University of Miami Law Review

Volume 36
Number 5 *Seventh Annual Baron de Hirsch Meyer Lecture Series*

Article 9

9-1-1982

Getting Back In: The *Plasencia* Decision and the Permanent Resident Alien's Right to Procedural Due Process

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CASE COMMENTS

Getting Back In: The *Plasencia* Decision and the Permanent Resident Alien's Right to Procedural Due Process

In Landon v. Plasencia, *the United States Supreme Court reversed the Ninth Circuit Court of Appeals and held that a permanent resident alien returning to the United States from a brief visit abroad is not necessarily entitled to have the question of her admissibility determined at a deportation hearing. The Court has, however, clarified the standards to be applied in determining, on a case-by-case basis, what process is due. After tracing the development of relevant case law as it has affected the rights of the permanent resident alien, the author concludes that the practical effect of* Plasencia *actually may be to ensure the higher standard of treatment originally ordered by the Ninth Circuit.*

I. INTRODUCTION

During the night of June 29, 1975, Maria Plasencia, a citizen of El Salvador and United States permanent resident alien, tried to gain legal entry into the United States at the Mexican border.[1] When customs agents found six nonresident aliens[2] in Mrs. Plasencia's car, she was detained[3] and eventually subjected to a summary exclusion hearing.[4] When denied admission to the United States on grounds of attempting to smuggle illegal aliens into the

1. Landon v. Plasencia, 103 S. Ct. 321, 324 (1982).

2. "The term 'alien' means any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (1976).

3. The authority of immigration officers to inspect and detain aliens at the border is found at 8 U.S.C. § 1225 (1976).

4. For a discussion of exclusion proceedings, see *infra* text accompanying notes 46-62.

country,[5] Mrs. Plasencia was denied access to her home of the previous five years, the country of her husband's citizenship, and the birthplace of her children. The challenge raised to that exclusion order was eventually to reach the United States Supreme Court,[6] which subsequently held that Mrs. Plasencia, as a United States permanent resident alien,[7] was vested with due process rights that may have been violated in the course of the exclusion hearing.

The two issues dealt with at the exclusion hearing[8] were: (1) whether Mrs. Plasencia was making an "entry" into the United States, in the statutory and judicial sense of the word;[9] and (2) if so, whether she was guilty of smuggling aliens for gain. Answering each question in the affirmative, the immigration judge ordered Mrs. Plasencia's exclusion. The Board of Immigration Appeals dismissed her administrative appeal and denied her motion to reopen the proceedings.[10] On a writ of habeas corpus, the United States District Court for the Central District of California vacated the Board's decision and ruled that the Immigration and Naturalization Service (INS) could proceed against Mrs. Plasencia, if at all, only in deportation proceedings.[11] The United States Court of Appeals for the Ninth Circuit affirmed, holding that INS could not litigate issues of "entry" and excludability of permanent resident aliens in exclusion hearings.[12] The Supreme Court recognized the

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5. "Any alien who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law [shall be excluded from the United States]." 8 U.S.C. § 1182(a)(31) (1976).

6. Landon v. Plasencia, 103 S. Ct. 321 (1982).

7. "The term 'lawfully admitted for permanent residence' means 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(a)(20) (1976). The word "permanent" does not carry its common connotation and is instead defined as "a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent *even though it is one that may be dissolved eventually at the instance either of the United States or of the individual,* in accordance with law." *Id.* § 1101(a)(31) (emphasis added).

8. Plasencia v. Sureck, 637 F.2d 1286, 1287 (9th Cir. 1980), *rev'd sub nom.* Landon v. Plasencia, 103 S. Ct. 321 (1982).

9. A border crossing does not necessarily amount to an "entry" for purposes of applying immigration law. The term was first defined by statute in the Immigration and Nationality Act of 1952, ch. 477, § 101(a)(13), 66 Stat. 163, 167 (codified at 8 U.S.C. § 1101(a)(13) (1976)). The Court later interpreted that definition in Rosenberg v. Fleuti, 374 U.S. 449 (1963). *See infra* notes 24-32 and accompanying text.

10. 103 S. Ct. at 325.

11. *Id.*

12. 637 F.2d at 1289.

due process rights of permanent resident aliens;[13] rather than endorsing the court of appeals' wholesale prohibition against such use of exclusion hearings, however, the Court reversed and remanded for possible findings of specific violations of Mrs. Plasencia's due process rights by INS.

This Casenote will examine two areas of immigration law that have both affected, and may be affected by, the *Plasencia* decision: (1) the reentry doctrine,[14] and (2) the differences between deportation hearings and exclusion proceedings.[15] A summary of the Supreme Court's analysis will be followed by the conclusion that the practical effect of the Court's opinion may, in fact, closely approximate the status of rights for the permanent resident alien envisioned by the Ninth Circuit.

II. THE REENTRY DOCTRINE

The reentry doctrine in essence provides that an alien who leaves the United States is subject to the provisions of the immigration laws upon his return.[16] A major reason for the doctrine's significance is that an alien's entry into the United States initiates a five-year probationary period after which various offenses no longer apply as grounds for deportation.[17] By treating all subsequent entries as the first, the doctrine lengthens this probationary

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13. *See infra* text accompanying notes 83-90.

14. *See infra* text accompanying notes 16-44.

15. *See infra* text accompanying notes 45-75.

16. *See* 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 4.6c (1981); *see also* 8 U.S.C. § 1101(a)(17) (1976) ("The term 'immigration laws' includes this chapter [12, Immigration and Nationality] and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation, or expulsion of aliens.").

17. For example, 8 U.S.C. § 1251(a) (1976) provides in part, regarding deportable aliens:

> Any alien in the United States shall . . . be deported who—
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> . . . .
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> (3) hereafter, *within five years after entry,* becomes institutionalized at public expense because of mental disease, defect, or deficiency . . . ;
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> (4) is convicted of a crime involving moral turpitude committed *within five years after entry* . . . ;
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> . . . .
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> (8) . . . has *within five years after entry* become a public charge . . . ;
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> . . . .
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> (13) . . . *at any time within five years after entry,* shall have . . . aided any other alien to enter or try to enter the United States in violation of law;
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> . . . .
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> (15) at any time *within five years after entry,* shall have been convicted of violating the provisions of title I of the Alien Registration Act, 1940.

Id. (emphasis added).

period. For example, an alien admitted for permanent residence in 1970, who committed a crime involving moral turpitude in 1976, is not subject to deportation for that crime because the five-year probationary period had expired before the crime occurred.[18] If, however, after voluntarily departing the United States in 1971, the permanent resident alien had returned in 1972, he would remain deportable because a new probationary period not expiring until 1977 is attached to the subsequent entry. Consequently, the issue of a resident alien's deportability often focuses on whether readmission to the United States constitutes an "entry."

For decades the courts construed the term "entry" literally to mean any arrival of an alien into the United States, irrespective of his legal status.[19] Therefore, a permanent resident alien who, although never intending to relinquish his American domicile, briefly visited a foreign country would make an "entry" upon his return to the United States. The reentry would extend the period of deportability for resident aliens.

The Immigration and Nationality Act of 1952,[20] however, significantly changed the doctrine by codifying court decisions that, in specific instances, ameliorated the harsh effect of the reentry doctrine on permanent resident aliens.[21] The Act provides that permanent resident aliens "shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves . . . that his departure to a foreign port or place . . . was not intended or . . . voluntary."[22] For aliens other than those lawfully admitted for permanent residence, the Act retains a literal construction and defines "entry" as "any coming of an alien into the United States, from a foreign port or place . . . ."[23] Yet

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18. *See id.* § 1251 (a)(4).

19. *See, e.g.*, United States *ex rel.* Volpe v. Smith, 289 U.S. 422 (1933); Lapina v. Williams, 232 U.S. 78 (1914).

20. 8 U.S.C. §§ 1101-1253 (1976).

21. 8 U.S.C. § 1101(a)(13) (1976). The *Plasencia* Court noted Congress's reliance on two cases in particular in developing its "voluntary" and "intentional" standards for departure. *See* 103 S. Ct. at 327 n.6 (quoting S. REP. No. 1137, 82d Cong., 2d Sess. 4; H.R. REP. No. 1365, 82d Cong., 2d Sess. 32, *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS 1653, 1683).

In DiPasquale v. Karnuth, 158 F.2d 878 (2d Cir. 1947), the Second Circuit held that an alien who took an overnight sleeper from Buffalo to Detroit on a route passing through Canada had no intent to leave the United States and thus was not deportable on a ground dependent upon reentry. In Delgadillo v. Carmichael, 332 U.S. 388 (1947), the United States Supreme Court held that an alien who had been taken to Cuba to recuperate after his merchant ship was torpedoed in the Caribbean did not leave the country voluntarily.

22. 8 U.S.C. § 1101(a)(13) (1976).

23. *Id.*

the circumstances in which a permanent resident alien's return from a brief foreign sojourn constitutes an entry under the Act's modified definition remained unclear because Congress failed to define "intended" or "voluntary" departures.

In the landmark case of *Rosenberg v. Fleuti*,[24] the Supreme Court of the United States attempted to clarify the issue by defining an intent to depart as one "which can be regarded as meaningfully interruptive of the alien's permanent residence."[25] The Court listed the following factors as relevant to determining such an intent: (1) the duration of the alien's absence from the United States; (2) the necessity of procuring special travel documents; (3) and a purpose in leaving that is contrary to some policy reflected in our immigration laws.[26] The Court noted, however, that these factors are not exhaustive and authorized the lower courts to develop other relevant considerations "by the gradual process of judicial inclusion and exclusion."[27] The Court held that "an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return."[28]

The Court's formulation of the "meaningfully interruptive" test to determine whether a permanent resident alien had intended to depart did not explicitly describe the test's proper application. Strict adherence to only the relevant factors articulated by the Court would create inflexibility and harshness similar to that associated with the literal entry definition,[29] and would not be consistent with the Court's recognition that other relevant factors must be developed.[30] Moreover, the Court's plea for a "more civilized application of our immigration laws"[31] and its perception of a con-

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24. 374 U.S. 449 (1963). Fleuti was lawfully admitted to the United States for permanent residence in 1952. He had continuously resided in this country since his admission except for a brief visit of a few hours to Mexico in 1956. Because Fleuti was a homosexual, INS attempted to deport him on the ground that at the time of his 1956 return he was an alien "afflicted with psychopathic personality," as defined in 8 U.S.C. § 1182(a)(4) (1976). 374 U.S. at 450-51.

25. 374 U.S. at 462.

26. *Id.*

27. *Id.* (quoting Davidson v. New Orleans, 96 U.S. 97, 104 (1877)).

28. *Id.*

29. *See* Longoria-Castenada v. INS, 548 F.2d 233, 238 (8th Cir.) (dissenting opinion), *cert. denied*, 434 U.S. 853 (1977); Vargas-Banuelos v. INS, 466 F.2d 1371 (5th Cir. 1972); Yanez-Jacquez v. INS, 440 F.2d 701 (5th Cir. 1971).

30. 374 U.S. at 462.

31. *Id.*

gressional intent to mitigate the harsh consequences of strict entry definitions indicated a primary concern for the humane treatment of the permanent resident alien.[32]

Yet most courts have disregarded the liberal tone of *Fleuti* and instead have relied on a single "relevant factor" from that case to find "entry." Probably the most common factor so used has been whether "the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws."[33]

Aware of the severe consequences flowing from strict adherence to the relevant factors approach, the Fifth Circuit applied the "meaningfully interruptive" test liberally in two immigration cases. In *Yanez-Jacquez v. INS*,[34] the Fifth Circuit balanced various factors, including an illicit purpose in departing, to conclude that the petitioner did not intend to interrupt his status as a resident alien by visiting Mexico.[35] The Fifth Circuit declared that the petitioner's illicit purpose, though "less than salutory [sic] in nature," was not controlling.[36] Rather, the Fifth Circuit stressed the trip's brevity and singular purpose, the petitioner's outward regard for this country as his permanent residence despite frequent visits to Mexico, and his procurement of a Border Crossing Identity Card. By de-emphasizing the importance of the illicit purpose, the Fifth Circuit implicitly tipped the balance in favor of *Fleuti*'s more humanitarian approach.

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32. *See supra* note 19.

33. 374 U.S. at 462; *see, e.g.*, Laredo-Miranda v. INS, 555 F.2d 1242 (5th Cir. 1977) (alien smuggling); Cuevas-Cuevas v. INS, 523 F.2d 883 (9th Cir. 1975) (same); Lozano-Giron v. INS, 506 F.2d 1073 (7th Cir. 1974) (possession of counterfeit money); Palatian v. INS, 502 F.2d 1091 (9th Cir. 1974) (drug smuggling); Martin-Mendoza v. INS, 499 F.2d 918 (9th Cir. 1974) (alien smuggling), *cert. denied*, 419 U.S. 1113 (1975); Solis-Davilla v. INS, 456 F.2d 424 (5th Cir. 1972) (same).

34. 440 F.2d 701 (5th Cir. 1971). Yanez-Jacquez was lawfully admitted to the United States for permanent residence in 1955. In 1963 he briefly visited Mexico, where he was assaulted and robbed. The following day, armed with an icepick and seeking revenge, he reentered Mexico. Unable to find his assailants, Yanez-Jacquez returned to the United States by crossing the Rio Grande. He was apprehended by officers of the U.S. Border Patrol, but was released after his mother brought his Border Crossing Identity Card to the immigration office.

In 1968 Yanez-Jacquez was convicted of uttering a forged instrument and sentenced to two years imprisonment. Thereafter, INS sought to deport him pursuant to 8 U.S.C. § 1251(a)(4) (1976), which provides for the deportation of an alien who "is convicted of a crime involving moral turpitude committed within five years after entry." INS contended that § 1251(a)(4) applied because the 1963 return from Mexico constituted an entry. 440 F.2d at 701-02.

35. *Id.* at 704.

36. *Id.*

The Fifth Circuit maintained its liberal view when, in *Vargas-Banuelos v. INS*,[37] it was in a position to construe the *Fleuti* Court's declaration that a meaningful interruption of resident status occurs if the alien's purpose in leaving the country contravenes the immigration laws. The Fifth Circuit interpreted *Fleuti* as requiring that

> a brief departure from this country should not give rise to grounds for deportation when the alien returns unless some element of the alien's state of mind *at the time of the departure* subjected him to the charge that he left the country with the intention to interrupt his residential status.[38]

Consequently, the Fifth Circuit held that an alien who innocently departed the United States and, while abroad, formulated a criminal purpose is not deportable on his return.[39] Recognizing the difficulty in determining whether a criminal purpose had been formed prior to or after departure, the court noted that both the spirit and letter of *Fleuti* and *Yanez-Jacquez* demanded a "compassionate interpretation and concomitant administration" of the immigration laws.[40] Furthermore, the Fifth Circuit reasoned, the added punishment of deportation was excessive because the petitioner had already been tried and convicted for his crime.

The United States Court of Appeals for the Seventh Circuit

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37. 466 F.2d 1371 (5th Cir. 1972). Vargas-Banuelos lawfully entered the United States for permanent residence in 1963. He was forty-one years old and had resided in Colorado since his admittance with his wife and four children, the youngest of whom was born in the United States. In 1970 he visited Mexico to pay a condolence call on the family of a cousin who had recently died. While in Mexico, four Mexicans approached him, seeking his help to enter the United States illegally. Accepting money from the four men, he arranged for a third party to meet them in Texas.

Vargas-Banuelos and his confederates were apprehended after crossing the Texas border. He pleaded guilty in federal district court to four counts of aiding and abetting the four Mexicans in illegally entering the country. He received suspended sentences on three counts and was placed on probation for five years. Afterwards, the district court amended its original judgment to include a recommendation that INS not deport Vargas-Banuelos. Nevertheless, INS sought to deport him pursuant to 8 U.S.C. § 1251(a)(13) (1976), which provides for the deportation of an alien who "at any time within five years after any entry . . . knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law." 466 F.2d at 1371-72.

38. 466 F.2d at 1374 (emphasis in original).

39. *But see* Laredo-Miranda v. INS, 555 F.2d 1242 (5th Cir. 1977) (smuggling of aliens into the United States meaningfully interrupts an alien's permanent residence status even though his intentions upon leaving were innocent); Cuevas-Cuevas v. INS, 523 F.2d 883 (9th Cir. 1975) (visit abroad loses innocent purpose at point when alien decides to violate immigration law); Palatian v. INS, 502 F.2d 1091 (9th Cir. 1974) (innocent intentions on departure irrelevant where alien attempted to smuggle marijuana upon his return to U.S.).

40. 466 F.2d at 1374.

also recognized an unnecessary severity in the common approach to determining whether a permanent resident alien intended to depart the United States. In *Lozano-Giron v. INS*,[41] that court formulated its own set of relevant factors, designed to take into account the effects expulsion might have on the life of the permanent resident alien. The factors listed included the number of years the alien has permanently resided in the United States; whether he lives with his wife and children; whether he owns a business, home, or other real estate; whether he is employed; the nature of the environment to which he would be deported; and his relation to that environment.[42] The court determined that *Fleuti* mandated consideration of these factors. First, the Seventh Circuit noted that *Fleuti* authorized the lower courts' development of these new tests "by the gradual process of judicial inclusion and exclusion."[43] Second, it reasoned that because *Fleuti* was essentially concerned with diminishing the harsh effects of low standards for finding "entry," the Supreme Court would undoubtedly approve of a group of relevant factors that promoted humane considerations. Although not referring to it as such, the Seventh Circuit established a balancing test similar to the one used in *Yanez-Jacquez*.[44]

Fleuti's "meaningfully interruptive" test has substantially reduced the chances that the reentry doctrine will unfairly subject a permanent resident alien to certain immigration laws every time he crosses the border. Yet a majority of courts continue to read *Fleuti* narrowly, without venturing outside of the confines of those "relevant factors" expressly suggested by the Court. To the permanent resident alien returning to the United States after a brief visit

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41. 506 F.2d 1073 (7th Cir. 1974). Lozano-Giron was admitted to the United States for permanent residence in late 1963. In 1972 he traveled to Colombia to marry his girlfriend. Although she declined to marry him, he remained in Colombia for 27 days.

A customs officer stopped and examined Lozano-Giron upon his return to the U.S. and discovered $2,400 in counterfeit money in his possession. Lozano-Giron pleaded guilty in federal district court and was sentenced to eighteen months imprisonment. The INS tried to deport him pursuant to 8 U.S.C. § 1251(a)(4) (1976), which provides for the deportation of an alien who is convicted and sentenced for a crime involving moral turpitude committed within five years after entry. INS contended that the 1972 return from Colombia constituted an entry. 506 F.2d at 1075.

42. 506 F.2d at 1077-78. After considering these factors, the court found that Lozano-Giron was deportable. The Seventh Circuit noted that "[h]e had neither wife nor children living in the United States" and had "introduced no evidence as to any property or employment ties with the United States nor as to any dangers awaiting him in Colombia." *Id.* at 1079.

43. Rosenberg v. Fleuti, 374 U.S. at 462 (quoting Davidson v. New Orleans, 96 U.S. 97, 104 (1877)).

44. *See supra* text accompanying notes 34-36.

abroad, therefore, the procedure by which "entry" is determined has become a critical issue.

III. The Differences Between Deportation Hearings and Exclusion Proceedings

Essential to an understanding of the differences of opinion between the Ninth Circuit and the Supreme Court in *Plasencia* is a basic awareness of the distinction between a deportation hearing and an exclusion proceeding. Although each can result in the deportation of an alien from the United States,[45] certain conceptual as well as procedural differences do exist and should be briefly noted.

Exclusion proceedings determine the admissibility of an alien who seeks to enter the United States.[46] Deportation proceedings, on the other hand, determine the continued residence of an alien who has entered the United States free from official restraint.[47] An alien who has entered free from official restraint is subject only to deportation proceedings irrespective of the entry's legality or illegality.[48] Thus, the alien who surreptitiously crosses the border and successfully evades capture at that point is accorded the same right to deportation proceedings as the alien who was permitted to enter by the examining immigration officers but thereafter committed a deportable offense.

There are various procedural distinctions between deportation and exclusion proceedings.[49] For example, in deportation proceedings the government bears the burden of alleging and proving grounds for discontinuance of the alien's residence and his subse-

45. The Supreme Court defined exclusion, expulsion, and deportation to ensure the clarity of its opinion in Kwong Hai Chew v. Colding, 344 U.S. 590 (1953). The Court defined exclusion as "preventing someone from entering the United States who is actually outside the United States or is treated as being so"; expulsion as "forcing someone out of the United States who is actually within the United States or is treated as being so"; and deportation as "the moving of someone away from the United States, after his exclusion or expulsion." *Id.* at 596 n.4.

46. *See generally* 1A C. Gordon & H. Rosenfield, *supra* note 16, § 3.18 (right to a fair hearing).

47. *Id.* §§ 3.18, 5.1 (nature of deportation proceeding).

48. United States *ex rel.* Lam Fo Sang v. Esperdy, 210 F. Supp. 786, 790 (S.D.N.Y. 1962) ("The right to a deportation hearing is not curtailed by the illegality of the initial entry into the United States."); *see, e.g.*, Cheng v. INS, 534 F.2d 1018 (2d Cir. 1976); United States v. Martin-Plasencia, 532 F.2d 1316 (9th Cir. 1976).

49. Maldonado-Sandoval v. INS, 518 F.2d 278, 280 n.3 (9th Cir. 1975). *See generally* 1A C. Gordon & H. Rosenfield, *supra* note 16, § 3.18 (right to a fair hearing); *id.* § 5.5 (basic concepts of fair treatment).

quent deportation.[50] The government must satisfy this burden by clear, unequivocal, and convincing evidence.[51] In exclusion proceedings, however, the alien desiring entry must establish his admissibility.[52] Furthermore, an alien involved in deportation proceedings may apply for a suspension of deportation,[53] which if granted, waives deportability and lawfully admits him for permanent residence.[54] The alien may also apply for a voluntary departure,[55] which, although requiring his departure from the United States, facilitates his possible return.[56] In contrast, such discretion-

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50. Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963). *See generally* 1A C. GORDON & H. ROSENFIELD, *supra* note 16, § 5.10b (burden of proof).

51. Woodby v. INS, 385 U.S. 276 (1966); 8 C.F.R. § 242.14(a) (1981).

52. 8 U.S.C. § 1361 (1976).

53. *Id.* § 1254 (1976).

54. The Act sets forth the minimum prerequisites that an alien must establish before the Attorney General may exercise his discretionary power to grant a suspension of deportation. The Act creates two categories of prerequisites, the first of which applies to aliens whose violations are not considered serious. The first category requires that an alien prove that he has been physically present in the United States for at least seven years preceding his application for suspension of deportation. He must demonstrate that during the seven-year period he was a person of good moral character and that he has remained so. He must demonstrate that his deportation would cause "extreme hardship" to himself or to his spouse, parent, or child, who is a United States citizen or permanent resident alien. Finally, he must prove that his violation does not relegate him to the second category. 8 U.S.C. § 1254(a)(1) (1976).

The second category encompasses aliens who have committed serious violations including crimes of moral turpitude, narcotic addiction, and subversive behavior. In this category, the alien must demonstrate that he has been physically present in the United States for at least ten years immediately following the commission of the act or assumption of the status constituting the ground for deportation. He must prove that he was a person of good moral character during the ten-year period and that he is maintaining such a character. Finally, he must establish that his deportation would result in "exceptional and extremely unusual hardship" to himself or to his spouse, parent, or child, who is a United States citizen or permanent resident alien. *Id.* § 1254(a)(2).

After approval by the Attorney General, Congress determines whether relief shall be granted. For first-category cases, the Attorney General's decision is ratified unless either house of Congress passes a resolution of disapproval. *Id.* § 1254(c)(2). For second-category cases, the Attorney General's decision is not ratified unless Congress passes a concurrent resolution of approval. *Id.* § 1254(c)(3).

55. *Id.* § 1254(e). This section provides:

> The Attorney General may, in his discretion, permit any alien under deportation proceedings [except those who have committed serious violations] . . . to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish . . . that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure . . . .

Id.

56. A deported alien requires special permission to return to the United States. If a deported alien returns without this permission, he is guilty of a felony. *Id.* § 1326. An alien who voluntarily leaves the United States before a final deportation order is entered need not

ary sanctions are not available to an alien in exclusion proceedings.[57] An alien ordered deported may designate the country to which he will be expelled.[58] An alien ordered excluded, however, must be returned "to the country whence he came" and no other.[59] Finally, in deportation proceedings an alien has direct recourse to a federal court of appeals after the Board of Immigration Appeals renders an unfavorable judgment.[60] The instituting of such an appeal automatically stays the deportation order.[61] Review of a final exclusion order, however, is "by habeas corpus proceedings and not otherwise."[62]

Most of the voluntary sanctions and procedural safeguards available in deportation hearings were designed to protect long-time resident aliens from the punitive effects of deportation.[63] If the permanent resident alien remains in the United States, he is clearly entitled to deportation proceedings.[64] If, however, the permanent resident alien travels abroad, the reentry doctrine requires that he again satisfy the requirements of the immigration laws upon his return to the United States. Accordingly, he may be considered a new entrant subject to exclusion proceedings.[65]

Recognizing the dissimilarity between a returning permanent resident alien and an alien seeking initial entry, the Supreme Court in *Kwong Hai Chew v. Colding*[66] held that a returning permanent resident alien has the constitutional right to procedural due process and may not be summarily excluded without a fair hearing that includes notice of the charges against him and an opportunity to refute them.[67] The Court did not, however, distinguish between deportation and exclusion proceedings; instead, it noted that "the issue is not one of exclusion, expulsion or deportation

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seek special permission. 2 C. GORDON & H. ROSENFIELD, *supra* note 16, § 7.2a; *see also* 8 C.F.R. § 243.5 (1981).

57. Maldonado-Sandoval v. INS, 518 F.2d 278, 280 n.3 (9th Cir. 1975).

58. 8 U.S.C. § 1253(a) (1976).

59. *Id.* § 1227(a).

60. *Id.* § 1105a(a).

61. *Id.* § 1105a(a)(3).

62. *Id.* § 1105a(b).

63. The deportation of an alien permanently bars him from the United States unless he obtains special permission from the Attorney General. *See supra* note 56. Furthermore, expulsion ends the alien's continuity of residence necessary for naturalization. 1A C. GORDON & H. ROSENFIELD, *supra* note 16, § 4.6d.

64. *See supra* text accompanying notes 46-48.

65. *Id.*

66. 344 U.S. 590 (1953).

67. *Id.* at 596-98.

. . . [but] one of . . . procedural due process."[68] The Court expressly recognized, however, the permanent resident alien's unique status:

> "The alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization."[69]

Therefore, a permanent resident alien may not be capriciously denied fifth amendment protections merely because of a voyage to foreign ports. The *Chew* Court reversed and remanded the case to the court of appeals to determine the alien's excludability in a fair hearing. The lower court interpreted the Supreme Court's decision to mean that a permanent resident alien is entitled to a hearing at which the government was the moving party and carried the burden of proof.[70]

The Court of Appeals for the Ninth Circuit—the same court that was to hear the *Plasencia* appeal—indicated its opposition to subjecting permanent resident aliens to exclusion hearings in *Maldonado-Sandoval v. INS*.[71] The court held that exclusion proceedings must be terminated when evidence appears that the alien is a permanent resident merely seeking to return to the United States after a brief visit abroad.[72] The facts of *Maldonado-Sandoval* made the court's finding less definitive than it might have been under other circumstances.[73] The court had initially determined that Maldonado-Sandoval's attempted return to the United States did not constitute an entry.[74] Consequently, without an entry, ex-

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68. *Id.* at 598.

69. *Id.* at 597 n.5 (quoting Johnson v. Eisentrager, 339 U.S. 763, 770-71 (1950)).

70. Kwong Hai Chew v. Rogers, 257 F.2d 606 (D.C. Cir. 1958).

71. 518 F.2d 278 (9th Cir. 1975). The Supreme Court's *Plasencia* opinion refers to *Maldonado-Sandoval* for an explanation of the specific differences between deportation hearings and exclusion hearings. 103 S. Ct. at 325.

72. 518 F.2d at 281.

73. Maldonado-Sandoval was lawfully admitted for permanent residence in 1967 on the basis of his marriage to an American citizen. In 1970, INS discovered that Maldonado-Sandoval was already married to a Mexican citizen when he married his American wife. He visited Mexico in 1970 for a few days and, upon his attempt to return, was refused admission. INS instituted exclusion proceedings, contending that Maldonado-Sandoval was not in possession of a valid immigrant visa because his marriage to the American citizen was bigamous. *Id.* at 279-80.

74. *Id.* at 280-81.

clusion proceedings would have been improper anyway.[75]

The cases briefly outlined above demonstrate that appellate courts have been at least sensitive to significant differences between exclusion proceedings and deportation hearings, and for the most part, have accorded permanent resident aliens certain constitutional rights commensurate with their preferred status among aliens. Following the *Fleuti* Court's concerns for a more humanitarian approach to dealing with permanent resident aliens at the border, assigning those aliens rights to have the question of "entry" determined solely at deportation hearings may have appeared to be the next logical measure. The United States Supreme Court in *Plasencia,* however, was to disagree with the Ninth Circuit and ensure that such an expansive entitlement would not soon become a part of immigration law.

IV. *Landon v. Plasencia*

The Supreme Court's analysis of the rights and privileges due Mrs. Plasencia as a permanent resident alien began—like the Ninth Circuit opinion—with a description of the differences between deportation hearings and exclusion hearings.[76] Addressing Mrs. Plasencia's contention that she was entitled to the procedural protections and substantive rights provided by a deportation hearing, the Court turned to the language of the Immigration and Nationality Act of 1952. Sections 235 and 236 of the Act, the Court noted, apply to "[a]ll aliens" who seek "admission or readmission to" the United States and provided for the exclusion hearing as "the sole and exclusive procedure for determining admissibility of a person to the United States . . . ."[77] The Court then cited legislative history to demonstrate Congress's intent that admissibility be determined in an exclusion hearing regardless of the alien's permanent residency status.[78]

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75. *See supra* text accompanying notes 46-48.

76. *See supra* text accompanying notes 45-62.

77. 103 S. Ct. at 326 (quoting the Immigration and Nationality Act of 1952, §§ 235, 236(a), 8 U.S.C. §§ 1225, 1226(a) (1976)). An earlier district court read the Act to forbid application of exclusion hearings to cases involving permanent resident aliens. Stacher v. Rosenberg, 216 F. Supp. 511 (S.D. Cal. 1963). The *Stacher* court reasoned that the Act's exclusion provision, which provides for the immediate return of an excludable alien "to the country whence he came," 8 U.S.C. § 1227(a), could not logically be applied to a permanent resident alien who had resided in the United States for fifty years.

78. "The special inquiry officer is empowered to determine whether an alien detained for further inquiry shall be excluded and deported or shall be allowed to enter after he has given the alien a hearing. The procedure established in the bill

The Court acknowledged the parties' agreement that only "entering" aliens were subject to exclusion, and cited *Fleuti* as the authoritative interpretation of what constitutes "entry."[79] The *Fleuti* Court had identified an alien's departure from the United States "to accomplish some object which is itself contrary to some policy reflected in our immigration laws"[80] as being meaningfully interruptive of the alien's permanent residence. Because of the hearing finding that Mrs. Plasencia had attempted to smuggle aliens, her departure from the United States was meaningfully interruptive of her permanent residence, and her return to the United States was an attempted "entry" within the meaning of the Act.

The point on which the Supreme Court was compelled to disagree with the Ninth Circuit, however, had nothing to do with the finding per se that Mrs. Plasencia had indeed sought "entry" and could, therefore, be subjected to an exclusion hearing. Rather, it was the fact that this determination had been made at an exclusion hearing that the Ninth Circuit characterized as a "manifest unfairness."[81] The court of appeals had determined that a resident alien returning from a visit abroad was entitled to a deportation hearing when it became necessary to litigate issues of "entry" and excludability.[82]

The Supreme Court could not affirm the Ninth Circuit's sweeping ban on exclusion hearings as the forum for applying the "meaningfully interruptive" test to permanent resident aliens,[83] nor justify such a holding in light of the perceived congressional intent behind the Act.[84] But both courts shared a fundamental concern for the due process rights of the permanent resident alien. In the court of appeals' view—given the distinct procedural differ-

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is made the sole and exclusive procedure for determining the admissibility of a person to the United States."

103 S. Ct. at 326 (quoting S. REP. No. 1137, 82d Cong., 2d Sess. 29; H.R. REP. No. 1365, 82d Cong., 2d Sess. 56, *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS 1653, 1711).

79. 103 S. Ct. at 327 (citing Rosenberg v. Fleuti, 374 U.S. 449 (1963)); *see supra* notes 20-32 and accompanying text. The *Fleuti* Court developed the "meaningfully interruptive" test for determining whether an alien's departure from, and reentry into, the United States should be deemed "intended" under § 101(a)(13) of the Act.

80. 374 U.S. at 462.

81. 637 F.2d at 1289.

82. *Id.*

83. The Court found using an exclusion hearing to litigate the issue of whether Mrs. Plasencia was making an "entry" no more unfair or "circular" than allowing "any court to decide that it has jurisdiction when the facts relevant to the determination of jurisdiction are also relevant to the merits." 103 S. Ct. at 328.

84. *See supra* notes 77 & 78 and accompanying text.

ences between exclusion and deportation hearings—the only forum guaranteeing the process due a permanent resident alien was the deportation hearing. The Supreme Court, on the other hand, implied that it was the format and not the forum that might have to change in order to accommodate Mrs. Plasencia's right to due process.

The Court was very careful to define the judiciary's role in the narrow terms of "determining whether the procedures meet the essential standard of fairness under the Due Process Clause."[85] In an obvious response to the Ninth Circuit's opinion, the Court emphasized the need for evaluation of "particular circumstances" in any given case, and cautioned against "imposing procedures that merely displace congressional choices of policy."[86] Even after presenting the appropriate test of the constitutional sufficiency of a challenged procedure,[87] however, the majority declined to adjudicate Mrs. Plasencia's due process claims on the grounds that the parties had not had the opportunity to present all factors relevant to due process analysis.[88]

In the opinion's final paragraphs, the Court reviewed the three aspects of the INS hearing in which Mrs. Plasencia claimed her due process rights were violated. She contended that she was unjustly encumbered with the burden of proof, that the notice provided was inadequate, and that she was allowed to waive her right to representation without a full understanding of the right or of the consequences of its waiver.[89] Although stressing the need to hear more argument—especially on the government's behalf—before deciding the due process question, the Court referred to cases and the policy of the Board of Immigration Appeals as

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85. 103 S. Ct. at 330.

86. *Id.*

87. In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, risk of an erroneous deprivation of the interest 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.

Id. (citing Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976)). The Court termed Mrs. Plasencia's interest at stake "a weighty one," referring to the possible loss of her right to rejoin her immediate family in the United States. 103 S. Ct. at 330.

88. Justice Marshall disagreed and deemed it unnecessary to remand the case for an inevitable finding that Mrs. Plasencia's due process rights had been violated in the exclusion hearing. He believed that the facts before the Court were sufficient for such a finding because Mrs. Plasencia had not been given adequate and timely notice of the charges against her and of her right to retain counsel to present a defense. 103 S. Ct. at 332 (Marshall, J., concurring in part and dissenting in part).

89. 103 S. Ct. at 330-31.

well as the Attorney General's regulations in what amounted to the beginning of its due process analysis. While these comments might be characterized as dicta, the Court was obviously exemplifying the kind of analysis expected on remand.

V. CONCLUSION

Both the Supreme Court and the court of appeals derived their respective conclusions on the *Plasencia* issues from the same source—the fundamental guarantee of due process rights afforded the permanent resident alien, as recognized in *Chew*. In effect, the Supreme Court's opinion merely draws the court of appeals back to that starting point and asks for a careful analysis[90] of the specific due process infirmities alleged under these conditions. The more extreme solution of flatly prohibiting determination of the fact of a permanent resident alien's "entry" during an exclusion hearing is not only unnecessary to preserve the alien's due process rights, it is also contrary to the language and intent of the Act. Nonetheless, the Court's opinion further weakens the reentry doctrine by subjecting to closer scrutiny the procedural conditions under which a permanent resident alien's "entry" is to be determined. *Plasencia* is consistent with the "humanitarian" approach of *Fleuti* and may be viewed as regressive only by those who relied on the viability of the extreme approach taken by the Ninth Circuit.

There can be no doubt after *Plasencia* that the permanent resident alien returning from abroad[91] is entitled to more than merely the hearing guaranteed by *Chew*, but not necessarily to all of the rights safeguarded in the routine course of a deportation hearing. Although the Court emphasized the significance of weighing all relevant factors of each case, it expressly declined to "decide the contours of the process that is due."[92]

No one should be very surprised if the Ninth Circuit on remand does find, using the Supreme Court's analysis, that Mrs. Plasencia's due process rights as a permanent resident alien were violated in the exclusion hearing. The number of specific violations

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90. This analysis involves use of the balancing test created in Mathews v. Eldridge, 424 U.S. 319 (1976). *See supra* note 87.

91. The period of absence will, of course, affect the alien's right to due process as a resident alien. *See* 103 S. Ct. at 330 (citing Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953) (alien who had left U.S. for twenty months not entitled to due process in assessing right to readmission)).

92. 103 S. Ct. at 329.

found will undoubtedly have some effect on the extent of change in procedural policy INS is likely to eventually implement. The most efficient solution for INS may be to voluntarily implement the procedures advocated by the Ninth Circuit and ensure protection of due process rights by dealing with all permanent resident aliens in deportation hearings exclusively. A second approach, though far more difficult to administer, would be to continue dealing with all aliens entering the country in exclusion hearings at the border, but to make procedural exceptions for permanent resident aliens where the specific existing process (e.g., notice) falls below minimal constitutional standards. A third alternative for INS would be to modify uniformly all exclusion procedures so that they guarantee at least the minimal due process rights to which permanent resident aliens are entitled. Administration of immigration policy at the border, however, would be almost impossible if summary proceedings were banned across the board.

To protect the permanent resident alien's due process rights most economically and efficiently, INS may perhaps find it wisest to litigate routinely all issues of such an alien's reentry eligibility at a deportation hearing—in effect, carrying out voluntarily the policy that the Ninth Circuit unsuccessfully attempted to mandate.

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