COMMENTS

Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry

A deported alien who reenters the United States without permission commits a felony.¹ Despite numerous court decisions and periodic congressional revisions of the immigration statutes, the ability of an alien on trial for illegal reentry to challenge the validity of a deportation order has not been resolved definitively.² This

¹ 8 U.S.C. § 1326 (1976):

Any alien who—

- (1) has been arrested and deported or excluded and deported, and thereafter
- (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than \$1,000, or both.

The first statute prohibiting aliens from reentering after deportation was enacted in 1929. Act of Mar. 4, 1929, ch. 690, 45 Stat. 1551 (repealed 1952). With limited exceptions, there was no felony provision for illegal reentry prior to this statute, which was substantially equivalent to 8 U.S.C. § 1326 (1976). An earlier felony provision, Immigration Act of 1907, ch. 1134, § 3, 34 Stat. 898 (1907), as amended by the Act of Mar. 26, 1910, ch. 128, 36 Stat. 263, made reentry a crime for aliens deported for immoral sexual conduct.

² By statute, the Government has the option of deporting the alien again rather than bringing a section 1326 prosecution. 8 U.S.C. § 1252(f) (1976). The circuits are divided over whether to allow collateral attacks in such cases, although the arguments against challenges would seem stronger than in section 1326 cases because no criminal prosecution is involved.

The Second Circuit has rejected such attacks. *United States ex rel. Bartsch v. Watkins*, 175 F.2d 245 (2d Cir. 1949), was an exclusion case holding that the alien had "no right to reenter the United States without compliance with our immigration laws. For lack of an immigration visa and of a valid passport or official document in lieu thereof he was properly excluded" *Id.* at 247.

The Third Circuit allowed a collateral attack in *McLeod v. Peterson*, 283 F.2d 180 (3d Cir. 1960), where it had been shown that there was a gross miscarriage of justice because of "fundamental errors . . . in prior proceedings," namely, "failures of [the alien's] counsel or of the officials involved." *Id.* at 184. The court adopted this "compromise position" in view of the competing interests involved: the goal of administrative efficiency, the desirability of having an end to litigation, and the need to protect the interests of the alien. *Id.* at 183.

comment will examine whether collateral attacks should be allowed under the current statute, section 1326 of Title 8 of the United States Code.³ After examining the legislative history and due process considerations, it concludes that collateral attacks should be allowed only if the alien was unrepresented by counsel at the deportation hearing and should succeed only if there was a denial of fundamental fairness at that proceeding.

I. CASE LAW

The federal courts have taken various positions on whether and under what circumstances to allow collateral attacks on deportation orders in section 1326 proceedings. A brief summary of the decisions will show that none of them offers a fully satisfactory treatment of the issue.

The continuing lack of agreement among the courts can be traced to the Supreme Court's decision in *United States v. Spector*⁴ to leave the issue unresolved. The Court stated that if the parties had raised and briefed the issue, it might have considered whether the statutory preclusion of collateral attacks rendered the statute unconstitutional.⁵ In a strong dissent, Justice Jackson argued that it was improper to make a deportation order unreviewable.⁶ He saw particular unfairness in exempting deportation hear-

The "gross miscarriage of justice" standard was adopted in other circuits as well. See *Palma v. INS*, 318 F.2d 645, 650-51 (6th Cir.), cert. denied, 375 U.S. 958 (1963); *United States ex rel. Beck v. Neelly*, 202 F.2d 221, 223 (7th Cir.), cert. denied, 345 U.S. 997 (1953); *United States ex rel. Steffner v. Carmichael*, 183 F.2d 19, 20 (5th Cir.), cert. denied, 340 U.S. 829 (1950). The Ninth Circuit suggested that it might adopt a gross miscarriage of justice standard. *De Souza v. Barber*, 263 F.2d 470, 475 (9th Cir.), cert. denied, 359 U.S. 989 (1959). The court held that no collateral attack would be allowed, however, primarily because 26 years between the original deportation and the attempt to deport the alien again was said to be too long.

³ 8 U.S.C. § 1326 (1976); see note 1 *supra*.

⁴ 343 U.S. 169 (1952). *Spector* involved the prosecution of an alien for willful failure to leave the country after a deportation order had been issued, a violation of section 20 of the Immigration Act of 1917, as amended by the Act of Sept. 23, 1950, ch. 1024, tit. I, § 23, 64 Stat. 1010 (superseded by 8 U.S.C. § 1252(e) (1976), collateral attacks being allowed under prescribed conditions by *id.* § 1105a(a)(6)). A decision on collateral attacks under this statute would have applied to section 1326 cases.

⁵ 343 U.S. at 172-73. Despite this statement, the Court suggested its opposition to collateral attacks by inviting a comparison with *Yakus v. United States*, 321 U.S. 414 (1944), see text and notes at notes 42-55 *infra*, and *Cox v. United States*, 332 U.S. 442 (1947), both of which rejected collateral attacks mounted at criminal trials against administrative actions.

⁶ 343 U.S. at 180 (Jackson, J., dissenting). He faulted the Court for being "shy" and for its "squeamishness" in failing to decide the collateral attack question.

ings from the strict due process requirements of criminal prosecutions by maintaining "with increasing logical difficulty" that deportation is a civil matter, while allowing the Government to "turn around and use the result as a conclusive determination of [deportability] in a criminal proceeding."⁸ He warned of the danger to citizens as well as to aliens in creating crimes with non-traversable elements.⁹

Only the Third Circuit has allowed an inquiry into the evidentiary basis of an order. In *United States v. Bowles*,¹⁰ the court held that a deportation order may be attacked "on at least two fundamental and limited grounds."¹¹ The first ground is that there is no "basis in fact" for the deportation order. If the Government can show factual support, the order becomes conclusive.¹² The second ground is that there is no "warrant in law" for the issuance of the order, by which the court apparently meant misconstruction of law during the initial determination of deportability.¹³ The court based its permissive stance toward collateral attacks on its interpretation

⁷ *Id.* at 178 (Jackson, J., dissenting).

⁸ *Id.* at 179 (Jackson, J., dissenting).

⁹ *Id.* at 177 (Jackson, J., dissenting).

¹⁰ 331 F.2d 742 (3d Cir. 1964).

¹¹ *Id.* at 750 (footnote omitted).

¹² *Id.* The court cited *Cox v. United States*, 332 U.S. 442, 453 (1947) (plurality opinion of Reed, J.). That case seemed to equate "basis in fact" with "any substantial basis." If the *Bowles* court meant "any substantial basis," a collateral attack could inquire deeply into the substantive merits of the deportation order as well as the procedures surrounding it.

A district court has interpreted *Bowles* to include denials of procedural due process at the hearing as grounds for challenges. *United States v. Floulis*, 457 F. Supp. 1350, 1357 (W.D. Pa. 1978). This probably was contemplated by the court in *Bowles*, given the decision in *McLeod v. Peterson*, 283 F.2d 180 (3d Cir. 1960). That case held that an alien subject to a second deportation for illegal reentry, *see* note 2 *supra*, could challenge the procedures of the prior proceeding. The *Floulis* court otherwise seemed to narrow the grounds for challenges, holding that a defendant could collaterally attack a prior deportation order only if he could show that there was a gross miscarriage of justice in the hearing. 457 F. Supp. at 1354. The court said:

[W]e hold that the Defendant may collaterally attack his deportation . . . only on grounds which go to the merits of the alien's deportability and on some procedural grounds which are related to the conduct of a full and fair hearing on the merits (i. e. the right to examine all evidence) but may not collaterally attack his deportation on procedural grounds which relate to events occurring after the deportation hearing (i. e. applications for extension of voluntary departure) and which have no bearing on the conduct of a fundamentally fair hearing on the merits of whether the alien is deportable.

Id. at 1357.

¹³ 331 F.2d at 750. As an illustration of the second ground for an attack, the court referred to the issue of whether *Bowles* had "entered" the country for purposes of the statute.

of the statute:

Back of a deportation lies the deportation warrant and back of the deportation warrant lies an order of deportation which in turn is bottomed upon a deportation proceeding held in accordance with law. When Congress made use of the word "deported" in the statute, it meant "deported according to law."¹⁴

The court thus held that a valid deportation order was required in order to convict an alien for unlawful reentry under section 1326.

The Ninth Circuit, in *United States v. Gasca-Kraft*,¹⁵ used language similar to that in *Bowles*: "A material element of the offense defined by [section] 1326 is a *lawful* deportation."¹⁶ The court made no mention, however, of an inquiry into an order's factual basis.¹⁷ In *United States v. Rangel-Gonzales*,¹⁸ the court held that one ground for challenging a deportation order is the failure of the Immigration and Naturalization Service ("INS") to follow a regulation established for the benefit of the alien. In such a case, "the violation invalidates the deportation 'only if the violation prejudiced interests of the alien which were protected by the regulation.'"¹⁹

The Seventh Circuit also allows collateral attacks, but limits their scope more than the Third and Ninth Circuits. In *United States v. Heikkinen*,²⁰ the court held that a collateral attack was limited to determining whether the INS had afforded the defendant due process in the deportation hearing, and whether it had followed the pertinent regulations and statutes.²¹ The court precluded a hearing de novo on the deportation order.²²

In contrast to these opinions, the Second Circuit seems to have precluded collateral attacks in most circumstances. The court

¹⁴ *Id.* at 749.

¹⁵ 522 F.2d 149 (9th Cir. 1975).

¹⁶ *Id.* at 152 (emphasis in original).

¹⁷ Another panel of the Ninth Circuit was disturbed by "the apparent statutory preclusion of such review by 8 U.S.C. § 1105a(c)." *United States v. Barraza-Leon*, 575 F.2d 218, 220 (9th Cir. 1978) (footnote omitted) (one of the three judges had participated in the *Gasca-Kraft* decision). Nevertheless, the panel followed *Gasca-Kraft*.

¹⁸ 617 F.2d 529 (9th Cir. 1980).

¹⁹ *Id.* at 530 (quoting *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979)).

²⁰ 221 F.2d 890 (7th Cir. 1955). The case involved an alien charged with willful failure to leave the country within six months after being served with a deportation order.

²¹ *Id.* at 893.

²² *Id.*

in *United States v. Pereira*²³ held that an alien deported because of a felony conviction could not challenge the deportation order in a section 1326 prosecution on the grounds of a defect in his guilty plea. The court's decision was based on several factors. The first was the "arguable" congressional intent to preclude collateral attacks.²⁴ The second was the court's determination that allowing a collateral attack would place too great a burden on the prosecution: "The Government might still have been able in 1970 to prove the constitutional adequacy of Pereira's 1965 guilty plea; in 1978, the task is obviously more difficult."²⁵ The third factor was the defendant's failure to exhaust his administrative and judicial remedies prior to any of his several deportations.²⁶ In concluding, however, the court qualified its prohibition of collateral attacks: "Under these circumstances, we do not hesitate to affirm Pereira's conviction, without deciding whether, under *other* circumstances, a collateral attack on a deportation order might be permissible in a § 1326 proceeding."²⁷

None of these cases contained an adequate justification for its holding. Those allowing collateral attacks did so without sufficient consideration of the legislative history of section 1326 or of the structure of the immigration laws generally. Those prohibiting collateral attacks did not adequately consider whether due process may require that collateral attacks be allowed in some situations.

II. THE STATUTE AND CONGRESSIONAL INTENT

The argument often made against allowing collateral attacks is

²³ 574 F.2d 103 (2d Cir.), *cert. denied*, 439 U.S. 847 (1978).

²⁴ *Id.* at 105 n.4.

²⁵ *Id.* at 106. *Cf.* *Palma v. INS*, 318 F.2d 645, 651 (6th Cir.) (original deportation order held unreviewable in a subsequent deportation hearing, in part because of elapse of 25 years between original deportation and the hearing), *cert. denied*, 375 U.S. 958 (1963); *De Souza v. Barber*, 263 F.2d 470, 474 (9th Cir.) (26 years held too long), *cert. denied*, 359 U.S. 989 (1959).

²⁶ 574 F.2d at 105-06.

²⁷ *Id.* at 106 (emphasis in original) (footnote omitted).

Two other circuits have held that under almost no circumstances should collateral attacks be allowed on deportation orders in section 1326 trials. The Fifth Circuit, in *United States v. Gonzalez-Parra*, 438 F.2d 694 (5th Cir.), *cert. denied*, 402 U.S. 1010 (1971), held that all challenges to a deportation order must be made prior to deportation. The court reached its conclusion primarily through statutory construction. *Id.* at 697. The court also noted that the alien had waived an administrative remedy and had not filed a habeas corpus petition challenging the order prior to deportation. *Id.* Similarly, the Tenth Circuit, in *Arriaga-Ramirez v. United States*, 325 F.2d 857, 859 (10th Cir. 1963), held that section 1326 "requires only that it be shown there was a previous 'deportation.'"

that section 1326 punishes the alien solely for disobeying the deportation order, not for being deportable.²⁸ In labelling an alien deportable, the INS does not punish him; rather, it issues an order on the basis of the finding of deportability. Section 1326 punishes him solely for disobeying that order. Under this view, the lawfulness of the order is irrelevant. An alien always is bound, as a result, to obtain permission before reentering.

The response to this argument is that it is not certain that section 1326 should punish the alien solely for disobeying the deportation order. It is necessary to inquire into the intent of Congress from the wording of the statute, its legislative history, and the statutory structure of the Immigration and Nationality Act of 1952.²⁹

Section 1326 is silent on the necessity for a valid deportation before a prosecution can be brought for illegal reentry. The statute provides that an alien who reenters after being "arrested and deported"³⁰ commits a felony. The wording is ambiguous, because "deported" may refer either to the act of causing an alien to leave the United States, or to such an act only when it is carried out lawfully. One interpretation is that the absence of the words "lawfully deported" means that Congress intended any reentry after deportation to be a criminal offense. There are other statutes, for example, that are silent as to the need for a valid underlying deter-

²⁸ See, e.g., *United States v. Mohammed*, 372 F. Supp. 1048, 1049 (S.D.N.Y. 1973):

The deportation order was proper on its face. Defender [*sic*] had no right to re-enter the country without seeking the permission of the Attorney General. The only question to be decided on this trial is whether there was an outstanding order of deportation pursuant to which the defendant was deported and whether thereafter he reentered the country without seeking permission of the Attorney General to reapply for admission.

This "proper on its face" reasoning is used frequently in cases in which a deportee who unlawfully reenters is deported again. See *United States ex rel. Rubio v. Jordan*, 190 F.2d 573, 575 (7th Cir. 1951); *United States ex rel. Bartsch v. Watkins*, 175 F.2d 245, 247 (2d Cir. 1949); *Daskaloff v. Zurbrigg*, 103 F.2d 579, 580 (6th Cir. 1939).

The general argument behind such a position has been stated most succinctly in another context in *White, Processing Conscientious Objector Claims: A Constitutional Inquiry*, 56 CALIF. L. REV. 652, 668-69 (1968):

The main argument . . . is . . . that it is not the agency who imprisons the defendant, and his imprisonment does not flow directly and necessarily from the fact found by the agency. He is not imprisoned for not being a conscientious objector but for disobeying an order to report for duty. The draft board does not punish him, but classifies him and issues an order based on that classification, and it is for disobeying that order that he is punished.

²⁹ 8 U.S.C. §§ 1101-1503 (1976).

³⁰ *Id.* § 1326(1) (1976).

mination or adjudication, in which collateral attacks have been denied.³¹

Drawing such an inference of intent from the wording of the statute may be as speculative as concluding that Congress intended to allow collateral attacks, however. The absence of the phrase "lawfully deported" could have been an oversight, or Congress may never have considered the question. One could argue further that such ambiguous wording should be construed in favor of the defendant in accordance with the canon that criminal statutes should be interpreted narrowly.³² Section 1326 thus may support two plausible but inconsistent interpretations.

The sparse legislative history of the statute gives no clear support for either interpretation, although its tone suggests that Congress would have disapproved of collateral attacks had it considered them directly. A House committee report indicated that only the most cursory of judicial review was envisioned for determinations of deportability, emphasizing that "the decision of the Secretary of Labor in every case of deportation shall be final."³³ Furthermore, the cosponsor of the Immigration and Nationality Act of 1952 seemed hostile to granting deportees any advantages: "[I]t seems to be almost an impossibility for the agencies of the Government to deport [illegal aliens]. When the agencies undertake to deport aliens who are illegally in the United States, they are confronted with every kind of barrier and excuse."³⁴

The structure of the Act also indicates that Congress intended to preclude collateral attacks.³⁵ The judicial review statute, section 1105a, provides that "[t]he procedure prescribed . . . shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation."³⁶ The strongest indica-

³¹ See, e.g., *Laws v. United States*, 386 F.2d 816, 817 (10th Cir. 1967) (interpreting 18 U.S.C. § 751 (1976) (escape)), cert. denied, 390 U.S. 1007 (1968); *United States v. Franklin*, 313 F. Supp. 43, 44 (S.D. Ind. 1970) (same), aff'd, 440 F.2d 1210 (7th Cir. 1971).

³² See generally W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 72 (1972).

³³ H.R. REP. NO. 2397, 70th Cong., 2d Sess. 10 (1929). The Attorney General now has responsibility for immigration matters. 8 U.S.C. § 1103(a) (1976).

³⁴ 98 CONG. REC. 5090 (1952) (remarks of Sen. McCarran).

³⁵ The immigration statutes long have contained a provision that appears to preclude collateral attacks: "[A]ny alien ordered deported . . . who has left the United States shall be considered to have been deported in pursuance of law . . ." Act of Mar. 4, 1929, ch. 690, § 1(b), 45 Stat. 1551 (codified at 8 U.S.C. § 1101(g) (1976)). All that this means, however, is that an alien ordered deported who leaves voluntarily will be deemed deported. See H.R. REP. NO. 2397, 70th Cong., 2d Sess. 6 (1929).

³⁶ 8 U.S.C. § 1105a(a) (1976).

tion in that statute that collateral attacks should be denied is the provision that a court may not review a deportation order if the alien has left the United States.³⁷ The statute also provides that an alien must exhaust his administrative remedies before judicial review of the order is possible; he is given six months to do so. If an alien fails to appeal to the Board of Immigration Appeals, he loses the right to make a later challenge.³⁸

Section 1105a also specifically *allows* collateral attacks in two types of prosecutions: those for willful failure to comply with regulations of the Attorney General pending deportation, and those for failure to depart from the United States.³⁹ In contrast, there is no provision for collateral attacks in section 1326 prosecutions. This omission may have been intentional; Congress may have wanted to deny collateral attacks in section 1326 cases to give deportees no encouragement, however slight, to reenter the country by the prospect of avoiding prosecution if caught.⁴⁰ Also, a deportation order in a section 1326 prosecution is likely to be old, imposing serious proof problems on the Government.⁴¹

III. DUE PROCESS

Congressional intent alone, however, may not determine whether collateral attacks should be allowed in section 1326 prosecutions. Even if Congress intended that deportation orders be unreviewable, one must ask whether due process requires that the defendant alien be allowed to make a collateral attack in some circumstances.

There are exceptional cases in which collateral attacks should be allowed regardless of whether the alien was represented by counsel prior to deportation. If an alien was denied a hearing

³⁷ *Id.* § 1105a(c).

³⁸ *Id.* § 1105a(a)(1).

³⁹ *Id.* § 1105a(a)(6) allows pretrial collateral attacks in prosecutions under *id.* § 1252(d) (willful failure to comply with regulations pending deportation after an order has been served), and *id.* § 1252(e) (willful failure to depart within six months after being served with an order of deportation).

⁴⁰ See text and notes at notes 85-87 *infra*. As a further indication of a congressional policy of discouraging aliens from entering surreptitiously under any circumstances, 8 U.S.C. § 1325 (1976) declares an alien entering the United States at an improper time or place guilty of a criminal offense. The collateral attack issue also has arisen in cases involving this statute, which enhances the punishment for repeated violations. The Ninth Circuit has allowed collateral attacks on the earlier conviction in trials in which the harsher penalty is sought. *United States v. Lopez-Beltran*, 607 F.2d 1223 (9th Cir. 1979).

⁴¹ See text and note at note 25 *supra*.

before expulsion, or was denied a needed interpreter or the right to appeal an adverse decision, there is little question that collateral attacks are proper. Precluding challenges in such cases would allow the government to deport anyone it desired without due process and with impunity. The deportee would have no effective redress, because the agency that expelled him would be unlikely to readmit him. Allowing collateral attacks not only would permit the person unlawfully deported to reenter the country but also would nullify the effect of the government's misconduct. Such cases of egregious governmental insensitivity to notions of fundamental fairness presumably would be rare, however.

Cases not involving such exceptional circumstances can be divided into two types. The first type comprises section 1326 prosecutions in which the alien was represented by counsel at the deportation hearing; in such cases the alien, through his counsel, presumably knew what was happening and could respond intelligently to the proceedings. The second type involves prosecutions in which the alien was not represented by counsel at the hearing; there, it is much more likely that the alien was unaware of the legal complexities of his case and was less able to respond to them effectively.

A. Aliens Represented by Counsel at Deportation Hearings

1. *Yakus and Its Progeny*. It can be argued that no due process issue is involved in a section 1326 trial when the defendant was represented by counsel at the deportation hearing, because due process requires only one opportunity to be heard. If the alien could have appealed the deportation order, but did not, or if he lost his appeal, he should lose the right to challenge the order at the later trial.

The rule against unlimited opportunities to be heard often is followed, and collateral attacks denied, in criminal trials for violations of administrative actions. The leading case, *Yakus v. United States*,⁴² upheld convictions for the violation of a regulation promulgated under a wartime price control act. The statute required that challenges to a regulation be made in a special court within sixty days, after which time the regulation would become unreviewable.⁴³ The defendants failed to make a challenge, but at

⁴² 321 U.S. 414 (1944).

⁴³ *Id.* at 428.

trial they attempted to argue that the order was invalid.

The Court upheld the trial court's rejection of that defense, saying that by providing for an exclusive procedure to test the validity of regulations, Congress intended to eliminate the defense of their invalidity.⁴⁴ The Court approved the statute, saying that the opportunity for testing the regulation, though limited, satisfied the requirements of due process: "[W]e are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity"⁴⁵ The Court noted that "a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."⁴⁶

Although the theory of *Yakus* may be sensible, an indiscriminate application of the doctrine would result in intolerable harshness and hardship in some cases.⁴⁷ The short time limit was the most objectionable feature, making it unlikely that the regulation would be reviewed within the set period. Furthermore, the statute assumed that a person had the incentive to challenge a regulation before violating it, an unreasonable assumption given the expense and inconvenience of going to court.⁴⁸ In addition, there was a notice problem because of the difficulty of discovering the agency action before the time limit expired.

These criticisms are not persuasive, however, when the *Yakus* rationale is applied to section 1326 prosecutions. Gone are the most objectionable elements of *Yakus*: the short time limit, the sharply restricted procedures for making a challenge, the lack of incentive to challenge the agency's action, and the notice problem. An alien ordered deported has notice of the agency's action, and also knows that he is not welcome to return to the United States.

⁴⁴ *Id.* at 430-31.

⁴⁵ *Id.* at 444.

⁴⁶ *Id.* Justice Rutledge sharply dissented from the holding that Congress could deny courts the authority to determine the validity of an administrative action underlying a criminal indictment. *Id.* at 478-85 (Rutledge, J., dissenting).

⁴⁷ See *United States v. Sagner*, 71 F. Supp. 52 (D. Or.) (commenting on the harshness of the *Yakus* decision), *rev'd per curiam*, 331 U.S. 791 (1947).

⁴⁸ "The cases [relying on *Yakus*] have presented a variety of circumstances, many involving the most grievous oppression. It is absurd to think the average citizen can take his case before a special court" *Id.* at 52.

If he wants to reenter the country legally ever again, therefore, he has an incentive to appeal the order.

Furthermore, the alien may challenge the deportation order prior to leaving the country; if he has counsel, he has little excuse for not doing so. By regulation, he must be informed of his right to appeal, and is given a simple form to complete, on which he is asked to give brief reasons for his appeal.⁴⁹ He may move for reopening or reconsideration by the special inquiry officer if there is newly available material evidence.⁵⁰ In addition, he may appeal to the Board of Immigration Appeals.⁵¹ If the Board denies the appeal, he may file a motion to reconsider.⁵² Once the administrative remedies are exhausted, he has the right to seek judicial review of the deportation order,⁵³ or if he is in custody he may also file a habeas corpus petition.⁵⁴ Once outside the country he may seek reentry by applying for a visa at a consulate after getting permission to do so from the INS.⁵⁵ To allow aliens to ignore these procedures, reenter the country, and then challenge the deportation would tend to denigrate the remedies and procedures available to aliens and might well encourage aliens to avoid them.

None of the exceptions to the *Yakus* doctrine applies to section 1326 prosecutions. In *McKart v. United States*,⁵⁶ the Court allowed a challenge to a Selective Service classification in a criminal trial for refusal to submit to induction, despite the defendant's failure to exhaust his administrative remedies. The opinion stated that the test for allowing a challenge was "whether there is . . . a governmental interest compelling enough to outweigh the severe burden" on the defendant.⁵⁷ The Court mentioned several factors to consider, including the impact on the defendant,⁵⁸ the need for an agency to discover and correct its own errors in order to avoid unnecessary litigation,⁵⁹ and the concern that "frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its

⁴⁹ 8 C.F.R. §§ 242.19, .21 (1980).

⁵⁰ *Id.* § 242.22.

⁵¹ *Id.* § 242.21 (within 10 days of the immigration judge's decision).

⁵² *Id.* § 3.2.

⁵³ 8 U.S.C. § 1105a (1976); 28 U.S.C. §§ 2341-2351 (1976).

⁵⁴ 8 U.S.C. § 1105a(a)(9) (1976).

⁵⁵ 22 C.F.R. § 41.91(a)(17) (1980).

⁵⁶ 395 U.S. 185 (1969).

⁵⁷ *Id.* at 197.

⁵⁸ *Id.*

⁵⁹ *Id.* at 195.

procedures."⁶⁰

In the subsequent, similar draft-classification case of *McGee v. United States*,⁶¹ the Court described more explicitly the situations in which collateral attacks are permissible in Selective Service cases. The opinion showed that the decision in *McKart* was not an invitation to unlimited collateral attacks. Holding that the defendant could not challenge his classification in a criminal trial, the Court said that when a purely factual dispute was involved, the exhaustion doctrine would be applied against the defendant.⁶² If, however, the issue had been entirely legal, failure to exhaust would have been unimportant.⁶³ The Court explained its use of the exhaustion doctrine by emphasizing the need to protect "the interest in full administrative fact gathering and utilization of agency expertise,"⁶⁴ an interest that might be undermined if defendants "were allowed to press their claims in court despite a . . . failure to exhaust."⁶⁵

Section 1326 prosecutions present situations similar to that in *McGee*. The INS has the authority and duty to determine whether an alien should be deported. The inquiry is the largely factual one of whether the alien comes within the statutory grounds for deportation. By analogy to *McGee*, an alien, represented by counsel, who does not exhaust his remedies should not be allowed to challenge the deportation order in a section 1326 prosecution. The INS should be allowed to make its findings of fact and be given a chance to correct its own errors.

2. *Escape and Recidivism.* Collateral attacks also are disallowed in several analogous situations. One is where a prisoner tries to defend an escape prosecution by attacking the proceeding that resulted in his detention.⁶⁶ The prisoner's argument is that if his confinement was unlawful, then his escape was legal because he was regaining his unlawfully denied freedom.

The primary reason for denying a prisoner the right to make a

⁶⁰ *Id.*

⁶¹ 402 U.S. 479 (1971).

⁶² *Id.* at 486.

⁶³ *Id.* at 485. The Court said, *id.* at 485-86, that such was the case in *McKart v. United States*, 398 U.S. 185 (1969).

⁶⁴ 402 U.S. at 486.

⁶⁵ *Id.* at 491.

⁶⁶ Some cases involving section 1326 have offered analogies to the law of escape. See *United States v. Pereira*, 574 F.2d 103, 106 n.6 (2d Cir.), *cert. denied*, 439 U.S. 847 (1978); *United States v. Bruno*, 328 F. Supp. 815, 825 (W.D. Mo. 1971).

collateral attack is that cited in *Yakus* and in several section 1326 cases: he has legal means to air his grievances. He has the right to appeal his conviction, and if appeals are denied he may file a habeas corpus petition. Other grievances may be taken through administrative channels. The courts' theory is that society has an interest—the maintenance of order and respect for the law—in encouraging prisoners to utilize the available avenues for relief, an interest that would be impaired by allowing a prisoner to employ a collateral attack defensively in an escape prosecution. The cases therefore are in agreement that a prisoner has no right to self-help as long as legal remedies are available.⁶⁷

Another situation in which collateral attacks generally are denied is recidivism cases in which the defendant has been represented by counsel at the earlier proceeding.⁶⁸ The statutes involved generally are of two types: those that enhance a penalty because of the defendant's criminal record, and those in which a prior conviction serves as the basis for criminalizing an otherwise lawful act. In cases of the first type, no collateral attacks are allowed when the underlying conviction is challenged as founded on insufficient evidence. The rationale is that challenges should have been made at that proceeding through appeals, rather than allowing the defendant to make them later and thereby burden the subsequent proceeding. If the conviction is challenged on grounds of a constitutional violation (other than denial of counsel), there is uncertainty as to the purposes for which the conviction may be used, such as whether it may be used for impeachment of testimony or for actual

⁶⁷ *E.g.*, *Lawson v. State*, 312 So. 2d 522, 524 (Fla. Dist. Ct. App. 1975) ("[A] prisoner . . . should seek [release] via legal channels provided by the state. That's what they are for. He shouldn't be encouraged to break jail on the chance that he will be legally excused if his conviction should be later set aside."). *Accord*, *United States v. Haley*, 417 F.2d 625, 626 (4th Cir. 1969); *Derengowski v. United States*, 404 F.2d 778, 782 (8th Cir. 1968), *cert. denied*, 394 U.S. 1024 (1969); *Wells v. California*, 352 F.2d 439, 443 (9th Cir. 1965), *cert. denied*, 384 U.S. 1009 (1966); *Aderhold v. Soileau*, 67 F.2d 259, 260 (5th Cir. 1933); *State v. Norcross*, 26 Ariz. App. 115, 117, 546 P.2d 840, 842 (1976); *State v. Hayes*, 52 N.J. Super. 178, 187, 145 A.2d 28, 33 (App. Div. 1958); *Rodriguez v. State*, 457 S.W.2d 555, 556 (Tex. Crim. App. 1970).

West Virginia is the only jurisdiction that allows collateral attacks in escape prosecutions. *See State ex rel. Robison v. Boles*, 149 W. Va. 516, 142 S.E.2d 55 (1965) (escape conviction reversed where underlying conviction obtained in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963) (denial of appointed counsel)); *State ex rel. McGilton v. Adams*, 143 W. Va. 325, 102 S.E.2d 145 (1958) (escape conviction reversed where defendant had been incarcerated in penitentiary by court without jurisdiction). *See also State v. Pishner*, 73 W. Va. 744, 81 S.E. 1046 (1914) (escape conviction reversed because defendant's prior conviction overturned for lack of evidence, *after* defendant's escape).

⁶⁸ For a discussion of denial-of-counsel cases, *see* text and notes at notes 94-96 *infra*.

enhancement of punishment.⁶⁹

Frequently litigated examples of the second type of recidivism case, involving a prior conviction that makes otherwise lawful action criminal, are the federal statutes prohibiting convicted felons from possessing firearms and lying about their past convictions when purchasing a weapon.⁷⁰ If a defendant's earlier conviction is outstanding at the weapons offense trial, no collateral attacks are allowed. Most courts also have held that, if the defendant was in the "convicted" status when he possessed the weapon, he may be prosecuted even if after arrest but before trial the underlying conviction has been overturned.⁷¹

Generally, courts have based their decisions on statutory construction: "Congress did not intend to exempt . . . one whose status as a convicted felon changed after the date of possession, regardless of how that change of status occurred. . . . [The statute] speaks only of conviction of a felony. It contains no requirement that the conviction be finally upheld on appeal."⁷² As with deportation,⁷³ some courts have cited the need for judicial efficiency as a reason for opposing collateral attacks, saying that they would be an encumbrance in trials based on facially valid convictions.⁷⁴

The reasoning in the firearms cases may be applied to section 1326 prosecutions in which the defendant was represented by counsel at the deportation hearing. Just as a convicted felon may apply for a permit before buying a gun,⁷⁵ so may a deported alien apply for readmission before reentering. In the case of a weapons violation, a convicted felon whose appeals are unsuccessful and

⁶⁹ See, e.g., *United States v. Martinez*, 413 F.2d 61 (7th Cir. 1969) (conviction obtained in violation of fifth amendment due process rights could not enhance punishment); *Beto v. Stacks*, 408 F.2d 313 (5th Cir. 1969) (conviction obtained through use of evidence obtained by improper search and seizure could not be used for enhancement of punishment). But see *Prophet v. Duckworth*, 580 F.2d 926 (7th Cir. 1978) (introduction of evidence of a constitutionally invalid conviction for impeachment purposes was not reversible error where harmless), *cert. denied*, 440 U.S. 923 (1979); *United States v. Penta*, 475 F.2d 92 (1st Cir.) (conviction used for impeachment purposes not reversible error where harmless and where the underlying conviction was overturned after recidivism trial on grounds of illegal search and seizure), *cert. denied*, 414 U.S. 870 (1973).

⁷⁰ 18 U.S.C. §§ 921-928 (1976); *id.* app. §§ 1201-1203.

⁷¹ E.g., *Barker v. United States*, 579 F.2d 1219 (10th Cir. 1978); *United States v. Williams*, 484 F.2d 428 (8th Cir. 1973); *United States v. Liles*, 432 F.2d 18 (9th Cir. 1970).

⁷² *United States v. Liles*, 432 F.2d 18, 20 (9th Cir. 1970).

⁷³ E.g., *McLeod v. Peterson*, 283 F.2d 180, 183 (3d Cir. 1960) (dictum).

⁷⁴ E.g., *United States v. Lewis*, 591 F.2d 978, 980 (4th Cir. 1979), *aff'd*, 445 U.S. 55 (1980).

⁷⁵ 18 U.S.C. § 925(c) (1976). See *United States v. Allen*, 556 F.2d 720, 724 (4th Cir. 1977).

who cannot obtain a permit must refrain from possessing a gun. By analogy, represented aliens ordered deported whose appeals were fruitless or who failed to appeal, and who are denied permission to reenter, should not be able to come into the country. This is especially true, arguably, because aliens have no legally recognized right to enter the United States.⁷⁶

3. *Further Considerations.* There are additional reasons for not allowing represented aliens to make collateral attacks. Of considerable importance is the danger that allowing the reopening of all deportation orders would result in uncertainty in immigration law. "[T]here must be an end to litigation and thus, to uncertainty, so that officials and other persons may perform their duties and conduct their lives on the basis of reasonably firm principles and premises."⁷⁷

The need to have efficient and workable judicial and administrative systems also is important. Side-trials of deportation orders would produce delays in the proceedings and increased burdens on the INS⁷⁸ and the court system. There often would be an immense evidentiary burden on the Government, especially if many years had elapsed between the deportation and the section 1326 prosecution.⁷⁹ The immigration judge might be retired or dead, and witnesses may have become unavailable. Memories may fade, or records may be lost or inconclusive from poor record keeping or because the standard of proof of deportability has been changed in the interim.⁸⁰ Even if the alien had to establish a *prima facie* case,

⁷⁶ "[A]n alien who seeks admission to this country may not do so under any claim of right. Admission of aliens . . . is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). *Accord*, *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 290-91 (1904); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603-04 (1889).

⁷⁷ *McLeod v. Peterson*, 283 F.2d 180, 183 (3d Cir. 1960) (dictum).

⁷⁸ "There are numerous cases where aliens have been deported several times, and if in each subsequent case the validity of the previous deportation order had to be determined, there would be no end to the proceedings cast upon administrative agencies." *United States ex rel. Steffner v. Carmichael*, 183 F.2d 19, 20 (5th Cir.) (footnote omitted), *cert. denied*, 340 U.S. 829 (1950). *Accord*, *Palma v. INS*, 318 F.2d 645, 651 (6th Cir.), *cert. denied*, 375 U.S. 958 (1963); *United States ex rel. Rubio v. Jordan*, 190 F.2d 573, 575-76 (7th Cir. 1951).

⁷⁹ Several cases have cited long time intervals as a reason for denying collateral attacks. *United States v. Pereira*, 574 F.2d 103, 106 (2d Cir.), *cert. denied*, 439 U.S. 847 (1978); *Palma v. INS*, 318 F.2d 645, 650-51 (6th Cir.), *cert. denied*, 375 U.S. 958 (1963); *De Souza v. Barber*, 263 F.2d 470, 474-75 (9th Cir.), *cert. denied*, 359 U.S. 989 (1959).

⁸⁰ One example is the change in the standard from "reasonable, substantial, and probative evidence" to "clear, unequivocal, and convincing evidence." See *Woodby v. INS*, 385

the Government might be unable to rebut it.

Another possible concern is that allowing collateral attacks might have a negative effect on the federal policy of excluding those aliens not accepted for entry into the United States. The immigration laws encourage aliens to respect this policy in several ways: aliens are required to enter the country at ports of entry and to be subject to inspection;⁸¹ unlawful entry is made both a deportable⁸² and a criminal offense;⁸³ and unlawful reentry after deportation is made a more serious offense in order to deter habitual illegal entrants.⁸⁴

It has been argued that allowing collateral attacks on deportation orders frustrates this policy by weakening one of the few deterrents to illegal entry. There are few effective deterrents: if no one knows that an alien has entered, no one is looking for him, so his chances of being caught are slim. The argument is that some habitual illegal entrants will consider that it is worthwhile to reenter the country, given the slight chance of being caught and the opportunity to avoid prosecution by making a collateral attack.⁸⁵ This argument sometimes is used in escape cases as a reason for denying collateral attacks: prisoners convinced of their innocence might believe that there was little to lose by escaping (because, if they are correct, they will be freed), thus resulting in more escapes.⁸⁶

Such an argument is largely fanciful. The chances of an alien knowing of this point of constructional law are minute. Those few who do know would be unlikely to rely on it, because making a

U.S. 276, 286 (1966) (interpreting 8 U.S.C. § 1105(a)(4) (1976)).

⁸¹ See 8 U.S.C. §§ 1225, 1229, 1321, 1325 (1976).

⁸² *Id.* § 1251(a)(2).

⁸³ *Id.* § 1325.

⁸⁴ *Id.* § 1326. See H.R. REP. NO. 2397, 70th Cong., 2d Sess. 6 (1929) ("A serious situation has arisen . . . whereby people deported to contiguous countries turn around and come back again without further penalty than exclusion or another deportation").

⁸⁵ See *United States v. Rangel-Perez*, 179 F. Supp. 619, 626 (S.D. Cal. 1959), in which the court held that an alien prosecuted under section 1326 could not retry the issue of his alienage determined at an earlier proceeding:

Even though the present risk of prosecution for illegal entry would remain under 8 U.S.C.A. § 1326, a defendant would have an added incentive to enter again and again, knowing that a trial *de novo* on the issue of alienage would be forthcoming and that such a trial might, on one occasion, result in a favorable verdict. . . . [A]ccomplishment of the objectives of the immigration laws to discourage and effectively control the already difficult problem of illegal entries into this country would thus be weakened.

⁸⁶ *E.g.*, *State v. Hayes*, 52 N.J. Super. 178, 187, 145 A.2d 28, 33 (App. Div. 1958).

collateral attack is not equivalent to winning the case. "[W]e doubt whether many . . . will be foolhardy enough . . . [to take] their chances with a criminal prosecution The very presence of the criminal sanction is sufficient to ensure that the great majority . . . will exhaust all administrative remedies" ⁸⁷

The arguments concerning due process and the need for administrative and judicial efficiency, on the other hand, are so strong that the reasons in support of collateral attacks seem unpersuasive in cases where the alien was represented by counsel. An alien who had counsel and who appealed through the agency and through the courts but lost simply should not be able to reenter the country without permission.

B. Aliens Unrepresented by Counsel at Deportation Hearings

In section 1326 prosecutions in which the alien had no counsel at the deportation hearing,⁸⁸ the arguments against collateral attacks are less persuasive. An alien unfamiliar with the language, customs, laws, and regulations of the United States is at an obvious disadvantage when compared with aliens represented by counsel.⁸⁹ Such an alien cannot reasonably be expected to understand

⁸⁷ *McKart v. United States*, 395 U.S. 185, 199-200 (1969) (collateral challenge of Selective Service classification).

⁸⁸ The statutes and regulations make no provision for the appointment of counsel at deportation hearings. 8 U.S.C. § 1252(b)(2) (1976) and 8 C.F.R. § 242.16 (1980) allow the alien to have counsel at his expense. Most courts have held that because deportation is a civil matter, *see text and note at note 91 infra*, free counsel is not required by due process or by the sixth amendment. *See, e.g.,* *Burquez v. INS*, 513 F.2d 751 (10th Cir. 1975); *Martin-Mendoza v. INS*, 499 F.2d 918 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975). *But see* *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 & n.3 (6th Cir. 1975) (adopting doctrine of case-by-case determination whether "fundamental fairness" requires appointed counsel in deportation hearings), *cert. denied*, 423 U.S. 1050 (1976). Other circuits have stated that they are undecided on the issue of appointed counsel. *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1302 n.5 (7th Cir. 1975) (this opinion did not mention the decision of the same circuit in *Tupacyapanqui-Marin v. INS*, 447 F.2d 603, 606 (7th Cir. 1971), which held that no appointed counsel need be provided; one judge participated in both cases); *Rosales-Caballero v. INS*, 472 F.2d 1158 (5th Cir. 1973); *Henriques v. INS*, 465 F.2d 119 (2d Cir. 1972), *cert. denied*, 410 U.S. 968 (1973).

⁸⁹ Compare the Supreme Court's statement of the value of a lawyer in a criminal trial: The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the

the legal complexities of the deportation proceeding, and may waive an appeal without realizing the implications of doing so. He is also at a disadvantage in presenting evidence, cross-examining witnesses, and giving reasons for an appeal. Furthermore, although an alien may provide his own attorney, "the right to counsel is a meaningless one . . . [if] people are too poor to hire their own advocates."⁹⁰

Although deportation long has been labelled a civil proceeding,⁹¹ even the Supreme Court has recognized that functionally it is equivalent to a criminal proceeding. "[Deportation] may result . . . in loss of both property and life; or of all that makes life worth

guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (quoted with approval in *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972) (requiring counsel in any case in which a prison term is imposed on defendant)).

⁹⁰ *Goldberg v. Kelly*, 397 U.S. 254, 278-79 (1970) (Black, J., dissenting).

⁹¹ See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893):

The order of deportation is not a punishment for crime. . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority . . . , has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law

As a consequence of this doctrine, various rules of evidence and procedure that apply to criminal proceedings have been held not to apply to deportation hearings. See, e.g., *Galvan v. Press*, 347 U.S. 522, 531 (1954) (ex post facto clause, U.S. CONST. art. 1, § 9, cl. 3, inapplicable to deportation statutes); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 154 (1923) (rule that a factfinder may not draw adverse inferences from the silence of a defendant held inapplicable); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (no right to trial by jury in deportation proceedings) (dictum); *Chavez-Raya v. INS*, 519 F.2d 397, 402 (7th Cir. 1975) (admission of statements made by an alien before *Miranda* warning given held proper); *Martin-Mendoza v. INS*, 499 F.2d 918, 921 (9th Cir. 1974) (hearsay admissible if its use is fundamentally fair), *cert. denied*, 419 U.S. 1113 (1975); *Yiannopoulos v. Robinson*, 247 F.2d 655, 657 (7th Cir. 1957) (evidence inadmissible in court is not reversible error when used in a deportation hearing if there is substantial other evidence to sustain agency's decision).

Nor has deportation successfully been challenged as cruel and unusual punishment for its harsh effects in a particular case, because the eighth amendment has been held applicable only to criminal proceedings. See *LeTourneur v. INS*, 538 F.2d 1368, 1370 (9th Cir. 1976), *cert. denied*, 429 U.S. 1044 (1977); *Santelises v. INS*, 491 F.2d 1254, 1256 (2d Cir.), *cert. denied*, 417 U.S. 968 (1974). A district court case holding deportation cruel and unusual punishment was reversed on appeal. *Lieggi v. INS*, 389 F. Supp. 12 (N.D. Ill. 1975), *rev'd*, 529 F.2d 530 (7th Cir.), *cert. denied*, 429 U.S. 839 (1976). See generally Comment, *Deportation as Punishment: Plenary Power Re-Examined*, 52 CHI.-KENT L. REV. 466 (1975) (discussing *Lieggi*).

living.”⁹² The equivalence of deportation proceedings to criminal trials is important because of the accepted doctrine that uncounseled convictions may not be used to support guilt or enhance punishment.⁹³ By analogy, therefore, a deportation order that was the product of an uncounseled hearing should be challengeable, at least in some situations, in section 1326 prosecutions.

The federal courts are practically unanimous in their acceptance⁹⁴ of the rule that felony convictions obtained without the defendant having had the benefit of counsel may not be used “either to support guilt or enhance punishment for another offense.”⁹⁵ Although the early cases contained little discussion of why uncounseled felony convictions should be void for enhancement of punishment purposes, later cases have held that “the subsequent conviction or sentence violated the Sixth Amendment because it depended upon the reliability of a past uncounseled conviction.”⁹⁶

It may be argued that a denial of counsel similarly renders deportation proceedings so unreliable as to be void, in some instances, for section 1326 purposes. Even though a deportation hearing in which the alien has no counsel may not be invalid per se

⁹² *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). *Accord*, *Galvan v. Press*, 347 U.S. 522, 530-31 (1954); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). *See generally* Comment, *supra* note 91.

The Court has questioned its labelling of deportation as civil. *E.g.*, *Trop v. Dulles*, 356 U.S. 86, 98 (1958) (plurality opinion of Warren, C.J.); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952). Perhaps because of these doubts, courts have limited the power of the federal government to determine the conditions under which aliens may remain in or be expelled from the United States. The United States has authority to exclude all aliens, *see* note 76 *supra*, but the government has no resultant lawful power to deny all rights to aliens within the country, *see, e.g.*, *Wong Wing v. United States*, 163 U.S. 228 (1896) (federal statute providing that certain aliens illegally within the country could be sentenced to term of hard labor by executive officer without trial held unconstitutional). Decisions have established minimum standards for deportation, holding that fundamental principles of justice must be respected, and that proceedings must be fair. *E.g.*, *Kwock Jan Fat v. White*, 253 U.S. 454, 457-58, 464 (1920). Fairness includes such requirements as notice of the charges and of the hearing, the right to examine witnesses, and the right to be represented by counsel at no expense to the government. *See Whetstone v. INS*, 561 F.2d 1303, 1306 (9th Cir. 1977); *Yiannopoulos v. Robinson*, 247 F.2d 655, 657 (7th Cir. 1957).

⁹³ *Burgett v. Texas*, 389 U.S. 109, 115 (1967).

⁹⁴ *United States ex rel. Fletcher v. Walters*, 526 F.2d 359 (3d Cir. 1975); *O'Shea v. United States*, 491 F.2d 774 (1st Cir. 1974); *Mitchell v. United States*, 482 F.2d 289 (5th Cir. 1973); *McHenry v. California*, 447 F.2d 470 (9th Cir. 1971); *Oswald v. Crouse*, 420 F.2d 373 (10th Cir. 1969); *Losieau v. Sigler*, 406 F.2d 795 (8th Cir.), *cert. denied*, 396 U.S. 988 (1969); *Williams v. Coiner*, 392 F.2d 210 (4th Cir. 1968).

⁹⁵ *Burgett v. Texas*, 389 U.S. 109, 115 (1967). *But see* *Lewis v. United States*, 445 U.S. 55 (1980), *discussed in* note 105 *infra*.

⁹⁶ *Lewis v. United States*, 445 U.S. 55, 67 (1980) (conviction valid because reliability not at issue). *See Loper v. Beto*, 405 U.S. 473, 484 (1972).

as a denial of due process, because of the longstanding doctrine that deportation is a civil proceeding, a hearing might be held invalid when violation of the order was the basis of a criminal prosecution.

A response to this claim of unfairness in deportation hearings without counsel is that the regulations and case law attempt to minimize the hardship of the absence of counsel. The INS is required to provide an interpreter for an alien who needs one;⁹⁷ courts have recognized that "[t]he right to a hearing is a vain thing if the alien is not understood."⁹⁸ The alien at least can understand what is being said, and he is able to respond to questions. The regulations require that the alien be advised of his right to be represented by counsel of his own choosing at his expense.⁹⁹ He must be told that he will have an opportunity to examine and object to evidence against him, to present evidence on his behalf, and to cross-examine witnesses. The factual allegations must be read to him and the charges explained in "nontechnical language."¹⁰⁰ Once the deportation order is entered, the alien is provided with a simple form that asks whether he seeks to appeal and, if so, asks for brief reasons why.¹⁰¹ Nevertheless, such procedures are not equivalent to providing counsel; in criminal trials, for example, a judge's attempts to protect the defendant, no matter how careful, do not render the presence of counsel unnecessary.

This comment does not suggest that the courts should *require* the government to provide counsel for aliens at deportation hearings. Although deportation is functionally equivalent to criminal punishment, the long standing of the doctrine that it is a civil matter makes a change of designation unlikely. Rather, it is suggested that in a section 1326 prosecution, the judge should allow collateral attacks on a case-by-case basis by aliens unrepresented by counsel.¹⁰² Aliens who were unrepresented by counsel at the hearing

⁹⁷ *Gonzales v. Zurbrick*, 45 F.2d 934 (6th Cir. 1930).

⁹⁸ *Id.* at 937.

⁹⁹ 8 C.F.R. § 242.16 (1980).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* § 242.21.

¹⁰² This rule is similar to the one established in *Betts v. Brady*, 316 U.S. 455 (1942). In that case, which concerned whether states were required to provide counsel in criminal cases, the Court held that there was no per se invalidity to a counselless conviction; rather, denial [of counsel] is to be tested by an appraisal of the totality of facts in a given case. That which may, on one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

could attack the deportation order, but would succeed only upon a showing of substantial procedural impropriety or a denial of fundamental fairness at the deportation hearing.¹⁰³ Such a theory would prevent collateral attacks in which the alien had counsel, and would not present any significant encouragement to aliens to reenter the country: few aliens who could afford a lawyer would intentionally forgo using one in order to be free to make a collateral attack at a later trial for illegal reentry. Equally few unrepresented aliens would know of this obscure point of constructional law.

When the alien was unrepresented, the *Yakus* argument that due process requires only one opportunity to be heard¹⁰⁴ is of considerably less force than when the alien was represented. If the alien had no counsel, there is a serious question as to whether there *was* an adequate opportunity to be heard. There also is doubt whether a failure to exhaust his remedies was a considered decision. An alien without a lawyer is at an obvious disadvantage compared to an alien with a lawyer in presenting his case.¹⁰⁵

Id. at 462 (footnote omitted).

Although *Betts* has been overruled with respect to criminal trials, *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963), its test suits the unusual case of collateral attacks on deportation orders. There, as in criminal trials under *Betts*, the government need not provide the defendant with counsel in deportation proceedings, but a challenge to the proceedings will be allowed when exceptional circumstances exist.

¹⁰³ Examples would be the denial of the right to present evidence, or to cross-examine witnesses, or to have counsel at his expense. See note 92 *supra*.

Admittedly, this theory will produce some of the undesirable burdens on the courts mentioned in text and notes at notes 77-80 *supra*. This is inevitable in any system that allows collateral attacks, because many aliens will claim that there was a gross miscarriage of justice at the deportation hearing even if there was a fair proceeding. The relatively high standard of proof required to prevail should reduce the numbers who will mount an attack, however, and the delays to the trial will be reduced if the judge, rather than the jury, decides whether the collateral attack has merit.

¹⁰⁴ See text and notes at notes 42-46 *supra*.

¹⁰⁵ The case of *Lewis v. United States*, 445 U.S. 55 (1980), is distinguishable and does not cast doubt on the validity of the cases concerning counselless convictions. The Court in *Lewis* held that a person whose underlying conviction was obtained without counsel in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963), nevertheless could be prosecuted for possession of a weapon under 18 U.S.C. app. § 1202(a)(1) (1976) discussed in text and notes at notes 70-76 *supra*. The Court said that, unlike the cases in which a counselless conviction was held void, the reliability of the conviction under the firearms statute was unimportant. 445 U.S. at 67. The intent of Congress, the Court determined, was to prohibit anyone convicted of a felony from possessing a gun, regardless of whether that conviction was valid; the Court noted that the statute prohibits weapons possession by anyone under indictment, even if that person is later exonerated. *Id.* at 64.

Saying that it had "never suggested that an uncounseled conviction is invalid for all purposes," *id.* at 66-67, the Court approved as "rational" the congressional judgment that "a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of

Furthermore, the law of habeas corpus provides an analogy supporting the position that the exhaustion-of-remedies requirement may be inapplicable in exceptional circumstances. In *Fay v. Noia*,¹⁰⁶ a habeas corpus petitioner had failed to appeal his murder conviction. His codefendants, who had appealed unsuccessfully, won release on habeas corpus, on the grounds of unconstitutionally coerced confessions.¹⁰⁷ The district court denied the respondent's petition on the theory that he had waived his state remedy by not appealing.¹⁰⁸ The Supreme Court affirmed the reversal of the district court's decision, stressing the need to prevent denials of individual rights despite procedural defaults. "[C]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."¹⁰⁹ The Court also rejected the argument that the respondent's imprisonment was caused by his default rather than the constitutional improprieties in the earlier trial, saying that "a forfeiture of remedies does not legitimize the unconstitutional conduct by which his conviction was procured."¹¹⁰ As modified by *Wainwright v. Sykes*,¹¹¹ *Fay* established that a petitioner may not be denied habeas relief on the grounds of failure to raise an issue at trial if he can show cause for his inaction

persons who should be disabled from dealing in or possessing firearms because of potential dangerousness," *id.* at 67. The Court explained that "[e]nforcement of [an] essentially civil disability through a criminal sanction does not 'support guilt or enhance punishment,' . . . on the basis of a conviction that is unreliable when one considers Congress' broad purpose." *Id.* (quoting *Burgett v. Texas*, 389 U.S. 109, 115 (1967)). The reliability of the deportation order, by contrast, is precisely what is at issue. Therefore, collateral attacks by unrepresented aliens would not be precluded by the *Lewis* decision.

¹⁰⁶ 372 U.S. 391 (1963).

¹⁰⁷ *Id.* at 395.

¹⁰⁸ *United States ex rel. Noia v. Fay*, 183 F. Supp. 222 (S.D.N.Y. 1960).

¹⁰⁹ 372 U.S. at 424.

¹¹⁰ *Id.* at 428.

¹¹¹ 433 U.S. 72 (1977). The Court in *Fay* had held that a habeas corpus petitioner could be denied relief on the grounds of failure to exhaust only if he had "deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies." 372 U.S. at 438. By "deliberately," the Court meant "understandingly and knowingly" and "after consultation with competent counsel." *Id.* at 439. *Wainwright v. Sykes* criticized this "sweeping language," 433 U.S. at 87, and the "deliberate bypass" standard, substituting the "cause" and "prejudice" tests, *id.* at 84-85, 90-91. In his concurring opinion to *Sykes*, Chief Justice Burger suggested that the deliberate-bypass doctrine would continue to apply where the procedural decision was entrusted to the defendant himself rather than to counsel. For example, the doctrine would apply to a defendant's decision not to appeal, because it involves "the exercise of volition by the defendant himself with respect to his own federal constitutional rights." *Id.* at 92 (Burger, C.J., concurring).

and actual prejudice resulting from the constitutional violation that is the basis of his petition.

This rationale should apply to an alien, unrepresented at the deportation hearing, who is on trial in a section 1326 prosecution. An alien unrepresented by counsel often will have a good reason for not exhausting his remedies: in the absence of counsel, he may fail to understand the implications of his decision not to appeal.¹¹² Furthermore, the technical failure to exhaust remedies is not the reason the defendant is prosecuted under section 1326; rather, the faults of the deportation hearing are what caused the deportation order to be issued, and thus the alien should be allowed to expose those faults by means of a collateral attack.

CONCLUSION

The courts are divided over the availability of collateral attacks on deportation orders in section 1326 prosecutions. Although the statute is silent as to the need for a valid deportation, the legislative history and the structure of the immigration laws suggest that allowing collateral attacks is inconsistent with congressional intent.

Furthermore, there is no compelling reason to allow an alien represented by counsel at the deportation hearing to make a collateral attack. If he appealed the finding of deportability but lost, he should not be able to reenter the country without permission. If he failed to appeal, he may be presumed to have done so knowingly and intelligently; he should not be allowed to reenter even if it appears that the deportation order was improper.

In cases in which the alien was unrepresented by counsel, however, there may be serious doubt about whether he was able to participate intelligently in the deportation hearing. Therefore, the alien should be allowed to mount a successful collateral attack if he can show a denial of fundamental fairness or a substantial procedural impropriety at the hearing.

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¹¹² See text and notes at notes 89-90 *supra*.