PANEL I: FAIRNESS IN IMMIGRATION PROCEEDINGS

DEBRA ANKER:* What I am going to try to do in this very brief time is trace the last eighty years of changes in immigration deportation proceedings and in the constitutional framework upon which they rest. From the perspective of this century, there have been major changes in the immigration court and in the requirements and contents of due process in deportation proceedings. In the spring of 1987, for the first time, immigration proceedings were given formal rules of procedure which were codified in final regulations.[1] These regulations were issued pursuant to a major reorganization that is only four years old, in which the immigration court bureaucracy was taken out of the Immigration and Naturalization Service (INS) and placed in a separate agency, the Executive Office for Immigration Review.

The immigration court system has changed significantly over the past decade. The number of immigration judges has increased dramatically, from forty in 1982 to seventy in 1987. In addition, the jurisdiction of the court has been vastly expanded since 1980 to include, for example, claims for political asylum. And, in a conscious effort by the new Chief Immigration Judge to rid the court system of old institutional ties to the INS, about one-quarter of the current immigration judges come from outside the immigration system. Clearly, these changes, in terms of independence of adjudicators, expanded jurisdiction, and increased formality of procedures, have influenced our concept of fairness, which is what the fifth amendment due process of law requirement is all about.

The current situation in terms of deportation proceedings is highly unstable and rests on a fundamentally ambivalent position. I will address two major issues regarding the reasons for this situation.

First, alien rights advocates have been pressing for more formal rights in deportation proceedings over the last decade. There is a right to counsel now in deportation proceedings, but there is no right similar to the sixth amendment right to have appointed counsel at the expense of the state when the alien is indigent. Arguments have been made in scholarly journals and elsewhere that such a right to appointed counsel should exist, at least in certain proceedings. There have also been moves towards increased formal rights and formal

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1. Rules of Procedure for Immigration Judge Proceedings, 8 C.F.R. §§ 3.12-3.38 (1988) (rules promulgated to assist in the expeditious, fair and proper resolution of all matters coming before immigration judges, including deportation, exclusion, bond, and rescission proceedings).

procedures: requirements of translators, continuances, changes of venue. All of these rights are being asserted in a more clearly articulated and formal way.

One fundamental problem that has arisen is the selection of cases which should be included within the jurisdiction of the immigration court. In visa petition cases, for example, immigration court does not have jurisdiction to determine whether an alien should be granted preference status or immediate relative status. That issue is adjudicated by the INS and is not subject to the more trial-like proceedings of the immigration court.

A second problem under the new immigration law, and in particular under the new regulations, is that the immigration court has no jurisdiction over the issue of legalization.[2] An alien will have an interview with an immigration officer at the INS, but there is no right to renew that application or have a hearing on that application before the INS. There has also been talk in the past about removing asylum hearings from the jurisdiction of the immigration court, establishing instead, a less formal adjudicatory framework, based on the model of alternative dispute resolution.

The second major issue, which relates to the resolution of the first, is the fundamental contradiction in the constitutional framework of immigration generally and of procedural due process in particular. Underlying immigration law—and it is the most important thing to understand about it in some ways—is the notion of plenary power. Immigration law is unlike any other area of the law in that the power of the political branches of government has been practically plenary and extra-constitutional. The result is that, despite the changes that have occurred over the last several years, over the last eighty years many aspects of immigration proceedings and their foundations have remained the same. We have always had a tension and an ambivalence in our treatment of aliens. I would like to provide a brief historical picture of how we got to where we are today.

For almost a century, the courts and our legal culture have assiduously avoided the fundamental constitutional question in immigration law: is fairness, and what kind of fairness, required as a matter of constitutional will or as a matter of constitutional right? The first important case dealing with procedural due process in deportation proceedings was The Japanese Immigrant Case, *Yamataya v. Fisher*,[3] decided in 1903. Earlier cases had established Congress's plenary power over setting substantive grounds of exclusion and deportation in the immigration context. It was not clear, though, whether procedural requirements embodied in the due process clause applied to immigrants. *Yamataya* involved a young Japanese woman who had been admitted as a resident alien and who was detained as a material witness in connection with a criminal investigation of her uncle. At some point during that detention, she was questioned by an immigration inspector about her right to be in

2. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201(f), 100 Stat. 3359, 3399-400. *See also* 8 C.F.R. §§ 103.2 (c), 103.3 (a) (1988).

3. 189 U.S. 86 (1903).

the United States. It was asserted that she was likely to become a public charge. When her case reached the Supreme Court, she claimed that she did not understand English, nor the nature and import of the questions which the immigration inspector had asked her. Most fundamentally, she did not understand that the questions and the investigation had reference to her deportation. Notice that some of the issues here are the same ones we face today, such as the right to an interpreter and the right to an attorney.

The Court reached two conclusions which have been followed to some extent in all the cases up until the present. First, while recognizing that there may be plenary power over substantive grounds of deportation, it stated that "this [C]ourt 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 the adoption of the Constitution."[4] The Court established that a reasonable construction of the acts of Congress requires the conclusion that due process protections apply to immigrants involved in deportation proceedings. However, the Court did not state clearly that due process for aliens is a matter of constitutional right.

Second, the Court said that the appellant had received due process since she was not denied the opportunity to be heard and had received notice of the charge and its purpose. If she had any complaint about the administrative proceeding, she should have appealed administratively, instead of petitioning the court for a writ of *habeas corpus*. The Court concluded that due process requires that "no person shall be deprived of his liberty without opportunity, at some time, to be heard."[5] Apparently, the "opportunity to be heard" does not necessarily require giving the immigrant formal notice of an investigation into her legal status since the record showed that the appellant in The Japanese Immigrant Case had never been formally notified of the investigation.

The next watershed series of opinions in this area occurred in the late 1940s and in the 1950s. With the growth of administrative agencies during the New Deal, Congress passed a uniform law of procedure for all federal government agencies, except where they were specifically exempted, and embodied certain basic principles of due process in statutory form in the Administrative Procedure Act (APA).[6] One of these principles was the division of prosecutorial and adjudicatory functions between an administrative agency and an independent civil service.

In *Wong Yang Sung v. McGrath*,[7] decided in 1950, the issue raised was whether immigration proceedings were covered by the APA, and particularly whether the APA's requirements of trial-type proceedings, including a sepa-

4. *Id.* at 100.

5. *Id.* at 101.

6. Administrative Procedure Act, Pub. L. No. 404, 60 Stat. 237 (1946), *repealed by* Pub. L. No. 89-554, 80 Stat. 378 (1966). The Act's provisions are currently incorporated in 5 U.S.C. §§ 551-59, 701-06 (1982).

7. 339 U.S. 33 (1950).

rate, independent hearing officer, were required. At that time, the regulations governing deportation proceedings provided that the immigration inspector assigned to conduct the hearing could not be the same officer who had conducted the investigation and brought charges against the alien, unless the alien consented. There was no requirement, however, that the adjudicator of the deportation proceeding be institutionally separate from the officer who prosecuted the case. In *Wong Yang Sung*, the Supreme Court held that the APA did apply to immigration proceedings and that the INS's commingling of adjudicatory and prosecutorial functions violated the Act.

The Immigration and Nationality Act of 1952 (INA),[8] under which we now operate, codified and legalized the practices which had been invalidated in *Wong Yang Sung* although it also gave immigrants some procedural safeguards. Section 242(b) (1), for example, specifies that the alien "shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held."[9] It also adds a protection that a deportation order is valid only if based upon reasonable, substantial and probative evidence. These procedural safeguards, however, were relatively insubstantial when compared to the standards of fairness which the APA had established.

Three years after the passage of the 1952 Act, the lack of separation of functions in the INS adjudicator was challenged in *Marcello v. Bonds.*[10] In that case, the Court, after elucidating the long-standing practice in deportation proceedings, rejected the petitioner's contention that the lack of separation of powers so strips the hearing of fairness as to make the procedure violative of due process. Justice Black's powerful dissent in *Marcello*[11] warned of the danger of keeping immigration judges under the authority of the Commissioner of the INS. The hearing officer in *Marcello* adjudicated the very case against petitioner that the hearing officer's superiors had initiated and prosecuted.

After *Marcello*, administrative practice became the measure of constitutional rights. The courts saw due process as a floor which had not been fallen through, rather than as a ceiling of fairness values which had not been reached in the immigration setting. The focus of discussion, again, was limited to an assessment of Congress's intention to provide protections rather than an assessment of any constitutional rights independent of the current attitude in the statutes of the day.

Criticisms of the procedures approved in *Marcello* continued to be made in several Supreme Court decisions and in congressional hearings, and some things started to change. In 1958, for example, the INS attempted to address

8. Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 166 (codified as amended at 8 U.S.C. §§ 1101-1525 (1982)) [hereinafter INA].

9. INA, § 242(b)(1), 8 U.S.C. § 1252(b)(1) (1982).

10. 349 U.S. 302 (1955), *reh'g denied*, 350 U.S. 856 (1955).

11. 349 U.S. at 315-19 (Black, J., dissenting).

the problem of the lack of independence of the inquiry officer, the predecessor of today's immigration judges. It stipulated that a special inquiry officer was no longer to report directly to the District Director, but would now be under the supervision of the Chief Special Inquiry Officer (predecessor to the current Office of the Chief Immigration Judge) who himself would be under the direction of the Commissioner of the INS, rather than the District Director of INS.[12] This reorganization was still a far cry from full separation of functions because the inquiry officers remained within the framework of an organizational structure that still subordinated special inquiry officers to enforcement officials.

Changes began to happen slowly, incrementally, and most importantly, by administrative practice and regulation, rather than by statute, let alone by the Constitution. In 1956, the INS began to mandate that special inquiry officers must have law degrees. In 1973, the INS changed the title of inquiry officer to immigration judge.[13] In 1962, the INS began training and maintaining a specialized staff of trial attorneys for investigating and presenting evidence to the immigration judge.[14]

In 1983, new regulations completely removed the administration of immigration judges from the INS[15] and addressed many of the other complaints that had existed since *Wong Yang Sung*.[16] The 1958 reforms had done little to address the problem of immigration judges' lack of independence from the INS. The 1983 regulations created the new Executive Office of Immigration Review which is directly accountable to the Associate Attorney General, rather than the INS Commissioner.[17] When the new regulations were released in 1983, the government explained its goal: "This realignment will place similar quasi-judicial functions within a single organization and will result in a more effective and efficient operation of the Department's immigration judicial review programs."[18] In terms of compliance with the spirit and letter of the APA, some difficulty still remained. Under the 1952 Act, the Attorney General is still the chief law enforcement agent of the immigration laws, and now she is also in a supervisory capacity over the immigration judges.[19]

We see then increased conformity with the spirit of the APA, done basically without the moral force of the Constitution or in many cases of a con-

12. This stipulation was formally made an INS regulation in 1983, now codified at 8 C.F.R. § 3.9 (1988).

13. *Id.* at § 1.1(l).

14. *Id.* at § 242.16(c) (providing that unless the alien concedes deportability, the Immigration Judge in a deportation proceeding must request the assignment of a trial attorney to present the government's case).

15. 48 Fed. Reg. 8,038 (1983) (amending 8 C.F.R. Parts 1, 3, 100).

16. 339 U.S. 33 (1950).

17. 8 C.F.R. § 3.0 (1988).

18. 48 Fed. Reg. 8,038-39 (1983).

19. INA, ch. 477, § 103(a), 8 U.S.C. § 1103(a) (1982) (providing that the Attorney General is responsible for the enforcement of all laws relating to the immigration and naturalization of aliens).

gressional act. Again, the 1983 changes were made by regulation, and many lawyers have criticized the lack of a statutory basis for the Board of Immigration Appeals (BIA) or, now, the new corps of immigration judges.

There are a number of questions which remain. Is there now true independence in the immigration court? What kinds of rights and what level of formality of rights is required? Perhaps most importantly, is there a right to counsel? If due process underlies these proceedings and this whole area of law, what is required by due process? The next few years are going to be a very important time for finding answers to these questions because of the newly constituted and organized immigration court system. It should be remembered that although the court system has been reorganized, its continued stature and jurisdiction are still under question.

I leave you with what I began with: the issue of what procedural matters should be addressed in the course of deportation proceedings is still very much questioned. The regulations currently do not provide a right to a trial-type hearing in an immigration court. There is an ongoing debate over whether asylum proceedings should be continued within the immigration court. If those cases are removed from the immigration court's jurisdiction by regulation, as they were given by regulation, we may eventually again and, perhaps more directly, have to face the constitutional question that constantly has been brushed aside.

ISAIS TORRES:* I would like to explain some practical applications of constitutional rights to deportation proceeding in order to ensure procedural fairness. Any attorney who represents an alien in a deportation proceeding has three duties at that hearing. The first one is ensuring procedural fairness, which will be the main subject of my discussion, but there are two other issues involving contesting deportability that I would like to spend just a minute on.

The first of these two is contesting charges of deportability on the merits. That is, where the Immigration Service has charged an alien with a particular violation of a provision of a statute, the alien should attempt to prove that she does not fall within the particular statute at issue. Second, the alien's attorney should always apply for relief from deportation. Such relief includes section 245 adjustment,[20] section 249 registry,[21] section 244 suspension,[22] section 244(e) voluntary departure,[23] and section 243(h) withholding of deportation.[24]

But before an attorney contests deportability on the merits or applies for relief from deportation, she should address the fairness of the proceeding. One should always make sure that the charging document is in its current form. In

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20. INA, § 245 (codified as amended at 8 U.S.C. § 1255 (Supp. IV 1986)).
21. INA, § 249 (codified as amended at 8 U.S.C. § 1259 (Supp. IV 1986)).
22. INA, § 244, 8 U.S.C. § 1230 (1982).
23. INA, § 244(e), 8 U.S.C. § 1254(e) (1982).
24. INA, § 243(h), 8 U.S.C. § 1253(h) (1982).

many cases, for example, the factual allegations in the charging document or in the order to show cause contain conclusions of law. The factual allegations should contain no conclusions of law. Furthermore, the factual allegations should be very particular and should spell out the essential elements of the particular statute under which the alien is being charged. For instance, if the alien is being charged with a section 241(a)(13)[25] violation, aiding and abetting an alien to enter the country unlawfully for gain, the elements of that provision should all be spelled out in the order to show cause.

The INS's main task at the deportation proceeding is to establish alienage of the respondent. One issue to note here is that of derivative citizenship, where a client is born outside of the United States but is in fact a United States citizen. One should be careful to look at section 301 of the Act[26] to make sure that you do not have a situation where, for example, the respondent was born outside the United States, and a grandparent was a United States citizen. In that case, derivative citizenship is granted to the parent and then to the respondent. There is, therefore, always the threshold issue of whether the respondent, your client, is in fact an alien, even if she was born outside the United States.

Some immigration judges have questioned their jurisdiction to rule on claims of derivative citizenship. *In re Cantu*,[27] though, indicates that the immigration judge, indeed, does have jurisdiction to rule on a citizenship claim because the very first charging document, the order to show cause, contains the factual allegation that the respondent is not a United States citizen. The immigration judge can, thus, address the issue of whether that particular respondent is or is not in fact an alien.

The main thrust of contesting alienage in a deportation proceeding is being able to prevent the Immigration Service from providing the judge with evidence which would prove alienage. The Immigration Service has four sources of evidence which it can use to establish the alienage of a particular respondent. These four sources of evidence are: first, evidence or statements that are obtained from the respondent at the time of arrest (regardless of the location of the arrest); second, statements or evidence that are obtained at post-arrest proceedings; third, admissions of the respondent or her lawyer at the time of the hearing; and fourth, evidence obtained from prior Immigration Service files. For instance, if the respondent has a prior, existing I-130 petition[28] in the Immigration Services files, the petition will have indicated that the respondent was in fact born outside of the United States. Such information then becomes a basis for establishing that the respondent is an alien.

To deny the government the ability to establish alienage, the attorney

25. INA, § 241(a)(13) (codified as amended at 8 U.S.C. § 1251(a)(13) (1982)).
26. INA, § 301, 8 U.S.C. § 1401 (1982).
27. 17 I. & N. Dec. 190 (1978).
28. Immigration & Nationalization Service, U.S. Dep't of Justice, Publ. No. 1115-0051, PETITION FOR PROSPECTIVE IMMIGRANT EMPLOYEE (1985) (petition to classify preference based on an alien's profession or occupation).

should attempt to exclude all four forms of evidence from the deportation proceeding. The attorney should try to use the exclusionary rule to keep out various statements and evidence obtained at the time of arrest or after the arrest. In addition, the alien may invoke her fifth amendment right to remain silent at the hearing. If she does so, then there is nothing from that particular hearing that the Immigration Service can use to establish alienage. It then becomes critical whether the alien can invoke the fifth amendment right to remain silent at all times. Various cases have held that an alien has the right to remain silent throughout the deportation proceeding only if the charge against her will criminally incriminate her or will furnish proof of a link in a chain of evidence that could create possible criminal liability. For instance, if the respondent is administratively charged with deportation for entry without inspection, that charge is also a possible misdemeanor under section 275 of the Act.[29]

The circuit courts and the Board of Immigration Appeals are split as to other forms of deportation charges that do or do not provide a link in a chain of evidence of criminality. There have been conflicting decisions as to whether overstaying a visa or violating the status of a non-immigrant visa can become the basis for invoking the fifth amendment right to remain silent. At times, the immigration judge or the District Director of the Immigration Service will assert that the respondent will receive immunity from criminal prosecution and, therefore, cannot invoke the fifth amendment right to remain silent. There have been other decisions,[30] however, that have indicated that the alien's right to remain silent is not affected by the immigration judge's or the District Director's offer of immunity from criminal prosecution.

As for the other forms of evidence—evidence obtained at arrest, pre-arrest, or from a prior record—the most common way to attack such evidence is, of course, the exclusionary rule under the fourth and fifth amendments. Under the fourth amendment,[31] which prohibits unreasonable searches and seizures, there are three propositions that the respondent's attorney must establish in order to invoke the exclusionary rule successfully. First, the respondent must establish that there has been, in fact, a seizure; second, that the particular seizure was unreasonable; and, third, that the exclusionary rule should be invoked and applied to exclude the unreasonably seized evidence.

In 1984, the Supreme Court in *INS v. Delgado*[32] severely limited the ability of respondents to invoke the fourth amendment. In that case, the Court held that even though the Immigration Service had surrounded a factory of workers and had sealed off the exits from that site, the workers within that building were not "seized" within the meaning of the fourth amendment. The

29. INA, § 275 (codified as amended at 8 U.S.C. § 1325 (Supp. IV 1986)).

30. *See In re* Carrillo, 17 I. & N. Dec. 30 (1979).

31. U.S. CONST. amend. IV. "The right of the people to be secure in their persons, houses, papers, and affects, against unreasonable searches and seizures, shall not be violated. . . ."

32. 466 U.S. 210 (1984).

Court reasoned that the factory raid was a consensual encounter with the Immigration Service which did not create the requisite level of seizure. *Delgado* has been severely criticized because from the subjective views of the alien, mere contact with the Immigration Service does create a sense of seizure and, therefore, should give rise to a fourth amendment analysis. While *Delgado* has limited the application of seizure to a factory raid, it still should be possible to establish a seizure of an individual when the Immigration Service does not allow the individual to walk away from questioning.

Assuming that there has been a "seizure," the next issue is whether or not that seizure is reasonable. We do have the requirement of a warrant in certain situations of entries into private property. We also have the requirement of consent where there is property involved. The most common situation is warrantless seizures where the Immigration Service approaches an individual on the street or at the worksite and begins to interrogate her and then detains her for possible violations of the immigration law. The Supreme Court over the years has created a long line of cases in which it looks at two elements to determine the reasonableness of this type of encounter. One element is the level of intrusion upon the individual. The least intrusive of these encounters, such as an interrogatory stop, is less likely to be challengeable. With more intrusive encounters, however, such as a search or a full-blown arrest, the courts have required the agent to establish a higher standard of suspicion, or probable cause, in its detention of the alien. Thus, with encounters at the border or their functional equivalent, the Court has been willing to allow Immigration Service agents more leeway in detaining and interrogating aliens. However, roving patrols or street encounters are subject to the stringent requirement that the agents prove reasonable suspicion or probable cause.

Once a seizure has been found to be unreasonable, then the final analysis is whether the particular evidence obtained is excludable. In a 1984 five-to-four decision, the Supreme Court in *INS v. Lopez-Mendoza*[33] held that evidence derived from peaceful arrests by INS officers need not be suppressed in an INS civil deportation hearing. The decision, though, was careful not to condone any violations of the fourth amendment that may have occurred in the arrest of Lopez-Mendoza. Justice O'Connor, writing for the majority, reasoned that the INS had previously taken measures to deter fourth amendment violations by its officers and that the costs of invoking the exclusionary rule in the context of civil deportation hearings are high because it would lead to the defendant's continued unlawful presence in this country. *Lopez-Mendoza*, like *Delgado*, has been severely criticized on the ground that the Court did not look at the real, practical situations that exist in encounters between aliens and the Immigration Service.

What is left of the exclusionary rule of the fourth amendment is still the main question. Recently, the Ninth Circuit came down with a very significant

33. 468 U.S. 1032 (1984).

decision, *Arguelles-Vasquez v. INS*,[34] which held that the Supreme Court ruling in *Lopez-Mendoza* does have an exception built into it. Where there is an egregious violation of the fourth amendment, the Ninth Circuit held that the fourth amendment exclusionary rule will apply in deportation proceedings. In *Arguelles-Vasquez*, the sole basis for detaining the alien was the fact that he appeared to be of Hispanic origin. The court found that this, in and of itself, was such an egregious violation of the fourth amendment that all statements and evidence obtained could be excluded from the deportation proceeding. The Board of Immigration Appeals (BIA), in *In re Toro*,[35] had earlier made a similar ruling. In that particular case, an alien was also stopped solely because of her Hispanic appearance. The BIA found that this was an egregious violation not only of the fourth amendment but also of the fifth amendment's due process requirement. The Board said that it would be fundamentally unfair to use evidence from statements obtained during that encounter because, again, the sole basis for stopping her was her Hispanic appearance. There is much still left of the fourth amendment exclusionary rule.

The most powerful exclusionary rule is the fifth amendment, which has two types of applications. One is the involuntary statements application. Throughout the years, the circuit courts and the Board of Immigration Appeals have clearly indicated that involuntary statements obtained from an alien may be excluded from deportation proceedings. In *In the Matter of Garcia*,[36] the BIA laid out the basic elements of involuntariness. For instance, the court or the BIA would inquire whether the INS led the respondent to believe that her removal from this country was inevitable. If so, that would give rise to involuntary statements. The BIA and the courts would also inquire whether the INS led the respondent to believe that her rights in that particular encounter were non-existent; whether the INS led the respondent to believe that she could not communicate with an attorney; and whether the INS led the respondent to believe that she could be detained without explanation. If any of those elements arose in that particular encounter, then the evidence or statements could be excluded on fifth amendment grounds.

A second way of excluding evidence on fifth amendment grounds is through the application of regulations. If the Immigration Service has violated its own regulations, such a violation also gives rise to the exclusionary rule. The three-prong test for excluding evidence based on the violation of INS regulations is as follows: the first prong requires the respondent to establish that the particular regulation was violated; the second prong requires that a determination be made as to whether the particular regulation is constitutionally or statutorily based, or whether it is an administrative efficiency regulation; the third prong determines whether the evidence will be excluded. If the regulation is constitutionally based, then the alien is presumed to have

34. 786 F.2d 1433 (9th Cir. 1986), *vacated on other grounds*, 844 F.2d 700 (9th Cir. 1988).
35. 17 I. & N. Dec. 340 (1980).
36. *Id.* at 319.

been harmed and prejudiced by that violation, and therefore, the evidence and statements are excludable. If the regulation is only statutorily based, then the alien must establish harm and prejudice in order to exclude that evidence. And lastly, if the regulation is only an administrative efficiency provision, then there is no basis at all for the alien to establish exclusion of evidence.

In closing, many immigration lawyers have come under severe criticism from the Supreme Court, which has said that much of this work is merely a delay tactic which attempts to keep aliens here in this country. I would remind lawyers that William O. Douglas once stated that one of the most revealing tests of democracy in our society is measured by the way that society treats its politically powerless groups. The ability of an alien to have a fair hearing, I suggest, is one way to make sure that our society meets that test.

DAN KESSELBRENNER:* I am going to focus on what happens to a non-citizen defendant in criminal proceedings and how those proceedings have an impact on the subsequent deportation hearing to which that non-citizen will be subject. Deportation is civil in nature, not criminal. That is why fewer rights are available to a non-citizen in deportation proceedings, and why the whole panoply of constitutional rights, including the sixth amendment right to counsel, do not apply in deportation proceedings. Many times non-citizen defendants will be shocked. Lawful, permanent residents, who may have been in the United States for many years, will be subject to criminal prosecution for fairly insignificant types of crimes. For example, conviction for two misdemeanors could trigger deportation. Shoplifting is a relatively insignificant crime for which a citizen is not likely to be sentenced to any time in prison. But, shoplifting in the immigration context has been held to be a crime of moral turpitude, and under section 241(a)(4) of the Immigration Nationality Act,[37] a conviction for shoplifting coupled with one other conviction for a crime of moral turpitude, can lead to the deportation of a long-standing permanent resident.

The harshness of that kind of impact has not stopped courts from requiring non-citizen defendants to be bound by the consequences of their guilty pleas. The Second Circuit instituted this requirement in the case of *United States v. Parrino*,[38] in which the defendant charged with a capital crime pled guilty following advice of counsel that there would be no deportation consequences from his plea. The defendant's counsel was a former commissioner of the Immigration and Naturalization Service. Mr. Parrino served his two-year sentence and then, following the initiation of deportation proceedings, filed a motion to withdraw his guilty plea. If the court allowed his motion, Mr. Parrino would then be tried for a capital crime, with the possibility of the death

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37. INA, § 241(a)(4) (codified as amended at 8 U.S.C. § 1251(a)(4) (Supp. IV 1986)).

38. 212 F.2d 919 (2d Cir. 1954).

penalty if he lost. In ruling on Mr. Parrino's motion, the Second Circuit held that deportation consequences are collateral consequences of a plea and do not affect its voluntariness. Rule 11 of the Federal Rules of Criminal Procedure requires the court to make an inquiry of each defendant before she enters a plea to establish that it was not coerced and that she understood the penalties involved. There is a list of questions that a federal judge needs to ask pursuant to Rule 11 to establish that the plea was made voluntarily. Although the trial judge had never asked Mr. Parrino these questions, the Second Circuit, nevertheless, held that Mr. Parrino's plea was voluntary, and that he was stuck with his earlier plea. Since then, the majority rule has been that deportation consequences are collateral and not a direct consequence of a plea.

Interestingly, the D.C. Circuit and the First Circuit also join in these harsh holdings based on a mechanical interpretation of Rules 11 and 32(d) of the Federal Rules of Criminal Procedure. Rule 32(d) provides for withdrawal of the plea for a fair and just reason. In a First Circuit case, *Nunez Cordero v. United States*,[39] the defendant moved to withdraw his plea prior to sentencing. Under the federal rules, motions to withdraw pleas made before sentencing are to be construed liberally. That is, a fair and just standard. Nevertheless, the First Circuit held that the district court's denial of a motion to withdraw the plea was not an abuse of discretion, despite the fact that the defendant had filed the motion to withdraw prior to sentencing and two weeks after the plea was made initially and that no harm of prejudice would result to the government's case. Another factor which courts have considered in denying Rule 32(d) motions is whether the defendant has waited to see her sentence before withdrawing her plea. This was not done in *Nuñez Cordero*. Since *Parrino* and *Nuñez Cordero*, several states have developed statutory provisions in state criminal proceedings to address the harshness of the rule in *United States v. Parrino*. Washington,[40] Oregon,[41] California,[42] Massachusetts,[43] and Connecticut[44] have all developed rules requiring a court to notify a defendant prior to entering a plea that her plea could result in deportation.

In another deportation case, *United States v. Sambro*,[45] Judge Bazelon of the D.C. Circuit dissented from an *en banc* decision in which, again, there were harsh consequences to a non-citizen who had no idea when he entered his guilty plea that it could result in his deportation. Judge Bazelon stated in his dissent that ineffective assistance of counsel may render a guilty plea subject to attack.[46] This assertion later became the basis for successful challenges to the harshness of the *Parrino* rule in jurisdictions where there was no statu-

39. 533 F.2d 723 (1st Cir. 1976).
40. WASH. REV. CODE ANN. § 10.40.200 (1983).
41. OR. REV. STAT. § 135.385(d) (1973).
42. CAL. PENAL CODE § 1016.5 (West 1977).
43. MASS. GEN. LAWS ANN. ch. 278, § 29(a) (West 1978).
44. CONN. GEN. STAT. ANN. § 54-1(j) (West 1982).
45. 454 F.2d 918 (D.C. Cir. 1971).
46. *Id.* at 926 (Bazelon, J., dissenting).

tory requirement to advise. In *Strickland v. Washington*,[47] the Supreme Court established standards to determine whether the defense counsel has provided reasonably effective assistance. To establish the existence of ineffective assistance, one must show that defense counsel engaged in unprofessional activity and that there was a reasonable probability that, but for the unprofessional conduct, there would have been a different outcome. Bad practice and prejudice must be shown. The courts have developed certain factors to determine whether there is prejudice. In *United States v. Downs-Morgan*,[48] an asylum applicant faced possible death or deportation if returned. Acknowledging the narrowness of its holding, the Eleventh Circuit Court of Appeals held that under these facts, where an asylum applicant has been given bad legal advice, the harm or the prejudice that would result warrants allowance of a motion to change the sentence. The prejudice was established by virtue of the possibility that the asylum applicant would face death or deportation if returned.

Ineffective assistance of counsel has allowed people to have some success in obtaining post-conviction relief. It eliminates the burden under Rule 11 which deals only with what the court has to provide to a defendant. It focuses on a constitutional claim that someone was denied her sixth amendment right to counsel, and it provides relief where there is prejudice, particularly in the case of someone who might be an asylum applicant. Under those types of circumstances, post-conviction relief based on a claim of ineffective counsel would have some likelihood of success.

The other area that provides relief for criminal defendants is judicial recommendation against deportation. This gives a sentencing judge in a state or federal trial court the power to eliminate the deportation consequences of non-drug convictions. It is extremely difficult for most state judges to comprehend, given the preemption doctrine of the Supremacy Clause, that they, as state court judges, can actually block a deportation ordered in a federal administrative proceeding. The failure to apply for judicial recommendation against deportation has recently been held by the Oregon Supreme Court, in *Lyons v. Pearce*,[49] to constitute ineffective assistance of counsel.

47. 467 U.S. 1267 (1984).
48. 765 F.2d 1534 (11th Cir. 1985).
49. 298 Or. 554, 694 P.2d 969 (1985).