificate setting aside the defendant's conviction. This relief is said to provide "greater relief than a presidential pardon of the same offense." Tatum v. United States, 310 F.2d 854, at 856, n.2 (D.C. Cir. 1962). The Youth Act is available to persons between 18 and 21 years of age at the time of the conviction. 18 U.S.C. § 5006(e) (1969). Persons between the ages of 22 and 26 years are also eligible for Youth Act sentences if so designated by the sentencing court. 18 U.S.C. § 4209 (1969). Youths between 18 and 21 years are presumptive Youth Act candidates unless the sentencing judge explicitly finds to the contrary on the record. Dorszynski v. United States, 418 U.S. 424 (1974). Juvenile convictions, being civil in nature, are not deportable offenses. Matter of I, 6 I.N. 835 (1955).

257. Mestre Morera v. INS, 462 F.2d 1030 (1st Cir. 1972).

258. Hernandez-Valensuela v. Rosenberg, 304 F.2d 639 (9th Cir. 1962).

259. Matter of Zingis, Interim Dec. No. 2270 (B.I.A. 14 March 1974).

260. *E.g.*, offenses involving moral turpitude under 8 U.S.C. § 1251(a)(4) (1970) and not otherwise listed as deportable in § 1251.

261. Garcia-Gonzales v. INS, 344 F.2d 804, 810 (9th Cir. 1965); *see also* Kolios v. INS, 532 F.2d 786 (1st Cir. 1976); *but cf.*, Rehman v. INS, 544 F.2d 71 (2d Cir. 1976) (holding New York statute expunging marijuana conviction bars deportation).

tion Appeals has recently adopted an exception to this position in holding that marijuana convictions of youth offenders which have been expunged under state laws similar to the expungement provisions of the Federal Youth Corrections Act will no longer be a basis for deportation.[262]

An important question in the area of expunged convictions is whether or not the expungement has been consummated. The cases cited above where relief has been granted involved convictions that had been expunged. If an alien has been convicted of a deportable offense the mere prospect of expungement in the future is not a basis for avoiding deportation.[263] Thus, a means to keep the alien in the United States pending the execution of a deportation order must be sought in order to await the expungement order.

Since a deportation order must rest upon a deportable criminal conviction which is final, one means of delaying the deportation proceeding and achieving expungement is by an appeal of the criminal conviction. At least one circuit has held that a conviction on appeal does not have the requisite finality to warrant a deportation.[264] While a criminal conviction is on appeal, the defendant may complete service of a sentence of incarceration and be deported back to his country of origin. The prosecution may contend that the deportation moots the appeal, thus depriving the alien of an opportunity to reverse the conviction and erase the bar to future legal entry and residence. However, the law is clear that deportation does not moot the appeal.[265]

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262. Matter of Andrade, Int. Dec. No. 2276 (B.I.A. 5 April 1974).

263. *See* Hernandez-Valensuela v. Rosenberg, 304 F.2d 639 (9th Cir. 1962).

264. Will v. INS, 447 F.2d 529 (7th Cir. 1971). The author assumes the reader of this article will abide by the AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(2) (1969), and not assert frivolous appellate issues merely to delay a deportation order. It is not uncommon for appellate jurists to castigate the dilatory appeal tactics of counsel in this area. *E.g.*, Bufalino v. INS, 473 F.2d 728 (3d Cir. 1973) (deportation delayed fifteen years by legal maneuvering of counsel for alien).

265. In United States v. Campos-Serrano, 404 U.S. 293, 294-295, at n.2 (1971), the Supreme Court addressed the issue as follows:

> The sentence was suspended, and the respondent was placed on probation for three years 'on condition that he return to Mexico and not return to the United States illegally.' Pursuant to this sentence, he was remanded to the custody of the Immigration and Naturalization Service for deportation under a previous order. It appears that he is now in Mexico. Clearly, the fact that the respondent is now out of the country does not render this case moot. He is still under the sentence of the District Court and on probation subject to conditions imposed by the District Court. Should he violate those conditions, he will be subject to imprisonment under his continuing criminal sentence. Eisler v. United States, 338 U.S. 189, is irrelevant to this case. There, the petitioner fled voluntarily from the United States and successfully resisted extradition. We, therefore, declined to consider the merits of his case, just as we have declined over the years to consider the merits of criminal cases in which the party seeking review has escaped 'from the restraints

If an appeal of a criminal conviction is unavailable, an appeal of the subsequent deportation order to the Board of Immigration Appeals is a time-consuming process which affords the alien time to gain an expungement of the criminal conviction.[266]

Expungement of the conviction is often difficult or impossible to attain for the alien defendant. Consideration may be given to the entry of a plea of *nolo contendere* in the first instance to avoid deportation subsequent to the conviction. Unfortunately, for the purposes of deportation, a judgment of guilt following a *nolo contendere* plea constitutes a conviction. If the conviction is for a deportable offense, the fact that the plea was by way of *nolo contendere* is irrelevant.[267] The rationale behind this rule is that the plea of *nolo contendere* is equivalent to a plea of guilty; a trial court will not accept such a plea unless it is satisfied that the defendant understands the direct consequences of the plea and is guilty of the offense. Since the conviction itself is the operative factor, the courts will not go behind the judgment to determine whether or not the conduct of the defendant was innocent or culpable.[268] Further, the rule that there is no duty upon the court to advise a defendant of the possibility of deportation before accepting a plea of guilty[269] is equally applicable where the plea is one of *nolo contendere.*

A more successful alternative to avert deportation is the diversion[270] or the deferral of the prosecution[271] pursuant to local

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placed upon him pursuant to the conviction.' Molinaro v. New Jersey, 396 U.S. 365, 366; Bonahan v. Nebraska, 125 U.S. 692; Smith v. United States, 94 U.S. 97. 'While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles [the party] to call upon the resources of the Court for determination of his claims.' Molinaro v. New Jersey, *supra*, at 366. In the present case, by contrast, the respondent has not fled from the restraints imposed by the District Court pursuant to this conviction. Rather, he is living under those restraints today.

266. The statutory framework for administrative review of orders of deportation is found in § 106 of the Act, 8 U.S.C. § 1105 (1970); see also 8 C.F.R. §§ 3.3 *et seq.* (1972). An appeal to the Board of Immigration Appeals will stay the execution of a deportation order. Other means of obtaining relief from deportation are beyond the scope of this article. *See generally*, GORDON AND ROSENFIELD, *supra* note 46, at §§ 7-4 *et seq.*

267. Ruis-Rubio v. INS, 380 F.2d 29 (9th Cir.), *cert. denied*, 389 U.S. 944 (1967); Tseung Chu v. Cornell, 247 F.2d 929 (9th Cir.), *cert. denied*, 355 U.S. 892 (1957).

268. Cruz-Sanchez v. INS, 438 F.2d 1087 (7th Cir. 1971).

269. United States v. Santelises, 476 F.2d 787 (2d Cir. 1973); United States *ex rel.* Durante v. Holton, 228 F.2d 827 (7th Cir.), *cert. denied*, 351 U.S. 963 (1956).

270. *E.g.*, CAL. PENAL CODE §§ 1000 *et seq.* (West 1974 Supp.). *See generally* AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE [hereinafter cited as ABA STANDARDS], THE DEFENSE FUNCTION § 6.1(a) (1971).

271. *E.g.*, 21 U.S.C. § 844(b)(1) (1971). The opportunity to divert or enter a deferred prosecution agreement with the prosecutor depends largely on the negotiation skills of the defense attorney. However, once such agreements are made, the prosecution may be required to take extraordinary steps to insure their execu-

plan or statute. These alternatives usually involve eventual dismissal of the charges upon successful completion of probationary-type programs and should be adopted if at all possible.

VI. TRIAL CONSIDERATIONS

Only a very brief treatment will be given to trial considerations in the defense of an alien since these factors are usually the same for any criminal defendant. An important preliminary concern is the delaying of any deportation or exclusion proceeding until after termination of the criminal trial.[272] For example, if a defendant alien is accused of transporting illegal aliens for gain, he is subject to deportation with or without a criminal conviction.[273] The testimony of the illegal aliens at a deportation hearing is sufficient to warrant the deportation even if no criminal proceeding is instituted.[274] However, if both deportation and criminal proceedings are simultaneously instituted against the defendant, a serious fifth amendment issue will arise should the deportation hearing be scheduled prior to the criminal trial. Since the defendant may wish to testify at the deportation hearing but not at the subsequent criminal trial, he will face the prospect of the testimony at the deportation hearing being used against him at the criminal trial. Thus, it will be necessary to enjoin or otherwise forestall the holding of a deportation hearing until the criminal proceedings are terminated.[275]

In preparing for trial, serious attention should be given to an inspection of the jury wheel to determine if it is constitutionally

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tion. For example, the ramifications of plea bargaining where aliens are involved often take on an international flavor. In Geiser v. United States, 513 F.2d 862 (5th Cir. 1975), the prosecutor promised the defendant that the Department of Justice would use its best efforts to see that she was paroled after serving three years of a seven year sentence and that she would not be deported to France or Switzerland. The appellate court held that the Department of Justice had a duty to make a strong presentation to the Department of State as to what had been promised and the likely dangers to the defendant if she were extradicted. The Court further ruled that the prosecution had a duty to inform the parole board of the plea bargain and of the importance to the public interest of its being honored.

272. For example, the defendant must assert the fifth amendment claim at the first opportunity and a failure to raise the privilege will constitute waiver. *E.g.*, Garner v. United States, 501 F.2d 228 (9th Cir. *en banc* 1974). *See also* note 275 *infra*.

273. Section 241 of the Act, 8 U.S.C. § 1251(a)(13) (1970).

274. *E.g.*, de Hernandez v. INS, 498 F.2d 919 (9th Cir. 1974).

275. In London v. Patterson, 463 F.2d 95 (9th Cir. 1972), the defendant faced both civil and criminal litigation. He had been deposed prior to the civil suit and the deposition was later used by the prosecution in its case in chief. By not asserting his fifth amendment claim at civil deposition, the defendant waived the privilege. The appellate court opinion points to relief under F.R.C.P. 30(b), to postpone the civil proceeding until after the criminal trial. Similar relief should be available to delay a deportation hearing, if required, until after the criminal prosecution.

formed.[276] To commence such an inspection, a motion will have to be brought to inspect pertinent jury records.[277] The alien defendant has a constitutional right to have the jury panel selected from a representative cross-section of the population, including minority groups within the district where trial is brought.[278] If inspection of the jury records reveals a pattern of substantial minority group under-representation, a motion to quash the jury panel must be considered.[279] The law requires a showing of purposeful discrimination which results in the under-representation of a minority group to warrant quashing the entire wheel.[280] However, in federal prosecutions affirmative action may be sought. A suit requesting a court order to force the clerk of the court responsible

276. See the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861 *et seq.* (West 1974 Supp.). The Act requires that jury panels be selected at random from a fair cross-section of the community and prohibits discrimination based on race, color, religion, sex, national origin, or economic status. *Id.*, at §§ 1863-1864. As a possible source for the names of prospective veniremen, the Act suggests voter registration lists or lists of actual voters. However, this suggestion is limited by the caveat that such sources must not be used where they fail to comport with the underlying policy of the Act. *Id.*, at §§ 1861, 1862, 1863(b)(2). The use of such lists as the sole source of names is constitutionally impermissible if such use results in the systematic exclusion of some cognizable group or class of qualified citizens.

277. The motion is made pursuant to 28 U.S.C. §§ 1867(f), 1868 (West 1974 Supp.). *See* Test v. United States, 420 U.S. 28 (1975); United States v. Beaty, 465 F.2d 1376 (9th Cir. 1972).

278. There is no question but that a systematic exclusion of an ethnic group from the venire would violate the Act as well as the equal protection clause of the fourteenth amendment. Hernandez v. Texas, 347 U.S. 475, 478-79 (1954) (persons of Mexican descent are deemed a cognizable group).

279. The Act permits a defendant to move to dismiss an indictment or stay proceedings for substantial failure to comply with the Act in the selection of the grand or petit jury. 28 U.S.C. § 1867(a)-(b) (West 1974 Supp.). To meet this burden, the defendant is entitled to an evidentiary hearing in order to present testimony from the jury commissioner or clerk, to introduce records which are not public but which were used by the clerk in the selection of the jury panel, and any other relevant evidence. *Id.* at § 1867(d). United States v. Duncan, 456 F.2d 1401, 1405 (9th Cir. 1972); Chee v. United States, 449 F.2d 747, 748 (9th Cir. 1971).

Note that no motion under this section will succeed under a theory that lawful resident aliens are improperly excluded from jury panels. The Supreme Court of the United States has affirmed a lower court ruling that resident aliens may be excluded from state and federal jury service. *See* Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974), *aff'd mem.* 426 U.S. —, 96 S. Ct. 2616 (1976); *accord*, People v. Rodriguez, 35 Cal. App. 3d 900 (1973).

280. *See* Swain v. Alabama, 380 U.S. 202, 208 (1965), holding that a defendant has no constitutional right to a proportionate percentage of his own race or ethnic group on a jury or jury panel. Swain also stands for the proposition that purposeful racial discrimination is not established merely by showing that one particular group is underrepresented by as much as ten percent. *Id.*, at 208-209. In United States v. Parker, 428 F.2d 488 (9th Cir. 1970), the court held that the use of voter lists was permissible absent a showing that the lists were used in a discriminatory fashion so as to reduce the representation of a racial group. *See also* Bloomer v. United States, 409 F.2d 869 (9th Cir. 1969). In United States v. Bennett, 445 F.2d 638 (9th Cir. 1971), the appellant argued that the exclusive use of voter lists discriminated against blacks because they were poor "and the poor are less likely to vote because of frequent residence changes." *Id.*, at 641. In rejecting the appellant's claim under the Act, the Ninth Circuit stated: "Appellant's contentions are unsupported by any showing of a discriminatory purpose or effect of the jury selection plan utilized in this case." *Id.*

for jury selection to use methods other than voter registration records to collect prospective jurors may succeed where a significant history of under-representation of minority groups is demonstrated.[281]

If the defendant alien does not speak English, he has a right at all pre-trial hearings as well as at the jury trial to an interpreter to accurately translate the English language into the language spoken by the defendant. Prior to such hearings, preparation should be made to provide the defendant with an interpreter. If the defendant is indigent, an interpreter must be provided at the expense of the government.[282]

In addition, aliens are often indicted both under their foreign name and an anglicized derivation in the nature of an "also known as". A motion should be made prior to trial to strike any "aka" since the use of an alias is totally inappropriate in this context.[283] While pre-trial motions concerning venue,[284] motions to suppress based on fourth[285] and fifth amendment violations,[286] and speedy trial[287] have been discussed in other contexts in this article, consideration should be given to bringing other pre-trial motions. Motions for recordation[288] and obtaining of transcripts of the grand jury proceedings,[289] to provide the defendant with transcripts of any other relevant pretrial or collateral hearings,[290] to

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281. 28 U.S.C. § 1863(b)(2) (West 1974 Supp.), provides that a district court's plan for random jury selection "shall prescribe some other source or sources of names in addition to voter lists where necessary to . . . protect the rights secured by sections 1861 and 1862 . . . ."

282. United States *ex rel.* Negron v. New York, 434 F.2d 386 (2d Cir. 1974). A defendant who speaks little or no English must be permitted to testify in his or her native tongue through an interpreter. Commonwealth v. Pana, — Pa. —, 364 A.2d 895 (1976); *see also* Navarro v. Johnson, 365 F. Supp. 676, 681 n.3 (E.D. Pa. 1973). Counsel should be sure that the interpreter is sufficiently skilled to perform the task. *See* People v. Walker, 69 Cal. App. 475, 488 (1924) ("the right to show the general incompetency of an interpreter and to impeach the correctness of his rendition of testimony in particular cases is a right which should be jealously guarded.").

283. Prejudice from the use of "aka's" in an indictment emanates from the possible impression that the defendant uses false names to disguise his true identity and escape detection. This practice has been condemned in circumstances such as where different spellings of the defendant's name appear on the indictment. United States v. Beedle, 463 F.2d 721 (3d Cir. 1972); *see also* United States v. Grayson, 166 F.2d 863, 867 (2d Cir. 1948).

284. *See* notes 23-24 *supra* and accompanying text.

285. *See* notes 178-210 *supra* and accompanying text.

286. *See* notes 190-198 *supra* and accompanying text.

287. *See* note 128 *supra*. *See also* F.R.Cr.P. 50(b); Strunk v. United States, 412 U.S. 434 (1973); Barker v. Wingo, 407 U.S. 514 (1972); *see generally* ABA STANDARDS, SPEEDY TRIAL (1968).

288. United States v. Thoresen, 428 F.2d 654 (9th Cir. 1970).

289. Dennis v. United States, 384 U.S. 855 (1966).

290. Roberts v. La Vallee, 389 U.S. 40 (1967) (transcript of preliminary hearing); Peterson v. United States, 351 F.2d 606 (9th Cir. 1965) (transcript of first trial).

depose material witnesses;[291] to subpoena material and character witnesses located outside of the trial district;[292] to appoint cultural experts when cultural habits of the defendant alien are an issue,[293] and others that appear appropriate should be brought. Motions challenging the constitutionality of the statute, such as its being void for vagueness,[294] should also be considered.

Mention has already been made of the necessity for counsel to be intimately familiar with the statutory and case law rules concerning the introduction of documentary evidence.[295] Consideration should also be given to collaterally attacking any previous conviction,[296] deportation,[297] or prior bad act[298] the government intends to introduce against the defendant. To defend against the introduction of these items, complete discovery[299] concerning them is necessary. Where both a defendant alien husband and wife are charged or otherwise involved in a criminal prosecution, counsel should be prepared to assert the husband-wife privilege where applicable.[300]

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291. F.R.Cr.P. 15(a); United States v. Puchi, 441 F.2d 697, 700-701 (9th Cir. 1971). *See also* note 64 *supra.*

292. F.R.Cr.P. 17(b); *cf.* Wagner v. United States, 416 F.2d 558, 564-565 (9th Cir. 1969).

293. *Cf.* United States v. Ruelas Altamirano, 463 F.2d 1197 (9th Cir. 1972), *cert. denied,* 393 U.S. 1107, *with* Mull v. United States, 402 F.2d 571 (9th Cir. 1968). The test suggested by Wigmore for the admissibility of expert testimony is a sound guide in determining whether such testimony would be helpful in the defense of the alien.

> On this subject can a jury from this person receive appreciable help? In other words, the test is a relative one, depending on the particular subject, and is not fixed or limited to any class of persons acting professionally. 7 WIGMORE ON EVIDENCE 21, § 1923. *See also* FED. R. EVID. 702.

The testimony of a cultural expert is admissible under the test cited with approval in Fineberg v. United States, 393 F.2d 417, 421 (9th Cir. 1968):

> To warrant the use of expert testimony, two elements are required. First, the subject of the inference must be so distinctly related to some science, profession, business or occupation as to be beyond the knowledge of the average layman, and second, the witness must have such knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.

Indigent defendants are entitled to the appointment of such experts at government expense. 18 U.S.C. § 3006A(e) (1970); *e.g.,* United States v. Bass, 477 F.2d 723 (9th Cir. 1973).

294. *See, e.g.,* note 25 *supra.*

295. *See* notes 39-45 *supra* and accompanying text. *See also* Aberson, *Information Gathering Methods in Immigration and Naturalization Service Proceedings,* 2 CHICANO L. REV. 51 (1975).

296. *E.g.,* Loper v. Beto, 405 U.S. 473 (1972) (successful challenge of conviction used to impeach defendant); United States v. Tucker, 404 U.S. 443 (1972) (successful challenge of constitutionally void convictions used at sentencing hearing).

297. *See* note 27 *supra.*

298. *E.g.,* United States v. Holley, 493 F.2d 581 (9th Cir. 1974) (defendant's prior alien transportation arrest properly used at subsequent § 1324(a)(2) trial. *See especially* Judge Hufstedler's dissent at 584. *Cf.* FED. R. EVID. 404.

299. See F.R.Cr.P. 16. *See generally* ABA STANDARDS, DISCOVERY AND PROCEDURE BEFORE TRIAL (1970).

300. The husband-wife privilege still survives and its two components should

Instructions for the final charge to the jury should be prepared with an eye to shaping instructions to fit the defendant's theory of the case.[301] Where the charge is one of entry into the United States, jurors may be sympathetic to the defendant alien whose motivation for the illegal entry is grounded in a desire to work and for a better life. Although an instruction to the jury indicating that it may nullify the prosecution's case and acquit the defendant even though the government has carried the burden of proof as to the elements of the offense is impermissible,[302] arguing a purely technical defense to the jury often involves the same considerations.[303] By arguing the legal technicality as a basis of acquittal, counsel is providing the jury a peg upon which to hang an acquittal based on broad concepts of justice. It never detracts from such a case to remind the jury of the humble origins of this country.[304]

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be recognized. First, neither spouse may be forced to testify against the other over objection. Hawkins v. United States, 358 U.S. 74 (1958). Second, the privilege extends to marital communications between the spouses which permits the communicating spouse to prevent the other from testifying (or to prevent others from testifying that one spouse revealed the other's communications). United States v. Figueroa-Paz, 468 F.2d 1055 (9th Cir. 1972). Section 278 of the Act, 8 U.S.C. § 1328 (1970), which makes illegal the importation of an alien for immoral purposes, provides a statutory bar to raising the marital privilege in prosecutions under that section. *Cf.* FED. R. EVID. 501.

301. *See* DEVITT AND BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS (2d ed. 1970). Framing jury instructions to the particular facts of the case will buttress final argument by putting the court's imprimatur on the defense theory. United States v. Phillips, 217 F.2d 435, 440 (7th Cir. 1954). It is error for a trial court to routinely refuse specific factual instructions geared to the particular case in favor of general pattern instructions. United States v. Barber, 442 F.2d 517, 527-528 (3d Cir. 1971). *See also, e.g.*, United States v. Pantelopoulos, 336 F.2d 421, 424, n.3 (2d Cir. 1964) (jury instruction in a § 1001 prosecution).

302. United States v. Simpson, 460 F.2d 515 (9th Cir. 1972) (proposed nullification instruction by defense properly refused by trial court). *See generally* Stolt, *Jury Nullification: The Forgotten Right*, 7 NEW ENG. L. REV. 105 (1971).

303. Although legally a jury cannot be told it may acquit a defendant if it finds that he committed the acts as charged, it still may do so and no one may question that decision. By presenting evidence of the defendant's family conditions, economic status, emotional condition and other surrounding circumstances which caused the accused to commit the act, the defense has conditioned the jury to understand why the act was committed. When this is accomplished, the jury may be receptive to acquittal arguments based on a purely technical basis. This is simply an alternate route to nullifying the charge.

304. Defense attorney Charles Garry recommends references in summation to the jury to the poem inscribed on the Statue of Liberty. In the defense of the alien defendant, it is particularly appropriate to quote the lady standing in New York harbor who cries:

> With silent lips. 'Give me your tired, your poor. Your huddled masses yearning to breathe free. The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door.'

The area of final argument is one in which prosecutors often use improper tactics. Defense counsel must be aware of the boundaries of proper argument. *See e.g.*, United States v. Herrera, 531 F.2d 788 (5th Cir. 1976) (conviction reversed where prosecutor argued that alien defendant would not have received as fair a trial in his own country); Kelley v. Stone, 514 F.2d 18 (9th Cir. 1975) (prosecutors appeal to race prejudice cause for reversal); People v. Singh, 11 Cal.

VII. CONCLUSION

To combat the many diverse problems attendant upon the entry into and residence of aliens in this nation, Congress has passed numerous criminal laws. The cursory review of the criminal statutes relating to aliens in this article demonstrates a complex set of overlapping statutes sprinkled throughout the Immigration and Nationality Act as well as the criminal code of the United States. It does not take the insight of a legislative analyst to conclude that these statutes would best be consolidated into a few simplified acts to adequately cover the same areas.

Consolidation and simplification of the alien laws, however, are not probable prospects in the foreseeable future. Congress has had before it bills proposing sanctions against the employer for employment of illegal aliens.[305] The goal of such legislation is to eliminate the magnet for illegal aliens—the employer.[306] The act provides a civil penalty of increasing severity for repeated violations to be assessed against the employer of an illegal alien. The act contemplates a citation for an offending employer for a first offense; a civil penalty of not more than $500 for a subsequent violation within two years of the initial citation; and for further violations, a one-year prison term and/or a fine of $1000 for each alien employed in violation of the law.

Since the passage of the United States Magistrates Act of 1968,[307] the forum for the majority of alien cases has shifted from the federal district courts to the magistrate level.[308] With the jurisdictional limitations of the magistrate's court of one year's confinement and a one thousand dollar fine, the exposure of the defendant alien in limited.[309] Problems sometimes arise, however, where both parties wish to keep the matter before the magistrate

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App. 2d 244 (1936) (characteristics of Hindus to murder, mutilate and lie an obviously improper appeal to prejudice). *See generally* Alschuler, *Courtroom Misconduct By Prosecutors and Trial Judges*, 50 TEXAS L. REV. 629 (1971).

305. H.R. 982 (Rodino Bill), 93rd Cong. 1st Sess. (1973); S. 3074 (Eastland Bill), 94th Cong., 2nd Sess. (1976). *See* Note, *The Undocumented Worker: The Controversy Takes a New Turn*, 3 CHICANO L. REV. 164 (1976).

306. As indicated in the introduction to this article, the vast majority of illegal aliens in the United States are Mexican and, as one appellate jurist notes ". . . employment of . . . aliens is primarily responsible for the whole Mexican alien problem." Herrera v. United States, 208 F.2d 215, 218 (9th Cir. 1953) (Pope concurring), *cert. denied*, 347 U.S. 92 (1954).

307. 28 U.S.C. §§ 631-639 (West 1974 Supp.).

308. "Total authorized prosecutions have increased dramatically since passage and implementation of the Federal Magistrates Act of October 17, 1968. The 16,657 prosecutions authorized during the current report year reflect an increase of 419 percent over the 3,212 prosecutions authorized in fiscal year 1968. The increase is largely attributed to the greater availability of magistrates to try many misdemeanor violations which formerly had to be declined by U.S. attorneys due to overcrowded court calendars and related conditions." 1973 ANNUAL REPORT at 15.

309. 18 U.S.C. § 3401(f) (1969).

court but are unable to find a charge within the jurisdiction of the court. A liberal application of several ameliorative federal statutes should resolve this problem.[310]

An alien on trial in the United States for criminal law violations is truly a "stranger in a strange land."[311] Many times, in addition to the loss of personal liberties, the alien faces the prospect of permanent banishment from this country. With so much at stake, the alien defendant is entitled to counsel fully informed of the facts and the law. Without a basic understanding of the applicability of immigration laws and the consequences flowing from the criminal prosecution, counsel will be inadequate to represent the client.[312] The information imparted in this article merely provides a rudimentary foundation to use in the competent defense of the alien.

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310. For example, the illegal transportation of aliens under 8 U.S.C. § 1324 (a)(2) (1970) may be tried in a magistrate's court by charging the defendant as an aider and abettor, 18 U.S.C. § 2(a) (1969), of the alien's illegal entry 8 U.S.C. § 1325 (1970). If the criminal act occurs on a federal reservation, the misdemeanor laws of the state may be used under the Assimilative Crimes Act, 18 U.S.C. § 13 (1969), to charge an offense triable in magistrate's court. If the charge is one involving any type of smuggling across the border, 18 U.S.C. § 2232 (1970), is available as a misdemeanor; however, because the fine exceeds the $1,000 dollar limit of the magistrate court, the defendant must be charged as an accessory after the fact under 18 U.S.C. § 3 (1969). Framing the charge in this manner brings the fine within the magistrate's jurisdiction. This dual charge is only appropriate where two or more individuals are involved in the attempted smuggling. Felonies to be aware of for plea bargain purposes in smuggling cases include 18 U.S.C. § 542 (false statements made to cross goods into United States) and 18 U.S.C. § 545 (fraud used to attempt to smuggle merchandise). Counsel must make sure the charging document asserting a § 542 or § 545 offense does not mention the type of merchandise (i.e., drugs) on its face to avoid operation of the automatic deportation provisions of 8 U.S.C. § 1251(a)(11).

Any time a misrepresentation of status occurs at the border in order to gain entry 8 U.S.C. § 1325(3) (1970) is available for trial before a magistrate as an alternative to the felony misrepresentation statutes. However, this misdemeanor is only useful where entry is perfected by the alien via the misrepresentation. *See* United States v. Oscar, 496 F.2d 492 (9th Cir. 1974). All of the above possibilities require the cooperation of the prosecution, defendant and court to succeed.

311. United States *ex rel.* Castro-Louzan v. Zimmerman, 94 F. Supp. 22, 25 (E.D. Pa. 1950).

312. *See, e.g.*, Judge Browning's dissent in Vizcarra-Delgadillo v. United States, 395 F.2d 70, 72 (9th Cir. 1968), contending the alien's counsel incompetent for failing to apprise the alien of the certain deportation consequences of a plea of guilty to a deportable offense. Failure by counsel to pursue discovery leads is also incompetent representation. *E.g.*, Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962). *See generally* Bazelon, *The Defective Assistance of Counsel*, 42 U. CINN. L. REV. 1 (1973); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973).