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Deportation: Procedural Rights of Reentering Permanent Resident Aliens Subjected to Exclusion Hearings

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DEPORTATION: PROcedural RIGHTS OF
REENTERING PERMANENT RESIDENT ALIENS
SUBJECTED TO EXCLUSION HEarINGS

INTRODUCTION

Aliens admitted for permanent residence in the United States enjoy substantial constitutional protections. Despite the extent of these protections, permanent residents are subject to deportation by the Immigration and Naturalization Service (INS) in certain circumstances. The deportation procedures of the INS raise the issue whether these constitutional protections accompany and return with a permanent resident who temporarily leaves the country.

Deportability is determined at either an exclusion hearing, if the alien is apprehended at the border, or at an expulsion hearing, if the

1. The term “permanent resident” as used in this Note designates a lawful permanent resident alien, defined by statute as one who maintains the “status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.” 8 U.S.C. § 1101(20) (1976); see 8 C.F.R. §§ 101.1–3 (1982). An alien may apply for a visa for permanent residence, which is issued at United States consulates or embassies after the applicant has fulfilled the requirements of the visa procedure. H. Kapner & I. Field, Not For Illegal Aliens Only 2 (1978). A nonimmigrant, such as a visitor, may also become a permanent resident by having his status adjusted within the United States. See 8 C.F.R. § 245.1 (1982).

2. See infra pt. III. Permanent resident aliens, by virtue of their acquired status, enjoy significant constitutional protection in other contexts. See Hampton v. Mow Sun Wong, 426 U.S. 88, 116-17 (1976) (barring permanent residents from civil service jobs violates due process); Yick Wo v. Hopkins, 118 U.S. 356, 368-69 (1886) (recognizing that Chinese permanent residents are entitled to equal protection). Despite judicial and statutory declarations, however, these aliens are still not coequal in some respects. 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 1.31 (1982).

3. This Note relates only to aliens who allegedly violate provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1557 (1976 & Supp. V 1981), and would therefore be subject to expulsion or exclusion procedures.

4. One may be “deported” from the United States after having been found excludable or expellable. Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.4 (1953). “[E]xclusion” means preventing someone from entering the United States who is actually outside the United States or is treated as being so. ‘Expulsion’ means forcing someone out of the United States who is actually within the United States or is treated as being so.” Id. While various sources use the term “deportation” synonymously with “expulsion,” see Rosenberg v. Fleuti, 374 U.S. 449, 450-51 (1963) (“deportation” proceeding used to denote “expulsion” proceeding); 8 U.S.C. § 1251 (1976 & Supp. V 1981) (same); Note, Exclusion and Deportation of Resident Aliens: The Re-Entry Doctrine and the Need for Reform, 13 San Diego L. Rev. 192, 192 (1975) (same), this Note utilizes the term only in its generic sense. Thus, the term “expulsion hearing” refers solely to proceedings within the United States, and the term “exclusion hearing” refers solely to proceedings at the border.
alien is found within the United States.\textsuperscript{5} Expulsion proceedings afford significantly greater procedural protection to aliens than do exclusion proceedings.\textsuperscript{6} This enhanced protection is consistent with the practice of applying constitutional safeguards to anyone who has, legally or otherwise, entered the country.\textsuperscript{7}

When a permanent resident crosses the border for a temporary trip outside the United States, he may be subjected on his return to an exclusion proceeding in which his procedural rights are essentially limited to those held by first time entrants.\textsuperscript{8} Neither Congress, through the Immigration and Nationality Act of 1952 (Act),\textsuperscript{9} nor the executive branch, through the INS, has seen fit to require a greater degree of procedural protection for a reentering permanent resident subject to exclusion proceedings. Furthermore, while the Supreme Court has broadly construed the Act to permit permanent residents to take "innocent, casual, and brief" trips across the border without being regarded as entrants upon their return,\textsuperscript{10} the Court recently


\textsuperscript{6} See infra pt. I(B). The lesser procedural protections afforded by exclusion proceedings have been justified by the rationale that "[a]dmission of aliens to the United States is a privilege granted by the sovereign United States Government," United States \textit{ex rel.} Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950), and "[w]hatsoever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." \textit{Id.} at 544. This procedural distinction based on entry has led to the anomalous situation in which aliens illegally within the United States are entitled to expulsion hearings while aliens attempting to enter lawfully at the border are subject to exclusion hearings. See W. Van Vleck, \textit{The Administrative Control of Aliens} 32 (1971) (surreptitious entry entitles alien to expulsion hearing). \textit{Compare In re Phelisna, No. 82 Civ. 2112 (E.D.N.Y. Nov. 24, 1982)} (illegal alien, who intentionally and successfully evades inspection upon entry, subject only to expulsion hearing) \textit{with} Landon v. Plasencia, 103 S. Ct. 321, 328-29 (1982) (lawful permanent resident returning via inspection station subject to exclusion hearing).

\textsuperscript{7} See Plyler v. Doe, 102 S. Ct. 2382, 2400-02 (1982) (illegal alien children entitled to equal protection under fourteenth amendment); Hampton v. Mow Sun Wong, 426 U.S. 88, 116-17 (1976) (holding that permanent resident aliens cannot be barred from federal civil service jobs under due process clause of fifth amendment); Lem Moon Sing v. United States, 158 U.S. 538, 547-48 (1895) (holding that Constitution protects alien as long as he remains within the United States); Note, \textit{Constitutional Limits on the Power to Exclude Aliens}, 82 Colum. L. Rev. 957, 980 (1982) (arguing that aliens detained pending exclusion hearings should have same constitutional rights presently enjoyed by alien criminals within country) [hereinafter cited as \textit{Constitutional Limits}]; \textit{cf.} Johnson v. Eisentrager, 339 U.S. 763, 771-72 (1950) (Chinese enemy aliens who have not stepped inside United States have no constitutional rights).

\textsuperscript{8} See, e.g., Landon v. Plasencia, 103 S. Ct. 321, 328-29 (1982) (permanent resident subject to exclusion); Palatian v. INS, 502 F.2d 1091, 1094 (9th Cir. 1974) (same).


held that the character of their departure may properly be litigated in exclusion proceedings as well as in expulsion proceedings.11

This Note examines the adequacy of the exclusion procedures as they currently apply to reentering permanent residents. Proposals are set forth that would guarantee this class a fairer hearing on critical issues of deportability without infringing upon the important national interests in administrative efficiency and the exclusion of undesirable aliens. Part I distinguishes the procedural aspects of expulsion and exclusion hearings as provided in the Act and in the regulations issued by the INS. Part II discusses the evolution of the judicially created reentry exception dealing with the substantive aspects of alien admissibility, and the absence of a procedural counterpart to that exception. Part III balances the government’s interest in preserving the status quo against the benefits of instituting additional procedural safeguards such as those already available in expulsion proceedings.

I. EXPULSION AND EXCLUSION: STATUTORY CATEGORIES AND PROCEEDINGS

Xenophobic restrictions on immigration developed in the nineteenth century as a result of racial and religious prejudice and of fear that aliens in the work force would upset the economic stability of American industry.12 The implied theory of sovereign power, supplemented by the constitutional grants of power to Congress to regulate commerce with foreign nations and to establish uniform rules of naturalization,13 was initially cited as authorization for federal control of the borders.14 By the 1880’s Congress had exercised this power in several ways,15 most significantly by entrusting the executive

11. Landon v. Plascencia, 103 S. Ct. 321, 328-29 (1982). The Plasencia Court, while affirming the validity of subjecting reentering permanent residents to exclusion proceedings when detained at the border, expressly left open the question of whether such proceedings sufficiently comport with due process. Id. at 329.


13. U.S. Const. art. 1, § 8, cls. 3-4.

14. The Supreme Court early recognized that a sovereign’s “[j]urisdiction over its own territory . . . is an incident of every independent nation. . . . If it could not exclude aliens it would be to that extent subject to the control of another power.” Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 603-04 (1889); accord United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893); Constitutional Limits, supra note 7, at 966-67 & n.69; see Edye v. Robertson (Head Money Cases), 112 U.S. 580, 591-92 (1884) (same). See generally Restatement of Foreign Relations Law § 722 reporters’ notes 1 (Tent. Draft No. 3, 1982) (sovereign power and constitutional authority to regulate aliens).

15. Congress had acted: 1) to exclude Chinese resident laborers who had previously obtained statutory permission to return to the United States, see Chae Chan
branch with sole and exclusive authority to regulate alien admissibility. Thus, as long as an immigration officer did not abuse his discretion in determining an alien's deportability from the United States, his judgment was final and not subject to judicial review. This latitude in decision-making applied to hearings conducted at the border as well as to hearings conducted within the country.

A. Categories for Expellability and Excludability

Any alien within the United States may be subjected to expulsion hearings if he falls within one or more of nineteen categories enumerated in the Act. An alien attempting to enter the United States at an authorized border crossing may be subjected to exclusion hearings if he falls within one or more of thirty-three enumerated categories. Certain aliens, such as smugglers and anarchists, fall within both expulsion and exclusion categories and may therefore be subjected to

Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 599 (1889); 2) to refuse reentry to a lawful resident alien on the basis that his constitutional rights were protected only on United States soil, see Lem Moon Sing v. United States, 158 U.S. 538, 547-48 (1895); and 3) to override the effect of treaties by passing restrictive legislation, see Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 599-601 (1889); Chew Heong v. United States, 112 U.S. 536, 554 (1884).


19. See 8 U.S.C. § 1251(a)(1)-(19) (1976 & Supp. V 1981). Included in these categories, for example, are aliens who were legally excludable at the time of entry but who nonetheless were admitted into the country, id. § 1251(a)(1) (1976), aliens who entered the United States without proper inspection, id. § 1251(a)(2), aliens who become public charges within five years of entry, id. § 1251(a)(3), aliens who are convicted of a crime of moral turpitude and are imprisoned for a year or more within five years of entry, or who at any time after entry are convicted of two crimes of moral turpitude, id. § 1251(a)(4), aliens who are or have been, after entry, anarchists, Communists, subversives, etc., id. § 1251(a)(6), and aliens who, at any time prior to entry and within five years after entry, knowingly and for gain encouraged, assisted or aided any other alien to enter the United States illegally, id. § 1251(a)(13).

20. See 8 U.S.C. § 1182(a)(1)-(33) (1976 & Supp. V 1981). These include, for example, aliens who are mentally retarded, id. § 1182(a)(1) (1976), are insane, id. § 1182(a)(2), are drug addicts or chronic alcoholics, id. § 1182(a)(5), are afflicted
either hearing depending on their point of apprehension. However, if an alien falls within one of the fourteen non-coextensive categories, he may be subjected only to the applicable hearing as set forth in the statute.

The fact that there are more grounds for exclusion than grounds for expulsion is consistent with the notion that aliens within the United States should enjoy relative freedom from the strong arm of sovereign power in its control of immigration. Also consistent with this notion is that even when an alien is subjected to an expulsion hearing, he is afforded various procedural safeguards unavailable to entrants in exclusion proceedings.

B. Proceedings

1. Expulsion Proceedings

In the expulsion process, which takes place near the alien’s home, an order to show cause must be given to the alien containing a statement of the nature of the proceeding, factual allegations informing the alien of the allegedly illegal conduct, and a designation of the charges and statutory provisions involved. Additionally, the alien is

with dangerous contagious diseases, id. § 1182(a)(6), are paupers, id. § 1182(a)(8), have been convicted of or admit to having committed crimes of moral turpitude, id. § 1182(a)(9), are stowaways, id. § 1182(a)(18), are anarchists or Communists, id. § 1182(a)(28)(A), (C), and, at any time, knowingly and for gain encouraged, assisted or aided any other alien to enter the United States illegally, id. § 1182(a)(31).

21. Compare id. § 1251(a)(13) (smugglers expellable) and id. § 1251(a)(6)(A) (anarchists expellable) with id. § 1182(a)(31) (smugglers excludable) and id. § 1182(a)(28)(A) (anarchists excludable).

22. Not all expellable categories correspond to excludable categories and vice versa. Thus, it is possible for a permanent resident to become afflicted with tuberculosis in the United States and not be expellable when the same affliction would render him excludable upon entry into the United States. See id. § 1182(a)(6) (category excluding aliens afflicted with any dangerous contagious disease); Report of the President’s Comm. on Immigration and Naturalization, Whom We Shall Welcome 179 (Jan. 1, 1953), reprinted in 6 Immigration and Nationality Acts Legislative Histories and Related Documents (O. Trelles, II & J. Bailey, III, eds. 1979) (Document 11) [hereinafter cited as Pres. Comm. Report].

23. See supra note 2 and accompanying text.

24. See 1A C. Gordon & H. Rosenfield, supra note 2, § 5.6(c). While the Code of Federal Regulations does not specifically require that expulsion hearings be held near the alien’s domicile, proximity may be inferred by the requirement that service be either personal or routine. See 8 C.F.R. § 241.1(c) (1982).

25. 8 C.F.R. § 242.1(b) (1982). Moreover, if the alien has been personally served, he is advised of his right to counsel, the availability of free legal services and the right to appeal at the time of service. Id. § 242.1(c).

Congress authorized the Attorney General to prescribe regulations not inconsistent with the following requirements:
entitled to notice of the time and place of the hearing no less than seven days before the hearing date. At the hearing itself, the immigration judge must advise the alien of his right to obtain counsel and of the availability of free legal services programs in the particular district where the hearing is being held. The immigration judge also must ascertain whether the alien has received a “Written Notice of Appeal Rights,” and must inform him that he will have a reasonable opportunity to examine and object to evidence, to present his own evidence and to cross-examine witnesses.

Expulsion hearings are open to the public, and a decision of deportability is invalid unless it is based on “clear, unequivocal and convincing” evidence. The burden of proving deportability is on the government; the alien needs to show only the time, place and manner of his entry. If the alien is deemed deportable, he may appeal to

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;
(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;
(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and
(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

28. 8 C.F.R. § 242.16(a) (1982).
29. Id.
30. Id.
31. Id.
32. Id. § 242.14(a) (1982). The standard set forth in the Act required only reasonable, substantial and probative evidence. See supra note 25. However, the Supreme Court in Woodby v. INS, 385 U.S. 276 (1966), stated that the statutory standard applied to the scope of judicial review and not to the burden of proof. Id. at 282-83. Thus, the Court held that Congress had not addressed the question of degree of proof, and determined that an expulsion order could not be entered “unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true.” Id. at 286. Thereafter, the Regulations were amended to replace the statutory standard with the Woodby standard without distinguishing, as the Court had done, between the scope of judicial review and the burden of proof. See 32 Fed. Reg. 2883 (1967) (codified at C.F.R. § 242.14(a) (1982)).
34. Id. In presenting such proof, an alien is entitled to the production of any nonconfidential document pertaining to entry in the custody of the INS. Id.
the Board of Immigration Appeals; an unfavorable ruling from the Board may be further appealed to the United States Court of Appeals. If the expulsion order is upheld, the alien may designate the country of deportation and, in some cases may depart voluntarily to avoid the stigma of expulsion. In the alternative, he may appeal to the Attorney General, who may suspend deportation and, barring express congressional disapproval, may adjust the alien's status to that of alien lawfully admitted for permanent residence. Finally, if the alien's designated country refuses to accept him, then depending on the alternate plans made for him by the immigration judge, the alien may apply for a withholding of deportation on the ground that he would suffer racial, religious or political persecution in the country designated by the immigration judge.

2. Exclusion Proceedings

In exclusion proceedings at the border, the only prior notice that must be given to the alien is a "Notice to Alien Detained for Hearing by an Immigration Judge," a form that is completed by the examining officer and generally given to the alien on the day of the hearing. At the hearing itself, the alien is first informed of the nature and

35. 8 C.F.R. § 242.21 (1982).
37. Id. § 1253(a) (1976 & Supp. V 1981). If the Attorney General concludes, however, that deportation to such country would be prejudicial to the United States' interests, or if the designated country fails to accept the alien, then the Attorney General may, in his discretion, designate the country of deportation. Id.
38. Id. § 1254(e) (Supp. V 1981); 8 C.F.R. § 242.17(b) (1982).
40. 8 U.S.C. § 1253(h)(1) (Supp. V 1981); 8 C.F.R. § 242.17(c) (1982). These provisions have been strictly limited to expellable aliens. In In re Milanovic, 162 F. Supp. 890 (S.D.N.Y. 1957), aff'd per curiam sub nom. United States ex rel. Milanovic v. Murff, 253 F.2d 941 (2d Cir. 1958), the court refused to withhold deportation of an excludable alien, reasoning that the alien had to be within the United States "to meet the literal requirements of [that section]." Id. at 894. However, the Code of Federal Regulations provides asylum procedures for excludable aliens. See 8 C.F.R. § 236.3 (1982).
41. 8 C.F.R. § 235.6(a) (1982). An immigration judge presides over both expulsion and exclusion hearings. Compare id. § 242.16 (describing duties of immigration judge at expulsion hearing) with id. § 236.2 (describing duties of immigration judge at exclusion hearing).
42. See Landon v. Plascencia, 103 S. Ct. 321, 324 (1982) (notice dated same day as hearing); see also 8 C.F.R. § 236.2 (1982) (no formal notice of charges); 1 C. Gordon & H. Rosenfield, supra note 2, § 3.19(a), at 3-182 (same).
purpose of the hearing, his right to counsel, the availability of free legal services, and the reasonable opportunity he will have to examine and produce evidence and to cross-examine witnesses.43

Exclusion hearings are closed to the public unless the alien expressly requests that the public be invited,44 and no provision establishes the degree to which excludability must be proved. The burden of proving appropriate entry status is on the alien,45 and if he fails initially in that burden, he may generally appeal to the Board of Immigration Appeals.46 However, an alien may not appeal an unfavorable ruling by the Board to the court of appeals, but is limited instead to a petition for writ of habeas corpus.47 If the exclusion is upheld, the alien is deported to the country from which he arrived.48 The discretionary withholding of deportation on the grounds that the alien will be subject to persecution is unavailable to the excluded alien, as are provisions for suspension of deportation and adjustment of status.49

43. 8 C.F.R. § 236.2(a) (1982). The consolidation of notice and hearing is "dictated by the nature of the proceedings. In an exclusion case the alien is seeking a privilege and he must establish his claim, [whereas] in an expulsion case the government is moving to dislodge a privilege of continued residence . . . ." 1 C. Gordon & H. Rosenfield, supra note 2, § 319(a), at 3-182 (footnote omitted). This justification is inapplicable to reentering permanent residents, however, who have already been granted the privilege to enter the country.

44. 8 C.F.R. § 236.2(a) (1982). Under the Act, the alien is permitted to have one friend or relative present. 8 U.S.C. § 1226(a) (1976).

45. 8 U.S.C. § 1361 (Supp. V 1981). This provision has been judicially modified as it relates to reentering permanent residents. See infra text accompanying note 115.

46. 8 U.S.C. § 1226(b) (1976); 8 C.F.R. § 236.7(a)-(b) (1982). The Attorney General, in the exercise of his powers under 8 U.S.C. 1103(a) (1976), delegated the authority to hear appeals to the Board. In certain instances, as when an alien is afflicted with a mental disease, no appeal may be taken. Id. § 1226(d).


48. Id. § 1227(a) (Supp. V 1981). The original statutory language calling for deportation of the alien to the country "whence he came," id. (1976), had fostered confusion and often bizarre results. See, e.g., Stacher v. Rosenberg, 216 F. Supp. 511, 513-14 (S.D. Cal. 1963) (holding that because United States was last place of abode, permanent resident could not be sent to original home in Russia and therefore was not deportable); In re Milanovic, 162 F. Supp. 890, 896-97 (S.D.N.Y. 1957) (holding that Yugoslav national who formulated intent to emigrate to United States while residing in Belgium could not be sent back to Yugoslavia), aff'd per curiam sub nom. United States ex rel. Milanovic v. Murff, 253 F.2d 941 (2d Cir. 1958); 1 C. Gordon & H. Rosenfield, supra note 2, § 3.25, at 3-208. But see Palatian v. INS, 502 F.2d 1091, 1094 (9th Cir. 1974) (Bulgarian permanent resident, residing in the United States several years sent back to Bulgaria). It is still unclear, however, whether the country in which the alien boarded the vessel refers to his initial entry or his reentry.

49. The Act does provide limited exceptions to mandatory excludability, see 8 U.S.C. § 1182(b)-(d) (1976 & Supp. V 1981), including discretionary relief for reentering permanent residents: "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive
Strict judicial and administrative adherence to the language of the Act and regulations, which places heavy emphasis on the location of apprehension, will cause reentering permanent residents to lose the important procedural advantages they enjoy within the United States. While the reentering alien subject to exclusion proceedings has the same right to counsel and right to present and object to evidence as he has in expulsion proceedings, these protections are rendered virtually meaningless by inadequate notice, the inability to appeal directly to the court of appeals, and the absence of discretionary relief on persecution or hardship grounds.\textsuperscript{50}

\section*{II. The Supreme Court and the Reentry Doctrine}

The judiciary has played a particularly limited role in policing congressional and administrative policies toward exclusion and expulsion of aliens.\textsuperscript{51} It has generally confined its review of legislative and executive determinations to instances in which due process safeguards have been jeopardized.\textsuperscript{52} Nevertheless, the Supreme Court has at times circumvented the rigidity of the Act's classifications by carving out exceptions when permanent resident status was at stake.\textsuperscript{53}

\begin{quotation}

years, may be admitted in the discretion of the Attorney General . . . .” \textit{Id.} § 1182(c) (1976).

\textsuperscript{50} See \textit{supra} notes 39-40 and accompanying text.

\textsuperscript{51} Seven years after striking down a municipal ordinance discriminating against Chinese launderers as violative of the equal protection clause, \textit{see} \textit{Yick Wo v. Hopkins}, 118 U.S. 356, 373-74 (1886), the Supreme Court readily conceded that it was not within the province of the judiciary to admit aliens contrary to the lawful measures of the legislative and executive branches, \textit{see} \textit{Fong Yue Ting v. United States}, 149 U.S. 698, 713 (1893); \textit{Nishimura Ekiu v. United States}, 142 U.S. 651, 659-60 (1892).

\textsuperscript{52} In \textit{The Japanese Immigrant Case}, 189 U.S. 86 (1903), a Japanese illegal alien challenged the constitutional propriety of the proceedings at which he was held deportable. Justice Harlan, while reiterating that executive action is not subject to judicial review, stated that the Supreme Court “has never held . . . that administrative officers . . . may disregard the fundamental principles that inhere in ‘due process of law’ as understood at the time of the adoption of the Constitution.” \textit{Id.} at 100. Similarly, in \textit{Tang Tun v. Edsell}, 223 U.S. 673 (1912), the Court held that because the due process requirements of a hearing and an opportunity to face witnesses were fulfilled, a Chinese alien returning to the United States was properly excluded. \textit{Id.} at 681-82; \textit{see} \textit{Hampton v. Mow Sun Wong}, 426 U.S. 88, 116-17 (1976) (holding that regulation barring aliens from civil service violates due process); \textit{Galvan v. Press}, 347 U.S. 522, 530 (1954) (holding that deportable aliens must be protected by due process “sense of fair play”); \textit{Kwong Hai Chew v. Colding}, 344 U.S. 590, 596-97 (1953) (holding that permanent resident cannot be excluded without notice and a hearing). \textit{See generally} Davis, \textit{The Requirement of a Trial-Type Hearing}, 70 Harv. L. Rev. 193, 248-56 (1956) (discussing when aliens may be accorded due process).

\textsuperscript{53} See \textit{infra} text accompanying notes 59-60.
\end{quotation}
A. Evolution of the Reentry Doctrine

While courts gradually accorded due process and other constitutional rights to aliens within the United States, the status of reentering permanent residents, particularly in relation to the entry provisions of the immigration laws, was initially unrecognized. In *United States ex rel. Volpe v. Smith*, an Italian permanent resident who had served a prison sentence for counterfeiting was held deportable after a brief trip to Cuba. Under the applicable immigration statute, an alien was prohibited from entering the United States if he had previously been convicted of a crime of moral turpitude. Had the alien never left the country, his conviction would not have rendered him deportable as it was handed down subsequent to his initial entry. The Supreme Court was apparently unconcerned that an innocent excursion across the border could subject an unwary permanent resident to the consequences of "entry."

Volpe's harsh implications were thereafter tempered in *Delgadillo v. Carmichael*, in which the Court held that a permanent resident did not "enter" for immigration purposes when he was rescued from a sinking ship and taken involuntarily to Cuba before reentering the United States. The Court relied primarily on a then recent Second Circuit decision in which Judge Learned Hand prophetically stated...

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55. 289 U.S. 422 (1933).

56. Id. at 423-24.

57. Id. at 424-26. The Court in Volpe relied on provisions of the Immigration Act of 1917, ch. 29, secs. 3, 19, 39 Stat. 874, 875, 889, 890 (current version at 8 U.S.C. §§ 1182, 1251 (1976 & Supp. V 1981)), which state in pertinent part that aliens "who [have been] convicted, or who [admit] the commission... of a felony or other crime or misdemeanor involving moral turpitude" shall be excludable, 39 Stat. at 889 (current version at 8 U.S.C. § 1182(a)(9) (1976)), and that "at any time within five years after entry, any alien who at the time of entry was [excludable] by law... shall... be taken into custody and deported," id. (current version at 8 U.S.C. § 1251(a)(1) (1976)). Thus, Volpe's conviction prior to his brief trip outside the United States rendered him excludable on his reentry; that he secured admission by an immigration inspector in Florida did not prevent his expulsion on grounds of excludability at the time of reentry.

58. The Court viewed "entry" as "any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one." 289 U.S. at 425 (emphasis added). Even though Volpe's initial entry took place 19 years before his counterfeiting conviction, the Court looked to his reentry from a brief trip to Cuba as an "entry" for purposes of the statute.


60. Id. at 389-91. The Court noted that "the exigencies of war, not his voluntary act, put him on foreign soil." Id. at 391 (footnote omitted).

that "Congress [could not have] meant to subject those who had acquired a residence, to the sport of chance, when the interests at stake may be so momentous."\(^{62}\)

According "due recognition" to these judicial precedents,\(^{63}\) Congress in 1952 enlarged the "entry" definition in the Act:

The term "entry" means any coming of an alien into the United States . . . except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry . . . for the purposes of the immigration laws if the alien proves . . . that his departure . . . was not intended or reasonably to be expected by him or his presence in a foreign place . . . was not voluntary.\(^{64}\)

The loophole created for permanent residents in this entry definition left unresolved the procedural issue whether exclusion proceedings are the proper forum for "entry" determinations. Interestingly, six months after Congress passed this new version of the Immigration Act, the Supreme Court held in *Kwong Hai Chew v. Colding*\(^{65}\) that the Attorney General was not authorized to exclude a reentering permanent resident without notice and an opportunity to be heard.\(^{66}\)

The Court stated that "[f]or purposes of his constitutional right to due process, [it would] assimilate petitioner's status to that of an alien continuously residing and physically present in the United States."\(^{67}\)

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62. *Id.* at 879. In *Di Pasquale*, a permanent resident who inadvertently passed through Canada on a sleeping car from Buffalo to Detroit was held not to have "entered" within the meaning of the statute. *Id.* at 878-79. The court reasoned:

[Concededly he was not subject to deportation except for his journey between Buffalo and Detroit; he had a vested interest in his residence, which could not be impaired so long as he avoided another conviction. That interest now to be forfeited because of perfectly lawful conduct which he could not possibly have supposed would result in anything of the sort. . . . Nothing can be more disingenuous than to say that deportation in these circumstances is not punishment.

Id. at 879; see Carmichael v. Delaney, 170 F.2d 239, 242-43 (9th Cir. 1948) (permanent resident merely obeying navy orders did not "enter"); Yukio Chai v. Bonham, 165 F.2d 207, 208 (9th Cir. 1947) (per curiam) (permanent resident did not "enter" when ship from Alaska made unscheduled stop in Victoria).


65. 344 U.S. 590 (1953).

66. *Id.* at 597. In *Chew*, a permanent resident seaman was detained and temporarily excluded without a hearing as an alien whose entry would be prejudicial to the public interest. *Id.* at 592-95.

67. *Id.* at 596 (footnote omitted). Thus, by treating a reentering permanent resident as though he never left the country, the Court seemed to suggest that only procedures similar to those available in expulsion hearings would be appropriate for such aliens. *Id.*
With the exception of *Chew*, however, the Court seemed unwilling to construe procedural provisions with the same expansiveness it accorded substantive provisions.

**B. The Fleuti Test**

*Rosenberg v. Fleuti*\(^{68}\) represents the Court's most liberal approach to the issue of permanent resident status upon reentry. In that case, a Swiss national admitted for permanent residence in 1952 was held expellable by the INS on grounds that he was excludable as a homosexual at the time of his reentry in 1956 after a brief visit to Mexico.\(^{69}\) The Court, in vacating the deportation order, focused on the scope of the entry exception in the Act\(^{70}\) and held that the entry exception not only included involuntary and unexpected departures from the United States, but also included any excursion which was "innocent, casual and brief."\(^{71}\) Because the Swiss permanent resident's trip to Mexico in 1956 was such an excursion, his departure was not "meaningfully interruptive of [his] permanent residence."\(^{72}\) Therefore, he did not "enter" for purposes of the immigration laws and was not subject to expulsion.

*Fleuti*, under the guise of statutory interpretation, is striking in its disregard for congressional and executive authority in immigration matters.\(^{73}\) The reentry doctrine it enunciated, however, has been implicitly accepted by Congress\(^{74}\) and has been adopted wholeheart-

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69. *Id.* at 450-51. See *supra* note 45. The court of appeals set aside the deportation order, holding that the statutory term "psychopathic personality" was unconstitutionally vague as applied to homosexuals. *Fleuti v. Rosenberg*, 302 F.2d 652, 658 (9th Cir. 1962), *vacated and remanded*, 374 U.S. 449 (1963).
70. The Court avoided the vagueness issue raised by the Ninth Circuit. 374 U.S. at 451.
71. *Id.* at 461-63.
72. *Id.* at 462. The Court outlined several factors bearing on whether a departure from the United States is "meaningful." These include the length of time the alien is absent, whether travel documents must be procured and the purpose of leaving the country. *Id.* If the alien intends "to accomplish [on his trip] some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful." *Id.*
73. The Court cited Congress' intent in 1952 to incorporate the liberal *Di Pasquale* and *Delgadillo* decisions into the entry provision as justification for stretching the literal meaning of the words of the Act. *Id.* at 458. A vigorous dissent, however, stated pointedly that the majority was "constructing" rather than "construing" the statute, a function that should be reserved for Congress. *Id.* at 463 (Clark, J., dissenting).
74. See *infra* text accompanying notes 102-04.
edly by the INS.\textsuperscript{75} Subsequent elaborations on the doctrine merely construe the extent to which a departure under \textit{Fleuti} is "meaningful."\textsuperscript{76}

Although \textit{Fleuti} was an expulsion case, its reentry test has been applied with equal force in exclusion proceedings,\textsuperscript{77} resulting in three different situations. First, if the reentering permanent resident is found by the immigration judge to have made a "meaningful departure" from the country, he is deemed an entrant and may be excluded at the border if the judge further determines that he falls within at least one of the thirty-three categories of excludability. For example, a reentering permanent resident who attempts to smuggle in nonresident aliens has made a "meaningful departure" within the meaning of \textit{Fleuti} and may therefore be excludable under section 212(a)(31) of the Act.\textsuperscript{78}

Second, if the permanent resident is found not to have made a "meaningful departure," he is not deemed an entrant and is therefore not subject to exclusion. In this situation, the alien may be admitted; if his alleged violation was only an excludable and not an expellable offense, such as his becoming insane during his initial residence in the country, the alien will not be subject to further INS proceedings.\textsuperscript{79}

Lastly, if this admissible alien does fall within one of the nineteen categories of expellability, he may then face an expulsion hearing within the United States.\textsuperscript{80} This would occur, for instance, if the alien


\textsuperscript{76} See, e.g., \textit{Vargas-Banuelos v. INS}, 466 F.2d 1371, 1372-74 (5th Cir. 1972) (since alien did not intend to interrupt status at time of departure, criminal purpose formed in Mexico to smuggle aliens not meaningful); \textit{Yanez-Jacquez v. INS}, 440 F.2d 701, 704 (5th Cir. 1971) (permanent resident, while intending to avenge his robbery on a brief trip to Mexico, did not intend to interrupt his resident status; therefore trip not meaningful). \textit{But see In re Guimaraes}, 10 I. & N. Dec. 529, 531-32 (1964) (holding that intent to return does not mean alien did not intend to meaningfully depart where trip required passport and other documents).

\textsuperscript{77} See, e.g., \textit{Maldonado-Sandoval v. INS}, 513 F.2d 278, 281 (9th Cir. 1975); \textit{Palatian v. INS}, 502 F.2d 1091, 1092-93 (9th Cir. 1974); \textit{Itzcovitz v. Selective Serv.}, 447 F.2d 888, 889, 894 (2d Cir. 1971).


\textsuperscript{79} \textit{See Itzcovitz v. Selective Serv.}, 447 F.2d 888, 891-94 (2d Cir. 1971) (permanent resident would not "enter" for purposes of excludability so that 8 U.S.C. § 1182(a)(22) (1976), excluding aliens who are ineligible for citizenship, would not apply to him); \textit{Pres. Comm. Report, supra note 22, at 180 (If a permanent resident would not be "subject to [expulsion] had [he] remained in the United States, [his] brief absence should not create [a] basis for exclusion.").

\textsuperscript{80} See \textit{Maldonado-Sandoval v. INS}, 513 F.2d 278, 279-81 (9th Cir. 1975) (holding that permanent resident who did not make entry and therefore was not amenable to exclusion under 8 U.S.C. § 1182(a)(20) (1976) as an alien not in
was twice convicted of a crime of moral turpitude while residing in the United States, thereby falling within both categories of deportability. Thus, the reentry exception's broadening of substantive rights affects permanent residents as a class, and is not conditioned on the type of hearing in which it is applied.

C. Plasencia’s Resolution of the Forum Question

Despite a few scattered calls for procedural justice, the judiciary has not broadened the scope of procedural rights in exclusion hearings to match the liberality of the Fleuti doctrine. In fact, the Supreme Court recently emphasized the distinction between the substantive and procedural rights of reentering permanent resident aliens in Landon v. Plasencia. In that case, a permanent resident was stopped with her American husband at the border while attempting to smuggle nonresidents into the United States from Mexico, and within twenty-four hours of apprehension was found to be excludable by the INS. The district court vacated this decision, relying on a magistrate’s report that a meaningful departure had not occurred and that Plasencia was therefore entitled to an expulsion hearing. The Court of Appeals affirmed, reasoning that Fleuti was a deportation case in which “[t]he Court neither held nor implied that the question of Fleuti’s ‘entry’ . . . could have been decided in exclusion proceedings.”

The Supreme Court reversed, noting that “[i]t is no more ‘circular’ to allow the immigration judge in the exclusion proceeding to deter-

possessive of valid immigrant visa, may still be amenable to expulsion under 8 U.S.C. § 1251(a)(1) (1976) as an alien excludable at time of initial entry).

81. See Kwong Hai Chew v. Colding, 344 U.S. 590, 600 (1953) (permanent resident entitled to due process “without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien”); Stacher v. Rosenberg, 216 F. Supp. 511, 514 (S.D. Cal. 1963) (“Congress did not contemplate that the exclusionary procedures would be used in a typical expulsion case.”); see also Pres. Comm. Report, supra note 22, at 180 (provisions relating to exclusion should not be applicable to reentering permanent residents).

82. 103 S. Ct. 321 (1982).

83. Id. at 325.

84. Plasencia v. Sureck, 637 F.2d 1286, 1288 (9th Cir. 1980), rev’d sub nom. Landon v. Plasencia, 103 S. Ct. 321 (1982). The circuit court mistakenly relied on an earlier decision, Maldonado-Sandoval v. INS, 518 F.2d 278 (9th Cir. 1975), for this proposition. See 637 F.2d at 1288-89. In that case, the court ruled that when evidence appears during an exclusion proceeding that an alien is a permanent resident seeking to reenter after a brief trip outside the United States, the proceeding shall be terminated. The INS may then institute expulsion proceedings to determine whether the alien committed an expellable act. 518 F.2d at 281. The court in Plasencia misinterpreted the fact that in Maldonado-Sandoval, “entry” was determined in the exclusion proceeding. Only when the Maldonado court was satisfied that the permanent resident made a brief—Fleuti-type—excursion did it hold that the alien had not “entered” and therefore could not be subject to exclusion. Id. at 280-81.
mine whether the alien is making an entry than it is for any court to decide that it has jurisdiction when the facts relevant to the determination of jurisdiction are also relevant to the merits.” The Court then held that the entry question may be properly determined in exclusion hearings as long as they are fair.

The Court, while distinguishing the entry issue from the forums in which it is decided, expressly declined to consider the alleged due process flaws in exclusion proceedings as currently applied to permanent residents. The Court merely outlined the steps necessary to evaluate the constitutional sufficiency of exclusion procedures:

[T]he courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of [a permanent resident’s interest in residing in the United States] through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.

In light of the Court’s willingness two decades ago to virtually “construct” a definition of entry that would take into account the uniqueness of permanent resident status, the Plasencia Court was exceedingly cautious in its strict adherence to the procedural requirements of the Act. Although the Court made clear that the Fleuti doctrine could not be superimposed on procedural issues, it did suggest that a court must balance the adequacy of minimal procedural safeguards at an exclusion proceeding with the risk of erroneously depriving a permanent resident of his previously granted right to reside in the United States.

85. 103 S. Ct. at 328. The Court also noted that Fleuti “only defined ‘entry’ and did not designate the forum for deciding questions of entry.” Id. at 329 (emphasis added).
86. Id. at 328.
87. Id. at 329 (“[W]e do not decide the contours of the process that is due or whether the process accorded Plasencia was insufficient.”).
88. Id. at 330 (citing Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976)). The Court then enumerated three possible procedural deficiencies for the court of appeals to explore on remand, including burden of proof, id. at 330-31, inadequate notice, id. at 331, and waiver of right to counsel without an understanding of the consequences, id. Also, the Court acknowledged that Plasencia’s hearing preceded the effective date of the regulation requiring notice of the availability of free legal services, but declined to decide whether the absence of this benefit was of constitutional magnitude or whether the remaining procedures by themselves comported with due process. Id.
90. The Court stated that there was “no explicit statutory or regulatory authorization for a continuance,” 103 S. Ct. at 331, no statement in the regulations as to burden of proof, id., and no statutory language suggesting that permanent resident status entitles such aliens to a suspension of the exclusion hearing, id. at 326.
III. THE PROCESS DUE A REENTERING PERMANENT RESIDENT ALIEN

Immigration laws are by nature restrictive because their purpose is to protect the national interest in a stable and productive society from the effects of a possible inundation of potentially burdensome and undesirable aliens.91 Such excludable individuals include criminals, illiterates, stowaways, vagrants, incompetents, subversives and other disruptive persons.92 This purpose is not frustrated, however, by affording previously welcome aliens the procedural safeguards to which they became entitled upon initially entering the country. Greater procedural protection will not prevent the ouster from the United States of aliens who are found to have violated the immigration laws. Judge Learned Hand recognized this distinction when he stated: "It is well that we should be free to rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality once granted, shall not be subject to meaningless and irrational hazards."93

Administrative expediency has also been cited as a justification for summary exclusion proceedings.94 Because aliens at the border are often first-time entrants, they possess no inherent constitutional rights that would conflict with the government's interest in avoiding administrative and financial burdens. When constitutional rights of permanent residents are involved, however, the justification of administrative efficiency is less compelling, particularly when additional procedures would produce only minimal inconvenience.95 Thus, without disrupting what the Plasencia Court referred to as "[t]he government's interest in efficient administration of the immigration laws at the border,"96 certain procedural safeguards already available in expulsion hearings could be readily adapted to exclusion hearings for reentering permanent residents.

96. 103 S. Ct. at 330.
A. Legislative Recognition of Permanent Resident Aliens' Unique Status

Despite the Plasencia Court's assertion that the legislative history of the Act does not require expulsion hearings to be the exclusive forum for permanent residents,97 there are other indications of legislative intent to provide permanent residents with greater constitutional protection than that presently afforded in exclusion hearings. For example, the policy of promoting and preserving the family unit underlies many of the immigration provisions enacted by Congress in 1952.98 The clearest manifestation of this concern is the comparative ease with which aliens with relatives in the United States can obtain immigrant visas.99 To do otherwise would result in splitting families apart without the benefit of adequate proceedings, and would contradict this well-defined policy.

Even more relevant are the Act's provisions relating directly to permanent residents. Not only has Congress included a discretionary waiver by the Attorney General of excludability for permanent residents returning to an unrelinquished domicile in the United States of seven consecutive years,100 but it also has consistently provided for preferential treatment of immigrants whose relatives are either citizens or permanent residents of the United States.101 This statutory coupling of citizenship and permanent resident status is evidence of congressional awareness that permanent resident status is closer in nature to that of citizenship than to that of a first-time entrant.

Furthermore, congressional reticence regarding the Fleuti doctrine may be interpreted as acquiescence in the Supreme Court's more flexible approach toward the reentry exception. This conclusion is reasonable in light of Congress' otherwise assertive stance on immigration matters as demonstrated by amendments abolishing the national quota system102 and according greater flexibility to the Attorney General in designating countries of deportation.103 Thus, Congress' defer-

97. Id. at 326-27.
100. See supra note 49.
101. See, e.g., 8 U.S.C. § 1182(i) (1976) (excludable alien who fraudulently procured visa may be admitted in the discretion of the Attorney General if he is related to a permanent resident or a United States citizen); id. § 1251(f) (Supp. V 1981) (expellable alien who fraudulently procured visa may not be deported from the United States if he is related to a permanent resident or citizen of the United States).
ence to the Court's handling of a traditionally legislative function—the making of immigration policy—is an indication that it may not object to judicial modifications of the statutory exclusion procedures as applied to permanent residents. 104

B. Administrative and Judicial Recognition of Permanent Resident Aliens' Unique Status

1. INS Regulations

While Congress has plenary powers to enact legislation regarding the procedural rights of reentering permanent resident aliens, its entrustment to the INS of authority to promulgate rules renders that body's determinations a viable alternative to legislative action. The INS has recently issued regulations enhancing procedural rights for aliens subject to deportation by requiring immigration judges to advise these aliens of the availability of legal services within the district (or border area) in which the hearing is held. 105 The INS should extend this practice of expanding procedural protections by establishing new rules requiring adequate prior notice of exclusion proceedings to allow permanent residents an opportunity to obtain counsel and prepare a sufficient defense against excludability. 106 Such rules should also embody the accepted practice of placing the burden of proof on the government to establish excludability, 107 and should require a higher standard of proof that would comport with the "clear, unequivocal and convincing" standard in expulsion hearings. Moreover, an excludable permanent resident should be given some choice concerning the country of deportation in light of the fact that his last "abode" was within the United States. 108 Finally, rules should be adopted that allow a permanent resident to appeal directly to the court of appeals rather than to a district court via habeas corpus, and which provide for the possibility of suspending deportation in a manner consistent with that applied in expulsion hearings.

While such modifications appear virtually identical to procedures available in expulsion hearings, significant distinctions would remain

104. Congress' acquiescence in judicial procedural modifications is already manifested by the unchallenged adoption by courts and the INS of the Chew v. Rogers rule. See infra text accompanying note 115.

105. See 44 Fed. Reg. 4651 (1979) (codified in scattered sections of 8 C.F.R. sub ch. B (1982)). The INS also recently ruled that application for adjustment of status to that of permanent residence may be renewed in exclusion hearings as well as in expulsion hearings. See 43 Fed. Reg. 16,445 (1978) (codified at 8 C.F.R. § 236.4 (1982)).


107. See infra text accompanying note 115.

108. See supra note 48 and accompanying text.
between the proceedings which satisfy both the need for administrative efficiency and the language of Plasencia. First, the proposed rules would be implemented at the border, thus requiring only one hearing to determine excludability rather than the two-hearing process suggested by the Ninth Circuit in Plasencia v. Sureck. Indeed, it might be possible to merge the exclusion and expulsion hearings in cases in which the INS finds that although the reentering permanent resident has not "entered" under the Fleuti test, he might still be expellable under one of the nineteen categories in the Act. Instead of admitting the permanent resident alien and then instituting expulsion hearings against him within the United States, the immigration judge at the border could be authorized to conduct the expulsion hearing, thereby avoiding the administrative burdens of multiple hearings. Of course, proper notice of the imminence of such a proceeding should be given. This notice would include a statement that in the event the permanent resident is found not to be excludable, his alleged conduct may subject him to expulsion, to be determined at the same hearing. Second, resident aliens may be paroled into the United States pending the hearing as is currently permissible under the Act, thereby preventing detention difficulties at the border while additional time is given to prepare for the hearing. Finally, the substantive criteria for exclusion categorized in the Act would remain applicable to permanent residents; hence, congressional authority to determine admissibility standards would be undiminished.

2. Judicial Initiative

Although the judiciary is limited in its authority in immigration matters, it is obligated to scrutinize the constitutional sufficiency of exclusion proceedings and has in fact taken the initiative in several

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109. 637 F.2d 1286, 1289 (9th Cir. 1980) (once it is determined that an entrant is a permanent resident, the exclusion hearing must cease and the issue of entry and deportability must be litigated at an expulsion hearing), rev'd and remanded sub nom. Landon v. Plasencia, 103 S. Ct. 321 (1982).

110. Standard INS practice is to admit reentering permanent residents who have not "meaningfully" departed and then to institute expulsion proceedings if it is deemed necessary. See Maldonado-Sandoval v. INS, 518 F.2d 278, 281 & n.6 (9th Cir. 1975); see also In re V-Q, 9 I. & N. Dec. 78, 80 (1960) ("Once 'admission' has occurred . . . exclusion proceedings are no longer proper and . . . expulsion proceedings are required.").

111. Such notice would be appended to the prior notice of the exclusion hearing.


113. The judiciary's role in immigration matters is limited to specific statutory, treaty-related and constitutional grants of authority. See supra note 51 and accompanying text.
cases in which Congress or the INS had failed to provide sufficient safeguards. Subsequent to the Supreme Court's pronouncement in *Kwong Hai Chew v. Colding*,114 the Court of Appeals for the District of Columbia Circuit held that Chew was entitled to have the government bear the burden of proof at his exclusion hearing.115 The Board of Immigration Appeals, as well as the courts of other circuits, have followed this ruling even though it is contrary to the Act's explicit direction that aliens bear the burden of proof in exclusion hearings.116

In another case, a reentering permanent resident was held excludable on the basis of an invalid visa, but the district court refused to deport him to Russia, the country "whence he came."117 Relying on the Second Circuit rule that the country of deportation for exclusion purposes is the country in which the alien had a place of abode and which he left to come to the United States,118 the court noted that the only country fitting this description in the petitioner's case was the United States. Therefore he could not be sent elsewhere.119 Stating that "Congress did not contemplate that the exclusionary procedures would be used in a typical expulsion case,"120 the court rejected rigid adherence to the Act's procedural formula given such anomalous results.

Finally, Justice Marshall, in his partial dissent from the *Plasencia* majority, chided the Court for failing to address the constitutional sufficiency of Plasencia's hearing.121 Noting that the Court "need not decide the precise contours of the process that would be constitutionally sufficient,"122 Marshall focused on the lack of prior notice, which robbed Plasencia of a reasonable opportunity to demonstrate that she was not excludable. He also noted that the inadequate explanation at the exclusion hearing of the charges against Plasencia, as well as inadequate notice of the standards for exclusion, denied her due process.123 Furthermore, Marshall wrote that "[w]hen a permanent resi-

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114. 344 U.S. 590 (1953).
116. See 8 U.S.C. § 1361 (Supp. V 1981) ("Whenever any person makes . . . application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is . . . not subject to exclusion . . . .")
118. 216 F. Supp. at 513.
119. Id. at 513-14.
120. Id. at 514.
122. Id. at 332 (Marshall, J., concurring in part, dissenting in part).
123. Id. at 333 (Marshall, J., concurring in part, dissenting in part).
dent alien's substantial interest in remaining in this country is at stake, the Due Process Clause forbids the Government to stack the deck in this fashion, [and] [o]nly a compelling need for truly summary action could justify this one-sided proceeding.\(^{124}\)

In sum, the judiciary may ultimately determine the contours of due process to be accorded permanent residents in exclusion proceedings. As neither Congress nor the INS has yet rebutted judicial attempts to set appropriate standards in this area, the courts may safely provide the speediest and most convenient forum to remedy procedural deficiencies.

**Conclusion**

Permanent resident aliens enjoy various constitutional protections by virtue of their physical presence and legal status in the United States. The procedural safeguards to which they are thereby entitled may be arbitrarily suspended if such aliens leave the country on a temporary excursion and attempt to reenter. While it has been widely recognized that the character of reentry is substantively distinguishable from that of initial entry, the procedural distinctions that should logically follow therefrom have been largely ignored.

Adoption of various procedural safeguards would ensure reentering permanent resident aliens a fair opportunity to litigate their excludability. Application of expulsion-type procedures would guarantee reentering permanent residents the same procedural benefits that are currently available for such individuals within the United States. Such additional procedures maybe effected through congressional, executive or judicial action, as all three branches of government are, to differing degrees, responsible for shaping policy regarding the rights of permanent resident aliens. This action would not be contrary to the strong national interest in deterring the entry of undesirable aliens into the United States because violations of the immigration laws may result in an alien's exclusion regardless of the procedures available to him at the exclusion hearing. No justifiable impediments to procedural sufficiency for permanent resident aliens exist to counterbalance the extreme hardships such aliens suffer through inadequate procedures.

\[Laurie \text{ A. Levin}\]

\(^{124}\) *Id.*