DEPORTATION PROCEEDINGS: THERE MUST BE A RIGHT TO APPOINTED COUNCIL

INTRODUCTION

Deportation proceedings have long raised significant questions with respect to alien's rights. Labeling the proceedings "civil"[1] in nature, the United States Supreme Court has refused to fully extend the sixth amendment right to counsel at government expense for indigents while espousing the statement that deportation can mean the severe possibility of banishment, separation of family and deprivation " . . . of all that makes life worth living."[2]

Congress is vested with the power to admit and consequently to provide for the expulsion of undesirable aliens.[3] The government's power to expel and exclude is a deep rooted attribute of sovereignty.[4] This power was delegated to the United States Attorney General to develop deportation proceedings and to assign administrative officers to grant discretionary relief.[5]

1. Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Carlson v. Landon, 342 U.S. 524 (1952); Bridges v. Wixon, 326 U.S. 135 (1945); United States v. Rebon-Delgado, 467 F.2d 11 (9th Cir. 1972); United States v. Ramirez-Aguilar, 455 F.2d 486 (9th Cir. 1972); Hyun v. Landon, 219 F.2d 404 (9th Cir. 1955).

2. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). In *Harisiades id.* at 600, Justices Douglas and Black, dissenting, describe the results of deportation: "It may deprive a man and his family of all that makes life worth while. Those who have their roots here have an important stake in this country. Their plans for themselves and their hopes for their children all depend on their right to stay. If they are uprooted and sent to lands no longer known to them, no longer hospitable, they become displaced, homeless people condemned to bitterness and despair." In Tan v. Phelan, 333 U.S. 6, at 10 (1948), the Supreme Court further described deportation as "a drastic measure and at times the equivalent of banishment . . ."

3. Bugajewitz v. Adams, 228 U.S. 585 (1913); Ng Fung Ho v. White, 259 U.S. 276 (1922); Wong Wing v. United States, 163 U.S. 228 (1896).

4. Fung Yue Ting v. United States, 149 U.S. 698 (1893); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); and Kwai Chin Yuen v. Immigration and Naturalization Service, 406 F.2d 499 (9th Cir. 1969). *Also see* Hesse, *The Constitutional Status of the Lawful Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 YALE L.J. 262 (1959); 1 OPPENHEIM, INTERN. LAW (3d ed., Roxburg, 1920) 498-502; WHEATON'S INTERN. LAW (6th ed., Keith, 1929), 210-211.

5. *See* Gordon, *Right to Counsel in Deportation Proceedings*, 45 MINN. L. REV. 875 (1961) (hereinafter cited as *Gordon, Right to Counsel*). *Also see* GORDON AND ROSENFIELD, IMMIGRATION LAW AND PROCEDURE (1974) (hereinafter cited as GORDON & ROSENFIELD). Cases upholding this formula of administrative adjudication include Mahler v. Sky, 264 U.S. 32 (1924); Zakonaite v. Wolf, 226 U.S. 272 (1912); Turner v. Williams, 194 U.S. 279 (1904); Wong Wing v. United States, 163 U.S. 228 (1886); Ng Fung Ho v. White, 259 U.S. 279 (1922); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Yamataya v. Fisher, 189 U.S. 86 (1903) (hereinafter referred to as the *Japanese Immigrant Case*); United States v. Ju Toy, 198 U.S. 253 (1905); Chin Yow v. United States, 208 U.S. 8 (1908).

Deportation procedures have changed in recent years. Before 1956 all deportation proceedings were commenced with the arrest of the respondent alien.[6] However, new procedures initiated in 1956[7] ended this practice and thereafter deportation proceedings have been preceded by an investigation to determine whether any basis for action by the Immigration and Naturalization Service exists (hereinafter referred to as INS). This is followed by the issuance of an "order to show cause"[8] why the alien should not be deported. The order sets forth the factual basis of the charges describing the nature and legal authority for the proceedings as well as informing the respondent of a scheduled appearance date with a special inquiry officer at the INS office servicing that region.[9]

At the hearing the special inquiry officer is required to advise the respondent that he has a right against self-incrimination, and a statutory right to be represented by counsel.[10] The statutory privilege to counsel is embodied in the 1952 revision of the Immigration and Nationality Act (hereinafter referred to as INA) which states that "The alien shall have the privilege of being represented (at no expense to the government) . . . "[11] The respondent is not afforded the absolute right or privilege to counsel, but rather he is only entitled to a fair opportunity to obtain counsel.[12] If he is given such opportunity and fails to procure the

6. 8 C.F.R. § 242 (1952); Harisiades v. Shaughnessy, 342 U.S. 580 (1952). *See* GORDON & ROSENFIELD, § 5.3a, note 5 *supra*.

7. 8 C.F.R. §§ 236.2(a), 242.16(a), the special inquiry officer is a hearing official designated under the Immigration and Nationality Act of 1952 to conduct both exclusion (hearings on persons seeking admittance into the United States) and deportation hearings. 66 Stat. 200, 208 (1952), 8 U.S.C. §§ 1226(a), 1252 (b) (1970). The special inquiry officer is designated by the Attorney General. *See* GORDON & ROSENFIELD, §§ 5.3a and 5.3c.

8. Orders to show cause may be issued by Immigration and Naturalization Service district directors, acting district directors, deputy district directors, or officer in charge. All that is needed is a prima facie case of deportability. 8 C.F.R. § 242.1(a). Abel v. United States, 362 U.S. 217 (1960); Chew v. Boyd, 309 F.2d 857 (9th Cir. 1962). Service is personal, 8 C.F.R. § 242.1(a), 242.3(a) (1976).

9. 8 C.F.R. § 242.1(a) and (b); § 242.16(a); § 236.2(a) (1976).

10. 8 C.F.R. § 242.2(a) states: "He [the alien] shall be advised that any statement he makes can be used against him."

Section 242(b)(2) of the I.N.A. states in part: "The alien shall have the privilege of being represented (at no expense to the government) by such representatives authorized to practice in such proceedings, as he shall choose." 8 U.S.C. § 1252(b) (1970); 8 C.F.R. § 242.16(a) (1976).

Section 282 of the I.N.A. further states: "In any exclusion or deportation, before a special inquiry officer and in any appeal proceedings, the person concerned shall have the privilege of being represented (at no expense to the government) by such counsel, authorized to practice in such proceedings, as he shall choose." 8 U.S.C. § 1362 (1970); 8 C.F.R. § 236.2(a) (1976).

11. I.N.A. § 242(b)(2), 8 U.S.C. § 1252(b)(2) (1970).

12. Wlodinger v. Reimer, 103 F.2d 435 (2d Cir. 1939); Dengeliski *ex rel* Saccardio Tillinghast, 65 F.2d 440 (1st Cir. 1933). *Also see* Barrese v. Ryan, 189 F. Supp. 499 (D. Conn. 1960).

assistance of counsel,[13] or if counsel received adequate notice and fails to appear, the hearing may proceed without the aid of counsel.[14] Thus, in certain instances this is a shallow privilege.

The INA lists eighteen general classes of deportable aliens.[15] An important aspect of the statute is its declaration that all enumerated grounds for deportation apply retroactively. An alien is therefore amenable to expulsion for an irregular entry or other misconduct from the past. Moreover, this mandate is not inhibited by any period of limitation.[16] As Gordon and Rosenfield state:

> Increasingly, Congress has decreed that an alien may be deported for conduct of the past. Such legislative edicts sometimes reach activities that violated no law when they occurred, and the affected aliens have charged a violation of the ex post facto clause in the Constitution. However, these challenges invariably have been vanquished. The reasoning has been that the ex post facto inhibition applies only to criminal statutes, and is thus inapplicable to expulsion laws, since they are civil and not criminal in nature.[17]

Needless to say, the retroactivity clause has received extensive criticism because of its harshness.[18]

With this outline of the procedural aspects of deportation, we now turn to an analysis of the need to have counsel as a right in these proceedings, to adequately safeguard the indigent respondent's rights, and the possible legal theories supporting the right to counsel as a basic right.[19] The three principle areas of analysis that follow are concerned with: (1) fifth amendment due process; (2) equal protection under the fifth amendment's due process clause; and (3) an analysis based on the sanctity and constitutional protection of the family unit.

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13. Modokoro v. Del Guercio, 160 F.2d 164 (9th Cir. 1947). *See Gordon, Right to Counsel*, note 5 *supra*.

14. I.N.A. § 242(b), 8 U.S.C. § 1242 (1970). *See Gordon, Right to Counsel*, note 5 *supra*. *Also see* GORDON & ROSENFIELD, note 5 *supra* and Bonaparte, *The Rodino Bill: An Example of Prejudice Towards Mexican Immigration To The United States*, 2 CHICANO L. REV. 51 (1975) for a full discussion of the INA and its major points and implications. The INA was amended by 79 Stat. 911 (1965) and again by 84 Stat. 116 (1970).

15. 8 U.S.C. §§ 1251 et seq.

16. *See* the *retroactivity* and *savings clause*, I.N.A. § 242(a)(17)(d), 8 U.S.C. § 1251(a)(17)(d) (1970).

17. GORDON & ROSENFIELD, § 4.3(c) and nn.21, 22 and 23. Bugajewitz v. Adams, 228 U.S. 585 (1913) (the prohibition of *ex post facto* laws in article 1, § 9 of the United States Constitution has no application to the deportation of aliens).

18. GORDON & ROSENFIELD, § 4.3(c) and nn.22 and 23.

19. *See* Note, *Deportation and the Right to Counsel*, 11 HARV. INT. L.J. 77 (1970).

DUE PROCESS OF LAW IN THE DEPORTATION CONTEXT

It is well settled that an alien is entitled due process protection,[20] and that this right to due process shall be accorded to an alien in a deportation proceeding.[21] In the *Japanese Immigrant Case*,[22] the Supreme Court stated that:

> . . . this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, to be heard, before such officers, in respect of the matters upon which that liberty depends. . . . Therefore, it is not competent for the Secretary of the Treasury or any executive officer . . . arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.[23]

Further, in *Whitfield v. Hanges*,[24] the Eighth Circuit court held that an alien as well as a citizen is protected by the prohibition against deprivation of life, liberty or property without due process of law, and that such protection applies to all persons within the territorial jurisdiction of the United States without regard to any difference of color, race or nationality. Moreover, an alien is subject to deportation only according to the principles inherent in due process of law.[25]

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20. United States, *ex rel.* Vajtauer v. Commissioner of Immigration, 273 U.S. 103 (1927); the *Japanese Immigrant Case*, note 5 *supra*; Ng Fung Ho, 259 U.S. 276 (1922); Fong Haw Ton v. Phelan, 333 U.S. 6 (1948); Bridges v. Wixon, 326 U.S. 135 (1945); Whitfield v. Hanges, 222 F. 745 (8th Cir. 1915). *See* Sung v. McGrath, 339 U.S. 33 (1950); Chew v. Colding, 344 U.S. 590 (1953); Gree v. McElroy, 360 U.S. 474 (1959); and Hannah v. Larche, 363 U.S. 474 (1960) for a discussion of due process in other connections.

21. *The Japanese Immigrant Case*, 189 U.S. 86 (1903) and Whitfield v. Hanges, 222 F. 745 (8th Cir. 1915).

22. *Id.*

23. *Id.* at 100.

24. 222 F. 745 (8th Cir. 1915).

25. *Id.* at 749. The Eighth Circuit further held that indispensable requisites of a fair hearing and due process include the requirements that the proceedings shall be appropriate to the case and the respondent shall receive timely notice of the charge against him; that he shall have an opportunity to be heard; that he may cross-examine witnesses; that he may present evidence to refute the evidence offered against him; and that the decision be based on the evidence taken at the hearing and be supported by such evidence. The court also stated at *id.*, 748: "A full and fair hearing on the charges which threaten the alien's deportation, and an absence of all abuse of discretion and arbitrary action by the inspector, or other

In view of the highly technical nature of deportation laws and the complexity of the proceedings for one not familiar with these administrative hearings, it would seem that a right to counsel would, by definition, have to follow since inherent in the concept of due process of law is the right to have the crucial assistance of counsel. Without this right the principle of due process is virtually meaningless. The United States Supreme Court in the case of *Gideon v. Wainwright*[26] and its progeny in the criminal area have made this quite clear; and this rationale of "fundamental fairness" advanced in *Gideon* should equally apply to deportation proceedings to insure fairness with the same thrust it has had in the criminal courts.

A. *Parity With the Criminal Area*

The major obstacle to a right to counsel argument based on a *Gideon* due process of law rationale is the fact that *Gideon* and its progeny were criminal cases.[27] The sixth amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense." As mentioned, deportation proceedings have consistently been held to be "civil" in nature[28] thus on their surface they do not come within the purview of the sixth amendment and the criminal right to counsel cases.

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executive officer, are indispensable to the lawful deportation of an alien. Where, by the abuse of discretion or the arbitrary action by the inspector, or other executive officer, or without a full and fair hearing, an alien is deprived of his liberty or is about to be deported, the power is conferred and the duty is imposed upon the courts of the United States to issue a writ of Habeas Corpus and relieve him." [citations omitted].

Important to note is the fact that the court made no mention of another indispensable requisite of a fair hearing—the right to be represented by counsel. This would be most crucial to a respondent since counsel is more skillful in offering evidence and cross examining witnesses.

26. 372 U.S. 335 (1963).

27. Escobedo v. Illinois, 378 U.S. 478 (1964) (right to counsel attaches when an investigation is no longer general but focuses on a particular suspect); Miranda v. Arizona, 384 U.S. 436 (1966) (right to have attorney present to protect defendant's fifth amendment right against self-incrimination in an investigation or interrogation); Powell v. Alabama, 287 U.S. 45 (1932) (guiding hand of counsel required at every critical stage in a criminal proceeding); Coleman v. Alabama, 399 U.S. 1 (1970) (a preliminary hearing is a critical stage, thus the guiding hand of counsel is required); Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel where a loss of liberty is involved, or a defendant may not be imprisoned if he was not represented by counsel after having requested that counsel be appointed); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (counsel will be appointed on a case basis in probation revocation hearings where there are disputed issues); Mempa v. Rhay, 389 U.S. 128 (1967) (probationer is entitled to be represented by counsel at a combination revocation and sentencing hearing—all criminal proceedings where substantial rights of a criminal accused may be affected); Douglas v. California, 372 U.S. 353 (1963) (counsel must be provided at the first appeal as of right; *In re* Gault, 387 U.S. 1 (1967) (counsel must be appointed to represent indigent juveniles in juvenile hearings). *See also* Massiah v. United States, 377 U.S. 201 (1964) and White v. Maryland, 373 U.S. 59 (1963).

28. *See* cases in note 1 *supra*. *See also* GORDON & ROSENFIELD, § 5.10 at 5-74.

However, by analogy to the criminal and juvenile areas these right to counsel cases should apply with equal force to the so-called civil deportation area. In *In re Gault*[29] it was argued that though the labels of "criminal" and "civil" distinguished the areas of criminal and juvenile law,[30] in a practical sense, the effect of juvenile proceedings and disposition were so severe that protections nearing those afforded criminal defendants should also be extended to juvenile defendants. Agreeing, the Court held that virtually all constitutional guarantees that are enjoyed in the criminal area are applicable to juvenile proceedings notwithstanding their civil label.[31] In regard to counsel, the Court specifically stated that:

> The Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine (juvenile) delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or, if they are unable to afford counsel, counsel will be appointed to represent the child.[32]

It must be emphasized that the Court stressed the need for counsel to assure fairness in a proceeding ". . . comparable in seriousness to a felony prosecution."[33]

There is a common thread that runs throughout juvenile, criminal and deportation proceedings, which ties them together. The thread is that in all these proceedings the end result may be loss of liberty as a penalty sanction. The Court has previously held that deportation is a penalty,[34] and a deprivation of liberty.[35] In fact, the Court in *In re Gault*, in its discussion of the right to counsel, placed particular emphasis upon the character of the sanction imposed—loss of liberty.[36] Thus, if loss of liberty must be the end result of a particular proceeding before the right to counsel attaches, then this requirement is certainly satisfied in the deportation area.

Of further importance is the fact that when one continues to compare their characteristics, deportation proceedings become even more similar to criminal proceedings thus illustrating a further

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29. 387 U.S. 1 (1967).
30. *Id.* at 49.
31. *Id.* at 29-57.
32. *Id.* at 41.
33. *Id.* at 36. *See In re* Samuel Winship, 397 U.S. 358 (1970) (proof standard of beyond a reasonable doubt is required in juvenile hearings).
34. Fong Haw Tan v. Phelan, 333 U.S. 6 (1948); Bridges v. Wixon, 326 U.S. 135 (1945).
35. *Bridges v. Wixon id.*, and the *Japanese Immigrant Case*, 189 U.S. 86 (1903).
36. 387 U.S. at 36.

need for a guaranteed right to counsel in the deportation area. For example, running parallel with the deportation process are possible criminal sanctions. If the government establishes a violation of INA Section 241 (a)(13) (a ground for deportation)[37] it has virtually proven its case for a violation of INA Section 274 (a felony).[38] A finding adverse to the alien will result both in deportation and a fine of $2,000 or imprisonment. In each proceeding there is a prosecutor for the government, a United States Attorney.[39] In each case the sentence is severe, a deprivation of liberty and "all that makes life worth while."[40]

Furthermore, the burden of proof in a deportation proceeding generally falls on the goverment,[41] and the government's case must be proven by a preponderance of evidence.[42] In criminal and juvenile trials the burden of proof falls on the prosecution and guilt must be proven beyond a reasonable doubt. In light of these facts, it is somewhat difficult to make the civil-criminal distinction, since deportation proceedings are as criminal in nature as are criminal trials, thus requiring appointed counsel to indigent aliens as a matter of due process right.[43] In fact this type of analysis led the Court in *Gault* to require the imposition of virtually all criminal constitutional guarantees in the juvenile area. While there may be

37. 8 U.S.C. § 1251(a)(13) reads: Deportable Aliens—
(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
(13) prior to, or at the time of any entry or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of Law.
This subsection essentially refers to procuring the unlawful entry, or aiding or abetting another alien to unlawfully enter the United States. *See generally* 8 U.S.C. § 1251 Deportable Aliens which covers virtually all grounds for deportation.

38. 8 U.S.C. § 1324 is similar to 8 U.S.C. § 1251(a)(13) in that the language is much the same in referring to aiding and abetting, inducing or generally bringing or procuring the entry of aliens unlawfully into the United States, except this covers the criminal aspect of this conduct and a violation is triable as a felony. In essence, section 1251(a)(13) makes one amenable to expulsion for committing these acts and section 1324 makes one criminally liable as well, thus a double liability is imposed for the same act. *See also* 8 U.S.C. § 1326 (1970).

39. In a deportation proceeding this is the inquiry officer, and in many cases there is a special officer appointed to prosecute the deportation proceeding. *See* 8 U.S.C. §§ 1252(b) and 1226(a). Generally, however, the special inquiry officer also acts as prosecutor.

40. Harisiades v. Shaughnessy, 342 U.S. 600.

41. Palmer v. Ultimo, 69 F.2d 1 (7th Cir. 1934); Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963).

42. I.N.A. § 349(c), 8 U.S.C. § 1481(c), as amended by section 19, Act of September 26, 1961, 75 Stat. 656. The Court has held that the standard is "clear, unequivocal, and convincing evidence." Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 285 (1966). *See Gordon & Rosenfield*, § 5.10b, at 5-78.

43. Gideon v. Wainwright, 372 U.S. 335 (1963). Justice Harlan in his concurrence rested his conclusion solely on the demands of due process, deeming the right to indigents to appointed counsel to be "implied in the concept of ordered liberty." *Id.* at 352. *See also In re* Samuel Winship, note 33 *supra*.

differences between the criminal, juvenile and deportation areas, the result is ultimately the same—a loss of liberty.[44] This fact the Supreme Court implicitly suggested was crucial to its conclusion of affording a right to counsel in both the criminal and "civil" juvenile area.

B. *The Alien's Qualified Right to Counsel: A Right Without Bite*

Rather than an unqualified right to counsel, the Supreme Court has suggested that in the case of administrative proceedings, indigent individuals may have a right to counsel if the facts are sufficiently complex or if the administrative proceeding may lead to criminal prosecutions.[45] It can hardly be imagined how a deportation proceeding may not seem complex to an alien unfamiliar with American institutions and especially governmental agencies. In fact, governmental agencies are totally foreign to many people who have lived in the United States their entire lives, let alone an alien. Charles Gordon illustrates this point:

> The persons involved in immigration proceedings usually are aliens, and generally they are in the less privileged economic class. Often they are at the threshold of our country, or have recently arrived, and then they have little or no comprehension of our language or institutions. The cases affecting those individuals sometimes pose complicated factual or legal questions. Obviously the services of counsel can be quite valuable in protecting those persons' rights and status.[46]

As we stated earlier, there is a statutory privilege to counsel, ". . . at no expense to the government by such representative authorized to practice in such proceedings. . . ."[47] But even this privilege is not absolute. Cases have held that where the grounds for deportation are clear[48] counsel can be denied. It has also been

44. *In re* Gault, 387 U.S. 1 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963); Bridges v. Wixon, 326 U.S. 135 (1945); and the *Japanese Immigrant Case*, 189 U.S. 86 (1903).

45. Mathis v. United States, 391 U.S. 1 (1968). Similarly, denial of due process fairness may also serve as a basis for requiring the appointment of counsel. However, a denial of due process would seem applicable only in the most extreme cases. In United States *ex rel.* Castro-Louzan v. Zimmerman, 94 F. Supp. 22 (E.D. Pa. 1950) the petitioner was imprisoned, improvised without friends, family or knowledge of the English language. The court stated: "where . . . as in this case, important facts having a very distinct bearing on the outcome of the case were not presented due to the absence of counsel, I have no hesitancy in finding that it did not meet the requirements of a fair hearing." 94 F. Supp., at 26. *See* Rosales-Caballero v. Immigration and Naturalization Service, 472 F.2d 1158 (5th Cir. 1973).

46. *Gordon, Right to Counsel, supra* note 5, at 877.

47. I.N.A. § 242(b), 8 U.S.C. § 1252(b) (1970).

48. De Bernardo v. Rogers, 254 F.2d 81 (D.C. Cir. 1958), a case in which a crime of moral turpitude was involved. The appellant, who had been found guilty of committing an unlawful entry and armed robbery was unable to obtain counsel due to his penurious condition. The court of appeals in ruling against him did not find it necessary to decide whether due process requires that counsel be appointed to represent an indigent respondent in a deportation proceeding, because the facts on which deportation was ordered were not in issue. The point is that even had

held that a hearing is not necessarily unfair merely because the respondent is confined to a penal institution, and that in such cases he is not denied counsel merely because it is difficult for him to procure counsel.[49] Generally, however, the guidelines are whether under all the circumstances the respondent had a fair opportunity to obtain counsel and a fair opportunity to develop the legal and factual defenses available to him.[50]

Given the Gordon description of the circumstances surrounding those individuals most frequently subjected to deportation proceedings[51] the guidelines would seem to require counsel as a matter of fundamental fairness in virtually all cases. This, however, is not the case. Only a fractional percentage of aliens are actually represented in various stages of the deportation proceeding.[52] As Reuben Oppenheimer, author of an early report on administration of immigration law, states, "Even after the alien is appraised that he may have counsel, and even though they may wish to have an attorney, he generally can not do so because of the lack of funds."[53] In addition, Oppenheimer contends that "[i]t is safe to say that in the great majority of cases throughout the country the alien is unrepresented."[54]

The substantive difference in the outcome of deportation proceedings with and without counsel is not surprising. Studies have found that the guiding hand of counsel is most crucial to the alien. Charles Gordon makes this observation:

> The Commentators found that there is a vast need for greater opportunities to be represented by counsel. The studies revealed that representation by counsel had a marked effect on the administrative proceedings and that the represented alien prevailed in a far higher proportion of cases, since their counsel was more effective in raising points of law, in questioning due process, in marshalling relevant evidence and in advancing claims to United States citizenship.[55]

Since most aliens are indigent for purposes of qualifying for government appointed counsel, it becomes imperative that a right to

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the respondent been able to procure counsel this privilege could still be denied since the facts on which deportation depended were so clearly against the respondent.

49. Wlodinger v. Reimer, 103 F.2d 435 (2d Cir. 1939); Dengeleski *ex rel.* Saccardio Tillinghast, 65 F.2d 440 (1st Cir. 1933).

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

51. *See* text accompanying note 46 *supra.*

52. OPPENHEIMER, THE ADMINISTRATION OF THE DEPORTATION LAWS OF THE UNITED STATES: REPORT TO THE NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (1935), at 85 (hereinafter cited as *Oppenheimer*).

53. *Id.*

54. *Id. See also* Note, 11 HARV. INT. L.J. 100, at n.29 (1970) in which Charles Gordon makes a similar observation as Oppenheimer's in a letter to William Haney author of the student Note.

55. *Gordon, Right to Counsel,* 45 MINN. L. REV. at 878.

counsel in these proceedings be established so the alien can have an adequate defense, for as the studies illustrate because of a lack of funds the alien goes largely unrepresented[56] thereby being denied due process of law. Further, since the alien is entitled to due process protection,[57] and the fact that the Supreme Court has already held that indigent individuals may have the right to counsel in other complex administrative proceedings,[58] to relieve these inequities necessitates a finding of a right to counsel. Otherwise, as Justice Black stated in his dissent in *Goldberg v. Kelly*, the right without the reality would be rendered meaningless.[59]

RIGHT TO COUNSEL BASED ON THE FIFTH AMENDMENT'S EQUAL PROTECTION CONCEPT OF THE DUE PROCESS CLAUSE

A. *Analogy to the Criminal Area*

An examination of grounds for finding a violation of equal protection in denying appointed counsel to indigent aliens in deportation proceedings poses further obstacles. First, applying an equal protection analysis necessarily requires the demonstration that there is an insular and discrete minority that constitutes a class that has been denied a benefit or a right. Certainly that class would not be based on alienage. Although the Supreme Court has held that alienage is an inherently suspect class,[60] the discrimination here, though aliens are the only ones affected, is based on wealth, since it is only those aliens who can afford private counsel that are represented in deportation proceedings.[61]

The Supreme Court has held that discrimination based on wealth is not inherently suspect. Therefore this basis of attack would seem to fail in generating a strict scrutiny standard of review.[62] The tendency of the Court has been to insert all that does not fit within the already established parameters of the strict scrutiny standard into the rational basis formula of review.[63] Un-

56. *Id.* at 877. *See* text accompanying note 51 *supra.*
57. The *Japanese Immigrant Case*, note 20 *supra* and accompanying cases.
58. Mathis v. United States, 391 U.S. 1 (1968).
59. 397 U.S. 254, 279 (1970). Justice Black was criticizing the majority's opinion that stated that a welfare recipient could be represented by counsel in a proceeding to terminate welfare benefits but at his own expense. His fear was that eventually this right would be extended to appointed counsel to meet the reality of this given right. In this circumstance, however, his expression is particularly apt.
60. Graham v. Richardson, 403 U.S. 365 (1971); Sugarman v. Dougall, 413 U.S. 634 (1973); *In re* Griffiths, 413 U.S. 717 (1973).
61. I.N.A. § 242(b), 8 U.S.C. § 1252(b) (1970). OPPENHEIMER, note 52 *supra* and text accompanying notes 46 and 53 *supra.*
62. San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973); James v. Valtierra, 402 U.S. 137 (1971). *But see* Justice Harlan's dissent in Shapiro v. Thompson, 394 U.S. 618 (1969) where he suggests the criterion of wealth was added to the list of suspects.
63. *See* Justice Harlan's dissent in *Shapiro id. See generally* Karst, *Invidious Discrimination: Justice Douglas and the Return of the Natural-Law-Due-Process Formula*, 16 U.C.L.A. L. REV. 716 (1969) (hereinafter cited as *Karst*).

der this standard virtually any justification for the particular discrimination will be upheld as long as the classification is reasonably related to a legitimate governmental purpose.[64] In this case the considerations are expediency and economy. Therefore the distribution of counsel on the basis of wealth (or denial on the basis of poverty) will probably be held to be reasonable under the rational basis approach.[65] This then necessitates another basis of analysis which the criminal area provides.

Although, as has been mentioned, the right to counsel (and consequently the right to appointed counsel) has been construed as fundamental only in the area of criminal law,[66] an attack based on wealth discrimination, by analogy to the criminal process, lends further support for the proposition that the right to appointed counsel should be extended to deportation proceedings. Wealth discrimination has had a significant impact in the criminal process. The Supreme Court cases of *Griffin v. Illinois*[67] and *Douglas v. California*[68] clearly illustrate this impact.

The Court held in *Griffin* and *Douglas* that where liberty is at stake[69] a state may not grant to one even a nonconstitutional statutory right, as the one in this case[70] and deny it to others because of poverty.[71] It is precisely this type of discrimination that is experienced in deportation proceedings, for the INA provides for counsel but "at no expense to the government,"[72] therefore resulting in an "invidious discrimination"[73] against indigent aliens. Hence, though wealth is not suspect, the Court has made it clear that where discrimination based on wealth is fundamentally unfair, it will not be tolerated. As the Court stated in Griffin, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[74]

Further, it has been stated that "[i]t may be that the *Griffin* and *Douglas* principle does not come into play unless and until discriminations based on wealth work an inequality so significant . . . as to amount to fundamental unfairness."[75] Given the

64. *Karst id.*
65. *Id. See also* Dandridge v. Williams, 397 U.S. 471 (1970) (state ceiling on welfare benefits approved).
66. *Gideon* and the cases cited in note 27 *supra.*
67. 351 U.S. 12 (1955).
68. 372 U.S. 353 (1963).
69. For deportation as a deprivation of liberty *see* text accompanying note 35 *supra.*
70. I.N.A. § 242(b)(2), 8 U.S.C. § 1252(b)(2) (1970).
71. *Griffin* and *Douglas* notes 67 and 68 *supra.*
72. I.N.A. § 242(b)(2), 8 U.S.C. § 1252(b)(2) (1970).
73. "Invidious discrimination" is Justice Douglas' phrase as *Karst* states in his article, *Invidious Discrimination*, note 63 *supra.*
74. 351 U.S. at 19.
75. Kamisar and Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations*, 48 MINN. L. REV. 1, 10-11 (1963).

fact that aliens with counsel prevail more often than those without,[76] a significant inequality, of the type dealt with in *Griffin* and *Douglas*, results against indigent aliens. To remedy this inequality, as well as to bring the deportation process more in tune with due process, counsel must be provided to indigent respondents as of right.

B. *The Marshall Approach*

A denial of equal protection to aliens who can not afford private counsel in deportation proceedings can also be found under Justice Marshall's analysis in *Dunn v. Blumenstein*[77] and his dissent in *San Antonio Independent School District v. Rodriquez*.[78] Under this view three questions are asked in analyzing a denial of equal protection: (1) what is the government's purpose for maintaining the classification and discrimination; (2) whether the classification is rational in view of the governmental purpose; and (3) the effect of the denial of the benefit or right on the individual.

The answer to question one is economy and expediency. The right to appointed counsel is denied because the costs that the government would have to bear would be great. Similarly, there would be a good deal of administrative time taken up by the determination of indigency. As for question two, denying counsel, which is a denial of not only equal protection but due process of law, can not be justified in view of the government's purpose of economy. For the end result is loss of liberty,[79] which must be outweighed by an interest of greater importance than economy.[80] The fifth amendment essentially demands that the government find alternate means of achieving its purpose. This leads to the third question which is the pivotal point of Marshall's inquiry.

There is little question that the denial of counsel has a substantial effect on the indigent alien.[81] Denial of appointed counsel, and hence an adequate defense, can result in deportation, and thus subject an alien and his family to a loss of liberty[82] and equal protection of the law. Economic considerations then must give way to the alien's due process and equal protection rights under this analysis.

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76. *See* text accompanying note 55 *supra*.
77. 405 U.S. 330 (1972).
78. 411 U.S. 1 (1973). *See also Karst*, note 63 *supra*.
79. *See* text accompanying notes 34-35 *supra*.
80. The criminal cases of *Gideon*, *Griffin* and *Douglas* make this quite clear.
81. *See* text accompanying note 55 *supra*.
82. *See* text accompanying note 35 *supra*. *See also* cases cited in note 2 *supra*.

THE CONSTITUTIONAL DILEMMA OF UNITED STATES CITIZEN CHILDREN HAVING THEIR PARENTS FOUND DEPORTABLE

A. *General Considerations*

Further justification for appointed counsel as a matter of right in deportation proceedings finds basis in the situation where the American born child may have his parents deported from him. Children have an obvious vested interest in having their parents receive adequate legal representation so as to raise all possible issues that may prevent deportation and hence preserve the family unit as well as the child's constitutional rights.

When their alien parent is found deportable, American minors face an awkward decision. They must choose between their parent(s) or their country. If they choose to remain with their parents and thus leave the country, they will also leave behind their friends, relatives, education, language and essentially their entire way of life. If they decide to stay, they will be left to the care of a relative, a friend, or perhaps even the state. Either alternative will involve an uprooting of their lives which will have serious material and psychological consequences.[83]

B. *Constitutional Protection of the Family Unit*

The integrity of the family unit has found support in various Supreme Court cases. The Court in *Stanley v. Illinois*[84] succintly summarized the different aspects of the family relationship that have found constitutional protection:

> This Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' *Meyer v. Nebraska* (citations omitted) 'basic civil rights of man,' *Skinner v. Oklahoma* . . . and 'rights far more precious than property rights,' *May v. Anderson* . . . *'It is cardinal with us that the custody, care and nurture of the child reside first in the parents,* whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince v. Massachusetts.* The integrity of the family unit has found protection in the Due Process clause of the Fourteenth

83. In the fiscal year 1974 the INS located 788,000 *deportable* aliens. Since at least 15 per cent of deportable aliens have American born children, there are conservatively 166,000 alien parent families with United States citizen children. Statements of Acting Attorney General, Lawrence H. Silberman, Feb. 25, 1975 before the House Judiciary Committee on Immigration Citizenship and International Law in support of H.R. 982. *See also* COMMON COUNCIL FOR AMERICAN UNITY, THE ALIEN AND IMMIGRATION LAW: A STUDY OF 1446 CASES ARISING UNDER THE IMMIGRATION AND NATIONALITY LAW OF THE UNITED STATES (1958).

84. 405 U.S. 645, 651. Further, Meyer v. Nebraska, 262 U.S. 390, 399 (1972) held that included in the concept of liberty under the fourteenth amendment is the right to bring up children.

> Amendment, *Meyer v. Nebraska* . . . , the Equal Protection clause of the Fourteenth Amendment, *Skinner v. Oklahoma* . . . (emphasis added).[85]

Additional protection of the family can be found in the ninth amendment and penumbral analysis offered by Justice Douglas in *Griswold v. Connecticut*.[86] In *Griswold* the Court invalidated a state law which made it a crime to aid or abet married persons in the use of contraceptive devices. Writing for the majority Justice Douglas held that the statute impinged upon the marital relationship which was so special that it was within a *zone of privacy* and thus free from state interference. This right to privacy was not specifically to be found in the Bill of Rights but rather within its penumbras, especially those of the first and ninth amendments.[87] This penumbral analysis is illustrated, for example, by Justice Douglas:

> The right to freedom of speech and press includes not only the right to utter or print but the right to distribute, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach . . . without those peripheral rights the specific rights would be less secure.[88]

Justice Douglas elaborated further:

> Specific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance . . . . Various guarantees create zones of privacy . . . . The Ninth Amendment provides: 'The enumeration in the Constitution of certain rights, shall not be construed to deny or disparge others retained by the people.'[89]

The aftermath of *Griswold* has seen the expansion of this notion of privacy. The Court has extended this right to include the right to privacy of the body,[90] liberty and privacy of the home,[91] and the right to procreate.[92]

Applying the *Griswold* penumbral analysis to the family unit, it necessarily follows that the penumbras of the Bill of Rights and the ninth amendment provide further protection of the family. For the family unit is the core element in any civilized society and it

85. 405 U.S. at 651.
86. 381 U.S. 479 (1965).
87. Justice Douglas used the first amendment to illustrate his point.
88. 381 U.S. 479, 482.
89. *Id.* at 484. The right to privacy is also recognized in the third amendment right of an owner of a dwelling to refuse to quarter a soldier during peace time; the fourth amendment right of persons to be secure against unreasonable searches and seizures; and the fifth amendment's protection against self-incrimination.
90. Roe v. Wade, 410 U.S. 113 (1973).
91. Stanley v. Georgia, 394 U.S. 557 (1969).
92. Skinner v. Oklahoma, 315 U.S. 535 (1942), as later *interpreted* by *Stanley v. Georgia*, note 91 *supra*.

would seem to follow that it must therefore be equally within a constitutionally protected zone of privacy.

Given that the family is constitutionally protected, then the family's rights must be safeguarded in deportation proceedings, especially those of the American born child. This would require an examination of the impact of deportation on the family, and again especially on the child since he not only has a right to be with his parents but equally important he has a constitutional right to remain in the United States as a citizen.[93] This examination however, is seldom conducted.

To deny an examination of the impact on the child's rights and on his welfare is to deny him and his parents fifth amendment due process. If the child chooses to remain in the United States he does so at the sacrifice of his right to remain with his parents, and if he decides to leave with his deported parents he sacrifices his right to remain in the United States as a citizen. In either case important rights are lost without due process of law.

Since the inquiry officer at a deportation proceeding is empowered to grant discretionary relief,[94] then an examination of the child's rights to be with his parents and the consequences of forfeiting citizenship, as well as the parent's rights to raise the child,[95] must be made. Further, to adequately protect these rights counsel is more crucial, since counsel is not only more articulate in expressing the hardships that may result from deportation, but he is equally more skilled at raising points of law and marshalling factual and legal issues. Counsel's assistance may prevent deportation and hence protect both the parent and child's constitutional rights.[96] Moreover, this would require appointed counsel as of right, since as Gordon further illustrates, a considerable percentage of respondents in deportation proceedings are indigent,[97] and to deny an alien and his children the effective protection of their rights because of indigency is clearly unconscionable and repugnant to our Constitution.[98]

C. *The Right to Citizenship v. the Right to Remain with One's Parents and Family: Latent Constitutional Tensions*

Once the parent is deported and the United States citizen

93. The right to remain in the United States flows from the inherent rights of citizenship. *See* section 1 of the Fourteenth Amendment. *See also* United States v. Guest, 383 U.S. 745 (1966) and Shapiro v. Thompson, 394 U.S. 618 (1969) which seem to suggest that the right to remain in the United States flows from a

94. GORDON & ROSENFIELD, note 4 *supra*, at § 5.3e, at 5-23.

95. See Meyer v. Nebraska, 262 U.S. 390.

96. *See* text accompanying note 55 *supra*.

97. *See Gordon, Right to Counsel*, note 5 *supra*, at 877.

98. *See Gideon, Griffin* and text accompanying note 71 *supra*.

child leaves with the deported parent (or parents), all of his constitutional guarantees are meaningless as he is not in his country to exercise them. This is accomplished by the federal government effectively forcing the child to leave with his parents or else remain in the country but without his family. A native born American, however, may not be deprived of his citizenship except by "voluntary renunciation."[99]

It has been suggested that in this situation the United States born child leaves voluntarily with his parents.[100] This is illogical, because in order for one to make a voluntary choice one must do so by selecting from viable alternatives. It can hardly be suggested that selecting between one's parents or one's country are viable alternatives. Either the child will, in effect, be deported without due process of law or removed from his parents without due process of law, even though the Court stated in *Levy v. Louisiana* that children are persons entitled to the protection of the United States Constitution.[101]

The ultimate result is that these American citizens are not only deprived of due process, but are having to forfeit one right in order to exercise another. This creates further constitutional tensions, as the exercise of one constitutional right should not be conditioned upon the relinquishment of another.[102]

Lastly, analogizing to parent neglect proceedings and the need for counsel where the possibility of family separation exists, one court stated:

> The permanent termination of parental rights is one of the most drastic actions the state can take against its inhabitants. It would be unconscionable for the state forever to terminate the parental rights of the poor without allowing such parents to be assisted by counsel . . . .[103]

CONCLUSION

This comment attempted to give a brief overview of deporta-

99. Afroyim v. Rusk, 387 U.S. 253 (1967).
100. Aslund v. Marshall, 323 F. Supp. 1380 (E.D. Tex. 1971).
101. 391 U.S. 68, 70 (1968). *See also In re Gault, supra* note 29 and text accompanying notes 31 and 32.
102. It is exactly this type of dilemma that the Court saw with respect to determining standing for a motion to suppress illegally seized contraband or stolen goods as evidence. This tension gave way to "automatic standing." In Jones v. United States, 362 U.S. 257 (1960), the defendant had to admit ownership of the stolen property in order to gain standing to suppress the evidence as violative of his fourth amendment right to be protected against unreasonable searches and seizures. But in so doing he would be admitting the crime of possession of the contraband. The Court resolved this tension between the fourth and fifth Amendments by allowing Jones to admit ownership to suppress but his pretrial testimony could not be used against him at the trial as evidence to determine guilt or innocence.
103. State v. Jamison, 251 Or. 114, 444 P.2d 1005 (1968).

tion proceedings in the United States, paying particular attention to the inequities inherent in this process with emphasis on the absence of a guaranteed right to appointed counsel. It is argued that there must be such a constitutional right in these proceedings to provide indigent aliens subjected to this process with an adequate defense and thus avoid the drastic consequences that inevitably follow from deportation.

Various bases of constitutional analysis have been employed to buttress the argument that the right to appointed counsel should be enjoyed by aliens subject to deportation to the same extent that this right is enjoyed in the criminal context. The analysis was focused on the legal theories of due process, equal protection and Justice Douglas' penumbral theory and the constitutional protection accorded the family unit. As was pointed out, the same justifications for finding these theories applicable in other areas of the law equally apply to deportation proceedings, thus necessitating the finding of a constitutional right to appointed counsel.

GILBERT LOPEZ
RAMÓN GÓMEZ