Right to Counsel in Immigration Proceedings

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INTRODUCTION

In any discussion of immigration procedure it must be borne in mind that the immigration process always has been administrative rather than judicial. Administrative officers have been entrusted with the powers of investigation, interrogation, detention, accusation, decision, ejection, and with the power to grant discretionary relief. The courts have been given no direct role in this process except in a limited zone of review to assure that the proceedings were legally conducted.

It is also evident that the immigration process often deals with momentous personal stakes: the ties of citizenship, home, family, job, and friends. Many courts have commented on the severe consequences of an expulsion order, and the relevant case law abounds with the expressions like that of Justice Brandeis, who pointed out that expulsion could separate a man from his home and family and deprive him “of all that makes life worth living.” Yet the courts thus far have resisted every effort to assimilate deportation

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*The opinions expressed are the author’s and do not necessarily represent the views of the Department of Justice.


1. An exceptional situation prevailed for a time under the Chinese Exclusion Laws under which determinations of deportability were made by United States Commissioners and district courts. See United States v. Woo Jan, 245 U.S. 552 (1918); Chin Bak Kan v. United States, 186 U.S. 193 (1902). This judicial process fell into disuse after the enactment of the 1907 Immigration Act, which permitted administrative deportation proceedings against Chinese. See United States v. Wong You, 223 U.S. 67 (1912). The Chinese Exclusion Laws were repealed by the Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

2. Cases upholding this formula for administrative adjudication include Mahler v. Eby, 264 U.S. 32 (1924); Zakonaite v. Wolf, 226 U.S. 272 (1912); Turner v. Williams, 194 U.S. 279 (1904); Fong Yue Ting v. United States, 149 U.S. 698 (1893).


to criminal punishment and to apply the constitutional guarantees and procedures that relate to criminal prosecutions. The immigration process thus remains civil in nature, but it is endowed with a number of uniquely coercive powers.

Our discussion of the right to counsel must be viewed in this context. It must take into account the currently accepted view that the immigration process is civil and administrative, not criminal and judicial. But it must have regard at the same time for the growing awareness of the vital interests involved and of the need for assuring the fullest protection of basic human rights.

I. GENERAL APPLICABILITY OF DUE PROCESS

Since the immigration process is not deemed a criminal trial, the sixth amendment's guaranty of counsel to an accused person is inapplicable. But it does not follow that one involved in an immigration proceeding can summon no constitutional protection; the fifth amendment's assurance of procedural due process of law always has had a measurable impact in immigration proceedings. And, as we shall see, the due process clause usually has been regarded as encompassing the right to be represented by counsel.

Immigration proceedings cover a wide range, and the same concepts of procedural due process do not apply equally to preliminary investigations, exclusion hearings, deportation hearings, and applications for discretionary relief. Moreover, it must constantly be recalled that the immigration process is a comparative newcomer in the ancient tribunals of the law. The immigration process


9. Although general federal legislation was inaugurated by the Act of
has been severely criticized at various stages in its development, and some of the criticisms have dealt with deprivations of representation by counsel.\textsuperscript{10} Because of such criticism and also because of constantly developing attitudes of legislators, courts, and administrators, the procedural protections in immigration cases have been steadily enlarged to comport with changing notions of justice.

II. THE NEED FOR COUNSEL

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 they may have little or no comprehension of our language or institutions. The cases affecting these individuals sometimes pose complicated factual or legal questions. Obviously the services of counsel can be quite valuable in protecting these persons' rights and status.\textsuperscript{11}

Some examples will illustrate the types of situations in which the services of counsel may be useful.\textsuperscript{12} A person may be charged with being a deportable alien and notified to report for a hearing on the deportation charges.\textsuperscript{13} A person arriving at the border may be required to submit to a hearing to determine his admissibility to the United States.\textsuperscript{14} An alien in temporary or illegal status in this country may seek to legalize his residence through proceedings known as suspension of deportation,\textsuperscript{15} adjustment of status,\textsuperscript{16} or registry of lawful entry.\textsuperscript{17} A person in this country may petition for preferred or exempt status under the quota on behalf of a

Aug. 3, 1882, ch. 376, 22 Stat. 214, the assignment of enforcement responsibilities to a federal agency, then the Treasury Department, was inaugurated by the Act of March 3, 1891, ch. 551, § 7, 26 Stat. 1085.

10. The major criticisms are found in the following studies: (1) Report on the Enforcement of the Deportation Laws of the United States, known as the Wickersham Commission Report and prepared for the National Commission on Law Observance and Enforcement by Reuben Oppenheimer (G.P.O. 1931); (2) CLARK, DEPORTATION OF ALIENS (1931); (3) VAN VLECK, op. cit. supra note 6; (4) Report of the Ellis Island Committee (privately printed, 1934); (5) Report of Secretary of Labor's Committee to Study Immigration Practice and Procedure (1940); (6) Whom We Shall Welcome, Report of President's Commission on Immigration and Naturalization, known as Perlman Commission Report (G.P.O. 1953).

11. See 5 Wickersham Commission Report 107, 155 (1941); VAN VLECK, op. cit. supra note 6, at 231–32.


relative. An alien in temporary or illegal status in this country may seek to obtain a visa from an American consul in a neighboring country.

In earlier days some administrative authorities looked with disfavor upon attorneys and sought to discourage their participation. In part this attitude no doubt was caused by a desire to avoid the difficulties that lawyers would place in the path of administrators; in part it may have stemmed from the activities of some unscrupulous practitioners. Even the critics of deportation procedure called attention to the unscrupulous minority, while urging the need for expanded representation by counsel.

A different attitude prevails today. The activities of the unscrupulous practitioner have been minimized and are no longer a serious problem. Administrators are now more alert to the need for protecting constitutional rights. The lawyer seeking to represent a party to an immigration proceeding no longer is regarded with suspicion. His participation in the immigration proceeding generally is welcomed as an assurance of due process. There is now an Association of Immigration and Nationality Lawyers, organized nationally and in local chapters, which publishes its own periodical and seeks to exert influence in the legislative, administrative, and judicial arenas. And immigration committees have been established by the American Bar Association and by local bar associations.

Early studies of the expulsion process found that respondents in such proceedings were represented by counsel in less than 20 per cent of the cases. In exclusion cases counsel were permitted, as we shall note, only on appeal, and the proportion of represented applicants was far less. The commentators found that in both instances there was a vast need for greater opportunities to be represented by counsel. Their studies revealed that representation by counsel had a marked effect on the chances for success, even in the administrative proceeding, and that represented aliens prevailed in a far higher proportion of cases, since their counsel were much more effective in raising points of law, in questioning due process, in marshalling relevant evidence, and in advancing claims to United States citizenship. The commentators found that

20. See V L E C K , op. cit. supra note 6, at 231.
22. See Gordon, supra note 12, at 20.
23. 5 Wickersham Commission Report 85 (1931); VAN V L E C K , op. cit. supra note 6, at 99.
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the employment of counsel often depended on such fortuitous circumstances as the ability to pay or the fact that a private organization had become interested in the party's case. The picture in this respect also has changed somewhat over the years. The proportion of represented aliens has increased appreciably, although it is doubtless still true that the majority of parties involved in immigration proceedings are not represented by counsel. Facilities for legal assistance have expanded and the administrative authorities often advise the indigent alien how he may obtain counsel. Yet many parties are unrepresented and it is evident to most observers that the party himself and the administrative process as well could benefit from greater participation by counsel.

III. THE RIGHT TO COUNSEL

A. IN GENERAL

Before 1952 there was no statute specifically recognizing the right to counsel in immigration proceedings. As we have seen, the right to counsel depended on the fifth amendment's assurance of procedural due process of law. Essentially, procedural due process means fairness in granting an opportunity to be heard and in arriving at the decision. We have also pointed out that due process is an expanding concept which reflects current notions of fairness.

Expositions of the elements of due process in immigration cases by early authorities did not specifically mention a right to counsel. This omission did not mean that the right to counsel was not recognized but that it was evaluated as an aspect in the total picture of fair dealing. As we shall see, the right to counsel is now explicitly endorsed in statutes and regulations. Deviations from procedural rights recorded in this fashion would, of course,

25. 5 Wickersham Commission Report 107, 143, 155, 168 (1931); VAN Vleck, op. cit. supra note 6, at 213, 218, 231, 232.
27. Early, but fairly comprehensive, statements summarizing the elements of due process in deportation cases are found in The Japanese Immigrant Case, 189 U.S. 86, 100-01 (1903); Whitfield v. Hanges, 222 Fed. 745, 748-49 (8th Cir. 1915).
29. See, e.g., The Japanese Immigrant Case, 189 U.S. 86 (1903); Ungar v. Seaman, 4 F.2d 80, 82 (8th Cir. 1924); Whitfield v. Hanges, 222 Fed. 745 (8th Cir. 1915); CLARK, DEPORTATION OF ALIENS 375 (1931).
offend due process. But even without specific statutory sanction, it seems manifest that under present concepts a party to an immigration proceeding ordinarily has a right to be represented by counsel of his own choosing, if he wishes such representation.

The succeeding discussion will indicate that this right is perhaps not an absolute right at all stages of the proceeding. Moreover, the absence of counsel may not be regarded as fatal when the party is unprejudiced by such an omission, as when deportability is clear under the admitted facts and applicable law. Conversely, the presence of counsel often has a bearing on whether due process was granted. If counsel was present throughout, the courts are less likely to find breaches of fair play, particularly when no complaint was made in the administrative proceeding. On the other hand, if the party was not represented by counsel the proceedings will be scrutinized more closely, and doubtful procedural questions often are resolved in favor of the unrepresented party. Now, as before, the observance of due process requirements is judged by appraising the proceedings in their entirety to ascertain whether there was fair dealing under the circumstances and in the light of current standards. Thus, it is often advantageous to the administrative authorities to have counsel present in order to assure a fair and expeditious proceeding.

B. DEPORTATION PROCEEDINGS

1. Preliminary interrogations

As in other regulatory or accusatory proceedings the deportation hearing is preceded by an investigation to determine whether any basis for action exists, and statements are taken from persons who later may become involved in such proceedings. The officials of other agencies conducting such inquiries frequently have refused to permit counsel, believing that counsel might encumber effective

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33. See Schenck v. Ward, 80 F.2d 422 (1st Cir. 1935); Greco v. Haff, 63 F.2d 863 (9th Cir. 1933); Ex parte Keizo Kamiyama, 44 F.2d 503 (9th Cir. 1930). Cf. Barrese v. Ryan, 189 F. Supp. 449 (D. Conn. 1960) (when fair opportunity to obtain counsel for administrative appeal was not given, court refused to consider merits and remanded case to enable respondent to be represented by counsel on such appeal).
The immigration authorities have shared this feeling, and until recently they did not permit counsel at such preliminary interrogations.\textsuperscript{37}

The early critics of the deportation process leveled their heaviest shafts against such interrogations, terming them private inquisitions. They pointed out that the entire factual basis of the charge often is developed at the preliminary interrogation at which the prospective respondent is unrepresented by counsel. They believed that there would be greater assurance of fairness if the alien were permitted counsel.\textsuperscript{38}

These criticisms perhaps had greater validity under former procedures, when the deportation proceeding was commenced by the arrest of the respondent and the preliminary interrogation frequently occurred between the time of such arrest and the hearing.\textsuperscript{39}

Since February, 1956, deportation proceedings are commenced by service of an order to show cause, and arrests are rare.\textsuperscript{40} Investigations now are usually completed before the order to show cause is issued.

The authorities generally have held that the absence of counsel or the refusal to permit counsel at such a preliminary interrogation does not make the procedure unfair or preclude use of the resulting statement at a hearing where the respondent has the right to be represented by counsel.\textsuperscript{41} Recently the United States Supreme Court, albeit by slim majorities, has upheld similar exclu-

\textsuperscript{36} See \textit{In re} Groban, 352 U.S. 330 (1957).

\textsuperscript{37} See \textit{5 Wickersham Commission Report} 85, 137, 143, 174 (1931); Clark, \textit{op. cit. supra} note 29, at 331; Van Vleck, \textit{op. cit. supra} note 6, at 182, 231; Report of Secretary of Labor's Committee 18, 69-72, 83 (1940).

\textsuperscript{38} Ibid.

\textsuperscript{39} See \textit{5 Wickersham Commission Report} 137, 142, 143 (1931); Clark \textit{op. cit. supra} note 29, at 331-32; and cases cited in notes 41-50 \textit{infra}. The Wickersham Report, at page 84, notes the declaration of Assistant Secretary of Labor Louis F. Post, announced on April 12, 1920, \textit{59 Cong. Rec.} 5560-61, that statements made by an alien while he was in custody would not be used unless he had a fair opportunity to be represented by counsel.

\textsuperscript{40} See Gordon & Rosenfield, \textit{op. cit. supra} note 4, at 521, 526.

\textsuperscript{41} Use of statements upheld when made: (1) while in custody of immigration officers, Low Wah Suey \textit{v.} Backus, 225 U.S. 460, 469-70 (1912); \textit{Ex parte} Ematsu Kishimoto, 32 F.2d 991 (9th Cir 1929); \textit{In re} Kosopud, 272 Fed. 330 (N.D. Ohio 1920); (2) while in custody of other officials, \textit{Ex parte} Vilarino, 50 F.2d 582 (9th Cir. 1931) (statement to immigration officers, while in police custody); Plane \textit{v.} Carr, 19 F.2d 470 (9th Cir.), \textit{cert. denied}, 275 U.S. 545 (1927) (statement to police officers while under arrest for prostitution); and (3) to immigration officers, when not in custody, Bilokumsky \textit{v.} Tod, 263 U.S. 149, 156 (1923); Drachmos \textit{v.} Hughes, 26 F. Supp. 192 (D.N.J. 1938).
sions of counsel in preliminary investigations by a fire marshal and by police officers.

Again the situation must be examined in totality, and allegations of unfairness will be assessed in the total setting. Significant factors in such an assessment may be whether the party was under restraint, whether he was aware of his rights, whether he was represented by counsel at the hearing itself, and whether the proceeding was otherwise fair and deportability clearly established. Of course, a confession will be invalidated if procedures announced in the statute or regulations are not followed or if the exclusion of counsel is coupled with coercion or other improper action on the part of the immigration officers.

To some extent the problem has been resolved by section 6(a) of the Administrative Procedure Act which grants to a party compelled to appear before an administrative agency "the right to be accompanied, represented, and advised by counsel." The immigration authorities have gone beyond this statutory directive. Even when the attendance of a witness at a preliminary inquiry in an immigration case is not compelled, which is the usual situation, he is now permitted to be accompanied and advised by counsel if he so desires. This practice is not announced in any regulation, and neither practice nor regulation requires that such a witness

42. In re Groban, 352 U.S. 330 (1957). However, the concurring opinion of Mr. Justice Frankfurter, joined by Mr. Justice Harlan, emphasized that this was not a "secret inquisition of those suspected of arson," or an "examination of suspects," but rather an inquiry to ascertain the causes and responsibility for the fire. Id. at 336.

43. Cicenia v. Lagay, 357 U.S. 504 (1958); Crooker v. California, 357 U.S. 433 (1958). No unfairness was found in these cases since the suspects were aware of their rights and no coercion was present.

44. Cf. authorities cited at note 41 supra. However, in Ungar v. Seaman, 4 F.2d 80 (8th Cir. 1924), unfair procedure was found when the statement was taken without counsel, while under immigration arrest, without notice of the charges or opportunity to meet them.

45. Ibid. However, in the absence of a regulation requiring that the party be advised of a right to counsel or forbidding interrogation without counsel, an interrogation without such advice or privilege was not deemed unfair. Biokumsky v. Tod, 263 U.S. 149, 156 (1923).

46. Low Wah Suey v. Backus, 225 U.S. 460, 469–70 (1912); Landon v. Clarke, 239 F.2d 631 (1st Cir. 1956) (no objection to statement at hearing); Beck v. Neelly, 202 F.2d 221 (7th Cir.), cert. denied, 345 U.S. 997 (1953) (admitted truth of statements at hearing); Ex parte Ematsu Kishimoto, 32 F.2d 991 (9th Cir. 1929) (statement at preliminary interrogation believed, although retracted at hearing); Drachmos v. Hughes, 26 F. Supp. 192 (D.N.J. 1938).

47. Ibid.

48. See notes 31, 45 supra.

49. Choy v. Barber, 279 F.2d 642 (9th Cir. 1960); Roux v. Commissioner, 203 Fed. 413 (9th Cir. 1913); Colyer v. Skeffington, 265 Fed. 17, 46 (D. Mass. 1920).

be advised of a privilege of representation by counsel. When counsel appears in such preliminary interrogations he may advise his client, but usually is permitted no further participation in the inquiry.\textsuperscript{51}

2. Deportation hearings

The resemblance in the situations of a respondent in a deportation hearing and of a defendant in a criminal trial strongly suggests the desirability of and need for representation by counsel in a deportation hearing. Until 1952 no immigration statute commanded such a right of representation but the right always has been recognized, and has been announced in the administrative regulations, which usually have required also that the respondent be advised of his right to be represented by counsel.\textsuperscript{52}

Some years ago it was debated whether due process would be satisfied if the respondent were permitted counsel only after the hearing had been initiated and had traversed a substantial portion of its route. Those who favored the affirmative of this question\textsuperscript{53} relied on an early, ambiguous utterance of the United States Supreme Court, which probably was addressed to the preliminary interrogation rather than the hearing itself.\textsuperscript{54} This view was reflected at times in the early administrative regulations.\textsuperscript{55} Thus, at the time of the "Palmer Red raids" of January, 1920,\textsuperscript{56} the regulations were amended to allow a right to be represented by counsel, "preferably at the beginning of the hearing or, at any rate, as soon as such hearing had proceeded sufficiently to protect the

\textsuperscript{51} See Gordon & Rosenfield, \textit{op. cit. supra} note 6, at 517.

\textsuperscript{52} For references to earlier regulations see Bouve, \textit{Exclusion and Expulsion of Aliens} 292, 618 (1912) (referring at the latter point to a "limited" participation by counsel); \textit{Wickersham Commission Report} 83–85 (1931); \textit{Clark, op. cit. supra} note 29, at 365; \textit{Van Vleck, op. cit. supra} note 6, at 97–98, 162; \textit{Report of the Secretary of Labor's Committee} 27, 82 (1940).

\textsuperscript{53} See Seif v. Nagle, 14 F.2d 416 (9th Cir. 1926) (waived counsel); Guiney v. Bonham, 261 Fed. 582 (9th Cir. 1919); \textit{Van Vleck, op. cit. supra} note 6, at 181. But in two cases the courts have held that refusal to permit counsel until late in the hearing offended due process. Whitfield v. Hanges, 222 Fed. 745, 751 (8th Cir. 1915) (such procedure "tended to prevent a fair hearing"); \textit{Ex parte Chin Loy You}, 223 Fed. 833, 838 (D. Mass. 1915) (finding the officers "were endeavoring to make out a case, rather than to act in a fair or judicial manner toward the alien").

\textsuperscript{54} Low Wah Suey v. Backus, 225 U.S. 460, 469–70 (1912). In the less meticulous practice of that era there was perhaps only a shadowy boundary between the end of the interrogation and the commencement of the hearing.

\textsuperscript{55} See notes 52–54 supra.

\textsuperscript{56} For descriptions of this episode see Colyer v. Skeffington, 265 Fed. 17, 31 (D. Mass. 1920); \textit{Wickersham Commission Report} 84 (1931); \textit{Van Vleck, op. cit. supra} note 6, at 161; Post, \textit{The Deportations Delirium of 1920} (1923).
Government's interests.” At the end of January, 1920, the regulations were changed back to their original form which permitted counsel at the beginning of the hearing.\textsuperscript{57} This \textit{ad hoc} shift in the regulations at the beginning of the month was widely criticized,\textsuperscript{58} and it was invalidated by the courts as an unfair device to entrap prospective respondents in the deportation proceedings conducted during that month.\textsuperscript{59}

It is hardly likely that anyone would seriously contend in the climate of today that the right of a respondent in deportation proceedings to be represented by counsel can be abridged or that he can be denied counsel for any portion of the deportation hearing. The present temper of the United States Supreme Court, as expressed in its recent decisions, irresistibly predicts that such an attempted abridgement would receive short shrift.\textsuperscript{60} In any event, such a contention would now be academic, since the statute and regulations directly assure the respondent in deportation proceedings the privilege of being represented by counsel of his own choice, throughout the deportation hearing and in taking an appeal to the Board of Immigration Appeals.

This privilege was embodied in the statute for the first time in the 1952 codification of the immigration laws.\textsuperscript{61} It likewise is inscribed in the administrative regulations.\textsuperscript{62} At the outset of the hearing the special inquiry officer is required to advise the respondent of his right to counsel and to afford him a reasonable opportunity to obtain counsel, if such an opportunity is desired.\textsuperscript{63} If counsel is obtained and files an appearance in the proceedings, he may examine the pertinent records, and all notices, papers, and

\textsuperscript{57} Colyer v. Skeffington, \textit{supra} note 56, at 47; \textit{Van Vleck, op. cit. supra} note 6, at 161.
\textsuperscript{58} \textit{Ibid.} See also statement of Assistant Secretary of Labor Louis P. Post, mentioned in note 39 \textit{supra}.
\textsuperscript{59} \textit{Ex parte} Radivoeff, 278 Fed. 227 (D. Mont. 1922); Colyer v. Skeffington, 265 Fed. 17, 46 (D. Mass. 1920) (the purpose of the amendment was “to cut the alien off from any representation by counsel”). Judge Anderson’s devastating opinion in \textit{Colyer} endures as a classic exposition of due process still cited by courts, legislators, and scholars.
\textsuperscript{62} 8 C.F.R. §§ 236.2(a) (exclusion hearing), 242.10, 242.16(a) (deportation hearing) (Supp. 1960).
decisions are served on him. He may represent his client fully in the hearing and subsequent proceedings by offering evidence, examining and cross-examining witnesses, making legal objections and arguments, taking an appeal from an adverse decision, and arguing the appeal in person before the Board of Immigration Appeals. Of course, counsel’s activities may be subject to restrictions comparable to those seen in court proceedings, such as reasonable limitations on cross-examination and participation of the special inquiry officer in the questioning to clarify points he deems unclear.

The respondent is entitled, however, only to a fair opportunity to obtain counsel. If he is given such opportunity and fails to procure counsel, or if his counsel has been given adequate notice and fails to appear, the hearing may proceed without counsel. In such situations, however, the courts will scrutinize the record carefully to make certain that fundamental fairness was accorded and that justice was done. Of course, the right to repre-

65. 8 C.F.R. §§ 31.1(e) (argument of appeal), 236.2(a) (exclusion hearing), 242.16(a) (deportation hearing), 292.5 (generally) (Supp. 1960).
68. Wlodinger v. Reimer, 103 F.2d 435 (2d Cir. 1939); Dengeleski v. Tillinghast, 65 F.2d 440 (1st Cir. 1933). See Barrese v. Ryan, 189 F. Supp. 449 (D. Conn. 1960) (when fair opportunity not given, case remanded to enable him to obtain counsel).
69. Madokoro v. Del Guercio, 160 F.2d 164 (9th Cir. 1947); Wlodinger v. Reimer, 103 F.2d 435 (2d Cir. 1939); Ciccarelli v. Curran, 12 F.2d 394 (2d Cir. 1926); In re Raimondi, 126 F. Supp. 390 (N.D. Cal. 1954). In each of the cited cases the alien was in custody and counsel was not readily available to him. In Bisaillon v. Hogan, 257 F.2d 435 (9th Cir.), cert. denied, 358 U.S. 872 (1958), counsel was barred from practice, but respondent agreed to proceed without counsel. Respondent was, however, represented by counsel on the administrative appeal and before the court.
70. United States v. Heikkinen, 240 F.2d 94 (7th Cir.), rev’d on other grounds, 355 U.S. 273 (1957) (counsel refused to attend hearing at new place to which it was transferred upon respondent’s change of address); Giaimo v. Pederson, 289 F.2d 483 (6th Cir. 1961) (counsel consulted but did not appear; apparently because place of confinement was changed); Dengeleski v. Tillinghast, 65 F.2d 440 (1st Cir. 1933) (alien had requested counsel to appear but he did not come); Weinbrand v. Prentis, 4 F.2d 778 (6th Cir. 1925) (counsel notified but did not attend); Gould v. Uhl, 6 F. Supp. 696 (S.D.N.Y. 1934) (counsel refused to attend hearing unless it was postponed until after respondent had completed jail sentence).
71. Giaimo v. Pederson, supra note 70 (represented by counsel on appeal and before court; on appeal raised no counsel at hearing); Van Den Berg v. Lehmann, 261 F.2d 828 (6th Cir. 1958) (court not satisfied that reasonable opportunity to obtain counsel had been offer-
sentation by counsel would be meaningless if the respondent does not have a reasonable opportunity to exercise it because of improper influence or action by government officers, insufficient notification of his rights, inadequate comprehension of the language, or because of mental incapacity. Deviations from fundamental fairness in these respects or by failing to accord rights granted by the regulations will be corrected by the courts.

A more difficult question is posed when the hearing is conducted while the respondent is incarcerated. Since imprisonment is no longer a normal aspect of the deportation proceeding, the prob-

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72. Choy v. Barber, 279 F.2d 642 (9th Cir. 1960) (intimidation); Plane v. Carr, 19 F.2d 470 (9th Cir. 1927) (improper refusal to permit counsel, but error was rectified by action of administrative authorities in reopening case and admitting counsel); Whitfield v. Hanges, 222 Fed. 745, 749-51 (8th Cir. 1915) (improper refusal to permit counsel); Roux v. Commissioner, 203 Fed. 413 (9th Cir. 1913) (improper persuasion and undue influence); Barrese v. Ryan, 189 F. Supp. 449 (D. Conn. 1960) (notice of decision misdirected, respondent refused reasonable continuance to obtain counsel for appeal); Colyer v. Skeffington, 265 Fed. 17, 46 (D. Mass. 1920) (improper refusal to permit counsel); Bosny v. Williams, 185 Fed. 598 (S.D.N.Y. 1911) (improper persuasion and intimidation). Cf. Ackerman v. United States, 340 U.S. 193 (1950) (advice deemed not improper); Percas v. Kauth, 28 F. Supp. 597 (W.D.N.Y. 1939) (same).

73. Ungar v. Seaman, 4 F.2d 80 (8th Cir. 1924) (preliminary statement); Barrese v. Ryan, 189 F. Supp. 449 (D. Conn. 1960) (notice of decision misdirected, denied reasonable opportunity to obtain counsel for appeal).


75. In re Osterloh, 34 F.2d 223 (S.D. Texas 1929); Dioguardi v. Flynn, 15 F.2d 576 (W.D.N.Y. 1926); United States v. Van De Mark, 3 F. Supp. 101 (W.D.N.Y. 1933). In Matter of H., 6 I. & N. Dec. 358 (1954), the rights of a mental incompetent were found to have been amply protected when his wife and counsel were present at the hearing and he himself testified.

76. See note 40 supra.
lem usually arises when the respondent is serving a sentence following a conviction for crime. The hearing is held in a penal institution, often far removed from the respondent's normal residence, and he frequently asserts inability to obtain counsel or to conduct his defense under such circumstances. In such instances the professed difficulties sometimes are neither unreal nor insubstantial.77

The United States Supreme Court and other courts have ruled 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 he claims it is difficult for him to procure counsel.78

A district court has held, on the other hand, that in the particular circumstances before it a newly arrived alien confined in prison had not been accorded the privilege of representation by counsel.79 Again the criterion must be 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.

C. EXCLUSION HEARINGS

Quite different has been the development of a right to counsel in exclusion hearings, which pass on the admissibility of an entry applicant whose right to enter is in dispute.80 Being at the threshold, such an applicant is deemed outside the United States, and the due process injunctions of the fifth amendment have not been regarded as fully applicable.81 Procedures to determine admissibility have been prescribed in statutes and regulations, and

77. See Giaimo v. Pederson, 289 F.2d 483 (6th Cir. 1961) (had consulted counsel who did not appear at hearing; apparently because place of confinement had been changed); Madokoro v. Del Guercio, 160 F.2d 164 (9th Cir.), cert. denied, 332 U.S. 764 (1947) (in internment camp—funds or counsel not readily available); In re Raimondi, 126 F. Supp. 390 (N.D. Cal. 1954) (in McNeil Island, Wash., prison, counsel and home in San Francisco); Gould v. Uhl, 6 F. Supp. 696 (S.D.N.Y. 1934) (counsel refused to attend hearing in jail).

78. Bilokumsky v. Tod, 263 U.S. 149, 158 (1923); Wlodinger v. Reimer, 103 F.2d 435 (2d Cir. 1939); Dengel'ski ex rel. Saccardio v. Tillinghast, 65 F.2d 440 (1st Cir. 1933); Ciccarelli v. Curran, 12 F.2d 394 (2d Cir. 1926); Gould v. Uhl, supra note 77.


the controlling authorities have found the entry applicant entitled only to the observance of those procedures.\footnote{82} Before 1952 hearings in exclusion cases were conducted by boards of special inquiry composed of three immigration officials. The statute specified that the hearings before such boards must be separate and apart from the public and that the alien might have a friend or relative present and might have the services of counsel on appeal from the decision of the board of special inquiry.\footnote{83} The administrative regulations interpreted this statutory language as authorizing denial of counsel before boards of special inquiry, and they permitted counsel only on appeal from the board's decision.\footnote{84} The theory upon which the assistance of counsel before the boards of special inquiry was denied was that it would impede the swift determinations necessary in entry cases and that the applicant's rights were sufficiently safeguarded by permitting representation of counsel on appeal.\footnote{85}

The early critics of the immigration process challenged this denial of counsel before the board of special inquiry as not required by the statute and unfair in practice.\footnote{86} However, the courts upheld this regulation as consistent with the statute and with due process.\footnote{87}

After the adoption of the Administrative Procedure Act in 1946 Attorney General Tom C. Clark directed that the privilege of representation by counsel be allowed in hearings before boards of special inquiry. This directive was incorporated in the published regulations and has been followed since then.\footnote{88} The codification of the immigration laws in 1952 endorsed this practice and specified that the exclusion hearing thereafter was to be held before a single special inquiry officer and that the entry applicant was

\footnote{82} Ibid.\footnote{83} Immigration Act of Feb. 5, 1917, ch. 29, §§ 16, 17, 39 Stat. 885–87.\footnote{84} Bouve, Exclusion and Expulsion of Aliens 29, 617 (1912); \textit{Van Vleck}, \textit{op. cit. supra} note 6, at 47, 76, 180; \textit{Report of Secretary of Labor's Committee} 23, 53 (1940).\footnote{85} Buccino \textit{v. Williams}, 190 Fed. 897 (S.D.N.Y. 1911); \textit{Van Vleck}, \textit{op. cit. supra} note 6, at 180.\footnote{86} \textit{Van Vleck}, \textit{op. cit. supra} note 6, at 213, 218; \textit{Report of Secretary of Labor's Committee} 55 (1940). The latter \textit{Report} was highly critical of the decisions of the boards of special inquiry, finding them "one of the least satisfactory parts of the Immigration Service work." \textit{Id.} at 49.\footnote{87} Brownlow \textit{v. Miers}, 28 F.2d 653 (5th Cir. 1928); Buccino \textit{v. Williams}, 190 Fed. 897 (S.D.N.Y. 1911). See also Quon Quon Poy \textit{v. Johnson}, 273 U.S. 352 (1927) (presence of friend or relative waived); Dong Yick Yuen \textit{v. Dunton}, 297 Fed. 447 (2d Cir. 1924); Chin Fook Wah \textit{v. Dunton}, 288 Fed. 959 (S.D.N.Y. 1923) (exclusion of applicant's father from hearing made the hearing unfair).\footnote{88} 8 C.F.R. § 236.2 (Supp. 1960).
entitled to the privilege of being represented by counsel of his choice.\textsuperscript{89}

The allowance of counsel in exclusion cases has worked satisfactorily. As so often happens with procedural reforms, the fears expressed by the opponents have proved unfounded. The present regulations provide for a full hearing with representation by counsel\textsuperscript{90} except in security cases, in which a hearing may be denied.\textsuperscript{91} The special inquiry officer is required to inform the applicant at the outset of the hearing of his right to be represented by counsel.\textsuperscript{92} If counsel is engaged, he participates as fully in the exclusion proceedings as he would in a deportation case. The right to representation by counsel in exclusion and deportation hearings thus can now be regarded as quite comparable.\textsuperscript{93}

D. MISCELLANEOUS APPLICATIONS UNDER THE IMMIGRATION LAWS

A most important type of application is a visa to come to the United States. The application for a visa must be presented to an American consul stationed in a foreign country.\textsuperscript{94} No hearing is prescribed and none is given. There is no right of appeal to an administrative body or the courts.\textsuperscript{95} However, counsel sometimes serve in these cases by assisting in assembling documents required by the consul and in soliciting an informal review of a consul’s re-


\textsuperscript{90} 8 C.F.R. § 236 (Supp. 1960).


\textsuperscript{92} 8 C.F.R. § 236.2(a) (Supp. 1960).

\textsuperscript{93} The burden of proof is different in exclusion and deportation hearings. In the former the burden is on the applicant for entry. In the latter the burden of proof generally is on the government. 66 Stat. 234 (1952), 8 U.S.C. § 1361 (1958); Bilukumsky v. Tod, 263 U.S. 149 (1923).

\textsuperscript{94} 66 Stat. 193 (1952), 8 U.S.C. § 1202(a) (1958). In some exceptional instances involving foreign government officials, the application for a temporary visa can be made in the United States. 22 C.F.R. § 41.120 (Supp. 1960).

\textsuperscript{95} This absence of procedural safeguards is criticized in Perlman Commission Report 146–52 (G.P.O. 1953); Rosenfield, Consular Non-Reviewability, 41 A.B.A.J. 1109 (1955); Wildes, Review of Denial of Visa, N.Y. L.J., Nov. 17, 18, 19, 1959, p. 4. The current practice is defended in Auerbach, The Administration of the Immigration Laws by the Department of State and the Foreign Service, 36 INTERPRETER RELEASES 6, VISA OFF. BULL. 40 (1959); Auerbach, The Visa Process and Review of Visa Applications, 37 INTERPRETER RELEASES 305, VISA OFF. BULL. 63 (1960).
fusal of a visa by the Department of State through a process known as an "advisory opinion."96

Many additional types of applications are made to the Immigration and Naturalization Service, usually by persons in the United States. These include: applications for approval of visa petitions on behalf of aliens seeking preferred status,97 applications by aliens in the United States for legalizing their irregular status through processes known as suspension of deportation,98 adjustment of status,99 registry of lawful entry,100 and waiver of inadmissibility,101 and applications for stay of deportation because of anticipated physical persecution in the country of their destination.102 Most of these applications involve the exercise of discretion and their consideration is somewhat informal. However, administrative regulations extend the privilege of being represented by counsel to every case pending before the service in which an examination is required by regulations, and counsel in such cases is permitted to examine and cross-examine witnesses, to introduce evidence, to make objections, and to submit briefs.103

IV. WHO MAY PRACTICE

For many years the immigration regulations have included some description of the persons who might practice in immigration cases and have sought to prescribe standards of conduct.104 The privilege of practice usually has been accorded to attorneys and to designated representatives of recognized social agencies. A 1944 change in the regulations established a requirement of special admission to practice before the Immigration Service and the Board

103. 8 C.F.R. § 292.5(b) (Supp. 1960).
104. See Bouve, op. cit. supra note 84, at 291–92, 617–18; 5 Wick-ersham Commission Report 106 (1931). When Bouve wrote, the regulations limited counsel fees to $10 per case, and at the time of the Wick-ersham Report in 1929 a limitation of a $25 fee in admission cases was prescribed, but these limitations were never enforced. The present regulations provide for discipline if counsel charges fees "deemed to be grossly excessive in relation to the services performed." 8 C.F.R. § 292.3(a)(1) (Supp. 1960). But apparently this sanction likewise has not been invoked.
of Immigration Appeals. Each applicant had to pay a fee of $25.00 and submit an application showing compliance with prescribed standards, in addition to admission to the bar of the highest court in his state. These requirements continued in effect until revised regulations inaugurating the standards now in effect were issued on April 23, 1958.

Under the current regulations special admission to practice no longer is required. Any person in the following groups now may practice before the Immigration Service and the Board of Immigration Appeals:

a. Any attorney in good standing in any state or federal court.

b. A foreign attorney granted special permission to appear in an individual case.

c. An accredited representative of a religious, charitable, social service, or similar organization recognized as such by the Board of Immigration Appeals. Such organizations always have afforded representation in immigration matters; and while their activities sometimes are quite different from the normal concept of the practice of law, they are particularly helpful: (1) in locating records and documents bearing on cases both in the United States and in the old country and (2) in detecting major trends and needs, illustrated by a large volume of cases, which are brought to the attention of the administrative authorities in proposing amendments of regulations and procedures.

d. An accredited official of the alien's government, such as a consul, if the official appears solely in his official capacity and with the alien's consent.

The regulations also list various types of misconduct for which an attorney or representative may be suspended or disbarred from practice before the Service and the Board. However, such disciplinary measures are rarely invoked, and debarment from practice usually occurs only when an attorney is suspended and disbarred by a court or when an accredited representative ends his connection with the recognized social agency.

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108. For definition of "attorney" see 8 C.F.R. § 1.1(f) (Supp. 1960).
109. The procedure for recognizing such organizations and accrediting their representatives is described in 8 C.F.R. § 292.2 (Supp. 1960). "Representative" is defined in 8 C.F.R. § 1.1(j) (Supp. 1960). At present there are 70 recognized social agencies and 134 accredited representatives of such agencies listed with the Board of Immigration Appeals.
111. 8 C.F.R. § 292.3 (Supp. 1960).
V. WAIVER OF COUNSEL

Since the right of counsel in exclusion and deportation cases now is safeguarded by statutes and regulations, hearings ordinarily are conducted without counsel in such cases only when counsel has been waived. The special inquiry officer, complying with the regulations,\footnote{112. 8 C.F.R. §§ 236.2(a) & 242.16(a) (Supp. 1960).} advises each party at the outset of the hearing of his right to be represented by counsel. Reasonable continuances will be granted to afford the party an opportunity to obtain counsel if he wishes such an opportunity. When the party informs the special inquiry officer, either at the initial or at an adjourned hearing, that he cannot obtain counsel or does not wish to be represented the special inquiry officer asks him whether he is willing to proceed without counsel. When an affirmative answer is made the hearing proceeds without counsel. The colloquies between the special inquiry officer and the party concerning representation by counsel are recorded in the hearing record.\footnote{113. 8 C.F.R. § 236.2(d) (Supp. 1960).}

Like most valuable rights the right to be represented by counsel can be waived. A waiver occurs when the party is informed of his rights and chooses to proceed without counsel.\footnote{114. Giaino v. Pederson, 289 F.2d 483 (6th Cir. 1961) (when counsel did not appear at hearing alien stated he wished to go ahead without counsel); Dentico v. Esperdy, 280 F.2d 71 (2d Cir. 1960); Coons v. Boyd, 203 F.2d 804 (9th Cir. 1953); Jankowski v. Shaughnessy, 186 F.2d 580 (2d Cir. 1950); Hee Chan v. Pilliod, 178 F. Supp. 793 (N.D. Ill. 1959). See also Johnson v. Zerbst, 304 U.S. 458 (1938) (requisites of an intelligent waiver of counsel in criminal prosecution); Quon Quon Poy v. Johnson, 273 U.S. 352 (1927) (waiver of privilege of having friend or relative present at board of special inquiry); Prassinos v. District Director, 193 F. Supp. 416 (N.D. Ohio 1960), aff'd mem., 289 F.2d 490 (6th Cir.), cert. denied, 81 Sup. Ct. 1925 (2d Cir. 1956).} A hearing can be conducted without counsel when the party has waived his right of representation in this manner, since in such cases he has "decided to go it alone and take his chances."\footnote{115. In re Ellis, 144 F. Supp. 448, 449 (N.D.N.Y. 1956), aff'd, 238 F.2d 235 (2d Cir. 1956).} But again the yardstick is whether fundamental fairness was accorded in a broad view of all the circumstances. The party's waiver must be made intelligently,\footnote{116. See cases cited in note 114 supra.} with full understanding of his rights,\footnote{117. Dentico v. Esperdy, 280 F.2d 71 (2d Cir. 1960) (under circumstances waiver was intelligent, despite alien's poor educational level, where right to representation clearly explained); Van Den Berg v. Lehmann, 261 F.2d 828 (6th Cir. 1958) (alien who did not understand, speak or read}
out coercion or deception. However, ordinarily the voluntariness of the waiver is not deemed affected by the fact that the party is in jail or without funds and has said that he would have retained counsel if he had been able. Of course, there cannot be an intelligent waiver by one who is not fully aware of his rights, either because he was not adequately advised of his right to counsel or because he lacked the mental capacity to comprehend.

VI. PROVIDING COUNSEL BY ASSIGNMENT OR REFERENCE

Whether the government should or must provide counsel in immigration cases for a party who desires such representation is a matter that has been discussed by commentators and courts. We have previously mentioned the obvious need for counsel in many situations, particularly when the party is arriving or has recently entered, and when he desires counsel but is unable to obtain such assistance because of imprisonment or lack of funds. Immigration practice never has included any authorization for providing counsel to parties who are unable to obtain such representation. Some commentators have suggested the desirability of adopting some such procedure. But their suggestions have never borne fruit. Indeed, the present statute specifies that a party in an exclusion or deportation hearing shall have the privilege of being represented by counsel "at no expense to the government." But the due process mandate may require the assignment of counsel to indigent parties in immigration proceedings is a ques-

English was not given reasonable opportunity to be represented by counsel); Handlovits v. Adcock, 80 F. Supp. 425 (E.D. Mich. 1948) (fair play not satisfied by perfunctory explanation of rights).

118. Roux v. Commissioner, 203 Fed. 413 (9th Cir. 1913) (improperly induced not to engage counsel); Bosny v. Williams, 185 Fed. 598 (S.D.N.Y. 1911) (improper persuasion and intimidation). See also note 72 supra.

119. Dengel'ski v. Tillinghast, 65 F.2d 440, 442 (1st Cir. 1933); Ciccerelli v. Curran, 12 F.2d 394 (2d Cir. 1926). See also notes 77, 78 supra. But see Castro-Louzan v. Zimmerman, 94 F. Supp. 22 (E.D. Pa. 1950) (due process not accorded when alien impoverished, without counsel, friends, family, or knowledge of language, and facts inadequately developed).


121. See note 117 supra.

122. See note 75 supra. In De Souza v. Barber, 263 F.2d 470 (9th Cir. 1959), a waiver of counsel by a 20 year old infant was not invalid since he had a clear understanding of his rights and actions.

123. See 5 Wickersham Commission Report 155, 168 (1931); Report of Secretary of Labor's Committee 83 (1940).

tion not yet definitely resolved. Some analogy may perhaps be found in the United States Supreme Court’s pronouncements dealing with the need to supply counsel to indigent defendants in criminal cases. It is settled that the sixth amendment demands such provision for counsel in federal criminal prosecutions.\(^{125}\) In regard to state prosecutions the holdings are not equally decisive, since the controlling guide is the malleable due process edict of the fourteenth amendment. Due process requires the assignment of counsel to indigent defendants in all capital cases,\(^ {126}\) but the Supreme Court thus far has shied away from any such unqualified requirement in noncapital state prosecutions, holding that the assignment of counsel in such cases is mandatory only when requisite for fundamental fairness.\(^ {127}\) However, the tide of decision in the Supreme Court has run strongly in favor of a generous estimation of the need for representation by counsel in particular cases as essential to fundamental fairness.\(^ {128}\)

As we have observed, immigration proceedings are not criminal cases, but it would not require too great a leap to find that the conceptions of fundamental fairness under the due process clause of the fourteenth amendment should be carried over to the identical prescription of the fifth amendment. Therefore, it is not inconceivable that a court some day might require assignment of counsel, when the circumstances warrant. The issue here, as always, is whether the dictates of fundamental fairness have been observed.

In several cases deportation orders have been contested because the respondent had to proceed without counsel when he desired such representation but had no funds to retain counsel. In each instance where the claim was made that due process required that such respondents be provided with counsel in the administrative proceeding, the courts have avoided confronting this claim and have ruled in each case that the alien was not prejudiced by the absence of counsel because the facts were undisputed and the legal issues could be fully resolved in the court proceeding.\(^ {129}\) In other cases the courts have found that under the particular circumstances the hearing conducted without counsel was unfair, but they

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have not considered the possibility of requiring that counsel be provided.\textsuperscript{130} It seems likely that this issue will continue to be raised by parties who believe themselves entitled to the assignment of counsel.

Immigration officers are forbidden to recommend individual attorneys.\textsuperscript{131} However, there is nothing to prevent them from bringing these cases to the attention of community organizations which can recommend counsel. In many cities legal representation is available through lawyers' reference bureaus maintained by bar associations, through legal aid societies, and through social welfare agencies such as the United HIAS Service, the Immigrants Protective League, the National Catholic Welfare Conference, the International Institutes, and other groups. The Association of Immigration and Nationality Lawyers also has a legal reference service in a few large cities through arrangement with the local immigration offices.\textsuperscript{132}

Indigent parties thus are not always frustrated in their desire for counsel. Under the present administrative practice, with its increased appreciation that the utmost fairness of procedure is advantageous both to the party and the government, an indigent party who wishes counsel will be aided in obtaining the services of a community resource, if such a resource is available. The special inquiry officer will suggest the names of some agencies that may furnish the desired representation or in some cases he may himself communicate with such an agency. The hearing will be continued to enable the party to obtain such representation. Of course, this legal reference system works best in large cities, where such community facilities are readily available. Its value is considerably less when the hearing is held in an institution or a small town, where no such community assistance can be obtained.

CONCLUSION

Due process of law of course is not a fixed, immutable concept. Its dimensions are constantly shifting to meet the needs of each succeeding era. It is equated with current notions of fairness.\textsuperscript{133}

In the immigration process this phenomenon has resulted in a steady advance in procedural protections. Among these changes has been a significant increase in safeguards for the right to be represented by counsel. Concededly the end of the road has not yet been reached. Perhaps on this road, as in every other aspect of

\textsuperscript{133} Wong Yong Sung v. McGrath, 339 U.S. 33 (1950).
due process, there is no end but rather a continuous journey in quest of fundamental fairness in a changing world. The most that can be said at any given moment is that we are headed in the right direction.

I believe such a conclusion is warranted in regard to the right to counsel in immigration proceedings. In my view it can reasonably be said that some progress has been made, that additional goals have been sighted on the road ahead, and that the administrative process has been moving forward steadily toward those goals.